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Recent Civil Decisions of the U.S. Supreme Court:

The 2003-2004 Term

Charles H. Whitebread

The civil cases decided by the United States Supreme Court during its last term were headlined by its decisions reasserting the rule of law in the context of detainees in the war on terrorism. In addition, the Court handed down a number of decisions on civil rights, the First Amendment, federalism, presidential power, and civil statutory interpretation. We review those cases here.

CIVIL RIGHTS ACT

In *Nelson v. Campbell*,[1] a unanimous Court held that 42 U.S.C. section 1983 was the appropriate vehicle for a prisoner's claim seeking temporary stay and permanent relief from a cut-down procedure to find a vein for a lethal injection to carry out a death sentence. Petitioner was sentenced to death and informed that, because his veins were compromised from years of drug-use, prison officials would perform a "cut-down" procedure prior to the lethal injection to find a vein. He filed a section 1983 action claiming the procedure "constituted cruel and unusual punishment and deliberate indifference to his serious medical needs in violation of the Eighth Amendment." The question before the Court was whether petitioner's claim was the functional equivalent of a habeas petition and, therefore, whether petitioner was required to obtain approval to file a second or successive habeas petition pursuant to section 2244(b)(3). Justice O'Connor, writing for the Court, determined that it was not. A section 1983 claim must give way to "the more specific habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." However, where the challenge is merely to the "conditions of a prisoner's confinement," the claim can be made under section 1983 in the first instance. The Court recognized that the challenge to a particular method of execution did not necessarily call into question the fact or validity of a sentence, however, "imposition of the death penalty presupposes a means of carrying it out." Nonetheless, a prisoner who was not facing a death sentence could bring a section 1983 action to challenge the cut-down procedure. The fact that the state can make a connection between the cut-down procedure and execution did not change this: "[t]hat venous access is a necessary prerequisite does not imply that a particular means of gaining such access is likewise necessary." If the cut-down method was mandatory by law, or petitioner was unable or unwilling "to concede acceptable alternatives," the state's argument might have had more weight. However, such was not the case.

In a *per curiam* decision, the Court, in *Muhammad v. Close*,[2] held that where a prisoner's 42 U.S.C. section 1983 claim cannot be considered on habeas relief based on any recognized theory, the prisoner need not exhaust state or federal remedies before filing an action in federal court. Petitioner, a prisoner, was put into detention until his hearing for violation of a prison rule prohibiting "threatening behavior." At the hearing, he was acquitted of threatening behavior but charged with the lesser infraction of insolence, for which prehearing detention was not required. Petitioner served an additional seven days of detention and was deprived of privileges for 30 days. Petitioner filed a complaint under section 1983 for damages. The Sixth Circuit dismissed the action pursuant to *Heck v. Humphrey*,[3] stating "that an action under 1983 to expunge his misconduct charge and for other relief occasioned by misconduct proceedings could be brought only after satisfying *Heck*'s favorable termination requirement."

In its decision, the Court first noted that the Sixth Circuit mistakenly assumed that petitioner was seeking expungement of the misconduct from his prison charge; he was not. It then went on to discuss whether *Heck's* favorable termination requirement applied. As background, the Court stated: "Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. 2254, and a complaint under . . . § 1983." Challenges on the "validity of confinement or to the particulars affecting its duration are the province of habeas corpus," while "requests for relief turning on circumstances of confinement may be presented in a § 1983 action." Federal petitions for habeas corpus "may be granted only after other avenues of relief have been exhausted." However, "[p]risoners suing under § 1983 . . . generally face a substantially lower gate, even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first." The Court then discussed hybrid cases, where a prisoner seeks "relief unavailable in habeas" but the allegations "imply the invalidity either of an underlying conviction or of a particular ground for denying release short of serving the maximum term of confinement." The Court's decision in *Heck* addressed these hybrid cases, holding "that where success in a prisoner's § 1983 damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable state, or federal habeas,

1. 124 S. Ct. 2117 (2004).
2. 540 U.S. 749 (2004).
3. 512 U.S. 477 (1994).

opportunities to challenge the underlying conviction or sentence." The Court, however, concluded that the Sixth Circuit erred "by following the mistaken view expressed in circuit precedent that *Heck* applie[d] categorically to all suits challenging prison disciplinary proceedings." The Court recognized these administrative proceedings "do not as such raise any implication about the validity of the underlying conviction, and although they may affect the duration of time to be served (by bearing on the award or revocation of good-time credits) that is not necessarily so." In this case, Muhammad "raised no claim on which habeas relief could have been granted on any recognized theory, with the consequence that *Heck's* favorable termination requirement was inapplicable."

Justice Stevens, writing for a unanimous Court in *Jones v. R.R. Donnelley & Sons Co.*,[4] held that claims arising under 42 U.S.C. section 1981, as amended by the 1991 Act, are governed by the four-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990, 28 U.S.C. section 1658. Petitioners, former employees of respondent, brought a class action for violation of their rights under section 1981. Their claims existed solely because of Congress's amendment to section 1981 in the 1991 Act. The employer moved to dismiss the action, arguing the applicable state statute of limitations had lapsed. Petitioners, the former employees, responded by arguing that the four-year statute of limitations under section 1658 applied. Section 1658 provides a four-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990. Because the Court found the term "arising under" vague, it turned to the history of the enactment of section 1658 to determine Congress's intent. Before its enactment, there was no uniform federal statute of limitations period and federal courts borrowed limitation periods from states. This void created a host of problems, which Congress attempted to alleviate by adopting a uniform limitations period. The Court concluded "[t]hat the history . . . [of] the enactment of 1658 strongly supports an interpretation that fills more rather than less of the void that has created so much unnecessary work for federal judges." Therefore, it believed the more favorable interpretation was that section 1658 applied to post-1990 amendments to federal law where the amendment created a cause of action that was not previously available. The 1991 Act "enlarged the category of conduct that is subject to § 1981 liability." Therefore, the Court concluded the 1991 Act "fully qualifie[d] as an Act of Congress enacted after [December 1, 1990] within the meaning of § 1658."

Justice Ginsburg delivered the opinion for an 8-1 Court in *Pennsylvania State Police v. Suders*.[5] It held that to establish constructive discharge under Title VII, a claimant alleging sexual harassment must show that the abusive work environment became so intolerable that her resignation qualified as a fitting response. If the actions that created the intolerable work environment were not sanctioned by the employer, the employer may assert as an affirmative defense that (1) the employer had in place an accessible and effective policy for reporting sexual harassment and (2) the employee failed to avail herself of it. Respondent, who was employed by Pennsylvania State Police (PSP), quit work in response to the sexual harassment of her male supervisors and co-workers. She brought an action against PSP under Title VII, claiming constructive discharge. PSP sought dismissal based on the affirmative defense set forth in *Faragher v. Boca Raton*[6] and *Burlington Industries, Inc. v. Ellerth*.[7] The *Ellerth/Faragher* affirmative defense provides that "when no tangible action is taken . . . the employer may raise an affirmative defense to liability, subject to proof by a preponderance of the evidence:" (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." The Court granted certiorari to resolve a circuit split regarding the application of the *Ellerth/Faragher* affirmative defense.

Justice Stevens . . . held that claims arising under 42 U.S.C. section 1981 . . . are governed by the four-year statute of limitations for actions arising under federal statutes . . . .

The Court first restated the principles of constructive discharge: "Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." The inquiry is objective. In *Ellerth* and *Faragher*, the Court concluded that when a supervisor takes tangible employment action against an employee, it is "beyond question" that the employer is liable under agency principles. When a supervisor's actions, however, did not culminate in tangible employment action, the Court adopted the "aided-by-the-agency-relation" standard for these scenarios, or the *Ellerth/Faragher* affirmative defense. In this case, the Court concluded that the constructive discharge claim stemmed from, "and can be regarded as an aggravated case of, sexual harassment or hostile work environment" with the addition that "[a] plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." However, as in *Ellerth* and *Faragher* this environment could either result from official or unofficial supervisory conduct and also was a combination of the employee's decision to leave and the precipitating conduct. The Court determined that because "a constructive discharge is functionally the same as an actual termination in damages-enhancing respects," the *Ellerth/Faragher* affirmative defense should be available to an employer. To hold otherwise "would make the *graver* claim of hostile-environment constructive discharge *easier* to prove than its lesser included component." The case was remanded because genuine issues of material fact existed with regard to whether PSP was entitled to the defense in this action.

