Order Code RL31060

Supreme Court Opinions: October 2000 Term

July 17, 2001

name redacted
Legislative Attorney
American Law Division

Supreme Court Opinions: October 2000 Term

Summary

This report contains synopses of Supreme Court decisions issued from the beginning of the October 2000 Term through the end of the Term on June 28, 2001. The purpose is to provide a quick reference guide for identification of cases of interest. These synopses are created throughout the Term and entered into the CRS Home Page on the Internet (http://www.crs.gov/reference/topics/law/00_term.shtml), which also provides links from the synopses to the full text of the Court's opinions. The report supersedes an earlier cumulation issued as a general distribution memorandum dated March 7, 2001. Included are all cases decided by signed opinion and selected cases decided *per curiam*. Not included are other cases receiving summary disposition and the many cases in which the Court denied review. Each synopsis contains a summary of the Court's holding, and most contain a brief statement of the Court's rationale. In addition, the date of decision is indicated, and cites to *United States Law Week* and West's *Supreme Court Reporter* are provided. Following each synopsis the vote on the Court's holding is indicated in bold typeface, and authors of the Court's opinion and of any concurring and dissenting opinions, along with the Justices who joined those opinions, are identified. Cases are listed alphabetically, and a subject index is appended.

Supreme Court Opinions: October 2000 Term

Alabama v. Bozeman 121 S. Ct. 2079, 69 USLW 4465 (6-11-01)

Interstate Agreement on Detainers: The "antishuttling" provision of the Interstate Agreement on Detainers requires dismissal of receiving-state charges against a prisoner who was transported to the receiving state for a single day for purpose of arraignment and who was then returned immediately to his original place of imprisonment prior to trial. The language of the provision, Article IV(e), is "absolute," providing that "[I]f trial is not had . . . prior to the prisoner's being returned to the original place of imprisonment . . . , such [charges] shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." Even if the Agreement were interpreted to exempt violations that are deemed to be *de minimis* in relation to the Agreement's purpose, the purpose of the "no return" provision cannot be simply to prevent interruption of rehabilitation in the sending state. Preventing return of the prisoner prior to trial necessarily decreases the time the prisoner will spend in the sending state. By requiring the receiving state to pay for the prisoner's incarceration, the Agreement provides the receiving state with an incentive to shorten the pretrial period. Alternatively, the Agreement's drafters may have believed that the "shuttling" itself adds to uncertainties that impede rehabilitation. Viewed against either of these purposes, the one-day violation at issue cannot be said to be "*de minimis*, technical, or harmless."

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

Alexander v. Sandoval 121 S. Ct. 1511, 69 USLW 4250 (4-24-01)

Civil Rights Act Title VI, implied private right of action: There is no implied private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. Section 601 of the Act prohibits discrimination on the basis of race, ethnicity, or national origin by recipients of federal financial assistance, and section 602 authorizes federal agencies to "effectuate the provisions" of section 601 by promulgating regulations. Three aspects of Title VI are well established and "must be taken as given": first, private individuals may sue to enforce section 601; second, section 601 prevents only intentional discrimination, not disparate-impact discrimination; and third, regulations promulgated under section 602 that proscribe disparate-impact discrimination are valid even though such discrimination is not proscribed by section 601. It does not follow, however, that private individuals may sue to enforce the disparate-impact regulations. Because the disparate-impact regulations "do not simply apply § 601," but go beyond it, the private right of action to enforce § 601 does not include a private right to enforce the regulations. "That right must come, if at all, from the independent force of § 602." Statutory text is the starting point – and in this case the ending point –

for ascertaining whether Congress has created a private right of action. The "rights-creating language" present in section 601 "is completely absent from § 602," which instead is directed at federal agencies that distribute public funds. Moreover, section 602's express provision for agency enforcement of section 602 through termination of funding and other means suggests that Congress intended to preclude remedies not expressly authorized. The regulations themselves cannot be read to create a right that Congress has not created. The Rehabilitation Act Amendments of 1986, which abrogated states' Eleventh Amendment immunity from actions brought under Title VI, did not ratify decisions finding a private right of action to enforce disparate-impact regulations. The cases relied on did not so hold, and the 1986 amendment by its terms applied only to suits "for a violation of a statute," not to suits for violation of a regulation.

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

Arkansas v. Sullivan 121 S. Ct. 1876, 69 USLW 3746 (5-29-01)

Fourth Amendment, pretextual arrest: The Arkansas Supreme Court erred in ruling that an arrest of a motorist who had committed a traffic violation was invalid because it was made for the purpose of searching the motorist's car. As the Court determined in *Whren v. United States* (1996), an officer's subjective motivation for making a traffic stop plays no part in probable cause analysis, and the same principle applies to a custodial arrest. The Arkansas court also erred in its alternative holding that it may interpret the United States Constitution to provide greater protection than does the United States Supreme Court. That position was refuted in *Oregon v. Hass* (1975). A state is free under its own law – not under the federal Constitution – to impose greater restrictions on police activity.

9-0. *Per curiam*. Concurring opinion by Ginsburg, joined by Stevens, O'Connor, and Breyer.

Artuz v. Bennett 121 S. Ct. 361, 69 USLW 4001 (11-7-00)

Habeas corpus, AEDPA: An application for state post-conviction relief containing claims that are procedurally barred can be "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2). That provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) tolls an applicable limitations period for the time during which a "properly filed" application for state post-conviction relief is pending. An application is "filed" when it is delivered to, and accepted by, the appropriate court officer. An application is "properly filed" when its delivery and acceptance are "in compliance with the applicable laws and rules governing filings." Whether an application has been "properly filed" is thus "quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." It is only individual claims, and not the application containing those claims, that can be procedurally barred.

9-0. Opinion for unanimous Court by Scalia.

Atkinson Trading Co. v. Shirley 121 S. Ct. 1825, 69 USLW 4363 (5-29-01)

Native Americans, taxation: The Navajo Nation's imposition of a hotel occupancy tax on persons who are not tribal members and who operate a hotel on non-Indian fee land within the Navajo Reservation is invalid. In *Montana v. United States* (1981), the Court held that, as a general matter, the inherent sovereignty of Indian tribes is limited to their members and their territory. Neither of the exceptions to the general rule recognized by the Court in *Montana* is applicable here. A tribe may tax or regulate consensual commercial relationships with the tribe or its members, but operation of the hotel is not such a relationship. The generalized availability of police, fire, and emergency medical services provided by the tribe "is patently insufficient" to sustain the tribe's assertion of civil authority over nonmembers on non-Indian fee land, and the petitioner's status as an "Indian trader" cannot by itself support the imposition of the hotel occupancy tax. The second exception, recognizing tribal jurisdiction over an operation that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," is also inapplicable. Operation of the hotel "does not endanger the Navajo Nation's political integrity."

9-0. Opinion for unanimous Court by Rehnquist. Concurring opinion by Souter, joined by Kennedy and Thomas.

Atwater v. City of Lago Vista 121 S. Ct. 1536, 69 USLW 4262 (4-24-01)

Fourth Amendment, arrest for minor offense: The Fourth Amendment does not prohibit a warrantless arrest for a minor offense, such as a misdemeanor seatbelt violation punishable only by a fine. In reading the Fourth Amendment, the Court is "guided by the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the [Constitution's] framing." There was no uniform rule at common law that prohibited peace officers from making warrantless misdemeanor arrests except in cases involving a breach of the peace. Commentators were divided as to the English rule, and, in any event, there were numerous statutory exceptions. There is no indication that the Constitution's framers intended such a limitation, the statutes of the colonies and states authorized arrest for various misdemeanors not involving a breach of the peace, and the historical record that has unfolded since the framing is also inconsistent with any such limitation. Today, the laws of all 50 states, the District of Columbia, and the Federal Government permit some misdemeanor arrests without a breach of the peace. The petitioner's request that the Court mint a new rule of constitutional law based on contemporary standards of reasonableness is rejected. "A responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations." The proposed rules, distinguishing between "jailable" and "fine-only" offenses, for example, would be difficult for officers to administer, and would require some exceptions. Such rules are better devised by statute, as some states have done. The "upshot" is that there is "a dearth of horribles demanding redress." The petitioner's arrest in this case was constitutional. Although the arrest was "humiliating" and "inconvenient" and subjected her to "pointless indignity and confinement," it was no more harmful to privacy or physical interests than the normal custodial arrest, and therefore was "not so extraordinary as to violate the Fourth Amendment." Because the police officer in this case had probable cause to believe that the petitioner had committed a crime in his presence by not

wearing a seatbelt and by not securing her children in seatbelts, the officer "was accordingly authorized . . . to make a custodial arrest" rather than issue a citation, and to do so "without balancing costs and benefits or determining whether or not [petitioner's] arrest was in some sense necessary."

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

Bartnicki v. Vopper 121 S. Ct. 1753, 69 USLW 4323 (5-21-01)

First Amendment, disclosure of illegally intercepted communication: A federal prohibition on disclosure of the contents of an illegally intercepted electronic communication (18 U.S.C. § 2511(c)), and a parallel Pennsylvania law, violate the First Amendment as applied in this case. The defendants, a talk show host and a community activist, played no part in the illegal interception, and obtained the tapes lawfully. The subject matter of the disclosed conversation, involving a threat of violence in a labor dispute, was "a matter of public concern." Ordinarily, government may not punish the publication of truthful information about a matter of public significance. The government has identified two interests alleged to be furthered by the disclosure prohibition – that of deterring unlawful conduct and that of protecting privacy. The government's interest in deterring unlawful conduct is not well served by the prohibition. The normal method of deterrence is to punish the person who engages in the unlawful conduct; it is "quite remarkable" to suppress speech by a law-abiding possessor of information in order to deter unlawful conduct by someone else. Also, there is no empirical evidence that supports the effectiveness of the disclosure prohibition. The government's "important" interest in protecting private communication is well served by the prohibition, however, and requires a balancing against the free speech interests that are impaired. In this case, "privacy concerns give way when balanced against the interest in publishing matters of public importance." There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." Application of this principle "requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."

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

Becker v. Montgomery 121 S. Ct. 1801, 69 USLW 4390 (5-29-01)

Appeals, required signature on notice: When a party files a timely notice of appeal in federal district court, the failure to sign the notice does not require the court of appeals to dismiss the appeal. Civil Rule 11(a), made applicable to notices of appeal by the appellate rules, "unquestionably" requires that notices of appeal be signed, and this means a handwritten name or a hand-placed mark. Rule 11(a) also provides, however, that the omission of a signature may be "corrected promptly after being called to the attention of the attorney or party," either by signing the copy that is on file or by submitting a duplicate, signed copy. The rule "was formulated and should be applied as a cohesive whole"; there is no basis for distinguishing notices of appeal from other written filings, or for applying a harsher rule to filings by *pro se* litigants than applies to parties

represented by attorneys. The Sixth Circuit erred in not accepting the petitioner's corrected notice as perfecting his appeal.

9-0. Opinion for unanimous Court by Ginsburg.

Board of Trustees of Univ. of Ala. v. Garrett 121 S. Ct. 955, 69 USLW 4105 (2-21-01)

Eleventh Amendment; Fourteenth Amendment enforcement; ADA: Congress exceeded its constitutional power by subjecting states to suits brought by state employees in federal courts to collect money damages for the state's failure to comply with Title I of the Americans with Disabilities Act of 1990 (ADA). Such actions are barred by the Eleventh Amendment. Congress may, through valid exercise of its Fourteenth Amendment power to enforce that Amendment's guarantees by "appropriate legislation," abrogate the states' Eleventh Amendment immunity from federal court suits for damages. The first step in determining whether Congress has validly exercised its Fourteenth Amendment enforcement power is "to identify with some precision the scope of the constitutional right" that is being enforced. The Court determined in *Cleburne v. Cleburne Living Center* (1985) that legislative classifications governing the mentally retarded should be measured by rational basis review, and the same test applies for other categories of the disabled. "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." The next step is to determine "whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled." The legislative record of the ADA, however, fails to show that Congress did in fact identify a pattern of irrational state employment discrimination against the disabled. The great majority of discriminatory incidents identified by Congress do not involve states, and the half dozen or so that do "taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 must be based." Congress failed to mention states in its legislative findings addressing discrimination in employment. And even if a pattern of discrimination by states were found, the ADA's remedies would run afoul of the "congruence and proportionality" limitation. The requirement of reasonable accommodation, even with the exception for undue hardship, "far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable."

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

Booth v. Churner 121 S. Ct. 1819, 69 USLW 4387 (5-29-01)

Prison Litigation Reform Act, exhaustion of administrative remedies: The Prison Litigation Reform Act, which provides that prison inmates must exhaust "such administrative remedies as are available" before suing over prison conditions, requires an inmate seeking only money damages to complete a prison administrative process that could provide only non-monetary relief. Neither "pragmatism" nor plain meaning resolves the case. While the odds of keeping an inmate out of court are slim if the relief he seeks is unavailable in administrative proceedings, there is some chance that "being heard" will "mollify

passions" or that administrative proceedings will weed out frivolous claims. "Available" can mean either having sufficient power to achieve an end, or whatever is offered. "Remedy" can mean either specific relief that is available, or the process itself that leads to relief. Two additional considerations provide "clearer pointers" to the provision's meaning. One is the "broader statutory context." "[T]he word 'exhausted' has a decidedly procedural emphasis," since "one 'exhausts' processes, not forms of relief." "Statutory history" is the second indicator. Prior to amendment in 1995, the section at issue required exhaustion of administrative remedies "only if those remedies were plain, speedy, and effective." Congress's removal of this language, especially after the Supreme Court had emphasized it in ruling that exhaustion was not required if money damages were sought but unavailable administratively, "confirms the suggestion that Congress meant to require procedural exhaustion regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible."

