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Recent Civil Decisions of the United States Supreme Court:

The 2004-2005 Term

Charles H. Whitebread

As I noted in reviewing the past term's criminal decisions,[1] what turned out to be the final year for the Rehnquist Court produced no blockbuster rulings. Nonetheless, there were several civil decisions of note. The Court's 5-4 ruling upholding the taking of private property for economic development purposes and two First Amendment cases involving public display of the Ten Commandments in a courthouse and in a school were among those receiving the most public attention.

FIFTH AMENDMENT TAKINGS

In a 5-4 decision, in *Kelo v. City of New London,*[2] the Court held that the taking of private property for the purpose of economic development satisfied the "public use" requirement of the Fifth Amendment. Justice Stevens delivered the opinion of the Court while Justice O'Connor led the dissent. New London, Connecticut was declared a "distressed municipality" by the State. Local and state officials targeted the area for economic revitalization and "[t]o this end, the respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated." The NLDC formally submitted plans for the city's rejuvenation and, "[u]pon obtaining state-level approval . . . finalized an integrated development plan focused on 90 acres of the Fort Trumbull area." The area targeted by NLDC comprised, in part, "privately owned properties." The plan was approved in 2000. "The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name." Most of the private property in the area was successfully purchased by NLCD; however, "negotiations with the petitioners failed." In December 2000, the petitioners brought an action in state court, claiming among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment."

The Court began by restating the basic principles of a State's eminent-domain power: "On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B." However, "it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking." According to the Court, "[n]either of these propositions . . . determines the disposition of this case." First, the property is not being taken for private purposes: "[t]he takings before us . . . would be executed pursuant to a carefully considered development plan," and there was no evidence that the City's purposes are illegitimate. Second, "this is not a case in which the City is planning to open the condemned land – at least not in its entirety – to use by general public." Even so, the Court has long since rejected that "public use" be determined by whether the land will be used by the public in favor of asking whether the land will be used for a "public purpose." The question then, according to the Court, was not whether the public will use the condemned land, but whether the City's development plan served a "public purpose." The Court stated that it has "defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."

After a discussion of its previous decisions, the Court stated that the City's plan for "economic rejuvenation is entitled to our deference." The Court also concluded that "[g]iven the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us . . . to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan." The Court declined to create a bright-line rule that disqualifies economic development for "public use": "Promoting economic development is a traditional and long accepted function of government," and the Court saw "no principled way of distinguishing economic development from the other public purposes that we have recognized." Further, the Court recognized that, as here, "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude."

Justice O'Connor, leading the dissent, believed the Court has abandoned a "long-held, basic limitation on government power" and the Court's holding made all private property "vulnerable to being taken and transferred to another private owner, so long as it might be upgraded." She would hold that economic takings are not constitutional because, generally, "any lawful use of real private property can be said to generate some incidental benefit to the public." Justice Thomas, who joined Justice O'Connor, also wrote separately because he believed that "[i]f such 'economic development' takings are for 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution."

Footnotes

1. Charles H. Whitebread, *Recent Criminal Decisions of the United States Supreme Court: The 2004-2005 Term*, COURT REVIEW, Spring 2005, at 26.
2. 125 S.Ct. 2655 (2005).

HABEAS CORPUS

Justice O'Connor delivered the opinion of the Court in *Rhines v. Weber,*[3] which finally affirmed the federal courts' stay-and-abeyance procedure in the context of federal habeas petitions filed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Court held that a district court may issue a stay to hold a habeas petition in abeyance while the petitioner returns to state court to exhaust his unexhausted claims if the court believed: (1) there is good cause why the petitioner failed to previously exhaust his claims; (2) the claims are not without merit; and (3) it imposes a time limit upon the petitioner in which to exhaust those claims. The petitioner Charles Russell Rhines was sentenced to death after being convicted of first-degree murder and third-degree burglary. His conviction became final on December 2, 1996, and on December 5, 1996, the petitioner filed his state habeas petition. His request for relief was denied, and the petitioner filed for federal habeas relief pursuant to 28 U.S.C. section 2254 within the one-year statutory period. Almost two years later, the District Court determined that eight of the petitioner's claims had not been exhausted. By this time, the one-year statute of limitations had run. The District Court, however, granted the petitioner's motion and issued a stay to hold the petitioner's petition in abeyance "while he presented his unexhausted claims to the South Dakota courts." The Court of Appeals for the Eighth Circuit "vacated the stay and remanded the case to the District Court to determine whether Rhines could proceed by deleting unexhausted claims from his petition."

The Court determined that the stay-and-abeyance procedure used by the District Court was appropriate. In *Rose v. Lundy*,[4] which was decided fourteen years prior to Congress's adoption of AEDPA, the Court held that "federal district courts may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims." The Court reasoned that the interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claim. When the Court decided *Lundy*, however, there was no statute of limitations on filing a federal habeas petition. Therefore, it was relatively easy for the petitioners to return to state court to exhaust their previously unexhausted claims before returning to federal court. The "enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions." The Court wrote: "Although the limitations period is tolled during the pendency of a 'properly filed application for State post-conviction or other collateral review,' . . . the filing of a petition for habeas corpus in federal court does not toll the statute of limitation." Therefore, many petitioners who come to federal court with mixed petitions risk the loss of federal review of their unexhausted claims.

To alleviate this problem, some courts had adopted the "stay-and-abeyance" procedure. The Court believed this to be an appropriate remedy, stating that "under this procedure, rather than dismiss the mixed petition pursuant to *Lundy*, a district court might stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims." The Court went on to explain that typically, district courts have the authority to enter stays "where such a stay would be a proper exercise of discretion." The AEDPA does not limit this power. The Court believed, however, that the procedure should be "compatible with AEDPA's purposes: (1) to reduce delays in the execution of state and federal criminal sentences; and (2) require prisoners to seek state relief first, thereby streamlining federal habeas proceedings." The Court concluded that the frequent use of the stay-and-abeyance procedure would "undermine these twin purposes" and, therefore, believed it should only be available in the circumstances discussed above: (1) where "the district court determined there was good cause for the petitioner's failure to exhaust his claims first in state court;" (2) the unexhausted claims are not meritless; and (3) the petitioner acts with diligence to exhaust his unexhausted claims.

