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Supreme Court Opinions: October 2001 Term

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Summary

This report contains synopses of Supreme Court decisions issued from the beginning of the October 2001 Term through the end of the Term on June 28, 2002. The purpose is to provide a quick reference guide for identification of cases of interest. These synopses are created throughout the Term and are accessible via the CRS Home Page [http://www.crs.gov/reference/general/law/01_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 congressional distribution memorandum dated April 19, 2002. 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.

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Alabama v. Shelton 122 S. Ct. 1764, 70 USLW 4438 (5-20-02)

Sixth Amendment right to counsel, suspended sentence: A suspended sentence that may result in imprisonment may not be imposed on an indigent defendant unless he was offered the assistance of counsel during his trial. The Court held in *Argersinger v. Hamlin* (1972) that defense counsel must be appointed in any prosecution that actually results in imprisonment. The same rule should prevent activation of a suspended sentence of imprisonment after an unrepresented defendant has violated the terms of probation. It makes "little sense," therefore, to allow the initial imposition of the suspended sentence at trial. The probation revocation hearing in Alabama, in which the sole issue is whether the defendant violated the terms of probation, "cannot compensate for the absence of trial counsel [because] it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt ... is sufficiently reliable to permit incarceration." The right to appointed counsel arises "at the critical stage when ... guilt or innocence ... is decided and ... vulnerability to imprisonment is determined." The rule conditioning imposition of a suspended sentence on provision of appointed counsel would not substantially limit the states' ability to impose probation. Most states already provide counsel to misdemeanor defendants, and the option of pretrial probation is available to those states that cannot bear the costs of providing counsel on a routine basis.

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

Ashcroft v. ACLU 122 S. Ct. 1700, 70 USLW 4381 (5-13-02)

First Amendment, Child Online Protection Act, "community standards": The Child Online Protection Act's (COPA's) reliance on "community standards" to identify "material that is harmful to minors" does not by itself render the statute substantially overbroad under the First Amendment. The fact that Web publishers lack any means to limit access to their sites based on the geographic location of particular Web users and that COPA may therefore subject Web publishers to the standards of the most puritanical community does not, without reference to COPA's other provisions, require a holding that COPA is facially unconstitutional. The case is remanded for further proceedings, and the government remains enjoined from enforcing COPA.

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

Ashcroft v. Free Speech Coalition 122 S. Ct. 1389, 70 USLW 4237 (4-16-02)

First Amendment, "virtual" child pornography: Two sections of the Child Pornography Prevention Act of 1996 (CPPA) that extend the federal prohibition against child pornography to sexually explicit images that appear to depict minors but that were produced without using any real children violate the First Amendment. These provisions cover any visual image that "appears to be" of a minor engaging in sexually explicit conduct, and any image promoted or presented in a way that "conveys the impression" that it depicts a minor engaging in sexually explicit conduct. The first prohibition thus can extend to computer-generated ("virtual") images, to movies in which a young-looking adult actor "appears to be a minor" engaging in sexual activity, and even to "a Renaissance painting depicting a scene from classical mythology." Neither obscenity nor child pornography is protected by the First Amendment, but the CPPA extends beyond both categories. A work is obscene, as defined by *Miller v. California* (1973), only if the government proves that the work, taken as a whole, appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value. The CPPA, which would punish possession of material due to the presence of a single explicit scene regardless of the work's overall value, fails to satisfy the *Miller* test. The Court in *New York v. Ferber* (1982) justified the First Amendment exception for child pornography on the basis of the government's interest in protecting the children who are exploited and abused in the production process. The CPPA, however, prohibits speech containing images which "do not involve, let alone harm, any children in the production process." The government's rationales for the CPPA – that "[p]edophiles might use the materials to encourage children to participate in sexual activity" and might "whet their own sexual appetites" with it, "thereby increasing ... the sexual abuse and exploitation of actual children" – are inadequate. Government "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" The government also argued that the existence of "virtual" child pornography "can make it harder to prosecute pornographers who do use real minors," because, "[a]s imaging technology improves ... , it becomes more difficult to prove that a picture was produced using actual children." This rationale "turns the First Amendment upside down. The government may not suppress lawful speech as a means to suppress unlawful speech." The government "does not offer a serious defense" of the CPPA's ban on pandering (the prohibition on conveying the "impression" that materials depict a minor).

7-2 (youthful-adult porn and pandering); **6-3** (virtual porn). Opinion of Court by Kennedy, joined by Stevens, Souter, Ginsburg, and Breyer. Concurring opinion by Thomas. Concurring and dissenting opinion by O'Connor, joined in part by Rehnquist and Scalia. Dissenting opinion by Rehnquist, joined in part by Scalia.

Atkins v. Virginia 122 S. Ct. 2242, 70 USLW 4585 (6-20-02)

Eighth Amendment, execution of mentally retarded: Execution of a mentally retarded individual constitutes cruel and unusual punishment prohibited by the Eighth Amendment. The Eighth Amendment prohibits "excessive" punishments, and reflects the principle that punishment "should be graduated and proportioned to the offense." What is excessive, or "cruel and unusual," is measured by today's standards – the "evolving standards of decency that mark the progress of a maturing society." Proportionality review should be informed

by "objective standards," the "clearest and most reliable" of which is the legislation enacted by the states and by Congress. The Court's "own judgment" is also brought to bear. "Much has changed" since the Court concluded in *Penry v. Lynaugh* (1989) that execution of the mentally retarded was not unconstitutional. There was no "national consensus" in 1989, when only two states and the Federal Government allowed executions but prohibited execution of the mentally retarded, and fourteen other states prohibited capital punishment altogether. Since then, an additional 16 states have prohibited execution of the mentally retarded, and no states have enacted legislation reinstating the power. "It is not so much the number of these States that is significant, but the consistency of the direction of change." In addition, so few mentally retarded offenders have been executed in those states that have continued to allow it that the practice can be said to be "truly unusual." "[I]t is fair to say that a national consensus has developed against [execution of the mentally retarded]." The Court's "independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures" that have created this national consensus. There is reason to question "whether either justification that has been recognized as a basis for the death penalty applies to mentally retarded offenders." A penalty appropriate to effect retribution "necessarily depends on the culpability of the offender," and mental retardation diminishes culpability. Deterrence – the other justification for capital punishment – can work only if potential offenders can evaluate the potential consequences of their actions and adjust behavior accordingly. Yet "the same cognitive and behavioral impairments that make these defendants less morally culpable ... also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information." Finally, mentally retarded offenders are more likely to make false confessions, and less likely to be able to present their best case for mitigation.

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

Barnes v. Gorman 122 S. Ct. 2097, 70 USLW 4548 (6-17-02)

Punitive damages, ADA and Rehabilitation Act private actions: Punitive damages may not be awarded in a private cause of action brought under section 202 of the Americans With Disabilities Act of 1990 (ADA) or section 504 of the Rehabilitation Act of 1973. The ADA provides that available remedies shall be those provided under section 505(a)(2) of the Rehabilitation Act, and that provision in turn references remedies set forth in Title VI of the Civil Rights Act. Title VI, which prohibits racial discrimination in federally funded programs and activities, invokes Congress's power under the Spending Clause. Statutes enacted under the Spending Clause are "much in the nature of a contract," and rely on principles of offer and acceptance. Accordingly, funding recipients may be held liable, and subjected to particular remedies, only if the recipient "is on notice that, by accepting federal funding, it exposes itself to liability of that nature." A funding recipient is generally on notice that it is subject both to remedies explicitly provided in the relevant statute, and to "those remedies traditionally available in suits for breach of contract." Title VI mentions no remedies, and punitive damages – unlike compensatory damages and injunctive relief – are generally not available for breach of contract. An

implied right to punitive damages cannot reasonably be found in Title VI. The conclusion is "consistent" with the well-settled rule that a court may resort to "any available remedy" when legal rights have been invaded. In the context of violation of Spending Clause legislation, the legal wrong is failure to fulfill a contractual obligation, and that wrong is remedied when the recipient compensates the Government or a third-party beneficiary for the loss.

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

Barnhart v. Sigmon Coal Co. 122 S. Ct. 941, 70 USLW 4127 (2-19-02)

Coal industry retiree health benefits: The Coal Industry Retiree Health Benefit Act of 1992 does not authorize the Commissioner of Social Security to assign responsibility for retired miners to the successors in interest of out-of-business operator companies that were signatories to a bituminous coal wage agreement. The Act is "clear and unambiguous" on this point. If a signatory company is no longer in business, the Act assigns liability for covered retirees to a defined group of "related persons." There are three categories of "related persons," as well as an additional category of "a successor in interest of any person described in" those three categories. Because a signatory company itself is not described in any of the three categories of "related persons," a successor in interest of the signatory does not fall within the additional category. Under the circumstances, successor liability should not be inferred. Other sections of the Act provide clearly and explicitly for successor liability, and "it is generally assumed that Congress acts intentionally and purposely" in the disparate inclusion or exclusion of explicit language. Legislative history in the form of floor statements by the bill's sponsors cannot overcome the clear and unambiguous statutory language. The "counter-intuitive" result – that a direct successor in interest of a signatory may not be made responsible for a signatory's former employees while successors to corporate affiliates of the signatory may be – is not an "absurd result" that requires a different interpretation. The Court will not "second-guess" legislative compromises that have been "brokered" among interest groups.

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

Barnhart v. Walton 122 S. Ct. 1265, 70 USLW 4231 (3-27-02)

Administrative law, deference to agency interpretation: The Social Security Administration's (SSA's) interpretation of the term "disability" as including an inability to work for a 12-month period is "lawful" and entitled to deference under principles set forth in *Chevron v. NRDC* (1984). The Social Security Act defines "disability" as an "inability" to engage in gainful employment due to an "impairment ... which has lasted or can be expected to last for a continuous period of not less than 12 months." In interpreting the term "inability" to include a 12-month requirement, the SSA reads "expected to last" as applicable only prospectively, when the inability to work has not yet lasted 12 months. Under the SSA's interpretation, a claimant who has returned to work within the 12-month period is barred from benefits whether or not his impairment had been expected to last longer than 12 months. The statute does not unambiguously forbid the regulation. Although the "12-month" phrase modifies only the word

"impairment," the statute is silent as to any durational requirement for "inability" to work. The agency's construction is "permissible." The basic objectives of the statute require that "some duration requirement" be recognized, and the agency's choice of 12 months is a reasonable one that "reconciles" the "impairment" and "inability" language. The agency's regulations, although only recently promulgated by notice-and-comment rulemaking, reflect a longstanding interpretation that Congress has not changed in spite of frequently amending or reenacting the relevant provisions. The fact that the Act authorizes a "trial work" period prior to the expiration of 12 months for persons "entitled" to disability benefits does not preclude the SSA's use of "hindsight" to make the disability determination. Here again, the statute is ambiguous and the agency's interpretation is "reasonable," it not being evident why a claimant who returns to work early should qualify only if that return "was a kind of medical surprise."

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

BE & K Construction Co. v. NLRB 122 S. Ct. 2390, 70 USLW 4647 (6-24-02)

Labor, First Amendment right of petition: The National Labor Relations Board may not impose liability on an employer for filing a losing retaliatory lawsuit against a union if the lawsuit was not objectively baseless. The class of reasonably based but unsuccessful lawsuits falls within the scope of protection of the First Amendment's Petition Clause. Limiting sanctions to unsuccessful lawsuits that are "retaliatory" does not save the Board's policy. The Board's definition of a retaliatory suit as one brought with a motive to "interfere with" the exercise of rights protected by the National Labor Relations Act (NLRA) "broadly covers a substantial amount of genuine petitioning." "Ill will is not uncommon in litigation," and regulation based on motive is "problematic." The Board also may not impose sanctions for lawsuits brought for a retaliatory "purpose." The relevant NLRA provision, which prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights, does not reach "all reasonably based but unsuccessful suits filed with a retaliatory purpose."

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

Bell v. Cone 122 S. Ct. 1843, 70 USLW 4447 (5-28-02)

Habeas corpus, claim of ineffective assistance of counsel: A claim of ineffective assistance of counsel during the sentencing phase of a capital murder trial should have been analyzed under principles announced in *Strickland v. Washington* (1984), not under *United States v. Cronic* (1984). In addition, the *Strickland* inquiry is constrained by the Antiterrorism and Effective Death Penalty Act of 1996, which allows *habeas* relief only if the state court's decision was "contrary to" or involved "an unreasonable application of clearly established Federal law." *Strickland*, which requires that a court's review of an attorney's representation be "highly deferential," established a two-part test: did counsel's performance fall below "an objective standard of reasonableness," and is there a "reasonable probability" that the result would have been different but

for counsel's errors. *Cronic* recognized that there are some circumstances "so likely to prejudice the accused" that actual proof of prejudice is unnecessary, as for example, when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." In this case, counsel failed to adduce mitigating evidence during the sentencing phase, and waived a closing argument at sentencing although the state had presented evidence of four aggravating circumstances that required imposition of the death penalty if established and not outweighed by mitigating evidence. Counsel did not "entirely" fail to present mitigating evidence, but merely did so "at specific points" in the process, so therefore *Cronic* is inapplicable. Because *Strickland* applies, there is "no merit" to the claim that the state court decision was "contrary to" clearly established law. Nor was there "unreasonable application" of *Strickland*. During the guilt phase of the trial counsel had attempted to establish an insanity defense, and had presented evidence of "Vietnam Veterans Syndrome." Counsel "could reasonably have concluded that the substance of [this] testimony was still fresh to the jury" at the sentencing phase. Counsel's decision to waive final argument at sentencing "was not unreasonable," given that the "junior" prosecutor had presented a "low-key" closing, and a closing argument by defense counsel would have allowed the "very persuasive" lead prosecutor to offer rebuttal.

