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# Supreme Court Opinions: October 2002 Term

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## Summary

This report contains synopses of Supreme Court decisions issued from the beginning of the October 2002 Term through the end of the Term on June 26, 2003. Included in this listing are all cases decided by signed opinion and selected cases decided *per curiam*. In addition to the summary, 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. These synopses are prepared throughout the Term and can be accessed through the CRS Home Page [http://www.crs.gov/reference/general/law/02_term.shtml], which also provides links from the synopses to the full texts of the Court's opinions.

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*American Ins. Ass'n v. Garamendi* 123 S. Ct. 2374, 71 USLW 4524 (6-23-03)

**Preemption, foreign relations**: California's Holocaust Victim Insurance Relief Act, which requires any insurance company doing business in the state to disclose information about policies it or "related" companies sold in Europe between 1920 and 1945, is preempted as interfering with the Federal Government's conduct of foreign relations. The relevant foreign policy is expressed principally in executive agreements with Germany, Austria, and France. Executive agreements that settle claims of U.S. nationals against foreign governments date to 1799, and Congress has acquiesced in this longstanding practice. Although the agreements at issue here address claims against foreign corporations rather than foreign governments, that distinction "does not matter." The Potsdam and Yalta agreements are precedent for executive agreements addressing reparations implicating private parties, and limiting the permissible scope of such agreements by requiring a sharp dividing line "would hamstring the President in settling international controversies." Valid executive agreements may preempt state law. The Court in *Zschernig v. Miller* (1968) held that state laws may not intrude into the field of foreign affairs, "which the Constitution entrusts to the President and the Congress," even in the absence of conflict with some affirmative federal activity. In this case there is "sufficiently clear conflict to require finding preemption." The general policy of "encourag[ing] European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions" has held true in the insurance area, where the executive agreements have "encourage[d] European insurers to work with [the International Commission on Holocaust Era Insurance Claims] to develop acceptable claim procedures, including procedures governing disclosure of policy information." California's different tack of providing regulatory sanctions, supplemented by litigation, "threatens to frustrate the operation of the particular mechanism the President has chosen." "California seeks to use an iron fist where the President has consistently chosen kid gloves." Congress's silence on the subject "is not to be equated with congressional disapproval" of the President's policies.

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

*Archer v. Warner* 123 S. Ct. 1462, 71 USLW 4249 (3-31-03)

**Bankruptcy**: A debt embodied in a settlement agreement that settled a creditor's earlier claim for money obtained by fraud can be considered a debt "for money . . . obtained by . . . fraud" within the meaning of section 523(a)(2)(A) of the Bankruptcy Code, and hence is nondischargeable in

bankruptcy. Although the settlement agreement can be considered a "kind of novation" that replaced the debt for money obtained by fraud with a new debt, that new debt can also amount to a debt for money obtained by fraud. The outcome is governed by *Brown v. Felsen* (1979), in which the court held nondischargeable a debt embodied in a stipulation and consent judgment resolving a suit based on fraud. The Court in *Brown* said that "the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt," and the same reasoning applies here. There is no significant difference between a debt embodied in a settlement and one embodied in a stipulation and judgment. The fact that the bankruptcy provision, which originally applied only to "judgments sounding in fraud," was later broadened to cover all such "liabilities" indicates that Congress "intended the fullest possible inquiry" to ensure that all debts arising out of fraud are excepted from discharge.

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

*Barnhart v. Peabody Coal Co.* 123 S. Ct. 748, 71 USLW 4041 (1-15-03)

**Coal Industry Retiree Health Benefit Act, deadline for assignment of retirees**: The Coal Industry Retiree Health Benefit Act's requirement that the Commissioner of Social Security "shall, before October 1, 1993," assign each eligible coal industry retiree to an operating company for purposes of responsibility for funding benefits does not invalidate an initial assignment made after that date. The claim that the deadline is jurisdictional is "unsupportable" and "counterintuitive." Coupling the mandatory "shall" with a specific deadline does not automatically void agency action taken after the deadline. The Act does not specify a consequence for noncompliance with the deadline, and "in the ordinary course" federal courts will not impose their own sanction. The fact that other provisions of the Act combine "shall" with a deadline in a manner "that could not possibly be read to prohibit action outside the statutory period" provides "structural clues." "Plausibility" governs resolution of the issue: Congress "would have said more than it did, and would not have couched its intent in language . . . already held to lack any clear jurisdictional significance" had it intended to limit authority to act after the deadline. The Act's express references to "unassigned" beneficiaries merely means that Congress recognized that in some instances there would be no operator to which a beneficiary could be assigned; Congress did not foresee that the deadline for assignment might not be met. It is fair to read the Act's requirement that an operator's percentage of obligations be determined on the basis of assignments "as of" the deadline date as qualified by Congress' assumption that all possible assignments would be made by that date. Congress intended to allocate the greatest number of beneficiaries to a responsible operator, and the deadline should be read "as a spur to prompt action, not as a bar to tardy completion."

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

*Beneficial Nat'l Bank v. Anderson* 123 S. Ct. 2058, 71 USLW 4409 (6-2-03)

**Removal, action "arising under" National Bank Act**: An action brought in state court to recover damages from a national bank for charging excessive interest in violation of both the common law usury doctrine and an Alabama usury statute may be removed to federal district court as an action "arising under" federal law, even though the complaint did not refer to any federal law. As a general rule, a case is not removable if the complaint does not allege a federal claim; potential defenses based on federal law, even if referenced by the complaint, ordinarily do not create a basis for removal. In two instances, however, involving certain causes of action under the Labor Management Relations Act and ERISA, the Court has recognized exceptions because the federal statute "wholly displaces" the state-law cause of action. The National Bank Act (NBA) is another such statute. The Court has long held that sections 85 and 86 of the NBA provide the exclusive cause of action for usury claims against national banks, and has also recognized that "the special nature of federally chartered banks" requires uniform rules limiting liability and prescribing exclusive remedies for overcharges.

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

*Black & Decker Disability Plan v. Nord* 123 S. Ct. 1965, 71 USLW 4405 (5-27-03)

**ERISA, deference to treating physician**: The "treating physician rule" applicable by regulation to Social Security disability benefit determinations does not apply to disability determinations under employee benefit plans covered by ERISA. The Secretary of Labor's regulations implementing ERISA's provisions on employee benefit plans do not require extra respect for the opinions of treating physicians, nothing in the Act itself suggests that plan administrators must accord treating physicians special deference, and the Ninth Circuit erred in imposing such a rule. The two statutory regimes are different. The Social Security Act creates a nationwide benefits program, and presumptions help the Administrator cope with the volume of claims and provide guidance to the administrative law judges who make the initial determinations. ERISA does not require the same uniformity. Rather, employers "have large leeway to design disability . . . plans as they see fit," and the validity of a claim depends upon interpretation of the particular plan at issue. "Courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician [or to] impose . . . a discrete burden of explanation when they [do not]."

**9-0**. Opinion for unanimous Court by Ginsburg.

*Boeing Co. v. United States* 123 S. Ct. 1099, 71 USLW 4131 (3-4-03)

**Taxation, DISCs, R&D expenses**: A Treasury Regulation that governs accounting of research and development expenses (R&D) for domestic international sales corporations (DISCs) and foreign sales corporations is a reasonable interpretation of the statute, and is entitled to deference by courts. The regulation requires that R&D expenses be allocated to a broadly defined category of products from a list of Standard Industrial Classifications (SICs), and prevents Boeing from attributing all such costs to one particular product model even in years when there were no sales for that product. The regulation thereby prevents Boeing from deducting R&D expenses that are not also reflected in combined taxable income derived by Boeing and its DISC for the

taxable years in question. The statute grants the Secretary authority to "prescribe all needful rules and regulations" for the enforcement of the Internal Revenue Code. Moreover, the statute does not define "combined taxable income" and does not specifically refer to R&D expenses. Although the statute does refer to a percentage of combined taxable income that is "attributable" to export sales, this limitation does not prevent the Secretary from classifying all R&D as an indirect cost "attributable" to all export sales of products in a broadly defined SIC category. Similarly, general language calling for a "ratable" apportionment of expenses that cannot definitely be allocated to some item or class of gross income does not prevent apportionment on a categorical basis. A regulation governing computation of combined taxable income does not override the regulation at issue, but instead relies on the challenged regulation for its application. To the extent that legislative history is relevant, it "weighs in favor of the Government's position."

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

*Borden Ranch Partnership v. U.S. Army Corps of Engineers* 123 S. Ct. 599, 71 USLW 4025 (12-16-02)

**Clean Water Act, wetlands**: The decision of the U.S. Court of Appeals for the Ninth Circuit is upheld by an equally divided vote. The Ninth Circuit held that the "deep ripping" plowing method, which disgorges and replaces soil in wetlands and results in draining the land and converting it to dry land, is subject to regulation under the Clean Water Act as the discharge of a pollutant.

**4-4**. Per curiam. Justice Kennedy did not participate.

*Branch v. Smith* 123 S. Ct. 1429, 71 USLW 4232 (3-31-03)

**Congressional redistricting, Voting Rights Act, court-ordered plan**: A federal district court properly enjoined a Mississippi state court's order imposing a congressional districting plan for the state, and properly fashioned its own redistricting plan rather than ordering at-large elections in accordance with 2 U.S.C. § 2a(c). The injunction was proper because the state-court plan, adopted after the state legislature had failed to redistrict on the basis of the 2000 census, "was not precleared [under § 5 of the Voting Rights Act] and had no prospect of being precleared in time for the 2002 election." Section 5 requires preclearance when a covered jurisdiction seeks to administer a change in voting procedures. A state's change in voting procedures may take effect if the Attorney General has not interposed an objection within 60 days of the state's submission. In this case, however, the 60-day period had been postponed by the Attorney General's request for additional information. The State did not provide the requested information until Feb. 20, 2002. The deadline for candidate qualification was March 1, 2002, and the federal court's injunction was issued on Feb. 26, 2002. The 60-day period that began running on Feb. 20 with submission of the additional information "had no legal significance" because the state "never appealed" the federal court's injunction and thus was no longer "seek[ing] to administer" the state-court plan. In fashioning a redistricting plan for Mississippi, the federal court properly relied on 2 U.S.C. § 2c, which directs that single-member districts "shall be established by law." Although this language "assuredly envisions legislative action, it also embraces action by state and federal courts" when legislatures have not acted. An earlier-enacted provision, 2 U.S.C. § 2a(c)(5), which directs that representatives shall

be elected at-large "until a state is redistricted in the manner provided by the law thereof" following an apportionment which has reduced the number of Representatives to which the state is entitled, is inapplicable. A Mississippi statute also calling for at-large election of Representatives in such circumstances is similarly inapplicable.

**9-0** (propriety of injunction); **7-2** (remedy). Opinion of Court by Scalia, unanimous in part, and joined in separate part by Rehnquist, Stevens, Souter, Ginsburg, and Breyer. Separate part of Scalia opinion joined by Rehnquist, Kennedy, and Ginsburg. Concurring opinions by Kennedy, joined in part by Stevens, Souter, and Breyer; and by Stevens, joined by Souter and Breyer. Concurring and dissenting opinion by O'Connor, joined by Thomas.

*Breuer v. Jim's Concrete of Brevard, Inc.* 123 S. Ct. 1882, 71 USLW 4367 (5-19-03)

**Fair Labor Standards Act, removal of cases to federal court**: The Fair Labor Standards Act (FLSA), which provides that a suit "may be maintained . . . in any Federal or State court of competent jurisdiction," does not bar removal of a suit from state to federal court. Such removal is authorized by 28 U.S.C. § 1441(a) "except as otherwise expressly provided by Act of Congress." Use of the word "maintained" does not amount to an express prohibition of removal; the word is ambiguous with respect to removal. "If use of an ambiguous word like 'maintain' qualified as an express provision . . . , then the requirement [in effect] would call for nothing more than a 'provision,' pure and simple, leaving the word 'expressly' with no consequence whatsoever." Moreover, the FLSA provision contrasts with language in other statutes (a civil action "may not be removed") that evidences an "indisputable" prohibition of removal. Removal does nothing to defeat a right to "maintain" an action to final judgment, but merely transfers the action from one forum to another. A contrary reading could defeat change of venue as well as removal. A number of other statutes use the same language allowing actions to be "maintained" in state or federal courts, and it is "just too hard to believe that a right to 'maintain' an action was ever meant to displace the right to remove."

