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Adarand Constructors, Inc. v. Slater 120 S. Ct. 722, 68 USLW 3456 (1-12-00)

Mootness: The United States Court of Appeals for the Tenth Circuit erred in dismissing this case as moot. The case, stemming from the remand in *Adarand Constructors, Inc. v. Pena* (1995), involved petitioner low-bidder's challenge to racially discriminatory policies in award of highway construction contracts. In response to earlier phases of the litigation, the Colorado Department of Transportation (CDOT) eliminated its race-based presumptions of disadvantaged status and instead authorized applicants to self-certify the "disadvantaged" status of their majority owners. The petitioner did so self-certify, based on the fact that it had been the subject of racial discrimination under the old policy. The Court of Appeals then dismissed the underlying action as moot because CDOT had recognized the petitioner's disadvantaged status. But the Court of Appeals failed to take into account that Colorado's self-certification procedures had not yet been approved by the U.S. Department of Transportation (DOT) as required by federal regulation. Given the "patent incompatibility of the certification with the federal regulations," it was "not at all clear" that the procedures could be approved by DOT. The respondents did not meet their burden of establishing that it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."

9-0. *Per curiam.*

Apprendi v. New Jersey 120 S. Ct. 2348, 68 USLW 4576 (6-26-00)

Due Process, right to trial by jury, sentence enhancement: A New Jersey "hate crime" statute that allows a judge to extend a sentence upon finding by a preponderance of the evidence that the defendant, in committing a crime for which he has been found guilty, acted with a purpose to intimidate because of race, violates the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's requirements of speedy and public trial by an impartial jury. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The hate crime law, which authorized the judge to extend imprisonment for a "second-degree" offense to imprisonment from 10 to 20 years, thereby authorized the judge to increase the defendant's penalty for the "second-degree" offense of possession of a firearm for an unlawful purpose, punishable by imprisonment of 5 to 10 years, beyond the prescribed statutory maximum for that offense. The effect is to turn a second-degree offense into a first-degree offense under New Jersey law. The constitutional principles are violated because the factual issue of whether the defendant acted with the purpose of intimidating is left to the judge rather than being submitted to the jury, and may be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt. Characterizing the inquiry as one of "motive" does not save the statute as a sentencing measure, since "the defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" The State's reliance on *McMillan v. Pennsylvania* (1986) and *Almendarez-Torres v. United States* (1998) is misplaced. *McMillan* dealt with a mandatory minimum sentence that did not authorize exceeding the statutory maximum for the underlying

offense, and the recidivism-based exception to the general rule recognized in *Almendarez-Torres* is inapplicable to the New Jersey law.

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

Arizona v. California 120 S. Ct. 2304, 68 USLW 4553 (6-19-00)

Water allocation, Colorado River: The claims of the Quechan Tribe, and of the United States on behalf of the Tribe, for increased rights to Colorado River water are not precluded by the Court's 1963 decision in *Arizona v. California* or by a consent judgment entered by the United States Claims Court in 1983. The case is remanded to the Special Master for consideration of the claims for additional water rights appurtenant to disputed boundary lands not attributed to the Fort Yuma Indian Reservation in earlier stages of the litigation. The Special Master's recommendations regarding allocation of water for the Fort Mojave Reservation and the Colorado River Indian Reservation are accepted.

6-3. Opinion of Court by Ginsburg, joined by Stevens, Scalia, Kennedy, Souter, and Breyer. Opinion by Rehnquist, concurring in part and dissenting in part, joined by O'Connor and Thomas.

Baral v. United States 120 S. Ct. 1006, 68 USLW 4119 (2-22-00)

Taxation, Federal: For purposes of determining the amount of credit or refund to which a taxpayer is entitled as compensation for overpayment of tax, the date on which withholding taxes and estimated tax payments are "paid" is the due date on the taxpayer's income tax return. Section 6511(b)(2)(A) of the Tax Code provides that the amount of credit or refund "shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension." The "plain language" of section 6513(b) determines when withholding and estimated taxes are "paid." That section provides that "for purposes of section 6511 . . . [withholding taxes] shall . . . be deemed to have been paid on the 15th day of the fourth month following the close of his taxable year," and estimated taxes "shall be deemed to have been paid on the last day prescribed for filing the return." Here the taxpayer did not file his 1988 return and claim a refund until June 1, 1993. The three year "look-back" period, lengthened as a result of the four-month extension he had received in 1989, extended back to February 1, 1990. The taxpayer had paid no portion of his overpaid tax during that period, since by operation of section 6513 his payments were deemed to have been made on April 15, 1989.

9-0. Opinion for unanimous Court by Thomas.

Beck v. Prupis 120 S. Ct. 1608, 68 USLW 4320 (4-26-00)

RICO, conspiracy, nature of "overt act": A person injured by an "overt act" in furtherance of a RICO conspiracy has a cause of action under 18 U.S.C. § 1962(d), only if the "overt act" is an act of racketeering or otherwise unlawful under RICO. The provision makes it "unlawful for any

person to conspire to violate"specified RICO provisions. When Congress uses language, not otherwise defined, with a settled common-law meaning, Congress is presumed to know and adopt that meaning. At the time of RICO's enactment in 1970, it was well established that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious. The RICO analogy to an act of a "tortious character" is an act that is "independently wrongful under RICO." In this case, the overt act of discharging from employment was not independently wrongful under RICO. This interpretation does not render the conspiracy language "mere surplusage," since, as long as one conspirator has committed an overt act, a plaintiff could use the provision to sue other co-conspirators who have not themselves committed an overt act.

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

Board of Regents of the Univ. of Wisconsin System v. Southworth 120 S. Ct. 1346, 68 USLW 4220 (3-21-00)

First Amendment, mandatory student fees: The First Amendment permits a public university to charge its students an activity fee that is used to support student organizations that engage in expressive activities if the money is allocated to those groups by use of viewpoint-neutral criteria. Students opposed to the purposes and expression of some of the subsidized organizations brought this challenge, alleging they should not be required to subsidize speech they find objectionable. The parties stipulated that two of the three processes for reviewing and approving funding are administered in a viewpoint-neutral fashion. This viewpoint neutrality requirement "is in general sufficient to protect the rights of the objecting students." Rights recognized in the context of union and state bar association dues are implicated by the University's program, but the protections adopted for those contexts "are neither applicable nor workable" in the university context. In those contexts the Court limited the required subsidy to speech "germane" to the purposes of the union or bar association. The germaneness standard, difficult enough to apply to unions and bar associations, "becomes all the more unmanageable" in the university setting, where the purpose is "to stimulate the whole universe of speech and ideas." The University may if it chooses adopt an optional or refund system, but there is no constitutional requirement that it do so. Nor need the University distinguish between on-campus and off-campus expressive activities. The third process the University provides for allocating funds to student groups – a student referendum in which the student body can vote to approve or to disapprove an assessment – substitutes majority rule for viewpoint neutrality, and cannot be upheld along with the other aspects of the program.

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

Bond v. United States 120 S. Ct. 1462, 68 USLW 4255 (4-17-00)

Fourth Amendment, luggage search: Border Patrol agents violated the Fourth Amendment by feeling and squeezing carry-on luggage in the overhead storage compartment of a bus. The bus passenger in this case had exhibited an actual expectation of privacy by using an opaque bag and placing it directly above his seat. A bus passenger who places his bag in an overhead bin expects that other passengers will handle the bag in the process of making room for their own luggage, but does not expect that other passengers will "feel the bag in an exploratory manner." That expectation of privacy is one that society is prepared to recognize as reasonable, and the agent's physical manipulation of the bag therefore violated the passenger's Fourth Amendment rights.

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

Boy Scouts of America v. Dale 120 S. Ct. 2446, 68 USLW 4625 (6-28-00)

First Amendment, freedom of association: Application of New Jersey's public accommodations law to require the Boy Scouts of America, a private, non-profit organization, to admit an avowed homosexual as an adult member and assistant scoutmaster violates the organization's First Amendment associational rights. The general mission of the Scouts, to instill values in young people, is expressive activity entitled to First Amendment protection. Although neither the Scout Oath nor the Scout Law expressly mentions sexuality or sexual orientation, they do require a scout to be "clean" and "morally straight." The Court "accept[s] the Boy Scouts' assertion" that the organization teaches that homosexual conduct is not morally straight. This assertion is documented by a 1978 "position statement" distributed to members of the Scouts' Executive Committee, and by other statements made after the respondent's membership in the Scouts was revoked. The Court also "give[s] deference to [the] association's view of what would impair its expression." Allowing a gay rights activist to serve in the Scouts would "force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." In earlier cases the Court found that application of state public accommodations laws to the Jaycees and to the Rotary Club would not materially interfere with the ideas that these organizations sought to express. By contrast, application of New Jersey's public accommodations law does "significantly burden the Scouts' right to oppose or disfavor homosexual conduct." The Court's decision in *Hurley v. Irish-American Gay Group* (1995), in which the Court upheld the right of parade organizers to exclude a message with which parade organizers disagreed, is more on point. While homosexuality appears to have gained "greater societal acceptance," an organization is free to espouse an unpopular view.

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

California Democratic Party v. Jones 120 S. Ct. 2402, 68 USLW 4604 (6-26-00)

First Amendment, right of association, "blanket" primary: California's "blanket" primary violates the First Amendment associational rights of

political parties. Under the blanket primary law, adopted by initiative in 1996 as Proposition 198, each voter's primary ballot lists every candidate regardless of party affiliation, and allows the voter to choose freely among all the candidates. While the Court has held that racial discrimination in state-sanctioned primary elections is state action for purposes of the Fifteenth Amendment, these cases do not stand for any general proposition "that party affairs are public affairs" that states may freely regulate. Rather, political parties retain rights of association that include the "right to exclude" non-members in the process of selecting nominees for public office. Proposition 198 impinges on these rights by forcing political parties to "adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party." The law can be upheld, therefore, only if it is narrowly tailored to serve a compelling state interest. No compelling state interest is furthered by Proposition 198. Better representation of the electorate and expansion of candidate debate are "inadmissible" interests that reduce to "stark repudiation of freedom of political association." The interest in assuring an "effective" vote for "disenfranchised" independents and minority party voters in "safe" districts is "overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." Other asserted interests in promoting fairness, voter choice, voter participation, and voter "privacy" are not compelling justifications for a blanket primary. Even if there were a compelling governmental interest, Proposition 198 is not "narrowly tailored." All of the asserted interests could be protected by a "nonpartisan blanket primary," in which parties might nominate candidates prior to the primary, so that primary voters would not choose a party's nominee.

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

Carmell v. Texas 120 S. Ct. 1620, 68 USLW 4325 (5-1-00)

Ex Post Facto Clause, corroboration of evidence: A Texas law that eliminated a requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses cannot constitutionally be applied to a crime committed while the earlier law was in effect. Such application violates the Ex Post Facto Clause of Art. I, sec. 10. The contours of the Ex Post Facto Clause were set forth in the 1798 case of *Calder v. Bull*, and included the category of "every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." The Texas law at issue is "unquestionably such a law." Under the old law, the petitioner could have been convicted only if the victim's testimony were corroborated by two other witnesses, while under the amended law, the petitioner could (and was) convicted on the victim's testimony alone. Neither Texas nor the United States, as amicus, offers persuasive reasons for abandoning this category of ex post facto law, which "resonates harmoniously" with one of the Clause's principal interests, that of "fundamental justice." .

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

Carter v. United States 120 S. Ct. 2159, 68 USLW 4513 (6-12-00)

Statutes, interpretation, lesser included offense: The crime defined by 18 U.S.C. § 2113(b) is not a lesser included offense of the crime defined by 18 U.S.C. § 2113(a). Subsection (b) penalizes anyone who "takes and carries away, with intent to steal or purloin, any property or money" exceeding $1,000 in value and belonging to a bank; subsection (a) penalizes anyone who "by force and violence, or by intimidation," takes from the person of another any money or property belonging to a bank. Generally, a crime is a lesser included offense of another crime only if the elements of the lesser offense are a subset of the elements of the charged offense. Three elements of section 2113(b) are not elements of section 2113(a): specific intent to steal, carrying away the stolen property, and valuation exceeding $1,000. Arguments for departing from this "straightforward reading of the text" are rejected. The fact that subsection (c) penalizes receipt of property taken from a bank in violation of subsection (b) but makes no mention of subsection (a) is an "anomaly," but does not rise to the level of an "absurdity." The fact that subsections (a) and (b) closely resemble the common law crimes of robbery and larceny does not require imputation of common-law meaning to the provisions. Common law meaning is imputed when Congress borrows terms of art with accumulated meaning, but neither the term "robbery" nor the term "larceny" appears in the statutory text. The word "robbery" does appear in the section's title, but words in a title are useful only when they shed light on some ambiguous word or phase in the text, and no such ambiguity exists. The "intent to steal or purloin" element of subsection (b) is not implicit in subsection (a). Only a general intent requirement – not the specific intent to steal or purloin – should be read into subsection (a). Taking property in violation of (a) should not be equated with taking and carrying away property in violation of (b); it would hardly have been "absurd" for Congress to have eliminated the asportation requirement from (a). The $1,000 valuation is clearly an offense element and not a sentencing factor.