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

Board of Educ. v. Earls 122 S. Ct. 2559, 70 USLW 4737 (6-27-02)

Fourth Amendment, drug testing of high school students: The drug testing policy adopted by the school district of Tecumseh, Oklahoma, requiring all middle school and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activities, is constitutional. The policy "reasonably serves the School District's important interest in detecting and preventing drug use among its students." The principles announced in *Vernonia School District v. Acton* (1995), upholding drug testing of student athletes, govern "the somewhat different facts of this case." A student's privacy interest is "limited in a public school environment." The fact that athletes are subject to regular physicals and community undress "was not essential" to the decision in *Vernonia*. That decision "depended primarily upon the school's custodial responsibility and authority," which is equally applicable to athletic and to non-athletic extracurricular activities. The "character" of the privacy invasion is minimally intrusive. The policy provides that the faculty monitors who collect urine samples are to wait outside a closed restroom stall while the student produces the sample, and test results are kept in confidential files. Finally, the "nature and immediacy of the government's concerns" in protecting the health and safety of its students and preventing drug use are important, and the testing program is "a reasonably effective means" of addressing these concerns. Although there was some evidence of drug use at Tecumseh schools, a drug testing program need not always be justified by a demonstrated problem of drug abuse, and there is no "threshold level" of drug use that need be satisfied. The Fourth Amendment does not require that the "least restrictive means" be employed, and in the public school context there is no need for individualized suspicion.

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

Carey v. Saffold 122 S. Ct. 2134, 70 USLW 4558 (6-17-02)

Habeas corpus, AEDPA limitations period: The one-year limitations period established by the Antiterrorism and Effective Death Penalty Act (AEDPA) for seeking a federal *habeas* corpus remedy, tolled while an application for state collateral review is "pending," is tolled during the time between a lower state court's decision and the filing of a timely notice of appeal to a higher state court. The ordinary meaning of the word "pending" includes "not yet decided." The principle applies as well to California's unique collateral review system, which provides for "original" *habeas* petitions in higher courts rather than for "appeals," and which measures timeliness of filing by a "reasonableness" standard rather than a specified time period. California's "original writ" system "is not as special in practice as its terminology might suggest"; an original petition in a higher court serves the same purpose that an appeal serves in other states. California's system functions in a way sufficiently like other state systems of collateral review to bring intervals between a lower court decision and a filing of a new petition in a higher court within the scope of the word "pending." This ruling has no application to "original writs" in those states which grant original writs only in "extraordinary" cases. This case is remanded for consideration of whether the *habeas* petitioner delayed unreasonably in seeking review from the California Supreme Court.

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

Chao v. Mallard Bay Drilling, Inc. 122 S. Ct. 738, 70 USLW 4065 (1-9-02)

OSHA, Coast Guard: An oil and gas exploration barge, anchored in the navigable waters of a state, is a "workplace" within the meaning of the Occupational Safety and Health Act ("Act"). In this case the Occupational Safety and Health Administration (OSHA) had authority to issue citations for safety violations relating to an explosion that killed four crew members and injured two others. The Act denies OSHA authority over "working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce" occupational safety and health standards. Use of the word "exercise" makes clear that an agency's possession of unexercised regulatory authority is "insufficient" to displace OSHA's jurisdiction. OSHA's regulations have been "pre-empted" by Coast Guard regulation of "inspected vessels." The barge in this case, however, is an "uninspected vessel" over which the Coast Guard has exercised only limited authority that is not related to the safety violations at issue. General marine safety regulations governing such things as fire extinguishers and life preservers do not address the occupational safety concerns created by inland drilling operations. Because the Coast Guard has not regulated the working conditions at issue in this case, and has not asserted comprehensive regulatory authority over working conditions on uninspected vessels, the Coast Guard has not "exercise[d]" its authority within the meaning of the Act.

8-0. Opinion for unanimous Court by Stevens. Scalia did not participate.

Chevron U.S.A. Inc. v. Echazabal 122 S. Ct. 2045, 70 USLW 4516 (6-10-02)

Americans With Disabilities Act: An EEOC regulation authorizing refusal to hire a disabled individual whose performance of the job would endanger his own health because of his disability is a permissible regulation under the Americans with Disabilities Act of 1990 (ADA). The statute allows employers to impose job-related "qualification standards," and provides that these "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." The EEOC regulation "carries the defense one step further" by allowing an employer to screen out a potential employee on the basis of a direct threat to the employee himself. The statutory language does not create a negative inference that disallows the regulation. The interpretive canon *expressio unius est exclusio alterius* is inapplicable. The statutory text itself, with the "expansive phrasing of 'may include,' points directly away" from the expression-exclusion rule. Also, the statute contains "no series of terms from which an omission bespeaks a negative implication." Finally, "there is no apparent stopping point to the argument" that Congress intended to limit protection to those in the workplace; the specified interest in protecting others in the workplace could not have been intended to require the hiring of someone whose disability would endanger those outside the workplace. Although the EEOC's regulations implementing the Rehabilitation Act of 1973 had explicit threat-to-self language, regulations of certain other agencies did not, and Congress's omission of any such language in the ADA created no negative implication. The EEOC's ADA regulation is a reasonable means of resolving the "tension" between the ADA and the Occupational Safety and Health Act, which has an objective of assuring a safe and healthful working environment for all workers.

9-0. Opinion for unanimous Court by Souter.

Chickasaw Nation v. United States 122 S. Ct. 528, 70 USLW 4020 (11-27-01)

Indian Gaming Regulatory Act; Taxation, Federal: The Indian Gaming Regulatory Act does not exempt tribes from paying taxes imposed by chapter 35 of the Internal Revenue Code. The relevant language, in 25 U.S.C. § 2719(d)(i), provides that "the provisions of [the Internal Revenue Code] (including sections 1441, 3402(q), 6041, and 60501, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations ... in the same manner as such provisions apply to State gaming and wagering operations." The issue arises because the referenced Chapter 35 simply imposes taxes, and has nothing to do with the reporting or withholding of taxes. The language outside the parenthetical – "concerning the reporting and withholding of taxes" – is "unambiguous," and controls the references within. Use of the parentheses indicates that Congress intended the references to be "simply illustrative, hence redundant." The reference to chapter 35 "is simply a bad example" – a "drafting mistake" resulting from the failure to delete an inappropriate cross-reference. The legislative history supports this interpretation. The original Senate bill applied both to taxation and to reporting and withholding, but the reference to "taxation" was deleted in committee without explanation. It is difficult to believe that the committee substituted a "confusion-generating numerical cross-reference" for pre-existing language that was "unambiguous." The "easier" explanation is that the committee

unintentionally failed to remove what had become a superfluous cross-reference. Canons of interpretation, some of which support a contrary conclusion, are not mandatory rules, but are "guides that need not be conclusive." Moreover, the canon that all words of a statute are to be given effect is "offset" by the canon that permits a court to reject words as surplusage if they were inadvertently inserted or repugnant to the rest of the statute; and the canon that ambiguous statutes are to be interpreted to benefit Indian tribes is "offset" in this case by the canon requiring that tax exemptions be clearly expressed.

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

Christopher v. Harbury 122 S. Ct. 2179, 70 USLW 4614 (6-20-02)

Access to courts: The plaintiff, who alleged that defendant government officials denied her access to the courts by intentionally deceiving her in concealing information about her husband, a foreign dissident being detained and tortured in his own country by persons paid by the CIA, failed to state an actionable claim. The point of recognizing an access claim "is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." The access right is "ancillary to the underlying claim." A complaint that alleges denial of access therefore must describe the underlying cause of action in accordance with Federal Rule of Civil Procedure 8(a), and, when the claim looks backward as this one does, must identify a remedy that has been foreclosed. The need to identify a viable claim is especially important in cases challenging the conduct of foreign relations, where issues of separation of powers may implicate the doctrine of constitutional avoidance. The complaint in this case "did not even come close to stating a constitutional claim for denial of access upon which relief could be granted." The complaint identified neither the underlying cause of action nor any remedy that was independent of relief that might be available on one or more of the 24 other counts set forth in the complaint. Even though a cause of action (intentional infliction of emotional distress) was identified during oral argument in the appeals court, there was no identification of a remedy that could not be obtained on an existing count.

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

City of Columbus v. Ours Garage and Wrecker Serv., Inc. 122 S. Ct. 2226, 70 USLW 4620 (6-20-02)

Preemption, political subdivisions exercising state authority: An exception to federal preemption of state and local regulation of motor carriers involved in the transportation of property (49 U.S.C. § 14501(c)(2)(A)), applicable to "the safety regulatory authority *of a State*," applies as well to safety regulations of a *political subdivision* of a state. "Absent a clear statement to the contrary, Congress' reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." The fact that the general preemption rule and two of the four exceptions to the rule apply to both a "State" and a "political subdivision of a State" does not require a ruling that the exception at issue, lacking any reference to a political subdivision, is inapplicable to regulation by

a political subdivision. While the disparate inclusion and exclusion of the words "political subdivisions" "support an argument of some force," a reading of the language "with a view to the basic tenets of our federal system" requires the conclusion that the language is not a "clear and manifest" indication of congressional intent to supplant local authority. The inference from the absence of any reference to "political subdivisions" "would be more persuasive" if that omission were "the sole difference" in wording. Moreover, a "restrictive reading" of the word "State" would introduce "an interpretive conundrum": if the safety exception were confined to states, then localities would be preempted from enforcing as well as enacting safety regulations.

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

City of Los Angeles v. Alameda Books, Inc. 122 S. Ct. 1728, 70 USLW 4369 (5-13-02)

First Amendment, zoning, "adult entertainment" businesses: The City's ordinance prohibiting the operation of more than one adult-oriented "business" (*e.g.*, an adult bookstore or an adult video arcade) in the same building is not invalid on its face. Under the rule announced in *Renton v. Playtime Theatres* (1986), such regulations directed at the secondary effects of adult-oriented businesses are subjected to "intermediate" rather than "strict" scrutiny under the First Amendment, and are upheld if they are "designed to serve a substantial government interest" and if "reasonable alternative avenues of communication remain[ ] available." Los Angeles relied on a 1977 study showing that crime rates are higher in areas with higher concentrations of adult establishments. The city's reliance on this study to ban multiple-use adult establishments is both rational and sufficient. Cities must have a reasonable opportunity to experiment, and need only rely on evidence that is "reasonably believed to be relevant" to the adverse secondary effects. Having established a link between crime and concentration of adult-oriented establishments, the city could reasonably infer that reducing the concentration of adult operations, whether located in separate establishments or in the same establishment, would reduce crime in a neighborhood. This is sufficient to defeat a motion for summary judgment.

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

Correctional Servs. Corp. v. Malesko 122 S. Ct. 515, 70 USLW 4013 (11-27-01)

Constitutional tort, *Bivens* action: The implied right of action for damages against federal officers alleged to have violated a citizen's constitutional rights, recognized in *Bivens v. Six Unknown Fed. Narcotics Agents* (1971), does not extend to allow recovery against a private corporation that operates a halfway house for the Bureau of Prisons. Because the purpose of *Bivens* is "to deter the officer, not the agency," the Court in 1994 refused to extend *Bivens* to permit suit against a federal agency. The Court reasoned that plaintiffs, if given a choice of suing a federal agency or suing an individual officer who could assert qualified immunity, would sue the agency, and that the deterrent effects of the remedy against individuals would thereby be lost. The same principle applies here. If suit is allowed against a corporate defendant, then "claimants will focus their collection efforts on it, and not the individual directly responsible" for the violation of constitutional rights. Because federal prisoners in facilities run by

the Bureau of Prisons cannot bring a *Bivens* action against the Bureau or the United States, the issue of whether "asymmetrical liability costs" should be imposed on private prison facilities should be resolved by Congress, not the courts. *Bivens* was justified in part by the unavailability of alternative remedies, but here there are the alternatives of grievance procedures, parallel tort remedies, and injunctive relief in federal court.

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 Stevens, joined by Souter, Ginsburg, and Breyer.

Devlin v. Scardelletti 122 S. Ct. 2005, 70 USLW 4496 (6-10-02)

Class actions, appeals: A non-named member of a class certified under Federal Rule of Civil Procedure 23 who has objected in a timely manner to approval of a settlement at the fairness hearing may bring an appeal without first intervening. Earlier cases have established that only parties to a lawsuit may appeal an adverse judgment, but the right to appeal has never been restricted to named parties. Non-named class members may be parties for some purposes and not for others. The district court's approval of a settlement binds members of the class and amounts to a final decision on the objections to the settlement that non-named class members have raised at the court's fairness hearing. Class members have no opportunity to opt out of a settlement, and therefore "are parties to the proceedings in the sense of being bound by the settlement." The Government's request, as an *amicus*, that the Court require class members to intervene for purposes of appeal, is rejected as being of little value.