***Rhones v. Weber* . . . finally affirmed the federal courts' stay-and-abeyance procedure in the context of federal habeas petitions . . . .**

Justice Kennedy delivered the opinion of a 5-3 Court in *Brown v. Payton*,[5] which held the California state court's determination that the instruction given in a death-penalty trial with regard to the "catch-all" provision of California Penal Code section 190.3 and its failure to declare a mistrial after the prosecutor misstated the law during closing argument was not an unreasonable application of Supreme Court precedent. Chief Justice Rehnquist took no part in the decision.

The respondent William Payton was tried and convicted for one count of rape and murder and two counts of attempted murder. During the penalty phase of the trial, the defense focused on Payton's actions after the crimes, in particular that Payton "participated in prison Bible study classes and a prison ministry, and had a calming effect on other prisoners." The trial judge gave an instruction, which followed the text of California Penal Code section 190.3, which "set[s] forth 11 different factors, labeled (a) through (k), for the jury to 'consider, take into account and be guided by' in determining whether to impose a sentence of life imprisonment or death." Factor (k), which is a "catch-all instruction," directs the jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." During closing arguments, the prosecutor argued that "factor (k) did not allow . . . [the jury] to consider anything that happened 'after the [crime] or later.'" The defense objected and moved for mistrial on grounds that the prosecutor misstated the law. The court declined. The jury returned a verdict of death and the respondent was sentenced.

On direct appeal to the California Supreme Court, Payton argued that the jury was "led to believe it could not consider

3. 544 U.S. 269 (2005).
4. 455 U.S. 509 (1982).
5. 544 U.S. 133 (2005).

The Court disagreed with the Eleventh Circuit's categorization of the Rule 60(b) motion although it affirmed the dismissal of the petitioner's motion.

the mitigating evidence of his post-conviction conduct . . . in violation of the Eighth Amendment of the U.S. Constitution." The California Supreme Court rejected the claim, applying United States Supreme Court's decision in *Boyde v. California*,[6] "which had considered the constitutionality of the same factor (k) instruction," and determined that "in the context of the proceedings there was no reasonable likelihood that Patyon's jury believed it was required to disregard his mitigating evidence." Payton subsequently filed a petition for a writ of habeas corpus in the District Court.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court's review is limited and it "may not grant relief unless the state court's adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." The Court determined that the state court's decision was not an unreasonable application of the law. The state court properly identified *Boyd*e at the commencement of its analysis. In *Boyde*, the Court held that the text of factor (k) did not "limit the jury's consideration of extenuating circumstances solely to circumstances of the crime." Therefore, it determined that factor (k) did not preclude "the jury from considering evidence pertaining to a defendant's background and character." In this case, the California Supreme Court interpreted this holding as allowing both pre-crime and post-crime mitigation evidence. The Court believed that, in light of *Boyde*, this conclusion was reasonable.

The Court also believed it was not unreasonable for the state court to conclude that the "prosecutor's arguments and remarks did not mislead the jury into believing it could not consider Payton's mitigation evidence." The defense presented "eight witnesses, spanning two days of testimony" regarding the mitigating evidence. For the jury to conclude that the evidence didn't matter would mean they had to "believe that the penalty phase served virtually no purpose at all." Further, "the prosecutor devoted specific attention to disputing the sincerity of Payton's evidence," thereby drawing focus on the evidence.

In *Gonzalez v. Crosby*,[7] a 7-2 Court, in a decision delivered by Justice Scalia, held that a motion filed under Federal Rules of Civil Procedure Rule 60(b) that challenges a District Court's previous ruling on the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is not a second or successive habeas petition and can be ruled upon without pre-certification. The petitioner pled guilty in a Florida circuit court to robbery with a firearm. He did not file an appeal and began serving his 99-year sentence in 1982. Within one year after AEDPA was enacted, the petitioner filed two petitions for state post-conviction relief, which were denied. He then filed a federal habeas petition. The District Court dismissed the action as barred by the one-year statute of limitations. It concluded that "the limitations period was not tolled during the 163-day period while the petitioner's second motion for state post-conviction relief was pending" because "Section 2244(d)(2) tolls the statute of limitations during the pendency of 'properly filed' applications only." The second petition, according to the District Court, "was not 'properly filed' because it was both untimely and successive." The Court of Appeals for the Eleventh Circuit "denied a certificate of appealability (COA)." On November 7, 2000, the Court decided *Artuz v. Bennett,*[8] in which it held "that an application for state post-conviction relief can be 'properly filed' even if the state courts dismiss it as procedurally barred." Approximately nine months later, the petitioner filed in the District Court a pro se "Motion to Amend or Alter Judgment," contending that the District Court's time-bar ruling was incorrect under *Artuz*'s construction of section 2242(d), and invoking Federal Rule of Civil Procedure 60 (b)(6), which permits a court to relieve a party from the effect of a final judgment." The District Court denied the petition. The Eleventh Circuit eventually determined that "the petitioner's motion – indeed any post-judgment motion under Rule 60(b)(6) save one alleging fraud on the court . . . was in substance a second or successive habeas petition."

The Court disagreed with the Eleventh Circuit's categorization of the Rule 60(b) motion although it affirmed the dismissal of the petitioner's motion. "Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." Rule 60(b)(6), under which the petitioner moved, "permits reopening when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rule 60(b)(1)-(5)." AEDPA does not "expressly circumscribe the operation of Rule 60(b)." In fact, 28 U.S.C. section 2254 states the Rules of Civil Procedure are applicable "'to the extent that . . . [they are] not inconsistent with' applicable federal statutory provisions and rules." The initial question the Court answered was whether a Rule 60(b) motion is a habeas petition because "section 2254(b) applies only where the court acts pursuant to a prisoner's 'application' for a writ of habeas corpus." The Court believed "it is clear that for the purposes of section 2244(b) an 'application' for habeas relief is a filing that contains one or more 'claims.'" According the Court, "a 'claim' as used in section 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." It concluded that "[i]n some instances, a Rule 60(b) motion will contain one or more 'claims.'" The Court believed, as did most Courts of Appeals, that in these instances, "a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." To hold otherwise would circumvent the requirements of AEDPA. However, the Court believed that "when a Rule 60(b) motion attacks not the substance of the federal court's resolution of a claim on the merits but some defect in

6. 494 U.S. 370 (1990).
7. 125 S.Ct. 2641 (2005).
8. 531 U.S. 4 (2000).

the integrity of the federal habeas proceedings, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application." According to the Court, "[A]llowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules." The Court believed that the petitioner's motion fits within this category. The motion "confines itself not only to the first federal habeas petition, but to a non-merits aspect of the first federal habeas proceeding."