**9-0**. Opinion for unanimous Court by Souter.

*Brown v. Legal Found. of Washington* 123 S. Ct. 1406, 71 USLW 4221 (3-26-03)

**Taking of property, IOLTA accounts**: Washington State's interest on lawyers' trust accounts (IOLTA) program, which requires each lawyer to deposit into a single pooled IOLTA account for all that lawyer's clients any client funds that cannot otherwise earn net interest for an individual client, and which requires the lawyer to direct the bank to pay interest on the pooled account to the Foundation, to be used for charitable and educational purposes, does not violate the Just Compensation Clause of the Fifth Amendment (as applicable to the State through the Fourteenth Amendment). A law that requires that interest on a client's funds be transferred to a different owner for a legitimate public use could constitute a *per se* taking requiring payment of just compensation to the client. No "just compensation" is due, however. Just compensation is measured by the owner's pecuniary loss, and that loss is zero if the Washington law is obeyed by placing in the IOLTA account only those client funds that, invested individually, could not provide a net positive return to the client.

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

*Bunkley v. Florida* 123 S. Ct. 2020, 71 USLW 3732 (5-27-03)

**Due Process, elements of crime at time of conviction**: The Florida Supreme Court must consider whether a pocket knife with a blade of $2^1/_2$ to 3 inches in length was a "dangerous weapon" within the meaning of the state's first-degree burglary statute at the time in 1989 when the petitioner's conviction for that crime became final, or whether the knife instead was a "common pocketknife" excepted from the definition of "weapon." In 1997 the Florida Supreme Court, relying on a 1951 opinion of the state attorney general, interpreted the provision for the first time as excluding a pocket knife with a blade length of $3^3/_4$ inches. The state court characterized its 1997 decision as part of a "century-long evolutionary process" in interpreting the provision, and this characterization raises the question of what the provision meant in 1989 when the petitioner was convicted. In a similar situation, the Court in *Fiori v. White* (2001) found a due process violation in a state's refusal to apply to an earlier conviction a definitive and exonerating interpretation of a criminal statute said to reflect a clarification of the statute's plain language rather than a new interpretation. A conviction denies due process if it is clear that the defendant's conduct did not violate an element of the crime set forth in the statute.

**9-0**. *Per curiam.*

*Chavez v. Martinez* 123 S. Ct. 1994, 71 USLW 4387 (5-27-03)

**Due Process, self-incrimination**: The respondent's claim for damages premised on police officers' violation of his privilege against self-incrimination is rejected. The officers interrogated the respondent while he was in a hospital being treated for gunshot wounds, and failed to give him a *Miranda* warning. The respondent was not charged with a crime, and hence the statements he gave in response to the questioning were not used against him at a criminal trial. Any such claim of outrageous conduct by police, however, may raise an issue of denial of substantive due process. The case is remanded for consideration of the due process issue.

**5-3** (due process); **6-3** (self-incrimination). Opinion of Court by Souter (due process issue), joined by Stevens, Kennedy, Ginsburg, and Breyer. Separate part of Souter opinion joined by Breyer. No opinion of Court on self-incrimination. Opinion by Thomas, joined by Rehnquist, and joined in separate and overlapping parts by O'Connor and Scalia. Opinion by Scalia concurring in part. Opinion by Stevens concurring in part and dissenting in part. Opinion by Kennedy concurring in part and dissenting in part, joined by Stevens and joined in part by Ginsburg. Opinion by Ginsburg concurring in part and dissenting in part.

*Citizens Bank v. Alafabco, Inc.* 123 S. Ct. 2037 (6-2-03)

**Commerce power, Federal Arbitration Act**: The Alabama Supreme Court applied an "improperly cramped view of Congress' Commerce Clause power" in holding that the Federal Arbitration Act (FAA) applies only to transactions "in" interstate commerce, and therefore did not apply to debt restructuring agreements between an Alabama bank and an Alabama construction company. The FAA applies to contracts "evidencing a transaction involving commerce." The term "involving commerce" is the "functional equivalent" of the term "affecting commerce," and ordinarily signals "the broadest permissible exercise" of the commerce power. "[I]t is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce.'" There was no need, therefore, to find that the restructuring related to interstate transactions or to out-of-state projects. Nor was it necessary to find that any of the individual debt-restructuring agreements, standing alone, had a substantial effect on interstate commerce; the issue instead is the cumulative impact of "the economic activity in question." The agreements at issue meet the FAA's "involving commerce" test. The respondent company engaged in business throughout the southeastern United States using loans from the petitioner bank; the debt was secured by all of the company's business assets, including out-of-state assets; and commercial lending – the "general practice" represented by the transactions – has "broad impact" on the national economy.

**9-0**. *Per curiam.*

*City of Cuyahoga Falls v. Buckeye Community Hope Found.* 123 S. Ct. 1389, 71 USLW 4213 (3-25-03)

**Equal Protection, due process, referendum**: City officials did not violate the Equal Protection Clause by submitting to the voters a petition to repeal an ordinance authorizing construction of low-income housing, or by denying building permits while the referendum was pending. The respondents failed to establish a racially discriminatory intent. The City acted pursuant to the requirements of its charter in submitting the referendum petition to the voters, and the city engineer performed "a nondiscretionary, ministerial act" in denying the building permits while the referendum was pending. Statements made by private individuals during the petition drive may not be attributed to city officials. "In fact, by adhering to charter procedures, city officials enabled public debate on the referendum to take place, thus advancing significant First Amendment interests." Respondents also failed to establish a substantive due process denial. The denial of building permits "in no sense constituted egregious or arbitrary government conduct." Although the substance of a measure approved by referendum may be challenged as arbitrary and capricious, the subjection of an ordinance to public approval through a referendum cannot be considered an invalid delegation of power, and in this case is not arbitrary government conduct that violates due process.

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

*City of Los Angeles v. David* 123 S. Ct. 1895, 71 USLW 3720 (5-19-03)

**Due Process, delay in holding of hearing**: The city did not deny the respondent due process by delaying a hearing on the validity of an automobile impoundment fee until 27 days after his car had been towed. The delay is supported by application of the three factors set forth in *Mathews v. Eldridge* (1976) for determining whether an individual has received the process that is "due." The private interest affected – the temporary loss of the use of money – is fully compensable. A 30-day delay is unlikely to create the risk of significant factual errors. The city's interest in "administrative necessity," however, "argues strongly in the city's favor." The city already holds hearings within 48 hours for those persons unable to pay impoundment fees, and it would be "burdensome" to have to hold all such hearings so promptly.

**9-0**. *Per curiam.*

*Clackamas Gastroenterology Assocs., P.C. v. Wells* 123 S. Ct. 1673, 71 USLW 4293 (4-22-03)

**ADA, definition of "employee"**: The issue of whether the four shareholder-directors of the petitioner professional corporation are "employees" under the Americans with Disabilities Act (ADA) – an issue that in this case determines whether the corporation is an "employer" subject to ADA coverage as having 15 or more "employees" – should be resolved by application of common law principles that define the master-servant relationship. The ADA's definition of an "employee" as "an individual employed by an employer" is "completely circular and explains nothing,"and in such instances the Court ordinarily presumes that Congress intended the common law of agency to govern. The petitioner's approach of asking whether the shareholder-directors are in reality partners "simply begs the question," and the appeals courts' approach seeking guidance in the ADA's broad purposes overlooks Congress's reasons for limiting coverage to firms with 15 or more employees. The common law definition of the master-servant relationship provides "helpful guidance," and is reflected in EEOC "guidelines." Under that EEOC/common law approach, the principal issue is whether the shareholder-directors operate independently and manage the firm or are instead subject to the firm's control. The case is remanded for further factual findings related to this inquiry.

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

*Clay v. United States* 123 S. Ct. 1072, 71 USLW 4155 (3-4-03)

**Habeas corpus, limitations period**: When a federal defendant takes an unsuccessful direct appeal from a judgment of conviction, but does not petition for a writ of certiorari from the Supreme Court, his conviction becomes "final" for purposes of the one-year limitation period for filing for postconviction relief under 28 U.S.C. § 2255 when the time expires for filing the petition for certiorari. The lower courts erred in ruling that the conviction became final on the earlier date when the appellate court issued its mandate in the direct appeal. Finality has "a long-recognized, clear meaning" in the context of postconviction relief: it attaches when the Supreme Court affirms a conviction on the merits on direct review or denies a petition for certiorari, or when the time for filing a certiorari petition expires. The Court "presume[s] that Congress intends its statutes to be read in conformity with this Court's precedents." Parallel

statutory provisions setting limitation periods do not require a different conclusion. The fact that a provision governing petitions from state prisoners is worded differently – it elaborates on "the date on which the judgment became final" by adding the words "by the conclusion of direct review or the expiration of the time for seeking such review" – does not mean that § 2255 must be interpreted differently. Congress might have felt the need to spell out the meaning of "final" in the context of petitions by state prisoners but not in the context of petitions by federal prisoners in order to make it clear that finality is be determined by a uniform federal rule rather than by reference to state law rules. A provision governing petitions by death-sentenced state prisoners is not similar enough to § 2255 to create any presumption as to § 2255's meaning.

**9-0**. Opinion for unanimous Court by Ginsburg.

*Connecticut Dep't of Public Safety v. Doe* 123 S. Ct. 1160, 71 USLW 4158 (3-5-03)

**Due Process, "Megan's Law"**: Connecticut's Megan's Law did not deprive the respondent of due process by requiring that he be listed as a convicted sex offender on the State's Website without affording him a hearing to attempt to prove that he is not currently dangerous. Even if injury to reputation could constitute a deprivation of a liberty interest, due process does not entitle a person to a hearing to establish a fact that is not material. Whether or not the respondent is currently dangerous "is of no consequence under Connecticut's Megan's Law." The law's posting requirements "turn on an offender's conviction alone." While it may be that a claim could be raised that public disclosures about currently non-dangerous sex offenders violate substantive due process, the respondent disavowed any reliance on that argument, and the issue was not properly before the Court.

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

*Cook County v. United States ex rel. Chandler* 123 S. Ct. 1239, 72 USLW 4192 (3-10-03)

**False Claims Act, applicability to local governments**: Local governments are "persons" subject to *qui tam* actions under the False Claims Act. Long before enactment of the False Claims Act (FCA) in 1863 private corporations had been held to be artificial persons ordinarily included within the statutory term "person." Although it was not until six years after enactment of the FCA that the Supreme Court held that municipal corporations are also "persons," this decision merely reflected a common understanding antedating the FCA. The Dictionary Act defines "person" to include corporate entities "unless the context" shows otherwise, but nothing about the FCA makes the common understanding inappropriate. The text is not inherently inconsistent with local government liability. The original act included references to natural persons in the land or naval forces, but also referred unqualifiedly to other "persons." And, although municipalities may not be subject to criminal penalties, "that is no reason to exempt them from remedies that sensibly apply." The fact that Congress in 1863 was primarily concerned with frauds committed by private contractors during the Civil War does not alter the fact that Congress wrote expansively to cover all fraud. 1986 amendments to the FCA that raised the ceiling on damages from double to treble did not repeal by implication the FCA's applicability to local governments. Although municipalities are

generally exempt from punitive damages, treble damages under the FCA have compensatory as well as punitive traits. Some liability beyond the amount of a fraud is usually necessary to compensate the government completely for the losses occasioned by fraud. The FCA does not provide for prejudgment interest or for consequential damages that typically come with recovery for fraud, and *qui tam* recoveries must be subtracted from the government's recovery. More important than the presumption against punitive recovery is the presumption against repeals by implication. "The basic purpose of the 1986 amendments was to make the FCA a more useful tool against fraud in modern times," and it is "simply not plausible" that Congress intended at the same time to repeal *sub silentio* the liability of local governments, "which today often administer or receive federal funds."

**9-0**. Opinion for unanimous Court by Souter.

*Dastar Corp. v. Twentieth Century Fox Film Corp.* 123 S. Ct. 2041, 71 USLW 4415 (6-2-03)

**Lanham Act, "origin" of goods**: Section 43 of the Lanham Act, which prohibits "a false designation of origin," does not prevent the unaccredited copying of a non-copyrighted work. The phrase "origin of goods" "refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods." Thus the petitioner corporation is the "origin" of a video set about the European campaigns of World War II that it produced and sold, even though it copied the videos from a television series based on General Eisenhower's book *Crusade in Europe*, and made only minor modifications before selling them. The "most natural understanding of the 'origin' of 'goods,'" derived from dictionary definitions, is "the producer of the tangible product sold in the marketplace." Interpreting the phrase to encompass the person whose ideas are embodied in the product would be "out of accord with the history and purpose of the Lanham Act." The Lanham Act prohibits actions that deceive consumers. A brand-loyal consumer cares about whether a favored company produced or stands behind a product, but does not necessarily care who originally designed or devised the formula for the product. A different rule for "communicative" products, where authorship is important to purchasers, would result in conflict with copyright law, which provides that the right to copy without attribution passes to the public upon expiration of a copyright. To hold the Lanham Act applicable in this way would be "akin to finding . . . a species of perpetual patent and copyright." When Congress has changed copyright law, "it has done so with much more specificity than the Lanham Act's ambiguous use of 'origin.'" Interpreting "origin" to require attribution of non-copyrighted material would pose practical problems as well, including the determination of "who is in the line of 'origin.'"

