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The past Term of the Court was one in which it swung to the right. A single justice, Justice Anthony Kennedy, made all the difference—being in the majority in every five-to-four decision that split along ideological lines. Significant 5-4 civil decisions included ones upholding the Partial-Birth Abortion Ban Act of 2003, limiting Title VII pay-discrimination suits by strictly interpreting the date the statute of limitations begins to run, limiting the ability of school districts to consider race in assigning students to schools, and further limiting punitive-damage claims.

FIRST AMENDMENT

In *Davenport v. Washington Education Association*,[1] the Court upheld a state law limiting the use of non-union member fees. Washington State law permits unions and government employers to engage in agency-shop agreements, which allow unions to charge dues to non-union members to "prevent nonmembers from free-riding on the union's efforts." However, Washington law requires authorization by a nonmember before using his fees "to make contributions or expenditures to influence an election or to operate a political committee." The respondent is "the exclusive bargaining agent for approximately 70,000 public educational employees," and in this capacity, it "collected agency fees from nonmembers that it represented in collective bargaining." The State of Washington brought suit against the respondent, as did several nonmembers who paid agency shop fees, claiming its "use of agency fees was in violation of § 760" and that the "respondent had failed to obtain affirmative authorization from nonmembers before using their agency fees for the election-related purposes specified in § 760." The Supreme Court of Washington held that section 760 violated the First Amendment "by imposing on respondent the burden of confirming that a nonmember does not object to the expenditure of his agency fees for electoral purpose" and by "interfer[ing] with respondent's expressive associational rights…." The Court begins by examining the Supreme Court of Washington's reasoning and noting that it reached its holding mostly based on a passage from *Teachers v. Hudson*,[2] which states: "'[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.'" The Court rejects this line of reasoning because it improperly extends this precedent in assuming "that unions have … constitutional entitlement to the fees of non-member-employees." Additionally, the Court acknowledges that "content-based regulations of speech are presumptively invalid," but it finds that precedent also establishes "that the government can make content-based distinctions when it subsidizes speech." The Court finds this latter principle applicable to the case at hand because section 760 was concerned with the integrity of the electoral process and was "limited to the state-created harm that the voters sought to remedy."

In *Tennessee Secondary School Athletic Association v. Brentwood Academy*,[3] the Court held that a state-sponsored high-school athletic league's rule prohibiting "undue influence" in recruiting middle-school athletes does not violate the First Amendment. The petitioner, Tennessee Secondary School Athletic Association (TSSAA), regulates sports among numerous private and public high schools in Tennessee, including the respondent: Brentwood Academy. TSSAA prohibits these schools "from using 'undue influence' in recruiting middle school students for their athletic programs." Brentwood Academy's football coach violated this prohibition, and the TSSAA placed sanctions upon Brentwood. Afterwards, Brentwood brought this action against TSSAA, alleging that the prohibition violated the First and Fourteenth Amendments and that TSSAA "deprived the school of due process of law" because of its handling of its appeal. The Court first notes that "Brentwood's speech rights are not absolute" and that "[t]he anti-recruiting rule strikes nowhere near the heart of the First Amendment" because it regulates "direct, personalized communication in a coercive setting" as opposed to "prohibiting appeals to the public at large," a distinction illustrated in *Ohralik v. Ohio State Bar Assn.*[4] In *Ohralik*, the Court held that a state bar association's decision to discipline a lawyer "for the in-person solicitation of clients" does not violate the First Amendment because the "ban was more akin to a conduct regulation than a speech restriction." In examining *Ohralik*, the Court concludes that its "'narrow' holding is limited to conduct that is '"inherently conducive to overreaching and other forms of misconduct."'" The Court believes that this "danger of undue influence … [is] also present when a high school coach contacts an eighth grader" because of the "youthful hopes and fear" involved in the decision whether to play high-school sports at a particular school. Against this background, the Court holds that "TSSAA's limited regulation of recruiting conduct poses no significant First Amendment concerns."

In a narrow decision, the Court held in *Morse v. Frederick*[5] that a high-school principal did not violate the respondent's

Footnotes

1. 127 S. Ct. 2372 (2007).
2. 475 U.S. 292 (1986).
3. 127 S. Ct. 2489 (2007).
4. 436 U.S. 447 (1978).
5. 127 S. Ct. 2618 (2007).

First Amendment rights by requiring him to take down a "BONG HiTS 4 JESUS" banner. The petitioner, Deborah Morse, a high-school principal in Alaska, gave permission to her students, including respondent Joseph Frederick, to miss classes to view the passing of the Olympic Torch Relay. As the torch and camera crews passed, Frederick and several of his friends displayed a 14-foot banner reading: "BONG HiTS 4 JESUS." Thinking the banner "encouraged illegal drug use, in violation of school policy," Principal Morse told the students to take it down, and "[e]veryone but Frederick complied." After confiscating the banner, she suspended Frederick. Frederick argues "that this is not a school speech case." The Court begins by rejecting this argument because the event in question occurred during regular school hours and "was sanctioned by Principal Morse 'as an approved social event or class trip.'" The Court next examines the banner, finding its message to be "cryptic," but agreeing with Morse that it could reasonably be interpreted as advocating the use of illegal drugs. The Court rejects Frederick's argument that he was just trying to get on television because it might explain his motive, but not the content of the sign. In light of its findings, the Court frames the relevant issue as "whether a principal may … restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." The Court finds that its precedent recognizes "that deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest." The Court holds that in light of "'the special characteristics of the school environment'" and the drug-use problem in schools, school officials may "restrict student expression that they reasonably regard as promoting illegal drug use." The Court states that Morse acted reasonably in believing that the banner promoted the use of illegal drugs and feels "that failing to act would send a powerful message to the students … about how serious the school was about the dangers of illegal drug use." Given its holding, the Court does not reach the issue of qualified immunity.

In *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[6] a 5-4 Court held that the Bipartisan Campaign Reform Act of 2002 (BCRA) is unconstitutional as applied to respondent's issue-focused advertisements because the FEC cannot demonstrate that the statute's ban on these ads is narrowly tailored to further a compelling interest. The BCRA makes it a crime for a corporation to use company funds for any "'electioneering communication,'" which includes "any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office." In 2004, the respondent, Wisconsin Right to Life, Inc. (WRTL), planned to air three television and radio commercials arguing against a Senate filibuster and encouraging viewers to "'[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster.'" WRTL realized that its planned airing would violate BCRA section 203 and filed suit against the Federal Election Commission (FEC) seeking declaratory and injunctive relief. The Court first addresses the FEC's argument that "these cases are moot because the 2004 election has passed …." The Court disagrees because the WRTL reasonably expects to run "'materially similar'" ads in the future, and "there is no reason to believe that the FEC will 'refrain from prosecuting violations.'" The Court next turns to the First Amendment issues presented, stating that "[b]ecause § 203 burdens political speech, it is subject to strict scrutiny" and "the *Government* must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve that interest." Because *McConnell v. Federal Election Com'n*[7] already upheld BCRA "to the extent it regulates express advocacy or its functional equivalent," the Court states that if the ads in this case fall into these categories, the FEC has proven its case. However, if they do not, the FEC must meet the more difficult standard above. To help this determination, the Court adopts an objective test, holding that "a court should find an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The Court concludes that WRTL's ads "are plainly not the functional equivalent of express advocacy" because they "focus on a legislative issue, take a position on that issue, … and … do not mention an election, candidacy, political party, or challenger …." The Court next applies the "narrowly tailored to further a compelling interest" standard. Citing *Buckley v. Valeo*,[8] the Court notes its long recognition of "'the governmental interest in preventing corruption and the appearance of corruption' in election campaigns." However, the Court sees no reason for extending speech limitations outside the context of campaign speech and concludes that the regulation of corporate campaign speech "has no application to issue advocacy of the sort engaged in by WRTL."