9-0. Opinion for unanimous Court by Souter.

Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n 121 S. Ct. 924, 69 USLW 4085 (2-20-01)

Fourteenth Amendment, state action: The regulatory activity of the Tennessee Secondary School Athletic Association, a statewide body incorporated to regulate interscholastic athletic competition among public and private secondary schools, should be treated as state action. The "nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." Whether actions may fairly be attributed to the state is a "necessarily fact-bound inquiry." Interscholastic athletics plays an integral part in public education in Tennessee, and the Association is the entity relied upon to regulate competition. The Association is "overwhelmingly" composed of public school officials, 84% of its members are public schools, and the principal part of its funding derives from gate receipts from member schools. This "entwinement" of public school officials "from the bottom up" is complemented by "entwinement from the top down." Representatives of the State Board of Education sit on the Association's committees as non-voting members, the State Board's rules are enforced by the Association, the State Board allows students to satisfy its physical education requirements by participating in interscholastic athletics sponsored by the Association, and the Association's employees are covered by the State's retirement system. The pervasive entwinement present in this case requires a finding of state action regardless of whether alternative tests for state action are satisfied. The Association did not establish that countervailing values should outweigh a finding of state action.

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

Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of HHR 121 S. Ct. 1835, 69 USLW 4350 (5-29-01)

Attorney's fees, "catalyst theory": The "catalyst theory" is not a permissible basis for the award of attorney's fees under the Fair Housing Act or the Americans with Disabilities Act, both of which authorize award of attorney's

fees to the "prevailing party." The catalyst theory would allow recovery of fees by a party who has failed to secure either a judgment on the merits or a court-ordered consent decree, but who has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. The Court's prior holdings interpret "prevailing party" to mean "one who has been awarded some relief by the court," as is the case with a judgment on the merits or a settlement agreement enforced through a consent decree. The "catalyst theory" falls on the other side of the line by allowing an award where there is "no judicially sanctioned change in the legal relationship of the parties." Circuit court precedent and dicta in Supreme Court decisions cannot overcome the plain language of the statute and the Court's prior holdings. Legislative history of the Civil Rights Attorney's Fees Awards Act, which also authorizes awards to a "prevailing party," is "at best ambiguous." The argument that the catalyst theory is necessary to prevent defendants from unilaterally mooting an action before judgment in order to avoid paying attorney's fees is speculative and unsupported by evidence. Moreover, the catalyst theory "is clearly not a formula for ready administrability."

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

Buckman Co. v. Plaintiffs' Legal Comm. 121 S. Ct. 1012, 69 USLW 4101 (2-21-01)

Preemption, Medical Device Amendments, state tort law: A state tort law action based on fraud on the FDA in falsely identifying the intended use for a medical device in an application under section 510(k) for approval of the device as substantially equivalent to a grandfathered "predicate device" is preempted by the Medical Device Amendments to the Food, Drug, and Cosmetic Act. Policing fraud against federal agencies is not a field which the states have traditionally occupied, and consequently no presumption against preemption applies. The comprehensive federal statutory scheme "amply empowers the FDA to punish and deter fraud against the agency," and grants the agency flexibility in achieving "a somewhat delicate balance" among the statute's objectives. Regulatory flexibility is especially important, given the "accepted and necessary" practice of "off-label" usage of medical devices. "Complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes [would] dramatically increase the burdens facing potential applicants" in a manner not contemplated by Congress.

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

Buford v. United States 121 S. Ct. 1276, 69 USLW 4182 (3-20-01)

Appeals, standard of review, sentencing guidelines: A court of appeals should apply deferential review – not *de novo* review – to a district court's determination as to whether an offender's prior convictions were consolidated, hence "related," for purposes of sentencing. Prior felony convictions that are "related" to one another are treated as a single prior conviction for purposes of calculating whether an offender has at least two prior felony convictions and should therefore be sentenced as a "career offender." Trial courts are in a better position than appellate courts to decide "whether a particular set of individual

circumstances demonstrates 'functional consolidation.'" This issue "grows out of, and is bounded by, case-specific detailed factual circumstances" that are appropriately addressed by the trial court. The legal issue is "minor, detailed, [and] interstitial," and not a "generally recurring, purely legal matter" for which an appellate court can provide clear guidance.

9-0. Opinion for unanimous Court by Breyer.

Bush v. Gore 121 S. Ct. 525, 69 USLW 4029 (12-12-00)

Presidential election, recount, equal protection: The Florida Supreme Court's order directing a partial manual recount of the vote for Presidential electors violates the Equal Protection Clause by allowing arbitrary and disparate treatment of members of the electorate. When a state legislature confers on its citizens the right to vote for Presidential electors, that right to vote is "fundamental," and equal protection applies to "the manner of its exercise." In this case the equal protection violation "inheres in the absence of specific standards to ensure . . . equal application" of the "intent of the voter" standard applied by the Florida court. There were "various respects" in which unequal treatment could result from implementation of the Florida court's order. The standard for accepting or rejecting contested ballots "might vary not only from county to county but indeed within a single county from one recount team to another." One county changed its evaluative standards during the counting process. A manual recount does not treat "overvotes" in the same manner as "undervotes." The court "certified" a "partial total" from one county. And the order "did not specify who would recount the ballots." Because "the problem of equal protection in election processes generally presents many complexities," this decision is "limited to the present circumstances," in which "a state court with the power to assure uniformity" has failed to provide "minimal procedural safeguards." Because "it is obvious" that a recount that complies with these constitutional requirements could not be conducted "without substantial additional work," and because there is no time left to do so and still comply with the requirement of Florida law that election contests be completed by December 12 (the date specified in 3 U.S.C. § 5), the judgment of the Florida Supreme Court ordering a recount to proceed is reversed.

5-4 (remedy); **7-2** (equal protection violation). *Per curiam*. Concurring opinion by Rehnquist, joined by Scalia and Thomas. Dissenting opinions by Stevens, joined by Ginsburg and Breyer; by Souter, joined by Breyer and joined in part by Stevens and Ginsburg; and by Ginsburg, joined by Stevens, and joined in part by Souter and Breyer.

Bush v. Palm Beach County Canvassing Bd. 121 S. Ct. 471, 69 USLW 4020 (12-4-00)

Presidential election, remand to Florida Supreme Court: The Supreme Court declines to review the federal questions presented by the petitioner, who challenges the Florida Supreme Court's decision that extended the deadline under Florida law for submission of county election returns to the Secretary of State, and thereby allowed time for manual recounts authorized by Florida law. The judgment of the Florida Supreme Court is vacated, and the case is remanded so that the Florida court can clarify the extent to which it relied on the Florida Constitution as "circumscribing the [Florida] legislature's authority under Article

II, § 1, cl. 2" of the United States Constitution, and can clarify the consideration it gave to 3 U.S.C. § 5.

9-0. *Per curiam.*

C & I Enterprises v. Citizen Band Potawatomi Tribe 121 S. Ct. 1589, 69 USLW 4290 (4-30-01)

Native Americans, tribal immunity, waiver: The tribe waived its immunity from suit in state court when it proposed and signed a construction contract containing a standard arbitration clause. A tribe's waiver of immunity from suit must be "clear," and in this case the tribe has waived its immunity "with the requisite clarity." The contract's arbitration clause provides for contract-related disputes to be resolved by binding arbitration, and for awards to be reduced to judgment in accordance with the applicable law "in any court having jurisdiction." The contract's choice-of-law clause, which provides that the law of the place where the project is located shall govern, makes it plain that the Oklahoma state court in which the suit was filed had jurisdiction to enforce the award, and that the parties "effectively agreed" to confirmation of the award in accordance with the Oklahoma Uniform Arbitration Act. That act authorizes state courts to enter judgment on an arbitration award. The tribe's effort to interpret the arbitration clause narrowly as merely waiving the right to a court trial of contractual disputes is unavailing. The arbitration regime "has a real world end," and the contract specifically authorizes judicial enforcement of the arbitral award. The tribe's argument that clear waiver cannot be established by a "form contract" is also rejected. The contract is not ambiguous, and, in any event, the tribe itself "proposed and prepared" it.

9-0. Opinion for unanimous Court by Ginsburg.

Calcano-Martinez v. INS 121 S. Ct. 2268, 69 USLW 4526

Immigration, judicial review, habeas corpus: The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) expressly precludes the courts of appeals from exercising jurisdiction to review a final order of removal against an alien who is removable by reason of conviction for any aggravated felony. Because elimination of all judicial review of such claims would raise "serious constitutional questions," the situation "can best be alleviated" by application of the Court's decision in *INS v. St. Cyr*, *infra*, construing IIRIRA's jurisdiction-stripping provisions as not precluding such aliens from pursuing habeas corpus relief under 28 U.S.C. § 2241.

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

Cedric Kushner Promotions, Ltd. v. King 121 S. Ct. 2087, 69 USLW 4468 (6-11-01)

RICO, "enterprise" distinct from "person": The Racketeer Influenced and Corrupt Organizations Act (RICO) makes it unlawful for "any person" employed by or associated with an "enterprise" to conduct such enterprise's affairs through the commission of two or more statutorily defined crimes. This language envisions two distinct entities, a "person" and an "enterprise." The need for the two distinct entities is satisfied "when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner – whether he

conducts those affairs within the scope, or beyond the scope, of corporate authority." Legally and linguistically, the corporate owner/employee is distinct from the corporation itself. To apply RICO in these circumstances is "consistent with the statute's basic purposes," which include "protecting the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle'" to conduct unlawful activity. There is no exception for employees acting within the scope of their employment in an illegitimate criminal enterprise.

9-0. Opinion for unanimous Court by Breyer.

Central Green Co. v. United States 121 S. Ct. 1005, 69 USLW 4126 (2-21-01)

Flood Control Act, scope of immunity: The grant of immunity to the United States "for any damage from or by floods or flood waters at any place" (33 U.S.C. § 702(c)) does not apply to all water that flows through a multi-purpose federal project operated only in part for flood control. The appropriate focus is on "the character of the waters that cause the relevant damage" and the purpose of their release, rather than on the overall project purposes. "[T]o characterize every drop of water that flows through [an] immense [federal] project as 'flood water' simply because flood control is among the purposes served by the project unnecessarily dilutes the language of the statute." The Ninth Circuit erred, therefore, in ruling that the plaintiff's action for damages resulting from operation of an irrigation canal that is part of the Central Valley Project should be dismissed because flood control is one of the purposes of that project.

9-0. Opinion for unanimous Court by Stevens.

Circuit City Stores, Inc. v. Adams 121 S. Ct. 1302, 69 USLW 4195 (3-21-01)

Federal Arbitration Act, scope of exclusion from coverage: Section 1of the Federal Arbitration Act, which excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," excludes contracts of employment of transportation workers, but not employment contracts of other workers engaged in interstate or foreign commerce. The words "any other class of workers engaged in . . . commerce" constitute a "residual phrase" that follows explicit reference to "seamen" and "railroad employees." This wording calls for application of the *ejusdem generis* canon of construction, which provides that general words following specific words in a statutory enumeration should be construed to embrace only objects similar in nature to the specifically enumerated objects. Application of the canon is supported by other "sound considerations." The phrase "engaged in commerce" has been interpreted to be more limited than other possible formulations, *e.g.*, "affecting commerce" and "involving commerce." The fact that the commerce power was construed narrowly when the FAA was enacted in 1925 does not mean that Congress used the phrase "engaged in commerce" in order to regulate to the full extent of its power, and the Court refuses to treat the phrase as "a variable standard" that can expand as interpretation of the power expands. The congressional decision to exempt workers over whom the commerce power was most apparent was not irrational; by 1925 Congress had created special dispute resolution procedures for seamen and was in the process of doing so for railway workers, and might well have preferred to address the needs of other categories of transportation

workers in similar manner. There is no need to assess the legislative history of the exclusion provision.

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

City News & Novelty, Inc. v. City of Waukesha 121 S. Ct. 743, 69 USLW 4081 (1-17-01)

Mootness: The issue of whether an applicant denied a license to operate an adult business is entitled to a prompt judicial determination on the merits, or merely to prompt access to judicial review, is not properly before the Court. When the city granted a license to a competitor, the petitioner withdrew its renewal application and ceased to operate as an adult business. This situation is different from that presented in *Erie v. Pap's A.M.* There the entity that terminated its adult business had prevailed in the lower court, and a dismissal based on mootness would have left the defendant city with the "ongoing injury" of an invalidated ordinance. Here the adult business has left the fray a loser, and dismissal does not leave the city under the "weight of an adverse judgment." Also, an applicant denied a renewal application is not in the same position as an applicant for an initial license. The typical concern of a renewal applicant is not the speed of court proceedings on the merits, but rather the availability of a stay of adverse action during the pendency of those proceedings.