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

Dusenbery v. United States 122 S. Ct. 694, 70 USLW 4044 (1-8-02)

Due Process, forfeiture, adequacy of notice to prison inmate: When the United States seeks to notify a federal prison inmate of its intention to forfeit property in which the inmate may have an interest, due process is satisfied by the sending of written notice via certified mail addressed to the prisoner at the prison, even if the receipt for the mail is signed by a prison officer and there is no proof that the prisoner ever received the notice. *Mullane v. Central Hanover Bank & Trust* (1950), not *Mathews v. Eldridge* (1976), provides the appropriate analytical framework for the adequacy of notice: whether the notice "was reasonably calculated under all the circumstances" to apprise the prisoner of the pendency of the forfeiture proceeding. To satisfy this standard, the government need not provide actual notice, but must "make efforts to provide actual notice." Those efforts need not be "heroic," but merely reasonably calculated to notify the targeted party. The fact that the Bureau of Prisons has improved its procedures after the attempted notification in this case, and now requires the prisoner recipient to sign a logbook acknowledging delivery, does not mean that the prior procedures were constitutionally inadequate.

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

Edelman v. Lynchburg College 122 S. Ct. 1145, 70 USLW 4198 (3-19-02)

EEOC, verification of charge: The EEOC's relation-back regulation, allowing an otherwise timely filer of an employment discrimination charge to submit an oath verifying that charge after the time for filing has expired, is valid. Title VII of the Civil Rights Act requires that "charges" must be "in writing under oath or affirmation," and by separate provision sets a time limit (180 or 300 days) for filing. The EEOC regulation permits the relation back of a verifying oath or affirmation "to the date the charge was first received." Neither statutory provision defines "charge," and the two provisions need not be read together as meaning that a submission is a "charge" only if accompanied by an oath or affirmation. Such a reading would ignore "the two quite different objectives of the timing and verification requirements." Because the Court "so clearly agree[s] with the EEOC," there is no need to consider the degree of deference that should be accorded to the agency's regulation. Other considerations are that Title VII was designed to enable laypersons to initiate the process, that courts have frequently allowed relation back when oaths are required, and that Congress has amended Title VII several times "without once casting doubt on the Commission's construction."

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

EEOC v. Waffle House, Inc. 122 S. Ct. 754, 70 USLW 4081 (1-15-02)

Arbitration, EEOC authority to sue on employee's behalf: An agreement between an employer and employee to arbitrate employment-related disputes rather than taking them to court does not bar the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action alleging that the employer has violated the Americans with Disabilities Act (ADA). Title VII of the Civil Rights Act, which gives the EEOC authority to bring enforcement actions to enjoin employers from engaging in unlawful employment practices, and to obtain reinstatement, backpay, and compensatory and punitive damages, "unambiguously authorize[s] the EEOC to obtain the relief that it seeks" in this case. Arbitration under the Federal Arbitration Act (FAA) is a matter of consent, not coercion, and the EEOC has not agreed to arbitrate its claims. The FAA authorizes courts to enforce arbitration agreements between private parties, but does not mention enforcement by public agencies and does not limit the EEOC's authority under Title VII. The Fourth Circuit erred in concluding that the "competing policies" of the ADA and the FAA required a holding that the EEOC could obtain only injunctive relief, and not victim-specific relief. Nothing in the language of the statutes or the arbitration agreement supports the lower court's conclusion. The EEOC does not need the employee's consent in order to bring an enforcement action, but rather is "the master of its own case," both with respect to evaluating the strength of the public interest at stake and with respect to assessing the need for victim-specific relief. Conferral of authority on the court to order other "appropriate" equitable relief does not supplant the EEOC's authority to determine what relief to seek, but rather is a "limited reference to only a subcategory of claims for equitable relief, not damages."

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

Federal Maritime Comm'n v. South Carolina State Ports Auth. 122 S. Ct. 1864, 70 USLW 4464 (5-28-02)

State sovereign immunity, adjudication by federal agency: State sovereign immunity bars the Federal Maritime Commission from adjudicating complaints filed by a private party against a non-consenting state. The fact that the Commission does not exercise the judicial power of the United States does not resolve the case. The Eleventh Amendment, which provides that the judicial power shall not extend to suits against a state by citizens of another state, "does not define the scope of the States' sovereign immunity, [but rather] is but one particular exemplification of that immunity." State sovereign immunity is protected by the presumption that the Constitution does not "rais[e] up any proceedings against the States that were anomalous and unheard of when the Constitution was adopted." Commission proceedings before administrative law judges (ALJs) are "the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union." The similarities between Commission proceedings and civil litigation targeted by the Eleventh Amendment are "overwhelming." Administrative law judges and trial judges are "functionally comparable," and the proceedings themselves share "numerous common features." "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." The "affront" to a state's dignity is the same whether an adjudication takes place in an Article III court or in an administrative tribunal. Two arguments raised by the United States are "unavailing." The fact that the Commission cannot enforce its own orders, but must seek enforcement in federal district court, is a "distinction without a significant difference." States are still in effect coerced into defending themselves before the Commission, because they may not challenge the merits of a Commission order when defending against an enforcement action in district court. The argument that Commission proceedings do not present the same threat to the financial integrity of states as would private lawsuits (Commission reparations orders must be enforced by the private party receiving the award, and in such actions the state can use sovereign immunity to bar recovery) misses the point that the sovereign immunity doctrine's "central purpose" is to accord the states "respect." State sovereign immunity does not yield to "the constitutional necessity of uniformity in the regulation of maritime commerce." The sovereign immunity bar applies regardless of the relief sought against the state, whether it be a reparations order or a cease-and-desist order.

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

Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co. 122 S. Ct. 1831, 70 USLW 4458 (5-28-02)

Patents, equivalents, prosecution history estoppel: Prosecution history estoppel is not limited to claim amendments made "to avoid the prior art," but can also arise when a claim is narrowed to comply with section 112 of the patent law. Prosecution history estoppel requires that claims be interpreted in light of

the history of the application process, so that a patentee who has narrowed a claim in response to a rejection may not claim protection for alleged "equivalents" of surrendered aspects of the claim. Section 112 requires that work be described in "full, clear, concise, and exact terms." "A narrowing amendment made to satisfy any requirement of the Patent Act may give rise to an estoppel." A section 112 amendment, "even if only for the purpose of better description," can operate to narrow a patent's scope, and thus estoppel may apply. However, by narrowing a patent claim by amendment, the patentee does not necessarily surrender all equivalents to the amended claim element. The court should presume that the patentee surrendered all subject matter between the broader and narrower language, but the patentee may show (and bears the burden of showing) that the amendment does not surrender the particular equivalent at issue. In order to do so, the patentee must establish that "one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent."

9-0. Opinion for unanimous Court by Kennedy.

Franconia Assocs. v. United States 122 S. Ct. 1993, 70 USLW 4532 (6-10-02)

Limitations period, Tucker Act: Enactment of the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), which restricted prepayment of Farmers Home Administration (FmHA) loans, did not constitute a breach of loan agreements that guaranteed an absolute prepayment right. Rather, breach occurs, and the six-year limitations period for bringing suit under the Tucker Act begins to run, when a borrower tenders prepayment and the Government then dishonors its obligation to accept the tender. The Government's obligation under the agreements was not merely to allow borrowers the right to prepay, but also to accept prepayment and execute the appropriate releases when borrowers tender prepayment. A promisor's renunciation of a contractual duty before the time fixed in the contract for performance is a "repudiation." Enactment of ELIHPA therefore effected a repudiation of FmHA loans, not an immediate breach. The text of the limitations provision, 28 U.S.C. § 2501, which bars claims not filed within six years after the claim "first accrues," is "unexceptional," and does not require a holding that the "first" accrual occurred with ELIHPA's enactment. A plaintiff should not be penalized for allowing the defendant the opportunity to retract a wrongful repudiation. Also, a contrary holding might have the detrimental effect of provoking additional litigation. The fact that the statement of intent not to perform was effected by an act of Congress does not render the repudiation doctrine futile. Congress may still change its mind and retract its repudiation in a later enactment.

9-0. Opinion for unanimous Court by Ginsburg.

Gisbrecht v. Barnhart 122 S. Ct. 1817, 70 USLW 4477 (5-28-02)

Attorney's fees, Social Security Act: The provision of the Social Security Act limiting fees that may be charged for representation of Social Security benefits claimants in court does not prohibit contingency fee agreements, but does instruct courts to review contingency fees for reasonableness. 42 U.S.C. § 406(b) provides that a court may allow "a reasonable fee ... not in excess of 25 percent of the ... past-due benefits" that are awarded to the claimant. The text of the provision, which is "inconclusive," "does not exclude" contingent fee

agreements that are within the 25 percent ceiling. The two principal approaches to fees – the lodestar method and contingent fees – provide interpretive guidance. The lodestar method is derived by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate, and often governs the amount of fees properly shifted to the loser in litigation. Fee shifting is not at issue, however; section 406(b) addresses instead fees payable from a successful party's recovery. Historically, Social Security representation has operated on a contingency fee basis. The concern in 1965 when the section was adopted was that "inordinately large fees" were being charged. Against this background, it is unlikely that Congress intended to outlaw contingency fees altogether, or to substitute a "lodestar method courts did not develop until some years later." Rather, section 406(b)'s reference to "a reasonable fee" provides for court review as an "independent check" on contingency fee agreements that fall within the 25 percent ceiling.

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

Gonzaga University v. Doe 122 S. Ct. 2268, 70 USLW 4577 (6-20-02)

Family Educational Rights and Privacy Act, private actions: A student may not sue a private university for damages under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA). Relevant provisions of FERPA create no rights that are enforceable under section 1983. FERPA conditions the receipt of federal funds by educational agencies and institutions on compliance with requirements relating to access to and disclosure of student educational records, and directs the Secretary of Education to enforce these spending conditions by terminating funding if appropriate. The general rule, announced in *Pennhurst State School and Hospital v. Halderman* (1981), is that federal funding laws provide no basis for private enforcement by section 1983 unless Congress "speaks with a clear voice" in creating such rights. Only violation of a right, not violation of a law, gives rise to a section 1983 action, and the same standard ("no less and no more") used to determine whether a statute creates a private right of action determines whether a statute confers rights enforceable under section 1983. The issue is "whether Congress intended to create a federal right." "There is no question that FERPA's nondisclosure provisions fail to confer enforceable rights." FERPA's provisions "speak only to the Secretary of Education," and speak only of "institutional policy and practice," not of individual instances of disclosure. This focus is "two steps removed from the interests of individual students and parents."

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

Great-West Life & Annuity Ins. Co. v. Knudson 122 S. Ct. 708, 70 USLW 4056 (1-8-02)

ERISA, action for "equitable relief": An action to enforce a reimbursement provision of a health benefits plan is not an action for "equitable relief" within the meaning of ERISA § 503(a)(3). That section authorizes an action to enjoin any act or practice that violates the terms of a plan, or to obtain "other appropriate equitable relief." This is a reference to relief that was available in an equity court when equity and law courts formed a "divided bench." This may

be "an ancient classification," but it is a classification that Congress has "plainly" specified in the statute, and therefore one that courts may not render "devoid of reason and effect." Typically, specific performance of a contract to pay money was not available in equity. Classifying the action as one seeking "restitution" does not make it an equitable action. Restitution was not an exclusively equitable remedy, but rather was available in both legal and equitable actions, depending on the basis of the claim and the nature of remedies sought. The kind of restitution that the petitioners seek – recovery of funds no longer in the respondent's possession – was a legal action for imposition of personal liability rather than an equitable action for a constructive trust or equitable lien on particular property. Analogy to the common law of trusts is "inapposite." A general characterization of one of ERISA's primary purposes as enabling enforcement of a benefits plan is "inadequate to overcome the words of [ERISA's] text regarding the *specific* issue under consideration."

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

Harris v. United States 122 S. Ct. 2406, 70 USLW 4655 (6-24-02)

Sentencing, mandatory minimum, right to jury trial: The federal law penalizing use of a firearm while committing a crime of violence or a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A), establishes a single offense with a choice of three mandatory minimum sentences, not three separate offenses. The seven-year mandatory minimum sentence applicable if the firearm is "brandished" during the offense is therefore a sentencing factor and not an element of a separate offense, and the finding of "brandishing" may constitutionally be made by the judge. The structure of the statutory provision suggests that "brandishing" is a sentencing factor. The provision follows the customary federal pattern of listing offense elements in a single sentence, and of introducing the sentencing factors with the word "shall." There is no federal tradition of treating brandishing or discharging a firearm (the other action for which the section specifies an increased mandatory minimum sentence) as offense elements; on the contrary, the Sentencing Guidelines treat brandishing and discharging as sentencing factors for "numerous" offenses. Moreover, the effect on the defendant's sentence is consistent with traditional understandings about how sentencing factors operate. The section specifies no maximum sentence, and the judge may impose a sentence of seven years or more with or without a finding that the defendant brandished a firearm. The constitutional issue is controlled by *McMillan v. Pennsylvania* (1986), upholding an increase in the mandatory minimum for an offense based on a judge's finding, by a preponderance of the evidence, that the defendant had possessed a firearm. *Apprendi v. New Jersey* (2000), holding that a jury must find facts on which a sentence exceeding the statutory maximum is based, is not applicable.