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

Castillo v. United States 120 S. Ct. 2090, 68 USLW 4475 (6-5-00)

Statutes, interpretation; elements of offense: Language in 18 U.S.C. § 924(c) providing that a person who uses a machine gun during commission of a crime of violence shall be sentenced to imprisonment for thirty years defines a separate crime, and does not merely authorize an enhanced sentence. An indictment for the machine gun offense therefore must identify the firearm type and a jury must find that element proved beyond a reasonable doubt. The section provides that anyone who uses a "firearm" during commission of a crime of violence shall be sentenced to five years' imprisonment, and then increases the penalty sixfold if that firearm is a machine gun. While the literal language of the section is "neutral" as to whether the relevant words create a separate crime or merely authorize an enhanced penalty, the statutory structure "strongly favors the 'new crime' interpretation." The "machine gun" provision is contained in the same sentence that establishes the elements of the basic "uses a firearm" offense. It is the following three sentences that refer directly to sentencing factors, such as recidivism. Although use of a

machine gun might be considered to fall within the traditional sentencing category relating to the manner in which a crime is carried out, the same could be said for use of a "firearm." To ask a jury rather than a judge to determine the type of weapon a defendant used will rarely complicate a trial or risk unfairness. On the other hand, leaving the decision to the sentencing judge may produce a conflict between the judge and jury when the jury must determine which of several weapons a defendant used. References to sentencing in the legislative history do not help the Government's interpretation, since the statute's basic "uses a firearm" provision also deals with sentencing. Finally, the "length and severity" of an added mandatory sentence weighs in favor of treating the language as referring to an element of an offense.

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

Christensen v. Harris County 120 S. Ct. 1655, 68 USLW 4343 (5-1-00)

FLSA, forced use of compensatory time: The Fair Labor Standards Act (FLSA) does not prohibit the County from requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time. Nothing in the FLSA expressly prohibits public employers from compelling employees to utilize accrued compensatory time, and the law's requirement that an employee "shall be permitted to use" compensatory time within a reasonable period of requesting to do so does not implicitly prohibit such compulsion. This latter grant of authority to employees to use compensatory time provided such use will not unduly disrupt the workplace does not implicitly preclude other methods of spending compensatory time. The provision should be read as safeguarding an employee's right to receive timely compensation, and as guaranteeing that an employee will get to use his compensatory time. No deference is due a Department of Labor opinion letter requiring advance agreement by an employee before an employer may compel use of comp time. Interpretations such as those contained in opinion letters are not arrived at after adjudication or notice-and-comment rulemaking, lack the force of law, and consequently do not warrant *Chevron*-type deference.

6-3 (merits); **5-4** (deference). Opinion of Court by Thomas, joined by Rehnquist, O'Connor, Kennedy, and Souter, and joined in part by Scalia. Concurring opinion by Souter. Opinion by Scalia concurring in part. Dissenting opinions by Stevens, joined by Ginsburg and Breyer; and by Breyer, joined by Ginsburg.

City of Erie v. Pap's A. M. 120 S. Ct. 1382, 68 USLW 4239 (3-29-00)

First Amendment, nude dancing: Erie, Pennsylvania's ordinance banning public nudity does not violate the First Amendment as applied to the operator of a nude dancing establishment open to the public. The ordinance permits dancers to perform wearing only pasties and a G-string, but not totally nude. One purpose of the ordinance was to combat negative "secondary effects," such as prostitution and other criminal activity, associated with the presence of adult entertainment establishments. As a general prohibition on public nudity, the ordinance is not aimed at suppression of expression, and consequently should be evaluated under the framework set forth in *United*

States v. O'Brien (1968), for content-neutral restrictions on symbolic speech. There is no Court majority, however, on how the *O'Brien* test applies. The four-Justice plurality would allow the city to take "official notice of 'legislative facts,'" and to rely on earlier cases permitting zoning of adult establishments, and would not require a discrete evidentiary record in order to satisfy *O'Brien's* requirement that an incidental restriction on expression be no greater than essential to achieve the regulation's purpose . The two other Justices concurring on the merits would hold that there is no need to identify harmful secondary effects because "a general law regulating conduct and not specifically directed at expression is not subject to First Amendment scrutiny at all." Although the "Kandyland" establishment operated by the respondents has been closed, the case is not moot, since the respondents may have an interest in resuming operations, and the city has an interest in reversing the Pennsylvania Supreme Court's decision in order to allow enforcement of its ordinance.

6-3 (nudity ban); **7-2*** (mootness). Opinion of Court (mootness only) by O'Connor, joined by Rehnquist, Kennedy, Souter, and Breyer. Separate part of O'Connor opinion joined by Rehnquist, Kennedy, and Breyer. Opinion by Scalia, joined by Thomas, concurring in part (nudity ban) and dissenting in part (mootness), joined by Thomas. Opinion by Souter, concurring in part (applicability of *O'Brien*) and dissenting in part (evidentiary support). Dissenting opinion by Stevens, joined by Ginsburg. *Justice Stevens' dissent does not address mootness.

Cortez Bryd Chips, Inc. v. Bill Harbert Constr. Co. 120 S. Ct. 1331, 68 USLW 4214 (3-20-00)

Venue, Federal Arbitration Act: The venue provisions of the Federal Arbitration Act (FAA) are permissive, not exclusive. A case seeking to confirm, vacate, or modify an arbitration award may be brought in any district that is proper under the general venue statute or, as provided in the FAA, in the district where the award was made. Sections 9, 10, and 11 of the FAA provide that the district court in the district in which the award was made "may" enter appropriate orders. Use of the word "may" is not necessarily conclusive of congressional intent to provide for discretionary or permissive authority. In this case, however, statutory history points toward a permissive reading, and this conclusion is reinforced by consideration of the "practical consequences" of a restrictive reading. When the FAA was enacted in 1925, venue was ordinarily available only in the district of the defendant's residence. Against this background, the FAA's venue provisions "had an obviously liberalizing effect," there being no indication that Congress intended to take away the venue that is normally the most convenient for a defendant. The "practical consequences" of a restrictive reading would include "a needless tension" with § 3, which authorizes a court to stay, and retain jurisdiction over, any action that is referable to arbitration; and the creation of "anomalous results in the aftermath of arbitrations held abroad."

9-0. Opinion for unanimous Court by Souter.

Crosby v. National Foreign Trade Council 120 S. Ct. 2288, 68 USLW 4445 (6-19-00)

Preemption, Massachusetts Burma law: A Massachusetts law barring state agencies from buying goods or services from any entity listed as doing business with Burma (Myanmar) is preempted by the federal sanctions law. The Massachusetts law stands as "an obstacle to the accomplishment of Congress's full objectives under the federal act." The Massachusetts law undermines the federal law's conferral on the President of effective discretion to control economic sanctions against Burma. The President is authorized to terminate sanctions initially imposed by statute, and is empowered to impose additional sanctions limiting new investment in Burma. The presence of state sanctions as well as their perpetual nature limits the President's flexibility. The Massachusetts law, which applies to contracts for goods and services and to foreign as well as domestic companies, is broader in scope than the federal law. The Massachusetts law also frustrates the President's ability to engage in effective diplomacy in carrying out the federal law's directive to work with other nations to develop a "comprehensive, multilateral strategy" for improving democracy and human rights practices in Burma. The failure of Congress to include express preemption language in the federal law is not dispositive; lack of express congressional recognition does not preclude operation of "conflict" preemption based on frustration of congressional purpose.

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

Dickerson v. United States 120 S. Ct. 2326, 68 USLW 4566 (6-26-00)

***Miranda* rule, congressional power to abrogate**: *Miranda v. Arizona* (1966) was a constitutional decision that the Supreme Court declines to overrule, and that may not be overruled by statute. In *Miranda* the Court laid down "concrete constitutional guidelines" for the police to follow prior to custodial interrogation of a suspect: police must warn a suspect that he has the right to remain silent, that anything he says can be used against him in court, that he has the right to an attorney, and that if he cannot afford an attorney one can be appointed. Two years after the *Miranda* decision Congress enacted 18 U.S.C. § 3501, which purported to reinstate the voluntariness principle that had measured the validity of confessions prior to *Miranda*, and that the Court had found inadequate in *Miranda*. Section 3501 is an invalid attempt by Congress to redefine a constitutional protection. "Congress may not legislatively supersede [the Supreme Court's] decisions interpreting and applying the Constitution." Although there is language in some of the Court's decisions suggesting that the *Miranda* warnings are merely prophylactic rules, they are instead constitution-based rules. This is not to say that the *Miranda* warnings are necessarily immutable. The Court in *Miranda* invited a legislative rule that would be "at least as effective" in protecting a suspect's right to remain silent during custodial interrogation. Section 3501, however, is not an adequate substitute for the *Miranda* warnings. *Miranda* should not be overruled by the Court. Principles of *stare decisis* "weigh heavily against" its overruling, and "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." Moreover, subsequent cases have not undermined *Miranda's* "doctrinal underpinnings."

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

Drye v. United States 120 S. Ct. 474, 68 USLW 4010 (12- 7-99)

Federal tax lien, disclaimer of inheritance under state law: Disclaimer of an inherited estate pursuant to state law does not operate to nullify a federal tax lien imposed on the heir's "property and rights to property" pursuant to 26 U.S.C. § 6321. The issue of whether the disclaimer right held under state law constitutes "property or rights to property" within the meaning of the federal tax lien statute is a matter of federal law. The language of the tax lien statute is broad, and reveals on its face that Congress intended to reach every interest in property that a taxpayer might have. Section 6334(a) of the Code, which lists property exempt from levy, corroborates this broad reading. Inheritances disclaimed under state law are not included in the listing of exempt property, and Congress provided that this listing is exclusive. Moreover, the tax lien treatment of disclaimers contrasts with that of section 2518(a), which expressly renders state-law disclaimers effective for federal wealth-transfer tax purposes. The important consideration in determining whether the disclaimer right constitutes a "property right" subject to tax lien is the breadth of control the taxpayer may exercise over the property. Here, Arkansas law conferred an unqualified right in the petitioner to receive the entire value of his mother's estate or to disclaim the inheritance and channel its entire value to his daughter. This control rendered the inheritance "property" or a "right to property" within the meaning of the statute.

9-0. Opinion for unanimous Court by Ginsburg.

Edwards v. Carpenter 120 S. Ct. 1587, 68 USLW 4308 (4-25-00)

Habeas corpus, ineffective assistance of counsel: A procedurally defaulted claim of ineffective assistance of counsel can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the "cause and prejudice" standard with respect to the ineffective assistance claim itself. A prisoner must demonstrate cause (and prejudice resulting therefrom), for his state-court default of any federal claim, including a claim of ineffective assistance of counsel. The purposes of requiring "exhaustion" of state remedies before presenting a federal habeas corpus claim would be defeated if federal review were permitted to a prisoner who had presented his claim to state court, but not in a timely manner allowing the state court to consider it.