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In *Hein v. Freedom from Religion Foundation, Inc.*,[9] a split Court held that respondents, as taxpayers, lack standing under Article III to challenge the executive branch's organization of conferences allegedly promoting religion. In 2001, President Bush formed the White House Office of Faith-Based and Community Initiatives to "ensure that 'private and charitable community groups, including religious ones … have the fullest opportunity permitted by law to compete on a level playing field….'" Congress did not enact legislation promoting the Office or any of the related centers, and the money for them comes solely from "general Executive Branch appropriations." The respondents, Freedom from Religion Foundation, Inc., and three of its members, filed suit in federal court, arguing

6. 127 S. Ct. 2652 (2007).
7. 540 U.S. 93 (2003).
8. 424 U.S. 1 (1976).
9. 127 S. Ct. 2553 (2007).

[A] 5-4 Court . . . held that the Constitution requires some procedural method for ensuring that juries do not use punitive damages to punish . . . for harm caused to nonparties.

that the petitioners violated the Establishment Clause of the Constitution by organizing conferences that were allegedly "designed to promote, and had the effect of promoting, religious groups over secular ones." Justice Alito announced the judgment of the Court and delivered an opinion, in which Chief Justice Roberts and Justice Kennedy joined. He begins by noting that under Establishment Clause precedent, parties cannot challenge laws of general application unless they have been personally injured, and generally "the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing." He notes that *Flast v. Cohen*[10] created a "narrow exception" to this principle but requires a taxpayer to establish: (1) a "'logical link between the status and the type of legislative enactment attacked;'" and (2) "'a nexus between the status and the precise nature of the constitutional infringement alleged.'" The respondents argue that *Flast* should govern the present case. Justice Alito finds the requisite link does not exist in the present case because the respondents do not challenge any specific congressional appropriation and the expenditures at issue "resulted from executive discretion, not congressional action." Justice Alito also rejects the respondents' position because he feels that without a distinction between executive and congressional spending, almost "every federal action" would be subject to an Establishment Clause challenge. Justice Alito further notes that the respondents have failed to supply a "workable limitation" on such challenges if *Flast* were extended to govern their case.

FOURTEENTH AMENDMENT

In *Philip Morris USA v. Williams*,[11] a 5-4 Court, in an opinion written by Justice Breyer, held that the Constitution requires some procedural method for ensuring that juries do not use punitive damages to punish a defendant for harm caused to nonparties. The respondent, the widow of Jesse Williams, filed a lawsuit against Philip Morris for negligence and deceit. A jury found that Williams's death resulted from smoking Marlboro cigarettes and that Philip Morris led him to believe smoking was safe. The jury awarded respondent $821,000 on the deceit claim and $79.5 million in punitive damages. On review, Philip Morris argued that the trial court erred in rejecting a jury instruction regarding punitive damages "that specified the jury could not seek to punish Philip Morris for injury to other persons not before the court." Philip Morris also argued that the approximately 100-to-1 ratio between the punitive damages and compensatory damages was unreasonable under *BMW of North America, Inc. v. Gore*.[12] The Court granted certiorari on two questions: (1) whether "Oregon had unconstitutionally permitted [Philip Morris] to be punished for harming nonparty victims;" and (2) "whether Oregon had in effect disregarded 'the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.'" The Court focuses its analysis on the Due Process Clause, finding that it "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent." Therefore, states must "provide assurance that juries are not … seeking … to punish for harm caused strangers." The respondent argues that the Oregon Supreme Court understood this and did not allow punitive damages against nonparties. The Court agrees that some sections of the Oregon Supreme Court's opinion focus "only upon reprehensibility" but concludes that that court erred in affirming the Oregon Court of Appeals' decision because it did not allow any form of protection against the jury awarding punitive damages for injuries to nonparties.

CIVIL RIGHTS

In *Wallace v. Kato*,[13] a 7-2 Court held that a cause of action for a claim of false imprisonment under 42 U.S.C. section 1983 begins at the time the prisoner is subjected to legal process. The petitioner Andrew Wallace was picked up by police officers in Chicago on January 19, 1994, two days after John Handy was shot to death. He was taken to the police station around 8 p.m. and interrogated until the early morning of the following day, when he agreed to confess to Handy's murder. The petitioner was convicted of first-degree murder at trial and sentenced to 26 years in prison. The Appellate Court of Illinois reversed the conviction because officers had no probable cause when arresting petitioner, a violation of the Fourth Amendment. The prosecutors subsequently dropped all charges against petitioner on April 10, 2002. On April 2, 2003, the petitioner filed suit against the city of Chicago and several police officers under 42 U.S.C. section 1983 for damages arising from his unlawful arrest. The District Court granted respondents' motion for summary judgment, and the Seventh Circuit affirmed, finding the suit barred under the applicable statute of limitations because the petitioner's "cause of action accrued at the time of his arrest, not when his conviction was later set aside." The Court begins by noting that both sides agree that the correct statute of limitations is two years, but they contest when the petitioner's cause of action began. The Court finds that the tort of false imprisonment is analogous to the petitioner's claim because "the sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*." Because the statute of limitations on false imprisonment claims begins to run "'when the alleged false imprisonment ends,'" the Court must decide when the petitioner's false imprisonment ended. The Court holds that false

10. 392 U.S. 83 (1968).
11. 127 S. Ct. 1057 (2007).
12. 517 U.S. 559 (1996).
13. 127 S. Ct. 1091 (2007).

[A] 5-4 Court held that two . . . student distribution plans are unconstitutional [because] they rely solely upon race as a determinative factor.

imprisonment ends "once the victim becomes held pursuant" to legal process and that any claim after this point would be for malicious prosecution. Therefore, the Court concludes that the petitioner's cause of action began "when he appeared before the examining magistrate and was bound over for trial," and the two-year limitations period has run.

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[14] a 5-4 Court held that petitioner's sex-discrimination claims based on pay decisions made prior to the 180-day period required by Title VII of the Civil Rights Act were time barred. The petitioner Lilly Ledbetter was employed by the respondent Goodyear Tire and Rubber Company, and she filed a questionnaire and a formal charge of sex discrimination in 1998 with the Equal Employment Opportunity Commission (EEOC). Later the same year, after retiring, the petitioner began this action, asserting "a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963 (EPA)." A jury awarded her backpay and damages. On appeal to the Eleventh Circuit, Goodyear claimed that the petitioner's claim "was time barred with respect to all pay decisions made prior to … 180 days before the filing of her EEOC questionnaire" and that "no discriminatory act relating to Ledbetter's pay occurred after that date." The Eleventh Circuit agreed and reversed the lower court's decision. The Court begins by examining Title VII, which requires an employee seeking to challenge an allegedly discriminatory practice to "file a charge with the EEOC … within a specified period (either 180 or 300 days, depending on the State) 'after the alleged unlawful employment practice occurred.'" The petitioner argues that each paycheck she received "was a separate act of discrimination," and, alternatively, that a 1998 evaluation with no raise was "'unlawful because it carried forward intentionally discriminatory disparities from prior years.'" The Court rejects both these arguments because the petitioner does not allege that Goodyear had discriminatory intent during either of these acts, but only "*prior to* the EEOC charging period." The Court notes that *United Air Lines, Inc. v. Evans*[15] held that "the continuing effects of the precharging period discrimination did not make out a present violation." The Court also cites *Lorance v. AT&T Technologies, Inc.*,[16] which held "that the … charging period ran from the time when the discrete act … occurred, not from the date when the effects of this practice were felt." Based on these decisions, the Court finds that "[a] new violation does not occur … upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past discrimination." The Court concludes that the petitioner's claim of continuing effects of past discrimination is inconsistent with these decisions.