FOURTEENTH AMENDMENT

In *Town of Castle Rock v. Gonzales,*[9] a 7-2 Court, in an opinion written by Justice Scalia, held that an individual does not have a property interest in having the police enforce a restraining order even where police have probable cause to believe the restraining order has been violated. The respondent in this case obtained a restraining order against her husband from a state court in conjunction with divorce proceedings. On June 22, 1999, the respondent's husband, in violation of the restraining order, "took the three daughters while they were playing outside the family home." The respondent contacted the Castle Rock Police Department numerous times during the evening and into the night but was told that there was nothing the police could do. In short, they refused to act. At 3:20 a.m., the "husband arrived at the police station and opened fire with a semiautomatic handgun." He was shot and killed by the police. "Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered."

The respondent brought an action under 42 U.S.C. section 1983, "claiming that the town violated the Due Process Clause because its police department had 'an official policy or custom of failing to respond properly to complaints of restraining order violations' and 'tolerated the non-enforcement of restraining orders by its police officers.'" The complaint also alleged "that the town's actions 'were taken either willfully, recklessly or with such gross negligence as to indicate wonton disregard and deliberate indifference to' the respondent's civil rights." The District Court dismissed the action pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court of Appeals for the Tenth Circuit reversed in part, holding that the respondent had alleged a cognizable procedural due process claim.

The Court disagreed. The Court stated that it "left a similar question unanswered" in *DeShaney v. Winnebago County Dept. of Social Servs.*,[10] where it "held that the so-called 'substantive' component of the Due Process Clause does not require the State to protect the life, liberty, and property of its citizens against invasion by private actors." The Court did not answer whether "child protection statutes gave [him] an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection." According to the Court, "[t]he procedural aspect of the Due Process Clause does not protect everything that might be described as a 'benefit': 'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire and 'more than a unilateral expectation of it.'" Instead, "[h]e must . . . have a legitimate claim of entitlement to it." These entitlements are not created by the Constitution but by state law. The Court had previously held that a benefit is not an entitlement "if government officials may grant or deny it in their discretion."

Town of Castle Rock v. Gonzales . . . held that an individual does not have a property interest in having the police enforce a restraining order . . . .

The Court believed "[t]he critical language in the restraining order did not come from any part of the order itself (which was signed by the state-court trial judge and directed to the restrained party . . .), but from the preprinted notice to law-enforcement personnel that appeared on the back of the order." The notice essentially restated the statute "describing 'peace officers' duties' related to the crime of violation of a restraining order." The Court believed that the language, which creates the grounds upon which the respondent's husband "could be arrested, criminally prosecuted, and held in contempt," does not make "enforcement of restraining orders *mandatory*." According to the Court and its precedent, discretion in law enforcement, despite "seemingly mandatory legislative commands," is "deep-rooted." Therefore, "a true mandate of police action would require some stronger indication from the Colorado Legislature." The Court also believed that even if it did find that the statute created an entitlement, "it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a 'property' interest for purposes of the Due Process Clause." It did not resemble "any traditional conception of property." According to the Court, it differed significantly in the fact that "the alleged property interest here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed – to wit, arresting people who they have probable cause to believe have committed a criminal offense."

FIRST AMENDMENT

In *Johanns v. Livestock Marketing Ass'n*,[11] a 6-3 Court, in an opinion written by Justice Scalia, held that the promotional campaign funded by the beef check-off program, as authorized by the Beef Promotion and Research Act, is government speech and, therefore, is immune from a First Amendment challenge. The Beef Promotion and Research Act of 1985 (Beef Act), "announces a federal policy of promoting the marketing and consumption of 'beef and beef products,' using funds raised by an assessment on cattle sales and importation." The Secretary of Agriculture, following the procedures set forth in the Beef Act, issued an order for a "$1-per-head assessment (or "check off") on all sales or importation of cattle and a comparable assessment on imported beef products." The "assessment is to

9. 125 S.Ct. 2796 (2005).
10. 489 U.S. 189 (1989)
11. 544 U.S. 550 (2005)

The Court held the First Amendment does not prevent a state from declining to allow voters who are registered in a certain party to vote in the primaries of another party.

be used to fund beef-related projects, including promotional campaigns, designed by the Operating Committee and approved by the Secretary." Since May 1988, "more than $1 billion has been collected though the check off . . . and a large fraction of that sum has been spent on promotional projects authorized by the Beef Act," for instance, the trademarked slogan "Beef. It's What's for Dinner." The Beef Board also "funds overseas marketing efforts; market and food science research . . . and informational campaigns for both consumers and beef producers." Most promotional messages bear the attribution "Funded by America's Beef Producers." Further, "[m]ost print and television messages also bear a Beef Board logo."

The respondents were two associations and various individuals who pay the check off. They brought a suit claiming "that the Board impermissibly used check off funds to send communications supportive of the beef program to beef producers." While the litigation was pending, the Court decided *United States v. United Foods, Inc.*,[12] in which the Court held that "a mandatory check off for generic mushroom advertising violated the First Amendment." Because the mushroom check-off program bore a resemblance to the beef check-off program, the respondents amended their complaint to allege a First Amendment violation.

Following a discussion of its First Amendment jurisprudence, the Court concluded: (1) "[i]n all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself;" (2) its "compelled-subsidy cases have consistently respected the principle that 'compelled support of a private association is fundamentally different from compelled support of government;'" (3) "'[c]ompelled support of government' . . . is of course perfectly constitutional;" and (4) "some government programs involve, or entirely consist of, advocating a position." The Court had "generally assumed . . . that compelled funding of government speech does not alone raise First Amendment concerns." The respondents did not dispute the conclusions drawn by the Court, but instead contended that the promotional campaigns funded by the check-off program "differ dispositively from the type of government speech that, our cases suggest, is not susceptible to First Amendment challenge." The respondents relied on two points for their argument: (1) private entities and individuals are the ones who design the promotional campaign; and (2) "the use of mandatory assessment on beef producers to fund the advertising." The Court dismissed these arguments. First, it concluded that "[t]he message of the promotional campaigns is effectively controlled by the Federal Government itself." Second, the Court found it irrelevant that the speech is "funded by a targeted assessment . . . rather than by general revenues." The Court believed "[t]he First Amendment does not confer a right to pay one's taxes into the general fund, because the injury of compelled funding (as opposed to the injury of compelled speech) does not stem from the Government's mode of accounting."

Justice Souter, joined by Justices Stevens and Kennedy, dissented. He stated that the Court "unwisely" accepts the Government's defense that "the beef advertising is its own speech, exempting it from the First Amendment bar against extracting special subsidies from those unwilling to underwrite an objectionable message." He wrote: "The error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own."