**8-0**. Opinion of Court by Scalia, joined by all Justices except Breyer, who did not participate.

*Demore v. Kim* 123 S. Ct. 1708, 71 USLW 4315 (4-29-03)

**Due Process, detention of aliens; judicial review**: Mandatory detention of an alien pending removal proceedings, without an individualized determination of risk of flight and danger to the community, does not violate due process under the circumstances of this case, in which a lawful permanent resident alien brought a habeas corpus action challenging the constitutionality of detention rather than availing himself of procedures under which he could challenge inclusion in the mandatory detention category. A provision of the Immigration and Nationality Act, 8 U.S.C. § 1226c, requires the Attorney General to detain "any alien" who is removable from this country because he has been convicted of any of certain specified crimes. "Congress regularly makes rules that would be unacceptable if applied to citizens," and the Court "has recognized the validity of detention during deportation proceedings." Detention pending removal proceedings "necessarily serves the purpose of preventing deportable criminal aliens from fleeing," and thus increases the chance of successful removal. This detention is normally of relatively short duration. If detention becomes "unreasonably long," the alien may become entitled to an individualized determination as to risk of flight and dangerousness. Judicial review is not precluded by language declaring that the Attorney General's discretionary judgment applying the section shall not be subject to review, and that no court may set aside any action or decision of the Attorney General regarding the detention of any alien. Here the respondent was not challenging a "discretionary judgment" or "decision" of the Attorney General, but rather the "statutory framework that permits his detention without bail."

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

*Desert Palace, Inc. v. Costa* 71 USLW 4434 (6-9-03)

**Civil rights, proof in "mixed-motive" cases**: A plaintiff need not present direct evidence of discrimination in order to obtain a mixed-motive instruction in an action brought under Title VII of the Civil Rights Act of 1991. The 1991 Act provides that an unlawful employment practice is established if the complaining party "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." This means that "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that [a prohibited consideration] was a motivating factor for any employment practice." That evidence may be circumstantial. The statute is unambiguous. A plaintiff "need only demonstrate" a discriminatory motive; the statute "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." Moreover, the Act defines the term "demonstrates" as meaning "to meet the burdens of production and persuasion." This contrasts with other situations, where "Congress has been unequivocal when imposing heightened proof requirements." Title VII's silence with respect to the type of evidence required also "suggests" that the "conventional rule of civil litigation" applicable in Title VII cases should govern, *viz.*, that the plaintiff must prove her case "by a preponderance of the evidence, using direct or circumstantial evidence." Courts

have long recognized "the utility of circumstantial evidence in discrimination cases," and in other contexts as well.

**9-0**. Opinion for unanimous Court by Thomas. Concurring opinion by O'Connor.

*Dole Food Co. v. Patrickson* 123 S. Ct. 1655, 71 USLW 4301 (4-22-03)

**Foreign Sovereign Immunities Act**: A subsidiary of a corporation in which a foreign state owns a majority of shares is not an "agency or instrumentality" of the foreign state for purposes of the Foreign Sovereign Immunities Act (FSIA), and hence is not entitled to removal under 28 U.S.C. § 1441 as a "foreign state." "Foreign state" is defined by the FSIA to include an "agency or instrumentality," defined in turn to include an entity "the majority of whose shares or other ownership interest is owned by a foreign state." "A corporation is an instrumentality of a foreign state under this definition only if the foreign state owns a majority of the corporation's shares." The meaning of share ownership is determined by reference to corporation law, and only "direct ownership" satisfies the requirement. "Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so," as, for example, in statutes that refer to "direct and indirect ownership," or that define an owner as someone who "owns or controls" an entity. A shareholder, by virtue of its ownership of shares, does not own the corporation's assets, and therefore does not own subsidiary corporations. "Other ownership interest" does not include a state's "interest" in its instrumentality's subsidiary, but rather is designed to recognize the possibility of different ownership forms in other countries. Instrumentality status must be determined as of the time the action is filed, not as of the time of the conduct giving rise to the suit. This interpretation is required by "plain text," *viz.*, use of the present tense in the FSIA definition ("a majority of whose shares . . . *is owned* by a foreign state"). Analogy to status-based immunities, which derive from an officer's status at the time of the conduct giving rise to suit, is inapt. Cases recognizing status-based immunities do not involve interpretation of a statute, and the reasons for the official immunities do not apply to a foreign state.

**7-2** (ownership of subsidiary); **9-0** (timing of determination). Opinion of Court by Kennedy, joined in part by Rehnquist, Stevens, Scalia, Souter, Thomas, and Ginsburg, and unanimous in separate part. Concurring and dissenting opinion by Breyer, joined by O'Connor.

*Dow Chemical Co. v. Stephenson* 71 USLW 4440 (6-9-03)

**Class actions, Agent Orange litigation**: The decision of the U.S. Court of Appeals for the Second Circuit, reversing a district court's dismissal of an action brought by Vietnam veterans against manufacturers of the herbicide Agent Orange as barred by a 1984 class action settlement, is affirmed by an equally divided vote.

**4-4**. Per curiam. Justice Stephens did not participate.

*Early v. Packer* 123 S. Ct. 362, 71 USLW 3312 (11-4-02)

**Habeas corpus, alleged coercion of jury verdict**: The Ninth Circuit erred in granting habeas corpus relief to a petitioner who alleged that the state trial judge had coerced the jury's verdict by instructing the jury, deadlocked 11 to 1, to deliberate further and attempt to reach a unanimous verdict. The California appellate court's decision upholding the conviction was not "contrary to clearly

established federal law" within the meaning of 28 U.S.C. § 2254(d). There is no need to *cite* the established federal law, as long as the result or reasoning does not *contradict* that law. The California court did not fail to apply the "totality of the circumstances" test by focusing on three particular incidents; those incidents constituted "the essence" of the complaint about juror coercion, and in any event the "fair import" of the court's decision is that it considered the cumulative impact of all the evidence. Also, Supreme Court decisions derived from the Court's supervisory power over the federal courts do not constitute "clearly established federal law" to which state courts must conform.

**9-0**. *Per curiam.*

*Eldred v. Ashcroft* 123 S. Ct. 769, 71 USLW 4052 (1-15-03)

**Copyright Term Extension Act, Copyright Clause**: The Copyright Term Extension Act (CTEA), which extends the copyright term from life of the author plus 50 years to life plus 70 years, and applies the change to existing as well as to future copyrights, is a valid exercise of Congress's authority under the Copyright Clause. The Clause, which empowers Congress to grant copyrights "for limited times," authorizes Congress to extend the terms of existing copyrights. The word "limited" does not mean that a copyright term, once set, becomes inalterable. There is "an unbroken congressional practice" of applying copyright term extensions to existing copyrights, and the same practice has been applied to patents. Application of the CTEA's extension to existing copyrights is a "rational" exercise of power. On the issue of rationality, the Court "defer[s] substantially to Congress." The extension conforms copyright practice to that of the European Union, consistent with the Berne Convention, and ensures that American authors will receive the same copyright protection in Europe as their European counterparts. Congress also rationally relied on predictions that longer terms would encourage copyright holders to invest in restoration and public distribution of works. The Court rejects the argument that permitting Congress to extend existing copyrights recognizes a power to create "perpetual" copyrights in violation of the "limited times" constraint. "Petitioners fail to show how the CTEA crosses a constitutionally significant threshold." Also rejected is the argument that there must be a *quid pro quo*. Authors need not submit a new writing in exchange for an extension; the original bargain entails "a copyright not only for the time in place . . . , but also for any renewal or extension legislated during that time." The "congruence and proportionality" standard recently used to limit congressional power under § 5 of the Fourteenth Amendment is inapplicable to the Copyright Clause. The CTEA does not violate the First Amendment. The Copyright Clause and the First Amendment were enacted close in time, and "copyright's limited monopolies are compatible with free speech principles." In addition, copyright law has "built-in free speech safeguards."

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

*Entergy Louisiana, Inc. v. Louisiana PSC* 123 S. Ct. 2050, 71 USLW 4420 (6-2-03)

**FERC regulation, "filed rate" preemption doctrine**: Under the "filed rate" doctrine, wholesale electricity rates filed with FERC or fixed by FERC must be given binding effect by state public utility commissions setting intrastate retail rates. A FERC tariff that does not set rates, but that delegates discretion to a public utility holding company to allocate capacity and costs among its operating companies, can also have preemptive effect under the filed rate doctrine. The Louisiana Public Service Commission's order disallowing costs related to electricity sharing under Entergy's system agreement, and having the effect of "trapping" costs so that Entergy Louisiana could not recoup them through retail sales, is therefore preempted. The fact that FERC had not specifically approved the cost allocation for the period covered by the Louisiana PSC's order does not matter; the only issue is "whether the FERC tariff dictates how and by whom that [allocation] should be made."

**9-0**. Opinion for unanimous Court by Thomas.

*Ewing v. California* 123 S. Ct. 1179, 71 USLW 4167 (3-5-03)

**Cruel and unusual punishment; "three-strikes" law**: California's "Three Strikes and You're Out" law is not unconstitutional as applied in sentencing a repeat felon to imprisonment of 25 years to life for stealing three golf clubs valued at $399 apiece. The three strikes law applies when a person is convicted of a felony (here "felony grand theft") and has previously been convicted of one or more prior felonies defined as "serious" or "violent." There was no opinion of the Court. Three Justices determined that the circumstances did not warrant application of the "narrow proportionality principle" applicable to non-capital cases and derived from the Eighth Amendment's Cruel and Unusual Punishments Clause, the sentence being "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record." One Justice asserted that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution, and one Justice argued that the Cruel and Unusual Punishments Clause "contains no proportionality principle."

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

*FCC v. NextWave Personal Communications, Inc.* 123 S. Ct. 832, 71 USLW 4085 (1-27-03)

**Bankruptcy, revocation of FCC license**: Section 525 of the Bankruptcy Code prohibits the FCC from revoking communications licenses held by a debtor in bankruptcy upon the debtor's failure to make timely payments for purchase of the licenses. Section 525 provides that a government agency "may not . . . revoke" a license held by a debtor "solely because" the debtor has not paid a debt that is dischargeable in bankruptcy. NextWave's failure to make payments on the licenses was the "proximate cause" of cancellation, and it is "irrelevant" that the FCC had a regulatory motive. When Congress has intended to provide regulatory exceptions to bankruptcy law requirements, "it has done so clearly and expressly." The license obligations are "debts that [are] dischargeable" in bankruptcy. "Debt" is defined broadly in terms of any "right to payment," and consequently "a debt is a debt, even when the obligation to pay it is also a regulatory condition." Dischargeability is not tied to authority to modify

regulatory obligations. A preconfirmation debt is dischargeable unless it falls within an express exception to discharge, and no such exception applies. The Court's interpretation of section 525 does not create any conflict with the Communications Act; the FCC's "policy preference" for selling licenses on credit and then cancelling the licenses rather than asserting security interests is not mandated by the Communications Act. The dissent's argument that section 525 should be interpreted more narrowly, in conformity with asserted congressional "purposes," is rejected.

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

*FEC v. Beaumont* 123 S. Ct. 2200, 71 USLW 4451 (6-16-03)

**First Amendment, campaign finance, corporate contributions**: The ban on direct corporate contributions to candidates for federal office imposed by 2 U.S.C. § 1441b may validly be applied to nonprofit advocacy corporations. The law allows corporations to establish political action committees ("separate segregated fund[s] to be utilized for political purposes") that may make contributions as well as other expenditures in connection with federal elections. The Court has distinguished between corporate contributions and "independent expenditures" by corporations, upholding a prohibition on contributions in *FEC v. National Right to Work Committee* (1982), and striking down a ban on independent expenditures as applied to a nonprofit advocacy corporation in *FEC v. Massachusetts Citizens for Life* (1986). The corporations involved in the two cases were similar, and *Massachusetts Citizens for Life* distinguished *National Right to Work* on the basis of "its addressing regulation of contributions, not expenditures." "Concern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations" even though they are "generally different from traditional business corporations." Advocacy corporations, as do for-profit corporations, benefit from "state-created advantages," and are "no less susceptible to misuse . . . as conduits for circumventing contribution limits imposed on individuals." Restrictions on contributions have not been subjected to the same level of First Amendment scrutiny as independent expenditures because "contributions lie closer to the edges than to the core of political expression." Section 1441b is not correctly characterized as a complete ban on contributions, since corporations are allowed to establish and pay the administrative expenses of PACs.