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

FDA v. Brown & Williamson Tobacco Corp. 120 S. Ct. 1291, 68 USLW 4194 (3-20-00)

FDA jurisdiction to regulate tobacco products: The FDA lacks authority under the Federal Food, Drug, and Cosmetic Act (FDCA) to regulate tobacco products. Congress has "directly spoken" to the issue of FDA jurisdiction within the meaning of *Chevron v. NRDC* (1984), and has precluded the

FDA's assertion of jurisdiction. The issue is not determined solely by reference to the FDCA's definitions, but rather by reference to the Act as a whole, by reference to "tobacco-specific" legislation enacted after the FDCA, and to "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." Tobacco products "simply do not fit" within the FDCA's regulatory scheme. A core purpose of the FDCA is to ensure that regulated products are "safe" and "effective" for their intended uses. Because the FDA exhaustively documented that tobacco products are unsafe and present extraordinary health risks, the agency would be required to remove these products from the market if it asserts jurisdiction to regulate them. Congress, however, has foreclosed the removal of tobacco products from the market. The six laws enacted since 1965 that directly address smoking and health all stop "well short of ordering a ban" on sale. Moreover, Congress' tobacco-specific statutes have "effectively ratified" the FDA's former, long-held position that it lacked authority to regulate tobacco products absent manufacturers' claims of therapeutic benefit. Congress has relied on the FDA's denial of jurisdiction in legislating to address smoking and health, has rejected bills that would have conferred such jurisdiction on the FDA, and has also acted to preclude other agencies from exercising regulatory authority in the area.

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

Fiore v. White 120 S. Ct. 469, 68 USLW 4001 (11-30-99)

Certification of state law question to state court: An issue involving the correct interpretation of a Pennsylvania statute at the time the petitioner's conviction became final is certified to the Pennsylvania Supreme Court. The petitioner, who owned and operated a hazardous waste facility, and his co-defendant, who was the facility's general manager, were both convicted of operating the facility without a permit. They possessed a permit, but had altered a monitoring pipe in order to hide a leakage problem. The petitioner's conviction was affirmed on appeal, and the Pennsylvania Supreme Court refused to review his case. After the petitioner's conviction became final, the Pennsylvania Supreme Court upheld an intermediate court's reversal of the facility manager's conviction, and ruled that violation of permit conditions did not constitute operation of the facility without a permit. The petitioner then initiated *habeas corpus* proceedings, alleging a due process deprivation. The question certified to the Pennsylvania Supreme Court is whether its interpretation in the facility manager's case stated the correct understanding of the statute at the time the petitioner's conviction became final, or whether it changed a prior understanding. Answer to this certified question will help the U.S. Supreme Court determine "the proper state law predicate" for resolving the constitutional issue raised.

9-0. Opinion for unanimous Court by Breyer.

Fischer v. United States 120 S. Ct. 1780, 68 USLW 4370 (5-15-00)

Federal bribery statute, scope: The federal bribery statute's prohibition on defrauding organizations that receive over $10,000 in "benefits" under a Federal program, 18 U.S.C. § 666, applies to hospital organizations that participate in the Medicare program. Language in section 666 providing that covered federal programs may involve a "grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance" reveals that Congress viewed many federal assistance programs as conferring benefits, and also reveals "Congress' expansive, unambiguous intent to ensure the integrity" of participating organizations. The fact that patients receive "benefits" under the program does not foreclose the possibility of other beneficiaries. Medicare payments to providers "are made for significant and substantial reasons in addition to compensation or reimbursement." Medicare is "a comprehensive federal assistance enterprise aimed at ensuring the availability of quality health care for the broader community." The Government has "a legitimate and significant interest in prohibiting financial fraud . . . being perpetrated upon Medicare providers," since fraudulent acts threaten the program's integrity and raise the risk that the providers will lack the resources necessary to maintain the desired level and quality of care.

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

Flippo v. West Virginia 120 S. Ct. 7, 68 USLW 3260 (11-18-99)

Fourth Amendment, warrant requirement, crime scene search: There is no general "murder scene exception" to the warrant requirement. In *Mincey v. Arizona* (1978), the Court held that a warrantless search of an apartment "was not constitutionally permissible simply because a homicide had recently occurred there." The state trial court's finding in this case that a warrantless search of "anything and everything found within" a crime scene that had been secured for investigation was "within the law" is inconsistent with *Mincey*. The trial court in this case erred, therefore, in relying on such a principle to admit into evidence photographs found within a briefcase left at a crime scene.

9-0. Per curiam.

Florida v. J. L. 120 S. Ct. 1375, 68 USLW 4236 (3-28-00)

Fourth Amendment, *Terry* stop, anonymous tip: An anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. Under some circumstances an anonymous tip, suitably corroborated, may exhibit sufficient indicia of reliability to provide reasonable suspicion necessary to justify an investigatory *Terry* stop. The tip in this case, however, contained no predictive information, and left the police with no means of testing the informant's knowledge or credibility about the alleged criminal activity. An accurate description of a subject's readily observable location and appearance does not demonstrate that the tipster has knowledge of concealed criminal activity. Reasonable suspicion requires that a tip be reliable in its assertion of illegality,

and not merely reliable in its identification of someone. There is no "firearm exception" to this reasonable suspicion requirement. Such an exception would "rove too far" by enabling anyone to harass another person simply by placing an anonymous call to the police falsely accusing the person of carrying a firearm. The Court will not "speculate" about whether there are other circumstances (e.g., a report of a person carrying a bomb) where the danger might be so great as to justify a search without a showing of reliability.

9-0. Opinion for unanimous Court by Ginsburg. Concurring opinion by Kennedy, joined by Rehnquist.

Free v. Abbott Laboratories, Inc. 120 S. Ct. 1578, 68 USLW 4254 (4-3-00)

Federal courts, jurisdiction: The decision of the United States Court of Appeals for the Fifth Circuit, holding that the supplemental jurisdiction statute, 28 U.S.C. § 1367, overrules *Zahn v. International Paper Co*. (1973), and thus expands federal subject matter jurisdiction in a class action to encompass unnamed class members whose claims do not satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332, as long as diversity jurisdiction exists for one named plaintiff, is affirmed by equally divided vote.

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

Friends of the Earth v. Laidlaw Envtl. Servs. 120 S. Ct. 693, 68 USLW 4044 (1-12-00)

Mootness, standing to sue: Environmental organizations had standing to assert the interests of their members in a Clean Water Act citizen suit seeking injunctive relief and civil penalties for violation of a discharge permit. The relevant showing for Article III standing is not injury to the environment, but rather injury to the plaintiffs. Here the environmental organizations established standing by documenting that the defendant's permit violations directly affected the recreational, aesthetic, and economic interests of their members. Redressability, one of the essential elements of standing, was present even though civil penalties are payable to the Government rather than to the plaintiffs. The civil penalties "carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiffs'] injuries by abating current violations and preventing future ones." The claims for civil penalties were not mooted by the defendant's compliance with its permit after the commencement of the litigation. Mootness is not merely "standing set in a time frame." There can be exceptions to mootness, *e.g*., "capable of repetition, yet evading review," that cannot be recognized for standing. The district court's denial of injunctive relief and the plaintiffs' failure to appeal that denial did not moot the case; the district court's assessment of civil penalties recognized a need for deterrence.

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

Garner v. Jones 120 S. Ct. 1362, 68 USLW 4230 (3-28-00)

Ex Post Facto Clause, extension of time between parole hearings: Evidence was insufficient to determine whether action by the Georgia Board

of Pardons and Paroles extending from three years to eight years the period between mandatory reconsideration of parole for inmates serving terms of life imprisonment violates the Ex Post Facto Clause, Art. I, § 10, cl. 1. A retroactive change in a law governing parole can violate the Clause if the change creates "a sufficient risk of increasing the measure of punishment" for a prisoner. In this case the rule changing the frequency of parole reviews was qualified in two respects. The law gave the Board discretion to determine how often within the eight-year period to reconsider an inmate's status, and the law also preserved the possibility of an earlier reconsideration based on a change of circumstances or new information. This discretion, allowing the Board to focus on prisoners deserving reconsideration, may result in some prisoners being released earlier than would have been the case otherwise. The record contained insufficient information to determine whether the change in the rule significantly increases the likelihood of prolonging the respondent's incarceration.

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

Geier v. American Honda Motor Co. 120 S. Ct. 1913, 68 USLW 4425 (5-22-00)

Preemption, federal motor vehicle safety standard: Federal Motor Vehicle Safety Standard 208, which required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints, preempts a state common law action against a manufacturer for negligence for failure to equip a 1987 vehicle with a driver's side airbag. The express preemption provision of the National Traffic and Motor Vehicle Safety Act, which prohibits states from applying "any safety standard" different from an applicable federal standard, does not by itself preempt the state tort action. Preemption by statute is inconsistent with the Act's "saving clause," which provides that "compliance with" a federal safety standard "does not exempt any person from any liability under common law." This saving clause, however, does not foreclose or limit the operation of ordinary preemption principles governing override of state laws – including common law tort rules – that conflict with federal statutes or regulations. Application of the tort rule would actually conflict with standard 208 because it would operate to frustrate the objectives of the federal rule. The federal standard sought variety, by allowing manufacturers to choose from among several different passive restraint systems, and also sought a gradual phase-in of passive restraints. Imposition of liability for failure to equip a particular car with an airbag is inconsistent with these approaches of dealer-choice and gradualism.

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

Gutierrez v. Ada 120 S. Ct. 740, 68 USLW 4066 (1-19-00)

Guam Organic Act, statutory construction: The Guam Organic Act does not require a runoff election when a candidate slate for Governor and Lieutenant Governor has received a majority of the votes cast for Governor and Lieutenant Governor, but not a majority of the number of ballots cast in the simultaneous general election. The Act provides for a runoff election "[i]f

no candidates receive a majority of the votes cast in any election . . . .” In context, it is clear that “any election” refers to an election for Governor and Lieutenant Governor. The reference to “any election” is preceded by two references to gubernatorial election and followed by four. A word is known by the company it keeps. “Other clues” confirm this interpretation. The reference to “general election” later in the same provision suggests that Congress would not have used “any election” to mean “general election.” Also, Congress has distinguished between “votes” and “ballots” in the same context of Guamanian elections. Equating the two terms would “impute to the Congress a strange preference for making it hard to select a Governor” by requiring a runoff “even though one slate already had a majority of all those who cared to make any choice among gubernatorial candidates.” A law enacted four years later, referring to “a majority of votes cast for the office of Delegate” is more precise, but does not purport to differentiate between Delegate and gubernatorial elections. The term “any election” does not create a redundancy, since it may refer to the initial election and any elections held in the future.

9-0. Opinion for unanimous Court by Souter.

Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc. 120 S. Ct. 2159, 68 USLW 4508 (6-12-00)

ERISA, action against nonfiduciaries: ERISA § 502(a)(3) authorizes a civil action against a nonfiduciary who participates in a transaction prohibited by ERISA § 406(a)(1). Section 406(a), which bars a fiduciary of an employee benefit plan from causing the plan to engage in certain transactions with a “party in interest,” imposes a duty only on the fiduciary. Section 502(a)(3), however, which authorizes a civil action to obtain “appropriate equitable relief” to redress violations of title I, itself imposes certain duties. Liability under section 502(a)(3), therefore, does not depend on whether ERISA’s substantive provisions impose a specific duty on the party being sued. The provision contains no limit on the universe of possible defendants, while, by contrast, other provisions of ERISA do address who may be a defendant. Because section 502(*l*) authorizes the Secretary to assess a civil penalty against “any other person” who knowingly participates in a fiduciary’s breach, “it follows that a participant, beneficiary, or fiduciary may bring suit against an ‘other person’ under the similarly worded subsection (a)(3).” Concerns about possible misuse of section 502(a)(3) are alleviated by the limitation to “appropriate equitable relief.” Also, the common law of trusts countenances the same sort of relief sought here, as, for example, when a trustee breaches his fiduciary duty by transferring trust property to a third person.

9-0. Opinion for unanimous Court by Thomas.

Hartford Underwriters Ins. Co. v. Union Planters Bank 120 S. Ct. 1942, 68 USLW 4441 (5-30-00)

Bankruptcy, administrative claim: 11 U.S.C. § 506(c) does not allow an administrative claimant of a bankruptcy estate to recover payment of its claim from property encumbered by a secured creditor’s lien. The petitioner insurance company had provided workers’ compensation insurance to

respondent company during Chapter 11 reorganization proceedings, and the premiums were not paid. The reorganization was converted into a Chapter 7 liquidation, and the petitioner sought to recover the premiums as an administrative expense. Section 506(c), which provides that "the trustee may recover from property securing an allowed secured claim the reasonable, necessary costs . . . of preserving . . . such property," creates an exception to the normal rule that secured claims are superior to administrative claims. The plain language of the provision specifies that it is the "trustee" who may recover administrative costs, and the proper inference is that the trustee is the only party so empowered. The trustee's "unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others." The fact that Congress did not use "only" or other restrictive language does not mean that parties other than the trustee may invoke the provision. In this case the language of the Code leaves no room for clarification by reference to pre-Code practice. It is also "far from clear" that policy implications favor petitioner's position. In any event, achieving a better policy outcome than that produced by a natural reading of the text "is a task for Congress, not the courts."