Justice Thomas delivered the opinion of a 6-3 Court in *Clingman v. Beaver*,[13] except in II-A of the opinion, where he wrote only for the plurality. The Court held the First Amendment does not prevent a state from declining to allow voters who are registered in a certain party to vote in the primaries of another party. "Oklahoma's election laws provide that only registered members of a political party may vote in the party's primary . . . unless the party opens its primary to registered Independents as well." In May 2000, the Libertarian Party of Oklahoma (LPO) informed the State Election Board that it was opening its primaries to all voters. The Board agreed as to all voters registered as Independent, but not voters registered with other parties. "The LPO and several Republican and Democratic voters then sued for declaratory and injunctive relief in the United States District Court for the Western District of Oklahoma, alleging that Oklahoma's semi-closed primary law unconstitutionally burdens their First Amendment right to freedom of political association." After a trial, "the district court found that Oklahoma's semi-closed primary system did not severely burden the respondents' associational rights." The Court of Appeals for the Tenth Circuit reversed. It concluded that "the State's semi-closed primary statute imposed a severe burden on the respondents' associational rights, and thus was constitutional only if the statute was narrowly tailored to serve a compelling state interest." The Tenth Circuit did not find any of the State's interests compelling.

The Court disagreed with the Court of Appeals. "The Constitution grants states broad power to prescribe the 'time, places, and manner of holding elections for senators and representatives,' . . . which power is matched by state control over the election process for state offices." While regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest, if a regulation only imposes a "lesser burden," a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. In *Tashjian v. Republican Party of Connecticut*,[14] the Court struck down a closed primary system that prevented a political party from inviting Independent voters to vote in the party's primary as inconsistent with the

12. 533 U.S. 405 (2001).
13. 544 U.S. 581 (2005).
14. 479 U.S. 208 (1986).

First Amendment. This case asked the question left open in *Tashjian*: "whether a State may prevent a political party from inviting registered voters of other parties to vote in its primary."

The Court thought the burdens in *Clingman* were dissimilar to those in *Tashjian*. In *Tashjian*, the Court identified two ways in which Connecticut's closed primary limited its citizens' freedom of political association. First, it required Independent voters to affiliate publicly with a party to vote in its primary. In *Clingman*, however, the voters "have *already* affiliated publicly with one of Oklahoma's political parties." Second, under Connecticut law, political parties could not "broaden opportunities for joining . . . by their own act, without any intervening action by potential voters." The Court saw a similar burden under Oklahoma's law, but stated that burden should not be considered "severe" by itself: "Many electoral regulations, including voter registration, generally require that voters take some action to participate in the primary process." The Court concluded that these minor barriers between voter and party "do not compel strict scrutiny." According to the Court, to deem ordinary and widespread burdens like these severe "would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." Instead of commanding strict scrutiny when a state electoral provision places no heavy burden on associational rights, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." In this case, Oklahoma had numerous interests that the Court recognized as important: "It preserves [political] parties as viable identifiable interest groups, . . . enhances parties' electioneering and party-building efforts . . . and guards against party raiding and 'sore loser' candidacies by spurned primary contenders."

In *Tory v. Cochran*,[15] a 7-2 Court held that since the primary purpose of the injunction was invalidated by Johnnie Cochran's death but the injunction was still valid under California law, it became an unacceptable prior restraint on Ulysses Tory's speech. Cochran brought a successful state defamation suit against Tory and his associates. When it became apparent to the state trial court that Tory would continue to engage in the defamatory behavior in order to "coerce" Cochran into paying "amounts of money to which Tory was not entitled," the court issued a permanent injunction, which, among other things, prohibited Tory, his associates, and their agents or representatives from picketing, displaying signs, placards, or other written or printed material, and from orally uttering statements about Johnnie L. Cochran, Jr., and about Cochran's law firm in "any public forum." Tory appealed and the decision was affirmed. The Court granted a writ of certiorari to answer the following question: "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violated the First Amendment." However, after oral argument, the Court was informed that Cochran was deceased. Tory agreed to the substitution of Cochran's widow as plaintiff. Cochran's counsel argued that the case was moot; however, Tory argued that it was not.

The Court stated that California law "does not recognize a cause of action for an injury to the memory of a deceased person's reputation" However, neither the Court or counsel for either party discovered any case law that suggested that the injunction became automatically invalid at Cochran's death, "not even the portion personal to Cochran." However, the Court recognized that at the same time that Cochran's death made it unnecessary for them to explore the petitioners' basic claims because, "as written, [the injunction] has now lost its underlying rationale." The activities forbidden by the injunction can not longer coerce Cochran to pay "tribute" to Tory for desisting in those activities. The Court concluded, stating "Consequently, the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification."

Congress did not violate the Establishment Clause when it enacted legislation that forbids a state from interfering with institutionalized persons' rights to freely exercise their religion.

In *Cutter v. Wilkinson*,[16] the Court interpreted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which "is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedent." Enacted under the Spending and Commerce Clauses, RLUIPA targets two areas, land use and the religious exercises of institutionalized persons. Section 3 of RLUIPA, which relates to institutionalized persons, was at issue in this case. Section 3 provided that no state or local government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, unless the government shows that the burden furthers a compelling government interest and does so by the least restrictive means. The petitioners were current and former inmates of institutions operated by the Ohio Department of Rehabilitation and Correction, who practice "non-mainstream" religions, including Satanist, Wicca, Asatru, and the Church of Jesus Christ Christian. They asserted claims under the First and Fourteenth Amendment and, after the enactment of RLUIPA, Section 3. The respondents moved to dismiss on the grounds that RLUIPA violates the Establishment Clause. Pursuant to 28 U.S.C. section 2403(a), the United States intervened in the District Court to defend RLUIPA's constitutionality.

A unanimous Court, led by Justice Ginsburg, held that Congress did not violate the Establishment Clause when it enacted legislation that forbids a state from interfering with institutionalized persons' rights to freely exercise their religion. Under the Religion Clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In between the Establishment

15. 544 U.S. 734 (2005)

16. 544 U.S. 709 (2005).

In *McCreary County v. ACLU,* a 5-4 Court held that the Establishment Clause required the removal of the Ten Commandments from the county's courthouses . . . .