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

*Fitzgerald v. Racing Ass'n of Central Iowa* 123 S. Ct. 2156, 71 USLW 4438 (6-9-03)

**State taxation, equal protection**: Iowa's differential taxation of revenues from slot machines – a maximum rate of 20% if the slot machines are on excursion riverboats and a maximum rate of 36% if the slot machines are at a racetrack – does not violate the Equal Protection Clause of the Fourteenth Amendment. The classification is subject to rational basis review. There must be a plausible policy reason for the classification, there must be justifying facts that the legislature rationally may have considered true, and the relationship of the classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational. The Iowa Supreme Court erred in invalidating the law as frustrating what it viewed as the law's basic objective of rescuing racetracks

from economic distress. The Iowa law can rationally be understood to advance racetracks' economic interests by granting tracks the authority to operate slot machines. More fundamentally, legislatures may, within the bounds of rationality, "decide whom they wish to help with their tax laws and how much help those laws ought to provide." Also, a law can serve more purposes than one and balance different objectives. What is harmful to the racetracks may be helpful to the riverboats, and the legislature may have wanted to encourage economic development of river communities or to protect reliance interests of riverboat operators whose revenues had previously been taxed at the 20% rate. The *Allegheny Pittsburgh Coal Co.* case (1989) is distinguishable. There the Court struck down property tax assessments in the "absence of any indication . . . that policies underlying [the law] could conceivably have been the purpose for the . . . unequal assessment"; here the facts do not preclude an inference that the reason for the different rates was to aid the riverboat industry or riverside communities.

**9-0**. Opinion for unanimous Court by Breyer.

*Franchise Tax Bd. of California v. Hyatt* 123 S. Ct. 1683, 71 USLW 4307 (4-23-03)

**Full Faith and Credit, sovereign immunity**: The Full Faith and Credit Clause does not require Nevada to give full faith and credit to California's statute immunizing its tax collection agency from suit. The Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. The Court abandoned the balancing-of-interests approach to conflicts of law in 1981, concluding that it is frequently the case that a court can lawfully apply either the law of one state or the contrary law of another. In this case, involving the California agency's alleged intentional torts against someone alleging to be a citizen of Nevada, Nevada has "significant contacts" and sufficient interests to avoid the conclusion that choice of its own law is arbitrary or unfair. The tax board's request for a new rule recognizing "core sovereignty" interests reflected in sovereign immunity statutes is rejected. "The question of which sovereign interest should be deemed more weighty is not one that can be easily answered." In this case there is neither a "principled distinction" nor a "constitutionally significant distinction" between competing state interests at issue in an earlier case (California's interest in automobile accidents on its roads and Nevada's interest in tort claims against its university employee) and those at issue in the present case (Nevada's interest in protecting its citizens against intentional torts, California's interest in collecting taxes). Here the Nevada Supreme Court "sensitively applied principles of comity with a healthy regard for California's sovereign status."

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

*Georgia v. Ashcroft* 123 S. Ct. 2498, 71 USLW 4545 (6-26-03)

**Voting Rights Act, state legislative redistricting**: The federal district court failed to consider all of the relevant factors when it determined that Georgia's redistricting for its State Senate violated section 5 of the Voting Rights Act, and therefore was not entitled to preclearance. Section 5 seeks to insure that states do not adopt changes in voting procedures that "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." "Effective exercise of the electoral franchise" includes the ability of minority voters to elect a candidate of their choice, and can be achieved through creation of "safe" districts in which minority voters constitute well over 50% of eligible voters. Effective exercise of the franchise can also be achieved, however, by increasing the concentration of minority voters in other districts in which they have a reasonable chance (but not a near certainty) of electing candidates of their choice or influencing the outcome of elections. Georgia's Senate redistricting plan "unpacked" several safe districts, reducing minority strength in each to just over 50%, but at the same time increased minority voting strength in other districts in order to increase the number of "influence" and "coalitional" districts. The district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the [safe] districts," and neglected to credit the state's creation of additional influence and coalitional districts. The district court did not abuse its discretion in allowing private litigants to intervene in the action.

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

*Gratz v. Bollinger* 123 S. Ct. 2411, 71 USLW 4480 (6-23-03)

**Equal protection, racial discrimination, college admissions**: The University of Michigan's policy governing admission of undergraduates relies impermissibly on the race of applicants, and violates the Equal Protection Clause of the Fourteenth Amendment. All racial classifications reviewed under the Clause must be strictly scrutinized without regard to the race of those burdened or benefitted. The University's policy, which automatically gives 20 points, or one-fifth of the total points needed to guarantee admission, to every applicant who is a member of an "underrepresented minority" defined by race (African-Americans, Hispanics, and Native Americans), is not narrowly tailored to achieve the asserted interest in educational diversity. Michigan's program does not meet the conditions proposed by Justice Powell in his 1978 opinion in *Regents v. Bakke*, allowing a public university to take race into account in its admissions policies in the context of "flexible" consideration of "all pertinent elements of diversity in light of the particular qualifications of each applicant." Rather than providing for individualized consideration of each applicant, the policy "has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant." The possibility that a student's application might be "flagged" for individualized consideration does not save the policy, since this flagging can operate only after allocation of the automatic points. The fact that there are practical difficulties in applying individualized consideration at so large a university "does not render constitutional an otherwise problematic system." A petitioner who was denied admission as a freshman and who expressed an interest in transferring if

Michigan eliminated its reliance on race had standing to maintain the action, and was an adequate representative in a class action.

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

*Green Tree Financial Corp. v. Bazzle* 123 S. Ct. 2402, 71 USLW 4538 (6-23-03)

**Arbitration**: The issue of whether an arbitration clause in a contract between a commercial lender and its customers forbids class arbitration is a matter for the arbitrator to decide. Because there is a "strong likelihood" in these cases that the arbitrator's decision "reflected a court's interpretation of the contracts rather than an arbitrator's interpretation," the case is remanded for further proceedings. The cases do not fall within narrow exceptions relating to whether the parties agreed to arbitrate a matter, but relate instead to "what kind of arbitration proceeding the parties agreed to." The issue is one of contract interpretation and arbitration procedures that arbitrators "are well situated to answer."

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

*Grutter v. Bollinger* 123 S. Ct. 2325, 71 USLW 4498 (6-23-03)

**Equal protection, racial discrimination, law school admissions**: The University of Michigan Law School's reliance on race as a factor governing admission of students does not violate the Equal Protection Clause of the Fourteenth Amendment. The law school seeks to enroll a "critical mass" of underrepresented minority students in order to produce classes "both diverse and academically outstanding." "Student body diversity is a compelling state interest that can justify the use of race in university admissions." Strict scrutiny is not always "strict in theory, but fatal in fact." Some governmental uses of race can withstand strict scrutiny. The law school's "educational judgment that such diversity is essential to its educational mission," supported by amici pointing to similar needs of the business and military communities, "is one to which we defer." Educational benefits of diversity include "cross-racial understanding" and "livelier" and "more enlightening" classroom discussion. Dispelling the stereotype that there is a single "minority viewpoint" on any issue can be achieved by a "critical mass" of minority students, but not by "token representation." The law school's admissions program is "narrowly tailored" to achieve the compelling interest of diversity. The program does not establish a "quota," but is "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." "Some attention to numbers, without more, does not transform a flexible admissions system into a rigid quota." The number of minority students enrolled between 1993 and 2000 showed variation (from 13.5 to 20.1 percent) in "a range inconsistent with a quota." The law school adequately considered and rejected race-neutral alternatives to its approach.

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

Ginsburg, joined by Breyer. Concurring and dissenting opinions by Scalia, joined by Thomas; and by Thomas, joined in part by Scalia. Dissenting opinions by Rehnquist, joined by Scalia, Kennedy, and Thomas; and by Kennedy.

*Hillside Dairy, Inc. v. Lyons* 123 S. Ct. 2142, 71 USLW 4425 (6-9-03)

**Commerce, state regulation; Privileges and Immunities Clause**: Section 144 of the Federal Agriculture Improvement and Reform Act of 1996, disclaiming preemption of any California law regulating "the percentage of milk solids or solids not fat in fluid milk" does not operate to exempt California's milk pricing laws from scrutiny under the Commerce Clause. Although Congress may authorize states to regulate interstate commerce in ways that, absent authorization, would be held to be invalid as burdening or discriminating against interstate commerce, Congress must express its intent to do so unambiguously. The federal statute at issue unambiguously expresses an intent to authorize California's "compositional and labeling laws" for milk, but "that expression does not encompass the pricing and pooling laws." A claim challenging California's pricing and pooling laws as violative of the Privileges and Immunities Clause of Art. IV, § 2, should not have been dismissed simply because the laws do not on their face discriminate on the basis of residency or citizenship. "Absence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting this claim."

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

*Howsam v. Dean Witter Reynolds, Inc.* 123 S. Ct. 588, 71 USLW 4019 (12-10-02)

**Arbitration**: An arbitrator rather than a court should apply an arbitration rule of the National Association of Securities Dealers (NASD) that is applicable to a dispute arising out of a contract between the parties, and that governs the time limit for submitting issues to arbitration. Because arbitration is a matter of contract and a party cannot be required to submit to arbitration without agreeing to do so, the general rule is that a question of arbitrability is for judicial determination unless the parties clearly and unmistakably provide otherwise. The NASD time limit rule, however, is a "gateway" procedural matter that parties would likely expect the arbitrator to decide, and that, therefore, is "presumptively for the arbitrator, not for the judge." This conclusion is consistent with a comment to the Revised Uniform Arbitration Act: "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits . . . have been met, are for the arbitrators to decide."

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

*Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.* 123 S. Ct. 1829, 71 USLW 4341 (5-5-03)

**First Amendment, charitable solicitations, fraud**: The First Amendment does not prohibit a state from bringing a fraud action against fundraisers who make false or misleading representations intended to deceive potential donors

about how their donations will be used. Earlier decisions of the Court invalidated state laws that prohibited fundraisers from keeping more than a specified percentage of money collected, or that required fundraisers to disclose to potential donors the percentage of their contributions that would actually be turner over to charity. These decisions were premised on the belief that neither high fundraising costs nor failure to disclose the fundraiser's fee establishes fraud, the Court explaining that states could still "vigorously enforce" antifraud laws to protect the public from false or misleading charitable solicitations. "So long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors' fees *per se*, such actions need not impermissibly chill protected speech." The state bears the burden of proof in a "properly tailored" fraud action; the Illinois law requires the state to prove by "clear and convincing evidence" that the defendant knowingly made a false representation of a material fact with the intent to mislead, and succeeded in doing so. In this case the pleading described misrepresentations that are unprotected by the First Amendment. Fundraisers allegedly asserted that "a significant amount" of each dollar donated would be paid over to the charity, when in fact "the amount of funds being paid over to charity (15 cents or less on the dollar) was merely incidental to the fund raising effort," and also allegedly asserted falsely that "substantial portions" of funds collected would be used to support a message center for Persian Gulf troops.

**9-0**. Opinion for unanimous Court by Ginsburg. Concurring opinion by Scalia, joined by Thomas.

*INS v. Ventura* 123 S. Ct. 353, 71 USLW 3314 (11-4-02)

**Immigration, review of BIA decision**: The Ninth Circuit erred in deciding an immigration case on the merits rather than remanding to the Board of Immigration Appeals to resolve an issue it had not addressed – the issue of whether circumstances in Guatemala had changed so much following the end of a civil war that the respondent would not face persecution on account of political opinions if he were denied asylum and forced to return to Guatemala. Generally, a court should remand to an agency for initial decision on a matter that the statute places primarily in agency hands. By relying on an ambiguous five-year-old State Department report to reach its conclusion that the threat of political persecution remained, the court disregarded the agency's legally mandated role and "created potentially far-reaching legal precedent . . . without giving the BIA the opportunity to address the matter in the first instance."

**9-0**. *Per curiam.*

*Inyo County v. Paiute-Shoshone Indians* 123 S. Ct. 1887, 71 USLW 4370 (5-19-03)

**Section 1983, "person," sovereign immunity**: An Indian Tribe does not qualify as a "person" who may sue under 42 U.S.C. § 1983 to vindicate an interest in immunity from compliance with a criminal search warrant. Section 1983 uses the word "person" in two contexts, to describe claimants who may sue and to describe potential defendants who, "under color of state law," deprive someone of federal rights. The Court has held that Congress did not intend to override state sovereign immunity, and that therefore a state is not a "person" subject to suit under section 1983. Even if similar protection is accorded to Indian tribes, however, this would not mean that tribes cannot be claimant "persons" for purposes of section 1983. The general presumption that identical words in the same act are intended to have identical meanings "is not rigid," and

"the meaning may vary to meet the purposes of the law." Sovereigns have been recognized as "persons" in other contexts, but the purposes of section 1983 would not be served by such recognition under the circumstances of this case. Section 1983 "was designed to secure private rights against government encroachment, . . . not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation."