4. 124 S. Ct. 1836 (2004).
5. 124 S. Ct. 2342 (2004).
6. 524 U.S. 775 (1998).
7. 524 U.S. 742 (1998).

Chief Justice Rehnquist . . . held that Washington's prohibition on giving scholarships to students who wished to pursue a degree in devotional theology is not inherently constitutionally suspect.

In *General Dynamics Land Systems, Inc. v. Cline*,[8] a 6-3 Court, in a decision written by Justice Souter, held that the "text, structure, purpose, and history of the [Age Discrimination in Employment Act (ADEA)], along with its relationship to other federal statutes . . . show[] that the statute [did] not mean to stop an employer from favoring an older employee over a younger one." In 1997, petitioner entered into a collective bargaining agreement with the United Auto Workers that eliminated petitioner's "obligation to provide health benefits to subsequently retired employees, except as the then-current workers at least 50 years old." Numerous employees filed an action claiming the agreement violated the ADEA because it discriminated against younger employees in favor of older. In rejecting respondent's claim, the Court turned to the history of the ADEA, the specific language of the statute, and case law. Congress decided not to include age discrimination in Title VII of the Civil Rights Act of 1964, "being aware that there were legitimate reasons as well as invidious ones for making employment decisions on age." Congressional hearings held prior to the ADEA's enactment "dwelled on unjustified assumptions about the effect of age on ability to work," reflecting "the common facts that an individual's chances to find and keep a job get worse over time." There was nothing to suggest that "any workers were registering complaints about discrimination in favor of their seniors." The specific language of used in the ADEA supported this conclusion. The Court noted that there is no suggestion in the introductory provisions that the ADEA meant to protect discrimination in favor of senior employees. Among other things, the introductory provisions "stress the impediments suffered by 'older workers . . . in their efforts to retain . . . and especially to regain employment.'" Case law also supported the Court's conclusion. In *Hazen Paper Co. v. Biggins*,[9] the Court held "there is no violation of the ADEA in firing an employee because his pension is about to vest, as a basis for action that we took to be analytically distinct from age, even though it would never occur without advanced years." In its reasoning the Court stated that "'the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age,' . . . whereas discrimination on the basis of pension status 'would not constitute discriminatory treatment on the basis of age [because] the prohibited stereotype [of the faltering worker] would not have figured in this decision, and the attendant stigma would not ensue.'" The Court stated that it had used the reasoning in this case as a background for other age discrimination cases and the "Courts of Appeals and the District Courts ha[d] read the law the same way."

FIRST AMENDMENT

In *Locke v. Davey*,[10] Chief Justice Rehnquist, writing for a 7-2 Court, held that Washington's prohibition on giving scholarships to students who wished to pursue a degree in devotional theology is not inherently constitutionally suspect; therefore, because the state's interest in not funding religious studies was substantial, and the burden it placed on the recipients of the scholarship minimal, the program did not violate the Free Exercise Clause of the First Amendment. Washington implemented a Promise Scholarship Program that awarded scholarships to students pursuing postsecondary education. However, a student was not eligible for scholarship funds if he or she pursued a degree in theology. Respondent, who received a scholarship but refused to sign a waiver stating he would not pursue a degree in devotional theology, was denied his scholarship funds. He challenged the statute, arguing "the denial of his scholarship based on his decision to pursue a theology degree violated, *inter alia*, the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment." The Court did not agree. First, it concluded that "the link between government funds and religious training is broken by the independent and private choice of the recipients." Therefore, even if a program recipient could and chose to pursue a degree in devotional theology, the program did not violate the Establishment Clause. Second, as to the Free Exercise Clause, the Court determined that Washington's decision not to fund a certain category of instruction was constitutional. Unlike in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,[11] "the State's disfavor (if it can be called that) is of a far milder kind" and the program "does not require students to choose between their religious beliefs and receiving a government benefit." Furthermore, that the program funds secular training did not necessarily require that it fund religious training. The Court believed that the two are not "fungible." The United States and the states' constitutions have distinct views, "in favor of free exercise, but opposed to establishment." That the state treats training for religious professions differently from training for secular professions is a product of these views and "not evidence of hostility toward religion." Washington's constitution may be more strict than the Federal Constitution, however, according to the Court, "the interest it seeks to further is scarcely novel."

In *Elk Grove Unified School District v. Newdow*,[12] the Court did not reach the merits of respondent's contention that the words "under God" in the pledge of allegiance violate the Establishment and Free Exercise Clauses of the First Amendment and instead determined that respondent lacked standing to maintain the action on behalf of his daughter. Justice Stevens, writing for a five-person majority, determined that a parent, who does not have the final decision-making

8. 540 U.S 581 (2004).
9. 507 U.S. 604 (1993).
10. 540 U.S. 712 (2004).
11. 508 U.S. 520 (1993).
12. 124 S. Ct. 2301 (2004).

authority over decisions regarding their child's psychological and educational well-being, does not have prudential standing to challenge a school district's policy regarding the pledge of allegiance.

The Court had two strands of jurisprudence regarding standing: (1) Article III standing, "which enforces the Constitution's case or controversy requirement;" and (2) "prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" The latter "encompasses 'the general prohibition on a litigants' raising another person's legal rights, the rules barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" The Court has continuously declined to interfere with domestic relations, believing "'[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the law of the States and not to the laws of the United States.'" The daughter's mother had the ultimate decision-making power in case of a disagreement regarding the daughter's health, education, and welfare. Nonetheless, "Newdow contend[ed] that despite [the mother's] final authority, he retain[ed] 'an unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive.'" However, the Court recognized that it was not only Newdow's interest in inculcating his child with his religious views, "but also the rights of the child's mother as a parent generally and under the Superior Court orders specifically." The Court also recognized the importance of the daughter's rights "who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution." Newdow's standing was derived from his relationship with his daughter, "but he lack[ed] the rights to litigate as her next friend." First, in direct contrast with the Court's law on prudential standing, Newdow's interests are not parallel, "and, indeed, [were] potentially in conflict" with his daughter's interests. Second, Newdow's parental status was defined by California domestic law. The Court of Appeals, to whom the Court would normally defer to in this instance given its greater familiarity with California law, determined that "state law vests in Newdow a cognizable right to influence his daughter's religious upbringing." However, the Court did not see how either the mother or the school board had done anything that impairs this right.

Justice Breyer delivered the opinion of the Court in *City of Littleton v. Z.J. Gifts*,[13] which held the special judicial review procedures set forth in *Freedman v. Maryland*[14] were not applicable to an adult business zoning ordinance; Colorado's ordinary judicial rules of review were adequate for First Amendment protection. The City of Littleton adopted a zoning ordinance that required an adult business to obtain a license to operate. The application for the license required numerous disclosures, and a denial of the license could be appealed to the state district court, pursuant to the Colorado Rules of Civil Procedure. Instead of applying for a license, respondent opened a store and brought an action to challenge the zoning ordinance, claiming Colorado law "[did] not assure that [the city's] license decisions will be given expedited [judicial] review," hence it did not assure "prompt final judicial decision" as required by the Constitution and the Court's decision in *Freedman*. The City of Littleton, in turn, argued (1) the Court, in *FW/PBS, Inc. v. Dallas*,[15] "found that the First Amendment required such a scheme to provide an applicant with '*prompt access*' to judicial review of an administrative denial of the license, but that the First Amendment did not require assurance of a 'prompt judicial *determination*' of the applicant's legal claim;" and (2) that Colorado law satisfies any "prompt judicial determination" requirement. The Court rejected the first argument, but accepted the second.