9-0. Opinion for unanimous Court by Ginsburg.

City of Indianapolis v. Edmond 121 S. Ct. 447, 69 USLW 4009 (11-28-00)

Fourth Amendment, drug checkpoints: The city's program of vehicle checkpoints on roads, designed to interdict unlawful drugs, violates the Fourth Amendment. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. The Court has never approved a checkpoint program "whose primary purpose was to detect evidence of ordinary criminal wrongdoing." Although the Court has recognized limited exceptions to the individualized suspicion requirement for checkpoints set up to police the borders or promote highway safety, the Indianapolis program does not fall within either of these exceptions. While each of these excepted programs had a law enforcement component, law enforcement was not the primary purpose of either. Expanding the exceptions to cover roadblocks designed primarily to serve the general interest in crime control "would do little to prevent such intrusions from becoming a routine part of American life." The Court "cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."

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

Clark County Sch. Dist. v. Breeden 121 S. Ct. 1508, 69 USLW 3684 (4-23-01)

Civil rights, Title VII, retaliation claim: The Ninth Circuit erred in reversing the district court's summary judgment ruling in favor of the school board on the respondent's claim that the school board had retaliated against her for actions protected by Title VII. The respondent could not reasonably have believed that

the incident she alleged – that a co-member of a job application review panel made an offensive remark – violated Title VII. The Court's precedents establish that sexual harassment is actionable under Title VII only if it is so severe or pervasive as to alter the conditions of employment and create an abusive working environment. This one isolated incident "cannot remotely be considered 'extremely serious.'" Besides alleging that she was punished for complaining about the alleged sexual harassment, the respondent also claimed that she was punished for filing charges with state and federal authorities. This second claim rested solely on temporal proximity between the protected action and the alleged retaliatory action. Causality can be established by temporal proximity only if the events are "very close" in time, yet the 20-month period in this case "suggests, by itself, no causality at all."

9-0. *Per curiam*.

Cleveland v. United States 121 S. Ct. 365, 69 USLW 4003 (11-7-00)

Mail fraud, false statements, victim's property interest: The federal mail fraud statute, 18 U.S.C. § 1341, does not reach false statements made in an application for a state license. The statute proscribes use of the mails to obtain "property" by false representations. The thing obtained must be "property" in the hands of the victim, yet state and municipal licenses in general, and Louisiana's video poker licenses in particular, are not "property" in the hands of the official licensor. The State's concern in issuing, renewing, and revoking video poker licenses is regulatory. The Government does not allege that the petitioner defrauded the State of any money, and the fact that the State has a substantial economic stake in the licenses does not convert the State's regulatory interest into a property interest. The Government's reading of the provision invites "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." Any ambiguity in the meaning of "property" should be resolved in favor of lenity.

9-0. Opinion for unanimous Court by Ginsburg.

Cook v. Gralike 121 S. Ct. 1029, 69 USLW 4150 (2-28-01)

Elections, ballot identification of candidates not supporting term limits: Provisions of the Missouri Constitution requiring identification on primary and general election ballots of congressional candidates who failed to support term limits in the prescribed manner are unconstitutional. The label "disregarded voters' instruction on term limits" was to be placed adjacent to the name of any incumbent candidate who had failed to take specified actions, and the label "declined to pledge to support term limits" was to be placed next to the name of any non-incumbent candidate who had declined to pledge to take those actions. States do not have power reserved by the Tenth Amendment to give binding instructions to their congressional representatives. The First Congress rejected a proposal to insert into what became the First Amendment a right of states "to instruct their representatives." The Court determined in *U.S. Term Limits, Inc. v. Thornton* (1995) that congressional offices arise from the Constitution, and that consequently no authority to regulate election to these offices could have preceded the Constitution and been "reserved" by the states. Any state power to regulate congressional elections had to be delegated, and the only source for such power is the "Elections Clause" of Article I, section 4, giving states power

to regulate the "times, places, and manner" of holding congressional elections. The Missouri ballot requirements do not relate to "times" or "places," and are not valid regulations of the "manner" of holding elections. "Manner" in this context refers to procedural regulations, yet Missouri's adverse ballot labels, like a "Scarlet Letter," are designed to "handicap candidates at the most crucial stage of the election process." Such attempts to influence electoral outcomes are not authorized by the Elections Clause.

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

Cooper Industries, Inc. v. Leatherman Tool Group, Inc. 121 S. Ct. 1678, 69 USLW 4299 (5-14-01)

Appeals, standard of review, punitive damages awards: A court of appeals should apply a *de novo* standard, not an abuse of discretion standard, when reviewing the constitutionality of a punitive damages award. A *de novo* standard is applied in "analogous cases" involving excessive fines, cruel and unusual punishments, reasonable suspicion, and probable cause, and is appropriate as well for reviewing constitutional challenges to punitive damages. Because the jury's award of punitive damages does not constitute a finding of fact, appellate review of the district court's determination that an award is constitutional does not implicate the Seventh Amendment. In this case, involving violations of the Lanham Act, *de novo* review of the district court's rejection of the petitioner's due process objections to the award might well have led the appeals court to reach a different result.

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

Daniels v. United States 121 S. Ct. 1578, 69 USLW 4279 (4-25-01)

Sentencing, motion to vacate, challenge to previous convictions: A defendant who has received the mandatory minimum 15-year sentence under the Armed Career Criminal Act (ACCA) as a felon who possessed a firearm and who had three previous convictions for a violent felony or serious drug offense, cannot have that sentence set aside under 28 U.S.C. § 2255 on the ground that the previous convictions were unconstitutional. The considerations underlying the Court's decision in *Custis v. United States* (1994) that there was no right to collaterally attack the prior convictions during the course of the ACCA sentencing proceeding apply as well in a § 2255 motion to vacate, set aside, or correct the sentence. As evidenced by this case, in which the transcript from the defendant's 1978 trial is missing, the district court may lack access to state court records necessary to evaluate claims arising from "long-past proceedings." Even after the defendant has served his complete sentence under a previous conviction, the state maintains "a strong interest in preserving the convictions it has obtained" so that it may impose disabilities on convicted felons and enhanced sentences on recidivist offenders. "The premise underlying the petitioner's argument – that defendants may challenge their convictions for constitutional infirmity – is quite correct." The "numerous opportunities" to do so, however, "are not available indefinitely and without limitation." If a prior conviction used

to enhance a federal sentence under the ACCA "is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies . . . or did so unsuccessfully, then that defendant is without recourse" under section 2255.

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

Department of Interior v. Klamath Water Users Protective Ass'n 121 S. Ct. 1060, 69 USLW 4166 (3-5-01)

FOIA, no "Indian trust" exemption: Documents prepared by Indian tribes for the Department of the Interior are not exempt from disclosure under Exemption 5 of the Freedom of Information Act (FOIA). Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters" which would be privileged against discovery in a civil action. The communications between the Indian tribes and the Interior Department do not qualify as "inter-agency" or "intra-agency." Although some appeals courts have held that documents prepared outside the government by consultants can qualify as "intra-agency" for purposes of the FOIA exemption, the analogy does not hold for the tribes' communications. A consultant represents the agency's interests, not its own. The tribes, on the other hand, "necessarily communicate . . . with their own . . . interests in mind." Rights to scarce water resources underlie the current litigation, and the tribes' interests are "necessarily adverse to the interests of competitors" such as the respondent. The Department's traditional fiduciary relationship to Indian tribes does not justify creation of an "Indian trust" exemption from the FOIA. Such an exemption is "out of the question," given the FOIA's dominant objective favoring disclosure over secrecy, and given the fact that there is "simply no support for the exemption in the statutory text."

9-0. Opinion for unanimous Court by Souter.

Director of Revenue of Mo. v. CoBank, ACB 121 S. Ct. 941, 69 USLW 4093 (2-20-01)

Taxation, State; banks for farm cooperatives: Although Congress has designated banks for farm cooperatives as "instrumentalities of the United States," implied immunity of federal instrumentalities from state taxation becomes an issue only when Congress has failed to address the matter. Beginning with the creation of banks for cooperatives by the Farm Credit Act of 1933, Congress has addressed the issue of state taxation, providing that the banks were subject to state income taxation unless the United States held stock in them. Although language in the governing section (12 U.S.C. § 2134) providing that the tax exemption "shall not apply" after stock held by the United States has been retired was deleted in 1985 by a technical correction occasioned by the fact that the United States was no longer authorized to invest in the banks, there was no intent to make a "radical" change in the law that would prevent states from taxing these banks. "[I]t would be surprising if Congress had eliminated this important [authority] *sub silentio*." The structure of the Farm Credit Act confirms that banks for cooperatives are subject to state taxation. The current "silence" of Congress with respect to state taxation of banks for cooperatives contrasts with explicit language conferring more

comprehensive exemption for farm credit banks and federal land bank associations.

9-0. Opinion for unanimous Court by Thomas.

Duncan v. Walker 121 S. Ct. 2120, 69 USLW 4473 (6-18-01)

Habeas corpus, AEDPA, tolling of limitations period: A federal habeas corpus petition is not an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2242(d)(2), and therefore did not toll the limitations period under the Antiterrorism and Effective Death Penalty Act (AEDPA). The word "State" applies to the entire phrase "post-conviction or other collateral review." In contrast with several other provisions of AEDPA, which refer to "State or Federal" post-conviction proceedings, Congress did not insert the word "federal" into § 2242(d)(2). If Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress intended the disparate treatment. There is "no likely explanation" for Congress's omission of the word "federal" other than that Congress did not intend for petitions for federal review to toll the limitation period. To read the provision as applying to federal petitions "would render the word 'State' insignificant, if not wholly superfluous." On the other hand, the phrase "other collateral review" need not refer to federal collateral review in order to have independent meaning; operative effect can be given to the phrase if it is limited to state collateral review. There are forms of "collateral" review, *e.g.*, challenges to the validity of civil commitment or civil contempt orders, that are not criminal in nature and hence are not forms of "post-conviction" review. Also, states employ "diverse terminology" to refer to forms of collateral review that are available. Finally, interpreting § 2242(d)(2) as inapplicable to federal petitions is consistent with AEDPA's purposes of promoting "comity, finality, and federalism."

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

Eastern Associated Coal Corp. v. UMW, District 17 121 S. Ct. 462, 69 USLW 4016 (11-28-00)

Arbitration: Public policy considerations do not require courts to refuse to enforce an arbitration award ordering an employer to reinstate an employee truck driver who twice tested positive for marijuana. In this case, the award suspended the driver for three months and required further substance-abuse treatment and testing prior to reinstatement. The employer asked a federal district court to vacate the arbitrator's award, arguing that the award contravened a public policy against operation of dangerous machinery by workers who test positive for drugs. The award implemented the governing collective bargaining agreement, so the award must be treated as if it were part of the agreement. Collective bargaining agreements that are contrary to public policy are unenforceable, but any such public policy must be well established and clearly ascertainable in laws or legal precedents. Here the applicable law is the "detailed regulatory regime" of the Omnibus Transportation Employee Testing Act of 1991 and DOT's implementing regulations. That regulatory regime reflects "complex" remedial aims that not only disfavor employee drug use and

favor drug testing, but also promote rehabilitation of employees who use drugs. The arbitration award, therefore, is "not contrary to these several policies, taken together." "Neither Congress nor the [DOT] Secretary has seen fit to mandate the discharge of a worker who twice tests positive for drugs," and the Court is hesitant "to infer a public policy . . . that goes beyond the careful and detailed [regulatory] scheme."

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

Egelhoff v. Egelhoff 121 S. Ct. 1322, 69 USLW 4206 (3-21-01)

ERISA, preemption: A Washington State statute providing that the designation of a spouse as the beneficiary of a non-probate asset is revoked automatically upon divorce is preempted by ERISA to the extent that it applies to employee benefit plans. ERISA expressly preempts state laws that "relate to any employee benefit plan," and the Court has restated this to mean any state law that "has a connection with or reference to such a plan." The Court looks both to the objectives of ERISA and to "the nature of the effect" of the state law on ERISA plans. Here there is "an impermissible connection" because the Washington statute purports to govern the payment of benefits, an "area of core ERISA concern," and also "interferes with nationally uniform plan administration." Moreover, the Washington statute is expressly preempted by ERISA. ERISA directs the fiduciary to administer the plan "in accordance with the documents and instruments governing the plan," and to make payments to a beneficiary "designated by a participant" or by the terms of the plan. While the Washington law contains an opt-out provision, the burden on plan administration would be "hardly trivial," since plan administrators in effect would have to maintain familiarity with the laws of all 50 states. The presumption against federal preemption of state family and probate law is overcome because "Congress has made clear its desire for pre-emption."