In *Parents Involved in Community Schools v. Seattle School District No 1.*,[17] a 5-4 Court held that two school-district student-distribution plans are unconstitutional to the extent that they rely solely upon race as a determinative factor. In 1998, the respondent Seattle School District No. 1 implemented a new student-distribution plan. If a school is "not within 10 percentage points of the district's" 41% white and 59% "nonwhite" balance, the district will select for "students whose race 'will serve to bring the school into balance.'" The petitioner, Parents Involved in Community Schools, sued in District Court, alleging that the system violated the Equal Protection Clause. In 2001, the respondent Jefferson County adopted a program under which all nonmagnet schools must maintain a minimum 15% and a maximum 50% black enrollment. The petitioner Crystal Meredith applied to transfer her son to a school only one mile from her home but was denied because it "'would have an adverse effect on desegregation compliance.'" The petitioner brought suit, alleging violations of the Equal Protection Clause. The Court first notes that racial classification plans must be "'narrowly tailored' to achieve a 'compelling' government interest.'" The Court has recognized two compelling interests in the context of racial classifications: (1) "remedying the effects of past intentional discrimination"; and (2) promoting "diversity in higher education." The Court finds that the first applies in neither case. The second compelling interest was outlined in *Grutter v. Bollinger*,[18] which reiterated that "'it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race.'" *Grutter* upheld a law-school admissions process that took race into account to achieve diversity. In contrast to the system in *Grutter*, the Court finds that in those at issue here, race "is not simply one factor weighed with others in reaching a decision …; it is *the* factor." The Court also feels that unlike the system in *Grutter*, those in the instant cases "employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/'other' terms in Jefferson County." The respondents offer two other possible compelling interests: (1) race classifications "[help] to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools"; and (2) schools have an interest in "educating … students 'in a racially integrated environment'" because "education and broader socialization benefits flow from a racially diverse learning environment." The Court rejects these interests because they are "not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity" and because this type of "'outright racial balancing'" would "'assur[e] that race will always be relevant in American life, and that the "ultimate goal" of "eliminating

14. 127 S. Ct. 2162 (2007).
15. 431 U.C. 553 (1977).
16. 490 U.S. 900 (1989).
17. 127 S. Ct. 2738 (2007).
18. 539 U.S. 306 (2003).

entirely from governmental decisionmaking such irrelevant factors as a human being's race" will never be achieved.'" The Court also finds that the "minimal impact [of the programs] … casts doubt upon the necessity of using racial classifications." Lastly, the Court rejects the arguments in Justice Breyer's lengthy dissent as a misunderstanding and misapplication of its precedent. The Court concludes that "[t]he way to stop discrimination on the basis of race is to stop discrimination on the basis of race."

FEDERALISM

In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[19] a divided Court held that flow-control ordinances benefiting a public enterprise do not violate the dormant Commerce Clause because they do not discriminate against interstate commerce. The two respondent counties involved in this case have traditionally disposed of their own waste, but "[b]y the 1980's, the Counties confronted … a solid waste 'crisis.'" In response, they requested the creation of respondent Oneida-Herkimer Solid Waste Management Authority (Authority), and New York's legislature obliged. Under an agreement between the counties and the Authority, "private haulers would remain free to pick up citizens' trash…, but the Authority would take over the job of processing the trash, sorting it, and sending it off for disposal." The counties used "flow control ordinances" mandating that "all solid waste generated within the Counties be delivered to the Authority's processing sites." To cover its expenses, the Authority collected "tipping fees" that "significantly exceeded those charged for waste removal on the open market." The petitioners represent six private waste haulers that operated in the counties. In 1995, they sued the respondents, "alleging that the flow control laws violate the Commerce Clause by discriminating against interstate commerce." The petitioners submitted evidence that the market price for disposing of waste was between $37 and $55 per ton, while the Authority's tipping fee was $86 per ton. The Court begins by laying out the dormant Commerce Clause test, which requires the Court to "first ask whether [a law] discriminates on its face against interstate commerce." Those discriminatory laws that are "motivated by 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity' … which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose." In analyzing the ordinances, the Court states that "it does not make any sense to regard laws favoring local government and laws favoring private industry with equal skepticism" in that "laws favoring local government … may be directed toward any number of legitimate goals" while laws favoring in-state business are "often the product of 'simple economic protectionism.'" Finding that the flow-control ordinances "benefit a clearly public facility, while treating all private companies exactly the same," the Court holds that they "do not discriminate against interstate commerce." The Court next applies the test established in *Pike v. Bruce Church, Inc.*,[20] which states that the Court "will uphold a nondiscriminatory statute like this one 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Because "both the Magistrate Judge and the District Court could not detect *any* disparate impact on out-of-state as opposed to in-state businesses," the Court concludes that "any arguable burden does not exceed the public benefits of the ordinances."

[T]he Court held that the Individuals with Disabilities Education Act affords parents independent rights to prosecute related claims . . . on their own behalf.

CIVIL STATUTORY INTERPRETATION

In *Winkelman v. Parma City School District*,[21] the Court held that the Individuals with Disabilities Education Act (IDEA) affords parents independent rights to prosecute related claims, and they may do so on their own behalf. The petitioner Jacob Winkelman, represented by his parents, is a child with autism spectrum disorder. The respondent Parma City School District participates in IDEA's education-spending program and "accepts federal funds for assistance in the education of children with disabilities." These funds are conditioned on the school structuring, with the participation of Jacob's parents, an individualized education program (IEP) for Jacob. Jacob's parents disagreed with the school's proposed IEP for the 2003-2004 school term and sought administrative review. A hearing officer rejected their claims, and they appealed to a state-level review officer. After the review officer affirmed the hearing officer's decision, the petitioners "on their own behalf and on behalf of Jacob," filed a complaint, "without the aid of an attorney," in federal court, where it was rejected. The petitioners appealed this decision, and the Sixth Circuit, "[r]elying on its recent decision in *Cavanaugh v. Cardinal Local School Dist.*,[22] … entered an order dismissing the appeal unless petitioners obtained counsel to represent Jacob." *Cavanaugh* held that in the IDEA context, the "right to a free appropriate public education 'belongs to the child alone'" and parents rights are "'derivative' of the child's right." The *Cavanaugh* court concluded that because IDEA "does not abrogate the common-law rule prohibiting nonlawyer parents from representing minor children," parents cannot proceed *pro se* with IDEA litigation in federal court. The Court first notes that several provisions of IDEA guarantee parents "protections that apply throughout the IEP process" and another requires the local education agency to "'resolv[e] … complaint[s] to the satisfaction of the parents.'" The Court also finds that IDEA "sets forth procedures … that, in the Act's express terms, contemplates parents will be the parties bringing the … complaints." Because "parents enjoy enforceable rights at the administrative stage," the

19. 127 S. Ct. 1786 (2007).
20. 397 U.S. 137 (1970).
21. 127 S. Ct. 1994 (2007).
22. 409 F. 3d 753 (2005).

[A] 5-4 Court upheld the Partial-Birth Abortion Ban Act of 2003.

Court holds that "it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court." The Court rejects the respondent's alternative interpretation of the statute and concludes that because parents have independent rights under IDEA, "they are … entitled to prosecute IDEA claims on their own behalf." Therefore, the Court "need not reach petitioners' alternative argument, which concerns whether IDEA entitles parents to litigate their child's claims *pro se*."