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

*Jinks v. Richland County* 123 S. Ct. 1667, 71 USLW 4310 (4-22-03)

**Necessary and Proper Clause, supplemental jurisdiction**: 28 U.S.C. § 1367(d), which provides for the tolling of a state statute of limitations while a state cause of action that is supplemental to a federal claim is pending in federal court, and for 30 days thereafter, is constitutional. Although the Constitution does not expressly grant Congress the power to toll limitations periods for state-law claims brought in a state court, the power conferred by Art. I, § 8, cl. 18 to make all laws "necessary and proper for carrying into execution" powers vested in the federal government supports section 1367(d). That provision is necessary and proper to effectuate Congress's power to "constitute tribunals inferior to the Supreme Court," and to enable the fair and efficient exercise of "the judicial power of the United States." A law need not be "absolutely necessary" to the exercise of an enumerated power to be "necessary and proper." "Rather, it suffices that § 1367(d) is 'conducive to the due administration of justice' in federal court and is 'plainly adapted' to that end." The provision is conducive to the administration of justice because it provides an alternative to the unsatisfactory options that federal judges would otherwise face in determining whether the retain jurisdiction over supplemental claims that might become time-barred in state court, and because it eliminates a serious impediment to access to federal courts by plaintiffs pursuing federal and state claims that derive from a common nucleus of operative fact. Principles of state sovereignty do not prevent § 1367(d) from being a "proper" exercise of power; the provision does not fall into the category of state "procedure" that is immune from congressional regulation. If there is a valid "substance/procedure dichotomy," the tolling of a limitations period falls on the substance side of the line. Section 1367(d) validly applies to claims brought against a state's political subdivisions; a clear statement rule for such cases would be inconsistent with *Monell v. New York City Department of Social Services* (1978), holding that municipalities are subject to suit as "persons" under 42 U.S.C. § 1983.

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

*Kaupp v. Texas* 123 S. Ct. 1843, 71 USLW 3696 (5-5-03)

**Fourth Amendment, arrest, confession**: The petitioner, a 17-year old, was arrested and seized within the meaning of the Fourth Amendment when police officers, who had been denied a warrant to take the petitioner into custody for questioning, awoke him in his bedroom at 3 a.m. by shining a flashlight in his eyes, told him "we need to go and talk," handcuffed him, took him to the patrol car in his underwear, transported him to the scene of a crime, and then took him to the station house and questioned him. The petitioner's "O.K." in response to "we need to go and talk" was "no showing of consent under the circumstances," but was merely a "submission to a claim of lawful authority." Because the petitioner was unlawfully arrested before he was questioned, his confession during that questioning must be suppressed unless the confession was "an act of free will sufficient to remove the primary taint of the unlawful invasion." A *Miranda* warning alone is insufficient to break the taint.

**9-0**. *Per curiam.*

*Kentucky Ass'n of Health Plans, Inc. v. Miller* 123 S. Ct. 1471, 71 USLW 4259 (4-2-03)

**ERISA, preemption, state laws regulating insurance**: Kentucky's "any willing provider" (AWP) statutes, which prohibit health insurers from discriminating against any provider willing to meet the insurer's terms and conditions for participation, are "law[s] . . . which regulate insurance" within the meaning of ERISA. This means that the AWP statutes are thereby saved from ERISA's broad preemption of all state laws that "relate to any employee health benefit plan." Generally, laws specifically directed toward the insurance practices of insurance companies are held to be laws "which regulate insurance." The fact that the AWP statutes' regulation of insurance companies also affects providers does not take the statutes outside the scope of the savings clause. State laws need not control the terms of insurance policies in order to qualify for the exception, but must substantially affect the risk pooling arrangement between the insurer and insured. AWP laws do so by altering the scope of permissible bargains between insurers and insureds; the effect is that insurers can no longer offer lower premiums in exchange for acceptance of a closed network of providers. Reliance on cases interpreting the McCarran-Ferguson Act, which regulates "the business of insurance," is misplaced. The two statutes use substantially different language, and the McCarran-Ferguson Act tests were developed in cases that addressed conduct by private actors rather than state laws.

**9-0**. Opinion for unanimous Court by Scalia.

*Lawrence v. Texas* 123 S. Ct. 2472, 71 USLW 4574 (6-26-03)

**Due Process, privacy, sodomy**: A Texas statute making it a crime for two people of the same sex to engage in sodomy violates the Due Process Clause of the Fourteenth Amendment. The right to liberty protected by the Due Process Clause includes the right of two adults, "with full and mutual consent from each other, [to] engag[e] in sexual practices common to a homosexual lifestyle." *Bowers v. Hardwick* (1986), upholding application of a Georgia sodomy law on the basis that there is no fundamental right of homosexuals to engage in sodomy, is overruled. The *Bowers* Court "misapprehended the claim of liberty." The sodomy laws, although directed at a particular sexual act, have "more far-reaching consequences, . . and seek to control a personal relationship

that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." The "historical premises" relied upon by the *Bowers* Court are questionable. "There is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." General sodomy laws "do not seem to have been enforced against consenting adults acting in private," but rather for the most part have been enforced in cases involving minors, assault victims, or animals. The *Bowers* precedent has been undermined by later decisions of the Court, and its reasoning has been rejected by state and foreign courts. The doctrine of *stare decisis* is not controlling; "there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding."

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

*Lockyer v. Andrade* 123 S. Ct. 1166, 71 USLW 4161 (3-5-03)

**Habeas corpus, "three-strikes" law**: Imposition on a 37-year-old of two consecutive 25-year-to-life sentences under California's three strikes law on conviction for two "petty thefts with a prior conviction" is not contrary to, and does not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court. The standard for habeas corpus relief from a state sentence established by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254, is therefore not met. The Supreme Court's precedents in the area "have not been a model of clarity." While a "gross disproportionality" principle derived from the Eighth Amendment's Cruel and Unusual Punishments Clause is applicable to sentences for terms of years, the precise contours of the principle are unclear. The California Court of Appeal's decision was not "contrary to" clearly established law. It was permissible for that court to rely on *Rummel v. Estelle* (1980), in which the Court rejected a challenge, based on gross disproportionality, to a sentence of life imprisonment with possibility of parole after 10 to 12 years. The facts in this case fell "in between" those of *Rummel* and those of *Solem v. Helm* (1983), in which the Court granted relief from a sentence of life imprisonment without possibility of parole. Nor are the consecutive sentences an "unreasonable application" of clearly established precedent. To fail under this test the state court's application must be "objectively unreasonable." "Here, however, the governing legal principle gives legislatures broad discretion to fashion a sentence that fits within the scope of the proportionality principle," and the sentencing was not objectively unreasonable.

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

*Massaro v. United States* 123 S. Ct. 1690, 71 USLW 4310 (4-23-03)

**Habeas corpus, ineffective assistance of counsel**: Ineffective assistance of counsel claims that were not raised on direct appeal may be brought in habeas corpus proceedings even if the petitioner could have raised the claim on direct appeal. In this case the petitioner had been represented by new counsel on appeal, and his trial counsel's ineffectiveness was evident from the trial record. The general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice is inapplicable to claims of ineffective counsel. Requiring such claims to be brought on direct

appeal does not promote the interests that are served by the procedural default rule – conserving judicial resources and promoting finality of judgments. The trial record is not developed for the purpose of litigating a claim of ineffective assistance of counsel, and may be incomplete for that purpose. Appellate counsel could feel compelled to raise the issue on direct appeal before it is fully developed, might feel pressured to bring the claim regardless of merit in order to prevent waiver and avoid a claim of ineffective appellate counsel, and might be hampered in obtaining trial counsel's assistance in the appeal. "Few" such claims would be capable of resolution on direct appeal, and appellate courts "would waste time and resources" attempting to resolve the various issues. Allowing ineffective assistance claims to be litigated on collateral review means that they can be litigated in the first instance in district courts, "the forum best suited to developing the facts necessary to determining the adequacy of representation."

**9-0**. Opinion for unanimous Court by Kennedy.

*Meyer v. Holley* 123 S. Ct. 824, 71 USLW 4081 (1-22-03)

**Fair Housing Act, racial discrimination, vicarious liability**: The Fair Housing Act imposes vicarious liability on a corporation, but not upon corporate officers or owners, for the racially discriminatory acts of corporate employees. The Act prohibits racial discrimination in real estate transactions, but is silent about vicarious liability. The established rule is that when Congress creates a tort action, as it did in the Fair Housing Act, it incorporates the ordinary tort rules of vicarious liability unless it specifies a different intent. Congress has done so in several contexts, *e.g.*, the antitrust and food and drug laws, but said nothing in the Fair Housing Act or its legislative history about extending vicarious liability beyond traditional principles. Traditional vicarious liability rules make employers liable for acts of their agents or employees in the scope of their employment, but treat the corporation – not its owner or officer – as the employer. A corporate officer's right to control an employee's actions is insufficient by itself to establish the employer/employee relationship. Moreover, the Court defers to an administering agency's reasonable interpretations of a statute, and views a HUD regulation governing administrative complaints as adopting the traditional vicarious liability rules. The Act does not create a non-delegable duty that trumps traditional vicarious liability principles. Characterizing the Act's objective as an "overriding societal priority" does not change the liability rules.

**9-0**. Opinion for unanimous Court by Breyer.

*Miller-El v. Cockrell* 123 S. Ct. 1029, 71 USLW 4095 (2-25-03)

**Habeas corpus, certificate of appealability**: A habeas corpus petitioner seeking permission in the form of a certificate of appealability (COA) to initiate appellate review of dismissal of his petition need only make "a substantial showing of the denial of a constitutional right." A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's rejection of his claims or could conclude that the issues are worthy of further consideration. In this case the appeals court erred in denying a COA. The petitioner made a "substantial showing" of racial discrimination in jury selection at his state court trial, as measured by a "threshold" application of the three-part test set forth in *Batson v. Kentucky* (1986). Statistical evidence alone raised "some debate" as to race-based motives: the prosecutors used peremptory

challenges to exclude 10 of the 11 eligible African-American jurors, and excluded only 4 of the 31 other prospective jurors. The manner in which potential jurors were questioned varied by race, prosecutors used a "jury shuffling" practice to reduce the number of African Americans likely to be questioned during *voir dire*, and there was a history in the county of a formal policy of excluding minorities from jury service. Although the prosecutors proffered race-neutral explanations for their actions, "a fair interpretation of the record . . . is that the prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire." Also, the state courts made no mention of the jury shuffling or the history of purposeful discrimination. Whether or not the petitioner can prevail on the merits by "clear and convincing evidence," the issue is at least "debatable," and that is all that is necessary for a COA.

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

*Moseley v. V Secret Catalogue, Inc.* 123 S. Ct. 1115, 71 USLW 4126 (3-4-03)

**Federal Trademark Dilution Act**: Trademark dilution, prohibited by the Federal Trademark Dilution Act (FTDA), requires objective proof of actual injury to the capacity of a famous mark to identify and distinguish a product, and is not satisfied by a mere presumption of harm embodied in a "likelihood of dilution" standard. The FTDA provides relief against the use of a famous mark if that use "causes dilution of the distinctive quality" of the mark. This language "unambiguously requires a showing of actual dilution, rather than a likelihood of dilution." Language in the definition of the term "dilution" reveals contrasting usage that "fortifie[s]" this conclusion. Dilution is defined as "the lessening of the capacity" of a famous mark to identify and distinguish a product, regardless of the presence or absence of "likelihood of confusion." Mental association of a junior user's mark with a famous mark is not sufficient to establish dilution. Neither blurring nor tarnishing is a necessary consequence of mental association. In this case, there was "a complete absence of any evidence" that use of the name "Victor's Little Secret" by a retail store caused "any lessening of the capacity of the VICTORIA'S SECRET mark to identify and distinguish goods or services sold in Victoria's Secret stores or advertised in its catalogs."

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

*National Park Hospitality Ass'n v. Department of the Interior* 123 S. Ct. 2026, 71 USLW 4399 (5-27-03)

**Administrative law, ripeness**: The facial challenge to a National Park Service regulation providing that the Contract Disputes Act (CDA) does not apply to contracts between the National Park Service and concessioners in the national parks is not ripe for adjudication. Ripeness of administrative action for judicial review is evaluated through two inquiries: whether the issues are fit for judicial decision and whether withholding review would create hardship for the parties. As a general matter, a regulation is not ripe for review until its application harms or threatens to harm a party. The National Park Service has no delegated rulemaking authority under the CDA, and the challenged portion of its regulation is "nothing more than a general statement of policy" informing the

public of NPS views on applicability of the CDA. The regulation, therefore, has no effects of a strictly legal kind, and does not adversely affect a concessioner's "primary" conduct. The fact that concessioners may wish to take CDA applicability into account when bidding on contracts merely reflects possible uncertainty not amounting to hardship. Although the issue raised is "a purely legal one" that is "final" for purposes of the Administrative Procedure Act, further factual development would enhance a court's ability to deal with those issues, and consequently judicial resolution "should await a concrete dispute about a particular concession contract."