[I]n Freedman, the Court set forth a number of safeguards necessary for constitutional protection in a censorship situation . . . .

First, in *Freedman*, the Court set forth a number of safeguards necessary for constitutional protection in a censorship situation, including prompt judicial review and determination. Despite the City of Littleton's arguments, *FW/PBS* "does not purport to radically alter the nature of those core requirements." Of these core requirements, it was clear that the Court still mandated prompt administrative and judicial determinations. As to the second argument, the Court stated that the City of Littleton "in effect, argues that [the Court] should modify *FW/PBS*, withdrawing its implication that *Freedman*'s special judicial review rules apply in this case." The Court agreed, finding Colorado's ordinary judicial review procedures suffice, for four reasons: (1) courts may accelerate the hearing process to avoid First Amendment violations; (2) the Court has "no reason to doubt the willingness of Colorado's judges" to use their power to avoid First Amendment harm; (3) the First Amendment harm in this instance is different than that in *Freedman*, making a special procedure unnecessary (in *Freedman*, the Court considered a subjective scheme while here, the "licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display"); and (4) the Court notes "nothing in *FW/PBS* or in *Freedman* requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme."

Congress enacted the Child Online Protection Act (COPA), 47 U.S.C. section 231, "to protect minors from exposure to sexually explicit materials on the Internet." In *Ashcroft v. ACLU*,[16] Justice Kennedy, delivering the opinion of a 6-3 Court, held that the district court did not abuse its discretion in granting respondent's preliminary injunction to enjoin the government from enforcing the criminal penalties set forth in the statute. The Court, in considering Congress's second attempt to make the Internet safe for minors, determined less

13. 124 S. Ct. 2219 (2004).
14. 380 U.S. 51 (1990).
15. 493 U.S. 215 (1990).
16. 124 S. Ct. 2783 (2004).

Both respondents were paraplegics who used wheelchairs for mobility and claimed that the state denied them access to . . . the state court system by reason of their disability.

restrictive means, *i.e.*, filtering software, existed to prevent minors from accessing harmful material on the Internet and, therefore, it was likely respondents might succeed on the merits.

In reaching its determination to uphold the preliminary injunction, the Court applied an abuse-of-discretion standard of review. In analyzing whether the district court abused its discretion, the Court considered whether "less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." The test "[was] not to consider whether the challenged restriction [had] some effect in achieving Congress's goal, regardless of the restriction it imposes," it was to "ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech [was] not chilled or punished." The primary concern of the district court was the availability of blocking and filtering software; it determined that this alternative provided a less restrictive means to prevent children from accessing the information. The Court agreed: "Filters are less restrictive than COPA. They impose selective restrictions on speech on the receiving end, not universal restrictions at the source." Furthermore, "promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished." The Court made special note of one contrary argument: "filtering software is not an available alternative because Congress may not require it to be used." Even though the Court made special note of the argument, it stated that the argument carries little weight "because Congress undoubtedly may act to encourage it to be used." Furthermore, "the need for parental cooperation does not automatically disqualify a proposed less restrictive alternative."

FEDERALISM: 11th AMENDMENT

In *Tennessee v. Lane*,[17] Justice Stevens delivered the opinion of a 5-4 Court, which held that Congress had the power to abrogate a state's Eleventh Amendment sovereign immunity under Title II of the Americans with Disabilities Act (ADA) for those classes of cases implicating the fundamental right of access to courts. Respondents filed an action alleging violation of Title II. Both respondents were paraplegics who used wheelchairs for mobility and claimed that the state denied them access to, and the services of, the state court system by reason of their disability. Specifically, many court buildings in Tennessee were inaccessible to them. Title II, at issue here, "prohibits any public entity from discriminating against 'qualified persons' with disabilities in the provision or operation of public services, programs, or activities." Title II also incorporates by reference section 505 of the Rehabilitation Act of 1973, "which authorizes private citizens to bring suits for money damages." Under the Eleventh Amendment, "Congress may abrogate the State's sovereign immunity if (1) it unequivocally expresses its intent and (2) acts pursuant to a valid grant of constitutional authority." Only the second element was at issue in this case.

The Court concluded that Congress's abrogation of the state's sovereign immunity in the Title II context was a valid exercise of its power. In *Fitzpatrick v. Bitzer*,[18] it held that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." The Court has recognized that this broad power includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *i.e.*, prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." However, Congress's section 5 power is not unlimited: "it may not work a 'substantive change' in the governing law." Applying this test in *Board of Trustees of Univ. of Ala. v. Garrett*,[19] the Court concluded that Title I was not a valid exercise of Congress's section 5 power because "Congress exercise of its prophylactic § 5 power was unsupported by a relevant history and pattern of constitutional violations." Here, however, the Court found the opposite true: "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." At this point, the Court stated that the only question that remained was "whether Title II is an appropriate response to this history and pattern of unequal treatment." First, it determined the scope of that inquiry, determining that it need not consider the application of Title II in general, but instead could ask "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." It concluded that because "Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further."

Under 11 U.S.C. section 523(a), student loans guaranteed by a governmental entity are not included in general discharges unless the bankruptcy court determines that excepting the debt from the order would impose an "undue hardship" on the debtor. Chief Justice Rehnquist, writing for a 7-2 Court, determined in *Tennessee Student Assistance Corp. v. Hood*[20] that state sovereign immunity was not implicated in a bankruptcy proceeding where a petitioner must serve a summons and complaint on the state in order to obtain an undue hardship determination for the purpose of discharging his or her student loans.

The Court explained that the "discharge of a debt by a bankruptcy court" was "similar to an *in rem* admiralty proceeding" where the Court has determined that "the Eleventh

17. 124 S. Ct. 1978 (2004).
18. 427 U.S. 445 (1976).
19. 531 U.S. 356 (2001).
20. 124 S. Ct. 1905 (2004).

Amendment does not bar federal jurisdiction . . . when the State is not in possession of the property." Similarly, a bankruptcy court has "jurisdiction over the debtor's property, wherever located, and over the estate." Furthermore, under the Court's longstanding precedent, "States, whether or not they choose to participate in the [bankruptcy] proceeding, are bound by a bankruptcy court's discharge order no less than other creditors." Therefore, according to the Court, the only question was whether "the particular process by which student loan's debts are discharged unconstitutionally infringes" upon a state's sovereignty, *i.e.*, service of a summons and a complaint. Section 528(a)(8) is self-executing: "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt." However, even if Congress has made it more difficult for an individual to discharge their student loan debt, the proceeding is still *in rem*. The Court reiterated its prior discussions and stated, "we have previously endorsed individualized determinations of State's interests within the federal courts *in rem* jurisdiction." The procedures used in this case do not change the nature of the *in rem* proceeding. Furthermore, the Court saw no need to engage in a comparative analysis with the similarities to a traditional civil trial. The Court noted that "if the Bankruptcy Court had to exercise personal jurisdiction over TSAC, such an adjudication would implicate the Eleventh Amendment." However, a bankruptcy proceeding was an *in rem* proceeding and, therefore, "even when the underlying proceedings are, for the most part identical," meaning the procedure bears a striking resemblance to a traditional civil suit, the similarities are irrelevant. Likewise, it found "the issuance of process" does not implicate state sovereign immunity. The bankruptcy court could adjudicate without personal jurisdiction over the state: the text of section 532(a)(8) does not require a summons, "and absent Rule 7001(6) a debtor could proceed by motion." The Court concluded, therefore, that there was "no reason why service of a summons, which in this case [was] indistinguishable in practical effect from a motion, should be given dispositive weight."