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

Hoffman Plastic Compounds, Inc. v. NLRB 122 S. Ct. 1275, 70 USLW 4209 (3-27-02)

Labor, immigration: The National Labor Relation Board's award of backpay to an undocumented alien who was not authorized to work in the United States is foreclosed by federal immigration policy set forth in the Immigration Reform and Control Act of 1986 (IRCA). The NLRB's discretion to fashion remedies for violations of the National Labor Relations Act (NLRA) "is not unlimited." The Court has "consistently set aside awards" to employees who have engaged in "serious illegal conduct" relating to their employment, and will not defer to the NLRB where the Board's remedies "potentially trench upon federal statutes and policies unrelated to the NLRA" and outside the Board's field of expertise. In *Sure-Tan v. NLRB* (1984), for example, the Court resolved a potential conflict between labor and immigration law by concluding that employees must be deemed unavailable for reinstatement or backpay "during any period when they were not lawfully entitled to be present and employed in the United States." It is unnecessary to decide whether *Sure-Tan* can be distinguished, because the "legal landscape ... significantly changed" with enactment of IRCA, a "comprehensive scheme" that makes it "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." Awarding backpay to an alien who has criminally violated IRCA by obtaining employment with false documents "trivializes the immigration laws [and] encourages future violations." "Other significant sanctions" are available to the NLRB against an employer who violates the NLRA by laying off employees who engage in union organizing activities.

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

Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc. 122 S. Ct. 1889, 70 USLW 4489 (6-3-02)

Jurisdiction, review of patent law claim: The Court of Appeals for the Federal Circuit lacks appellate jurisdiction over a case in which the complaint did not allege a claim arising under federal patent law, but the answer contained a patent-law counterclaim. The Federal Circuit has jurisdiction over an appeal from a district court decision if the district court's jurisdiction was based on 28 U.S.C. § 1338. Section 1338 confers jurisdiction on district courts over "any civil action arising under any Act of Congress relating to patents." "Arising under" is the same operative language used in 28 U.S.C. § 1331, and should be given the same construction. The "well-pleaded-complaint" rule has long governed whether a case "arises under" federal law for purposes of section 1331. This means that the issue of whether a case "arises under" patent law – and thus the issue of whether the Federal Circuit has appellate jurisdiction – is resolved by reference to the plaintiff's complaint. Cases have established that "arising under" jurisdiction cannot depend on a defendant's answer. Because a counterclaim appears as part of the defendant's answer, a counterclaim cannot serve as the basis for a district court's "arising under" jurisdiction. To rule otherwise would contravene the longstanding policy of allowing a plaintiff to choose a state court rather than a federal court, and would "radically expand" the class of removable cases. The argument that "arising under" should have a different meaning for the Federal Circuit's jurisdiction in order to promote the uniformity of patent law is not "available"; the Court's task is "not to determine what would further Congress's

goal ... , but to determine what the words of the statute must fairly be understood to mean." Moreover, section 1338's "arising under" language cannot mean one thing in its own right, but "something quite different" when referenced by another provision.

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

Hope v. Pelzer 122 S. Ct. 2508, 70 USLW 4710 (6-27-02)

Qualified immunity, Eighth Amendment claim: The alleged actions of Alabama prison guards in handcuffing the prisoner to a hitching post for long periods of time constituted cruel and unusual punishment in violation of the Eighth Amendment. The defendant prison guards, moreover, were not entitled to qualified immunity from a civil damages action. Qualified immunity is appropriate if the alleged actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." The required "fair warning" that defeats qualified immunity may be present even in the absence of case law precedent based on materially similar fact situations. "General statements of the law are not inherently incapable of giving fair and clear warning." Here the prison guards had fair warning, derived from Eleventh Circuit precedent, a state corrections department regulation, and a Department of Justice report warning of the unconstitutionality of the practice, that their conduct violated the Eighth Amendment. In addition, the "obvious cruelty" of the practice should have provided the guards with "some notice" that their conduct violated the prisoner's constitutional rights.

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

Horn v. Banks 122 S. Ct. 2147, 70 USLW 3772 (6-17-02)

Habeas corpus, *Teague* analysis: The Court of Appeals for the Third Circuit erred in concluding that there was no need to apply *Teague v. Lane* (1989) analysis to determine whether a Supreme Court decision should be applied retroactively to a case on *habeas* review. *Teague* announced a general rule, subject to exceptions, that new constitutional rules of criminal procedure should not be applied to cases which have become final before the new rules were announced. A federal court may decline to apply *Teague* if the state has not argued it, but may not decline to apply *Teague* simply because state courts neglected to do so during state *habeas* review. Nor does the Antiterrorism and Effective Death Penalty Act (AEDPA) relieve courts of the responsibility to conduct *Teague* analysis. The AEDPA and *Teague* inquiries are "distinct."

9-0. *Per curiam.*

HUD v. Rucker 122 S. Ct. 1230, 70 USLW 4206 (3-26-02)

Public housing, eviction for drug activity: The Anti-Drug Abuse Act of 1988 unambiguously requires that lease terms in federally assisted low-income housing programs must vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the drug activity.

The "plain language" of 42 U.S.C. § 1437(d)(*l*)(6) precludes an "innocent tenant" exception. That section authorizes termination of tenancy for "any drug-related criminal activity ... engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control." Congress' decision not to impose any qualification in the statute, combined with use of the word "any" to modify "drug-related criminal activity," refutes any knowledge requirement. An interpretation of "under the tenant's control" as modifying "member of the tenant's household" "runs counter to basic rules of grammar"; the phrase instead modifies only "other person." Comparison to a related statutory provision containing an "innocent owner" exception for civil forfeiture "reinforces the unambiguous text," demonstrating that "Congress knew exactly how to provide an 'innocent owner' defense," yet did not do so in § 1437(d)(*l*)(6). Because the statute is unambiguous, there is "no need" to consult legislative history. The plain meaning does not produce an "absurd result," since the statute does not *require* eviction but merely authorizes it. Elimination of the threat to other residents posed by drug crime is the "obvious reason" why Congress would have authorized no-fault evictions. Because there is no statutory ambiguity, the canon of constitutional avoidance is inapplicable. Moreover, no-fault evictions for drug-related crime create no serious constitutional doubts.

8-0. Opinion for unanimous Court by Rehnquist. Breyer did not participate.

J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc. 122 S. Ct. 593, 70 USLW 4032 (12-10-01)

Patents, utility patents, plants: Utility patents may be issued for newly developed plant breeds pursuant to 35 U.S.C. § 101. In *Diamond v. Chakrabarty* (1980), the Court characterized the language of § 101, which extends patent protection to "any new and useful ... manufacture, or composition of matter," as being "extremely broad," and as covering man-made micro-organisms. The Board of Patent Appeals and Interferences has held that plants are within the provision's coverage. Neither the Plant Patent Act of 1930 (PPA) nor the Plant Variety Protection Act (PVPA) removes plants from § 101's coverage. By enacting the PPA in 1930, Congress conferred patent protection on asexually reproduced plants. Although Congress then believed that plants were not patentable under § 101, the premises for that belief have been disproved over time. As the Court concluded in *Chakrabarty*, the distinction is not "between living and inanimate things, but between products of nature, whether living or not, and human-made inventions." The 1952 recodification that placed the plant patent language in a separate section of the Code did not limit the scope of § 101's broad language, and thus was not an affirmative decision to deny patent protection to sexually reproduced plants. The PVPA, enacted in 1970, extended patent protection to certain sexually reproduced plants, but contained no statement that its coverage was intended to be the exclusive means of protecting sexually reproducing plants. Repeals by implication are disfavored, and the two statutes are capable of coexistence. The requirements for obtaining a utility patent under § 101 are more stringent than those for obtaining a PVP certificate, and the protections afforded by a utility patent are more extensive than those afforded by a PVP certificate. Dual protection by statutes that overlap is permissible so long as each reaches some distinct cases. Finally, although the Patent and Trademark Office has issued 1,800 patents for plants, Congress has

not only failed to pass legislation disapproving this practice, but has passed one law that suggests a recognition that plants are patentable under § 101.

6-2. Opinion of Court by Thomas, joined by Rehnquist, Scalia, Kennedy, Souter, and Ginsburg. Concurring opinion by Scalia. Dissenting opinion by Breyer, joined by Stevens. O'Connor did not participate.

JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd. 122 S. Ct. 2054, 70 USLW 4520 (6-10-02)

Federal courts, alienage diversity jurisdiction: A corporation organized under the laws of the British Virgin Islands is a "citizen or subject of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2). That provision grants federal district courts jurisdiction over actions between "citizens of a state and citizens or subjects of a foreign state." Although the British Virgin Islands is not recognized by the United States as an independent foreign state, it is a British Overseas Territory, and its citizens are at least "nationals" of the United Kingdom for purposes of alienage diversity jurisdiction. Alienage jurisdiction of federal courts was authorized by Article III of the Constitution because the "notoriously frosty" reception that foreign creditors received in state courts was an impediment to international relations and foreign investment. The jurisdictional statute had the same purpose. "Given the object of the alienage statute, ... there is no serious question that 'nationals' were meant to be amenable to the jurisdiction of the federal courts."

9-0. Opinion for unanimous Court by Souter.

Kansas v. Crane 122 S. Ct. 867, 70 USLW 4117 (1-22-02)

Sexual predator law, civil commitment: Civil commitment of a dangerous sexual predator need not be based on a finding that the person is completely unable to control his behavior. Rather, "there must be proof of serious difficulty in controlling behavior," and this proof "must be sufficient to distinguish [such sexual predators subject to commitment] from the dangerous but typical recidivist convicted in an ordinary criminal case." The Kansas Supreme Court misread *Kansas v. Hendricks* (1997) as requiring an "absolutist approach." "[T]he Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." The Court instead will proceed "deliberately and contextually" in this area. Both *Hendricks* and this case involved "volitional" impairments, so there is no need to determine whether confinement based solely on an "emotional" abnormality would be constitutional.

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

Kelly v. South Carolina 122 S. Ct. 726, 70 USLW 4068 (1-9-02)

Due Process, capital sentencing, jury instruction on parole ineligibility: The rule announced in two previous South Carolina cases (*Simmons v. South Carolina* (1994) and *Shafer v. South Carolina* (2001)) – that a capital defendant is entitled to inform the jury of his parole ineligibility under a sentence of life imprisonment without possibility of parole, if that sentence and a death sentence are the only sentencing alternatives, and if the defendant's future dangerousness is at issue – is not limited to situations in which the prosecutor states an intent

to prove future dangerousness. Rather, the rule applies to situations in which a logical inference of future dangerousness may be drawn from the evidence. Here, an inference of future dangerousness could be drawn from evidence of the defendant's violent behavior in prison, from evidence of his dangerous character, and from the prosecutor's description of him as a "dangerous" "bloody" "butcher" who was "more frightening than a serial killer." The fact that the jury did not ask the court for further instruction on parole eligibility does not alter the judge's duty to give instructions adequate to explain the law.

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

Kirk v. Louisiana 122 S. Ct. 2458, 70 USLW (6-24-02)

Fourth Amendment, entry into home: Police need either a warrant or probable cause plus exigent circumstances to make a lawful entry into a home to conduct a search or to make an arrest. *Payton v. New York* (1980) governs. Louisiana courts erred in concluding that probable cause was sufficient justification for a warrantless entry into a home, and that the issue of whether exigent circumstances had existed was "irrelevant."

9-0. *Per curiam.*

Lapides v. Board of Regents 122 S. Ct. 1640, 70 USLW 4425 (5-13-02)

Eleventh Amendment, removal to federal court: A state waives its Eleventh Amendment immunity from suit in federal court when it removes a case from state to federal court. The Court has long recognized that a state's voluntary appearance in federal court, as an intervenor or as a plaintiff, amounts to a waiver of Eleventh Amendment immunity. By removing a case from state to federal court, a state voluntarily invokes the federal court's jurisdiction, and thereby brings itself within the general principle of waiver by voluntary action. Cases requiring a "clear" indication of a state's intent are distinguishable when waivers are effected by litigation conduct, and in any event the litigation act of removal "is clear." A benign motive, *e.g.*, helping co-defendants avail themselves of generous federal rules, "cannot make the critical difference." The fact that state law may not authorize the attorney general to waive the state's Eleventh Amendment immunity does not prevent waiver. *Ford Motor Co. v. Department of Treasury of Indiana* (1945), relying on a similar state law to recognize immunity after a state defendant had litigated in federal court, is overruled "insofar as it would otherwise apply." Holding that voluntary invocations of federal jurisdiction constitute waiver of immunity is a "clear" rule that is easily applied by both federal courts and the states themselves, and that avoids "the problems of inconsistency and unfairness that a contrary rule of law would create."

9-0. Opinion for unanimous Court by Breyer.

Lee v. Kemna 122 S. Ct. 877, 70 USLW 4104 (1-22-02)

Habeas corpus, adequate state grounds to bar federal relief: Missouri procedural rules, first injected into the case by a state appellate court, did not constitute state grounds adequate to bar federal *habeas* corpus review. The defendant's motion for a brief continuance to allow time to locate his alibi

witnesses, who had been present but had left the courtroom, was denied by the trial judge on the basis that the judge had a personal matter to attend to the next day and another trial scheduled to begin on the following business day. The trial judge also opined that the alibi witnesses had "in effect abandoned the defendant." Neither the prosecutor nor the trial judge identified any procedural flaw in the presentation or content of the continuance motion. In dismissing the appeal, however, the Missouri Court of Appeals cited non-compliance with rules requiring that the continuance motion be submitted in writing, and specifying the requisite showings for obtaining a continuance based on absence of witnesses. Under the circumstances, where the court had "the information needed to rule intelligently on the merits of the motion" and the petitioner "had substantially, if imperfectly" made the required showing, the petitioner's right to defend his case "should not depend on a formal ritual ... that would further no perceivable state interest." Although ordinarily "violation of firmly established and regularly followed state rules" will be adequate to foreclose federal review, there are "exceptional cases" such as this one "in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question."

