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Recent Civil Decisions of the United States Supreme Court: The 2000-2001 Term

Charles H. Whitebread

The Supreme Court's role in the 2000 presidential election sparked intense national debate and will be the sole decision for which this term will be remembered. Although no other decisions rose to same level of political or popular significance, the Court confronted various civil-law topics of particular interest. Among them were issues concerning immigrant rights, interpretation of significant statutes such as the Americans with Disabilities Act, and important matters regarding the First Amendment and federalism.¹

ELECTIONS

On November 8, 2000, the Florida Division of Elections reported that George W. Bush won the preceding day's presidential election, defeating Al Gore by a margin of victory that was less than one-half of a percent of the votes cast. Pursuant to Florida's election code, an automatic machine recount was subsequently carried out. The recount indicated that Bush was still the victor, though by an even smaller margin. Al Gore then requested manual recounts in four Florida counties. After a dispute arose between Florida's secretary of state and the Florida Supreme Court over the deadline for the submission of the recounted votes, the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board*² vacated the Florida Supreme Court's imposed deadline due to the "considerable uncertainty as to the grounds on which it was based." The Florida Supreme Court reinstated its deadline of November 26, at which time Bush was declared the winner of Florida's 25 electoral votes based on the certified recount results. Gore contested the certification relying on the Federal election code, "which provides that 'receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election' shall be grounds for a contest."

The Florida Supreme Court defined a "legal vote" as one that provides a "clear indication of the intent of the voter." The Florida Supreme Court recognized 9,000 ballots from Miami-Dade County alone that had failed to detect a vote for president. Because these "undervotes" were "sufficient to place the results of the election in doubt," the Florida Supreme Court ordered an immediate manual recount "in all Florida counties where so-called 'undervotes' had not been subject to manual tabulation" and also ordered the inclusion of votes for Gore that failed to meet the November deadline. In *Bush v. Gore*,³ the 5-4 *per curiam* decision of the United States Supreme Court held that the

Florida Supreme Court's order for a statewide, manual recount of the presidential election ballots violated the Equal Protection Clause absent specified procedural standards. The Court explained that though considering the "intent of the voter" from ballot cards "is unobjectionable" in the abstract, the recount procedure in this case, which had no specific and uniform standard of interpretation to be used throughout the Florida counties, "is not a process with sufficient guarantees of equal protection." It emphasized, "When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." However, the Court held that inclusion of vote counts resulting from standards of interpretation that vary in each county does not satisfy these requirements. In conclusion, the Court referred to 3 U.S.C. section 5's requirement "that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12." Since the Court delivered its opinion on that date, and there were no recount procedures in place that could meet the requisite constitutional standards, "any recount seeking to meet the December 12 date will be unconstitutional" and therefore the Court vacated the recount order, thus bringing the election to an end.

In Chief Justice Rehnquist's concurring opinion, he stressed several additional grounds for reversing the Florida Supreme Court's decision. One reason he suggested was that the Florida Supreme Court's interpretation of the federal election code "impermissibly distorted" Florida's "detailed if not perfectly crafted statutory scheme" for appointing presidential electors by "frustrat[ing] the legislative desire to attain the 'safe harbor' provided by § 5." Ultimately, he concluded that the Florida Supreme Court's order to recount "tens of thousands of so-called 'undervotes'" four days before the December 12 deadline was not an "appropriate" remedy as authorized by the Florida legislature because it "could not possibly be completed by that date."

Justice Stevens filed a dissenting opinion because he did not believe that the Florida Supreme Court's failure "to specify in detail the precise manner in which the 'intent of the voter' . . . is to be determined rises to the level of a constitutional violation." He suggested that the Court's decision was based instead on "an unstated lack of confidence in the impartiality and capacity of the state judges." He concluded, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It

1. For a more in-depth review of the decisions of the past term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2000-2001 (Amer. Acad. Jud. Educ. 2001).

2. 531 U.S. 70 (2000).

3. 531 U.S. 98 (2000).

is the Nation's confidence in the judge as an impartial guardian of the rule of law."

Justice Souter dissented because he disagreed with the Court's decision to stop the recount and instead believed the "political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15." Also, he saw "no warrant for this Court to assume that Florida could not possibly comply with [equal protection] requirement[s] before the date set for the meeting of electors, December 18."