9-0. Opinion for unanimous Court by Scalia.

Hill v. Colorado 120 S. Ct. 2480, 68 USLW 4643 (6-28-00)

First Amendment, restrictions on speech near clinics: A Colorado statute making it unlawful within 100 feet of a health care facility to approach within eight feet of another person, without that person's consent, for the purpose of passing a leaflet or handbill, displaying a sign, or engaging in protest, education, or counseling, is constitutional. The measure is a valid content-neutral "time, place, or manner" regulation of speech that balances the rights of law-abiding speakers to attempt to persuade others to change their views and the recognized privacy interest of the unwilling listener in avoiding unwanted communication. The restrictions are content-neutral because they regulate only the places where some speech may occur, and because they apply equally to all demonstrators, regardless of viewpoint. Although the restrictions do not apply to all speech, the "kind of cursory examination" that might be required to distinguish casual conversation from protest, education, or counseling is not "problematic." The law is "narrowly tailored" to achieve the state's interests. The 8-foot restriction does not significantly impair the ability to convey messages by signs, and ordinarily allows speakers to come within a normal conversational distance of their targets. Because the statute allows the speaker to remain in one place, persons who wish to hand out leaflets may position themselves beside entrances near the path of oncoming pedestrians, and consequently are not deprived of the opportunity to get the attention of persons entering a clinic. The statute is neither overbroad nor unconstitutionally vague.

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

Hunt-Wesson, Inc. v. Franchise Tax Bd. Of California 120 S. Ct. 1022, 68 USLW 4127

(2-22-00)

Taxation, State, "unitary" income, multistate corporation: California's rules for taxing its share of a multistate, nondomiciliary corporation's income violate the Due Process and Commerce Clauses by carving out an exception to its interest expense deduction measured by the amount of nonunitary dividend and interest income that the corporation has received. California uses a "unitary business" income calculation for determining its taxable share of a multistate corporation's income. Under that system the corporation's total income from its nationwide business is first determined, and the share appropriately attributed to California is then calculated by applying ratios reflecting instate property, payroll, and sales. The "unitary" income subject to tax excludes income derived from a business enterprise that is separate and "discrete" from that conducted instate. A state may not constitutionally tax this "nonunitary" business income. California specifies that the amount of interest that may be deducted is the amount by which "interest expense exceeds interest and dividend income . . . not subject to allocation by formula" – *i.e.*, the amount by which interest expense exceeds interest and dividends received from nonunitary business or investment. If California could show that its deduction limit actually reflects the portion of the expense properly attributable to nonunitary income, the tax would not, in fact, be a tax on nonunitary income. California cannot do so, however, and also cannot establish that its limit is a reasonable effort to allocate the deduction between taxable and tax-exempt income. Other approaches, such as ratio-based rules, recognize that borrowing may support nonunitary investment as well as the unitary business, but do not assume as California does that *all* borrowing first supports nonunitary business.

9-0. Opinion for unanimous Court by Breyer.

Illinois v. Wardlow 120 S. Ct. 673, 68 USLW 4031 (1-12-00)

Fourth Amendment, flight from police, *Terry* stop: Police officers did not violate the respondent's Fourth Amendment rights by pursuing him and subjecting him to a *Terry* stop after he fled from a high crime area upon the arrival of the officers' patrol. In *Terry v. Ohio* (1968), the Court held that a police officer may conduct a brief, investigatory stop of a person if the officer has a reasonable, articulable suspicion that the person is engaging in criminal activity. Here, the respondent's presence in a high-crime area was not enough, standing alone, to create such a reasonable suspicion, but his "unprovoked flight [from the area] when noticing the police," did create a reasonable suspicion that he was involved in criminal activity. "Headlong flight – wherever it occurs – is the consummate act of evasion; it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." A person approached by officers who lack probable cause or reasonable suspicion may refuse to cooperate, but "unprovoked flight is simply not a mere refusal to cooperate." The fact that there may be innocent reasons for flight does not prevent an investigative stop; even in *Terry* the conduct justifying the stop was ambiguous, and the officers were allowed to detain the individual to "resolve the ambiguity."

5-4. Opinion of Court by Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas. Dissenting and concurring (concurring only as to rejection of *per se* approach) opinion by Stevens, joined by Souter, Ginsburg, and Breyer.

Johnson v. United States 120 S. Ct. 1795, 68 USLW 4378 (5-15-00)

Statutes, interpretation, retroactivity: A 1994 amendment to the Sentencing Reform Act (18 U.S.C. § 3583h)) does not apply retroactively, and hence there is no need to consider whether its retroactive application would violate the prohibition on *ex post facto* laws. There are no indications that Congress intended the provision to apply retroactively, and the normal rule, in the absence of contrary indications, is that the effective date is the date of enactment. The preexisting provision, 18 U.S.C. § 3583(e)(3), permits imposition of additional supervised release following revocation of supervised release and reimprisonment. The provision allows a court to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release." Focus on the verb "revoke" would lead the Court to conclude that the language confers no authority to impose supervised release following the reincarceration. The "conventional" meaning of "revoke" is to annul by recalling or taking back. There are "some textual reasons," however, to conclude otherwise. Subsection (e)(1) authorizes a court when circumstances warrant to "terminate" a term of supervised release and discharge the supervised person. "If subsection (3) had likewise been meant to conclude any possibility of supervised release later, it would have been natural for Congress to write in like terms." Also, since subsection (3) provides that "all or part of the term of supervised release" may be served in prison, this means that "something about the term of supervised release survives" the revocation order. Moreover, there is an "unconventional" usage of "revoke," supported by a dictionary, that indicates that the "recall" need not be final, but may be "tentative for deliberation." Finally, this "unconventional" reading comports with the evident congressional purpose of improving the odds of a successful transition from prison to liberty.

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

Jones v. United States 120 S. Ct. 1904, 68 USLW 4422 (5-22-00)

Commerce, arson of private residence: Arson of an owner-occupied private residence does not fall within the coverage of the federal arson statute, 18 U.S.C. § 844(i), which prohibits arson of "any building used in interstate or foreign commerce or in any activity affecting [such] commerce." The key word is "used," and the appropriate inquiry is into the function of the building. What is required is active employment of a building for commercial purposes. "Use" of the building as collateral to obtain a mortgage from an out-of-state lender, to obtain insurance from an out-of-state company, or to receive natural gas from another state, does not satisfy this test. Nor does the Court's decision in *Russell v. United States* (1985), in which the Court upheld application of the statute to arson of a 2-unit apartment building,

require a different result. The *Russell* Court merely recognized that rental of real estate is "unquestionably" an activity that affects commerce. Were the Court to accept the Government's interpretation that owner-occupied private residences are covered, "hardly a building in the land would fall outside the federal statute's domain." Moreover, construing the statute as not applying to such private residences is consistent with the principle of constitutional doubt. A statute susceptible of two interpretations, one of which raises serious constitutional questions and one of which does not, should be interpreted to avoid the constitutional issue. Were the arson statute interpreted to apply to owner-occupied private residences, the issue of its validity under *United States v. Lopez* (1995) would be presented.

9-0. Opinion for unanimous Court by Ginsburg. Concurring opinions by Stevens, joined by Thomas; and by Thomas, joined by Scalia.

Kimel v. Florida Bd. of Regents 120 S. Ct. 631, 68 USLW 4016 (1-11-00)

Age Discrimination in Employment Act; 14th Amendment Enforcement Power: The Age Discrimination in Employment Act (ADEA) contains a clear statement of congressional intent to abrogate states' Eleventh Amendment immunity from suit in federal court, but that abrogation exceeded congressional authority under section 5 of the Fourteenth Amendment. Congressional intent to abrogate states' Eleventh Amendment immunity is "unmistakably clear" in the ADEA. The Act authorizes employees to maintain actions "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," and defines the term "public agency" to include "the government of a State or political subdivision thereof." Because Congress lacks power under Article I to abrogate states' Eleventh Amendment immunity, but may do so pursuant to section 5 of the Fourteenth Amendment, the private petitioners in this case may maintain their federal court actions against states only if the ADEA is "appropriate" legislation under section 5. The test for appropriateness is whether there is a "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." Age is not a suspect class under the Equal Protection Clause, and hence age classifications must be "irrational" before being held unconstitutional. Given this standard, the ADEA is "so out of proportion to a remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Congress pursuant to its section 5 power may enact "reasonably prophylactic legislation," but the legislative history of the ADEA falls "well short" of demonstrating any pattern of age discrimination by the states, let alone any discrimination rising to the level of a constitutional violation.

5-4 (section 5 power); **7-2** (unmistakable clarity of abrogation). Opinion of Court by O'Connor, joined in part by Rehnquist, Scalia, Kennedy, and Thomas; and joined in separate part by Rehnquist, Stevens, Scalia, Souter, Ginsburg, and Breyer. Opinion by Stevens, concurring in part and dissenting in part, joined by Souter, Ginsburg, and Breyer. Opinion by Thomas, concurring in part and dissenting in part, joined by Kennedy.

Los Angeles Police Dep't v. United Reporting Publishing Corp. 120 S. Ct. 483, 68 USLW 4005 (12-7-99)

First Amendment, overbreadth: A California statute restricting access to police-held information about the addresses of arrestees and crime victims is not subject to a First Amendment facial challenge by a company that obtains the information and sells it to others. The law requires that an entity requesting an address declare that the information will not be used to sell a product or service. At least for purposes of facial invalidity, the statute does not abridge anyone's speech, but instead merely regulates access to information. "California could decide not to give out arrestee information at all without violating the First Amendment." The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. One of the exceptions to this traditional rule is based on First Amendment overbreadth but that exception is employed only sparingly, and the effect of the statute on the company's potential customers does not justify its invocation. Potential customers face no threat of prosecution, and there is no possibility that protected speech will be muted.

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

Martinez v. Court of Appeal of California, Fourth App. Dist. 120 S. Ct. 684, 68 USLW 4040 (1-12-00)

Appeals, self-representation: There is no constitutional right to self-representation on direct appeal from a criminal conviction. The rule of *Faretta v. California* (1975) that a criminal defendant has a constitutional right to proceed without counsel at trial, is inapplicable on appeal. The Court's conclusion in *Faretta* was based on three interrelated arguments, relying on historical evidence, the structure of the Sixth Amendment, and respect for the individual. The historical evidence supporting a trial right no longer has the same force, and, in any event, "there simply was no long-respected right of self-representation on appeal." The structure of the Sixth Amendment is not relevant; the Amendment identifies "rights that are available in preparation for trial and at the trial itself," but does not include any right to appeal. Respect for individual autonomy is applicable to an appellant as well as to a defendant at trial, but any right to self-representation based on autonomy must be grounded in the Due Process Clause, and there is insufficient risk of disloyal counsel or suspicion of disloyalty to justify recognition of a constitutional right. "The requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court."

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

Miller v. French 120 S. Ct. 2246, 68 USLW 4535 (6-19-00)

Prison Litigation Reform Act, stay of injunctions, separation of powers: The automatic stay provision of the Prison Litigation Reform Act is mandatory, and the Act precludes courts from exercising equitable power to

enjoin the stays. Under the provision, a motion to modify or terminate prospective relief "shall operate as a stay during the period . . . beginning on the 30th day after such motion is filed . . . and ending on the date the court enters a final order ruling on the motion." The statutory command that the motion "shall operate as a stay during [the specified time period]" indicates that the stay is mandatory throughout that time period. "To allow courts to exercise their equitable discretion to prevent the stay from 'operating' during this statutorily prescribed period would . . . contradict [the provision's] plain terms." Because Congress's intent to remove equitable discretion is "unmistakable," the doctrine of constitutional doubt is inapplicable and the constitutional issue raised by the provision must be faced. The automatic stay provision does not violate separation of powers principles. *Hayburn's Case* is inapplicable; the stay does not vest in Executive Branch officials review of the decisions of an Article III court. Although the stay provision can be viewed as legislatively suspending a final judgment of an Article III court, it operates to establish new standards for prospective injunctive relief. Prospective relief under a continuing injunction remains subject to alteration due to changes in conditions and changes in the law. Whether the automatic stay's deadline for judicial decisionmaking is so short as to deprive litigants of a meaningful opportunity to be heard is a due process question that is not before the Court.