Justice Kennedy delivered the opinion of a unanimous Court in *Frew v. Hawkins*.[21] It held state officials were not protected by Eleventh Amendment sovereign immunity with respect to a federal court's enforcement of a consent decree. Petitioners brought an action against the state and its officials to enforce certain provisions of Medicaid, specifically as they relate to the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. The state was dismissed on Eleventh Amendment grounds, and the petitioners and state officials entered into a consent decree, which was approved by the district court in 1996. The enforcement of the consent decree was at issue in this case. The state officials claim "the Eleventh Amendment rendered the decree unenforceable even if they were in noncompliance" because petitioners had not shown a violation of federal law. According to the Court, "this case involves the intersection of two areas of federal law: the reach of the Eleventh Amendment and the rules governing consent decrees." *Ex parte Young*,[22] carved out a narrow exception to the Eleventh Amendment, allowing "suits for prospective relief against state officials acting in violation of federal law." *Firefighters v. Cleveland*[23] requires that a consent decree entered in a federal court must "spring from, and serve to resolve, a dispute within the court's subject matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objective of the law upon which the complaint was based." The Court did not read into these requirements, as the state officials argued, that a consent decree was not enforceable unless petitioners could prove first a violation of federal law. First, the consent decree was properly entered by the district court and it stated a mandatory and enforceable obligation: "The petitioners' motion to enforce . . . sought enforcement of a remedy consistent with *Ex parte Young* and *Firefighters*, a remedy the state officials themselves accepted when they asked the District Court to approve the decree."

It held that state officials were not protected by Eleventh Amendment sovereign immunity with respect to a federal court's enforcement of a consent decree.

In *Engine Manufacturing Association v. South Coast Air Quality Management Dist.*[24] an 8-1 Court held that the reference to "standards" in Section 209 of the Clean Air Act refers merely to standards and not methods of enforcement; therefore, California's mandates regarding the purchase of vehicles, rather than the manufacture or sale, did not escape preemption. Respondent, a political subdivision of California, adopted six "fleet rules," which applied to various operators of fleets and "contain[ed] detailed prescriptions regarding the types of vehicles that fleet operators must purchase or lease when adding or replacing fleet vehicles." All six rules applied to public operators, and three apply to private ones. Petitioner claimed the fleet rules were preempted by section 209 of the Clean Air Act (CAA). Section 209 provides: "No state or any political subdivision thereof shall adopt or attempt to enforce any *standard* relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." According to the Court, the resolution of this case depended upon the interpretation of the word "standard." The lower courts, and respondent, "engraft[ed] onto this meaning . . . a limiting component, defining it as only '[a] production mandat[e] that require[s] manufacturers to ensure that the vehicles they produce have particular emissions characteristics.'" The Court, however, believed this interpretation

21. 540 U.S. 431 (2004).
22. 209 U.S. 123 (1908).
23. 478 U.S. 501 (1986).
24. 124 S. Ct. 1756 (2004).

In *Hamdi v. Rumsfeld*, Justice O'Connor announced . . . that a citizen, who was an enemy combatant . . ., was entitled to some due process of law.

"confuse[d] standards with the means of enforcing standards."

PRESIDENTIAL POWER

In *Rasul v. Bush*,[25] the Court determined that alien petitioners were not barred from bringing a petition for a writ of habeas corpus in the District Court for the District of Columbia, which had jurisdiction over the petitioners' custodians, even though they were being held outside the United States; section 2241 by its terms did not require that the petitioners reside in the district in which they were bringing their petitions, only that the court had jurisdiction over the custodians. Petitioners were foreign nationals being held in the United States Naval Base in Guantanamo Bay under Authorization for Use of Military Force (AUMF). In 2002, petitioners, through relatives acting as their next friends, filed various actions in the United States District Court for the District of Columbia, "challenging the legality of their detention at the Base."

Justice Stevens, writing for a five-justice majority, began by stating that under 28 U.S.C. section 2241, Congress had granted federal courts "the authority to hear applications for habeas corpus by any person who claims to be held 'in custody in violation of the Constitution or laws or treaties of the United States.'" The government relied primarily on *Johnson v. Eisentrager*[26] to support its argument that the district court lacked jurisdiction to issue a writ. In *Eisentrager*, the Court held that the district court lacked authority to issue a writ to German citizens "who had been captured by U.S. forces in China, tried and convicted . . . by an American military commission in Nanking, and incarcerated in the Landsberg Prison in occupied Germany." The Court stated that the prisoners in this case differed from those in *Eisentrager*: (1) they were not nationals of countries at war with the United States; (2) they denied they had engaged in or plotted acts of aggression against the United States; (3) they had never been afforded access to any tribunal, or charged with any wrongdoing; and (4) they had been imprisoned "in territory over which the United States exercises exclusive jurisdiction and control."

The Court determined that the holding in *Eisentrager* was justified at the time, but a similar result was not justified here. At the time *Eisentrager* was decided, the Court had just decided *Ahrens v. Clark*,[27] "a case concerning the application of the habeas statute to the petitions of 120 Germans who were then being detained at Ellis Island . . . for deportation." In *Ahrens*, the Court held that the district court lacked jurisdiction to review the petitions because the statute required that the petitioners be present in the jurisdiction in which they bring their petition. The Court of Appeals, in issuing its *Eisentrager* decision shortly after *Ahrens*, found an unconstitutional gap that had to be filled by reference to "fundamentals." The *Ahrens* Court also ignored this gap and addressed only the constitutional issues raised in the Court of Appeals's decision. This gap had since been filled: In *Braden v. 30th Judicial Circuit Court of Ky.*,[28] the Court held, "contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not 'an invariable prerequisite' to the exercise of district court jurisdiction." Instead, what was important was whether the person who holds the petitioner in custody was within the jurisdictional limits of the district court. The Court concluded that because *Braden* "overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly [did] not preclude the exercise of § 2241 jurisdiction over petitioner's claims." Furthermore, the Court believed that "application of the habeas statute to persons detained at the base [was] consistent with the historical reach of the writ of habeas corpus." At common law, courts readily applied the writ to persons being held within the territorial limits of the nation, "as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run."

In *Hamdi v. Rumsfeld*,[29] Justice O'Connor announced the judgment of the Court, which concluded that a citizen, who was an enemy combatant being held pursuant to Authorization for Use of Military Force (the AUMF), was entitled to some due process of the law. After the September 11 terrorist attacks, Congress passed a resolution, AUMF, authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks or harbored such organizations or person, in order to prevent any future acts of international terrorism against the United States by such nation, organizations, or person." Hamdi, an American citizen, was arrested by friendly forces in Afghanistan in 2001 and had been held in the United States Naval Base in Guantanamo Bay since January 2002. Hamdi's father filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. section 2241, on Hamdi's behalf and as his next friend, claiming that Hamdi's detention was not legally authorized and that, as a United States citizen, Hamdi was entitled to "the full protections of the Constitution."

Justice O'Connor, writing for the plurality, framed the threshold issue in this case as "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'" The plurality found that "Congress [had] in fact authorized Hamdi's detention, through the AUMF," by authorizing the President to use "necessary and appropriate force." The plurality agreed that Hamdi could not be held indefinitely, but read the AUMF as only authorizing detention as long as "the relevant conflict" was still ongoing. The plurality then determined "what process is constitutionally due to a citizen who disputes his enemy-combatant status." Its analysis involved both an examination of the writ of habeas corpus and the Due Process Clause. As to the writ, the parties agreed that "absent

25. 124 S. Ct. 2686 (2004).
26. 339 U.S. 763 (1950).
27. 335 U.S. 188 (1948).
28. 410 U.S. 484 (1973).
29. 124 S. Ct. 2633 (2004).

suspension, the writ of habeas corpus remains available to every individual detained within the United States." The parties also agreed that Congress had not suspended the writ in this instance. Therefore, the plurality must conclude that "Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241." The parties also agreed that section 2241 "provide[s] at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review," most notably, § 2243 provides that "'the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,' and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories." The question then was what due process was required. The plurality recognized that both parties "highlight[ed] legitimate concerns:" (1) the government "in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States;" and (2) Hamdi's asserted private "interest of being free from physical detention by one's own government." The plurality recognized the latter interest was not reduced by the "circumstances of war or the accusation of treasonous behavior." The plurality used the balancing test set forth in *Mathews v. Eldridge*[30] for determining the procedures that are necessary to ensure that a citizen is not "'deprived of life, liberty, or property, without due process of law,'" and concluded that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker." However, at the same time, the plurality conceded that in a time of war, it must not unduly burden the government. Therefore, the government's burden of proof might be relaxed in some ways, *i.e.*, the use of hearsay evidence.