In her dissent, Justice Ginsburg criticized the Court for its intervention into the Florida Supreme Court's interpretation of its own state's law. She asserted that the "core of federalism" is the principle that "Federal courts defer to state high courts' interpretations of their state's own law." She also suggested that even if there were an equal protection violation, "the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested."

In Justice Breyer's dissenting opinion, he asserted that "there is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely." He also suggested that the federal claims, if any, could have been fixed on remand. Though a constitutional recount could not take place by December 12, he concluded that it should be up to the state courts to determine whether one could be conducted before the electors were scheduled to meet on December 18. He ultimately disagreed with the Court's role in resolving the dispute because "Congress is the body primarily authorized to resolve [such] disputes." He suggested, "Congress, being a political body, expresses the people's will far more accurately than does an unelected Court." He concluded by expressing his apprehension that "in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself."

IMMIGRATION

In *Zadvydas v. Davis*,⁴ a divided Court held that the Constitution "does not permit indefinite detention" of deportable aliens, but "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States," even if the government is unable to find a recipient country. The detention statute states that if an alien falls within a certain statutory category, then that alien "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision." Despite the fact that there is "no 'limit on the length of time beyond the removal period that [such] an alien . . . may be detained,'" the Court "read an implicit limitation into the statute." Though the statute uses the discretionary term "may," the Court said that did "not necessarily suggest unlimited discretion." It continued, "[I]f Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms." The Court emphasized that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United

States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." The Court considered it "practically necessary to recognize some presumptively reasonable period of detention." Therefore, it instructed, "After [a] 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." In his dissent, Justice Kennedy complained that the Court's imputation of an "implied, nontextual limitation . . . has no basis in the language or structure of the [statute] and in fact contradicts and defeats the purpose set forth in the express terms of the statutory text." He also explained, "When an alien is removable, he or she has no right under the basic immigration laws to remain in this country," because "[a]n alien's admission to this country is conditioned upon compliance with our laws, and removal is the consequence of a breach of that understanding."

Justice Stevens, writing for a divided Court in *Immigration and Naturalization Service v. St. Cyr*,⁵ held that federal courts have jurisdiction under 28 U.S.C. section 2241 to review a deportable alien's challenge to deportation policies. Also, the Court held that the Attorney General's discretionary relief to waive deportation of eligible aliens, granted by section 212(c) of the Immigration and Nationality Act of 1952, remains available to aliens whose convictions were obtained through plea agreements and who would have been eligible for waiver prior to the effective dates of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). Those statutes have been interpreted to withdraw his discretion to grant waivers of deportation. Regarding federal courts' review jurisdiction, the Court stated that the INS's interpretation of these statutes "would entirely preclude review of a pure question of law by any court . . . [and thus] give rise to substantial constitutional questions." The Court agreed with the Second Circuit's holding that Congress's intentions "are ambiguous and that the statute imposes an impermissible retroactive effect on aliens who, in reliance on the possibility of § 212(c) relief, pled guilty to aggravated felonies." "Finally," he wrote, "the fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion [because t]here is a clear difference . . . between facing possible deportation and facing certain deportation."

In another 5-4 decision, the Court in *Nguyen v. Immigration and Naturalization Service*⁶ held that an immigration law that establishes different citizenship rules for children born out of wedlock depending on whether the citizen parent is the mother or father is consistent with the Fifth Amendment's guarantee of equal protection. The disputed statutory provision requires "one of three affirmative steps . . . be taken if the citizen parent is the father, but not if the citizen parent is the mother." The Court stated that this decision by Congress "is based on the significant difference between [the parents'] respective relationships to the potential citizen at the time of birth." The Court advised that even a "facially neutral rule would sometimes require fathers to

4. 533 U.S. 678 (2001).

5. 533 U.S. 289 (2001).

6. 533 U.S. 53 (2001).

take additional affirmative steps which would not be required of mothers.” Moreover, “Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction.” The Court concluded that “the [statute’s] use of gender specific terms takes into account a biological difference between the parents.” It also cautioned, “Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.” Justice O’Connor condemned the manner in which the Court explained and applied the heightened scrutiny standard appropriate to legislative classifications based on sex. Though she agreed that “the failure to recognize relevant differences is out of line with the command of equal protection,” she argued that “so too do we undermine the promise of equal protection when we try to make our differences carry weight they simply cannot bear.”