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

*Nevada Dep't of Human Resources v. Hibbs* 123 S. Ct. 1972, 71 USLW 4375 (5-27-03)

**Family and Medical Leave Act, state immunity**: The Family and Medical Leave Act of 1993 (FMLA) is a valid exercise of congressional power under section 5 of the Fourteenth Amendment. The FMLA entitles eligible employees, including employees of state governments, to take up to 12 weeks annually of unpaid leave to care for a family member with a serious health condition, and authorizes suits for injunctive relief and money damages "against any employer (including a public agency)" that interferes with exercise of FMLA rights. This authorization of recovery of money damages from state employers is valid. Congress may, pursuant to a valid exercise of power under section 5 of the Fourteenth Amendment, abrogate state immunity from suit in federal court. Under section 5, Congress may enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." The FMLA "aims to protect the right to be free from gender-based discrimination in the workplace," and Congress had evidence of a pattern of gender-based discrimination by states that was "weighty enough to justify the enactment of prophylactic §5 legislation." The *Kimel* and *Garrett* decisions are distinguished by the fact that age and disability discrimination are not subjected to the heightened level of scrutiny that applies to gender discrimination; heightened scrutiny of state action made it "easier for Congress to show a pattern of state constitutional violations." The FMLA's remedy, "creating an across-the-board, routine employment benefit for all eligible employees" rather than simply prohibiting gender discrimination in the provision of leave benefits, is "congruent and proportional" to the targeted violation. This approach "attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving," and reduces employers' incentive to discriminate in the hiring and promotion of women. The limitations placed on leave availability (*e.g.*, leave is unpaid, employees must work for a year before qualifying) help to ensure that the means are "proportionate" to ends that are legitimate under section 5.

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

*Nguyen v. United States* 123 S. Ct. 2130, 71 USLW 4428 (6-9-03)

**Appeals courts, designation of district judges**: Judges of the District Court for the Northern Mariana Islands are not "district judges" who may sit by

designation on the U.S. Court of Appeals for the Ninth Circuit. As used in the applicable statute, 28 U.S.C. § 292(a), which authorizes a circuit's chief judge to assign "one or more district judges within the circuit" to sit on the appeals court, the term "district judges" refers to judges of Article III courts, not to judges of territorial "Article IV" courts. Several provisions of title 28, read together, require this conclusion. The term "district court" as used in title 28 is defined as a "court of the United States" that is constituted pursuant to chapter five of the title. Chapter five lists all such courts, but the District Court for the Northern Mariana Islands is not so listed. Moreover, although chapter five provides that district judges hold office "during good behavior," another provision directs that district judges for the Marianas are appointed for a term of years, and are removable by the President for cause. Case law precedent also supports the conclusion that the term "United States district court," as used in title 28, "ordinarily excludes Article IV territorial courts." Arguments that the appellate panel's judgment should remain undisturbed even though the panel was improperly constituted are rejected. The "de facto officer doctrine" has been applied when there were merely technical defects of statutory authority, but should not apply to contravene Congress's "weighty" decision to maintain the Article III character of the appeals courts. Concern for the validity of the appeals court's composition also counsels against deciding the case on the basis of an assessment of the fairness of the petitioners' convictions. The presence of a quorum of two qualified judges on the panel is also insufficient to overcome the defect.

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

*Norfolk & Western Ry. v. Ayers* 123 S. Ct. 1210, 71 USLW 4197 (3-10-03)

**Federal Employers' Liability Act, damages for mental anguish**: A railroad worker suffering from asbestosis caused in part by on-the-job exposure to asbestos may recover damages under the Federal Employers' Liability Act (FELA) for pain and suffering due to fear of developing cancer. Case law precedents under the FELA have recognized two categories of emotional distress claims: "stand-alone" claims not provoked by any physical injury, for which recovery is sharply circumscribed; and claims brought on by a physical injury, for which pain and suffering recovery is permitted. Asbestosis is a cognizable injury under the FELA, and fear that cancer will develop is an emotional disturbance that can be tied to the injury and that can give rise to recovery. Although it is asbestos exposure rather than asbestosis itself that can result in cancer, once there has been bodily harm in the form of asbestosis the responsible parties traditionally can be held liable for emotional distress "resulting from . . . the conduct which causes [the bodily harm]." "There is an undisputed relationship between exposure to asbestos sufficient to cause asbestosis, and asbestos-related cancer." Claimants must, however, establish that their alleged fears are "genuine and serious." The FELA does not authorize apportionment of damages between railroad and non-railroad causes. Rather, the FELA provides that, if an injury has resulted "in whole or in part" from a railroad's negligence, that railroad is "liable in damages . . . for such injury." This means that the railroad is jointly and severally liable for full damages even if the injuries were caused in part by negligence of third parties. Narrowing this employer liability without textual warrant would "run counter to a century of FELA jurisprudence," and would complicate adjudications.

**5-4** (recovery for fear of cancer) **9-0** (joint and several liability). Opinion of Court by Ginsburg, unanimous in part, and joined in separate part by Stevens, Scalia, Souter, and Thomas. Concurring and dissenting opinion by Kennedy, joined by Rehnquist, O'Connor, and Breyer. Concurring and dissenting opinion by Breyer.

*Overton v. Bazzetta* 123 S. Ct. 2162, 71 USLW 4445 (6-16-03)

**Due process, restrictions on prison visitation**: Prison visitation policies implemented by the Michigan Department of Corrections in 1995 are not invalid as depriving inmates of associational or due process rights, and do not constitute cruel and unusual punishment. The right of association "is among the rights least compatible with incarceration." Each challenged policy "bears a reasonable relationship to a legitimate penological interest." Restrictions on visitation by children bear a rational relation to the interest in maintaining internal security and protecting children from exposure to sexual or other inmate misconduct. Excluding unrelated children or children as to whom the inmate's parental rights have been terminated is a permissible means of reducing the overall number of child visitors. Banning all visits for a two-year period, except those by lawyers and clergy, for inmates who commit multiple substance abuse violations is "a proper and even necessary management technique" not shown to be unconstitutionally severe in application. Inmates have available the alternative means of letters and telephone calls to exercise the rights they assert; these alternatives "need not be ideal, [but] need only be available." Prisoners have not pointed to a regulatory alternative that accommodates their asserted rights while imposing only *de minimis* cost to valid penological objectives; on the contrary, accommodating the prisoners' demands would require a "significant reallocation" of prison resources and would impair the ability of corrections officers to protect visitors and inmates. The restrictions for substance-abuse violators do not constitute cruel and unusual punishment, but a different case would be presented "if the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate."

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

*Pacificare Health Systems, Inc. v. Book* 123 S. Ct. 1531, 71 USLW 4280 (4-7-03)

**Ripeness, arbitration**: A federal district court should have granted a motion to compel arbitration of claims arising under RICO, even though the parties' arbitration agreements may be construed to limit the arbitrator's authority to award treble damages under RICO. The district court ruled that the respondents could not obtain "meaningful relief" on their RICO claims in an arbitration forum, but it was unclear how arbitrators might rule. The arbitration agreements specified that arbitrators have no authority to award "punitive or exemplary" damages. The Court has recognized, however, that RICO's treble-damages provision serves a "remedial function," and it is "in doubt" whether arbitrators would consider such damages to be punitive within the meaning of the agreements.

**8-0**. Opinion of Court by Scalia, joined by all Justices except Thomas, who did not participate.

*Pharmaceutical Research and Mfrs. of America v. Walsh* 123 S. Ct. 1855, 71 USLW 4354 (5-19-03)

**Medicaid, burden on commerce, preemption**: The Maine Rx Program, under which the state negotiates rebates with drug manufacturers in order to provide discounted prescription drugs to Maine citizens, does not impose an unconstitutional burden on interstate commerce by requiring drug manufacturers who do not enter into a rebate agreement to obtain prior authorization to qualify a doctor's prescription for Medicaid reimbursement. Cases invalidating price affirmation laws that had the effect of regulating prices of sales in other states are inapplicable because "the Maine Act does not regulate the price of any out-of-state transaction." Nor does the Maine law benefit in-state companies at the expense of out-of-state companies. The petitioner did not carry its burden of establishing a likelihood of success on the merits on its claim that the Maine program is preempted by the Medicaid Act, and consequently the district court should not have issued a preliminary injunction.

**9-0** (burden on commerce); **6-3** (preemption). Opinion of Court by Stevens, joined by Rehnquist, O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Separate parts of Stevens opinion joined by Souter, Ginsburg, and Breyer; and by Souter and Ginsburg. Concurring opinions by Breyer, by Scalia, and by Thomas. Concurring and dissenting opinion by O'Connor, joined by Rehnquist and Kennedy.

*Pierce County v. Guillen* 123 S. Ct. 720, 71 USLW 4035 (1-14-03)

**Commerce power, highway hazards, evidentiary privilege**: 23 U.S.C. § 409, which provides that "data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential [highway] accident sites . . . shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding . . . in any action for damages" arising from an accident at any such site, is a valid exercise of Congress's authority to regulate interstate commerce. The Court has jurisdiction under 28 U.S.C. § 1257 to review as "final" the Supreme Court of Washington's ruling requiring disclosure of certain documents under the state's public disclosure law. The Court lacks jurisdiction, however, over a parallel tort action that is not yet "final." Section 409's privilege applies to data that federal law (23 U.S.C. § 152) requires states to collect and compile for a road hazard elimination program. Section 409 is correctly interpreted as applying to information compiled or collected for section 152 purposes, but not to information originally

compiled or collected for other purposes and held by another agency, even if it has since been collected for section 152 purposes. Section 409 was adopted as a response to the reluctance of states to comply fully with section 152 for fear that the assembled data could make them easier targets of negligence actions. "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement . . . would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decision-making, and, ultimately, greater safety on our Nation's roads." Section 409, therefore, "can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce."

**9-0**. Opinion for unanimous Court by Thomas.

*Price v. Vincent* 123 S. Ct. 1848, 71 USLW 4351 (5-19-03)

**Habeas corpus, statutory limits**: Federal courts erred in granting habeas corpus relief to a state prisoner who alleged that his prosecution for first-degree murder constituted double jeopardy because it came after the trial judge had indicated that second-degree murder was the "appropriate charge." Habeas relief is barred by 28 U.S.C. § 2254(d) because the state court decisions upholding the first-degree murder conviction were neither "contrary to" nor an "unreasonable application of, clearly established Federal law, as determined by the Supreme Court." The Michigan Supreme Court's decision was not "contrary to" clearly established law, but instead followed precedent from the U.S. Supreme Court. Moreover, the Michigan court's conclusion that the trial judge's comments "simply were not sufficiently final as to terminate jeopardy" was not an "unreasonable application" of precedent, but instead was consistent with decisions of other courts requiring some formal indication of finality, such as a signed order or a jury instruction. Even if such an interpretation is incorrect, "it was at least reasonable for the state court to conclude otherwise."

**9-0**. Opinion for unanimous Court by Rehnquist.

*Roell v. Withrow* 123 S. Ct. 1696, 71 USLW 4336 (4-29-03)

**Magistrate judges, litigants' consent to use**: Consent to trial before a magistrate judge may be implied from a party's conduct in submitting to litigation before the magistrate. The Federal Magistrate Act authorizes magistrate judges to conduct civil trials if they are specially designated by a district court and are acting "upon the consent of the parties." Although the procedures established by statute and rules envision consent in writing, the text and structure of the section as a whole suggest that a party's failure to comply with the procedures does not deprive a magistrate of jurisdiction. Recognizing implied consent when parties have submitted to litigation before a magistrate judge without filing written consent is the better solution to meeting the dual congressional objectives of relieving court congestion and thereby improving access for civil litigants, while keeping resort to magistrate judges purely voluntary. The "virtue" of insistence on express consent is "simply the value of any bright line" – here assuring that use of a magistrate judge is voluntary. But insistence on express consent would create the risk of "wasting" a "full and complicated trial" before a magistrate judge, and of allowing "gamesmanship" by parties who await the outcome of the trial before objecting to the magistrate judge's authority.