Justice Scalia disputed that the AUMF "authorize[d] detention of a citizen with the clarity necessary to satisfy the interpretative canon that statutes should be construed so as to avoid grave constitutional concerns . . . or with the clarity necessary to overcome the statutory prescriptions that 'no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.'" He also noted that Congress failed to suspend a detainee's right to seek a writ. Therefore, instead of "making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures," the Court should have concluded that "Hamdi [was] entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus."

Justice Souter, concurring in part, dissenting in part, and concurring in the judgment, also believed the Government had shown that "the Force Resolution authorize[d] the detention complained of here even on the facts the Government claims." Furthermore, Justice Souter concluded that if Hamdi was being held as a prisoner of war, then his treatment must also fall within the Geneva Convention, which would require, among other things, "a 'written record . . . of proceedings.'" He would not reach the question of what process Hamdi was due because he would find that the government was not authorized to detain Hamdi in the first place. Justice Thomas also dissented, but reached the conclusion that petitioner's writ should fail: "This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."

BCRA's enactment followed the Court's decision in *Buckley v. Valeo*, and a Senate investigation into soft-money contributions . . . .

In *Rumsfeld v. Padilla*,[31] a 5-4 Court dismissed the habeas petition of a detainee being held pursuant to the Authorization for Use of Military Force (AUMF) because the petitioner named the Secretary of Defense Donald H. Rumsfeld as the respondent instead of Commander of the Consolidated Naval Brig, Melanie A. Marr, who was his actual physical custodian. Petitioner also filed his action in the Southern District of New York when he was being held in South Carolina. The Court broke down the question of whether the Southern District had jurisdiction over Padilla's petition into two related subquestions: (1) "who [was] the proper respondent to the petition?"; and (2) "[did] the Southern District have jurisdiction over him or her?" As to the first subquestion, the Court wrote: "The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is 'the person who has custody over [the petitioner].'" Generally, there is only one proper respondent in a petition, the custodian, who is "'the person' with the ability to produce the prisoner's body before the habeas court." There are exceptions to this rule, but the Court found that neither the recognized nor proposed ones were applicable here. The case law instead stood for the "simple proposition that the immediate physical custodian rule, by its terms, [did] not apply when a habeas petitioner challenges something other than his present physical confinement." The Court turned to the second subquestion and concluded that the District Court did not have jurisdiction over Commander Marr: "District courts are limited to granting habeas relief 'within their respective jurisdictions.'" The Court interpreted this rule to require only that "the court issuing the writ have jurisdiction over the custodian." Congress added the limiting clause that district courts could only issue a writ "within their respective jurisdictions." Accordingly, "with respect to habeas petitions 'designed to relieve an individual from oppressive confinement,'" the traditional rule is that "the Great Writ is issuable only in the district of confinement." The Court also relied on other portions of the habeas statute and legislative history to support its conclusion. For example, "if a petitioner seeks habeas relief in the court of appeals, or from this Court . . . the petitioner must 'state the reasons for not making application to *the* district court of the district *in which the applicant*

30. 424 U.S. 319 (1976).

31. 124 S. Ct. 2711 (2004).

In sum, the Court upheld the provisions of Title I, which are Congress's attempt to plug the loophole regarding the issue of soft money.

is held.'" Also, it was clear that Congress legislated against a backdrop of a "district of confinement" rule as evidenced by the exceptions to the rule.

ELECTIONS

In *McConnell v. Federal Elections Commn*,[32] the Court reviewed various provisions contained in Titles I through V of the Bipartisan Campaign Reform Act of 2002 (BCRA). BCRA's enactment followed the Court's decision in *Buckley v. Valeo*[33] and a Senate investigation into soft-money contributions, issue advertising, and the political practices involved in the 1996 federal elections. Its central provisions "are designed to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections." Certain provisions also attempt to provide limitations on contributions. "Soft money" refers to contributions made to state and local elections, but are used to support federal elections. Soft money is money raised and spent by political parties that is not covered by limits on contributions to candidates and committees in federal elections. Issue advertising consists of communications that do not expressly advocate the election or defeat of clearly identified candidates, *i.e.*, use "the magic words" "Elect John Smith," but are functionally identical to such express advocacy. Plaintiffs challenged these provisions as facially invalid under the First Amendment, and as violating the Election Clause, federalism, and equal protection. Justice Stevens, Justice O'Connor, Chief Justice Rehnquist, and Justice Breyer wrote various portions of the opinion. The Court applied *Buckley*'s closely drawn scrutiny test: a test less exacting than strict scrutiny, but that showed "proper deference to Congress ability to weigh competing constitutional interests in an area which it enjoys particular expertise."

In sum, the Court upheld the provisions of Title I, which are Congress's attempt to plug the loophole regarding the use of soft money. It also upheld the majority of the provisions in Title II, relating to issue advertising, except to the extent it attempted to limit party spending during post-nomination and pre-election. This unconstitutional provision required parties to choose between two spending options: (1) a party making an independent expenditure was barred from making a coordinated expenditure; or (2) a party making a coordinated expenditure could not make an independent expenditure "*for express advocacy*." The Court had previously held that caps on individual compensations were unconstitutional and, therefore, only addressed this statute as it applied to "coordinated expenditures." The Court concluded that "while the category of burdened speech [was] relatively small, it plainly [was] entitled to First Amendment protection." It found the government did not have a compelling interest in having the parties "avoid the use of magic words": "Any claim that a restriction on independent express advocacy serve[d] a strong Government interest [was] belied by the overwhelming evidence that the line between express advocacy and other types of election-influencing expression is, for Congress' purposes, functionally meaningless." Indeed, the Court concluded, Congress defined "electioneering communications" because it recognized the inadequacy of the "express advocacy" test.

The Court avoided ruling on most of the challenged provisions under Title III and IV on standing grounds, including: (1) an amendment to the Federal Communications Act, which required broadcast stations, within certain time periods to "sell a qualified candidate the 'lowest unit charge of the station for the same class and amount of time for the same period;'" (2) the new provision "increases and indexes for inflation certain FECA contribution limits;" and (3) the "millionaire provisions," which "provide[d] for a series of staggered increases in otherwise applicable contribution-to-candidate limits in the candidate's opponent spends a triggering amount of his personal funds." It did, however, determine that the limits placed on contributions by minors unconstitutional: "Limitations on the amount that an individual may contribute to a candidate or political committee impinge on the protected freedoms of expression and association."

The Court finally considered Title V, amending the Communications Act of 1934. The amendment required "broadcasters to keep publicly available records of politically related broadcasting requests." As to the first provision, the Court determined that the regulation was virtually identical to the provision enacted by the Federal Communications Commission in 1938 and "which with slight modifications the FCC [had] maintained in effect ever since." Therefore, the Court rejected plaintiffs' arguments that the provision was "intolerably burdensome and invasive." For the same reasons, the Court also rejected plaintiffs' arguments that there were no important governmental interests. The FCC had pointed out that "these records are necessary to permit political candidates and others to verify that licensees have complied with their obligations relating to use of their facilities by candidates for political office pursuant to the equal time provision." As to the second provision, referred to as "election message request" requirements, which required broadcasters to keep records of broadcast messages that refer to "a legally qualified candidate" or to "any election to Federal Office," the Court determined that, although broader than the "candidate requests," they served essentially the same purpose. For the same reasons discussed above, the Court could not find that they imposed an undue administrative burden and determined that they were supported by an important government interest. Finally, the Court addressed the third provision, or the "issue requirement," which required broadcasters to keep records of requests to broadcast "message[s] related to a national legislative issue of public importance . . . or otherwise relating to a political matter of national importance." It found that this provision was "likely to help the FCC determine whether broadcasters [were] carrying out their 'obligations to afford reasonable opportunity for the discussion of conflicting views on issues of

32. 540 U.S. 93 (2003).