In *Sole v. Wyner*,[23] a unanimous Court held that the respondent is not entitled to an award of attorney's fees because a plaintiff who wins a preliminary injunction but later loses the same case on the merits is not a prevailing party. The respondent T.A. Wyner filed suit against the petitioners, including the Secretary of Florida's Department of Environmental Protection (DEP). She alleged that Florida's "Bathing Suit Rule," which requires that patrons in Florida's state parks "wear at a minimum, a thong and, if female, a bikini top," violated her First Amendment right to engage in artwork that "would consist of nude individuals assembled into a peace sign." The District Court granted respondent a preliminary injunction and allowed the DEP to put up a screen, behind which the exhibit would take place. However, "the display was set up outside the barrier, and participants, once disassembled from the peace symbol formation, went into the water in the nude." After this occurrence, the trial continued and respondent sought a permanent injunction because she intended to stage a repeat exhibit the next year. The District Court granted petitioner's motion for summary final judgment, holding that "[t]he deliberate failure of Wyner and her coparticipants to remain behind the screen at the 2003 … display … demonstrated that the Bathing Suit Rule's prohibition of nudity was 'no greater than is essential….'" Despite its ruling, the District Court held that Wyner had prevailing-party status because she initially obtained the preliminary injunction. Under 42 U.S.C. section 1988(b), Congress gave federal district courts discretion to "'allow the prevailing party … a reasonable attorney's fee as part of the costs.'" Accordingly, the District Court "awarded [respondent] counsel fees covering the first phase of the litigation." The Court begins by examining the definition of a "prevailing party." The Court finds that in the case at hand, "the preliminary injunction hearing was necessarily hasty and abbreviated" and that the relief "expired before appellate review could be gained." In this context, the Court holds that "[t]he final decision in Wyner's case rejected the same claim she advanced in her preliminary injunction motion" and that "her initial victory was ephemeral." Therefore, the Court concludes "that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under §1988(b) if the merits of the case are ultimately decided against her."

In *Watson v. Philip Morris Companies, Inc.*,[24] a unanimous Court held that mere compliance with federal agency regulations, even where an agency closely monitors activities, is not "acting under" the government for purposes of the federal officer removal statute. The petitioners filed suit in state court against the respondent Philip Morris Companies for allegedly engaging in "unfair and deceptive business practices" in advertising certain cigarettes as light. The complaint accuses the respondent of manipulating its cigarettes' performance in the tobacco industry's Cambridge Filter Method tests "'to register lower levels of tar and nicotine … than would be delivered to the consumers of the product.'" The respondent removed the case to Federal District Court under the federal officer removal statute, which allows the removal of suits against the "United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof …." The petitioner argues that the removal is invalid. The Court begins its opinion by addressing the extensive history surrounding the federal officer removal statute. After analyzing this background, the Court concludes that the statute "was '[o]bviously … an attempt to protect federal officers from interference by hostile state courts.'" Turning to the pertinent language, the Court finds that "[t]he relevant relationship is that of a private person '*acting under*' a federal 'officer' or 'agency'" and that the plain meaning of this "relationship typically involves 'subjection, guidance, or control.'" The Court reasons that "simply *complying* with the law" does not fall under this phrase and would not normally trigger the threat of state court prejudice that the statute was designed to protect against. The Court holds that "a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone, … even if the private firm's activities are highly supervised and monitored." Philip Morris contends that in conducting the cigarette tests, it did more than merely comply with Government regulations but was acting under "'*delegated authority*'" from the FTC. The Court points out that no official delegation of legal authority was ever made from the FTC to the tobacco industry "to undertake testing on the Government agency's behalf." The Court concludes that it "can find nothing that warrants treating the FTC/Philip Morris relationship as distinct from the usual regulator/regulated relationship" and that this relationship alone "cannot be construed as bringing Philip Morris within the terms of the statute."

ABORTION

In *Gonzales v. Carhart*,[25] a 5-4 Court upheld the Partial-Birth Abortion Ban Act of 2003. Congress passed the Act in response to *Stenberg v. Carhart*.[26] In *Stenberg*, the Court invalidated a state ban on certain abortion procedures used in later stages of pregnancy. While the laws at issue are similar, the language of the Act is "more precise in its coverage" than the *Stenberg* statute and was supported by factual findings from Congress. The Act provides in pertinent part that "'[a]ny physician who, in or affecting interstate or foreign commerce,

23. 127 S. Ct. 2188 (2007).
24. 127 S. Ct. 2301 (2007).
25. 127 S. Ct. 1610 (2007).
26. 530 U.S. 914 (2000).

knowingly performs a partial-birth abortion … shall be fined under this title or imprisoned not more than 2 years, or both.'" The term "partial-birth abortion" is defined as a procedure in which a physician: "deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus." The respondents filed suit in federal court against the Attorney General of the United States and were awarded permanent injunctions barring enforcement of the Act in most situations. The Court begins by discussing the abortion procedures at issue. The usual method for abortion during the second trimester is dilation and evacuation (D&E), and in a normal D&E procedure, the doctor will dilate the cervix and insert forceps to grab the fetus and "[pull] it back through the cervix and vagina." The numerous acts banning partial-birth abortions were motivated by a variation on this procedure known as intact D&E. Intact D&E is similar to regular D&E, but the goal is that the fetus remains whole. Normally, the "fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass." Doctors next use various methods to evacuate the skull contents and crush the skull to allow it to pass. The Court reviews its holdings in *Roe v. Wade*[27] and *Planned Parenthood of Southeastern Pa. v. Casey*[28] and finds that *Casey* allows "'[r]egulations … by which the State, … express[es] profound respect for the life of the unborn …, if they are not a substantial obstacle to the woman's exercise of the right to choose.'" The respondents assert that "the Act is void for vagueness" and alternatively that "the Act's text proscribes all D&Es," thereby imposing an undue burden. The Court finds the Act not void for vagueness because it clearly requires a doctor to vaginally deliver a fetus to an anatomical landmark, perform an overt act to kill the partially delivered fetus, and have the requisite scienter in performing this act for a violation to occur. The Court also rejects the respondents' undue-burden argument because the Act only prohibits intact D&Es and intent is required. Next, the Court addresses whether the Act is unconstitutional because its "'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion….'" The Court finds that it is reasonable for Congress to determine that "the abortion methods it proscribed had a 'disturbing similarity to the killing of a newborn infant'" and that the Act "furthers the Government's objectives." The Court acknowledges that the Act would be unconstitutional if it "'subject[ed] [women] to significant health risks'" but states that the record shows a "documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women" and that this disagreement is not sufficient to demonstrate sufficient health risks. The Court concludes by noting that the Act might still be open to a proper as-applied challenge but that the facial challenges at issue will not invalidate it.

BUSINESS LAW

[A] 7-1 Court held that securities law precludes the application of antitrust law to alleged anticompetitive activities during the marketing of IPOs . . . .

In *Credit Suisse Securities (USA) LLC v. Billing*,[29] a 7-1 Court held that securities law precludes the application of antitrust law to alleged anti-competitive activities during the marketing of IPOs because it is "clearly incompatible" with antitrust law. The petitioners are underwriters who facilitate an initial public offering (IPO) of shares in a company. In doing so, they engage in "book building" by interviewing potential investors to determine the price and quantity of shares to be offered. After this process, the petitioners discuss arrangements for the offering with the offering company and then buy shares at a discounted price, which the petitioner resells to investors at the price determined through book building, "in effect earning its commission in the process." The petitioners were sued by the respondents, a group of 60 investors, for actions during this process, which respondents allege violated various federal and state antitrust laws, including section 1 of the Sherman Act. The petitioners seek to dismiss the complaint "on the ground that federal securities law impliedly precludes application of antitrust laws to the conduct in question." The Court first states that the relevant issue is "whether, given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint—or … whether the two are 'clearly incompatible.'" Four factors are critical in this determination: "(1) the existence of regulatory authority under the securities law to supervise the activities in question;" (2) a showing that the regulator "exercise[s] that authority;" (3) a risk of conflict between the two statutes if both were followed; and (4) the presence of "practices that lie squarely within an area of financial market activity that the securities law seeks to regulate." The Court finds that the fourth factor is present because "the activities in question here … [are] central to the proper functioning of well-regulated capital markets." The Court also finds that the first and second factors are met because the SEC has "authority to supervise all of the activities here in question" and "has continuously exercised its legal authority to regulate" this conduct. The central issue is the third factor: whether there is "a conflict that rises to the level of incompatibility." The Court believes that "there is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target…" and that antitrust courts "are likely to make unusually serious mistakes in this respect." Also, the Court finds that "any enforcement-related need for an antitrust lawsuit is unusually small" because the SEC enforces its rules, and investors can challenge activities and receive damages under relevant securities law. Because the four requisite ele-

27. 410 U.S. 113 (1973).