Clause and the Free Exercise Clause "there is room for play . . . some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." The Court determined that RLUIPA falls within this space: "On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause." First, it found RLUIPA compatible with the Establishment Clause "because it alleviates exceptional government-created burdens on private religious exercise." Second, the Act contains no provisions that make it incompatible with the Court's prior decisions: (1) "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries;" and (2) "they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths." According to the Court, RLUIPA only covers those persons "who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."

In *McCreary County v. American Civil Liberties Union of Kentucky*,[17] a 5-4 Court held that the Establishment Clause required the removal of the Ten Commandments from the county's courthouses because the county's real purpose, as evidenced from the history of its legislation, is based on religion, despite a pretextual secular purpose. Justice Souter delivered the opinion of the Court. Justice Scalia filed a dissent and was joined by Chief Justice Rehnquist and Justice Thomas and Justice Kennedy in part.

In 1999, the petitioners McCreary County and Pulaski County, Kentucky, displayed in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus. In McCreary County, the display was in response to an order of the county legislative body requiring the display to be posted in "a very high traffic area" of the courthouse. In Pulaski County, the Commandments were hung because they were "good rules to live by." The ACLU brought an action under 42 U.S.C. section 1983 and sought a preliminary injunction claiming that the display violated the "prohibition of religious establishment included in the First Amendment." During the course of the litigation, the counties changed their displays. At first, both counties' legislative bodies authorized by nearly identical resolutions a second, expanded display reciting that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded" and stating several grounds for taking that position. When the district court expanded its preliminary injunction to include the expanded displays, the counties installed another display in the each courthouse called, "The Foundations of American Law and Government Display." The counties argued that the display desired to demonstrate that the "Ten Commandments were part of the foundation of American Law and Government" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government."

In *Stone v. Graham*,[18] the Court held that the display of the Commandments in Kentucky's public schools violated the First Amendment's bar against establishment of religion because their display was for a "predominantly religious purpose . . . given their prominence as an 'instrument of religion.'" The Court stated that the counties asked for a different conclusion here based on two arguments: (1) "that [the] official purpose is unknowable and the search for it inherently vain;" or, alternatively, (2) that the scope of the purpose enquiry should be limited "so severely that any trivial rationalization would suffice, under a standard oblivious to the history of religious government action like the progression of exhibits in this case." The Court stated that "[t]he touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion." The Court viewed the counties' requests as one to "abandon" the purpose test set forth in under *Lemon v. Kurtzman*.[19] It stated that "[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country." It also made practical sense, "as in an Establishment analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." The Court stated: "*Lemon* said that government action must have a secular . . . purpose . . . and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." The Court continued to quickly dispatch the counties' argument "that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject." The Court responded by stating: "But the world is not made brand new every morning, and the counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show."

The Court saw two similarities between *Stone* and this case: (1) "both set out a text of the Commandments as distinct from any traditionally symbolic representations;" and (2) "each stood along, not part of an arguably secular display." The Court stated: "*Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message . . . and for good

17. 125 S.Ct. 2722 (2005).
18. 449 U.S. 39 (1980).
19. 403 U.S. 602 (1971)

reason, the Commandments being a central point of reference in the religious and moral history of Jews and Christians." According to the Court, the counties' displays "unstinting focus was on religious passages, showing that the counties were posting the Commandments precisely because of their sectarian content." Further, even their third displays, despite the nonreligious names, enhanced the sectarian spirit. The Court concluded that "[i]f the observer had not thrown up his hands, he would probably suspect that the counties were simply reaching for any way to keep religious documents on the walls of courthouses constitutionally required to embody religious neutrality."

Justice Scalia dissented on the grounds that: (1) the Court is incorrect in reading the First Amendment as barring the government from favoring religious practice; (2) "today's opinion extends the scope of that falsehood even beyond prior cases;" and (3) "even on the basis of the Court's false assumptions the judgment here is wrong." Justice Scalia looked at the history of the United States, including recent episodes, to show how the idea of monotheism is ingrained in our government. He argued that the Court's decision expanded *Lemon* because "the Court justifies inquiry into legislative purpose, not as an end itself, but as a means to ascertain the appearance of the government action to an 'objective observer.'"

In *Van Orden v. Perry*,[20] the Court held the First Amendment does not bar the display of the Ten Commandments on a monument donated by a special interest group when the State's reasons for accepting the monument were purely secular. Chief Justice Rehnquist announced the judgment of the Court and was joined by Justices Scalia, Kennedy, and Thomas. Justices Scalia and Thomas also filed concurring opinions. Justice Breyer filed an opinion concurring in the judgment. Justice Stevens, joined by Justice Ginsburg, and Justice Souter filed dissenting opinions.

The 22 acres that comprise the Texas State Capitol are dotted with monuments and historical markers. One monolith displays the text of the Ten Commandments, along with other religious symbols and symbols of the United States. The monument, as inscribed, was "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961." The petitioner Thomas Van Orden, a native Texan, brought an action under 42 U.S.C. section 1983, "seeking both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal." The district court held that the monument did not contravene the Establishment Clause. It determined that the State had a valid secular purpose in recognizing and commending the Eagles for their efforts to reduce juvenile delinquency and "a reasonable observer, mindful of the history, purpose, and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion." The Court of Appeals for the Fifth Circuit affirmed.

The Court agreed. The plurality believed that the Court's precedent relating to the Establishment Clause point in two directions: (1) "[o]ne face looks toward the strong role played by religion and religious traditions throughout our Nation's history;" and (2) the "other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom." These two faces were evidenced in the Court's cases invalidating laws under the Establishment Clause. The Court had pointed often to *Lemon* as providing the governing test in Establishment Clause cases. However, just two years after *Lemon* was decided, the Court noted that the factors identified in *Lemon* serve as "no more than helpful signposts." Many recent cases have either not applied the *Lemon* test or "applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test." Regardless, the plurality did not think the *Lemon* test is "useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds" and believed, "[i]nstead, our analysis is driven both by the nature of the monument and our Nation's history." The plurality first looked at *Lynch v. Donnelly*,[21] where the Court recognized that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." In the end, the plurality believed that Texas's monument is merely an "acknowledgment of the role played by the Ten Commandments in our Nation's heritage." Similar displays are common throughout America, even in the Supreme Court. They did not dispute that the Commandments are religious in nature. However, "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." The plurality recognized that there are limits "to the display of religious messages or symbols." It referred to *Stone v. Graham*,[22] where it found that a Kentucky statute requiring the display of the Commandments in every classroom had a religious purpose and was, therefore, unconstitutional. However, the monument in Texas "is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day."