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

FEC v. Colorado Republican Fed. Campaign Comm. 121 S. Ct. 2351, 69 USLW 4553

First Amendment, campaign finance, coordinated expenditures: The party expenditure provision of the Federal Election Campaign Act is not facially invalid under the First Amendment insofar as it limits the amount of money that a national or state committee of a political party may spend in coordination with its own candidate for the Senate or House of Representatives. Beginning with *Buckley v. Valeo* (1976), the Court has distinguished between limits on political contributions, which have been upheld, and limits on political expenditures, which require closer scrutiny. In *Colorado I* (1996), the Court invalidated limits on independent expenditures by political parties. Campaign spending that is coordinated with a candidate, however, can closely resemble a contribution to that candidate's campaign. The limitation on coordinated spending, applicable to individuals and non-parties, does not impose such a unique burden on parties that a constitutional exception is required. The Government's argument that coordinated expenditures provide a means of circumventing the contribution limits outweighs the party's argument that coordinated expenditures are essential

to the party's principal mission of electing its candidates. The party's argument that a party is so "joined at the hip" with its candidates that its spending must necessarily be coordinated with candidates is "at odds with the history of nearly 30 years under the Act." There is little evidence to suggest that limits on coordinated spending have frustrated the ability of political parties to support their candidates. Moreover, in addition to electing candidates, parties "act as agents" for PACs and others "who seek to produce obligated officeholders." The same test applicable to contributions therefore applies, and there is adequate evidence to sustain the limit as being "closely drawn" to match the important government interest in combating political corruption. Under the Act a contributor is limited to $2,000 in contributions to one candidate, but may give $20,000 to a national party committee supporting the candidate. Absent the requirement that most of the party's spending on a candidate's behalf be done independently, "the inducement to circumvent would almost certainly intensify." "Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits."

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

Ferguson v. City of Charleston 121 S. Ct. 1281, 69 USLW 4184 (3-21-01)

Fourth Amendment, prenatal drug testing: A state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. In this case, a city-run hospital in Charleston, South Carolina, working in conjunction with police and prosecutors, developed a program under which hospital employees performed urine drug screening on pregnant patients suspected of cocaine use, and turned over positive results to the police. These tests were performed without the informed consent of the patients. This case differs from previous cases in which the Court has recognized an exception to the warrant requirement for drug testing justified by "special needs" divorced from a state's general interest in law enforcement. The "critical difference" lies in the nature of the "special need" asserted as justification. In this case "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." The "beneficent" purpose does not justify a "special needs" exception when the immediate objective is to generate evidence for law enforcement purposes. Because law enforcement "always serves some broader social purpose," virtually all suspicionless searches could be justified under the special needs doctrine were it tied to ultimate rather than immediate objective. Moreover, principles of knowing waiver require that state employees who seek to obtain evidence from patients for the purpose of incriminating them make sure that the patients are fully informed about their constitutional rights.

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

Fiore v. White 121 S. Ct. 712, 69 USLW 4066 (1-9-01)

Due Process, failure to prove element of crime: Pennsylvania deprived the defendant of due process by convicting him of the crime of operating a

hazardous waste facility without a permit, but in failing to prove that in fact the defendant did not possess a permit. Failure to possess a permit is a basic element of the crime, and conviction without proving each element beyond a reasonable doubt violates due process. The state conceded that the defendant did possess a permit, but argued that he had deviated so dramatically from the permit's terms that he had thereby violated the statute. The Pennsylvania Supreme Court, in response to the U.S. Supreme Court's certification of the question, clarified that a person who possesses a permit but deviates from its terms does not violate the statute. The conviction for conduct that the criminal statute, properly interpreted, does not prohibit, thus violates due process.

9-0. *Per curiam.*

Florida v. Thomas 121 S. Ct. 1905, 69 USLW 4400 (6-4-01)

Supreme Court, jurisdiction: The Supreme Court lacks jurisdiction to review the decision of the Florida Supreme Court holding that the bright-line rule of *New York v. Belton* did not justify a search of a vehicle incident to an arrest when the police initiated contact with the person after the person had exited his vehicle. The Florida Supreme Court had remanded the case to the trial court for further factfinding, and for a determination of whether the vehicle search was justified under *Chimel v. California*. Although in some circumstances the Court will review a state court decision even though further proceedings must take place in state courts, none of the four exceptions to the "finality" rule is applicable. The need for further factfinding and for a *Chimel* determination eliminate two of the exceptions; the state would not necessarily have to go to trial without the suppressed evidence, since a final determination on suppression has not been made; and the State can make "no claim [that] serious erosion of federal policy" will result from denying immediate review.

9-0. Opinion for unanimous Court by Rehnquist.

Gitlitz v. Commissioner 121 S. Ct. 701, 69 USLW 4060 (1-9-01)

Taxation, Federal, subchapter S shareholders: A subchapter S corporation's excluded discharged debt is an "item of income" within the meaning of I.R.C. § 1366(a)(1), and as such it passes through to the corporation's shareholders and increases their bases in the corporation's stock. Section 108(a)'s exclusion of discharged indebtedness from "gross income" does not affect the status as an "item of income." The pass-through occurs before, not after, the reduction of the S corporation's tax "attributes" pursuant to section 108(b). This "sequencing" issue is addressed by section 108(b)(4)(A), which provides that attribute reductions "shall be made after the determination of the tax imposed by this chapter." The tax is imposed on the shareholder, and the shareholder must adjust his basis and pass through all items of income and loss in order to determine the amount of the tax. Consequently, the attribute reduction must be made after the basis adjustment and pass-through.

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

Glover v. United States 121 S. Ct. 696, 69 USLW 4058 (1-9-01)

Ineffective assistance of counsel, showing of prejudice: The Seventh Circuit erred in ruling that an increase of 6 to 21 months in a defendant's sentence, allegedly resulting from inadequate representation, was not significant enough to amount to "prejudice" for purposes of applying the test for ineffective assistance of counsel set forth in *Strickland v. Washington* (1984). Such a rule is not mandated by the Court's decision in *Lockhart v. Fretwell* (1993), holding that a mere difference in outcome does not always establish prejudice. To the contrary, "any amount of actual jail time has Sixth Amendment significance." An additional difficulty with the Seventh Circuit's rule is that there is "no obvious dividing line by which to measure" how long a sentence increase must be in order to constitute substantial prejudice.

9-0. Opinion for unanimous Court by Kennedy.

Good News Club v. Milford Central School 121 S. Ct. 2093, 69 USLW 4451 (6-11-01)

First Amendment: viewpoint discrimination, Establishment Clause: Milford Central School's exclusion of the Good News Club from meeting after hours at the school constituted viewpoint discrimination in violation of the Free Speech Clause of the First Amendment, and was not justified as a means of avoiding violation of the Establishment Clause. The school's community use policy authorized after-hours use of the school for social, civic, and recreational purposes, but prohibited use for religious purposes. The Good News Club is a private Christian organization that requested use of the school for "singing songs, hearing a Bible lesson and memorizing scripture." The parties agreed that the community use policy created a limited public forum. Although a limited public forum may be restricted to certain groups or topics, viewpoint discrimination is impermissible. Teaching children morals and character development is a permissible purpose under Milford's policy, and it is clear that the Good News Club teaches morals and character development to children. The Court's decisions in *Lamb's Chapel* and *Rosenberger* control. Speech addressing "otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." Practices that are "quintessentially religious" or "decidedly religious in nature [can] also be characterized as the teaching of morals and character development from a particular viewpoint." There is "no logical difference in kind between the invocation of Christianity and the invocation of teamwork, loyalty, or patriotism . . . to provide a foundation for their lessons." There would be no Establishment Clause violation in allowing the Club access. The "neutrality" principle would not be offended, since the Club "seeks nothing more than to be treated neutrally." The meetings were to be held after school hours, were not sponsored by the school, were open to any student who obtained parental consent, and were to take place in a forum available to other groups. The argument is unpersuasive that elementary school children might feel coerced or might believe that the school is endorsing the Club. Since parental consent is required, the relevant community is the parents, not the children. Cases finding Establishment Clause violations in introduction of religious content at obligatory graduation exercises or in the school curriculum are inapposite. The danger that children would misperceive an endorsement of religion "is no greater

than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded."

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

Green Tree Financial Corp.-Ala. v. Randolph 121 S. Ct. 513, 69 USLW 4023 (12-11-00)

Arbitration, appeals, final decision: A federal district court's order compelling arbitration and dismissing a party's other claims with prejudice is immediately appealable as a "final decision with respect to an arbitration" within the meaning of section 16 the Federal Arbitration Act. The consistent and longstanding interpretation of the term "final decision" includes a decision that ends litigation and leaves nothing for the court to do but execute the judgment. At the time of section 16's enactment, the distinction between finality in "embedded" proceedings and finality in "independent" proceedings was not firmly established, and was not incorporated in the statute. Failure of an arbitration agreement to mention arbitration costs and fees does not render the agreement unenforceable. A party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs, and the respondent in this case did not meet that burden.

9-0 ("final decision"); **5-4** (costs). Opinion of Court by Rehnquist, unanimous in part, and joined in separate part by O'Connor, Scalia, Kennedy, and Thomas. Opinion by Ginsburg, concurring and dissenting, joined by Stevens and Souter, and joined in part by Breyer.

*Hunt v. Cromartie** 121 S. Ct. 1452, 69 USLW 4234 (4-18-01) *to be changed to *Easley v. Cromartie*

Equal Protection, Congressional districting, reliance on race: The three-judge district court erred in holding that the North Carolina Legislature used race as the predominant factor in redrawing the boundaries of the 12th Congressional District in 1997. The district court conducted a 3-day trial after the Supreme Court had reversed the district court's previous ruling on summary judgment and remanded for clarification of the factual record. The district court's finding that the legislature's motive was predominantly racial rather than political is not adequately supported. The legislature's aim of protecting incumbents was "a legitimate political goal." The court's finding that race predominated was based in part on data showing that the legislature had excluded mostly white precincts with high Democratic Party registration in order to include heavily African-American precincts with equivalent or lower Democratic registration. Registration figures, however, do not accurately predict voting behavior. White voters registered as Democrats "cross over" to vote for a Republican candidate more often than do African-Americans, who register and vote Democratic between 95% and 97% of the time. None of the excluded white precincts were as reliably Democratic as the included African-American precincts. Testimony by a legislative leader that the redistricting plan overall "provides for a fair, geographic, racial, and partisan balance" does not establish that race played a predominant role. While an e-mail from a legislative

staff member explaining that he had moved the "Greensboro Black community into the 12th" provides some support for the district court's conclusion, the record, taken as a whole, does not show that racial considerations predominated in the creation of district 12's boundaries.

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

Idaho v. United States 121 S. Ct. 2135, 69 USLW 4500 (6-18-01)

Submerged lands, title: Submerged lands lying beneath those portions of Lake Coeur d'Alene that are within the reservation of lands set aside for the Coeur d'Alene Tribe did not pass to the State of Idaho at statehood; rather, title to the submerged lands remained in the Federal Government in trust for the Tribe. The "default rule" is that title to land beneath navigable waters passes from the United States to a newly admitted State. If there is a claim that submerged lands have been reserved by the United States prior to statehood, then "congressional intent" controls. The first inquiry is whether Congress intended to include submerged lands in a pre-statehood reservation, and the second issue is whether Congress intended to defeat the future state's title to the submerged lands. In this case the intent to include submerged lands within the reservation for the Coeur d'Alene Tribe is conceded, and the issue is whether Congress recognized the reservation in a way that demonstrated an intent to defeat state title. Agreements to include a portion of the Lake within the boundaries of the reservation were concluded prior to statehood, but were not ratified by Congress until after statehood. Nonetheless, congressional intent to retain title to the submerged lands for benefit of the Tribe is evidenced by the history of congressionally authorized negotiations with the Tribe. Congress's objectives were to extinguish "aboriginal title" in lands outside the reservation, but "to obtain tribal interests only by tribal consent." "The intent . . . was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit." Passage of the bill confirming the reservation was delayed past enactment of the statehood bill only because of a need to conform House and Senate bills, and not due to uncertainty over the scope of the reservation. Congressional actions after statehood reinforced this understanding that the submerged lands had not been bestowed on Idaho at statehood.

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

Illinois v. McArthur 121 S. Ct. 946, 69 USLW 4096 (2-20-01)

Fourth Amendment, "securing" the premises: Police with probable cause to believe that the respondent had hidden marijuana in his home did not violate his Fourth Amendment rights by preventing him from reentering his home, unaccompanied by a police officer, for a period of two hours while they obtained a search warrant. Under the circumstances, the warrantless "seizure" of the premises was reasonable. The officers had probable cause to believe that the respondent's trailer home contained evidence of a crime and contraband. The officers also had good reason to believe that the respondent, unless restrained, would destroy the drugs before officers could return with a warrant. By merely "impounding" the home without entering and searching the premises and without

arresting the respondent, the officers imposed a "significantly less restrictive restraint," and did so for a limited period of time. This action was consistent with other decisions in which the Court has upheld temporary restraints necessary to preserve evidence until a warrant can be obtained.