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

*Sattazahn v. Pennsylvania* 123 S. Ct. 732, 71 USLW 4027 (1-14-03)

**Double Jeopardy, death eligibility on retrial**: Pennsylvania was not barred from seeking the death penalty at the defendant's second trial. At his first trial, the defendant had been sentenced to life imprisonment by operation of a statute authorizing the judge to discharge a capital sentencing jury that is deadlocked, and requiring the judge in such circumstances to impose a life sentence. The mere imposition of a life sentence does not raise a double jeopardy bar. Rather, jeopardy attaches only if there is an "acquittal at a trial-like sentencing phase." Normally, therefore, a retrial following a "hung" jury does not violate the Double Jeopardy Clause. Here as well, the jury's deadlock (9-to-3 in favor of a life sentence) "cannot fairly be called an acquittal 'based on findings sufficient to establish legal entitlement to the life sentence.'" Nor can the court's mandated entry of the life sentence be considered an acquittal; the judge "makes no findings and resolves no factual matter." There is no merit to a separate due process claim; the Due Process Clause does not provide "greater double-jeopardy protection than does the Double Jeopardy Clause."

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

*Scheidler v. NOW* 123 S. Ct. 1057, 71 USLW 4116 (2-26-03)

**Hobbs Act, RICO, abortion protests**: Abortion protesters did not commit "extortion" within the meaning of the Hobbs Act by using violence and threats to attempt to shut down abortion clinics, and consequently there were no "predicate acts" of "racketeering" on which a RICO violation could be based. The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, obtained by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The allegations, however, are not that the petitioners used violence, threats, or fear to *obtain* property, but that they used such devices to cause the respondents to *give up* property rights (rights to seek and to provide medical services). The Hobbs Act language is consistent with common law interpretations, and is based on the Penal Code of New York and the Field Code, both of which included acquisition as well as deprivation of property within the meaning of "obtaining of property." Similarly, the Hobbs Act has been interpreted to require acquisition. Eliminating the requirement that property be "obtained" to constitute extortion would eliminate the distinction between extortion and the separate crime of coercion, which involves the use of force to restrict another's freedom of action, and which "more accurately describes the nature of petitioners' actions." Congress was aware of the distinction between extortion and coercion when it adopted the Hobbs Act. Although RICO defines "racketeering activity" to include "any act or threat of . . . extortion . . . which is chargeable under State law," this has been interpreted to apply "a generic definition of extortion" that requires obtaining or seeking to obtain property. Similarly, the alleged violations of the Travel Act, which prohibits extortion in violation of state law, cannot constitute predicate acts for purposes of RICO because the alleged acts are not extortionate.

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

*Sell v. United States* 123 S. Ct. 2174, 71 USLW 4456 (6-16-03)

**Due process, forced medication to stand trial; appeals**: An individual has a constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs. Although the Constitution allows the Government to forcibly administer antipsychotic drugs to a mentally ill criminal defendant in order to render that defendant competent to stand trial for a serious crime, the requisite findings were not made in this case. The treatment must be "medically appropriate, . . . substantially unlikely to have side effects that may undermine the fairness of the trial, and taking account of less intrusive alternatives, . . . necessary significantly to further important governmental trial-related interests." Whether a sufficiently important governmental interest is at stake will depend upon the facts of the individual case, including the potential for future confinement. Ordinarily, before a court approves forced administration of drugs for purposes of rendering a defendant competent to stand trial, it should determine whether the Government seeks, or has sought, permission to administer the drugs for purposes of rendering the individual not dangerous to himself or others. In this case, in which the lower courts held that a magistrate's finding of dangerousness was erroneous, it was error to approve forced medication solely to render the petitioner competent to stand trial. The appeals court had jurisdiction to hear the appeal in this case even though the district court's decision was not "final" within the meaning of 28 U.S.C. § 1291. The case falls under the exception for "collateral" orders that are "effectively unreviewable on appeal from a final judgment." By the time of trial the defendant would have undergone forced medication – "the very harm that he seeks to avoid," and he could not have undone the harm even if acquitted.

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

*Smith v. Doe* 123 S. Ct. 1140, 71 USLW 4182 (3-5-03)

**Ex Post Facto Clause, "Megan's Law"**: Alaska's Sex Offender Registration Act, a "Megan's Law" which requires persons convicted of sex offenses prior to the Act's enactment to register with law enforcement authorities, and which also requires public notification, does not impose retroactive punishment prohibited by the Ex Post Facto Clause of Article I, § 10, cl.1. Ex post facto analysis requires a determination of whether a law is civil or punitive in purpose. If the legislature's purpose was to enact a civil regulatory scheme, then the law is ex post fact only if there is "the clearest proof" of punitive effect. Here the primary purpose was that of public safety – "protecting the public from sex offenders." Although this is also a goal of criminal laws, that fact alone does not make the objective punitive. Several factors provide "guideposts" for analysis. Registration and public notification of sex offenders are of recent origin, and are not viewed as a "traditional means of punishment." These requirements do not closely resemble punishments of public disgrace imposed in colonial times; the stigma of Megan's Law results not from public shaming but from the dissemination of information about a criminal record, most of which is already public. The Act does not subject the registrants to an "affirmative disability or restraint"; there is no physical restraint or occupational

disbarment, and, unlike conditions of probation, there is no restraint or supervision of living conditions. Although the Act might help to deter future crimes, this is consistent with a non-punitive regulatory objective. There is a rational connection to the non-punitive purpose of protecting public safety; the statute need not be narrowly tailored for that purpose. Nor is the act "excessive" in relation to its regulatory purpose. Rather, "the means chosen are reasonable in light of the nonpunitive objective." Unlike involuntary civil commitment, where the "magnitude of restraint [makes] individual assessment appropriate," the state may make "reasonable categorical judgments," and need not provide individualized determinations of dangerousness.

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

*Sprietsma v. Mercury Marine* 123 S. Ct. 518, 71 USLW 4009 (12-3-02)

**Preemption, Federal Boat Safety Act**: The Federal Boat Safety Act of 1971 does not preempt a state common law tort action for damages from the manufacturer of an outboard motor not equipped with a propeller guard. The Act contains an express preemption clause that prohibits states from adopting or enforcing "a law or regulation . . . not identical to a regulation prescribed under [the Act]." No federal regulation requires propeller guards on outboard motors; the Coast Guard studied the matter and decided not to issue a regulation. The statute's preemption language "is best read as not encompassing common-law claims." Use of the article "a" before "law or regulation" "implies a discreteness – which is embodied in statutes and regulations – that is not present in the common law." Also, use of the words "law" and "regulation" together suggests that "law" should not be read so broadly as to encompass "regulation" and thereby render superfluous inclusion of the latter word. A narrower reading of "law" as excluding "regulation" could also exclude "common law." The Act's saving clause, providing that compliance with the federal standards or regulations "does not relieve a person from liability at common law" "buttresses this conclusion." The common law claim is not implicitly preempted by the Coast Guard's decision not to require propeller guards. That decision was not premised on a federal policy against propeller guards, and the Coast Guard does not view its refusal to regulate as having any preemptive effect. Nor does the "statutory scheme as a whole" preempt the common law claim. The Act "did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies."

**9-0.** Opinion for unanimous Court by Stevens.

*State Farm Mut. Auto. Ins. Co. v. Campbell* 123 S. Ct. 1513, 71 USLW 4282 (4-7-03)

**Due Process, punitive damages**: Utah's award of $145 million in punitive damages following an award of $1 million in compensatory damages was an irrational and arbitrary deprivation of property in violation of the Fourteenth Amendment's Due Process Clause. The "guideposts" governing appellate review of punitive damages awards were set forth in *BMW v. Gore* (1996). The first guidepost is the degree of reprehensibility of the defendant's conduct. While State Farm's handling of the claims in this case "merits no praise," the state's "legitimate objectives" could have been satisfied by "a more modest punishment." Instead, the case was used as a "platform" to expose and punish State Farm for its nationwide policies, even though much of the out-of-state conduct was lawful where it occurred, and a state may not punish a defendant "for conduct that may have been lawful where it occurred." More important, the Utah courts awarded punitive damages to punish and deter conduct that bore no relation to the plaintiffs' harm. The second *Gore* guidepost examines the disparity between the harm suffered by the plaintiff and the punitive damages award. "Few awards exceeding a single-digit ratio . . . will satisfy due process." When compensatory damages are substantial, as they were in this case, "then a lesser ratio, perhaps only equal to compensatory damages," can be upheld. Here the harm was economic, rather than physical, and a component of the punitive award was likely duplicated in the compensatory award. The third *Gore* guidepost, the disparity between the punitive award and civil penalties authorized or imposed in comparable cases, reveals that the most relevant civil sanction – a $10,000 fine for an act of fraud – is "dwarfed" by the punitive damages award. Application of the *Gore* guideposts, therefore, "likely would justify a punitive damages award at or near the amount of compensatory damages."

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

*Stogner v. California* 123 S. Ct. 2446, 71 USLW 4588 (6-26-03)

**Ex Post Facto Clause, revival of limitations period**: A California statute that permits resurrection of an otherwise time-barred criminal prosecution for sexual abuse of a child, and that was itself enacted after the pre-existing limitations period had expired for the crimes at issue, violates the Ex Post Facto Clause of Art. I, § 10, cl. 1. The statute threatens the kinds of harms to fairness that the Clause seeks to avoid. Moreover, the statute falls literally within one of the four categories of ex post facto laws described by Justice Chase in *Calder v. Bull* (1798) – those laws that "aggravate a crime or make it greater than it was, when committed," *e.g.*, those laws that "inflict punishment, where the party was not, by law, liable to any punishment." The petitioner in this case was not "liable to any punishment" after California's three-year statute of limitations had run on his alleged crimes, alleged to have taken place between 1955 and 1973. California's 1993 law authorized prosecution for those alleged crimes however, and prosecution was initiated 22 years after the original limitations period had run. Commentators and courts have long believed it settled that the Clause forbids resurrection of a time-barred prosecutions. Courts that have upheld extensions of unexpired statutes of limitations have been careful to distinguish those situations in which limitations periods have expired, suggesting that resurrection rather than extension would be unconstitutional. To allow prosecution years after the state has, in effect, granted an amnesty and told the accused that he need not preserve evidence of innocence, is unfair.

**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.

*Sygenta Crop Protection, Inc. v. Henson* 123 S. Ct. 366, 71 USLW 4001 (11-5-02)

**Removal jurisdiction, All Writs Act**: The All Writs Act does not furnish jurisdiction for removal of an action from state to federal court. The governing statute, 28 U.S.C. § 1441, authorizes removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." The All Writs Act does not provide such original jurisdiction, but instead authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." Likewise, the All Writs Act in combination with the doctrine of ancillary enforcement jurisdiction does not confer the original jurisdiction on which removal must be predicated. Invocation of ancillary jurisdiction does not eliminate "the need for compliance with statutory requirements" for removal.

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

*United States v. American Library Ass'n* 123 S. Ct. 2297, 71 USLW 4465 (6-23-03)

**First Amendment, spending power, internet filters**: The Children's Internet Protection Act (CIPA), which conditions certain Internet-related federal assistance to public libraries on the libraries' installation of filters that block Internet access to images that constitute obscenity or child pornography, or that are harmful to minors, is not unconstitutional on its face. CIPA provides that public libraries may disable the blocking filters at the request of a patron, and thereby allow "access to any speech that is constitutionally protected with respect to that patron." If some libraries lack the capacity to unblock a specific Web site or to disable the filter altogether, then there is the possibility of an as-applied challenge. Because, however, the respondents failed to show that the ability of adult patrons to access Internet material "is burdened in any significant degree," the facial challenge is rejected.

**6-3**. No opinion of Court. Opinion announcing the Court's judgment by Rehnquist, joined by O'Connor, Scalia, and Thomas. Concurring opinions by Kennedy and by Breyer. Dissenting opinions by Stevens; and by Souter, joined by Ginsburg.

*United States v. Bean* 123 S. Ct. 584, 71 USLW 4017 (12-10-02)

**Judicial review, inaction on petition to remove firearms disability**: A federal district court lacks authority under 18 U.S.C. § 925(c) to grant relief to someone whose application to the Bureau of Alcohol, Tobacco, and Firearms (ATF) to remove his prohibition on possessing a firearm was returned unprocessed in accordance with a prohibition in the ATF's appropriation law. Section 925(c) provides that "[a]ny person whose application for relief from disabilities is denied by the Secretary may file a petition [in federal district court] for review of such denial." ATF's failure to act "does not amount to a 'denial' within the meaning of § 925(c). . . . An actual decision by ATF on an application is a prerequisite for judicial review." The phrase "denied by the Secretary" references the Secretary's determinations as to whether the applicant will be able to act in a manner not dangerous to public safety and as to whether relief would be contrary to the public interest. Both of these standards "point to ATF

as the primary decisionmaker." The procedures that the section requires and the broad discretion conferred on the Secretary also suggest the need for an actual adverse action on an application. Finally, the admission of additional evidence in district court proceedings is contemplated only in exceptional circumstances. Ordinarily, the district court's determination must rely heavily on the record compiled by ATF, but there is no such record for the court to rely on when the application has been returned unprocessed.