[T]he Court held the First Amendment does not bar the display of the Ten Commandments on a [donated] monument . . . when the State's reasons for accepting the monument were purely secular.

Justice Scalia wrote a concurring opinion because he would prefer a holding that "is in accord with our Nation's past and present practices, and that can be consistently applied – the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God . . . or, in a non-proselytizing manner, venerating the Ten Commandments." Justice Thomas, also concurring, wrote because he also believed the Court should return to the original meaning of the word "establishment." According to Justice

20. 125 S.Ct. 2854 (2005).
21. 465 U.S. 668 (1984).
22. 449 U.S. 39 (1980).

[T]he Court held that Congress has the power under the Commerce Clause to regulate even the local cultivation and use of marijuana for medical purposes.

Thomas, "[t]he Framers understood establishment necessarily [to] involve actual legal coercion." Justice Breyer concurs in the judgment. He believed that the Religious Clauses of the First Amendment "seek to maintain that separation of church and state that has long been critical to the peaceful dominion that religion exercises in [this] country, where the spirit of religion and the spirit of freedom are productively united, reigning together, but in separate spheres." In determining Texas's monument constitutional, he relied less "on a literal application of any particular test," i.e., *Lemon*, "than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves." He believed that in certain contexts, the text of the Commandments does not convey a religious message but possibly a moral secular message or a historical message – "a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States."

Justices Stevens, O'Connor, and Souter dissented. Justice Stevens believed that the monument "is not a work of art and does not refer to any event in the history of the State," but clearly just communicates a religious message. He believed "[t]he monolith displayed on Texas Capitol grounds cannot be discounted as a passive acknowledgment of religion, nor can the State's refusal to remove it upon objection be explained as a simple desire to preserve a historic relic." The Nation's commitment to neutrality, as reflected in the Religious Clauses, "is flatly inconsistent with the plurality's wholehearted validation of an official state endorsement of the message that there is one, and only one, God." Justice Souter, also dissenting, wrote because he believed that the Court's prior cases had made clear that the simple reality was "that the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same."

FEDERALISM

In *Gonzales v. Raich*,[23] the Court considered California's Compassionate Use Act of 1996 (Act), which "creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician." California was only one of nine States that has legalized the use of marijuana for medicinal purposes. The purpose of the Act "was . . . to ensure that seriously ill residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need." The respondents are California residents who suffer from various medical conditions, as well as primary caregivers who have sought to avail themselves of medical marijuana pursuant to the terms of the Act. The respondents filed this action against the United States Attorney General and the head of the DEA, "seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA). . . to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use." Their claims are based on the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments, and the doctrine of medical necessity.

In a 6-3 decision, with Justice Stevens writing for the majority, the Court held that Congress has the power under the Commerce Clause to regulate even the local cultivation and use of marijuana for medical purposes. The Court began its opinion with a lengthy discussion of the history of the CSA. Its main objective was "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." In particular, Congress sought to control "the diversion of drugs from legitimate to illicit channels." Therefore, Congress enacted a "closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." Marijuana was and is classified as a Schedule I drug, which are drugs that have a "high potential for abuse, lack of any accepted medical use, and [the] absence of any accepted safety for use in medically supervised treatment."

The respondents did not challenge the validity of the CSA but instead argued that "the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress's authority under the Commerce Clause." The Court stated that to determine the validity of the CSA in these circumstances, "none of our Commerce Clause cases can be viewed in isolation," primarily because the Court's understanding of Congress's power "has evolved over time." Initially, "the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible." Then, "Congress 'ushered in a new era of federal regulation.'" During the new era, the Court has "identified three general categories of regulation in which Congress is authorized to engage under its commerce power:" (1) "Congress can regulate the channels of interstate commerce;" (2) "Congress has authority to regulate and protect the instrumentalities of interstate commerce, and person or things in interstate commerce;" and (3) "Congress has the power to regulate activities that substantially affect interstate commerce." The Court's case law had made clear that Congress can "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."

The Court focused on one of its prior cases as instructive of the principles set forth above: *Wickard v. Fulburn*.[24] In that case, Congress had enacted a statute designed to "control the

23. 125 S.Ct. 2195 (2005).

24. 317 U.S. 111 (1942).

volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices." Fulburn was only allowed 11.1 acres for his wheat crop but cultivated 23, claiming that the surplus was for use only on his farm. The Court determined that Fulburn's cultivation of wheat for personal use was still within Congress's power to regulate. The Court believed the similarities between these cases were "striking:" "The respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market." Like the agricultural law in *Wickard*, the CSA's purpose was "to control the supply and demand of controlled substances in both lawful and unlawful drug markets." As above, "[h]ere too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." Further, Congress was right to be concerned that the demand for marijuana in the interstate market will "draw such marijuana into that market." The Court reasoned that "One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance."

Justice O'Connor, joined by the Chief Justice and Justice Thomas in part, dissented. She believed the Court's decision was incongruous with its prior holdings and "gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause." She called California's law an "experiment" that should be protected "to maintain the distribution of power fundamental to our federalist system of government." Justice Thomas also wrote separately. He believed the respondents' use of marijuana "has had no demonstrable effect on the national market for marijuana." Under the Court's rule, Congress will be able to regulate "anything – and the Federal Government is no longer one of limited and enumerated powers." He also rejected the Court's argument that banning the medical use of marijuana is necessary and proper to carry out Congress's goals as set forth by CSA.

In *Granholm v. Heald*,[25] a 5-4 Court, in a decision written by Justice Kennedy, held that state laws that discriminate against out-of-state wineries violate the Commerce Clause; they are not saved by the Twenty-first Amendment even though it grants the States the broad power to regulate the transportation and importation of alcoholic beverages. Both Michigan and New York have laws which regulate the sale and importation of alcoholic beverages through a three-tier distribution system, meaning "[s]eparate licenses are required for producers, wholesalers, and retailers." The Court has previously upheld "three-tier distribution scheme in the exercise of . . . [the States'] authority under the Twenty-first Amendment." However, the Michigan and New York laws are before the Court because they apply only to out-of-state wineries. In Michigan, in-state wineries "are eligible for 'wine maker' licenses that allow direct shipment to in-state consumers," while out-of-state wineries are not. In New York, in-state wineries can make "direct sales to consumers in New York on terms not available to out-of-state wineries." Many small wineries "rely on direct shipping to reach new markets" because they do not produce enough product for wholesalers to purchase it. This case, based on a claim that the states violating the Commerce Clause, was filed by wine producers of small wineries "that rely on direct consumer sales as an important part of their business."