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

INS v. St. Cyr 121 S. Ct. 2271, 69 USLW 4510

Habeas corpus, Suspension Clause, deportation, retroactivity: Neither the Antiterrorism and Effective Death Penalty Act (AEDPA) nor the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) eliminated a federal court's habeas corpus jurisdiction under 28 U.S.C. § 2241 to determine whether the Attorney General retained authority under former section 212(c) of the Immigration and Nationality Act to waive deportation of certain resident aliens. The absence of an alternative forum for resolution of the issue, coupled with "the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions" under the Suspension Clause. At a minimum, the Suspension Clause protects the writ as it existed in 1789, and use of the writ to review the legality of executive detention was at the writ's "historical core." On the merits, IIRIRA does not evidence a clear congressional intent to apply retroactively its repeal of the Attorney General's section 212(c) waiver authority to aliens who, like the respondent, had entered a plea agreement before enactment of IIRIRA, at a time when they would have been eligible for a waiver. Neither the statute's general effective date nor a "saving provision" declaring the amendments' inapplicability to deportation proceedings begun before the effective date provides unmistakable clarity as to congressional intent with respect to deportation proceedings begun after the effective date. Given the frequency with which waivers were granted prior to IIRIRA's enactment, aliens like the respondent had a "significant likelihood" of receiving a waiver and entered plea agreements with that understanding. Consequently, the potential unfairness of retroactive application of the waiver repeal is "significant and manifest."

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

Kansas v. Colorado 121 S. Ct. 2023, 69 USLW 4424 (6-11-01)

Interstate compacts, damages, Eleventh Amendment: A damages award recommended by the special master in a suit by Kansas alleging violations of the Arkansas River Compact by Colorado does not violate the Eleventh Amendment. The Eleventh Amendment by its terms applies only to suits against a state brought by citizens, and Kansas has "unquestionably" established that it is not merely suing on behalf of some of its citizen farmers, but has "a direct interest of its own." The unliquidated nature of the damages does not preclude an award of prejudgment interest. The special master acted properly in awarding only as much prejudgment interest as was required by a balancing of the equities. In this case the equities do not support an award of interest from the date of the

first violation of the Compact or the date that Colorado knew or should have known that it was violating the Compact, but rather support accrual from the date the complaint was filed. The special master properly determined the value of crop losses attributed to Colorado's compact violations.

9-0 (Eleventh Amendment; value of crops); **6-3** (prejudgment interest). Opinion of Court by Stevens, unanimous in part, and joined in separate part by Rehnquist, Kennedy, Souter, Ginsburg, and Breyer. Opinion by O'Connor, concurring in part and dissenting in part, joined by Scalia and Thomas.

Kyllo v. United States 121 S. Ct. 2038, 69 USLW 4431 (6-11-01)

Fourth Amendment, thermal imaging: Use by police of a thermal imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment, and is presumptively unreasonable without a warrant. Although (unaided) visual observation is not a search at all, the power of advancing technology to "shrink the realm of guaranteed privacy" requires a rule designed to preserve "that degree of privacy that existed when the Fourth Amendment was adopted." The rule is that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' . . . constitutes a search – at least where (as here) the technology in question is not in general public use." The Government's attempted distinction between "off-the-wall" observations and "through-the-wall" surveillance is untenable; the Court rejected this "mechanical" approach in *Katz v. United States* (1967), disallowing warrantless use of an electronic listening device placed on the outside of a phone booth. The Government's assertion that the surveillance was permissible because it did not detect "private activities" occurring within the home is also untenable. "In the home, . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." Limiting the prohibition to the recovery of "intimate details" would also be impractical, since "there is no necessary connection between the sophistication of the surveillance equipment and the 'intimacy' of the details that it observes."

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

Lackawanna County District Attorney v. Coss 121 S. Ct. 1567, 69 USLW 4285 (4-25-01)

Habeas corpus, challenge to previous convictions used to enhance current sentence: Federal post-conviction relief under 28 U.S.C. § 2254 is unavailable to a prisoner challenging a current sentence on the ground that it was enhanced based on an allegedly unconstitutional prior conviction for which the prisoner is no longer in custody. The principles applied in *Daniels v. United States*, *supra*, to § 2255 motions are equally applicable to § 2254 *habeas* petitions. The "most compelling interest is in the finality of convictions," and "ease of administration" is "an additional concern." There is an exception to the general rule, applicable in § 2254 as well as § 2255 cases, if the current sentence was enhanced on the basis of a prior conviction that was obtained after "a failure to appoint counsel [for an indigent] in violation of the Sixth Amendment."

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

Legal Services Corp. v. Velazquez 121 S. Ct. 1043, 69 USLW 4157 (2-28-01)

First Amendment, funding restriction, challenges to welfare laws: A restriction in the Legal Services Corporation Act that prohibits funding for any organization that participates in litigation that challenges a federal or state welfare law constitutes viewpoint discrimination in violation of the First Amendment. *Rust v. Sullivan* (1991), in which the Court upheld a restriction on abortion counseling by doctors employed at federally funded family planning clinics, is distinguished. *Rust* involved the government's use of private speakers to transmit information about the government's program, and abortion was outside the scope of that program. The Legal Services Corporation (LSC) program, on the other hand, "was designed to facilitate private speech, not to promote a governmental message." The government's message in litigation is delivered by a government attorney, while the LSC lawyer speaks on behalf of his or her private, indigent client. Moreover, the restrictions on LSC advocacy "distort [the] usual functioning" of the judiciary, and are "inconsistent with accepted separation-of-powers principles." "An informed, independent judiciary presumes an informed, independent bar," yet the restriction "prohibits speech and expression on which courts must depend for the proper exercise of judicial power." The restriction operates as "an attempt to exclude from litigation those arguments and theories Congress finds unacceptable," since the likely effect of a LSC attorney's withdrawal from a case is to leave the indigent client unable to procure other counsel, and hence unable to challenge the validity of the welfare laws. This illustrates another contrast with *Rust*: the patient in *Rust* was not required to forfeit the Government-funded advice if she also received abortion counseling through other channels.

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

Lewis v. Lewis & Clark Marine, Inc. 121 S. Ct. 993, 69 USLW 4129 (2-21-01)

Admiralty, saving to suitors, limitation of liability: The "tension" that exists between the saving to suitors clause (28 U.S.C. § 1333(1)), which preserves common law remedies, and the Limitation of Liability Act (46 U.S.C. § 181 et seq.), which limits a shipowner's liability to the value of the vessel and its cargo after an accident, is resolved by allowing state courts to adjudicate claims against vessel owners so long as the vessel owner's right to seek limitation of liability is protected. The Limitation Act "is directed at misfortunes at sea where the losses incurred exceed the value of the vessel and the pending freight." If the value of the vessel and freight exceeds the claims, however, "there is no necessity for the maintenance of the [limitation] action in federal court." In this case, where there was only one claimant, and that claimant stipulated that his claim did not exceed the limitation fund, the federal district court acted properly in lifting the injunction against the state court proceeding, and, "out of an abundance of caution" stayed the limitation proceedings so that it could act if the

state court proceeding jeopardized the vessel owner's rights under the Limitation Act.

9-0. Opinion for unanimous Court by O'Connor.

Lopez v. Davis 121 S. Ct. 714, 69 USLW 4067 (1-10-01)

Administrative law, deference to agency interpretation: The Bureau of Prisons' regulation that denies early release to prisoners whose current offense is a felony that involved the carrying, possession, or use of a firearm is a permissible exercise of the discretion conferred by 18 U.S.C. § 3621(e)(2)(B). Section 3621 directs the Bureau to offer appropriate substance abuse treatment to prisoners who have a treatable substance abuse condition, and in subsection (e)(2)(B) also provides that the period of incarceration of "a prisoner convicted of a nonviolent offense . . . may be reduced by the Bureau" if that prisoner has successfully completed a treatment program. The regulation, as amended in 1997, does not purport to define the term "prisoner convicted of a nonviolent offense," but instead relies upon the discretion conferred on the Bureau to exclude enumerated categories of inmates. Congress' use of the permissive "may" rather than the mandatory "shall" means that the Bureau has the authority, but not the duty, to grant early release to a nonviolent offender who has completed the drug treatment program. *Chevron* analysis applies. Congress has not spoken directly to the precise question, and the Bureau's interpretation is "reasonable both in taking account of pre-conviction conduct and in making categorical exclusions." Congress has manifested concern for pre-conviction behavior by denying eligibility to violent offenders, and the Bureau may "reasonably" consider other pre-conviction behavior. Nor has Congress limited the Bureau to case-by-case assessments; the Bureau may resolve issues of general applicability through rulemaking. Finally, the Bureau reasonably concluded that an inmate's "prior involvement with firearms" while committing a felony suggests a "readiness" to resort to violence that makes early release inappropriate.

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

Lorillard Tobacco Co. v. Reilly 121 S. Ct. 2404, 69 USLW 4582 (6-28-01)

Regulation of tobacco advertising, preemption, First Amendment: Massachusetts' restrictions on outdoor advertising and point-of-sale advertising of cigarettes are preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). The Massachusetts regulations prohibit outdoor advertising within 1,000 feet of a school, park, or playground, and prohibit "point-of-sale" advertising placed lower than five feet above the floor of retail establishments. The FCLAA is a "comprehensive" regulation of the advertising and promotion of cigarettes. In addition to providing that no "statement" other than that mandated by the FCLAA shall be required on any cigarette package, it also provides that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes." The Massachusetts regulations, targeted at youth exposure to cigarette advertising, are "based on smoking and health" within the meaning of the FCLAA; concern about youth exposure is "intertwined" with concern about smoking and health. The fact that the regulations govern location rather than

content of advertising does not remove them from the preemption language, which covers all state "requirements and prohibitions." Similar Massachusetts restrictions applicable to advertising of smokeless tobacco and cigar products are not preempted; FCLAA's preemption provision applies only to cigarettes. However, these outdoor advertising and point-of-sale restrictions applicable to smokeless tobacco and cigars violate the First Amendment because they do not satisfy the fourth step of the *Central Hudson* test for regulation of commercial speech. That step requires a "reasonable fit" between the means and ends of a regulation, yet the regulations are not "narrowly tailored" to achieve such a fit. The 1,000 foot restriction on outdoor advertising sweeps broadly and imposes "particularly onerous burdens" in some instances. It would result in "nearly a complete ban" in urban areas, and applies regardless of the size and degree of visibility of the sign. The point-of-sale restriction on signs appearing below a height of five feet does not advance the State's goal of limiting youth exposure to advertising, and does not constitute a "reasonable fit," since not all children are less than five feet tall, and "those who are certainly have the ability to look up and take in their surroundings." Still other regulations that restrict sales practices by cigarette, smokeless tobacco, and cigar merchants by barring the use of self-service displays and prohibiting sampling or promotional giveaways, withstand First Amendment scrutiny. These restrictions regulate conduct for reasons unrelated to the communication of ideas, serve the state's interest in age verification, and leave open ample channels of communication.

5-4 (preemption; First Amendment/outdoor advertising); **6-3** (point-of-sale height restriction); **9-0** (sales practices). Opinion of Court by O'Connor, unanimous in part, joined in part by Scalia, Kennedy, Souter, and Thomas; joined in separate part by Rehnquist, Stevens, Souter, Ginsburg, and Breyer; and joined in still separate part by Rehnquist, Scalia, Kennedy, and Thomas. Concurring opinions by Kennedy, joined by Scalia; and by Thomas. Opinion by Souter, concurring in part and dissenting in part. Opinion by Stevens, concurring in part and dissenting in part, joined by Ginsburg and Breyer, and joined in part by Souter.

Lujan v. G & G Fire Sprinklers, Inc. 121 S. Ct. 1446, 69 USLW 4222 (4-17-01)

Due Process, public contracts: Provisions of the California Labor Code authorizing the withholding of payment to a subcontractor on a public works project if the subcontractor has failed to pay a specified wage to its employees do not deprive the subcontractor of due process. There is no due process requirement that the enforcement agency provide notice and hearing to the subcontractor before directing the contract-awarding agency to withhold payment. Rather, it suffices that the subcontractor can litigate the dispute in an ordinary breach-of-contract action for damages. The Court has held that due process requires pre-deprivation notice and hearing only in situations like forfeiture, posing an immediate threat to property ownership, or wage garnishment, posing an immediate threat to the right to gainful employment. Unlike the claimants in those cases, the claimant here "has not been denied any present entitlement."

9-0. Opinion for unanimous Court by Rehnquist.

Major League Baseball Players Ass'n v. Garvey 121 S. Ct. 1724, 69 USLW 3725 (5-14-01)

Arbitration, review, appropriate remedy: The Ninth Circuit Court of Appeals erred in reversing the district court's remand to an arbitrator and instead ordering entry of judgment in favor of the respondent. The appeals court had found that the arbitrator's ruling was "inexplicable" and "bordered on the irrational." Judicial review of arbitration awards entered pursuant to collective bargaining agreements is "very limited." If the arbitrator is construing a contract and acting within the scope of his authority, "even serious error" does not justify a reversal on the merits. "Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings."