7-2 (statutory interpretation); **5-2** (separation of powers). Opinion of Court by O'Connor, joined by Rehnquist, Scalia, Kennedy, and Thomas, and joined in part by Souter and Ginsburg. Opinion by Souter, concurring in part (statutory grounds) and dissenting in part (separation of powers), joined by Ginsburg. Dissenting opinion (statutory grounds) by Breyer, joined by Stevens.

Mitchell v. Helms 120 S. Ct. 2530, 68 USLW 4668 (6-28-00)

Establishment Clause, aid to parochial schools: Provision of federal assistance to private schools in the form of loans of educational materials and equipment does not violate the Establishment Clause, even though some of the private schools receiving assistance are religiously affiliated. The assistance, authorized by chapter 2 of the Education Consolidation and Improvement Act of 1981, is provided to public and private schools alike based on the number of children enrolled in each school. Because of these neutral, secular criteria, chapter 2 does not define its recipients by reference to religion in violation of the principle set forth in *Agostini v. Felton* (1997). Nor does chapter 2 result in "governmental indoctrination" of religion within the meaning of *Agostini*. The four-Justice plurality and the two-Justice concurrence disagree as to rationale, but agree that *Meek v. Pittenger* (1975) and *Wolman v. Walter* (1977) are overruled with respect to their holdings that governmental loan of instructional materials and equipment to religious schools is unconstitutional. The distinction drawn in those cases between loan of textbooks (held to be permissible) and loan of other instructional materials and equipment (held impermissible) is untenable.

6-3. No opinion of Court. Opinion by Thomas, joined by Rehnquist, Scalia, and Kennedy. Concurring opinion by O'Connor, joined by Breyer. Dissenting opinion by Souter, joined by Stevens and Ginsburg.

Mobil Oil Expl. & Prod. S.E., Inc. v. United States 120 S. Ct. 2423, 68 USLW 4615 (6-26-00)

Government contracts, OCS oil and gas lease: The Government has breached its outer continental shelf (OCS) oil and gas lease agreements with the petitioner oil companies, and the companies are therefore entitled to restitution of "bonus" payments made to the Government. In return for the bonus payments, the companies in 1981 received 10-year lease contracts with the United States that entitled them to explore for oil off the North Carolina coast and develop any oil that they found, subject to royalty payments and to compliance with specified statutes, including the Outer Continental Shelf Lands Act (OCSLA), and regulations. A new law enacted in 1990, the Outer Banks Protection Act (OBPA), imposed additional requirements. OBPA prohibited the Secretary of the Interior from approving any OCS exploration or development plan until new studies required by OBPA were completed and requisite findings had been made, and placed a minimum 13-month delay on approvals. Under the OCSLA, the Secretary had been required to approve within 30 days an exploration plan that satisfied that Act's requirements. After enactment of OBPA, the Secretary took no further action on the petitioners' plans. This inaction constituted a breach of the lease agreements. The lease agreements' explicit references to future regulations under specified laws means that the agreements were not subject to future regulations promulgated under other laws, including new statutes like OBPA. OBPA required Interior to impose the contract-violating delays, but "the fact that Interior's repudiation rested upon the enactment of a new statute makes no significant difference." The Government's breach was substantial and material. The companies did not waive their right to restitution, since they did not receive "substantial" post-repudiation performance from the Government. Whether the companies could ultimately have developed oil under the contracts is irrelevant, since the companies seek restitution of bonus payments rather than damages.

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

Nelson v. Adams 120 S. Ct. 1579, 68 USLW 4311 (4-25-00)

Due process, personal liability: The federal district court denied the petitioner due process and also violated Rule 15, Federal Rules of Civil Procedure, by simultaneously granting a motion to amend the pleadings to make the petitioner a party and subjecting him to liability for costs and attorney's fees in an action brought against a company of which he was president and sole shareholder. Rule 15 directs that, if a court grants leave to amend a pleading to add a party, that party must be given 10 days to respond on the merits after service of the amended pleading. Here, the district court granted permission to amend the pleading and altered the judgment "at a single stroke." The petitioner therefore was never given an opportunity to respond and contest his personal liability after he was made a party and before the entry of judgment against him.

9-0. Opinion for unanimous Court by Ginsburg.

New York v. Hill 120 S. Ct. 659, 68 USLW 4029 (1-11-00)

Interstate Agreement on Detainers: A defense counsel's agreement to a trial date outside the time period required by Article III of the Interstate Agreement on Detainers (IAD) bars the defendant from seeking dismissal because his trial did not occur within that period. Article III provides that a prisoner must be brought to trial within 180 days of the prisoner's request for disposition of the detainer, "provided that for good cause shown . . . , the prisoner and his counsel being present, the court . . . may grant any necessary or reasonable continuance." There is a general rule, applicable to most rights of a criminal defendant, that presumes the availability of waiver. "Scheduling matters" are among the rights that need not be waived personally by defendants, but instead may be waived by action of counsel. The "necessary or reasonable continuance" provision is the sole means by which the prosecution may obtain an extension over the defendant's objection, but it does not preclude a defendant from waiving his right by other means. There is no general principle that a private right that also benefits society may not be waived. Waiver is not allowed if it would contravene a statutory policy, but here there is no unalterable statutory policy barring waiver. There is no requirement that waiver of the speedy trial rights guaranteed by the IAD be effected by an affirmative request.

9-0. Opinion for unanimous Court by Scalia.

Nixon v. Shrink Missouri Government PAC 120 S. Ct. 897, 68 USLW 4102 (1-24-00)

First Amendment, campaign finance, contribution limitation: *Buckley v. Valeo* (1976), in which the Court upheld against First Amendment challenge restrictions on contributions to federal election campaigns and struck down limitations on expenditures linked to specific candidates, is authority for upholding state limits on contributions to state political candidates. State contribution limits need not, however, be pegged to the dollar amounts approved in *Buckley*. In distinguishing contribution limits from expenditure limits, the Court in *Buckley* determined that limiting the amount of contributions had little impact on speech and association rights protected by the First Amendment. The Court also determined that prevention of corruption and the appearance of corruption was a constitutionally sufficient justification for the contribution limits. Here Missouri espouses those same interests of preventing corruption and the appearance of corruption, and the respondents allege that Missouri failed to produce empirical evidence to justify invocation of those interests. This case "does not present a close call requiring further definition of whatever the State's evidentiary obligation may be." Missouri does not preserve legislative history. The record, however, consisting of an affidavit by a legislative leader, newspaper articles, and findings by the district court as well as the Eight Circuit, is sufficient to substantiate Missouri's concerns. The current Missouri limit of $1075 for statewide elections is not, as a result of inflation, violative of *Buckley*. In *Buckley*, the Court rejected the contention that the $1,000 limit then approved was a constitutional minimum. Rather, the issue is whether the limits are "so low as to impede the ability of candidates to amass the resources necessary for effective advocacy." Respondents have not established that Missouri's contribution limits so operate to suppress effective political advocacy.

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

Norfolk So. Ry. v. Shanklin 120 S. Ct. 1467, 68 USLW 4258 (4-17-00)

Preemption, Federal Railroad Safety Act: A state tort action alleging negligence based on inadequate warning devices at a railway grade crossing is preempted if the warning devices at issue were installed with federal funds under a project approved by the federal government. Regulations promulgated under the FRSA set standards for warning devices installed with federal funds; these standards require automatic gates and flashing lights where certain conditions are present, and require approval by the Federal Highway Administration if those conditions are not present. The Court determined in *CSX Transportation, Inc. v. Easterwood* (1993) that state tort law is preempted if these regulations are applicable. The regulations are applicable and "mandatory for all warning devices installed with federal funds." The FHWA's new interpretation, that preemption is appropriate only for the "priority" or "hazard program" that is based on diagnostic studies and particularized analysis, and not for the "minimum protection" program, is not entitled to deference. The agency's new interpretation "contradicts the regulations' plain text," and departs from the previous interpretation that the Court adopted as "authoritative" in the *Easterwood* case. States are free to install more protective warning devices, but they may not hold the railroad responsible for the adequacy of devices installed with federal funds.

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

Ohler v. United States 120 S. Ct. 1851, 68 USLW 4396 (5-22-00)

Evidence, appeals: A defendant in a criminal trial who during direct examination voluntarily introduces evidence of a prior conviction may not on appeal challenge the admission of such evidence. This is so even though the testimony was offered only after an *in limine* ruling allowing the Government to introduce the prior conviction as impeachment evidence. Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted. Neither Federal Rule of Evidence 103 nor Rule 609 addresses the question. Rule 609 has been amended to clarify that prior conviction evidence may be introduced on direct examination, but it does no more than that. Both the Government and the defendant must make choices as a criminal trial progresses, and there is nothing "unfair" about putting the defendant to her choice as to whether to forego the tactical advantage of preemptively introducing evidence of the conviction in order to preserve her right to appeal the *in limine* ruling. Nor does this waiver rule unconstitutionally burden her right to appeal.

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

Pegram v. Herdrich 120 S. Ct. 2143, 68 USLW 4501 (6-12-00)

ERISA, HMOs, fiduciary duty, treatment decisions: Treatment decisions made by a health maintenance organization (HMO), acting through its physician employees, are not fiduciary acts within the meaning of ERISA. In this case a patient who suffered a ruptured appendix following her HMO doctor's decision to delay treatment sued for malpractice, and also sued the HMO under ERISA for violation of a fiduciary duty by offering incentives to their doctors to hold down treatment costs. An HMO's treatment decisions are intertwined with eligibility decisions. Typically fiduciary responsibilities relate to managing assets and distributing property to beneficiaries, and it is doubtful whether Congress intended to extend fiduciary responsibilities to mixed eligibility and treatment decisions by HMO doctors. Consideration of the consequences of extending coverage confirms that Congress made no such choice. Allowing recovery for breach of fiduciary responsibility simply upon a showing that the profit incentive to ration health care would generally affect mixed eligibility and treatment decisions would have the effect of eliminating the for-profit HMO, yet Congress "has promoted the formation of HMO practices" for 27 years. Courts have "no warrant to precipitate [such an] upheaval." The appeals court's effort to confine the fiduciary breach to cases in which the financial motive was the "sole purpose" of delaying or withholding treatment "entails erroneous corruption of fiduciary obligation." ERISA was not enacted "in order to federalize malpractice litigation in the name of fiduciary duty."

9-0. Opinion for unanimous Court by Souter.

Portuondo v. Agard 120 S. Ct. 1119, 68 USLW 4176 (3-6-00)

Prosecutorial comments: A defendant who testified at his trial was not deprived of any constitutional rights as a result of the prosecutor's comments, during summation to the jury, that the defendant had had the opportunity to hear all the other witnesses testify and to tailor his testimony accordingly. *Griffin v. California (1965)*, holding that a prosecutor's comments about a defendant's failure to testify unconstitutionally burdened the defendant's privilege against self-incrimination, should not be extended to the present context. *Griffin* prohibited the prosecutor from urging the jury to do something the jury is not permitted to do. By contrast, it is "natural and irresistible" for a jury, in evaluating the credibility of a defendant who testified last, to take into account the fact that he had heard the testimony of those witnesses who preceded him. The comments prohibited by *Griffin* suggested evidence of guilt, while the comments here concerned the defendant's credibility as a witness. The Court, rejecting in *Brooks v. Tennessee* (1972) the "heavy-handed" approach of requiring a defendant to testify at the outset of his defense or not at all, had suggested that arguing credibility to the jury is "the preferred means of counteracting tailoring of the defendant's testimony." Because of the defendant's Sixth Amendment right to confront witnesses, the court cannot sequester the defendant, and allowing comment on the defendant's presence and "unique opportunity" to tailor testimony may sometimes be "essential" to discovering the truth. No due process denial stems from the fact that the defendant was required by state law to be present at his trial.