In *Granholm v. Heald*, a 5-4 Court . . . held that state laws that discriminate against out-of-state wineries violate the Commerce Clause . . . .

The Court began its opinion by stating: "Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" This rule "follows . . . from the principle that states should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens" because they "deprive citizens of their right to have access to the markets of other states on equal terms." The Court found that the "discriminatory character of the Michigan system is obvious." While in-state wineries can obtain licenses to ship directly to consumers, out-of-state wineries cannot. Although the New York law is different, the Court found it also discriminates. It found the law "is just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system" and "grants in-state wineries access to the State's consumers on preferential terms."

The states "contend that their statutes are saved by section 2 of the Twenty-first Amendment, which provides:" "The transportation of importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The ratification of the Twenty-first Amendment in 1933 ended nationwide prohibition by repealing the Eighteenth Amendment. Its aim was "to allow states to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." The Court stated that its "more recent cases . . . confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that states may not give a discriminatory preference to their own producers." Since the Court did not find that either State's regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," it found that both run afoul of the Commerce Clause.

In *American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*,[26] the Court held that Michigan's law that imposed a

25. 544 U.S. 460 (2005).

26. 125 S.Ct. 2419 (2005).

***Leocal v. Ashcroft* . . . held that a conviction under a statute for driving under the influence . . . is not a crime of violence . . . requiring deportation.**

$100 fee on motor carriers engaging in intrastate commerce does not violate the Commerce Clause. A subsection of Michigan's Motor Carrier Act imposed upon each motor carrier for the administration of this act, an annual fee of $100 for each self-propelled motor vehicle operated by or on behalf of the motor carrier. The fee was assessed only on motor carriers that operate in intrastate commerce. The petitioners operated both interstate and intrastate commerce and both claimed "that trucks that carry *both* interstate *and* intrastate loads engage in intrastate business less than trucks that confine their operations to the Great Lakes State." They argued that, "because Michigan's fee was flat, it discriminates again interstate carriers and imposes unconstitutional burdens upon interstate trade."

The Court began its opinion by stating: "Our Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together.'" Therefore, "this Court has consistently held that the Constitution's express grant to Congress of the power to 'regulate Commerce . . . among the several States, contains a further, negative command, known as the dormant Commerce Clause.'" The dormant Commerce Clause "'create[s] an area free from interference by the States'" . . . and prevents them 'jeopardizing the welfare of the Nation as a whole' by 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" Under the dormant Commerce Clause, the Court has invalidated a number of state laws in the following areas: (1) laws that "discriminate on their face against out-of-state entities;" (2) laws that "impose burdens on interstate trade that are clearly excessive in relation to the putative local benefits;" (3) laws that "impose taxes that facially discriminate against interstate business and offer commercial advantage to local enterprises;" (4) laws that "improperly apportion state assessments on transactions with out-of-state components;" and (5) laws that "have the inevitable effect [of] threatening the free movement of commerce by placing a financial barrier around the State." The Court found that "[a]pplying these principles and precedents," nothing in Michigan's law offended the Commerce Clause. Michigan only imposed a flat fee of $100 on trucks that operate within intrastate commerce. This law does not discriminate against out-of-state operators, "does not reflect an effort to tax activity that takes place . . . outside the State," and "[n]othing in our case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause."

Justice Scalia concurred in the judgment but would rest his decision "without adverting to various tests from our wardrobe of ever-changing negative Commerce Clause fashions." Instead he would "ask whether the fee 'facially discriminates against interstate commerce' and whether it was 'indistinguishable from a type of law previously held unconstitutional by this Court.'" Justice Thomas also concurred in the judgment but because "'the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.'"

Federal law required a Federal Permit for all motor carriers operating in interstate commerce. Michigan has a state law, which provided: "A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state [i.e., which has a Michigan license plate] and operating entirely in interstate commerce." In *Mid-Con Freight Systems, Inc. v. Michigan Public Serv. Comm'n*,[27] the Court considered whether the federal Single State Registration System (SSRS) preempted this state law. "The SSRS allows a trucking company to fill out one set of forms in one State (the base State), and by doing so to register its Federal Permit in *every* State through which its trucks will travel." The SSRS allows the State to demand the following: "(1) proof of the trucking company's possession of a Federal Permit, (2) proof of insurance, (3) the name of an agent designated to receive 'service of process,' and (4) a total fee (charged for the filing of the proof of insurance) equal to the sum of the individual state fees." In addition, "[t]he SSRS statute specifies that a State may not impose any additional 'registration requirement'" and provides, specifically, that "when a State Registration requirement imposes further obligations, 'the part in excess is an unreasonable burden.'"

In a 6-3 decision, the Court held that the SSRS does not preempt Michigan's $100 fee because the latter relates to matters that fall outside the scope of the SSRS. The first question the Court addressed was what SSRS means when it uses the term "State registration requirement." The Court concluded that the interpretation was very narrow: they "apply only to those state requirements that concern *SSRS registration* – that is, registration with a State of evidence that a carrier possesses a Federal Permit, registration of proof of insurance, or registration of the name of an agent 'for service of process.'" The Court believed that the language of the statute "makes clear that the federal provision reaches no further." The Court also believed that Michigan's statute does not concern SSRS's subject matter. First, "the Michigan statute imposing the $100 fee makes no reference to evidence of a Federal Permit, to any insurance requirement, or to an agent for receiving service of process." Second, legislative history shows the law was not established to circumvent the federal statute. Finally, "Michigan rules provide that a Michigan-plated interstate truck choosing Michigan as its SSRS base State can apparently comply with Michigan's SSRS requirements even if it does not comply with Michigan's $100 fee requirement." The truck owner could simply fill out a different form providing proof of a Federal Permit and another form to comply with Michigan and SSRS's requirements. They would not receive a state decal, but "nothing . . . suggests the owner will have violated any other provision of Michigan law . . . [a]nd they have not demonstrated that Michigan law in

27. 125 S.Ct. 2427 (2005).

practice holds hostage a truck owner's SSRS compliance until the owner pays" the $100 fee.