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

Nevada v. Hicks 121 S. Ct. 2304, 69 USLW 4528

Native Americans, tribal court jurisdiction: The Fallon Pauite-Shoshone Tribal Court lacks jurisdiction over civil claims brought against state officials who entered tribal land to execute a search warrant against a tribal member suspected of having violated state law off the reservation. As a general matter, a tribe's adjudicative jurisdiction over non-members does not exceed its legislative jurisdiction, and the tribe's legislative jurisdiction in this case does not extend to regulation of state wardens executing a search warrant for evidence of off-reservation crime. Tribal jurisdiction over non-members is limited to "what is necessary to protect tribal self-government or to control internal relations." Essentials of self-government include such things as the power to tax, to punish tribal offenders, to regulate domestic relations among members, and to prescribe rules of inheritance for members, but do not exclude all state regulatory authority on the reservation. When state interests outside the reservation are implicated – as is the case with crimes committed off reservation by tribal members – states may regulate the activities even of tribal members on tribal land. Recognition of state authority to serve process on reservations is necessary to prevent these areas from becoming asylums for fugitives. Although Congress has the authority to strip the state of jurisdiction, it has not done so in this case. Tribal courts are not courts of general jurisdiction that may entertain suits under 42 U.S.C. § 1983. To recognize such jurisdiction would create an "anomaly" under the removal statute, which authorizes removal of section 1983 actions from state to federal courts, but makes no provision for removal from tribal courts. Finally, since it is clear that tribal courts lack jurisdiction over state officials for causes of action relating to their official duties, requiring exhaustion of remedies in tribal court would serve no purpose.

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

New Hampshire v. Maine 121 S. Ct. 1808, 69 USLW 4393 (5-29-01)

State boundaries: New Hampshire is estopped from asserting that its boundary with Maine along the inland stretch of the Piscataqua River runs along the Maine shore. New Hampshire agreed, in a 1977 consent judgment entered by the

Supreme Court and establishing the marine lateral boundary, that the "Middle of the River" boundary established by earlier decree means the middle of the river's main channel of navigation. The rule of judicial estoppel prevents a party from prevailing in one phase of litigation on one theory and then relying on a contradictory argument to prevail in a later phase. Several factors in this case "tip the balance of equities" in favor of judicial estoppel. New Hampshire's claim that the river boundary runs along the Maine shore is "clearly inconsistent" with its earlier interpretation of "Middle of the River." The Supreme Court accepted this earlier interpretation, and New Hampshire benefited from that interpretation. New Hampshire's 1977 position was not based on "inadvertence or mistake," nor did the state lack opportunity or incentive in 1977 to locate the river boundary at Maine's shore. Rather, New Hampshire's 1977 position was based on a "searching historical inquiry."

8-0. Opinion of Court by Ginsburg joined by all Justices except Souter, who did not participate.

New York Times Co. v. Tasini 121 S. Ct. 2381, 69 USLW 4567

Copyright, electronic distribution of print articles: Section 201(c) of the Copyright Act does not authorize newspaper and other print publishers, without the authors' consent, to provide to electronic databases copies of articles written by freelance authors. When an author contributes an article to a "collective work" such as a newspaper or magazine, the Act recognizes two distinct copyrights, one in "each separate contribution," and one in "the collective work as a whole." Section 201(c) provides that the owner of a copyright in a collective work "is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." The publishers' contention that reproducing and distributing the articles in the electronic databases is a "revision" of the original collective work is "unacceptable." As presented to database users, the articles are "clear" of their original contexts, and an article is not presented as "a part of" either the original edition or a "revision" of that edition. A "revision" is a "new version" of something, and the electronic databases "are not recognizable" as a new version of each small article that they contain. Analogy to microforms is inapt. Unlike microforms, the databases "do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any 'revision' thereof."

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

Nguyen v. INS 121 S. Ct. 2053, 69 USLW 4438 (6-11-01)

Due Process, Equal Protection, gender-based classification: The statute (8 U.S.C. § 1409) that provides different rules for attainment of citizenship by children born abroad and out of wedlock to one United States citizen parent and one non-citizen parent, depending upon whether the one citizen parent is the mother or the father, does not violate the equal protection component of due process. If the mother of the out-of-wedlock child is the citizen parent, then the child acquires U.S. citizenship at birth. If, on the other hand, the father but not the mother is the citizen parent, a "blood relationship" must be established and

the child must be legitimated or acknowledged by the father before the child's 18th birthday. A gender-based classification can survive equal protection challenge if it serves "important" governmental objectives and if the means employed are "substantially related to the achievement of those objectives." Section 1409 satisfies this standard. The first important governmental interest served by the provision is "the importance of assuring that a biological parent-child relationship exists." The mother's relation is verified at birth. It is a "reasonable conclusion" by Congress that satisfaction of one of the alternatives will establish the father's blood relationship. The second governmental interest is ensuring that the child and the citizen parent "have some demonstrated opportunity" to develop a relationship "that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." In the case of a citizen mother, "the opportunity for a meaningful relationship" with the child "inheres in the very event of birth." In the case of the unwed father, "the same opportunity does not result from the event of birth, as a matter of biological inevitability." There is "no assurance that the father and his biological child will ever meet."

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

NLRB v. Kentucky River Community Care, Inc. 121 S. Ct. 1861, 69 USLW 4380 (5-29-01)

Labor, "supervisor": The National Labor Relations Board's rule for allocating the burden of proof in determining whether an employee is an excepted "supervisor" within the meaning of the National Labor Relations Act is reasonable and consistent with the Act, and is entitled to deference. Under the Board's rule, the burden is borne by the party asserting that the exception applies, and that the employee is a supervisor not properly included in a collective bargaining unit. In this case the burden to establish the excepted status of employees should have remained on the employer during an unfair labor practice proceeding. The Board's interpretation of one element of the statute's three-part test for determining supervisory status was unlawful, however. The statute defines a supervisor as someone who exercises any of 12 listed supervisory functions in a manner that is not merely routine or clerical, but instead "requires the use of independent judgment." The Board's interpretation of this language to mean that employees do not use independent judgment when they exercise "ordinary professional or technical judgment in directing less-skilled employees" "would insert a startling categorical exclusion into statutory language that does not suggest its existence." The breadth of this limitation "would virtually eliminate 'supervisors' from the Act," and is also unjustified because it applies to just one of the twelve listed supervisory functions. The Board's interpretation would contradict as well the Court's prior determination that the test for supervisory status "applies no differently to professionals than to other employees."

9-0 (burden of proof); **5-4** (exercise of "independent judgment"). Opinion of Court by Scalia, unanimous in part, and joined in separate part by Rehnquist, O'Connor, Kennedy, and Thomas. Opinion by Stevens, joined by Souter, Ginsburg, and Breyer, concurring in part and dissenting in part.

Norfolk Shipbuilding & Drydock Co. v. Garris 121 S. Ct. 1927, 69 USLW 4410 (6-4-01)

Admiralty, wrongful death negligence action: The maritime cause of action recognized in *Moragne v. States Marine Lines* (1970) for death caused by violation of the duty of seaworthiness is equally applicable to death resulting from negligent breach of a general duty of care. It is already settled that the general maritime law imposes duties to avoid unseaworthiness and negligence, that nonfatal injuries caused by the breach of either duty are compensable, and that death caused by breach of the duty of seaworthiness is also compensable. *Moragne* announced a general rule that death caused by violation of a maritime duty is actionable, but was limited by its facts and holding to the duty of seaworthiness. There is "no rational basis . . . for distinguishing negligence from seaworthiness" in this regard. While accommodation of state remedial statutes is "constitutionally permissible," to defer to state wrongful death statutes and thus deny a federal remedy for death while providing a remedy for injury not resulting in death would create a "choice-of-law anomaly." Judge-made maritime law is superseded by applicable federal statutes, but none of the three "relevant" statutes governs this case, which involves injuries to a non-seaman in state waters. The Jones Act applies only to seamen, the Death on the High Seas Act applies only to deaths beyond a marine league from the shore of any state, and the Longshore and Harbor Workers Compensation Act (LHWCA) allows claims against employers and vessels, but not against the petitioner in this case, a "third party" for LHWCA purposes.

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

Ohio v. Reiner 121 S. Ct. 1252, 69 USLW 3616 (3-19-01)

Self-Incrimination: The Ohio Supreme Court erred in holding that the privilege against self-incrimination is unavailable to those who claim innocence. One of the "basic functions" of the privilege is "to protect innocent [people] who otherwise might be ensnared by ambiguous circumstances." The babysitter of a child who died of "shaken baby syndrome" had reasonable cause to apprehend danger from her answers if questioned at the trial of the child's father, even though she asserted under immunity that she had not shaken the baby and had nothing to do with the baby's injuries. The babysitter had spent extended periods of time alone with the child in the weeks immediately preceding discovery of the injuries, and had also been alone with the child during part of the time during which the fatal trauma could have occurred. In this context the sitter had a valid Fifth Amendment privilege against self-incrimination.

9-0. *Per curiam*.

Palazzolo v. Rhode Island 121 S. Ct. 2448, 69 USLW 4605 (6-28-01)

Taking of property, restriction on wetlands development: The petitioner's inverse condemnation action, alleging a taking of property resulting from the State's denial of permission to fill and develop wetland property, was ripe for adjudication. Ripeness principles set forth in the *Williamson County* case (1985) require the landowner to obtain a final decision that informs a court as to the extent of permitted development. Because it is clear, due to "the unequivocal

nature" of Rhode Island's wetlands regulations and their application by the administering agency, that the landowner will not be permitted to fill and develop the wetlands portions of his property "for any likely or foreseeable use," the takings claim is ripe. The Rhode Island Supreme Court's holding that the petitioner has no right to challenge the wetlands regulations that were in effect when he succeeded to legal ownership of the property in 1978 is erroneous. "[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a [binding] background principle of the State's law by mere virtue of the passage of title." The state court was correct, however, in ruling that the petitioner had not been deprived of all economically beneficial use of his property, it being "undisputed" that the parcel retained significant value for construction of a residence on an upland portion. The case is remanded for consideration of the claim in light of principles set forth in the Court's 1978 decision in *Penn Central Transp. Co. v. New York City*.

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

Penry v. Johnson 121 S. Ct. 1910, 69 USLW 4402 (6-4-01)

Death penalty, consideration of retardation; self-incrimination: Jury instructions did not give the jury in the defendant's second trial a vehicle for giving effect to its reasoned moral response to evidence of the defendant's mental retardation and childhood abuse, as required by the Court's decision in *Penry v. Lynaugh* (*Penry I*) (1989), following the defendant's first trial. The sentencing jury was told to answer the same three "special issues" found in *Penry I* to provide constitutionally inadequate guidance – whether the killing was deliberate, whether the defendant would present a continuing threat to society, and whether the killing was an unreasonable response to any provocation – and was further told that an affirmative answer to all three questions would result in imposition of the death penalty. A "supplemental instruction," however, directed consideration of mitigating circumstances, including any aspect of the defendant's character or record. If the jury determined that the mitigating evidence made a life sentence more appropriate than a death sentence, then the jury was to give "a negative finding" to one of the three "special issues." This supplemental instruction "made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation." Jurors could give effect to the supplemental instruction only by changing a truthful "yes" answer to one of the three special issues to an untruthful "no" answer, and by doing so they would violate their oath to render a "true verdict." This "ineffective and illogical" mechanism for consideration of mitigating evidence was thus no improvement on that found constitutionally inadequate in *Penry I*. The defendant's privilege against self-incrimination was not violated by introduction during the sentencing phase of the conclusion of a psychiatric report that the defendant would be dangerous to others if released. The decision by state courts to allow the evidence was not contrary to, nor did it involve an unreasonable application of, clearly established federal law. The Court's 1981 decision in *Estelle v. Smith* is distinguishable, and, even if it were

controlling, it is doubtful that the defendant could establish that admission of the evidence had a substantial effect on the jury's verdict.

6-3 (mitigating evidence); **9-0** (self-incrimination). Opinion of Court by O'Connor, unanimous in part, and joined in separate part by Stevens, Kennedy, Souter, Ginsburg, and Breyer. Opinion by Thomas, concurring in part and dissenting in part, joined by Rehnquist and Scalia.

PGA Tour, Inc. v. Martin 121 S. Ct. 1879, 69 USLW 4367 (5-29-01)

Americans with Disabilities Act, use of a cart in PGA events: The Americans with Disabilities Act of 1990 (ADA) requires the PGA Tour to allow a disabled golfer to use a golf cart while participating in PGA golf tournaments. Title III of the ADA prohibits discrimination against any individual "on the basis of disability in the full and equal enjoyment of the . . . privileges of any place of public accommodation," and the PGA tour and qualifying rounds "fit comfortably within" Title III's coverage. The ADA's definition of "public accommodation" expressly includes a "golf course," and among the "privileges" offered by the Tour are those of competing in the qualifying rounds and playing in Tour-sponsored tournaments. The argument that Title III is inapplicable because it applies only to clients and customers seeking services, and not to those providing the services, is rejected. Even assuming that Title III is so limited, it is appropriate to consider golfers who pay to compete in the qualifying rounds, and, if successful, participate in tour events, as clients or customers of the Tour. Such competition is a "privilege" that the Tour makes available to members of the general public. Prohibited discrimination under Title III is defined as failure to make "reasonable modifications" necessary to afford privileges to disabled "individuals" unless making such modifications "would fundamentally alter the nature of such privileges." A golf cart is a reasonable modification that is necessary if the respondent is to play in golf tournaments. Allowing the respondent to use a golf cart would not "fundamentally alter" the nature of the events. "Use of carts is not itself inconsistent with the fundamental character of the game of golf." The "essence of the game" is "shot-making," and there is nothing in the Rules of Golf that forbids the use of carts or penalizes a golfer who uses one. Nor is the Tour's walking rule an indispensable part of tournament golf; the Tour itself permits carts in its first two qualifying rounds, and also in its Seniors tournaments. The purpose of the walking rule is said to be to inject the element of fatigue into the game. But even if the rule is effective in that regard, the ADA mandates an "individualized inquiry." Because the walking rule "is at best peripheral to the nature" of the game, it may be waived in individual cases without working a fundamental alteration. Because the district court found that the respondent endures greater fatigue when using a cart than able-bodied competitors do by walking, the rule may be waived in his case without impairing the rule's purpose.