THE FIRST AMENDMENT

Justice Thomas, writing for the Court in *Good News Club v. Milford Central School*,⁷ held that the exclusion of a religious club’s access to a school’s limited public forum is impermissible viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. A public school enacted a community use policy designating appropriate purposes for which residents may use its building after school. Among the permissible purposes were uses for “social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.” However, when the Good News Club, a Christian organization for children, requested permission to hold weekly after-school meetings in the school cafeteria, it was denied because its activities “were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself.” The Court, however, asserted that “it is clear that the club teaches morals and character development to children . . . even if it does so in a nonsecular way.” The Court also “disagree[d] that something that is ‘quintessentially religious’ or ‘decidedly religious in nature’ cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.” Instead, the Court said “we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.” In his dissenting opinion, Justice Stevens asserted, “School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith” may well “introduce divisiveness and tend to separate young children into cliques that undermine the school’s educational mission.” Justice Souter also dissented criticizing the Court’s holding, which he cautioned could potentially “stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.”

In *United States v. United Foods, Inc.*,⁸ the Court held that

mandatory assessments used to fund generic mushroom advertisements violate the First Amendment right against compelled speech. In doing so, the Court declined to rethink the relative position of commercial speech in the free speech hierarchy. The Court observed that United Foods, Inc. “wants to convey the message that its brand of mushrooms is superior to those grown by other producers,” but is forced to subsidize the message “that mushrooms are worth consuming whether or not they are branded,” which is “favored by a majority of producers.” The Court distinguished this case from its prior decision in *Glickman v. Wileman Brothers & Elliot, Inc.*,⁹ which allowed mandated assessments for speech regarding the marketing of California tree fruits. The Court points out that in that case, competition among producers was displaced and they “were compelled to contribute funds for use in cooperative advertising . . . ‘as part of a broader collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme.’” In the present case, however, the sole purpose for the mandatory assessment was the “generic advertising” of mushrooms. Beyond this regulation, mushroom producers were not similarly constrained in their freedom to act independently nor were they bound by the statute to “associate as a group which makes cooperative decisions.” The Court found this absence of a “broader regulatory system” a “fundamental” difference that required it to depart from *Glickman*. In Justice Breyer’s dissent, he asserted that the Court’s reliance on the level of regulation was inapposite and stated, “It is difficult to see why a Constitution that seeks to protect individual freedom would consider the absence of ‘heavy regulation’ . . . to amount to a special, determinative reason for refusing to permit this less intrusive program.” He concluded that the Court “sets an unfortunate precedent” that will only be an incentive for heavier governmental regulation and restrictions.

In a 6-3 decision, the Court, in *Bartnicki v. Vopper*,¹⁰ held that the First Amendment protects speech that discloses the content of an illegally intercepted communication concerning a public matter. Here, an unidentified person intercepted a conversation between two representatives of a teachers union discussing bargaining negotiations with a school board. The conversation was recorded and given to media representatives who ultimately published it. Federal and state wiretapping statutes prohibit the disclosure of communications that one “knew or had reason to know” were illegally intercepted. The Court stated the statute’s “naked prohibition against disclosures is fairly characterized as a regulation of pure speech.” Though the statutes’ restrictions intend to remove “the incentive for parties to intercept private conversations, and . . . minimize[e] the harm to persons whose conversations have been illegally intercepted,” the Court noted that in this case the information disclosed was lawfully obtained and concerned “a matter of public concern,” and the media representatives “played no part in the illegal interception.” Given these facts, the Court concluded that “it by no means follows that punishing disclosures [of this kind] is an acceptable means of serving those ends.” Ultimately, the Court asserted, “privacy concerns give way when balanced against the interest in pub-

7. 533 U.S. 98 (2001).

8. 533 U.S. 405 (2001).

9. 521 U.S. 457 (1997).

10. 532 U.S. 514 (2001).

lishing matters of public importance.” The key to the Court’s decision is the importance of the matter: the Court indicated that it might not feel the same way if the intercepted conversation concerned private gossip or personal matters.