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

McKune v. Lile 122 S. Ct. 2017, 70 USLW 4502 (6-10-02)

Self-incrimination, sexual abuse treatment program: The Kansas Sexual Abuse Treatment Program, which requires participants to admit responsibility for the crime for which they have been sentenced and to complete a sexual history form detailing all prior sexual activities, does not violate a prisoner's privilege against self-incrimination. (A prisoner who testified at trial may risk prosecution for perjury by admitting responsibility for his crime; a prisoner who has committed crimes for which he has not been charged may risk prosecution by revealing prior sexual activity.) Refusal to participate in the treatment program results in a reduction of privileges within prison and transfer to a maximum security unit, but does not extend the term of imprisonment or affect eligibility for good-time credits or parole. These consequences, which can be described as "minor" changes in living conditions, are not serious enough to *compel* a prisoner to be a witness against himself. Although the penalties for refusal to participate in the treatment program are the same as those imposed for prison disciplinary violations, and give a prisoner a reason not to violate prison rules, it would take more to compel a prisoner to expose himself to additional criminal liability.

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

Mickens v. Taylor 122 S. Ct. 1237, 70 USLW 4216 (3-27-02)

Sixth Amendment, attorney's conflict of interest: In order to demonstrate a violation of the Sixth Amendment right to the assistance of counsel when the trial court has failed to inquire into the defense counsel's potential conflict of interest, about which the trial court knew or reasonably should have known, a criminal defendant must establish that the conflict of interest adversely affected

his counsel's performance. The situation in this case, in which court-appointed defense counsel had been representing the murder victim at the time of the crime, falls under the general rule established in *Strickland v. Washington* (1984), that a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Exceptions authorizing automatic reversal have been recognized for "situations in which the conviction will reasonably not be regarded as fundamentally fair," as, for example, when the defense attorney, over his timely objection, must actively represent the conflicting interests of co-defendants. Absent a timely objection by counsel representing multiple defendants, however, a defendant must establish that his counsel's performance was affected by the conflict of interest. The trial court's failure to inquire into a potential conflict does not reduce this burden of proof for the defendant. Moreover, a conflict caused by prior representation may be treated differently than conflicts caused by concurrent representation.

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

National Cable & Telecommunications Ass'n v. Gulf Power Co. 122 S. Ct. 782, 70 USLW 4094 (1-16-02)

Pole attachments, high-speed Internet and wireless access: The Federal Communications Commission (FCC) has jurisdiction under the Pole Attachments Act to regulate rates that utility companies charge for pole attachments for commingled high-speed Internet and traditional cable television services, and for wireless telecommunications providers. These attachments "fall within the heartland of the Act." The Act requires the FCC to "regulate the rates, terms, and conditions for pole attachments," and defines these to include "any attachment by a cable television system." The addition of high-speed Internet service to a cable that provides cable television service "does not change the character of the attaching entity," and it is the attaching entity – not the nature of service – that determines jurisdiction under the Act. The fact that the Act contains specific authority for two types of rates – one for attachments by cable companies "solely to provide cable service," the other for attachments by telecommunications companies – does not mean that these are the exclusive rates allowed, or that attachments not corresponding to either rate category are disallowed. If the attachments at issue do not fall into either rate category, "this would simply mean that the FCC must prescribe just and reasonable rates for them." The attachment of equipment of wireless telecommunications providers is also subject to regulation under the Act. Pole attachments are defined to include "any attachment by a ... provider of telecommunications service," and "telecommunications service" in turn is defined as the offering of telecommunications to the public "regardless of the facilities used."

6-2 (commingled cable, Internet); **8-0** (wireless telecommunications). Opinion of Court by Kennedy, joined by Rehnquist, Stevens, Scalia, Ginsburg, and Breyer; and joined in part by Thomas and Souter. Concurring and dissenting opinion by Thomas, joined by Souter.

National Railroad Passenger Corp. v. Morgan 122 S. Ct. 2061, 70 USLW 4524 (6-10-02)

Limitations period, Title VII: A Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate number of days (180 or 300 days, as set forth in 42 U.S.C. § 2000e-5(e)(1)) following the occurrence of the discrete act. A charge alleging a hostile work environment, however, will not be time barred so long as at least one of the multiple acts that together created the hostile environment took place within the time period. The statute provides that a charge "shall be filed" within the requisite number of days "after the alleged unlawful employment practice occurred." There is usually no issue as to when a "discrete" discriminatory or retaliatory act such as termination, failure to promote, denial of transfer, or refusal to hire, occurred. Each such discrete discriminatory act "starts a new clock" for filing charges. Hostile environment claims, on the other hand, are based on the cumulative effect of individual acts, and cannot be said to occur on any particular day. The series of separate acts collectively constitute one "unlawful employment practice" within the meaning of the statute. Provided that at least one act contributing to the claim occurs within the filing period, "the entire time period of the hostile environment may be considered [in] determining liability." The act on which a filing is based need not be the last act; it is possible that an unlawful practice has "occurred" even if it is continuing. Employers have recourse, *e.g.*, by raising a laches defense, if a plaintiff unreasonably delays filing.

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

Nebraska v. Wyoming 122 S. Ct. 585, 70 USLW 4338 (11-13-01)

Apportionment of North Platte River water: The Final Settlement and Stipulation among the states of Colorado, Wyoming, and Nebraska, which modifies the equitable apportionment of the North Platte River and includes the parties' agreement to create the North Platte Decree Committee to assist in monitoring and administering the decree, is approved and adopted.

9-0. *Per curiam.*

New York v. FERC 122 S. Ct. 1012, 70 USLW 4166 (3-4-02)

Electricity regulation, FERC jurisdiction: The Federal Energy Regulatory Commission (FERC) had jurisdiction to include "unbundled" retail transmissions (those transmissions for which the costs of transmission and the costs of electrical energy are separately billed for retail customers) within the scope of an order that electric utilities provide competitors with non-discriminatory "open access" to transmission services. FERC also had the authority not to include "bundled" retail sales within the scope of the order. The "plain language of the FPA [Federal Power Act] readily supports FERC's claim of jurisdiction." The FPA grants FERC authority to regulate "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce," and also prohibits unreasonable rates and undue discrimination with respect to covered transactions. FERC's jurisdiction over transmissions is not

limited to the wholesale market. Due to the interconnected nature of the power grids in the continental United States, "any electricity that enters the grid immediately becomes part of a vast pool of energy that is constantly moving in interstate commerce." Consequently, the unbundled retail transmissions regulated by FERC are "transmissions of electric energy in interstate commerce" that are subject to FERC jurisdiction. The FPA went beyond merely closing the "*Attleboro*" gap in regulation of wholesale, interstate transactions that are beyond a state's jurisdiction. The presumption against preemption, applicable when state and federal laws conflict, is inapplicable in a case such as this, when the issue instead is whether a federal agency is acting within the scope of its authority. The FPA's general policy statement about intent to preserve state jurisdiction, echoed in the legislative history, "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." Moreover, the legislative history "is not particularly helpful because of the interim developments in the electric industry." FERC had the discretion to determine that it was not necessary to apply its open access remedy to bundled retail transmissions. FERC did not rule that it lacked jurisdiction over bundled sales, but rather sought to remedy a problem of discrimination in the wholesale power market, and determined that its regulation of the wholesale and unbundled markets was a sufficient response.

9-0 (jurisdiction over unbundled sales); **6-3** (decision not to regulate bundled sales). Opinion of Court by Stevens, unanimous in part; and joined in separate part by Rehnquist, O'Connor, Souter, Ginsburg, and Breyer. Concurring and dissenting opinion by Thomas, joined by Scalia and Kennedy.

Owasso Indep. Sch. Dist. v. Falvo 122 S. Ct. 934, 70 USLW 4123 (2-19-02)

Educational privacy, peer grading: The practice of "peer grading," under which school teachers require students to score each others' tests, is not prohibited by the Family Educational Rights and Privacy Act of 1974. The Act authorizes the withholding of federal funds from school districts that have a policy or practice of permitting the release of "education records" of students without their parents' written consent. "Education records" are defined as records directly related to a student which "are maintained by an educational agency or institution or by a person acting for such agency or institution." Student papers subject to peer grading "are not, at that stage, 'maintained'" within the meaning of the definition. Moreover, a student grader is not "a person acting for" an educational institution in maintaining records. "Correcting a classmate's work can be as much a part of the assignment as taking the test itself," and the Act does not prohibit such educational techniques. Other sections of the Act support this interpretation. The school must "maintain a record" of those who have requested access to a student's education records, and this requirement would become a "weighty administrative burden" on teachers if it were applied in the peer grading context. The fact that this record of access is to be kept with the education records suggests that the records are to be kept by a "single central custodian." Also, parents are entitled to a hearing to contest the accuracy of education records, and it is doubtful that Congress intended to authorize such formal challenges to the grading of each test or paper. Courts should "hesitate" before interpreting a statute to "intervene in [such] drastic fashion with traditional state functions."

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

Porter v. Nussle 122 S. Ct. 983, 70 USLW 4155 (2-26-02)

Prison Litigation Reform Act, exhaustion of administrative remedies: The exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA) "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." The Act provides that "no action shall be brought with respect to prison conditions ... by a prisoner ... until such administrative remedies as are available are exhausted." In the context of enactment, it is clear that this requirement "applies to all prisoners seeking redress for prison circumstances or occurrences." The Act was adopted to make exhaustion mandatory and to "reduce the quantity and improve the quality of prisoner suits." In 1991 the Court had interpreted the term "prison conditions," used in a similar context, to include isolated incidents of excessive force as well as ongoing prison conditions. There is no suggestion that Congress intended the PLRA to depart from this interpretation and divide prisoner petitions into separate categories. Indeed, it makes "scant sense" that Congress would have intended to dispense with an exhaustion requirement for single-occurrence assaults while retaining the requirement for widespread or routine beatings.

9-0. Opinion for unanimous Court by Ginsburg.

Ragsdale v. Wolverine World Wide, Inc. 122 S. Ct. 1155, 70 USLW 4191 (3-19-02)

Family and Medical Leave Act: A regulation penalizing an employer for failure to comply with notification requirements of the Family and Medical Leave Act (FMLA) "is contrary to the Act and beyond the Secretary of Labor's authority." The statute requires employers to post information about employee rights under FMLA, and imposes a small monetary penalty for non-compliance. The regulation provides that, if an employee takes medical leave and the employer does not designate the leave as FMLA leave and so notify the employee, the leave taken does not count against the employee's FMLA entitlement. In this case the employer granted the employee 30 weeks of leave rather than the "total of 12" required by the FMLA, but did not notify the employee that her leave counted as FMLA leave. The regulation would have penalized the employer by requiring that it grant an additional 12 weeks of leave. Even if the regulation's additional notice requirement is valid, the categorical penalty for its breach "is contrary to the Act's remedial design." The FMLA authorizes damages and equitable relief only if an employee establishes that she has been prejudiced by a violation, yet the penalty regulation establishes an "irrebuttable" presumption that an employee's rights have been impaired. The regulation also has the effect of entitling an employee to reinstatement and back pay. Not only does the regulation work "an end run around important limitations" of FMLA, it also "amends the FMLA's most fundamental substantive guarantee – the employee's entitlement to 'a total of 12 workweeks of leave.'" Finally, the penalty regulation is "in considerable tension with the statute's admonition" that it not be construed to discourage employers from adopting "more generous" policies than the Act requires.

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

Raygor v. Regents of Univ. of Minnesota 122 S. Ct. 999, 70 USLW 4159 (2-27-02)

Eleventh Amendment, pendent jurisdiction, tolling of limitations period: The supplemental jurisdiction statute, 28 U.S.C. § 1367, does not toll the limitations period applicable to state law claims that are brought in state courts after having been dismissed in federal court on Eleventh Amendment grounds. The statute authorizes federal district courts to assert supplemental jurisdiction over state law claims that are "part of the same case or controversy" as the federal claim, and provides that the limitations period for "any" such state law claim that is "asserted" shall be tolled during the pendency of the action in federal court and for 30 days thereafter. The Eleventh Amendment bars the adjudication in federal court of pendent (supplemental) state law claims against non-consenting state defendants, and in that context constitutes "an explicit limitation on federal jurisdiction." Congress may abrogate states' Eleventh Amendment immunity only with "unmistakably clear" statutory language. The language of section 1367 that tolls state limitations periods is not unmistakably clear. "On its face," the language "purports to apply to 'any claim asserted,'" and thus could be read to apply to claims that are asserted but later dismissed on Eleventh Amendment grounds. But the Court has held that such general language is insufficient to satisfy clear statement requirements. A clear statement rule is appropriate because application of the tolling requirement to extend the time for filing in state court would raise "serious" constitutional doubts. If applied in this manner, the provision "at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity." The State did not "unequivocally" express a consent to be sued in federal court, and hence did not waive its Eleventh Amendment immunity.