28. 505 U.S. 833 (1992).

29. 127 S. Ct. 2383 (2007).

[T]he Court held that the Fair Credit Reporting Act's adverse-action notice requirement only applies when an action is willful or reckless. . . .

ments are present, the Court concludes that "securities laws are 'clearly incompatible' with the application of the antitrust laws in this context."

In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[30] an 8-1 Court held that the "strong inference" standard in the Private Securities Litigation Reform Act of 1995 (PSLRA) requires a plaintiff to allege in his or her complaint "facts rendering an inference of scienter *at least as likely as* any plausible opposing inference." Congress passed the PSLRA to "check against abusive litigation by private parties" within the securities context. The plaintiffs are required to "'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" The respondents are shareholders who purchased stock in the petitioner Tellabs, Inc., in 2000 and 2001. They allege that during this period, the petitioner Richard Notebaert, acting as CEO and president of Tellabs, "knowingly misled the public" with false statements and representations regarding the company. By 2001, evidence of the company's troubles came to light, and the stock price dropped significantly. The respondents filed a class-action lawsuit in 2002. On appeal, the Seventh Circuit held that the "strong inference" requirement is met if a complaint "'alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent ….'" The Supreme Court granted certiorari to resolve a conflict among the Circuit Courts of Appeals in interpreting this requirement. The Court first notes that the PSLRA was partially intended to resolve a split among the circuits regarding the correct standard for pleading requirements of scienter in a private party's securities-related action. The Court concludes that it must "prescribe a workable construction of the 'strong inference' standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims." To this end, the Court states three prescriptions: (1) when deciding a motion to dismiss, courts must accept the complaint's alleged facts as true; (2) courts must examine the complaint and referenced documents in their entirety; and (3) in applying the "strong inference" standard, courts "must take into account plausible opposing inferences." In reaching the third prescription, the Court rejects the Seventh Circuit's standard because the PSLRA does not require plaintiffs "to allege facts from which an inference of scienter rationally *could* be drawn" but more specifically "require[s] plaintiffs to plead with particularity facts that give rise to a 'strong'—*i.e.*, a powerful or cogent—inference." The Court holds that "[a] complaint will survive … only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." In conclusion, the Court rejects the Seventh Circuit's standard, but "do[es] not decide whether … [respondents'] allegations warrant 'a strong inference that [Notebaert and Tellabs] acted with the required state of mind ….'"

In *Safeco Insurance Co. of America v. Burr*,[31] the Court held that the Fair Credit Reporting Act's (FCRA) adverse-action notice requirement only applies when an action is willful or reckless and only if the proposed premium rate is above a "neutral" rate that would apply regardless of the consumer's credit report. The FCRA requires that "'any person [who] takes any adverse action with respect to any consumer that is based … on any information contained in a consumer [credit] report' must notify the affected customer." If a breach of the statute is willful, a consumer can be awarded actual or statutory damages, and possibly punitive damages. The respondent Ajene Edo applied for auto insurance from the petitioner GEICO, who obtained his credit score and offered him a "standard policy … (at rates higher than the most favorable), which he accepted." Under GEICO's tiered scheme, Edo was not offered a "preferred policy," but the standard policy offered was no different from the "neutral" rate he would have received without consideration of his credit report. GEICO did not send Edo an adverse-action notice. Edo brought suit alleging a willful failure to give notice and seeking statutory and punitive damages. The respondents Charles Burr and Shannon Massey were similarly offered higher rates from the petitioner Safeco, who based these premiums partially on their credit reports. After Safeco failed to send adverse-action notices, the respondents joined a class action against Safeco. The Court first examines the definition of "willful" under FCRA and finds that under common usage, it includes "reckless disregard." The Court next addresses the initial issue of "whether either company violated the adverse action requirement at all." Under FCRA, an adverse action can only occur in these circumstances if "quoting or charging a first-time premium is 'an increase in any charge for … any insurance….'" The Court holds that "the 'increase' required for 'adverse action'… speaks to a disadvantageous rate even with no prior dealing." Additionally, the Court accepts GEICO's argument "that in order to have adverse action 'based on' a credit report, consideration of the report must be a necessary precondition for the increased rate." In light of these findings, the Court states that it must identify "the benchmark for determining whether a first-time rate is a disadvantageous increase." GEICO argues that the baseline should be the neutral rate obtained by not taking an applicant's credit score into account at all. The Court agrees because it feels GEICO's proposed definition is more in keeping with the "based on" causation requirement discussed above. The Court holds that because "the initial rate offered to Edo was the one he would have received if his credit score had not been taken into account," GEICO was not required to send an adverse-action notice. With regard to Safeco, the Court finds that the insurer understood the adverse-action notice requirement as not applying to initial applications for insurance. The Court holds that because it is clear from the record

30. 127 S. Ct. 2499 (2007).

31. 127 S. Ct. 2201 (2007).

that Safeco did not act recklessly or willfully in this misinterpretation of FCRA, it cannot be liable even if its actions otherwise meet the "adverse action" requirement.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[32] a 5-4 Court held that vertical price restraints should be judged under the Sherman Act by the rule of reason and not by a *per se* rule of illegality. The petitioner, Leegin Creative Leather Products, Inc., is a manufacturer of leather goods and accessories. The respondent, PSKS, Inc., sold the petitioner's goods in its retail establishment Kay's Kloset beginning in 1995. In 1997, the petitioner began a program under which it "refused to sell to retailers that discounted [its] goods below suggested prices." In 2002, the petitioner learned that Kay's Kloset had violated the policy and asked the respondent to stop. After it refused, the petitioner stopped selling to Kay's Kloset. The Respondent sued, alleging that the petitioner had violated antitrust laws. The Court begins by examining section 1 of the Sherman Act, which prohibits "'[e]very contract … in restraint of trade or commerce among the several states.'" The Court notes that this has never applied literally, but only to "'unreasonable restraints'" and that the reasonableness of a particular contract is usually determined by applying the rule of reason, under which "'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" However, some practices are governed by a *per se* rule of illegality because they "'would always or almost always tend to restrict competition and decrease output.'" For example, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[33] has been interpreted as "establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices." The Court finds that recent cases have rejected the "'formalistic'" reasoning of *Dr. Miles* in favor an evaluation of "'demonstrable economic effect'" and concludes that the *Dr. Miles* opinion is insufficient to justify a *per se* rule. In undertaking its own evaluation, the Court finds that in light of the opposing viewpoints of economists on the subject, "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output.'" For this reason, the Court states that "were [it] considering the issue as an original matter," it would apply the rule of reason to vertical price restraints. The Court next examines the doctrine of *stare decisis*, noting that it is weakened in the context of the Sherman Act because "[f]rom the beginning the Court has treated the Sherman Act as a common-law statute," making it more adaptable to "modern understanding and greater experience." In addition, the Court finds that subsequent decisions have weakened *Dr. Miles*'s "'doctrinal underpinnings.'" Therefore, the Court overrules *Dr. Miles* and holds that vertical price restraints should be evaluated under the rule of reason.