In *Legal Services Corp. v. Velazquez*,¹¹ a divided Court held that a congressional funding condition on the Legal Services Corporation that prohibited it from representing indigent clients attempting to challenge or amend existing welfare law violates the First Amendment. The Legal Services Corporation (LSC) distributes funds to grantee organizations “for the purpose of providing financial support for legal assistance in noncriminal proceedings to persons financially unable to afford legal assistance.” Though indigent clients could challenge welfare determinations based on existing law, “grantees could not accept representations designed to change welfare laws, much less argue against the constitutionality or statutory validity of those laws.” The Court noted that here “the Government seeks to use an existing medium of expression and to control it . . . in ways which distort its usual functioning.” The Court asserted that the government “may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.” The Court concluded that the statutory condition impairs the authority of the judiciary to interpret law and the Constitution because it prohibits “speech and expression upon which courts must depend for the proper exercise of the judicial power.” Furthermore, the Court explained that the restriction is inconsistent with separation of powers principles because it is used “to insulate the Government’s laws from judicial inquiry” by excluding “from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.”

In a 5-4 decision, the Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*¹² held that limitations on a political party’s independent expenditures violate the First Amendment, but that limitations on the party’s spending when coordinated with a candidate are constitutional. The Court explained that “limits on political expenditures deserve closer scrutiny than restrictions on political contributions,” because “[r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do.” The Court pointed out that it has “routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits.” Moreover, “treating coordinated expenditures as contributions ‘prevent[s] attempts to circumvent the [Federal Election Campaign Act] through prearranged or coordinated expenditures amounting to disguised contributions.” The Court concluded, “There is no question about the closeness of candidates to parties and no doubt that the Act affected parties’ roles and their exercise of power.” But “there is little evidence to suggest that coordinated party spending limits adopted by Congress have frustrated the ability of political parties to exercise their First Amendment rights to support their candidates.” The Court considered the limitation on a party’s coordinated spending as

“closely drawn’ to match . . . the ‘sufficiently important’ government interest in combating political corruption.”

STATE ACTION

Justice Souter, writing for a divided Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,¹³ held that a statewide athletic association’s regulatory activity may be treated as state action due to the “pervasive entwinement” of state school officials in its structure absent an offsetting reason to consider the activity otherwise. A nonprofit membership association regulated interscholastic sport of its member schools, both public and private, throughout Tennessee. However, public schools made up 84% of the association’s membership. Also, though the association’s officials are not paid by the state, they are eligible for the state retirement system. The Court relied on dictum in *National Collegiate Athletic Association v. Tarkanian*,¹⁴ which suggested “that statewide interscholastic athletic associations are state actors” if their “membership consisted entirely of institutions located within the same state, many of them public institutions.” The Court concluded that “to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling.” Demonstrating the “pervasive entwinement,” the Court continued, “[t]here would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts.” The Court recognized that other tests like the “public function” or State “coercion” tests would not permit a finding of state action. However, it said that “the implication of state action is not affected by pointing out that the facts might not loom as large under a different test.” In response to concerns that a finding of state action here would “somehow trigger an epidemic of unprecedented federal litigation,” the Court noted that in the numerous jurisdictions that have already declared “statewide athletic association[s] like the one here” to be state actors, there has been “no evident wave of litigation.”

FEDERALISM

Chief Justice Rehnquist, writing for another divided Court in *Board of Trustees of the University of Alabama v. Garrett*,¹⁵ held that the Eleventh Amendment bars suits in federal court by state employees seeking money damages from the state for its failure to comply with Title I of the Americans with Disabilities Act (ADA). Title I of the ADA “prohibits certain employers, including the States, from ‘discriminat[ing in various ways] against a qualified individual with a disability because of the disability of such individual.” It also requires employers to “mak[e] reasonable accommodations” unless they “would impose an undue hardship on the operation of the [employer’s] business.” The Court explained, “The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.” The Court indicated that Congress may use the ADA to abrogate this immunity pursuant

11. 531 U.S. 533 (2001).

12. 533 U.S. 431 (2001).

13. 531 U.S. 288 (2001).

14. 488 U.S. 179 (1988).