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

Republican Party of Minnesota v. White 122 S. Ct. 2528, 70 USLW 4720 (6-27-02)

First Amendment, limitation on judicial candidates' speech: A canon of judicial conduct adopted by the Minnesota Supreme Court that prohibits a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues" violates the First Amendment. Because this "announce clause" prohibits speech on the basis of its content and burdens political speech "at the core of our First Amendment freedoms," strict scrutiny applies: the clause must be "narrowly tailored" to serve a "compelling" state interest. The announce clause is not narrowly tailored to serve the compelling interests of preserving the impartiality and the appearance of impartiality of the state judiciary. Because the clause restricts speech on the basis of issues, not parties, it is clearly not narrowly tailored to serve impartiality in the traditional sense of lack of bias for or against either party. Impartiality defined as "lack of preconception in favor of or against a particular legal view" is not a compelling state interest, since "avoiding judicial preconceptions on legal issues is neither possible nor desirable." The clause is "woefully underinclusive" if it is designed to promote "impartiality" in the sense

of "openmindedness," since it prohibits speech by judges "only at certain times and in certain forms." The premise "that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." The Court has "never allowed the government to prohibit candidates from communicating relevant information to voters during an election."

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

Ring v. Arizona 122 S. Ct. 2458, 70 USLW 4666 (6-24-02)

Sixth Amendment right to jury trial, capital sentencing: Arizona's capital sentencing law violates the Sixth Amendment right to jury trial by allowing a sentencing judge to find an aggravating circumstance necessary for imposition of the death penalty. *Walton v. Arizona* (1990), holding that the Sixth Amendment does not require that specific findings authorizing the imposition of a death sentence be made by the jury, is overruled. The Court established the governing principle in *Apprendi v. New Jersey* (2000), holding that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The "relevant inquiry is one not of form, but of effect." In effect, the required finding of an aggravating circumstance exposed the defendant to a greater punishment than that authorized by the jury's guilty verdict. Characterizing a fact or circumstance as a "sentencing factor" rather than an "element" of a crime "is not determinative of the question 'who decides,' judge or jury." The fact that states have constructed "elaborate" capital sentencing procedures in order to comply with requirements derived from the Eighth Amendment does not require that capital defendants be denied the constitutional protection recognized in *Apprendi*. Nor does the right to jury trial depend on "the relative rationality, fairness, or efficiency" of potential factfinders. "The right to trial by jury ... would be senselessly diminished if it encompasses the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."

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

Rush Prudential HMO, Inc. v. Moran 122 S. Ct. 2151, 70 USLW 4600 (6-20-02)

ERISA, preemption: ERISA does not preempt section 4-10 of the Illinois Health Maintenance Organization Act, which provides HMO subscribers with a right to independent medical review of certain denials of benefits. ERISA broadly preempts any state laws that "relate to" employee benefit plans, but makes an exception for state laws that "regulat[e] insurance." It is "beyond serious dispute" that the Illinois HMO Act "relates to" employee benefit plans within the meaning of ERISA, so the issue becomes whether the exception for insurance regulation applies. The first aspect of determining whether a law regulates insurance is "a common-sense enquiry" that focuses on the "primary elements of an insurance contract" – the spreading and underwriting of a policyholder's risk. HMOs are both health care providers and insurers, and in

the latter capacity "actually underwrite and spread risk among their participants." Congress has understood this fact about HMOs "from the start," beginning with enactment of the HMO Act of 1973. The Illinois law also satisfies tests used to determine whether a law regulates insurance for purposes of the McCarran-Ferguson Act: it regulates an integral part of the policy relationship between insurer and insured, and it does not apply to entities outside the insurance industry. There is no federal uniformity policy embodied in ERISA that overrides the preemption exception for state laws regulating insurance. The Illinois provision imposes no new obligation or remedy that is inconsistent with ERISA objectives. Restricting an insurer's autonomy in defining "terms congenial to its own interests" is "inseparable from enforcing the quintessentially state-law standards of reasonable medical care."

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.

Sao Paulo State v. American Tobacco Co. 122 S. Ct. 1290, 70 USLW 3613 (4-1-02)

Judges, disqualification: A federal district court judge whose name had appeared erroneously, prior to his appointment to the bench, on a motion to file an amicus brief in a similar suit against some of the same defendants, need not have disqualified himself. 28 U.S.C. § 455(a) requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The Court held in a 1988 case that this language requires disqualification "'if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge' of his interest or bias in the case." The Fifth Circuit erred in requiring recusal in this case based on what a reasonable person would believe *without* knowing all of the circumstances – *i.e.*, without knowing that the judge's name had been added mistakenly and without his knowledge to a *pro forma* motion filed by a trial lawyer's association. The motion had erroneously listed the judge as president of the association even though he had retired from that position six months earlier.

9-0. *Per curiam.*

SEC v. Zandford 122 S. Ct. 1899, 70 USLW 4485 (6-3-02)

Securities fraud: A stockbroker entrusted with a power of attorney to engage in securities transactions without his customer's prior approval violated section 10(b) of the Securities Exchange Act of 1934 as well as SEC Rule 10b-5 by selling the customer's securities and using the proceeds for his own benefit. The fraud was "in connection with the purchase or sale of any security" within the meaning of the Act and rule. Among Congress's objectives in passing the 1934 Act was "to insure honest securities markets and thereby promote investor confidence" after the market crash of 1929. Consequently, the Act should be construed "flexibly to effectuate its remedial purposes." The SEC's broad reading of section 10(b) as covering the sale of securities with the intent to misappropriate the proceeds is reasonable, and entitled to deference. Several earlier decisions of the Court support this interpretation. In this case the securities sales and the broker's fraudulent practices were not independent events, but rather were properly viewed as a "course of business." To be covered under the prohibition, fraud need not involve an affirmative misrepresentation,

or manipulation of a particular security. The fraud in this case prevents investors from trusting their brokers to execute transactions for their benefit, and also undermines the value of a discretionary account.

9-0. Opinion for unanimous Court by Stevens.

Stewart v. Smith 122 S. Ct. 2578, 70 USLW 3796 (6-28-02)

Habeas corpus, procedural default: The ruling of the Arizona Supreme Court dismissing the petitioner's state *habeas* corpus petition for failure to comply with an Arizona rule of criminal procedure was based on state law grounds independent of federal law. The Arizona rule, which provides for waiver of *habeas* claims that have not been raised in earlier *habeas* petitions, does not require courts to evaluate the merits of the particular claim. In fact, the state court ruling did not depend on evaluation of the merits of the petitioner's ineffective-assistance-of-counsel claim. Because the petitioner defaulted on the federal claim in state court and the state ruling was based on state procedural grounds independent of the federal claim, the federal petition may also be barred.

9-0. *Per curiam.*

Swierkiewicz v. Sorema N.A. 122 S. Ct. 992, 70 USLW 4152 (2-26-02)

Civil procedure, specificity of complaint: A complaint in an employment discrimination suit need not contain specific facts establishing a *prima facie* case of discrimination. Rather, as provided by Federal Rule of Civil Procedure 8(a)(2), the complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and providing the defendant fair notice of what the claim is and the grounds upon which it rests. The simplified notice pleading system of which Rule 8(a) is a part was adopted to focus litigation on the merits of a claim. Liberal discovery rules and summary judgment motions are available to define disputed facts and issues. The prima facie requirement set forth in *McDonnell Douglas Corp. v. Green* (1973) is an evidentiary standard, not a pleading requirement. There are limited exceptions to simplified pleading, but there is no heightened standard for employment discrimination suits.

9-0. Opinion for unanimous Court by Thomas.

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency 122 S. Ct. 1465, 70 USLW 4260 (4-23-02)

Taking of property, moratorium on development: Two consecutive moratoria on development of environmentally sensitive lands within the Lake Tahoe Basin, lasting a total of 32 months while the Tahoe Regional Planning Agency was preparing a comprehensive land use plan, did not constitute a *per se* taking of property within the meaning of the Fifth Amendment. The issue of whether a temporary moratorium on property development constitutes a taking is best analyzed under the *ad hoc*, factual approach set out in the *Penn Central* case (1978), and not under *per se* rules that are applied when government takes physical possession of property. Precedents from the physical takings context are generally inappropriate in the context of regulatory takings. The Court recognized a "narrow exception" in the *Lucas* case (1992) by establishing a categorical rule for regulatory takings that effect a permanent deprivation of all beneficial use of property, but the temporary moratoria at issue do not fall within

that exception. The period of time during which the property was subject to the moratoria may not be severed from the remainder of a fee simple property estate in order to invoke the *Lucas* exception; the appropriate focus is on "the parcel as a whole." Both temporal and spatial dimensions must be considered if a property interest is to be viewed in its entirety. "[B]ecause the property will recover value as soon as the prohibition is lifted," a fee simple estate is not rendered valueless by a temporary prohibition on economic use. The Court's decision in *First English* (1987) is not controlling; there the Court dealt with valuation of property, and did not rule on whether the temporary regulation at issue had constituted a taking. Finally, considerations of fairness and justice do not require creation of a new categorical rule for moratoria. An "extreme" rule that would require compensation for any deprivation of all economic use, no matter how brief, "would render routine government processes prohibitively expensive or encourage hasty decisionmaking." A narrower rule, excluding normal delays associated with the processing of permits, or applicable only if delays exceed one year, "would still impose serious financial constraints on the planning process." Although a one-year moratorium may well be viewed with "special skepticism," "in some cases a 1-year moratorium may not impose a burden at all." Fairness and justice "will best be served" by relying on the flexible *Penn Central* approach, "rather than by attempting to craft a new categorical rule."

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

Thomas v. Chicago Park Dist. 122 S. Ct. 775, 70 USLW 4091 (1-15-02)

First Amendment, permit for use of park: Chicago's municipal park ordinance, which requires individuals to obtain a permit before conducting large-scale events in a park, need not contain the procedural safeguards described in *Freedman v. Maryland* (1965). *Freedman* involved a licensing board authorized to censor movies based on their content, and the Court imposed safeguards limiting the operation of prior restraint and requiring expeditious judicial review. Chicago's licensing scheme governing park use "is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum." The various grounds for denying a permit "are reasonably specific and objective," being designed to coordinate multiple uses of limited space and to ensure financial accountability for damage caused by an event, and have nothing to do with the content of speech. The fact that permit denial is discretionary rather than mandatory when any of the listed grounds for denial are met does not invalidate the ordinance. If this authority is abused by favoring or disfavoring certain speakers, any such abuse "must be dealt with if and when a pattern of unlawful favoritism appears."

9-0. Opinion for unanimous Court by Scalia.

Thompson v. Western States Medical Center 122 S. Ct. 1497, 70 USLW 4275 (4-29-02)

First Amendment, commercial speech: Section 503A of the Federal Food, Drug, and Cosmetic Act, added by the Food and Drug Administration Modernization Act of 1997 to exempt "compounded drugs" from the regular FDA approval process if providers comply with several restrictions, including that they refrain from advertising or promoting the compounded drugs, violates

the First Amendment. "Compounded drugs" are drugs not commercially available that a pharmacist, pursuant to prescription, specially tailors for individual needs. The advertising restriction does not meet the *Central Hudson* test for acceptable governmental regulation of commercial speech. Under *Central Hudson*, government may regulate commercial speech that does not relate to unlawful activity and that is not misleading if the asserted governmental interest is "substantial," if the regulation directly advances that interest, and if the regulation "is not more extensive than is necessary to serve that interest." The government has an "important" interest in preventing the exemption for small-scale compounding from becoming a loophole by which large-scale drug manufacturing can avoid the FDA drug approval process. Even assuming that drugs cannot be marketed on a large scale without advertising, the government failed to demonstrate that the advertising restriction is "not more extensive than is necessary" to serve its interest. "[R]egulating speech must be a last – not first – resort," and there are several non-speech-related means by which government might achieve its interests in distinguishing compounding and large-scale manufacturing. These include banning the use of commercial-scale equipment in the compounding process, prohibiting sale of compounded drugs at wholesale, prohibiting or limiting out-of-state sales, and various means of restricting the amount of compounded drugs that a pharmacist may produce. The government "has not offered any reason why these possibilities, alone or in combination, would be insufficient" to achieve its objective. A hypothesized governmental interest in limiting the sale of compounded drugs to patients who may not need them, but who respond to advertisements by asking their doctors to prescribe them, would not justify the advertising restriction. The fear that people would make bad decisions if given truthful information is not a valid basis for restricting speech.

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

Toyota Motor Mfg., Ky., Inc. v. Williams 122 S. Ct. 681, 70 USLW 4050 (1-8-02)

Americans With Disabilities Act, definition of "disability": A showing that a physical impairment such as carpal tunnel syndrome affects an individual's ability to perform manual tasks at work does not establish that the employee is disabled within the meaning of the ADA. When the ADA's definition of "disability," which requires "a physical or mental impairment that substantially limits one or more of the major life activities," is applied to the major life activity of "performing manual tasks," an individual must be found to have an impairment "that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." A medical diagnosis of impairment does not alone suffice. An "individualized assessment" of the effects of an impairment is especially important for an impairment like carpal tunnel syndrome, for which symptoms vary widely from individual to individual. Moreover, "occupation-specific tasks may have only limited relevance to the manual tasks inquiry." The proper inquiry is whether the claimant is unable to perform the variety of manual tasks that are central to most people's daily lives, e.g., household chores, bathing, and brushing one's teeth.