33. 424 U.S. 1 (1976) (*per curiam*).

public importance,' and whether broadcasters were too heavily favoring entertainment, and discriminating against broadcasts devoted to public affairs." The Court found that the statute was not overbroad because of its use of the term "national affairs," which was no broader than language Congress has used in other contexts to impose other obligations on broadcasters.

In *Vieth v. Jubelirer*,[34] Justice Scalia, writing for the plurality, determined that the Court's decision in *Davis v. Bandemer*[35] was in error: political gerrymander claims were not justiciable. Justices Stevens and Souter, the latter who was joined by Justice Ginsburg, would hold that political gerrymander claims were justiciable on a district level, while Justices Breyer and Kennedy would continue to adjudicate them on a statewide level.

Plaintiffs challenged Pennsylvania's redistricting plan, alleging, among other things, it constituted an unconstitutional gerrymander. Political gerrymandering existed before the constitution was signed and "remained alive and well . . . at the time of the framing." The Framers provided a remedy in the Constitution, Article I, section 4, leaving "in state legislatures the initial power to draw districts for federal elections," but permitting Congress to "'make or alter' those districts if it wished." Congress had continuously attempted to restrain the practice of political gerrymander. The Court too had taken a role: "[e]ighteen years ago, we held [in *Bandemer*] that the Equal Protection Clause grants judges the power—and duty—to control political gerrymandering." However, since that decision, the Court had failed to articulate a judicially discoverable and manageable standard for resolving political gerrymander claims, indicating that they were likely "political questions" or nonjusticiable claims.

The plurality began its analysis by stating that the "judicial power" created by Article III, was not the power of a court to do whatever it wishes, but "the power to act in the manner traditional for English and American courts." One important tradition was that a court's action be governed by *standard*, by *rule*. In *Bandemer*, six justices determined "since it was 'not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided,' . . . such cases *were* justiciable." This decision improperly shifted the burden of proof. Furthermore, the six justices could not decide on what standard should apply, four applying a different standard than the other two. Since *Bandemer*, the Court had not revisited the issue, although lower courts have continually applied the plurality standard, essentially resulting in the refusal of a court to intervene: "[t]hroughout its subsequent history, *Bandemer* had served almost exclusively as an invitation to litigation without much prospect of redress." The plurality addressed each of the dissent's proposed standards and the plaintiffs' proposed standard, finding that none were workable.

Justice Stevens would "require courts to consider political gerrymander challenges at the individual-district level," much like the Court's standard in racial gerrymandering cases. Justice Souter, like Justice Stevens, would "restrict these plaintiffs, on the allegations before us, to district-specific political gerrymandering claims." However, Justice Souter "recognize[d] that there is no existing workable standard for adjudicat[ing] such claims." The standard he created was loosely based on Title VII cases, "complete with a five-step prima facie test sewn together from parts of, among other things, our Voting Rights Act jurisprudence, law review articles, and apportionment cases." Justice Breyer would attack the problem on a statewide level. He proposes the criterion that "nothing is more precise than 'the *unjustified* use of political factors to entrench a minority in power.'" He invoked the Equal Protection Clause, but "unjustified entrenchment" was really measured by his own theory of "effective government." Justice Kennedy also recognized the shortcomings of the other standards considered to date, but "conclude[d] that courts should continue to adjudicate such claims because a standard *may* one day be discovered."

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CIVIL STATUTORY INTERPRETATION

In *Hibbs v. Winn*,[36] a 5-4 Court, in an opinion written by Justice Ginsburg, determined that the Tax Injunction Act, 28 U.S.C. section 1341, did not bar a lawsuit questioning the constitutionality of a state tax, it only barred those suits filed by taxpayers seeking to avoid payment of tax liabilities. Arizona law "authorize[d] income-tax credits for payments to organizations that award educational scholarships and tuition grants to children attending private schools." Respondents brought an action seeking to enjoin the state from giving tax credits on Establishment Clause grounds. The state sought dismissal based upon the TIA, which prohibits a lower federal court from restraining "the assessment, levy or collection of any tax under State law." The Court stated that "[t]o determine whether this litigation falls within the TIA's prohibition, it [was] appropriate, first, to identify the relief sought." The Court concluded respondent was seeking only prospective relief. The next question then was whether the relief sought seeks to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." The answer, the Court stated, turned on the meaning of the word "assessment."

Turning to the Internal Revenue Code and then the context in which the word assessment was used in the TIA, the Court concluded "an assessment [was] closely tied to the collection of a tax, *i.e.*, the assessment [was] the official recording of liability that triggers levy and collection efforts." The Court next turned to the history of the TIA to support its conclusion. It

34. 124 S. Ct. 1769 (2004).
35. 478 U.S. 109 (1986).
36. 124 S. Ct. 2276 (2004).

The Court assume[d] Congress legislated against this background of law, scholarship, and history . . . .

stated: "Congress modeled [TIA] upon earlier federal 'statutes of similar import,' laws that, in turn, paralleled state provisions proscribing 'actions in State courts to enjoin the collection of State and county taxes.'" Congress drew heavily on the Anti-Injunction Act (AIA), "which bars 'any court' from entertaining a suit brought 'for the purpose of restraining the assessment or collection of any [federal] tax.'" The Court had recognized that AIA served two purposes: (1) it protects the government's need to assess and collect taxes in a timely fashion; and (2) "require[s] that the legal right to the disputed sums be determined in a suit for refund." Similarly, the TIA "shields" a state's assessment and collection of taxes from federal-court restraints. Also, it forces individuals who wish to challenge the assessment of taxes to pursue those procedures specified by the taxing authority. The Court next pointed out that in prior cases involving the TIA, it had recognized TIA's principal purpose as limiting "drastically federal-court interference with the collection of [state] taxes." Most telling for the Court were its prior cases dealing with desegregation. The Court stated: "In a procession of cases not rationally distinguishable from this one, no Justice or member of the bar of this Court ever raised a § 1341 objection that, according to the petitioner in this case, should have caused us to order dismissal of the action for want of jurisdiction."

A unanimous Court in *Barnhart v. Thomas*[37] determined the Social Security Administration (SSA) did not need to consider whether a claimant's previous job existed in significant numbers in the national economy when determining whether the claimant was disabled. Respondent, a former elevator operator, applied for disability benefits, which were denied by the SSA. An administrative law judge concluded that she was not disabled because "her 'impairments do not prevent [her] from performing her past relevant work as an elevator operator.'" The ALJ rejected respondent's argument that because the work no longer existed "in significant numbers in the national economy," she was unable to do her work, as did the Court. Title II's definition of disability is qualified by the language that "[a]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that *he is not only unable to do his previous work but cannot*, considering his age, education, and work experience, *engage in any other kind of substantial gainful work which exists in the national economy.*" The question before the Court was whether "exists in the national economy" only modified the "substantial gainful work" or whether it also modified "unable to do his previous work." The SSA had determined that it did not need to determine whether a claimant's previous work "exist[ed] in the national economy." Because the SSA was the agency charged with enforcement of this statute, the Court, in accordance with its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[38] must defer to the SSA's determination if it was reasonable. The Court found that it was. Grammatical rules regarding the last antecedent state "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." Furthermore, the SSA's interpretation did not "lead to 'absurd results.'" The Third Circuit concluded that there was "no plausible reason why Congress might have wanted to deny benefits to an otherwise qualified person simply because that person, although unable to perform any job that actually exists in the national economy, could perform a previous job that no longer exists." In response, the Court identified the "proxy theory": "Congress could have determined that an analysis of a claimant's physical and mental capacity to do his previous work would 'in the vast majority of cases' serve as an effective and efficient administrative proxy for the claimant's ability to do *some* work that does exist in the national economy." The Court recognized that this proxy rationale might produce undesirable results in some circumstances; however, it stated "[t]hat [the Third Circuit's] logic would invalidate a vast number of the procedures employed by the administrative state;" every legal rule has imperfect applications.