15. 531 U.S. 356 (2001).

to a valid exercise of its enforcement power under section 5 of the Fourteenth Amendment. Also, the ADA “must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” Identifying the “scope of the constitutional right at issue,” the Court cited *Cleburne v. Cleburne Living Center, Inc.*,¹⁶ which held that mental retardation was not a “quasi-suspect” classification and legislation using such a classification was subject only to “rational-basis” review. The Court concluded that “the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational.” Pointing out that the burden is on Congress to negate “any reasonably conceivable state of facts that could provide a rational basis for the classification,” the Court determined that “[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.” Furthermore, the Court concluded that despite the ADA’s “undue hardship” exception, “the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer.” In Justice Breyer’s dissent, he asserted that “Congress reasonably could have concluded that the remedy before us constitutes an ‘appropriate’ way to enforce this basic equal protection requirement. And that is all the Constitution requires.”

In an 8-0 decision, the Court in *United States v. Oakland Cannabis Buyers’ Cooperative*¹⁷ held that there is no medical necessity exception to the Controlled Substances Act’s prohibitions on manufacturing and distributing marijuana. Under the Controlled Substances Act, marijuana is a “schedule I” drug, which is the most restrictive of the five schedules designated in the statute. Under this federal law, the only exception to its prohibition on the manufacture and distribution of such a drug is government-approved research. However, California’s Compassionate Use Act of 1996 provided “seriously ill Californians . . . the right to obtain and use marijuana for medical purposes” upon the recommendation of a physician. Thus, though the actions of organizations created to provide marijuana to seriously ill Californians were legal under state law, they remained in violation of federal law. The Court refused to add to the federal statute an “implied exception” of medical necessity even though “necessity was a defense at common law.” The Court asserted that it “need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act[, . . . which] leave no doubt that the defense is unavailable.” Ultimately, the Court noted that in the present case Congress had made the determination that “marijuana has ‘no currently accepted medical use’ at all” and has classified it accordingly.

In *Lorillard Tobacco Co. v. Reilly*,¹⁸ a divided Court held that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempts Massachusetts’s regulations on outdoor and point-of-sale cigarette advertising. However, all of the justices agreed that

those same regulations on smokeless tobacco and cigars violate the First Amendment. Examining the FCLAA’s preemption provision, the Court explained that its “sweeping language” prohibited states from imposing restrictions “based on smoking and health with respect to the advertising and promotion of cigarettes.” Though the Massachusetts regulations are aimed to “prevent access to such products by underage consumers,” the Court concluded that “the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health.” Despite the contention that the advertising regulations on cigarettes “fall squarely within the State’s traditional powers to control the location of advertising and to protect the welfare of children,” the Court asserted that this argument “cannot be squared with the language of the pre-emption provision, which reaches all ‘requirements’ and ‘prohibitions’ imposed under state law.” Also, it “cannot be reconciled with Congress’ own location-based restriction, which bans advertising in electronic media, but not elsewhere.” In support of its ruling that the outdoor regulations on smokeless tobacco and cigars violate the First Amendment, the Court asserted that Massachusetts’s “Attorney General did not ‘carefully calculate the costs and benefits associated with the burden on speech imposed’ by the regulations,” which “unduly impinge on the [tobacco retailers’] ability to propose a commercial transaction and the adult listener’s opportunity to obtain information about [tobacco] products.” Regarding the restrictions on indoor, point-of-sale advertising, which prohibit tobacco advertisements from being lower than five feet from the floor, the Court explained, “The 5 foot rule does not seem to advance [the State’s interest in preventing minors from using tobacco products]. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.”

PROPERTY RIGHTS

In another 5-4 decision, the Court in *Palazzolo v. Rhode Island*¹⁹ held that a claim under the Takings Clause of the Fifth Amendment is ripe when a final decision is made regarding the extent of permitted development on the property at issue. The Court also held that the date of title transfer does not bar an individual from raising a takings claim. Anthony Palazzolo was the sole shareholder of a corporation that owned the title to 20 acres of land, most of which was considered “coastal wetlands” under state law. Some time later, the Rhode Island Coastal Resource Management Council promulgated regulations that were to greatly limit development on “coastal wetlands” in Rhode Island. After the promulgation of the regulations, title of the 20 acres was transferred to Palazzolo. All proposals to develop on the land, submitted by the corporation and Palazzolo, were denied because their impact on the wetlands would conflict with the regulation scheme. The Court explained that the final decision requirement was adopted because whether a regulatory taking has occurred “cannot be resolved in definitive terms until a court knows ‘the extent of permitted development’ on the land in question.” Though the council claimed that the extent of permissible development on the property was still in doubt, the Court dis-

16. 473 U.S. 432 (1985).