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

TRW Inc. v. Andrews 122 S. Ct. 441, 70 USLW 4006 (11-13-01)

Fair Credit Reporting Act, limitations period: The two-year statute of limitations period that governs suits brought under the Fair Credit Reporting Act is not a discovery rule. The provision, set forth in 15 U.S.C. § 1681p, states a general rule that an action may be brought "within two years from the date on which the liability arises," and makes an exception for certain cases involving willful misrepresentation, which may be brought within two years of the plaintiff's "discovery" of the misrepresentation. The Court of Appeals for the Ninth Circuit erred in ruling that the FCRA's limitations period falls within a "general" federal discovery rule. It is not necessary to decide whether there is such a general federal discovery rule, because "the text and structure of §1681p evince Congress' intent to preclude judicial implication of a discovery rule." The "most natural reading" of the provision is that "Congress implicitly excluded a general discovery rule by explicitly including a more limited one." A general discovery rule would for practical purposes render the exception almost entirely superfluous, and it is a "cardinal principle of statutory construction ... that no clause, sentence, or word should be superfluous, void, or insignificant." The words "date on which the liability arises" do not require a discovery rule, and are "not particularly instructive." The provision's legislative history is "similarly unhelpful." While Congress abandoned initial language that would have tied the start of the limitations period to "the date of the occurrence of the violation," it also declined to include language tying the period to "the date on which the violation is discovered."

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

United States Postal Serv. v. Gregory 122 S. Ct. 431, 70 USLW 4001 (11-13-01)

Civil Service Reform Act: The Merit System Protection Board has broad discretion under the Civil Service Reform Act to determine how to review prior disciplinary actions that are pending during its review of a termination or other serious disciplinary action. The Federal Circuit erred in its "sweeping" ruling that the Board may never rely on prior disciplinary actions that are still subject to ongoing review. The Board's decisions should be reviewed under an arbitrariness standard, and there was "nothing arbitrary about the Board's decision to independently review prior disciplinary actions." The Board has applied this policy consistently for 19 years, and, in view of the possible alternatives – either waiting for the pending disciplinary actions to be resolved or ignoring them altogether in the termination action – did not lack reasons for its policy. The independent review of pending actions does not violate the CSRA. The Board's authority to review the serious disciplinary action of termination must include the authority to review the series of disciplinary actions on which the termination was based, even though some of those actions were minor actions that the Board could not have reviewed independently.

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

United States v. Arvizu 122 S. Ct. 744, 70 USLW 4076 (1-15-02)

Fourth Amendment, vehicle stop based on "reasonable suspicion": A border patrol agent had reasonable suspicion to stop a minivan traveling on unpaved

roads in a possible attempt to evade a border patrol checkpoint on the highway. "Reasonable suspicion to believe that criminal activity may be afoot" is all that the Fourth Amendment requires for an investigatory stop. In reviewing such cases, courts must look at the "totality of the circumstances" to determine whether the detaining officer, drawing on his experience as an officer, had a "particularized and objective basis" for suspecting legal wrongdoing. The Ninth Circuit departed from the totality of the circumstances inquiry by excluding seven of the ten factors relied on by the officer as carrying little or no weight in isolation, and by ruling that the remaining three were insufficient to render the stop permissible. A determination that reasonable suspicion exists "need not rule out the possibility of innocent conduct." While each of the factors relied on by the agent was susceptible to an innocent explanation, they sufficed, taken together, to create a reasonable suspicion.

9-0. Opinion for unanimous Court by Rehnquist. Concurring opinion by Scalia.

United States v. Bass 122 S. Ct. 2389, 70 USLW 3797 (6-28-02)

Discovery, claim of racially selective prosecution: The defendant was not entitled to a discovery order requiring the Government to provide information relating to its decisions to seek the death penalty. Under *United States v. Armstrong* (1996), a defendant seeking discovery on a claim of selective prosecution must show some evidence of discriminatory intent and discriminatory effect. The evidence of discriminatory effect must show that similarly situated defendants of a different race were not prosecuted. The defendant's submission, consisting of nationwide statistics broken down only by race, was inadequate to demonstrate discriminatory effect because it provided no information about similarly situated defendants.

9-0. *Per curiam.*

United States v. Cotton 122 S. Ct. 1781, 70 USLW 4429 (5-20-02)

Plain error, defective indictment: The appeals court erred in vacating an enhanced sentence because of a defective indictment about which the defendant had not objected at trial. The indictment had omitted the factual basis for increasing the sentence beyond the prescribed statutory maximum. It alleged distribution and possession of a "detectable amount" of cocaine base – an offense punishable by no more than 20 years' imprisonment – but did not allege offenses involving at least 50 grams, and punishable by imprisonment for life. The defendant was sentenced to 30 years' imprisonment. A defective indictment is not a jurisdictional error that deprives a court of power to adjudicate a case. The issue, therefore, involves application of the "plain error" test of Federal Rule of Criminal Procedure 52(b). The error in this case was "plain." There is no need to determine whether the plain error affected "substantial rights," however, because the final part of the test was not satisfied: "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." The evidence that the drug conspiracy involved at least 50 grams of cocaine base was "overwhelming" and "essentially uncontroverted."

9-0. Opinion for unanimous Court by Rehnquist.

United States v. Craft 122 S. Ct. 1414, 70 USLW 4249 (4-17-02)

Taxation, Federal, tax lien on "entireties" property: A federal tax lien may attach to the taxpayer's interest in property that the taxpayer and his spouse own jointly in a "tenancy by the entirety." A spouse's share in a tenancy by the entirety constitutes "property" or "rights to property" within the meaning of the federal tax lien statute, 26 U.S.C. § 6321. What constitutes "property" under the statute is "ultimately a question of federal law," the answer to which "largely depends upon" the substance but not the "labels" of state law. The Michigan Supreme Court has "characterize[d]" a tenancy by the entirety as creating no individual rights in a spouse that are separable from that of the other spouse. A spouse does, however, have the right to use the property, the right to exclude third parties from it, the right of survivorship, the right to become a tenant in common upon divorce, the right to sell or encumber the property with his spouse's consent, and the right to block his spouse from selling or encumbering the property unilaterally. These rights give a spouse "a substantial degree of control" over entireties property, and therefore qualify as "property" or "rights to property" under section 6321. It is already established, in a case involving homestead property, that federal tax liens may attach to property that the taxpayer may not alienate unilaterally. Legislative history indicating that in 1954 the Senate rejected an amendment with explicit language making an interest in a tenancy by the entirety subject to a tax lien is not persuasive. Failed legislative proposals, and congressional inaction in general, lack persuasive force, and there is some evidence that the rejected amendment was deemed superfluous. A common law rule that tax liens could not attach to entireties property was not so well established at the time of enactment as to require the presumption that Congress intended the rule to control interpretation.

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

United States v. Drayton 122 S. Ct. 2105, 70 USLW 4552 (6-17-02)

Fourth Amendment, search of bus passengers: Police officers who confront passengers on a bus and ask to search their luggage and persons need not advise the passengers of their right not to cooperate. The standard announced in *Florida v. Bostick* (1991) – whether a reasonable person would feel free to terminate the encounter – determines whether there was a seizure. The bus passengers in this case were neither seized nor searched unreasonably when three police officers got on a bus stopped at a station, one stationed himself in the rear facing forward, one stationed himself in the front facing rearward, and the third proceeded from back to front questioning passengers. There were ample grounds for the district court to conclude that everything that took place between the officers and the passenger was "cooperative," and that there was nothing "coercive or confrontational" about the encounter. An officer asked the defendant's traveling companion whether he objected to having his luggage and person searched, and the companion gave his consent. After the officer found drugs on the companion's person, he asked the defendant whether he objected to being searched, and the defendant indicated his consent. Under the totality of the circumstances, the search was voluntary, and hence reasonable.

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

United States v. Fior D'Italia, Inc. 122 S. Ct. 2117, 70 USLW 4565 (6-17-02)

Taxation, Federal, FICA taxes: The aggregate estimation method used by the IRS to account for employees' tips in calculating an employer's Federal Insurance Contribution Act (FICA) tax is authorized by the statute. The IRS has the authority to make "assessments of all taxes ... which have not been duly paid," and this necessarily includes the authority to estimate an individual's tax liability if the method used is "reasonable." The FICA tax is imposed on "wages" paid by an employer, and the term "wages" is defined to include tips "received by an employee in the course of his employment." The respondent's linguistic argument "makes too much out of too little." The fact that the definitional language speaks in the singular is overborne by the fact that the "operational" sections speak in the plural. The fact that other statutory provisions authorize the IRS to use estimation for other purposes does not create a negative implication that the IRS may not do so in calculating the tips component of wages. The fact that the aggregate estimate will sometimes be inaccurate does not mean that its use is unreasonable; a taxpayer remains free to show that the method likely produced an inaccurate result in his case. Moreover, the respondent did not establish that individualized assessments would inevitably produce a more reasonable result than the estimates. An alleged "fairness" problem created by an IRS regulation that directs the employer to calculate FICA taxes on the basis of tips reported by employees is alleviated by the fact that penalties do not attach until after the employer refuses an IRS demand for payment based on estimated tips not reported. The "abuse of power" argument also fails. Use of aggregate estimates is not prohibited by the statutes that protect restaurants from onerous monitoring requirements.

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

United States v. Knights 122 S. Ct. 587, 70 USLW 4029 (12-10-01)

Fourth Amendment, search as condition of probation: A warrantless search of a probationer subject to a probation order allowing law enforcement officers to search him and his property at any time does not violate the Fourth Amendment if the search is supported by reasonable suspicion. Searches pursuant to such a probation condition need not be limited to those with a probationary purpose. *Griffin v. Wisconsin* (1987), in which the Court upheld searches of probationers as justified by a "special need" for supervision to assure that probation restrictions are observed, expressly reserved the question of whether searches of probationers are otherwise reasonable under the Fourth Amendment. Probation status informs both sides of the Fourth Amendment reasonableness balance. Probation is a form of criminal sanction. Criminal sanctions by their nature curtail freedoms enjoyed by law-abiding citizens, and the search condition significantly diminished the probationer's reasonable expectation of privacy. On the other side of the balance, the governmental interest in protecting society from the increased probability that a probationer will engage in criminal conduct justifies a lesser-than-probable-cause standard

for probationers. "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's diminished privacy interests is reasonable." Because the search in this case passes the reasonableness test, the Court declines to decide whether the respondent's acceptance of the search condition constituted consent.

9-0. Opinion for unanimous Court by Rehnquist. Concurring opinion by Souter.

United States v. Ruiz 122 S. Ct. 2450, 70 USLW 4677 (6-24-02)

Sixth Amendment right to fair trial, waiver: A criminal defendant may waive her right to receive impeachment information from the prosecution relating to any informants or other witnesses, and also may waive her right to receive information supporting any affirmative defense. The government's action in withdrawing its offer of a plea bargain because the defendant refused to waive those rights, therefore, was not unconstitutional. The right to receive exculpatory impeachment information from prosecutors before trial is part of the Sixth Amendment's basic "fair trial" guarantee. By pleading guilty, however, a defendant forgoes the right to a fair trial and other accompanying constitutional guarantees. Disclosure of impeachment information is an important aspect of the fairness of a trial, but is not of special importance in relation to whether a plea or waiver is voluntary. A waiver is voluntary if the defendant understands the nature of the right and how it applies in general; there is no requirement that a defendant also understand the specifics of the prosecution's case and the specific consequences of invoking or waiving the right. Due process considerations also weigh against recognition of a right to receive impeachment information prior to a guilty plea. The value to the defendant may be limited, and the harm to the government's interests in securing guilty pleas and conducting ongoing investigations may be significant. Similar considerations govern a defendant's waiver of her right to receive government information regarding any affirmative defenses the defendant may have.

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

United States v. Vonn 122 S. Ct. 1043, 70 USLW 4181 (3-4-02)

Criminal procedure, acceptance of guilty plea, harmless error: A defendant who lets Rule 11 error pass without objection in the trial court must carry the burden imposed by Rule 52(b) to establish that the error affected his substantive rights. Rule 11 of the Federal Rules of Criminal Procedure requires that a judge, prior to accepting a guilty plea, inform the defendant about the charges he faces and the rights he will have if he proceeds to trial. Rule 11(h) adds a harmless error rule applicable if the trial judge fails to adhere to Rule 11's requirements: a violation "that does not affect substantial rights shall be disregarded." This restates Rule 52(a)'s general harmless error rule applicable to errors at trial, and places the burden on the government to establish that the error was "harmless." Rule 52(b) provides that a defendant who failed to object to a "plain error" at trial may still raise the issue on appeal, but places the burden on the defendant to establish that his "substantial rights" were affected. Rule 11(h), added after Rule 11 was revised to place more detailed requirements on the trial judge, did not supplant applicability of Rule 52(b) for a defendant who fails to object to a

Rule 11 error. Otherwise, a defendant would lose nothing by failing to object to obvious Rule 11 error when it occurs. The issue is not resolved by the text of the rules. The interpretive canon attaching a negative inference to Congress's inclusion of a provision without a companion provision with which it is usually paired is at best "only a guide," and gives way to contrary indications. One contrary indication is provided by the conflicting interpretational rule that repeals by implication are disfavored. There is no "persuasive" reason to believe that Rule 11(h) was intended to repeal Rule 52(b) for every Rule 11 case. In determining the effect of a Rule 11 error, a court is not limited to the record of the plea proceeding, but may look to the record of preliminary proceedings as well. Because the defendant was informed in preliminary stages of his right to counsel if he proceeded to trial, the case is remanded so that the Court of Appeals can take this information into account.