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

Public Lands Council v. Babbitt 120 S. Ct. 1815, 68 USLW 4387 (5-15-00)

Public Lands, Taylor Grazing Act regulations: Three challenged aspects of 1995 federal grazing regulations were within the Secretary of the Interior's authority under the Taylor Grazing Act. A new definition of "grazing preference" omits reference to a specified quantity of forage, and explicitly ties forage to that allocated by an applicable land use plan. Defining the privileges in relation to land use plans does not violate the Secretary's responsibility to "safeguard" previously recognized grazing privileges. The statute qualifies the duty to safeguard in several respects: it is to be achieved only "so far as consistent with the [Act's] purposes and provisions," and those purposes include preventing injury to the public grazing lands; and issuance of a grazing permit is said to create no "right, title, interest, or estate." Moreover, Congress has directed the development of land use plans for the rangelands, and "it is difficult to see how a definitional change that simply refers to the use of such plans could violate the Taylor Act." Other considerations are that the prior system, quantifying grazing privileges in terms of animal unit months, did not afford anything close to "absolute security," and the new definition does not automatically diminish the security of existing grazing privileges. The second challenged regulation eliminates the words "engaged in the livestock business" from the description of stock owners qualified to apply for permits. The statute itself limits the category to settlers, residents, "and other stock owners," and extends a preference to those engaged in the livestock business. The terms "stock owner" and "stock owner engaged in the livestock business" are not coextensive. The third challenge is to a change in the regulation that provides that ownership of range improvements made pursuant to cooperative agreements shall be in the name of the United States. Nothing in the statute denies the Secretary the authority to decide when or whether to grant title to those who make improvements.

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

Raleigh v. Illinois Dep't of Revenue 120 S. Ct. 1951, 68 USLW 4445 (5-30-00)

Bankruptcy, tax claims, burden of proof: When the substantive law creating a tax obligation puts the burden of proof on the taxpayer, the burden remains on the taxpayer (in this case the trustee in bankruptcy) in a proceeding in bankruptcy court. Creditors' entitlements in bankruptcy arise from the underlying substantive law creating the debtor's obligation, unless the Bankruptcy Code provides to the contrary. As a general matter, the burden of proof is a "substantive" aspect of a claim, and tax law is no candidate for exception. There is no indication in the Bankruptcy Code that Congress has altered the burden of proof on tax claims. The Code's silence on the matter does not require reliance on pre-Code practice; that practice was not well settled. Supreme Court precedent holding that "allowance" of claims is a federal matter is not helpful, since "allowance" refers to ordering of valid claims, not to the validity of claims in the first instance, and since the

burden of proof rule here bears only on validity. A bankruptcy court's equitable powers are limited by what the Code provides, and, in any event, equitable principles do not necessarily favor the taxpayer's position.

9-0. Opinion for unanimous Court by Souter.

Ramdass v. Angelone 120 S. Ct. 2113, 68 USLW 4486 (6-12-00)

Habeas corpus, capital sentencing, parole ineligibility: The rule of *Simmons v. South Carolina* (1994), requiring that a capital sentencing jury be informed that a defendant is parole ineligible if the State has put the defendant's future dangerousness at issue and if the only alternative to a death sentences is life imprisonment without possibility of parole, is inapplicable to the present case. Here the defendant was not parole ineligible at the time of sentencing. Virginia has a three-strikes law providing that someone who has been convicted three times of felony offenses of murder, rape, or robbery with a deadly weapon is parole ineligible. At the time of sentencing in this case, the defendant had one such final conviction, but a second such conviction had not yet become final because the court had not entered judgment following the jury's verdict. Entry of a judgment order is not a purely ministerial act in Virginia because the court may set aside the jury verdict in response to a post-trial motion.

5-4. No opinion of Court. Opinion by Kennedy, joined by Rehnquist, Scalia, and Thomas. Concurring opinion by O'Connor. Dissenting opinion by Stevens, joined by Souter, Ginsburg, and Breyer.

Reeves v. Sanderson Plumbing Products, Inc. 120 S. Ct. 2097, 68 USLW 4480 (6-12-00)

Age Discrimination in Employment Act, burden of production: A plaintiff's prima facie case of discrimination, combined with sufficient evidence to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination under the Age Discrimination in Employment Act. The appeals court erred in assuming that a plaintiff must always introduce additional, independent evidence of discrimination once his prima facie case has been made and the employer's explanation has been disproved. It is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Proof of such falsity will not always be adequate to sustain a finding of liability, but discrimination "may well be the most likely alternative explanation" for the employer's action.

9-0. Opinion for unanimous court by O'Connor. Concurring opinion by Ginsburg.

Reno v. Bossier Parish School Bd. 120 S. Ct. 866, 68 USLW 4086 (1-24-00)

Voting Rights Act, preclearance: Section 5 of the Voting Rights Act does not prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose. Section 5 authorizes the Attorney General to preclear an election law change that "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." This language requires a covered jurisdiction to make two distinct showings: that the proposed plan does not have the purpose of denying or

abridging the right to vote, and that the plan will not have that effect. The Court had previously held that the no-effect requirement is limited to retrogressive effects. The purpose prong is also so limited. The Court "refuse[s] to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending upon which object it is modifying." For purposes of preclearance, the baseline for determining whether a voting practice "abridges" the right to vote is the status quo; if the change "abridges the right to vote relative to the status quo, then preclearance is denied, and the status quo (however discriminatory it may be) remains in effect." If a proposed voting change is not retrogressive, this means that it "cannot be stopped in advance under the extraordinary burden-shifting procedures of §5, but must be attacked through the normal means of a §2 action." "To deny preclearance to a plan that is not retrogressive – no matter how unconstitutional it may be – would risk leaving in effect a status quo that is even worse." The case is not moot. Although there will be a new census and presumably a new apportionment plan before the next scheduled school board election in 2002, the current plan will serve as the baseline against which the next plan will be measured for purposes of preclearance.

9-0 (mootness); **5-4** (merits). Opinion of Court by Scalia, unanimous as to mootness, and joined by Rehnquist, O'Connor, Kennedy, and Thomas on the merits. Concurring opinion by Thomas. Opinion by Souter concurring in part and dissenting in part, joined by Stevens, Ginsburg, and Breyer. Dissenting opinions by Stevens, joined by Ginsburg; and by Breyer.

Reno v. Condon 120 S. Ct. 666, 68 USLW 4037 (1-12-00)

Driver's Privacy Protection Act; Tenth Amendment: The Driver's Privacy Protection Act (DPPA) is a valid exercise of the commerce power, and does not violate the Tenth Amendment. The DPPA prohibits state departments of motor vehicles (DMVs) and others to whom the DMVs provide information from disclosing a driver's personal information (name, address, phone number, vehicle description, Social Security number, etc.) without the driver's consent. DMVs that violate the Act are subject to civil penalties. The drivers' information that the DPPA regulates is used by insurers, marketers, and others engaged in interstate commerce to contact drivers with customized solicitations, and therefore this information in this context constitutes "an article of commerce" subject to regulation under the commerce power. The DPPA does not violate the federalism principles reflected in the Tenth Amendment and set forth in *New York v. United States* (1992) and *Printz v. United States* (1997). *South Carolina v. Baker* (1988) governs instead. Although compliance with the DPPA will require time and effort on the part of state employees, the DPPA does not "commandeer" states in enforcing federal law applicable to private entities. The DPPA regulates state activities directly rather than seeking to control the manner in which states regulate private parties. Also, the DPPA is generally applicable, regulating both the states as initial suppliers and private entities that resell drivers' information – "the universe of entities that participate as suppliers to the market for motor vehicles."

9-0. Opinion for unanimous Court by Rehnquist.

Rice v. Cayetano 120 S. Ct. 1044, 68 USLW 4138 (2-23-00)

Fifteenth Amendment, voting restricted by ancestry: A provision of the Hawaii Constitution restricting the right to vote for trustees of the Office of Hawaiian Affairs (OHA) to persons who are descendants of people inhabiting the Hawaiian Islands in 1778 violates the Fifteenth Amendment. The OHA administers programs for the benefit of "Hawaiians" – the class of persons who may vote for trustees – as well as for a subclass of "Native Hawaiians." The State's electoral restriction enacts a race-based voting qualification forbidden by the Fifteenth Amendment. Ancestry can be a proxy for race, and that is the case here. The Court previously described racial discrimination as "singl[ing] out identifiable classes of persons solely because of their ancestry or ethnic characteristics," and that is what Hawaii's voting restriction does. Simply because a class defined by ancestry does not include all members of a race does not suffice to make the classification race-neutral. The State's arguments in support of the restriction are rejected. Cases upholding differential treatment of certain members of Indian tribes are inapplicable. Voting restrictions in tribal elections are "the internal affair of a quasi-sovereign," while the OHA elections are statewide elections to which the Fifteenth Amendment applies. *Morton v. Mancari* (1974), involving a hiring preference at the Bureau of Indian Affairs for members of federally recognized tribes, should not be extended to the election area. Cases exempting certain special district elections from the one person, one vote rule derived from the Fourteenth Amendment are inapplicable to the Fifteenth Amendment's command of race neutrality. Hawaii's restriction cannot be upheld as merely ensuring alignment of interests between the fiduciaries and beneficiaries of a trust, since the restriction rests "on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."

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

Roe v. Flores-Ortega 120 S. Ct. 1029, 68 USLW 4132 (2-23-00)

Sixth Amendment, ineffective assistance of counsel: A defense counsel's failure to file a notice of appeal when the defendant has not clearly conveyed his wishes about whether to appeal does not constitute *per se* ineffective assistance of counsel in violation of the Sixth Amendment. Nor is representation deficient as a constitutional matter if counsel fails to consult with the defendant about an appeal. Instead, failure to appeal is measured by the general test for ineffective counsel set forth in *Strickland v. Washington* (1984): whether representation "fell below an objective standard of reasonableness," and whether counsel's deficient performance prejudiced the defendant. Counsel has a constitutionally mandated duty to consult with the defendant about an appeal when there is reason to believe that a rational defendant would want to appeal, or that this particular defendant has reasonably demonstrated that he is interested in an appeal. All relevant factors must be considered, *e.g.*, whether conviction followed a trial or a guilty plea, and whether a plea expressly reserved or waived rights to appeal. To show prejudice, a defendant must demonstrate that, "but for counsel's deficient conduct" in not consulting with him about an appeal, he would have appealed.

6-3 (duty to consult); **9-0** (prejudice). Opinion of Court by O'Connor, joined by Rehnquist, Scalia, Kennedy, Thomas, and Breyer, and joined in part by Stevens, Souter, and Ginsburg. Concurring opinion by Breyer. Opinion by Souter, joined by Stevens and Ginsburg, concurring in part and dissenting in part.

Rotella v. Wood 120 S. Ct. 1075, 68 USLW 4153 (2-23-00)

Civil RICO, limitations period: The injury discovery accrual rule – not the injury and pattern discovery rule – applies to the four-year limitations period applicable to civil RICO actions. This means that the statute of limitations begins to run when the plaintiff knew or should have known of his injury. Under the injury and pattern rule, the period would begin to run only after the plaintiff discovers, or should discover, both an injury and a pattern of RICO activity. This latter approach is "unsound for a number of reasons." Under RICO, predicate acts of racketeering can be 10 years apart, and remote from time of trial. Even in medical malpractice suits, "where the cry for a discovery rule is loudest," it is the discovery of the injury, not discovery of other aspects of the claim, that starts the clock. This rule places the burden on the victim of inadequate medical treatment to determine within the limitations period whether the inadequacy constituted malpractice. There is no reason for accepting a lesser degree of responsibility on the part of the RICO plaintiff. Also, Congress relied on the Clayton Act in formulating RICO, and at the time RICO was enacted the Clayton Act's injury-focused accrual rule was well established.

9-0. Opinion for unanimous Court by Souter.

Santa Fe Ind. School Dist. v. Doe 120 S. Ct. 2266, 68 USLW 4525 (6-19-00)

Establishment Clause, student-led prayer at high school football games: A Texas school district's policy permitting a student-led, student-initiated prayer delivered over public address systems at public high school football games violates the Establishment Clause. The policy authorizes students to determine by majority vote whether to select a student to deliver a "statement or invocation" at football games, and then, also by majority vote, to select the student who may do so. The policy "involves both perceived and actual endorsement of religion." The prayers are authorized by government policy, and take place on government property at government-sponsored school-related events. Moreover, "the policy, by its terms, invites and encourages religious messages." The government has not created the type of "public forum" at which the pre-game invocations could be considered to be private rather than government-sponsored speech. Selection of the speaker by majority vote does not cure the constitutional defect, but rather "guarantees . . . that minority candidates will never prevail and that their views will be effectively silenced." The policy cannot be justified by secular purposes, given the policy's approval of only one specific kind of message – an invocation – and given the evolution of the policy, which began with the "candid" title of "prayer at football games" and which originally created an office of "student chaplain." The football game venue does not distinguish the prayer from the graduation prayer held to violate the Establishment Clause in *Lee v. Weisman* (1992). Even though attendance at games is not compulsory, the prayer "has the improper effect of coercing those present to

participate in an act of religious worship." Finally, the respondents' facial challenge is not premature. Although no invocation has yet been delivered under the policy, Establishment Clause values can be eroded in other ways, *e.g.*, by adoption of the policy and by subjecting the prayer issue to majoritarian vote.