17. 532 U.S. 483 (2001).

18. 533 U.S. 525 (2001).

19. 533 U.S. 606 (2001).

agreed because the “extent of permissible development on petitioner’s wetlands” was identifiable given “the unequivocal nature of the wetland regulations at issue and by the Council’s application of the regulations to the subject property.” Holding that Palazzolo’s post-regulation acquisition of title was not fatal to his claim, the Court rejected the State’s “sweeping rule” that pronounced “[a] purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.” “Were we to accept the State’s rule,” the Court concluded, “the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable,” thus allowing the state, “in effect, to put an expiration date on the Takings Clause.”

STATUTORY INTERPRETATION

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,²⁰ a divided Court held that the U.S. Army Corps of Engineers’ extension of the definition of “navigable waters” under the Clean Water Act (CWA) to include intrastate waters used as a habitat by migratory birds exceeded the authority granted by the Act. An association of Chicago cities sought to develop a disposal site for nonhazardous solid waste on a parcel of land that had been used for sand and gravel pit mining until it was abandoned. The excavation trenches had since become a “scattering of permanent and seasonal ponds of varying size” on which a number of migratory birds have been observed. Under section 404(a) of the CWA, the corps may regulate “navigable waters” defined as “the waters of the United States, including territorial seas.” The corps clarified its jurisdictional reach by extending the definition of “navigable waters” to include “intrastate waters . . . which are or would be used as habitat by . . . migratory birds which cross state lines.” The Court concluded, however, that this interpretation “is not fairly supported by the CWA.” The Court recognized that in *United States v. Riverside Bayview Homes, Inc.*,²¹ it had extended the corps’ jurisdiction under section 404(a) to wetlands adjacent to a “navigable waterway,” noting “that the term ‘navigable’ is of ‘limited import’ and that Congress evidenced its intent to ‘regulate at least some waters that would not be deemed navigable under the classical understanding.’” The Court found that decision “was based in large measure upon Congress’ unequivocal acquiescence to, and approval of, the Corps’ regulations interpreting the CWA to cover wetlands . . . ‘inseparably bound up with the ‘waters’ of the United States.’” The present case, however, lacks that “significant nexus between the wetlands and ‘navigable waters.’” Though Congress failed “to pass legislation that would have overturned the corps’ 1977 regulations and the extension of jurisdiction,” the Court explained that the failure to pass legislation was insufficient to demonstrate that Congress acquiesced to the corps’ expansive interpretation of section 404(a). The Court also refused to accept the corps’ interpretation because the expanded jurisdiction “would result in a significant impingement of the States’ traditional and primary power over land and water use.”

In a 5-4 decision, the Court in *Circuit City Stores, Inc. v. Adams*²² held that section 1 of the Federal Arbitration Act (FAA) confines an exemption from arbitration to employment contracts of transportation workers. The Court noted that section 1 of the FAA exempts from the statute’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The Court rejected the Ninth Circuit’s construction of section 1, which reasoned that all employment contracts are excluded as “contracts of employment of . . . any other class of workers engaged in . . . commerce.” The Court explained that the phrase “any other class of workers engaged in commerce” is “a residual phrase following . . . explicit reference to ‘seamen’ and ‘railroad employees.’” To construe it “to exclude all employment contracts fails to give independent effect to the statute’s enumeration of the specific categories of workers which precedes it.” The Court also rejected the argument that the use of “engaged in commerce” was intended to invoke Congress’s commerce power to the full extent because it has consistently reaffirmed the relatively limited scope of that phrase. The Court concluded its opinion by endorsing the “real benefits to the enforcement of arbitration provisions,” which include the avoidance of litigation costs to parties and the courts.