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

US Airways, Inc. v. Barnett 122 S. Ct. 1516, 70 USLW 4285 (4-29-02)

Americans with Disabilities Act, seniority rules: An employer's showing that an accommodation requested by an employee with a disability conflicts with the rules of a seniority system is ordinarily sufficient to establish that the requested accommodation is not "reasonable" within the meaning of the Americans with Disabilities Act (ADA), and to entitle the employer to summary judgment. The ADA does not create an absolute rule always favoring seniority systems or always favoring a requested accommodation in spite of conflict with seniority rules. But "ordinarily ... in the run of cases," seniority rules will prevail. There is case law precedent favoring seniority rights in the context of religious discrimination under Title VII, and also under "the linguistically similar Rehabilitation Act." A seniority system, whether the result of collective bargaining or whether unilaterally imposed by management, "provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." To require a "typical employer to show more than the existence of a seniority system might undermine the employees' expectations of consistent, uniform treatment." "Nothing" in the ADA suggests that Congress "intended to undermine seniority systems in this way." However, once the employer has established that an accommodation conflicts with seniority rules, the employee may attempt to establish that "special circumstances" require a different result, as would be the case, for example, if the employer "fairly frequently" changes the seniority system unilaterally, and thereby diminishes employee expectations to the point where one more departure would "not likely make a difference."

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

Utah v. Evans 122 S. Ct. 2191, 70 USLW 4628 (6-20-02)

Census, "hot-deck" imputation method: The Census Bureau's use of a methodology called "hot-deck imputation" does not violate a statutory prohibition on using a "statistical method known as 'sampling'" for purposes of

apportionment of Representatives, and is not inconsistent with the Constitution's reference to an "actual enumeration" of population. Utah has standing to sue. The relevant statutes do not bar post-census lawsuits or bar revision of the certification of population on which apportionment of Representatives is based, and it is "likely" that Utah's success in this action "would bring about the ultimate relief that Utah seeks." "Hot-deck imputation" is a method, using current (2000) census data, to fill in missing or confused information by imputing to an address or unit the same population characteristics as a nearby address or unit of the same type. Sampling, by contrast, relies on information gathered from a subset of the whole to project information about the whole. The two methods differ, therefore, in the nature of the enterprise, the methodology used, and the objective. Moreover, "the history of the sampling statute suggests that Congress did not have imputation in mind in 1958 when it wrote that law." The Census Bureau was then relying on data from small subsets of the population to project answers to "subsidiary census questions" (*e.g.*, about automobile and telephone usage), and asked Congress for explicit authority to continue the practice. The Bureau did not object to the restriction on sampling for purposes of reapportionment, and did not suggest that the restriction would impair its ability to continue to engage in apportionment-related imputation. For many years the Bureau has interpreted the statute to permit imputation, and Congress has enacted related legislation without changing that interpretation. The Constitution's reference in Art. I, § 2, cl. 3 to an "actual enumeration" does not preclude use of imputation to fill in census data. The "general word 'enumeration' refers to a counting process without describing the count's methodological details." In context, the word "actual" refers to the enumeration to be used for apportioning the Third Congress. The history of the constitutional phrase supports this interpretation. The Convention's Committee of Style, which had no authority to alter meaning, substituted the words "actual enumeration" for language providing that the number of inhabitants "shall be taken in such manner as [Congress] may direct." Both versions served to distinguish the census from the process of apportionment for the first Congress. "Enumeration" did not refer to counting methodology in contemporaneous general usage, and contemporaneous legal documents did not use the term in any specialized way. The Constitution's framers "did not write detailed census methodology into the Constitution." Imputation is constitutionally permissible in circumstances where "all efforts have been made to reach every household, ... [and] where the alternative is to make a far less accurate assessment."

> **7-1** (statute); **5-2** (Census Clause); **8-1** (standing). Opinion of Court by Breyer, joined by Rehnquist, Stevens, Souter, and Ginsburg. Concurring and dissenting opinion by O'Connor. Concurring and dissenting opinion by Thomas, joined by Kennedy. Dissenting opinion by Scalia.

Verizon Communications, Inc. v. FCC 122 S. Ct. 1646, 70 USLW 4396 (5-13-02)

Telecommunications Act of 1996, FCC regulation of equipment leasing: The FCC can require state commissions to set the rates that "incumbents" may charge new entrants for leasing elements of local telephone systems on a "forward-looking" basis not tied to the incumbents' investment. In the Telecommunications Act of 1996, "Congress called for ratemaking different from any historical practices, to achieve the entirely new objective of uprooting the monopolies" and encouraging competitors by giving them "every possible

incentive to enter local retail telephone markets, short of confiscating the incumbents' property." The FCC's interpretation of the Act is a reasonable one that is entitled to deference under *Chevron* principles. In implementing the Act's directive that state commissions set "just and reasonable" and "nondiscriminatory" rates that are based on "the cost of providing the ... network element," the FCC specified by regulation a "forward-looking economic cost" equal to the sum of the total element long-run incremental cost of the element ("TELRIC") and a reasonable allocation of forward-looking common costs. The word "cost" is a "chameleon" dependent on its statutory setting, and need not be tied to an incumbent's actual, "historical" cost. The conferral of authority to set "just and reasonable" rates "leaves methodology largely subject to discretion." The incumbents' argument that TELRIC assumes perfect competition is mistaken. It was not unreasonable for the FCC to choose TELRIC over the alternative methodologies suggested by the incumbents, and the data over a four-year period indicates that "substantial competitive capital spending" by entrants has occurred under TELRIC. "TELRIC appears to be a reasonable policy for now, and that is all that counts." The rule of constitutional avoidance is inapplicable because the incumbents have presented no evidence of TELRIC rates and consequently have made no showing that any particular rates are confiscatory. The FCC's rules that require incumbents to "combine" unbundled elements of their phone networks at the request of entrants who cannot themselves combine them are also reasonable under *Chevron*. The statute's language, directing incumbents to provide unbundled elements "in a manner that allows requesting carriers to combine such elements" is "not that plain," and the issue is one "of context as much as grammar." Requiring incumbents to combine elements is "consistent with the Act's goals of competition and nondiscrimination."

7-1 (rates); **6-2** (combined elements rules). Opinion of Court by Souter, joined by Rehnquist, Stevens, Kennedy, and Ginsburg; and joined in overlapping and separate parts by Scalia and Thomas. Concurring and dissenting opinion by Breyer, joined in part by Scalia. O'Connor did not participate.

Verizon Maryland, Inc. v. Public Serv. Comm'n 122 S. Ct. 1753, 70 USLW 4432 (5-20-02)

Telecommunications; federal court jurisdiction; Eleventh Amendment: Federal district courts have jurisdiction over a telecommunication carrier's claim that the order of a state utility commission requiring reciprocal compensation for telephone calls to Internet service providers violates federal law. Federal courts have "federal question" jurisdiction under 28 U.S.C. § 1331 to determine whether the state commission's regulation is preempted by the Telecommunications Act of 1996 or by an FCC ruling issued thereunder. The fact that a section of the Act (47 U.S.C. § 252(e)(6)) provides for federal review of certain agreements does not eliminate jurisdiction to review other agreements and actions under section 1331. It is unnecessary to determine whether the state commission waived its Eleventh Amendment immunity by voluntary participation in the regulatory regime established by the Act, because Verizon may proceed against individual commissioners pursuant to the doctrine of *Ex parte Young* (1908). Verizon alleges an ongoing violation, and seeks only prospective relief, not damages. The request that state officials be restrained from enforcing an order in contravention of federal law "clearly satisfies" the

Young standard. The request for declaratory relief seeks to establish the invalidity of past actions, but seeks no damages for past actions. Jurisdiction under the *Young* exception is not affected by the merits of the preemption claim. The 1996 Act does not evidence an intent to foreclose jurisdiction under *Young*.

8-0. Opinion for unanimous Court by Scalia. Concurring opinions by Kennedy; and by Souter, joined by Ginsburg and Breyer. O'Connor did not participate.

Watchtower Bible & Tract Soc'y v. Village of Stratton 122 S. Ct. 2080, 70 USLW 4540 (6-17-02)

First Amendment, door-to-door advocacy: The village's ordinance making it a misdemeanor offense to engage in door-to-door advocacy without first registering with the mayor and receiving a permit, required to be shown to an officer or resident who so requests, violates the First Amendment. The Court has invalidated restrictions on door-to-door canvassing and pamphleteering in a series of cases, most of which, as does this case, involved Jehovah's Witnesses. The free and unhampered distribution of pamphlets is "an age-old form of missionary evangelism," and is important as well for the dissemination of other ideas unrelated to religion. The asserted interests that the village seeks to protect – the prevention of fraud, prevention of crime, and protection of privacy – are "important." Nevertheless, the breadth of the ordinance, extending to religious and political as well as commercial speech, "raises constitutional concerns." It is "offensive ... to the very notion of a free society" that a citizen must first inform the government before speaking to her neighbors. The requirement that a canvasser when requested exhibit her permit, containing identification, requires surrender of anonymity. Disclosure of identity may be required in some circumstances, but the ordinance, "covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process," sweeps too broadly. The ordinance also suppresses speech by persons with religious scruples against applying for a license, and effectively bans spontaneous speech. The ordinance is not narrowly tailored to the village's stated interests. Prevention of fraud does not justify application to non-commercial transactions, protection of privacy is amply served by allowing the posting of "no-solicitation" signs, and the permit requirement is unlikely to preclude criminals from knocking on doors.

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

Wisconsin Dep't of Health and Family Servs. v. Blumer 122 S. Ct. 962, 70 USLW 4139 (2-20-02)

Medicaid catastrophic coverage: Wisconsin's "income-first" method of allocating income between a spouse institutionalized in a nursing home and her "community" spouse living at home is a permissible interpretation of the Medicare Catastrophic Coverage Act of 1988. In order to prevent "impoverishment" of the community spouse by drawing down all of the couple's income and assets before the institutionalized spouse can qualify for Medicaid payments, the Act divides the couple's assets between the spouses for purposes of the eligibility determination, sets a minimum monthly subsistence allowance for the community spouse, and permits income transfers from the institutionalized spouse to the community spouse in order to meet that

subsistence allowance. Wisconsin's "income-first" allocation method anticipates this transfer of income and attributes it to the community spouse for purposes of a hearing that determines the community spouse's target income level ("resource allowance"). Use of this method makes it less likely that the community spouse's monthly allowance will be increased, and therefore tends to require couples to expend more of their resources in order to qualify the institutionalized spouse for Medicaid. The words "community spouse's income," as used in the provision of the Act that authorizes the hearing, "may be interpreted to include potential, posteligibility transfers of income from the institutionalized spouse." Use of the possessive does not limit applicability to income actually possessed by the community spouse at the time of the hearing, and therefore does not rule out attribution of income that will be transferred to the community spouse after the eligibility determination. Although the hearing is conducted pre-eligibility, its purpose is to anticipate the post-eligibility financial situation of the couple. The design and structure of the Act do not rule out the "income-first" rule, but instead "offer affirmative support" for it.

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

Young v. United States 122 S. Ct. 1036, 70 USLW 4178 (3-4-02)

Bankruptcy, tax debts: The three-year "lookback" period contained in section 507 of the Bankruptcy Code is tolled during the pendency of a prior bankruptcy petition. The lookback language, which provides that an IRS claim for taxes that were due within three years before a taxpayer filed a bankruptcy petition is nondischargeable in bankruptcy, is a limitations period subject to traditional principles of equitable tolling. The period was tolled during the pendency of the taxpayer's Chapter 13 bankruptcy petition, and therefore the IRS claim remained nondischargeable for purposes of a Chapter 7 petition that the taxpayer had filed after dismissal of the Chapter 13 petition. Otherwise, a taxpayer could render a tax debt dischargeable by back-to-back filings, first filing a Chapter 13 petition, then voluntarily dismissing the petition after the lookback period had lapsed, and finally refiling under Chapter 7. Tolling is appropriate regardless of whether the Chapter 13 filing was made in good faith, or solely for the purpose of running the lookback period. Either way, the IRS was disabled from protecting its claim. The Code's inclusion of explicit tolling language in different contexts carries no negative inference for section 507. Instructing non-bankruptcy courts to toll non-bankruptcy limitations is compatible with an assumption that bankruptcy courts will use their equitable powers to toll the Code's limitations periods, and a separate provision tolling a lookback period during the pendency of an offer in compromise had the effect of supplementing the established principles of equitable tolling.

9-0. Opinion for unanimous Court by Scalia.

Zelman v. Simmons-Harris 122 S. Ct. 2460, 70 USLW 4683 (6-27-02)

Religion, Establishment Clause, school vouchers: Ohio's Pilot Project Scholarship Program, which provides financial assistance in the form of tuition vouchers for parents of schoolchildren in school districts that have been under federal court supervision, does not violate the Establishment Clause. Parents

may use the vouchers for tuition at private schools of their choice, whether those schools are religious or non-religious. The program permits the participation of all schools within the district, authorizes grants to public schools in adjacent districts that accept district students, and provides aid for tutors for students who stay in public schools. The program does not have the effect of advancing religion. The Court has distinguished between programs that provide aid directly to religious schools and "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." Ohio's program is one of "true private choice, ... neutral in all respects toward religion." It is "part of a general and multifaceted undertaking ... to provide educational opportunities to the children of a failed school district." The program does not coerce parents into sending their children to religious schools. Neither the fact that 82% of the private schools participating in the program are religious schools nor the fact that 96% of the students enrolled in the program attend religious schools renders the assistance unconstitutional. Under *Mueller v. Allen* (1983), it is "irrelevant" that the vast majority of recipients of governmental aid are parents of children in religious schools so long as those schools are selected through the private and independent choices of the parents. In such circumstances the incidental advancement of religion and any perceived endorsement of religion are "reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."

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

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