INTELLECTUAL PROPERTY

In *KSR Intern. Co. v. Teleflex Inc.*,[34] a unanimous Court held that the respondent's patent on an electronic pedal sensor is void for obviousness because it can be derived by a person of ordinary skill from previous patents. In 1999, the petitioner KSR International Company patented an "adjustable pedal system for various lines of automobiles with cable-actuated throttle controls." When KSR was hired by General Motors Corporation to manufacture pedals, it "added a modular sensor" to its previous design to ensure compatibility. The respondent Teleflex Incorporated sued KSR for infringing upon its Engelgau patent. Claim 4 of the Engelgau patent "describes a mechanism for combining an electronic sensor with an adjustable automobile pedal so the pedal's position can be transmitted to a computer that controls the throttle in the vehicle's engine." KSR argued that claim 4's content is obvious and that the patent is invalid under the Patent Act, 35 U.S.C. section 103, which "forbids issuance of a patent" if "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." The District Court found "'little difference'" between the prior art and the Engelgau patent and concluded that claim 4 was obvious. However, the "District Court was not permitted to stop there" because the Federal Circuit applies a "'teaching, suggestion, or motivation' test (TSM test)." Under the TSM test, a patent claim can be obvious only if "'some motivation or suggestion to combine the prior art teachings' can be found in the prior art, the nature of the problem, or the knowledge of a person having ordinary skill in the art." The District Court concluded that KSR satisfied this test and granted its motion for summary judgment. The Federal Circuit Court of Appeals reversed, holding that "the District Court had not been strict enough in applying" the TSM test. The Court "begin[s] by rejecting the rigid approach of the Court of Appeals" because its previous "cases have set forth an expansive and flexible approach." The Court next examines the TSM test, agreeing that "it can be important to identify a reason that would have prompted a person … to combine the elements," but finding that "obviousness analysis cannot be confined" to such a formalistic test. The Court finds the Federal Circuit erred "by holding that courts and patent examiners should look only to the problem the patentee was trying to solve" because the correct inquiry is whether it was obvious to a person of ordinary skill, not the individual patentee. The Court agrees with the District Court's finding that there is little difference between the combination of previous patents and the Engelgau patent, and "a person having ordinary skill in the art could have combined [a previous patent]

[A] 5-4 Court held that vertical price restraints should be judged under the Sherman Act by the rule of reason and not by a *per se* rule of illegality.

32. 127 S. Ct. 2705 (2007).
33. 220 U.S. 373 (1911).
34. 127 S. Ct. 1727 (2007).

[A] 5-4 Court held that the Clean Air Act requires the EPA to issue regulations governing new vehicle emissions of greenhouse gases.

with a pedal position sensor in a fashion encompassed by claim 4, and would have seen the benefits of doing so." Therefore, the Court concludes claim 4 is obvious.

In *Microsoft Corp. v. AT&T Corp.*,[35] a 7-1 Court held that Microsoft is not liable for overseas patent infringement because sending a master version of software overseas is not supplying a component from the United States under section 271(f) of the Patent Act of 1984. Generally, a patent infringement does not occur "when a patented product is made and sold in another country." However, section 271(f) of the Patent Act of 1984 contains an exception to this rule "when one 'supplies … from the United States,' for 'combination' abroad, a patented invention's 'components.'" The respondent AT&T holds a patent on a device used "for digitally encoding and compressing recorded speech" and the petitioner Microsoft's Windows software "has the potential to infringe AT&T's patent, because Windows incorporates software code that, when installed, enable a computer to process speech" in this manner. Microsoft sells master versions of Windows to overseas manufacturers of computers who copy this master version and install these copies onto their products. In 2001, AT&T sued Microsoft in federal court for infringing its patent as a result of these foreign installations of Windows. Microsoft argues that the master versions sold were not "'supplie[d] … from the United States" and were not "'component[s]'" covered under section 271(f). The Court begins by stating the two issues to be addressed: (1) "[W]hen … does software qualify as a 'component' under §271(f)"; and (2) "[W]ere 'components' of the foreign-made computers involved in this case 'supplie[d]' by Microsoft 'from the United States'?" Turning to the first question, the Court finds that Windows software in the abstract cannot be combined to infringe on AT&T's patent but must be installed from "a computer-readable 'copy'" in order to do so. Therefore, the Court concludes that uninstalled Windows software is not a component within the meaning of section 271(f). Next, the Court examines the question of whether components were supplied from the United States. The Court notes that "the copies of Windows actually installed on the foreign computers were not themselves supplied from the Unites States" but were "generated by third parties outside the United States." Because section 271(f) is silent on the issue of copying, the Court concludes that this "weighs against a judicial determination that replication abroad of a master dispatched from the United States 'supplies' the foreign-made copies from the United States."

ENVIRONMENTAL LAW

In *Massachusetts v. E.P.A.*,[36] a 5-4 Court held that the Clean Air Act requires the Environmental Protection Agency (EPA) to issue regulations governing new-vehicle emissions of greenhouse gases. Under section 202(a)(1) of the Clean Air Act, the EPA is required to "prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles, which … cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare …." In 1999, several private organizations petitioned the EPA to regulate "'greenhouse gas emissions from new motor vehicles under §202,'" arguing that these gases have "accelerated climate change." In 2003, the EPA denied the organizations' petition, stating that "the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change" and that even if it did, "it would be unwise to do so at this time." The organizations were joined by several states and local governments and sought review of EPA's denial. The Court begins by addressing the issue of standing because at least one petitioner must demonstrate the requirements of injury, causation, and remedy. Using Massachusetts as an example, the Court finds the first requirement met because the injuries "associated with climate change are serious and well recognized." With regard to the second, the Court finds that a reduction in auto emissions could be a significant step in battling global warming. Turning to the remedy requirement, the Court finds that the EPA's actions could "slow the pace of global emissions increases, no matter what happens elsewhere." Because all three requirements are met, Massachusetts has standing to challenge the EPA's decision. Turning to the merits of the case, the Court finds that greenhouse gases are air pollutants within the Act's broad definition and that the EPA has the authority to regulate greenhouse-gas emissions from new vehicles. Finally, the Court addresses the EPA's alternative argument that even if it has this authority, "it would be unwise to do so at this time." While recognizing that the EPA has some discretion under the statute, the Court states that it "can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion." Because the EPA has not met these requirements, the Court holds that its denial was "'arbitrary, capricious, … or otherwise not in accordance with law.'"

In *U. S. v. Atlantic Research Corp.*,[37] a unanimous Court held that section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides the respondent with a cause of action against the petitioner for reimbursement of environmental cleanup costs. CERCLA contains two provisions that "allow private parties to recover expenses associated with cleaning up contaminated sites." Section 107(a) makes four categories of potentially responsible parties (PRPs) liable for "(A) all costs of removal or remedial action incurred by the

35. 127 S. Ct. 1746 (2007).
36. 127 S. Ct. 1438 (2007).
37. 127 S. Ct. 2331 (2007).