Under the Freedom of Information Act (FOIA), "Exemption 7(C) excuses from disclosure 'records or information compiled for law enforcement purposes' if their production could reasonably be expected to constitute an unwarranted invasion of personal privacy." In *National Archives and Records Administration v. Favish*,[39] a unanimous Court held that Exemption 7(C) recognized family members' rights to personal privacy in the death-scene images of their close relative. In order to overcome this privacy interest, a requester must (1) assert a significant public interest to be advanced by the information sought; and (2) where the interest sought to be advanced was that the government acted negligently or inappropriately, produce sufficient evidence that would warrant belief by a reasonable person that the alleged government impropriety might have occurred.

The Court agreed with NARA's denial of respondent's request under the FIOA for the death scene photos of Vincent Foster, Jr., deputy counsel to President Clinton. It notes that the Exemption 7(C)'s language was "in marked contrast to the language in Exemption 6, pertaining to 'personnel and medical files,' where withholding [was] required only if disclosure 'would constitute a clearly unwarranted invasion of personal privacy.'" The Court drew two conclusions from these differences: (1) the use of the word "clearly" and the use of the phrase "would constitute" versus "could reasonably," clearly indicates Exemption 7(C) was broader than Exemption 6; and (2) the data compiled in law enforcement documents contain information on individuals other than the person being investigated, *i.e.*, witnesses and initial suspects. As to the latter, the Court wrote, "[t]here [was] special reason, therefore, to give protection to this intimate personal data, to which the public does not have a general right of access in the ordinary course."

37. 540 U.S. 20 (2003).
38. 467 U.S. 837 (1984).
39. 124 S. Ct. 1570 (2004).

First, traditional burial rights and common law acknowledge "a family's control over the body and death images of the deceased." The Court "assume[d] Congress legislated against this background of law, scholarship, and history" as well as "the background of the Attorney General's consistent interpretation of the exemption to protect members of the family of the person to whom the information pertains." The protection in Exemption 7(C) "[went] beyond the common law and the Constitution" and, therefore, "it would be anomalous to hold in the instant case that the statutes provide[d] even less protection than does the common law." Second, if the Court adopted Favish's position, "child molesters, rapists, murderers, and other violent criminals" could obtain information regarding their victims. FOIA requests cannot be denied based on the identity of the person; therefore, the Court's holding "ensure[d] that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases."

The Court stated that its conclusion above did not end its inquiry. While a family's privacy interest falls within the exemption, "the statute directs nondisclosures only where the information 'could reasonably be expected to constitute an unwarranted invasion' of the family's personal privacy." According to the Court, "[t]he term 'unwarranted' requires [it] to balance the family's privacy interest against the public interest in disclosure." Therefore, while the person requesting the information typically need not give a reason for a request, when limitations, such as personal privacy protection, come into play, he or she must. The Court applied a balancing test, stating that the person requesting the information must "establish a sufficient reason for disclosure" by showing that: (1) "the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake;" and (2) "the information is likely to advance that interest."

OTHER SIGNIFICANT DECISIONS

In *Bedroc Limited, LLC v. United States*,[40] the Court declined to extend its holding in *Watt v. Western Nuclear, Inc.*,[41] relating to the Stock-Raising Homestead Act of 1916 (SRHA), to the Pittman Underground Water Act of 1919. The issue before the Court was whether sand and gravel were "valuable minerals" reserved to the United States in any land grants made under the Pittman Act. While the Court determined that gravel constituted a mineral under the SRHA reserved to the United States, the plurality, in this instance, determined that sand and gravel were not "valuable minerals" reserved to the United States under the Pittman Act. The Court relied on the plain language of the Pittman Act, which referred to valuable minerals and the statutory context of the Act as it related to the General Mining Act, under which sand and gravel would not constitute "valuable mineral deposit[s]." Justice Thomas concurred in the judgment but believed the Court relied too heavily on the Acts use of the word "valuable."

In *Virginia v. Maryland*,[42] a 7-2 Court resolved the latest dispute between the two states relating to use of the Potomac River. Chief Justice Rehnquist, writing for the majority, held that Maryland did not have the right to regulate Virginia's construction of the water intake structures or water withdrawal. The Court concluded that even though Maryland owned the river-bed to the low-water mark, the 1785 Compact granted Virginia the right to build improvements from its shore and the Black-Jenkins Award did not in any way limit those rights. The state's long-standing dispute regarding ownership of the river led to two major resolutions: (1) the 1785 Compact, which "resolved many important navigational and jurisdictional issues, but did not determine the boundary line between the States;" and (2) the Black-Jenkins Award, an arbitration award issued in 1877, which placed the boundary line between the states at the low-water mark on the Virginia shore of the Potomac, thereby awarding Maryland ownership of the entire bed of the river. The latter, however, also awarded Virginia "such right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five." In 1933, "Maryland established a permitting system for water withdrawal and waterway construction taking place within the Maryland territory" and, for the last 50 years, has issued numerous permits to Virginia entities. Virginia now contended that Maryland's regulation of the river was in violation of the 1785 Compact and Black-Jenkins Award.

In *Virginia v. Maryland*, a 7-2 Court resolved the latest dispute between the two states relating to the use of the Potomac River.

The Court agreed. Prior to the 1785 Compact and the Black-Jenkins Award, the ownership of the river was contested. However, the Award, while vesting ownership in Maryland, also granted Virginia "the sovereign right to use the River beyond the low-water mark." Thus, the Court concluded, "Maryland's necessary concession that Virginia own[ed] the soil to the low-water mark must also doom her claim that Virginia [did] not possess riparian rights appurtenant to those lands to construct improvements beyond the low-water mark and otherwise make use of the water in the River." The Court also concluded that "[i]n granting Virginia sovereign riparian rights, the arbitrators did not construe or alter any private rights . . . rather, they held that Virginia had gained sovereign rights by prescription."

Finally, the Court addressed the issue of whether Virginia "ha[d] lost her sovereign riparian rights by acquiescing in Maryland's regulation of her water withdrawal and waterway construction activities." To succeed, Maryland needed to show by a preponderance of the evidence "[1] a long and continuous . . . assertion of sovereignty over Virginia's riparian activities, as well as [2] Virginia's acquiescence in her prescriptive acts."

40. 124 S. Ct. 1587 (2004).
41. 462 U.S. 36 (1983).
42. 540 U.S. 56 (2003).

The Executive Branch, at its highest level, [was] seeking the aid of the courts to protect its constitutional prerogatives.

The Court concluded that Maryland "ha[d] not carried her burden." First, although the period for prescription by one state over another was not set, the Court had previously indicated that it must be "substantial." The prescriptive period began in 1957, when Maryland issued its first permit, and ended in 2000, when Virginia sought leave to file a complaint in this Court. The Court believed in this circumstance, where Virginia's sovereign right was clearly established and Maryland sought to defeat those rights, "it [was] far from clear that such a short prescriptive period [was] sufficient as a matter of law." Second, the Court stated that even if this amount of time was sufficient, Maryland had not shown Virginia's acquiescence. In 1976, during a dispute between the states about water rights, Maryland tried to assert exclusive authority to allocate the water of the Potomac. Virginia protested Maryland's position. Therefore, contrary to Maryland's assertions, Virginia had not acquiesced to Maryland's assertions that it had regulatory authority over construction and water withdrawal.