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

Pollard v. E. I. DuPont de Nemours & Co. 121 S. Ct. 1946, 69 USLW 4419 (6-4-01)

Civil Rights Act, compensatory damages, "front pay": Front pay is not an element of compensatory damages that can be awarded in employment discrimination cases pursuant to 42 U.S.C. § 1981, and hence is not subject to the cap on compensatory damages that is imposed by 42 U.S.C. § 1981a(b)(3).

Front pay – pay awarded for lost compensation during the period between judgment and reinstatement, or in lieu of reinstatement – might ordinarily be considered compensation for future pecuniary losses. The statutory context, however, indicates that front pay is excluded from compensatory damages subject to the cap. Before Congress in 1991 expressly authorized the award of compensatory and punitive damages in employment discrimination cases based on sex, religion, or disability, section 706(g) of the Civil Rights Act authorized courts to order reinstatement "with or without back pay." This language was patterned on section 10(c) of the National Labor Relations Act, which had been interpreted to allow awards of "backpay" up to the date of reinstatement. This form of "backpay," to the extent that it occurs after the date of judgment, is known today as "front pay." The 1991 law provided for recovery of compensatory and punitive damages "in addition to any relief authorized by section 706(g)," and further provided that compensatory damages "shall not include backpay . . . or any other type of relief authorized under section 706(g)." Because front pay was a type of relief authorized under section 706(g), it is excluded from the meaning of compensatory damages under section 1981. There is "no logical difference" between front pay in lieu of reinstatement and front pay prior to reinstatement, and both are excluded from compensatory damages and from operation of the cap.

8-0. Opinion of Court by Thomas, joined by all other Justices except O'Connor, who did not participate.

Rogers v. Tennessee 121 S. Ct. 1693, 69 USLW 4307 (5-14-01)

Due Process, retroactive abrogation of common law rule by court: The Tennessee Supreme Court's retroactive application to a criminal defendant of its decision abolishing the common law "year and a day rule" did not deprive the defendant of due process. Under the year and a day rule, a defendant could not be convicted of murder unless his victim had died by the defendant's act within a year and a day of that act. Legislative abrogation of the rule could have violated the Ex Post Facto Clause, but that Clause "does not apply to courts." The specific prohibitions of the Ex Post Facto Clause are not incorporated into the Fourteenth Amendment's Due Process Clause, which does apply to judicial decisions. Under the Court's decision in *Bouie v. City of Columbia* (1964), retroactive application of judicial interpretations of criminal statutes violates due process only if the application is "unexpected and indefensible" by reference to the law in effect when the prohibited conduct took place. Here the Tennessee' court's abolition of the year and a day rule was not unexpected or indefensible. The rule was "widely viewed as an outdated relic of the common law," and "had only the most tenuous foothold" in Tennessee. The rule had never served as the ground of decision in a Tennessee murder case, and had been mentioned in only three cases, each time as dictum. Abrogation of the rule in the defendant's case was therefore "a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense."

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

Saucier v. Katz 121 S. Ct. 2151, 69 USLW 4481 (6-18-01)

Qualified immunity, arrest, claim of excessive force: The issues of whether a police officer used excessive force in arresting a suspect, and whether that officer is entitled to avoid going to trial through operation of the doctrine of qualified immunity, are separate and distinct inquiries. The Court's decision in *Graham v. Connor* (1989) directs that the issue of excessive force should be measured by the Fourth Amendment's objective reasonableness standard – basically whether the officer's on-the-scene judgment was reasonable. The qualified immunity inquiry "has a further dimension" that allows the officer to make a "reasonable mistake" in his assessment of what the law requires. Assuming that a constitutional violation (use of excessive force) occurred in this case, the officer was entitled to qualified immunity. The issue for immunity purposes is whether a "clearly established" right was violated so that it would have been clear to a reasonable officer that his conduct was unlawful in the situation he faced. There was no contravention of a clearly established right. Under the circumstances (a protest at a military base with the Vice-President in attendance), there were "substantial grounds for the officer to have concluded that he had legitimate justification under the law for acting as he did" in dragging a protester away from the protest scene and shoving him (without injuring him) into a police van.

9-0 (judgment); **5-3-1** (disposition of qualified immunity claim). Opinion of Court by Kennedy, joined by Rehnquist, O'Connor, Scalia, and Thomas, and joined in part by Souter. Concurring opinion by Ginsburg, joined by Stevens and Breyer. Opinion by Souter, concurring in part and dissenting in part.

Seling v. Young 121 S. Ct. 727, 69 USLW 4073 (1-17-01)

Double Jeopardy, Ex post facto: For purposes of double jeopardy and *ex post facto* analysis, a statute determined to be civil and not punitive in nature cannot be deemed punitive "as applied" to a single individual. Washington's Community Protection Act of 1990, which authorizes the civil commitment of "sexually violent predators," is very similar to the Kansas law held to be non-punitive in *Kansas v. Hendricks* (1997). The Washington Supreme Court has held that the Community Protection Act is civil in nature, and that status is assumed for purposes of this case. An "as-applied" analysis of a law already held to be civil would prove "unworkable." Such an analysis could not be conclusive, since "confinement is not a fixed event," and conditions of confinement can change over time. Moreover, permitting an as-applied challenge "would invite an end run around the Washington Supreme Court's decision." Other remedies are available to persons confined as sexual predators. They may sue under state law to secure their statutory right to adequate care and independent treatment, they may challenge conditions of confinement under due process, or they may bring an action under 42 U.S.C. § 1983.

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

Semtek Int'l Inc. v. Lockheed Martin Corp. 121 S. Ct. 1021, 69 USLW 4147 (2-27-01)

Civil procedure, claim preclusion: The claim-preclusive effect in state court of a dismissal "on the merits" of a federal diversity action is dictated neither by

the Court's decision in *Dupasseur v. Rochereau* (1875) nor by Federal Rule of Civil Procedure 41(b). *Dupasseur* interpreted and applied the Conformity Act of 1872, since repealed. Rule 41(b), which provides that a dismissal "operates as an adjudication on the merits" unless the court otherwise specifies, merely precludes refiling of the same claim in the same federal district court, and does not govern claim preclusion. Instead, the issue of the claim-preclusive effect of a federal judgment is a matter of federal common law ultimately resolved by the Supreme Court. The rule adopted for federal diversity judgments is the state rule, *i.e.*, "the rule that would be applied by state courts in the State in which the federal diversity court sits."

9-0. Opinion for unanimous Court by Scalia.

Shafer v. South Carolina 121 S. Ct. 1263, 69 USLW 4175 (3-20-01)

Due Process, death penalty, jury instruction on parole eligibility: The South Carolina Supreme Court incorrectly held that the U.S. Supreme Court's holding in *Simmons v. South Carolina* (1994) is inapplicable to the State's current capital sentencing law. *Simmons* held that due process entitles a defendant to inform a sentencing jury of his parole ineligibility if his future dangerousness is at issue and if life imprisonment without possibility of parole is the only sentencing alternative to the death penalty. After *Simmons*, South Carolina amended its capital sentencing procedures to provide for non-capital sentencing by the judge if the jury does not agree unanimously on the presence of an "aggravating" circumstance. If, however, the jury does find such an aggravating circumstance, then the jury does the sentencing, and must choose between a death sentence and life imprisonment without possibility of parole. The South Carolina Supreme Court erred in finding *Simmons* inapplicable once a jury becomes responsible for sentencing after finding an aggravating circumstance. The jury in this case was not properly informed of the defendant's parole ineligibility. During deliberation the jury had sought further instruction, asking whether there was "any remote chance" that the defendant could become eligible for parole, and the trial court had instructed the jury that "parole eligibility or ineligibility is not for your consideration."

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

Shaw v. Murphy 121 S. Ct. 1475, 69 USLW 4231 (4-18-01)

First Amendment, jailhouse lawyer: A prison inmate does not have a First Amendment right to provide legal assistance to another inmate. Rather, inmate-to-inmate communications are governed by the general test set forth in *Turner v. Safley* (1987), providing that a prison regulation impinging on inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests." Inmate-to-inmate correspondence that includes legal assistance is entitled to no more First Amendment protection than is correspondence not including legal assistance. The *Turner* test, which is very deferential to the judgment of prison officials, "simply does not accommodate" assessment of the value of the content of the communication. Even if the rule did permit special protection based on the content of prisoners' speech, the Court would not accord that protection to speech that includes legal advice. "Augmenting First Amendment protection for inmate legal advice would undermine prison officials'

ability to address the 'complex and intractable' problems of prison administration." Inmate law clerks "are sometimes a menace to prison discipline," and prisoners have "an acknowledged propensity . . . to abuse both the giving and the seeking of legal assistance."

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

Sinkfield v. Kelley 121 S. Ct. 446, 69 USLW 3362 (11-27-00)

Standing to sue, state legislative redistricting: White (Caucasian) voters who are residents of majority-white legislative districts lack standing to challenge the constitutionality of their own districts based on alleged racial gerrymandering of adjacent "majority-minority" districts. The case is governed by *United States v. Hays* (1995). None of the plaintiffs in this case alleged or proved that any of them was assigned to his or her district as a direct result of having personally been subjected to a racial classification. The fact that majority-minority districts may have been unconstitutionally gerrymandered does "not prove anything" with respect to adjacent majority-white districts.

9-0. *Per curiam.*

Solid Waste Agency v. Corps of Engineers 121 S. Ct. 675, 69 USLW 4048 (1-9-01)

Clean Water Act, jurisdiction, migratory bird rule: Section 404(a) of the Clean Water Act (CWA) does not extend jurisdiction to the Corps of Engineers to regulate an abandoned sand and gravel pit that provides habitat for migratory birds, but that is not adjacent to navigable waters. Section 404 authorizes the Corps to grant permits for the discharge of dredged or fill material into "navigable waters," defined in the Act as the "waters of the United States." Regulations promulgated by the Corps in 1977 define "waters of the United States" to include various isolated intrastate waters, such as prairie potholes and natural ponds, that are not tributaries of navigable or interstate waters. A 1986 clarification provided that Corps jurisdiction extends to such isolated waters that are or could be used as habitat by migratory birds. This migratory bird rule "is not fairly supported by the CWA." Congress did not "acquiesce" in the 1977 isolated wetlands rule by rejecting a bill that would have narrowed the statutory definition to traditionally navigable waters, since there is "no persuasive evidence" that the bill was proposed in response to the Corps' claim of jurisdiction over isolated waters, or that the bill's failure indicated congressional acquiescence. Congress did not ratify the 1977 rule by enacting an amendment to section 404 that authorized state administration of permit programs governing waters "other than" those used in or capable of use in interstate commerce. "[O]ther . . . waters" may simply have been a reference to non-navigable waters adjacent to traditionally navigable waters. *Chevron* deference to the administrative interpretation is inappropriate where that interpretation "invokes the outer limits of Congress' power," and where there is no "clear indication" that Congress intended that result.

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

Texas v. Cobb 121 S. Ct. 1335, 69 USLW 4213 (4-2-01)

Sixth Amendment, "offense specific" limitation: The Sixth Amendment, which assures an accused the right to the assistance of counsel "in all criminal

prosecutions," is "offense specific." This means that a criminal suspect who has been charged with one offense and who is represented by counsel for purposes of defending that charge is not protected by the Sixth Amendment from police interrogation about other offenses. For purposes of this rule, "the definition of an offense is not necessarily limited to the four corners of a charging instrument." Rather, the *Blockburger* test applicable to double jeopardy applies: if the same act or transaction constitutes a violation of two distinct statutory provisions, the test is "whether each provision requires proof of a fact which the other does not." The Court sees "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." In this case police interrogation of a suspect about his involvement in murder of burglary victims was permissible at a time when he was represented by counsel on the burglary charge, but when no murder charges had been brought. As defined by Texas law, burglary and capital murder are not the same offense under *Blockburger*.

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

The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc. 121 S. Ct. 1776, 69 USLW 4344 (5-21-01)

Securities: Selling an option to buy stock while secretly intending never to honor that option is a violation of section 10(b) of the Securities Exchange Act of 1934, which prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. The secret intent not to honor the option amounts to misrepresentation within the meaning of section 10(b) and implementing Rule 10(b)(5). The fact that the agreement was oral does not exclude it from the Act's coverage. Case law holding the Act inapplicable to misrepresentations that dissuade a potential buyer from buying is not controlling, since in this case an option was actually sold. The secret reservation rendered that option valueless, and therefore implicated section 10(b)'s policy of full disclosure concerning a sale. Finally, the case is not a simple dispute over ownership, or breach of contract, but rather involves a claim of fraudulent misrepresentation.

9-0. Opinion for unanimous Court by Breyer.