Justice Scalia, writing for a divided Court in *Alexander v. Sandoval*,²³ held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. Section 601 of the Civil Rights Act provides “that no person shall, ‘on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity’ covered by Title VI.” Federal agencies are authorized under section 602 “to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.” The Court explained that “private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.” The Court “assume[s] for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.” The Court recognized “that regulations applying § 601’s ban on intentional discrimination are covered by the cause of action to enforce that section . . . [because] if valid and reasonable, [they] authoritatively construe the statute itself.” Thus, there is no need “to talk about a separate cause of action to enforce the regulations apart from the statute.” However, the Court indicated that “the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore [it is] clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.” If section 602 does not confer a private right to enforce the disparate-impact regulations, then “a failure to comply with regulations promulgated under § 602 that is not also a failure to comply with § 601 is not actionable.” Examining the text of section 602, the Court concluded that it clearly lacks the “rights-creating language” present in section 601. Instead, “the focus of § 602 is

20. 531 U.S. 159 (2001).
21. 474 U.S. 121 (1985).

22. 121 S.Ct. 1302 (2001).
23. 532 U.S. 275 (2001).

twice removed from the individuals who will ultimately benefit from Title VI's protection," because it "focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating." The Court indicated that § 602 merely prescribes how federal agencies may enforce the provisions of § 601 and applies restrictions on that enforcement. In dissent, Justice Stevens asserted, "The plain meaning of [section 602's] text reveals Congress' intent to provide the relevant agencies with sufficient authority to transform the statute's broad aspiration into social reality." Accordingly, "the regulations are inspired by, at the service of, and inseparably intertwined with § 601's antidiscrimination mandate." Therefore, he argued that "it makes no sense to differentiate between private actions to enforce § 601 and private actions to enforce § 602. There is but one private action to enforce Title VI, and we already know that such an action exists." Stevens concluded, "[T]oday's decision is the unconscious product of the majority's profound distaste for implied causes of action rather than an attempt to discern the intent of the Congress that enacted Title VI of the Civil Rights Act of 1964."

In yet another 5-4 decision, the Court in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*²⁴ held that to be a "prevailing party" for the purposes of fee-shifting statutes, there must be a judgment on the merits or a court-ordered consent decree. Therefore, the "catalyst theory," which had been accepted by most courts of appeal, is an impermissible basis for awarding attorney's fees. The Court began its opinion by asserting the predominance of the "American Rule," which is a "general practice of not awarding fees to a prevailing party absent explicit statutory authority." The Court said that the "view that a 'prevailing party' is one who has been awarded some relief by the court can be distilled from our prior cases." It indicated that precedent reveals the common thread "that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." Under the "catalyst theory," a prevailing party is one whose lawsuit brought about the voluntary change in the other party's conduct, for which it hoped. The Court held the catalyst theory inconsistent with the Court's prior decisions because "it allows an award where there is no judicially sanctioned change in the legal relationship of the parties." Despite the contention that the Civil Rights Attorney's Fees Awards Act's legislative history supports a "broad reading of 'prevailing party,'" the Court "doubt[s] that legislative history could overcome what [it] think[s] is the rather clear meaning of 'prevailing party'—the term actually used in the statute." Justice Ginsburg dissented, arguing that the Court's decision not only "upsets long-prevailing Circuit precedent" and "allows a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray," but also "impede[s] access to court for the less well-heeled, and shrink[s] the incentive Congress created for the enforcement of federal law." In her opinion, "the judicial decree is not the end but the means," and "if a party reaches the 'sought-after destination,"

then the party 'prevails' regardless of the 'route taken.'"