Justice Scalia delivered the opinion of a unanimous Court in *Norton v. Southern Utah Wilderness Alliance*,[43] which held the Administrative Procedure Act (APA) did not provide a remedy to compel the Bureau of Land Management (BLM) to ban the use of off-road vehicles (ORVs) in certain wilderness areas. Furthermore, the land use plan itself was agency action so there was no duty to supplement the environmental impact statement prepared in compliance with the National Environmental Policy Act (NEPA). The Court first provided a lengthy summary of the statutes that applied to this case. In brief, the Federal Land Policy and Management Act (FLPMA) "establishe[d] a dual regime of inventory and planning." In addition, The Wilderness Act of 1964 required the Department of Interior to designate some lands as wilderness areas, which "subject to certain exceptions, shall [have] no motorized vehicles, and no manmade structures." The Secretary of the Interior had "identified so-called 'wilderness study areas' (WSAs), roadless lands of 5,000 acres or more that possess 'wilderness characteristics,' as determined in the Secretary's land inventory." WSAs, as well as some previously designated lands, "have been subjected to further examination and public comment in order to evaluate their suitability for designation as wilderness." The BLM designated portions of Utah as WSAs. It continued to operate those areas under land management plans and allow access by ORVs. Respondents argued that the BLM's actions violated the BLM's nonimpairment obligation under FLPMA and that the BLM was required to implement provisions in its land use plans relating to ORV use. Furthermore, respondents contended that the BLM had failed to take a "hard look" at whether, pursuant to the NEPA, it should have undertaken supplemental environmental analyses for areas in which ORV had increased. The Court concluded that respondents had not stated a claim for relief.

The APA "authorize[d] suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" The reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed." The Court stated that "the only action that can be compelled under the APA [was] an action legally *required*." Thus, the APA barred "any kind of broad programmatic attack," such as the Court rejected in *Lujan v. National Wildlife Federation*.[44] Furthermore, a court cannot compel an agency to act in a certain manner. With these principles in mind, the Court turned to the present action, analyzing each claim in turn. SUWA's first claim was that BLM "violated its mandate to continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for wilderness." The Court stated that the provisions under FLPMA were mandatory, but "[left] BLM a great deal of discretion in deciding how to achieve it." Therefore, the Court determined that it could not compel BLM to comply with the nonimpairment mandate, without telling BLM how to comply with the mandate. Similarly, the Court could grant relief on SUWAs allegations that the BLM failed to comply with "certain provisions of its land use plans" as that would require the Court to compel the BLM to take certain actions. The Court finally turned to SUWA's third claim. Prior to deciding if a NEPA-duty was actionable under the APA, the Court first decided whether any duty exists. NEPA required that a federal agency prepare an environmental impact statement (EIS) "as part of any 'proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.'" SUWA argued "that evidence of increased ORV use [was] 'significant new circumstance or information' that require[d] a 'hard look,'" thus, creating a duty to supplement the EIS. "The Court disagreed. The approval of a land use plan was a major federal action; however, "that action [was] completed when the plan [was] approved." The plan "[was] the 'proposed action' contemplated by the regulation," and, therefore, there [was] no ongoing action that would require supplementation.

In *Cheney v. District Court*,[45] the Court, in an opinion written by Justice Kennedy, determined that when a court considers whether to issue a writ of mandamus in a civil action that involves the President or Vice President, it should not deny the writ on the grounds other relief was available because the President and Vice President can assert Executive Privilege. The Judicial Watch and the Sierra Club filed separate actions, later consolidated, seeking declaratory and injunctive relief to require the National Energy Policy Development Group (NEPDG), an advisory committee established by President Bush, to produce all material subject to requirements of the Federal Advisory Committee Act (FACA). The district court issued a writ of mandamus, pursuant to 28 U.S.C. section 1361, allowing respondents to conduct limited, "tightly-

43. 124 S. Ct. 2373 (2004).
44. 497 U.S. 871 (1990).
45. 124 S. Ct. 2576 (2004).

reined" discovery into the issue of whether "'non-federal employees,' including 'private lobbyists,' 'regularly attended and fully participated in non-public meetings.'" If they did, they were considered *de facto* members of the committee, which would subject NEPDG to FACA's disclosure requirements.

The common-law writ of mandamus was codified by 28 U.S.C. section 1651(a). It is "drastic and extraordinary" and should only be issued if: (1) no other adequate relief exists; (2) the right to relief is "clear and indisputable;" and (3) "the issuing court, in its discretion, must be satisfied that the writ is appropriate under the circumstances." The Court stated that because Vice President Cheney was a party to the case, it was removed from "ordinary" and the Court's analysis was different. The orders issued by the district court "threaten[ed] substantial intrusions on the process by which those in closest operational proximity to the President advise the President." The Court believed that "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President." The Court concluded that the lower court's reliance on *United States v. Nixon*[46] to establish that the Vice President and his former colleagues were responsible for asserting particularized privileges was misplaced. *Nixon* dealt with criminal proceedings while this one was civil. According to the Court, "the criminal context [was] much weightier because of our historic[al] commitment to the rule of law . . . that guilt shall not escape or innocence suffer." Here, however, the discovery requests were not only about a party's need for documents, but also "the burden imposed by the discovery orders." Furthermore, this was not a routine discovery dispute: "The Executive Branch, at its highest level, [was] seeking the aid of the courts to protect its constitutional prerogatives." Unlike in *Nixon*, it could not be said in this case that the "production of confidential information would not disrupt the functioning of the Executive Branch." In light of the overly broad requests, the Court determined that *Nixon* could not provide "support for the proposition that the Executive Branch 'shall bear the burden' of invoking executive privilege with sufficient specificity and of making particularized objections." The Executive Privilege "is an extraordinary assertion of power not to be lightly invoked." Once it is asserted, "coequal branches of the Government are set on a collision course." Therefore, it was better that courts explore other avenues before "forcing the Executive to invoke the privilege."

In *Sosa v. Alvarez-Machain*,[47] the Court determined that an alien taken into custody in a foreign country by foreign nationals and transferred to the United States, where he was immediately arrested and arraigned, could not (1) state claim under the Federal Tort Claims Act (FTCA) against the government or (2) state a claim against one of the individuals involved in the kidnapping under the Alien Torts Statute (ATS). The Drug Enforcement Agency (DEA) believed respondent was involved in the torture and murder of one of its officers in Mexico. When the DEA failed to obtain help from the Mexican government in extraditing respondent for prosecution, the DEA "approved of a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial." Respondent was acquitted and subsequently brought an action against the government and several individuals involved in his kidnapping in Mexico.

The FTCA "was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual." One exception was for "any claim arising in a foreign country." The Court concluded that the circumstances that took place in Mexico were the "kernel" of the claim and, therefore, respondent's claim arose in Mexico. Thus, the claim fell within the exception for which the government had not waived immunity. Furthermore, unlike the Ninth Circuit, the Court found the "headquarters doctrine" inapplicable. For the doctrine to apply, a court must find that the act or omission at the headquarters "was sufficiently close to the ultimate injury, to make it reasonable to follow liability back to the behavior at headquarters." The Court believed that use of the doctrine would subject the government to liability beyond that which was reasonable and, further, that it would circumvent the Court's understanding of proximate cause.

The Court also determined that respondent did not state a claim against one of the individuals involved in the kidnapping based on the ATS, which provided that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Court concluded that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations," *i.e.*, safe conducts, infringement on rights of ambassadors, and piracy. The Court also believed judicial caution should be exercised when expanding the traditional category of actions that could be brought under the ATS and found that respondent's claim was not one of the circumstances that would justify overcoming that caution. The Court wrote, however, that "the door is still ajar" under the ATS for tort claims based on more definite and accepted "customary law," and mentioned "prolonged arbitrary detention" as one possible such claim.

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46. 418 U.S. 683 (1974).

47. 124 S. Ct. 2739 (2004).