**9-0**. Opinion for unanimous Court by Thomas.

*United States v. Jimenez Recio* 123 S. Ct. 819, 71 USLW 4076 (1-21-03)

**Conspiracy, termination**: A conspiracy does not terminate automatically when the object of the conspiracy becomes impossible to achieve. The Ninth Circuit's view that it does is rejected by "almost all courts and commentators." Thus, a conspiracy to distribute illegal drugs did not end when government agents seized the drugs in question; persons caught in a sting operation set up after the drug seizure can be convicted of conspiracy. The essence of a conspiracy is an agreement to commit an unlawful act, and the agreement is a distinct evil that exists regardless of whether the substantive crime ensues. A conspiracy poses a threat to the public "over and above" the threat of the commission of the planned crime because the combination makes it more likely that the conspirators will continue their criminal ways and commit other crimes. This additional threat persists when conspirators continue to pursue their objective, unaware that police have frustrated its accomplishment.

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

*United States v. Navajo Nation* 123 S. Ct. 1079, 71 USLW 4146 (3-4-03)

**Indian Tucker Act; Indian Mineral Leasing Act**: The Tribe's claim for compensation from the United States for breach of trust in connection with the Secretary of the Interior's approval of coal lease amendments negotiated by the Tribe and Peabody Coal Company after alleged pressure brought to bear on the Tribe by the Secretary must be rejected because the claim does not derive from any liability-imposing provision of the Indian Mineral Leasing Act (IMLA). The Indian Tucker Act grants the Court of Federal Claims jurisdiction over tribal claims against the United States, but is not itself a source of substantive rights. Existing precedent requires a tribal plaintiff to invoke a rights-creating law that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." The IMLA is not such a law. Rather than imposing a "detailed fiduciary responsibility" on the Secretary to manage leasing and mineral resources in the best interests of the tribe, the IMLA "simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective." In this respect, the IMLA resembles the General Allotment Act, held not to give rise to a damages action for breach of trust in managing allotted lands, and may be distinguished from "a network of other statutes and regulations" later held to impose "full responsibility to manage Indian resources and land for the benefit of the Indians." Moreover, interpreting the IMLA to impose fiduciary duties giving rise to compensable claims would counter one of the IMLA's principal purposes – that of enhancing tribal self-determination by giving tribes the lead role in negotiating mineral leases.

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

*United States v. White Mountain Apache Tribe* 123 S. Ct. 1126, 71 USLW 4139 (3-4-03)

**Indian Tucker Act, management of trust lands**: A 1960 law under which the former Fort Apache Military Reservation is held in trust for the White Mountain Apache Tribe, subject to a proviso granting the United States the right to use any part of the land and improvements for administrative or school purposes, triggered compensable trustee responsibilities over property used under the proviso. The Indian Tucker Act allows damage actions against the United States only if the statute conferring substantive rights "can fairly be interpreted as mandating compensation." The two *Mitchell* cases represent the two categories of fiduciary duties – a "bare trust" under the General Allotment Act the breach of which is not compensable, and "elaborate control" under timber management statutes the breach of which is compensable. "The 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach." Although the Act does not expressly subject the Government to duties of management and conservation, it does subject the property to a trust, and the Government's use of the property, involving daily supervision and daily occupation, creates a "fair inference [of] an obligation to preserve the property improvements." The Government's defenses are rejected. Property used under the proviso is not carved out of the trust. Specific language on damages is not needed if the requisite "fair inference" can be drawn from the trust obligation. A damages remedy is not "inappropriate" for a failure of maintenance even though injunctive relief may represent the economic "equivalent."

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

*Virginia v. Black* 123 S. Ct. 1536, 71 USLW 4263 (4-7-03)

**First Amendment, cross burning**: A state, consistent with the First Amendment, may prohibit cross burning carried out with the intent to intimidate. Intimidation can be a type of true threat that is not protected by the First Amendment. Given the history of cross burnings in this country, some cross burnings fit within this category of intimidating expression. Virginia's law does not run afoul of *R. A. V. v. St. Paul* (1992), in which the Court invalidated as content-based an ordinance that prohibited cross burnings that constituted "fighting words" only if they offended on the basis of race, color, creed, religion or gender. "Virginia's statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.'" Not all content discrimination is prohibited, however. "Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence." As a general matter, content discrimination is permissible if it is "based on the very reasons why the particular class of speech at issue . . . is proscribable." However, the Virginia statute's *prima facie* evidence provision, stating that a cross burning "shall be *prima facie* evidence of an intent to intimidate," is unconstitutional.

**6-3** (intimidation); **7-2** (*prima facie* evidence). Opinion of Court by O'Connor, joined by Rehnquist, Stevens, Scalia, and Breyer. Separate part of O'Connor opinion joined by Rehnquist, Stevens, and Breyer. Concurring opinion by Stevens. Concurring and dissenting opinions by Souter, joined by Kennedy and Ginsburg; and by Scalia, joined in part by Thomas. Dissenting opinion by Thomas.

*Virginia v. Hicks* 123 S. Ct. 2191, 71 USLW 4441 (6-16-03)

**First Amendment, overbreadth**: The Richmond Redevelopment and Housing Authority's trespass policy is not facially invalid under the First Amendment's overbreadth doctrine. Under the trespass policy, the Authority may ban from streets within the development any person who is not a resident or employee and who "cannot demonstrate a legitimate business or social purpose for being on the premises." The respondent was arrested for trespass after having received written notice barring him from the development. The Virginia Supreme Court held that the ordinance was unconstitutionally overbroad because it granted the property manager discretion that could be used to prohibit speech protected by the First Amendment; persons wishing to hand out leaflets in the development's property would be required to obtain the manager's permission. Under the overbreadth doctrine, a law with legitimate applications can be invalidated if it punishes a substantial amount of protected free speech, but only if application to protected speech is substantial not just in an absolute sense, but also in relation to the scope of the law's plainly legitimate applications. "Rarely, if ever, will an overbreadth challenge succeed against a law . . . that is not specifically addressed to speech." The trespass policy is addressed to non-expressive conduct. "Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment." More important, the policy applies to all persons who enter the development's streets, not just to those persons who seek to engage in expression. The respondent failed to show that the policy would be used to bar anyone from engaging in constitutionally protected speech, or even that protected speech falls outside the "legitimate business or social purposes" that permit entry to the development.

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

*Washington State Dep't of Soc. and Health Servs. v. Guardianship Estate of Keffeler* 123 S. Ct. 1017, 71 USLW 4110 (2-25-03)

**Social Security**: The State's use of foster children's social security benefits to reimburse itself for expenditures related to foster care is not prohibited by a provision of the Social Security Act (42 U.S.C. § 407(a)) that protects benefits from "execution, levy, attachment, garnishment, or other legal process." The State Supreme Court generalized from the text to conclude that it prohibits "creditor-type acts," and determined that the State's reimbursement scheme violates that principle. Neither the statute nor the regulations, however, "say anything about 'creditors.'" Because the reimbursement does not involve "execution, levy, attachment, or garnishment," the case boils down to the meaning of "other legal process." The interpretive canons *noscitur a sociis* and *ejusdem generis* require that the general phrase be interpreted to embrace objects similar in nature to the enumerated objects. The processes of execution, levy, attachment, and garnishment require use of "some judicial or quasi-judicial mechanism . . . by which control over property passes from one person to another in order to discharge . . . [a] liability." Neither characteristic is

present: the State has no enforceable claim against its foster children, and the benefits are already in its possession and control. The State Supreme Court's reliance on two precedents was misplaced, since both involved forms of legal process expressly prohibited by § 407(a). Reliance on the "best interest of the beneficiary foster child" was also misplaced; here too, the state court should have deferred to the Commissioner's interpretation, under which the beneficiary's best interest is seen as having her basic needs taken care of by a representative payee.

**9-0**. Opinion for unanimous Court by Souter.

*Wiggins v. Smith* 123 S. Ct. 2527, 71 USLW 4560 (6-26-03)

**Habeas corpus, ineffective assistance of counsel**: The petitioner's attorneys' failure to pursue investigation of petitioner's personal history and to present important mitigating evidence at his capital sentencing constituted ineffective assistance of counsel, and the state court's rejection of his claim involved an "unreasonable application" of clearly established federal law within the meaning of 28 U.S.C. § 2254. The petitioner, therefore, was entitled to federal habeas relief. The governing law was established by *Strickland v. Washington* (1984), holding that an ineffective assistance of counsel claim must be based on a showing of deficient attorney performance that falls below an objective standard of reasonableness, and that resulted in prejudice to the defense. Under *Strickland*, a defense attorney's strategic judgment made after less than complete investigation is reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." Here the attorneys' decision not to expand their investigation into their client's background fell short of professional standards then governing, and was unreasonable in light of the information actually discovered. They abandoned the investigation after having acquired "only rudimentary knowledge" of their client's history, but after having acquired information that "any reasonably competent attorney would have realized [was necessary to pursue in] making an informed choice among possible defenses." Under the circumstances, the state court's deference to the attorneys' "strategic decision" not to present the background mitigating evidence was objectively unreasonable. Actual prejudice to the petitioner's case was established. The available mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal of [the petitioner's] moral culpability."

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

*Woodford v. Garceau* 123 S. Ct. 1398, 71 USLW 4217 (3-25-03)

**Habeas corpus, cases "pending" on AEDPA effective date**: For purposes of applying the rule announced in *Lindh v. Murphy* (1997) that amendments made by the Antiterrorism and Effective Death Penalty Act (AEDPA) do not apply to cases pending on AEDPA's effective date, a case does not become "pending" until an actual petition for habeas relief is filed in federal court. Neither the filing of a motion for appointment of a federal habeas counsel nor the application for a stay of execution suffices to make a case "pending." AEDPA places heavy emphasis on the standards governing review of the merits of a habeas application, and the meaning of "pending" should reflect that emphasis. The issue, therefore, is whether on AEDPA's effective date the state prisoner "had before a federal court an application for habeas relief seeking an adjudication on the *merits* of the petitioner's claims." Textual support for the conclusion that an application is required is found in 28 U.S.C. § 2254(e)(1), which provides that a presumption of the correctness of the state court's determination of factual issues shall apply "in a proceeding instituted by an application for a writ of habeas corpus." If a proceeding could be "instituted" by a request for an attorney or for a stay of execution, then the presumption would be inapplicable in such cases. Also, the filing of a habeas petition is the functional equivalent of the filing of a complaint in a civil action, and a civil action is commenced by the filing of a complaint.

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

*Woodford v. Visciotti* 123 S. Ct. 357, 71 USLW 3315 (11-4-02)

**Habeas corpus, ineffective assistance of counsel**: The Ninth Circuit erred in affirming the grant of habeas corpus relief to a petitioner whose claim was barred by operation of 28 U.S.C. § 2254(d). That federal statute allows a federal court to grant habeas relief to a state prisoner whose claim was adjudicated on the merits in state court only if the state decision was contrary to, or involved an unreasonable application of, clearly established federal law, or if the state decision was based on an unreasonable determination of the facts. The California Supreme Court's decision was not "contrary to" the Supreme Court's decision in *Strickland v. Washington* (1984), which required a "reasonable probability" that, but for counsel's error, the outcome of the case would have been different. The California court's "occasional shorthand reference" to the *Strickland* standard did not establish error. Nor did the California court unreasonably apply *Strickland*. An incorrect application of federal law is not necessarily an "unreasonable" application under section 2254(d). Although during the sentencing phase of the trial the defense counsel had made multiple concessions as to the effects of the defendant's brain injury, and had failed to introduce mitigating evidence about the defendant's background, the state courts could reasonably have concluded that this mitigating evidence was outweighed by "severe" aggravating factors.

**9-0**. *Per curiam.*

*Yellow Transportation, Inc. v. Michigan* 123 S. Ct. 371, 71 USLW 4003 (11-5-02)

**Deference to agency interpretation, motor carrier regulation**: The Interstate Commerce Commission's (ICC's) implementation of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) to require that states consider fees charged under reciprocity agreements when complying with the statute's mandate that registration fees under the new Single-State Insurance Registration system be "equal to" fees "collected or charged" under the old system as of November 15, 1991, is entitled to deference under principles established in *Chevron v. NRDC* (1984). The statute is ambiguous, and the ICC's interpretation is "permissible" and "reasonable." "ISTEA's fee-cap provision does not foreclose the ICC's determination that fees charged under States' pre-existing reciprocity agreements were, in effect, frozen by the new [system]." The words "'collected or charged' can quite naturally be read to mean fees that a State actually collected or charged," and do not instead refer to a "fee system." Congress made an express delegation of authority to the ICC to promulgate standards to implement the new registration system, and "it was thus for that agency to resolve any ambiguities and fill in any holes in the statutory scheme."

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

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