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

Shalala v. Illinois Council on Long Term Care 120 S. Ct. 1084, 68 USLW 4159 (2-29-00)

Judicial review, Medicare Act: The Medicare Act bars federal question jurisdiction over an action by provider nursing homes challenging the validity of certain Medicare-related regulations. A section of the Social Security Act, 42 U.S.C. § 405(h), as incorporated in the Medicare Act by 42 U.S.C. § 1395ii, provides that "no action . . . to recover on any claim" arising under the Medicare laws shall be brought "under section 1331 . . . of title 28," the section that confers federal question jurisdiction on federal courts. Instead, such challenges must be brought under a separate and exclusive system of administrative and judicial review for denials of Medicare claims. The nursing homes' challenge to the regulations is an action "to recover on any claim" within the meaning of section 405(h). The language clearly applies to a Medicare benefits case, and under the Court's precedents, applies as well to the challenge to the regulations. *Weinberger v. Salfi* (1975) and *Heckler v. Ringer* (1984) govern interpretation. In *Salfi* the Court held that section 405(h) barred federal question jurisdiction in an action challenging a statutory provision that denied the plaintiffs Social Security benefits. In *Ringer*, the Court reached the same conclusion about an action challenging the lawfulness of the agency's determination not to provide Medicare Part B reimbursement to persons who had undergone a particular medical operation. The appeals court erred in concluding that *Bowen v. Michigan Academy of Family Physicians* (1986) makes *Salfi* and *Ringer* inapplicable. The Court's holding in *Michigan Academy* that section 405(h) did not preclude federal question review of the lawfulness of regulations governing procedures used to calculate Medicare Part B benefits was not based on a general limitation of that provision to "amount determinations" – a construction that would render the provision inapplicable in the instant case – but instead was based on a narrower exception for instances in which application would result in a denial of all review rather than a channeling of review through the agency. The *Michigan Academy* precedent is inapplicable because, under a "legally permissible" interpretation by the Secretary of HHS, nursing home providers are entitled to review of a determination that they are not in compliance with governing law.

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

Sims v. Apfel 120 S. Ct. 2080, 68 USLW 4470 (6-5-00)

Judicial review, issue exhaustion, Social Security proceedings: A person whose claim for Social Security benefits is denied by an administrative law

judge, and whose request for review by the Social Security Appeals Council is denied, may obtain judicial review of issues that he did not request the Appeals Council to review. Requirements for administrative issue exhaustion are for the most part contained in statutes or regulations. Neither the Social Security Act nor regulations implementing it require issue exhaustion. On occasion the Court has imposed an administrative issue exhaustion requirement in the absence of statute or regulation, but reasons for doing so are inapplicable here. The basis for a judicially imposed rule is an analogy to the rule that appellate courts refuse to consider issues that were not raised before the trial court. The rationale is that issue exhaustion is appropriate in an adversary proceeding. The administrative proceedings at issue are not sufficiently adversarial to require issue exhaustion.

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

Slack v. McDaniel 120 S. Ct. 1595, 68 USLW 4315 (4-26-00)

Habeas corpus, AEDPA, "second or successive petition": Provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that condition a *habeas corpus* petitioner's right to appeal on issuance of a certificate of appealability (COA) apply to appeals initiated after the Act's effective date, whether or not the *habeas* petition itself was filed in the district court before AEDPA's effective date. An appeal is a distinct step in litigation, and, under AEDPA, an appellate case is commenced when the application for a COA is filed. A COA may issue when the district court has denied a *habeas* petition on procedural grounds without reaching the petitioner's constitutional claims, if the prisoner shows that jurists of reason would find the constitutional claim and the procedural ruling at least debatable. A *habeas* petition that is filed after an initial petition was dismissed for failure to exhaust state remedies, and without adjudication on the merits, is not a "second or successive petition" as that term is understood in the habeas corpus context.

6-3 (effective date); **7-2** (second or successive petition). Opinion of Court by Kennedy, joined in par by Rehnquist, O'Connor, Scalia, Thomas, and Ginsburg; and joined in separate part by Rehnquist, Stevens, O'Connor, Souter, Ginsburg, and Breyer. Opinion by Stevens, concurring in part, joined by Souter and Breyer. Opinion by Scalia, concurring in part and dissenting in part, joined by Thomas.

Smith v. Robbins 120 S. Ct. 746, 68 USLW 4069 (1-19-00)

Equal Protection, indigents, frivolous appeals: California's procedures for evaluating the request of an appointed counsel not to pursue an appeal that would be frivolous are not unconstitutional simply because they diverge from the procedures set forth by the Court in *Anders v. California* (1967). Moreover, California's procedures, derived from *People v. Wende* (1979), satisfy all constitutional requirements. Under *Anders* procedures, the attorney requesting permission to withdraw must submit a brief pointing out anything in the record that might arguably support an appeal. Under California's *Wende* procedures, counsel summarizes the case's procedural and

factual history. Counsel does not explicitly state that an appeal would be frivolous, and does not request to withdraw, but instead expresses availability to brief any issues on which the court desires briefing. The court, upon receiving a *Wende* brief, must conduct a review of the entire record. These *Wende* procedures satisfy the constitutional standard by providing a criminal appellant the minimum safeguards necessary to make the appeal adequate and effective. The *Wende* procedures are "undoubtedly far better than those procedures we have found inadequate," and "at least comparable to those procedures we have approved." On remand, respondent may still attempt to prove that his appellate counsel was constitutionally ineffective; this claim should be measured by the standards set forth in *Strickland v. Washington* (1984).

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

Stenberg v. Carhart 120 S. Ct. 2597, 68 USLW 4702 (6-28-00)

Abortion: Nebraska's statute criminalizing the performance of "partial birth abortions" is unconstitutional under principles set forth in *Roe v. Wade* (1973) and *Planned Parenthood v. Casey (1992)*. The statute prohibits partial birth abortions "unless the procedure is necessary to save the life of the mother," and further defines partial birth abortion to mean "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." The statute is inconsistent with the Court's guidelines in *Planned Parenthood v. Casey* because it lacks an exception for those instances in which the banned procedure is necessary to preserve the health of the mother. The statute is also unconstitutional on the alternative ground that it imposes an "undue burden" on a woman's right to choose to terminate her pregnancy before viability. Nebraska's ban covers not only dilation and extraction (D&X), but also dilation and evacuation (D&E) procedures. D&E is the most commonly used method for performing pre-viability second trimester abortions, and prohibition of D&E would impose an undue burden on a woman's right to a pre-viability abortion.

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

Texas v. Lesage 120 S. Ct. 467, 68 USLW 3351 (11-29-99)

Summary judgment; racial discrimination, college admissions: The fact that a public university rejected the application of a prospective student while operating a racially discriminatory admissions program does not establish a cause of action under 42 U.S.C. § 1983. The government can defeat liability by demonstrating that it would have made the same decision absent the forbidden discrimination. Because it was undisputed in this case that the respondent's application would have been rejected even if the university's admissions process had been completely color-blind, there was no factual

issue, and the State's motion for summary judgment should have been granted.

9-0. *Per curiam.*

Troxel v. Granville 120 S. Ct. 2054, 68 USLW 4458 (6-5-00)

Due Process, grandparent visitation rights: A Washington State law allowing "any person" to petition a court "at any time" to obtain visitation rights whenever visitation "may serve the best interests" of a child is unconstitutional as applied to an order requiring a parent to allow her child's grandparents more extensive visitation than the parent wished. The Court has long recognized the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." The Washington statute, as applied, infringes on that fundamental right by placing the "best-interests" determination solely in the hands of a judge, with no deference accorded a parent's decision that visitation would not be in her child's best interest.

6-3. No opinion of the Court. Opinion by O'Connor, joined by Rehnquist, Ginsburg, and Breyer. Separate concurring opinions by Souter and Thomas. Dissenting opinions by Stevens, Scalia, and Kennedy.

United States v. Hubbell 120 S. Ct. 2037, 68 USLW 4449 (6-5-00)

Self-Incrimination, personal papers, immunity: The Fifth Amendment privilege against self-incrimination protects a witness from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with reasonable particularity. The Independent Counsel violated this principle by bringing criminal charges against the respondent based on information gained from documents obtained by virtue of the respondent's compliance with a subpoena to produce all records related to his and his family's income, employment, and relationship with professional clients. The district court's order compelling production of documents also extended use and derivative-use immunity pursuant to 18 U.S.C. § 6002, an immunity that has been interpreted to be coextensive with the scope of the privilege against self-incrimination. The act of producing documents that the Government identifies with particularity is not testimonial in nature, and ordinarily the privilege does not extend to the content of such documents. However, the act of producing documents in response to a subpoena can have a testimonial aspect if it communicates information about the existence, custody, or authenticity of documents. The broad scope of the subpoena in this case suggests that the Independent Counsel needed the respondent's assistance in identifying potential sources of information that could lead to his prosecution, and that is what happened. The respondent, in complying with the subpoena, provided the Independent Counsel with a mass of documents falling within 11 broadly worded subpoena categories, and prosecutors culled incriminating evidence from these documents. Because the Independent Counsel is unable to prove that the evidence used in obtaining the indictment and proposed to be used at trial was derived from legitimate sources wholly independent of the testimonial aspect of respondent's immunized conduct in selecting and producing documents described in the subpoena, the indictment must be dismissed.

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

United States v. Johnson 120 S. Ct. 1114, 68 USLW 4174 (3-1-00)

Prisoners, supervised release: A prisoner serving time in federal prison for multiple offenses, released after having served time under convictions held invalid, is not entitled to have his excess prison time credited against supervised release time still to be served on remaining convictions. The language of 18 U.S.C. § 3624(e) controls. That section provides that "[t]he term of supervised release commences on the day the person is released from imprisonment." The dictionary definition as well as the "ordinary, commonsense" meaning of "release" is "to be freed from confinement." The section does allow concurrent counting, but only for prison terms of less than 30 days. The "proper inference" is that Congress considered exceptions and intended to limit exceptions to those set forth. While the text of section 3624 "resolves the case," the result "accords with the statute's purpose and design," since supervised release serves "rehabilitative ends, distinct from those served by incarceration."

9-0. Opinion for unanimous Court by Kennedy.

United States v. Locke 120 S. Ct. 1135, 68 USLW 4184 (3-6-00)

Preemption, regulation of oil tankers: Four Washington State regulations imposed on oil tankers for the purpose of preventing oil spills are preempted by federal law. These four rules impose training requirements for tanker crews, require crews to be proficient in the English language, impose staffing requirements for navigation watch, and require reporting to state authorities of certain marine casualties. The State regulations intrude in an area where the federal interest in regulating navigation "without embarrassment from intervention of the separate States and resulting difficulties with foreign nations" is "manifest." Congress has enacted a series of statutes and has ratified international agreements governing oil tankers. Principal among the statutes are the Ports and Waterways Safety Act of 1972 (PWSA) and the Oil Pollution Act of 1990 (OPA). The Court's interpretation of the PWSA in *Ray v. Atlantic Richfield Co.* (1978) remains "correct and controlling." The Ninth Circuit erroneously relied on language in OPA Title I disclaiming any intent to preempt state laws imposing additional liability or additional requirements relating to the discharge of oil. Title I of the OPA does not regulate vessel operation, design, or manning, and its savings clause is similarly limited in scope. The preemptive reach of the PWSA and the regulations promulgated under it is not affected by the OPA. Under Title I of the PWSA, Congress preserved state authority to regulate the "peculiarities of local waters if there is no conflict with federal regulatory determinations." Uniformity is required under Title II of the PWSA for federal rules governing general seaworthiness of tankers and their crews – such things as construction, operation, maintenance, equipping, and manning of vessels. The first three Washington rules set forth above are subject to the "field preemption rule surrounding Title II." These training and crew qualification rules address matters that are not unique to the waters of Puget Sound, and

impose requirements that affect tanker operations outside State waters. Other sources of federal regulation govern the reporting of marine incidents, and leave no room for duplicative or additional state requirements. The case is remanded for further evaluation of various other State regulations being challenged by tanker owners.

9-0. Opinion for unanimous Court by Kennedy.