TrafFix Devices, Inc. v. Marketing Displays, Inc. 121 S. Ct. 1255, 69 USLW 4172 (3-20-01)

Patents, trade dress protection: A dual spring design intended to keep temporary road signs from toppling in strong winds is a functional feature for which there is no trade dress protection under the Lanham Act. Trade dress is a "secondary meaning" of a product when its design or packaging attains a distinctiveness which serves to identify the product with its manufacturer or source. The person who asserts trade dress protection has the burden of proving that the matter sought to be protected against copying is not functional. An expired patent can have an important bearing on a trade dress claim by helping to identify the functional aspects of design. In this case the fact that the dual-spring design was the central advance claimed in the expired patent created a strong inference of functionality that the respondent was unable to overcome. Even in the absence of the expired patent, the respondent could not have

disproved functionality. Because the dual-spring mechanism "provides a unique and useful mechanism to resist the force of the wind," it is "essential to the use or purpose of the device," and hence is functional.

9-0. Opinion for unanimous Court by Kennedy.

Tyler v. Cain 121 S. Ct. 2478, 69 USLW 4620 (6-28-01)

AEDPA, habeas corpus, "new rule": The rule of *Cage v. Louisiana* (1990), that a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt, does not qualify under the Antiterrorism and Effective Death Penalty Act (AEDPA) as a new rule of constitutional law that has been "made retroactive to cases on collateral review by the Supreme Court." The consequence is that a habeas corpus petition relying for the first time on *Cage v. Louisiana* fails to qualify for an exception to AEDPA's general rule requiring dismissal of petitions that assert a claim not previously presented. A new rule is "made retroactive" by the Supreme Court only if the Court holds it to be retroactive. The Court has not held that the *Cage* rule is retroactive. The *Cage* decision itself did not make the rule retroactive, and the Court's decision in *Sullivan v. Louisiana* (1993) "held only that a *Cage* error is "structural," *i.e.*, that it is "not amenable to harmless-error analysis and will always invalidate the conviction." Nor did *Sullivan* make clear that retroactive application is warranted through application of principles set forth in *Teague v. Lane* (1989), which recognized an exception for "watershed rules . . . implicating the fundamental fairness and accuracy of the criminal proceeding." The present case does not afford the Court an opportunity to make *Cage* retroactive.

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

United Dominion Industries, Inc. v. United States 121 S. Ct. 1934, 69 USLW 4413 (6-4-01)

Taxation, Federal, product liability losses: The product liability loss of an affiliated group of corporations that elects to file a consolidated federal income tax return must be figured on a consolidated basis in the first instance, not by aggregating product liability losses separately determined company by company. A taxpayer's "product liability loss" (PLL) – a loss that can be carried back ten years – is defined by the Code as the lesser of its "net operating loss" (NOL) and its product liability "expenses" (PLEs). Applying this definition requires a taxpayer first to determine whether it has a net operating loss, or whether instead it has a taxable income, since a taxpayer can have a product liability loss only if it has a net operating loss. The Code and regulations governing affiliated groups filing consolidated returns provide only one definition of net operating loss: "consolidated" net operating loss (CNOL). The concept of a separate net operating loss "simply does not exist." The only comparison that can be made, therefore, between product liability expenses and a net operating loss is with the "consolidated" net operating loss. "Comparable treatment" of public liability losses of the usual corporate taxpayer and a group filing a consolidated return can be achieved "only if the comparison of PLEs with a limiting loss amount occurs at the consolidated level after CNOL has been determined." Neither of

the two suggested methods of computing PLL on a separate-member basis squares with the notion of comparability as applied to consolidated return regulations.

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

United States v. Cleveland Indians Baseball Co. 121 S. Ct. 1433, 69 USLW 4225 (4-17-01)

FICA, FUTA, taxation of back wages: For purposes of the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA), awards of back wages should be attributed to the year in which they are actually paid, and not to the year in which they should have been paid. Both statutes refer to "wages paid during" a calendar year. Because the Court in *Social Security Board v. Nierotko* (1946) interpreted the same phrase in the Social Security Act to permit an allocation-back rule for backpay, the Court "cannot say" that the FICA and FUTA provisions have a plain meaning that precludes allocation of backpay to the year it should have been paid. Ordinarily, identical statutory language is given the same interpretation each time it appears. *Nierotko*, however, "does not compel symmetrical construction." The concerns about worker eligibility for Social Security benefits that underlay *Nierotko* have no relevance in the tax setting, where the concern instead is "fiscal administrability." Although some "inequities" and "anomalies" can result from application of the year-of-payment rule, and there is "some tension" between the "twin aims" that the tax provisions be "both efficiently administrable and fair," the regulations and the agency's interpretation of them are both longstanding and reasonable, and are entitled to deference.

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

United States v. Hatter 121 S. Ct. 1782, 69 USLW 4336 (5-21-01)

Judges, Compensation Clause, Social Security and Medicare taxes: The Compensation Clause of Article III, § 1, which provides that the compensation of federal judges "shall not be diminished during their continuance in office," prevents the government from collecting Social Security taxes, but not Medicare taxes, from federal judges who held office before Congress extended those taxes to federal employees. The Clause "does not prevent Congress from imposing a non-discriminatory tax laid generally upon judges and other citizens . . . , but it does prohibit taxation that singles out judges for specially unfavorable treatment." The Court's decision in *Evans v. Gore* (1920) is overruled insofar as it held that the Compensation Clause prohibits Congress from applying a generally applicable, nondiscriminatory tax to the salaries of federal judges. "[T]he potential threats to judicial independence that underlie [the Compensation Clause] cannot justify a special judicial exemption from a commonly shared tax." "There is no good reason why a judge should not share the tax burdens borne by all citizens." The Medicare tax, extended to all federal employees in 1982, is such a nondiscriminatory tax that may be applied to federal judges. The 1983 extension of the Social Security tax to then-sitting judges, however, "is a different matter." The 1983 Social Security law gave 96% of federal employees "total freedom" of choice about whether to participate in the system, and

structured the system in such a way that "virtually all" of the remaining 4% of employees – except the judges – could opt to retain existing coverage. By requiring then-sitting judges to join the Social Security System and pay Social Security taxes, the 1983 law discriminated against judges in violation of the Compensation Clause. This constitutional violation was not cured when Congress in 1984 increased judges' salaries by an amount greater than the amount of Social Security taxes that they were required to pay.

5-2 (Medicare tax); **7-0** (Social Security tax). Opinion of Court by Breyer, joined by Rehnquist, Kennedy, Souter, and Ginsburg, and joined in part by Scalia. Concurring and dissenting opinion by Scalia. Dissenting opinion by Thomas.

United States v. Mead Corp. 121 S. Ct. 2164, 69 USLW 4488 (6-18-01)

Administrative law, deference to agency interpretation: A tariff classification ruling by the United States Customs Service is not entitled to judicial deference under principles set forth in *Chevron v. NRDC* (1984), but instead is "eligible to claim respect under" *Skidmore v. Swift & Co.* (1944). The applicable statute authorizes the Customs Service to fix the classification and duty rate for merchandise under rules and regulations prescribed by the Secretary of the Treasury. Those regulations in turn authorize classification by "ruling letters" that describe the merchandise, determine the appropriate classification, and specify the corresponding tariff. Ruling letters are not subject to notice and comment before being issued, and may be modified or revoked without notice. Any of the 46 port-of-entry Customs offices, as well as Customs Headquarters, may issue ruling letters. *Chevron* deference is appropriate if Congress has conferred authority on an agency "to speak with the force of law when it addresses ambiguity in the statute," as when the agency conducts adjudication or notice-and-comment rule making. The Customs ruling letters bind only the parties to the ruling, not third parties, and thus fall short of the kind of "rulemaking with force of law" that merits *Chevron* deference. Instead, the ruling letters "are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.'" Under *Skidmore*, some deference can be accorded these less formal agency actions based on consideration of such factors as their persuasive force, the complexity of the regulatory scheme, and the specialized expertise of the agency.

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

United States v. Oakland Cannabis Buyers' Cooperative 121 S. Ct. 1711, 69 USLW 4316 (5-14-01)

Controlled Substances, no exception for medical marijuana: There is no medical necessity exception to the prohibitions in the Controlled Substances Act on the manufacture and distribution of marijuana. Whether or not medical necessity can ever be a defense when the applicable federal statute does not expressly provide for it – and "such a defense would entail a social balancing that is better left to Congress" – the defense "cannot succeed when [Congress] itself has made a 'determination of values.'" Congress has done so in the Controlled Substances Act. The structure of the Act, which divides drugs into five schedules and imposes different restrictions, depending in part on whether the drug has an accepted medical use, reinforces this conclusion. By placing marijuana in the most restrictive schedule (schedule I), Congress necessarily

determined that the drug had "no currently accepted medical use in treatment in the United States." The Act "consistently treats all schedule I drugs alike," whether the drugs have been placed in schedule I by Congress or have been so categorized by the Attorney General, and the Cooperative offered "no convincing explanation" for why drugs placed on the schedule by Congress should be subject to fewer controls than those placed there by the Attorney General. The canon of constitutional doubt has no application because the statute is not ambiguous on this point. The Ninth Circuit erred in ruling that the district court had discretion to recognize a medical necessity exception. Although district courts have broad discretion in formulating equitable relief, they may not "ignore the judgment of Congress, deliberately expressed in legislation."

8-0. Opinion of Court by Thomas, joined by Rehnquist, O'Connor, Scalia, and Kennedy. Concurring opinion by Stevens, joined by Souter and Ginsburg. Breyer did not participate.

United States v. United Foods, Inc. 121 S. Ct. 2334, 69 USLW 4543

First Amendment, compelled payment for generic advertising: The Mushroom Promotion, Research, and Consumer Information Act violates the First Amendment by imposing mandatory assessments on mushroom handlers for the purpose of funding generic advertising to promote mushroom sales. Even if it is accepted that commercial speech is entitled to less protection than other speech, there is no basis in Supreme Court precedent for sustaining the compelled assessment. In *Glickman v. Wileman Brothers & Elliott* (1997), the Court upheld a similar assessment imposed on California fruit growers, but the program sustained in *Glickman* differs "in a most fundamental respect" from the mushroom program. There the mandated assessments were "ancillary to a more comprehensive program restricting marketing autonomy," while here there is "no broader regulatory system in place." Unlike the marketing scheme upheld in *Glickman*, the mushroom program contains no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing else that forces mushroom producers to associate as a group to make cooperative decisions. But for the assessment for advertising, the mushroom growing business is unregulated.

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

Whitman v. American Trucking Ass'ns 121 S. Ct. 903, 69 USLW 4136 (2-27-01)

Clean Air Act; delegation; deference to agency interpretation: Section 109(b)(1) of the Clean Air Act, which directs the EPA Administrator to set primary ambient air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health [with] an adequate margin of safety," unambiguously bars cost considerations in setting the standards. Section 109 is not an unconstitutional delegation of legislative power. The provision contains an "intelligible principle" to guide the Administrator in setting standards, and that is all that is constitutionally required. The Court has upheld other "strikingly similar" provisions – directing that standards be set to avoid an "imminent hazard to the public safety" or to assure that "no employee will suffer any impairment of health" – and the Court has never required that statutes

provide "a determinate criterion for saying how much of the regulated harm is too much." The court of appeals had jurisdiction to review EPA's implementation of the revised ambient air quality standard for ozone in "nonattainment" areas. The statute is ambiguous as to the manner in which Subpart I (containing general nonattainment regulations) and Subpart 2 (containing ozone-specific nonattainment regulations) of Part D of Title I interact with regard to revised ozone standards. The Court, applying *Chevron* principles, would defer to any reasonable EPA resolution of that ambiguity. EPA's resolution, however, is not reasonable. Although there are gaps in Subpart 2's coverage, Subpart 2 eliminates regulatory discretion that Subpart 1 allowed. EPA's solution, making Subpart 2 inapplicable once a new standard has been promulgated, "completely nullifies textually applicable provisions meant to limit its discretion."

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

Zadvydas v. Davis 121 S. Ct. 2491, 69 USLW 4626 (6-28-01)

Immigration, indefinite detention of aliens subject to removal: The provision of immigration law, 8 U.S.C. § 1231(a)(6), which allows detention of a removable alien "beyond the [90-day] removal period," does not permit indefinite detention. Because indefinite detention would raise "serious constitutional concerns," the statute is construed to contain "an implicit 'reasonable time' limitation, the application of which is subject to federal court review." Neither alien status itself nor lack of a legal right to live at large in this country justifies indefinite detention. The choice is not between imprisonment and "living at large," but rather between imprisonment and supervised release. Cases allowing detention of aliens at the border are inapplicable, since the Due Process Clause, unavailable to aliens at the border and elsewhere outside the United States, protects all persons within the United States, including illegal aliens. Congress's "plenary power" over immigration law "is subject to important constitutional limitations." Congress has not provided "clear indication" of an intent to authorize indefinite detention, nor does anything in the history of the statute clearly demonstrate such an intent. Congress could have employed clearer language, *e.g.*, that applicable to detention of a "terrorist alien," if it had intended to authorize indefinite detention. The "reasonable time" during which detention is permissible is a period "reasonably necessary to bring about that alien's removal from the United States." In order to grant the Executive Branch "appropriate leeway" and "for the sake of uniform administration in the federal courts," a period of six months is determined to be a "presumptively reasonable" detention period.

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

Index