United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan." Section 113(f) additionally "authorizes one PRP to sue another for contribution in certain circumstances." In *Cooper Industries, Inc. v. Aviall Services, Inc.*,[38] the Court held that "a private party could seek contribution from other liable parties only after having been sued under §106 or §107(a)." *Cooper*, however, left open the issue of "whether PRPs have rights under §107(a)(4)(B)." In the instant case, the respondent Atlantic Research was hired by the petitioner United States to retrofit rocket motors. During this process, the respondent contaminated nearby "soil and groundwater," cleaned the site, and later sought contribution from the petitioner under sections 107(a) and 113(f). After the Court's decision in *Cooper*, however, the respondent "amended its complaint to seek relief under §107(a) and federal common law." The Court begins by noting that "[t]he parties' dispute centers on what 'other person[s]' may sue under §107(a)(4)(B)." The Court agrees with Atlantic Research that "subparagraph (B) can be understood only with reference to subparagraph (A)" and "any other person" includes "anyone except the United States, a State, or an Indian tribe—the persons listed in subparagraph (A)." The government argues that the Court's "interpretation will create friction between §107(a) and §113(f)." The Court rejects this reasoning, noting that it has "previously recognized that §§107(a) and 113(f) provide two 'clearly distinct' remedies" in that section 113(f) allows a right to contribution "contingent upon an inequitable distribution of common liability among liable parties" while section 107(a) "permits recovery of cleanup costs but does not create a right to contribution." The Court concludes that the government's fears of "friction" are unfounded and that section 107(a)(4)(B) "provides Atlantic Research with a cause of action."

In *National Ass'n of Home Builders v. Defenders of Wildlife*,[39] a 5-4 Court held that a mandatory provision of the Clean Water Act of 1972 (CWA) controls a mandatory provision of the Endangered Species Act of 1973 (ESA). The CWA provides that the EPA shall administer the review and approval of permits under the National Pollution Discharge Elimination System (NPDES) in each state. A state can apply to take control of its permitting system, and if it makes a showing of nine criteria, the EPA "'shall approve'" its application. The ESA is designed to protect endangered species and gives the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) authority to administer the ESA with respect to species under the jurisdiction of the Secretary of the Interior and the Secretary of Commerce, respectively. Under section 7 of the ESA, federal agencies must "'insure that any action authorized … by such agency … is not likely to jeopardize the continued existence of any endangered species ….'" In 2002, Arizona applied to administer its NPDES permitting system, and the EPA began to consult with FWS regarding the application. FWS found no directly negative impact on an endangered species but was concerned about possible future impacts. The EPA found these possibilities to be too attenuated and also believed that they were legally required to approve the transfer because Arizona had met the nine CWA requirements. After further consultation, the EPA approved the transfer to Arizona. The respondents filed a petition "seeking review of the transfer," and the petitioners, the National Association of Home Builders, were granted permission to intervene. The respondent Defenders of Wildlife filed a different action, alleging that the FWS failed to comply with the ESA in issuing its biological opinion. The Ninth Circuit consolidated the two actions, held that the EPA's decision granting the transfer was "arbitrary and capricious" and vacated the transfer. The Court first notes the strong deference it gives agency decisions. The Court disagrees with the Ninth Circuit's determination that the EPA's position was "'internally inconsistent'" because the only inconsistency the respondent's can point to is that EPA "changed [its] mind" over the course of consulting with FWS, and the EPA was "fully entitled to do" so. The Court next examines the statutory conflict between the CWA and the ESA. The Court believes that a literal application of the ESA would "'*ad*[*d*] one [additional] requirement'" to the nine already mandated by the CWA, reversing its mandatory nature. The Court states that later enacted statutes, like the ESA, are normally not construed to repeal an earlier provision unless such a construction "'is absolutely necessary … in order that [the] words [of the later statute] shall have any meaning at all.'"" Applying this principle, the Court rejects the Ninth Circuit's broad interpretation of the ESA that would alter the CWA's mandate. To resolve the statutory conflict, the Court looks to the interpretation of the implementing agencies (FSW and NMFS), whose reading would limit application of section 7 of the ESA to agency "'actions in which there is *discretionary* Federal involvement or control.'" The Court finds that deference to the agencies' interpretation is warranted because it is a reasonable reading of the statute. Therefore, the Court concludes that because EPA's decision under the CWA is not discretionary, section 7 of the ESA does not control.

[A] 5-4 Court held that a mandatory provision of the Clean Water Act of 1972 controls [over] a mandatory provision of the Endangered Species Act of 1973.

IMMIGRATION

In *Lopez v. Gonzales*,[40] an 8-1 Court held that an offense qualifying as a felony under state law but only as a misdemeanor under the Controlled Substances Act (CSA) is not a felony punishable under the CSA. The petitioner Jose Antonio Lopez entered the United States illegally in 1986 but became a

38. 543 U.S. 157 (2004).
39. 127 S. Ct. 2518 (2007).
40. 127 S. Ct. 625 (2006).

Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

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Articles: Articles should be submitted in double-spaced text with footnotes, preferably in Word format (although WordPerfect format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better-state-bar-association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

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legal permanent resident in 1990. In 1997, he pleaded guilty to aiding and abetting another's possession of cocaine, a state felony in South Dakota. After serving 15 months of his five-year sentence, the petitioner was released and the Immigration and Naturalization Service (INS) began removal proceedings against him because his conviction was a controlled substance violation and an aggravated felony. The petitioner contested the aggravated-felony classification because his conduct is only a misdemeanor under the CSA. The immigration judge disagreed because drug possession was a felony under state law. The Board of Immigration Appeals (BIA) affirmed, and the Court of Appeals affirmed. This outcome required the mandatory removal of the petitioner, whereas a finding in the petitioner's favor would leave his removal open for discretionary cancellation. The Supreme Court granted certiorari to address conflicting decisions in the circuits regarding the correct interpretation of the CSA in this regard. The Court begins by addressing the statutory language involved. Immigration and Nationality Act (INA) section 1101(a)(43)(B) defines an aggravated felony to include "illicit trafficking in a controlled substance … including a drug trafficking crime …." Title 18 defines drug-trafficking crime as "any felony punishable under the Controlled Substances Act." The government argues that the petitioner's conduct satisfies this language because it is a felony, under South Dakota state law, and it is punishable under the CSA, albeit as a misdemeanor. The Court rejects this argument because the plain meaning of "trafficking" would not include the petitioner's crime of possession. The government's interpretation is also rejected because it would "render the law of alien removal … dependent on varying state criminal classifications" where Congress's intent seems to be quite the opposite. The Court states that Congress instead likely intended the law to depend upon the felony and misdemeanor scheme it establishes in the CSA. In conclusion, the Court holds "that a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."

In *Gonzales v. Duenes-Alvarez*,[41] an 8-1 Court held that aiding and abetting theft falls within the definition of a generic theft for the purposes of removal under the Immigration and Nationality Act (INA). The respondent Luis Duenas-Alvarez is a permanent resident of the United States. He was convicted as an accessory for violating Cal. Veh. Code Ann. section 10851(a), which states in the pertinent part: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof … or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense." The government began removal proceedings against the respondent under the INA, which allows for removal of certain aliens who are convicted of some offenses, including theft. A federal immigration judge found that the respondent was removable because of his conviction. The Bureau of Immigration Appeals (BIA) affirmed, and the respondent petitioned for review in the Ninth Circuit. The Ninth Circuit remanded the respondent's case to the BIA because of its decision in *Penuliar v. Ashcroft*,[42] which held that Cal. Veh. Code Ann. section 10851(a) "sweeps more broadly than generic theft." The Court begins its analysis by noting the four traditional common-law aiding-and-abetting categories: (1) first-degree principals; (2) second-degree principals; (3) accessories before the fact; and (4) accessories after the fact. The Court states that the first three categories have largely merged, and the vast majority of jurisdictions now distinguish only between principal accessories and accessories after the fact. The Court holds that a generic theft offense covers principal accessories as well as principals. The Court next addresses the respondent's attempt to demonstrate that the California statute criminalizes conduct that most jurisdictions do not consider "theft." The respondent argues that the statute unconstitutionally makes the accused liable for unintended and unforeseen consequences. The Court disagrees and states that such a showing requires "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." The Court concludes that the respondent has not met this burden because he has pointed to no cases involving such a misapplication of the California statute.