United States v. Martinez-Salazar 120 S. Ct. 774, 68 USLW 4081 (1-19-00)

Peremptory challenges: A defendant charged with a federal offense who exercises a peremptory challenge to remove a potential juror following the trial court's erroneous refusal to dismiss that juror for cause is not deprived of any rule-based or constitutional right. Nothing in the Constitution requires Congress to provide for peremptory challenges. Rule 24, Federal Rules of Criminal Procedure, provides defendants with 10 peremptory challenges for the petit jury and one challenge for an alternate juror, and authorizes a district court to allow additional challenges in multiple-defendant cases. In this case the defendant and his co-defendant exercised their 11 challenges and did not request additional challenges, and defendant's counsel stated that he had no objection to the jurors who were seated. In *Ross v. Oklahoma* (1988), the Court held in a state-law setting that loss of a peremptory challenge exercised to cure the trial court's error in not dismissing a juror for cause did not deprive the defendant of any constitutional right "so long as the jury that sits is impartial." The same principle applies in the federal setting. Here the defendant "used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." The district court's error did not result in the seating of any juror who should have been dismissed for cause.

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

United States v. Morrison 120 S. Ct. 1740, 68 USLW 4351 (5-15-00)

Violence Against Women Act; Commerce power, 14th Amendment enforcement power: 42 U.S.C. § 13981, a provision of the Violence Against Women Act that creates a federal civil remedy for victims of gender-motivated violence, exceeds congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment. The guiding Commerce Clause principles were set forth in *United States v. Lopez* (1995), in which the Court held that the Gun-Free School Zones Act exceeded congressional power to regulate "activities that substantially affect interstate commerce." So far, the Court has upheld commerce-power regulation of intrastate activity only if that activity is economic in nature, and gender-motivated crimes of violence "are not, in any sense of the phrase, economic activity." Like the Gun-Free School Zones Act, section 13981 contains no jurisdictional element tying the regulated violence to interstate commerce. Unlike the Gun-Free School Zones Act, section 13981 contains "numerous" congressional findings about the impacts of gender-motivated crimes. Congressional findings, however, do not necessarily suffice to sustain Commerce Clause legislation. It is ultimately a judicial rather than a

legislative question whether particular activities substantially affect interstate commerce. In this case the congressional findings rely heavily on a method of reasoning rejected in *Lopez*, a but-for causal chain that traces from violence to attenuated effects upon employment, production, transit, or consumption. Congress lacks the power to regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Regulation and punishment of crime that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Similarly, there are limitations to Congress's power under section 5 of the Fourteenth Amendment to enforce that Amendment's guarantees. The Amendment prohibits only state action, and affords no protection against "merely private conduct." This principle, established in 1883 in *United States v. Harris* and the *Civil Rights Cases*, was not overruled by dicta in *United States v. Guest* (1966). Even if Congress's aim is to correct state officials' refusal or neglect in enforcing evenhanded laws, the remedy here is simply not corrective in character, and cannot be said to be congruent and proportional to the injury being addressed. Section 13981 is not aimed at proscribing discriminatory administration by state officials, but instead is aimed at private conduct. The section is "unlike any of the § 5 remedies" that the Court has upheld; it does not apply to state officials, and it applies uniformly throughout the nation rather than in targeted states.

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

United States v. Playboy Entertainment Group, Inc. 120 S. Ct. 1878, 68 USLW 4409
(5-22-00)

First Amendment, regulation of indecent cable TV broadcasts: Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to hours when children are unlikely to be viewing, violates the First Amendment. The provision, applicable to sexually explicit adult programming, is content-based, and therefore is subject to strict scrutiny: it must be "narrowly tailored to promote a compelling Government interest." Section 505 is not narrowly tailored in this sense, because section 504 offers a less restrictive alternative. Section 504 requires a cable operator, upon request by a subscriber, to fully scramble any channel the subscriber does not wish to receive. This key difference between cable television and the broadcasting media – the capacity to block unwanted channels on a household-by-household basis – enables the Government to support parental authority without affecting the First Amendment rights of other speakers and willing listeners. Here the only question is whether section 504, if adequately publicized, can be effective. The Government failed to meet its burden of proving that this alternative will not be effective in achieving its goals. Although there were very few blocking requests under section 504 before the addition of section 505, the Government did not establish the reason for this

low utilization, nor did it establish that signal bleed was actually a pervasive problem.

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

Vermont Agency of Nat. Res. v. United States ex rel. Stevens 120 S. Ct. 1858, 68 USLW 4399 (5-22-00)

False Claims Act, *qui tam* actions, standing to sue, state defendants: A private individual may not maintain an action against a state, on behalf of the United States, under the *qui tam* provision of the False Claims Act. A private individual who brings such a *qui tam* action has standing to sue. The provision allows an individual to sue any person who defrauds the Government, and to collect a portion of any civil penalty or treble damages assessed. The *qui tam* relator suffers no injury to a legally protected interest, but adequate basis for standing derives from the principle that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The United States suffers injury in fact, and the False Claims Act effects a partial assignment of the Government's damages claim. The long tradition of *qui tam* actions in England and in the American colonies supports this conclusion, since Article III's restriction of judicial power to "cases and controversies" has been interpreted to mean "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." The False Claims Act, however, does not subject a state to liability in a *qui tam* action, because a state is not "person" within the meaning of the Act. The Act does not define the term "person," and there is a longstanding presumption that "person" does not include the sovereign. Nothing in the history and structure of the Act overcomes this presumption. Moreover, the conclusion is supported by two rules of construction: Congress may change the usual constitutional balance between states and the federal government only by unmistakably clear language, and statutes should be construed so as to avoid difficult constitutional issues (here the Eleventh Amendment issue).

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

Village of Willowbrook v. Olech 120 S. Ct. 1073, 68 USLW 4157 (2-23-00)

Equal Protection, "class of one": Successful equal protection claims may be brought by a "class of one" if the plaintiff establishes that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the different treatment. The respondent in this case had asked the Village to connect her property to the municipal water supply, and the Village had conditioned the connection on a 33-foot easement rather than a 15-foot easement required of other property owners. The respondent alleged that the demand for a 33-foot easement was motivated by ill-will stemming from a previous, successful lawsuit she had brought against the Village; this allegation, if proved, would establish that the discriminatory treatment was intentional.

9-0. *Per curiam*. Separate opinion by Breyer, concurring in the result.

Wal-Mart Stores, Inc. v. Samara Bros., Inc. 120 S. Ct. 1339, 68 USLW 4217 (3-21-00)

Lanham Act, trade dress infringement: In an action for infringement of unregistered trade dress under section 43(a) of the Lanham Act, a product's design is distinctive, and therefore protectible, only upon a showing of secondary meaning. A mark can be distinctive in one of two ways – if it is inherently distinctive (*i.e.*, if its inherent nature serves to identify a particular source), or if it has developed secondary meaning. Secondary meaning is found if the primary significance of the mark in the public mind is to identify the source of a product rather than the product itself. Design, like color, is not inherently distinctive, "since consumer predisposition to equate product design with the source does not exist." Moreover, application of inherent distinctiveness to product design could harm consumer interests, since competition could be deterred "by the plausible threat of successful suit." Courts that have a difficult time in marginal cases distinguishing between product-design and product-packaging trade dress "should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning."

9-0. Opinion for unanimous Court by Scalia.

Weeks v. Angelone 120 S. Ct. 727, 68 USLW 4060 (1-19-00)

Jury instruction, capital case, mitigating factors: A trial judge does not violate the Constitution by directing a jury's attention to a specific paragraph of a constitutionally sufficient sentencing instruction in response to the jury's question regarding the proper consideration of mitigating circumstances. After four hours of deliberation, the jury had asked the judge whether it was their "duty" to vote for the death penalty if they found the defendant "guilty" of at least one aggravating factor. Rather than answering the question directly, the judge referred the jury to language in the instruction providing that the jury "may" fix the punishment at death upon finding that the state had proved one aggravating factor, "or," the instruction continued, "if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment [at life imprisonment]." The jury also received a separate instruction that "you must consider a mitigating circumstance if you find there is evidence to support it." The Court had previously upheld the Virginia pattern instruction at issue. "Given that the jury was adequately instructed, and given that the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry," there was no constitutional violation. Moreover, federal habeas corpus relief is precluded by 28 U.S.C. § 2254(d); affirmance of conviction was neither contrary to nor did it involve an unreasonable application of clearly established federal law.

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

Weisgram v. Marley 120 S. Ct. 1011, 68 USLW 4122 (2-22-00)

Federal courts, appeals: Federal Rule of Civil Procedure 50 permits an appellate court to direct the entry of judgment as a matter of law when it

determines that evidence was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case. The Court had previously held in *Neely v. Martin K. Eby Constr. Co.* (1967) that there are situations in which an appellate court may appropriately enter judgment as a matter of law against the jury-verdict winner. Cases in which there remains insufficient evidence to support the jury's verdict after exclusion of erroneously admitted evidence can fall into this *Neely* category. The appellate court's "informed discretion" should guide its choice among the alternatives of ordering a new trial, remanding for the trial court to determine whether a new trial is warranted, or directing entry of judgment as a matter of law. Fairness to the parties is key to the exercise of the appellate court's discretion in the matter. A party whose verdict is set aside on appeal will have had notice at trial of any alleged evidentiary insufficiency, and it is "unconvincing" to suggest that allowing the appellate court to direct entry of judgment for the defendant will punish plaintiffs who could have shored up their cases by other means had they known that their expert testimony would be found inadmissible.

9-0. Opinion for unanimous Court by Ginsburg.

Williams v. Taylor 120 S. Ct. 1479, 68 USLW 4279 (4-18-00)

***Habeas corpus*, AEDPA, failure to develop factual basis in state court**: A *habeas corpus* petitioner has "failed" to develop the factual basis of his claim within the meaning of section 2254(e)(2) of the Antiterrorism and Effective Death Penalty Act (AEDPA) only if there has been some lack of diligence on his part. The provision, which denies a federal court evidentiary hearing to a *habeas corpus* applicant who "has failed to develop the factual basis of [the] claim in State court proceedings," is not a no-fault standard. In ordinary usage the word "failed" connotes some omission, fault, or negligence by the person who has failed to do something. Moreover, this statutory language "echoes" the Court's characterization, in a case decided four years prior to AEDPA's enactment, of an attorney's negligent failure to develop a factual record. "When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary." In this case there was lack of diligence as to one claim, involving the prosecution's failure to disclose the psychiatric report of a co-defendant and witness, since there were repeated references to the report in the transcript of the sentencing proceeding. The petitioner met his burden of showing diligence in efforts to develop facts supporting two other claims, one involving juror bias and the other involving prosecutorial misconduct.

9-0. Opinion for unanimous Court by Kennedy.

Williams v. Taylor 120 S. Ct. 1495, 68 USLW 4263 (4-18-00)

***Habeas corpus*, AEDPA, ineffective assistance of counsel**: Section 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a federal court may grant *habeas corpus* relief to a prisoner who has already litigated the issue in state court only if the state-court adjudication was "contrary to," or involved an "unreasonable application of," clearly established federal law as determined by the Supreme

Court, imposed new constraints on the federal court's power to grant relief. In this case, the claim of ineffective assistance of counsel due to counsel's failure to investigate and present substantial mitigating evidence to the sentencing jury involves law that had been "clearly established" by the Supreme Court's decision in *Strickland v. Washington* (1984). Counsel's representation during the sentencing phase fell short of the professional standards mandated by *Strickland*, and also "prejudiced" the petitioner by probably affecting the outcome of the proceeding. The Virginia Supreme Court's decision rejecting petitioner's ineffective assistance claim was both "contrary to" and involved an "unreasonable application" of *Strickland*. The "contrary to" and "unreasonable application" clauses carry independent meaning. The former clause requires that the state court's decision must be "substantially different from" the governing precedent. The "unreasonable application" clause requires an objective test; the "subjective" test that asks whether all jurists would agree that the state court's application was unreasonable is erroneous.

6-3 (result); **5-4** (applicable standard). Opinion of Court (in part) by Stevens, joined by O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Separate part of Stevens opinion joined by Souter, Ginsburg, and Breyer. Separate part of Opinion of Court by O'Connor, joined by Rehnquist, Scalia, Kennedy, and Thomas. Separate part of O'Connor opinion joined by Kennedy. Opinion by Rehnquist, joined by Scalia and Thomas, concurring in part and dissenting in part.

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