In a 7-2 decision, the Court in *PGA Tour, Inc. v. Martin*²⁵ held that Title III of the Americans with Disabilities Act (ADA) protects access to professional golf tournaments by a qualified entrant with a disability. Further, permitting that entrant's use of a golf cart does not "fundamentally alter the nature" of the tournaments. Casey Martin is a golfer with a degenerative circulatory disease that is covered by the ADA and prevents him from walking the length of a golf course. The PGA Tour refused to waive its tournament's walking requirement despite Martin's well-documented medical condition. Title III of the ADA prohibits the discrimination of disabled individuals in places of public accommodation. After examining the text Title III, the Court then looked to the facts of this case, which "fit comfortably within the coverage of Title III, and Martin within its protection." The PGA Tour, as a lessor and operator of "golf courses," which are "specifically identified by the Act," cannot prevent Martin's "full and equal enjoyment" of those courses. The Court rejected the argument that Title I, which prohibits discrimination by employers, is more appropriate because Martin's claim is "job-related" since he is not a "client or customer," but is instead like an independent contractor. Since Title I does not protect independent contractors, the argument went, his claim necessarily fails. However, the Court asserted that "it would be entirely appropriate to classify the golfers . . . as petitioner's clients or customers" because they pay for the chance to compete. Further, the PGA Tour "simultaneously offer[s] . . . two 'privileges' to the public—that of watching the golf competition and that of competing in it." The Court also concluded that Martin's use of a golf cart, which is a "necessary" and "reasonable modification," would not "fundamentally alter the nature" of petitioner's tournaments because "the essence of [golf is] shot-making" and the walking rule "is not an essential attribute of the game itself . . . [nor an] indispensable feature of tournament golf."

In *Whitman v. American Trucking Associations, Inc.*,²⁶ the Court held that the Environmental Protection Agency may not consider implementation costs in setting national ambient air quality standards under section 109(b) of the Clean Air Act (CAA). Section 109(b) instructs the EPA to set primary ambient air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety.'" According to section 109(b)(1), "the EPA . . . is to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an 'adequate' margin of safety, and set the standard at that level." However, "nowhere are the costs of achieving such a standard made part of that initial calculation." The Court asserted, "Congress was unquestionably aware" that "the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air." As a matter of fact, Congress "not only anticipated that compliance costs could injure the public health, but provided for that precise exigency" in "other provisions [that] explicitly permitted or required economic costs to be taken into account in implementing the air quality standards." Such is not the case

24. 532 U.S. 598 (2001).

25. 532 U.S. 661 (2001).

26. 531 U.S. 457 (2001).

with section 109(b)(1). The Court “therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.” The Court suggested that the cost of implementation is a factor “that . . . is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in §§ 108 and 109 had Congress meant it to be considered.”

OTHER SIGNIFICANT DECISIONS

In an 8-1 decision, the Supreme Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*²⁷ held that courts of appeals should apply a *de novo* standard when reviewing district court determinations of the constitutionality of punitive damages awards. Cooper Industries used photographs of Leatherman’s multifunction pocket tool in its own posters, packaging, and advertising materials; Cooper Industries ultimately was found guilty of unfair competition. Leatherman was awarded \$50,000 in compensatory damages and \$4.5 million in punitive damages. On appeal, the Ninth Circuit held that “the district court did not abuse its discretion in declining to reduce the amount of punitive damages.” Noting that “legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards,” the Court affirmed that when juries determine awards within those limits and “[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court’s ‘determination under an abuse-of-discretion standard.’” However, the Fourteenth and Eighth Amendments place “substantive limits on that discretion.” The Court indicated that in order to determine whether a punitive damages award violates the Constitution, a court must determine if it is “grossly disproportional to the gravity of . . . [the] defendant’s offense.” While “the factual findings made by the district courts in conducting the excessiveness inquiry . . . must be

accepted unless clearly erroneous,” the Court has “expressly noted that the courts of appeals must review the proportionality determination *de novo*.” The Court concluded, “Independent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles.” Furthermore, “*de novo* review tends to unify precedent” and “stabilize the law.”

CONCLUSION

As can be seen from the cases addressed by the Supreme Court this term, the ideological balance was extremely influential in many decisions. Some of the most important cases, like *Alexander v. Sandoval* and *Board of Trustees of the University of Alabama v. Garrett*, were decided by votes of 5-4. Even in the highly politicized *Bush v. Gore*, the Supreme Court was unable to unite and speak with one voice, which, as Justices Stevens and Breyer seem to agree, may ultimately undermine the public’s confidence in the Supreme Court. The significance of the numerous 5-4 decisions lies not only in how the Court is perceived by the public, but also in the stability of constitutional jurisprudence. As many anticipate, several justices will retire in the coming years. Due to the closeness of some of the most significant cases, this may completely change the ideological course on which the Supreme Court has traveled for the last several years.



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27. 532 U.S. 424 (2001).