[A]n 8-1 Court held that an indictment that fails to allege any overt act in an attempt offense is constitutionally sufficient . . . .

In *U.S. v. Resendiz-Ponce*,[43] an 8-1 Court held that an indictment that fails to allege any overt act in an attempt offense is constitutionally sufficient because it uses the word "attempt" and describes the time and place of the alleged attempt. The respondent Juan Resendiz-Ponce was deported in 1988 and again in 2002. He attempted to reenter the country in 2003 by presenting the photo identification of his cousin and claiming to be a legal resident of the United States. The respondent was charged with violating 8 U.S.C. section 1326(a) for attempting to reenter the country illegally. The indictment stated that the respondent "knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States." The respondent attempted to have the indictment dismissed on the grounds that it "fail[ed] to allege an essential element, an overt act, or to state the essential facts of such over act." After the District Court denied the respondent's motion, he was found guilty and sentenced to 63 months of imprisonment. The Ninth Circuit reversed his conviction, finding that the "omission of 'an essential element of the offense is a fatal flaw and not subject to mere harmless error analysis.'" The Court begins by addressing the government's argument that the indictment implicitly alleges that the respondent committed

41. 127 S. Ct. 815 (2007).
42. 395 F.3d 1037 (2005).
43. 127 S. Ct. 782 (2007).

> **[A] unanimous Court held that overtime and minimum wage standards . . . do not apply to . . . a domestic care-giver employed by a third-party agency . . . .**

the requisite overt act "simply by alleging that 'he attempted to enter the United States.'" The Court states that *Hamling v. U.S.*[44] requires two elements for an indictment to be constitutional: "First, [that it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." The Court holds that the indictment at issue satisfies both of these requirements by using the word "attempt" and specifying the time and place of the alleged attempt. The Court also notes that the indictment complies with the Rule 7(c)(1) requirement that an indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

LABOR LAW

In *Beck v. PACE Intern. Union*,[45] a unanimous Court held that the petitioner did not breach a fiduciary duty in failing to fully consider the respondent's merger proposal. The petitioner Crown Paper provided a defined-benefit pension plan for the 2,600 persons employed at its paper mills. Under a defined-benefit pension plan, employers take the risk of covering the pension payments if investments do not pay off but also benefit if investments provide more than is necessary to cover the payments. In 2000, the petitioner filed for bankruptcy and considered termination of its pension plan under the Employee Retirement Income Security Act of 1974 (ERISA) through the purchase of annuities. The respondent PACE International Union represented the petitioner's employees covered under the defined-benefit plans. Instead of terminating the pension plan, the respondent proposed a merger with the PACE Industrial Union Management Pension Fund (PIUMPF) that would shift all plan assets and liability to PIUMPF. While examining its pension plan, however, Crown "discovered that it had overfunded certain of its pension plans, so that purchasing annuities would allow it to retain a projected $5 million reversion." This reversion would go to PIUMPF under PACE's proposed merger. Crown rejected the respondent's merger proposal and decided to terminate its plan through the purchase of annuities, allowing Crown "to reap the $5 million reversion in surplus funds." In response, PACE filed suit against Crown in Bankruptcy Court, "alleging that Crown's directors had breached their fiduciary duties under ERISA by neglecting to give diligent consideration to PACE's merger proposal." The Bankruptcy Court agreed and issued a preliminary injunction against Crown, "preventing [it] from obtaining the $5 million reversion." The petitioner appealed to the District Court, which affirmed, as did the Ninth Circuit. The Court begins its discussion by noting that under ERISA, an employer only has a fiduciary duty when acting as plan administrator as the decision "*whether* to terminate an ERISA plan is … immune from ERISA's fiduciary obligations." PACE acknowledges this but "says that its proposed merger was different, because [it] represented a *method of terminating* the Crown plans." Because ERISA imposes a fiduciary duty in selecting annuities when terminating a plan, PACE argues this duty should similarly apply to the merger method of termination. In examining this argument, the Court finds that it must first determine whether the proposed merger is "a *permissible* form of plan termination under ERISA." The Court states that section 1341(b)(3)(A) of ERISA contains an exhaustive list of procedures for terminating pension plans and agrees with petitioner that the merger plan is not included. The Court further notes that merger is not explicitly mentioned in the section but is "expressly provided for in an entirely separate set of statutory sections." In light of this interpretation, the Court concludes that the merger is not permissible, and Crown did not breach a fiduciary duty in not considering PACE's merger proposal.

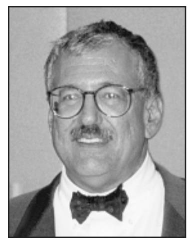
In *Long Island Care at Home, Ltd. v. Coke*,[46] a unanimous Court held that overtime and minimum-wage standards in the Fair Labor Standards Act of 1938 (FLSA) do not apply to the respondent because she is a domestic caregiver employed by a third-party agency, and Department of Labor (DOL) regulations exempt her from these requirements. The FLSA was amended by Congress in 1974 "to include many 'domestic service' employees …." However, Congress exempted "any employee employed in domestic service employment to provide companionship services for individuals who … are unable to care for themselves." Shortly thereafter, the DOL issued a regulation limiting the term "domestic service employment" to employees who work "'in or about a private home … *of the person by whom he or she is employed*." Another DOL regulation, the "third-party regulation," defines exempt companionship workers as those "'who are employed by an employer or agency other than the family or household using their services…." The respondent Evelyn Coke is a domestic worker "who provides 'companionship services' to elderly and infirm men and women." She brought suit against her former employer, the petitioner Long Island Care at Home, alleging a failure to compensate her for overtime and minimum wages that she was entitled to under the FLSA. The District Court dismissed her claim, citing the DOL third-party regulation. The Second Circuit reversed because it found the third-party regulation "'unenforceable.'" The Court begins by noting that administrative agencies have the power to "'formulat[e] … policy … to fill any gap left, implicitly or explicitly, by Congress." The Court will generally defer to those regulations if they are reasonable "and in accordance with other applicable

44. 418 U.S. 87 (1974).

45. 127 S. Ct. 2310 (2007).

46. 127 S. Ct. 2339 (2007).

(e.g., procedural) requirements." The Court finds that the FLSA contains explicit gaps regarding the definitions of "domestic service employment" and "companionship service," and that the DOL has "the power to fill these gaps." The respondent argues that the third-party regulation is unreasonable because: (1) it "falls outside the scope of Congress' delegation;" (2) it contradicts another binding regulation; (3) it does not "[warrant] judicial deference;" and (4) it "was improperly promulgated." The Court rejects the first argument because the FLSA "language refers broadly to 'domestic service employment' and 'companionship services.'" The Court states that this leaves it to the DOL to "work out the details of those broad definitions." The respondent's second argument is that the third-party regulation conflicts with the DOL regulation defining "domestic service employment." The Court acknowledges a conflict but concludes that the third-party regulation controls because it believes congressional intent is more in line with this conclusion. Also, the Court states that "normally the specific governs the general" and finds that the third-party regulation is more specific in its purpose. The Court rejects the respondent's third argument because it finds that the DOL clearly intended the regulation to be legally binding in that it "used full public notice-and-comment procedures" when passing the regulation and has since "treated [it] … as a legally binding exercise of its rulemaking authority." In this situation, the Court concludes that "a court ordinarily assumes that Congress intended it to defer to the agency's determination." Finally, the respondent argues that the "notice-and-comment procedure, leading to the promulgation of the third-party regulation, was legally 'defective' because notice was inadequate and the [DOL's] explanation also inadequate." The Court disagrees, finding that the final third-party regulation was a foreseeable outgrowth of the proposal during the notice-and-comment procedure and that there is no "significant legal problem with the [DOL's] explanation for the change." For the foregoing reasons, the Court concludes that the third-party regulation controls.



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