IMMIGRATION

Chief Justice Rehnquist delivered the opinion for a unanimous Court in *Leocal v. Ashcroft*.[28] It held that a conviction under a statute for driving under the influence, which does not have a mens rea component, is not a crime of violence under 18 U.S.C. section 16, requiring deportation. The petitioner immigrated to the United States and became a lawful permanent resident. Subsequently, the petitioner was charged under Florida law and pleaded guilty to two counts of driving under the influence of alcohol (DUI), causing seriously bodily injury. He was sentenced to two and a half years in prison. While serving his sentence, the Immigration and Nationalization Service (INS) initiated removal proceedings under section 237 of the Immigration and Nationalization Act (INA). Section 237 allows the Attorney General to order removal of an alien "who is convicted of an aggravated felony." An "aggravated felony" includes crimes of violence, as defined by 18 U.S.C. section 16, "for which the term of imprisonment [is] at least one year." Section 16 defines "crimes of violence" as follows: (1) crimes in which there is an element of "use, attempted use, or threatened use of physical force against the person or property of another;" or (2) an offense that is a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Immigration Judge determined that the petitioner was removable. The Board of Immigration Appeals and the Court of Appeals for the Eleventh Circuit affirmed.

The Court began by stating that section 16 directs the Court to look at "the elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime." The crime for which the petitioner was convicted is a third-degree felony under Florida law. Although the statute required proof of causation of injury, it does not require proof of "any particular mental state." To qualify as a "crime of violence" under the first part of section 16, the crime "must have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another." The Court believed that focusing only on the word "use" is too narrow. Instead, "when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it." Looking at the phrase as a whole, the Court concluded that "'use' requires active employment." The Court believed that this interpretation does not include the use of force by "accident." The Court also found that Florida's DUI statute does not qualify as a crime of violence under the second part of the statute. It does not, according to the Court, include "all negligent misconduct," but "offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense," i.e., burglary. The Court concluded that even though the second part of section 16 is broader, it cannot construe it any more broadly than the first section since "it contains the same formulation" with regard to the "use" of physical force. The Court concluded its opinion by stating that it "cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" It stated that the ordinary use of this term combined with "section 16's emphasis on the use of physical force . . . suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."

In *Clark v. Martinez*, a 7-2 Court . . . held that . . . an alien may be detained beyond the 90-day removal period, but only for as long as is reasonably necessary to effectuate removal.

In *Jama v. Immigration and Customs Enforcement*,[29] a 5-4 Court, in an opinion written by Justice Scalia, held that the Attorney General need not obtain the advance consent of the "additional removal countries" to which an alien may be removed except in the last instance where, if it is "impracticable, inadvisable, or impossible," then the Attorney General may remove an alien to any country that gives its consent. The petitioner was born in Somalia and remains a citizen of that country. He was admitted to the United States as a refugee but his status was terminated in 2000 due to a criminal conviction. The Immigration and Naturalization Service (INS) brought a removal action. The petitioner "declined to designate a country to which he preferred to be removed." Therefore, the Immigration Judge ordered him removed to Somalia. The Board of Immigration Appeals affirmed and the petitioner did not seek further review. Instead, the petitioner sought a writ of habeas corpus, pursuant to 28 U.S.C. section 2241 "to challenge the designation of Somalia as his destination." He claimed "that Somalia had no functioning government, that Somalia therefore could not consent in advance to his removal, and that the Government was barred from removing him to Somalia absent advance consent."

The Attorney General determined an alien's destination after removal is ordered under 28 U.S.C. section 1231(b)(2). In sum, the statute provided "four consecutive removal commands:" (1) an alien "shall be removed to the country of his choice" unless certain conditions exist (hereinafter, "Subparagraphs A through C"); (2) "otherwise he shall be removed to the country of which he is a citizen, unless one of the conditions eliminating that command is satisfied" (hereinafter, "Subparagraph D"); (3) an alien shall be removed "to one of the countries with which he has a lesser connection" (hereinafter, "Subparagraph E, clauses (i) through (vi)"); or (4), if (3) is "impracticable, inadvisable, or impossible," then the alien "shall be removed to 'another country whose government will accept the alien into that country'" (hereinafter, "Subparagraph E, clause (vii)"). The Court stated that it will not "lightly assume that Congress has omitted from its adopted text requirements what it nonetheless intends to apply." This is

28. 543 U.S. 1 (2004).

29. 543 U.S. 335 (2005).

especially true if "Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." The Court concluded, therefore, that the statute does not require by its terms that acceptance by Somalia is necessary: the requirement that the destination country give approval applies only to Subparagraph E, clause (vii), not Subparagraph E, clauses (i) through (vi). The language of the statute is specific and no mention of approval is made in Subparagraph E except as it pertains to the terminal clause: "[i]f impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country."

In *Clark v. Martinez*,[30] a 7-2 Court, in an opinion written by Justice Scalia, held that under 8 U.S.C. section 1231(a)(6), an alien may be detained beyond the 90-day removal period, but only for as long as is reasonably necessary to effectuate removal. The respondents arrived in the United States from Cuba in June 1980 as part of the "Mariel boatlift." Pursuant to 8 U.S.C. section 1182(d)(5), they were paroled in the country under the Attorney General's authority. Until 1996, Cubans who were paroled into the United Stated could adjust their status after one year to that of "permanent lawful resident." Martinez and Benitez did not qualify for the adjustment at the time they applied because of prior criminal convictions in the United States. After their application, both men were convicted of additional crimes. In both cases, the INS took the men into custody and they were ordered removed. Also in both cases, the men were detained beyond the 90-day removal period as set forth in section 1216(a)(6). The respondents filed petitions for writs of habeas corpus under 28 U.S.C. section 2241 "to challenge their detention beyond the 90-day removal period."

Section 1231(a)(6) provided that three specific categories of aliens "'may be detained beyond the removal period and, if released, shall be subject to the terms of supervision.'" The three categories of aliens are: (1) "those ordered removed who are inadmissible under section 1182;" (2) "those ordered removed who are removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4);" and (3) "those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk." With regards to the second category, the Court, in *Zadvydas v. Davis*,[31] "interpreted this provision to authorize the Attorney General . . . to detain aliens only as long as 'reasonably necessary' to remove them from the country." The Court laid out its reasoning behind this decision: (1) the word "may" is ambiguous, but suggests discretion; and (2) there is a "'serious constitutional threat'" of "indefinite detention." The question presented in this case is whether this reasoning also applied to the first category of aliens in section 1231(a)(6). The Court answers in the affirmative. The Court stated that the "operative" language in section 1231(a)(6), "'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens." The Court concluded that this "cannot justify giving the *same* detention provision a different meaning when such aliens are involved." The "lowest common denominator," or interpretation of the same ambiguous language, must apply to all three categories of aliens specified in the statute.

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30. 543 U.S. 371 (2005).

31. 533 U.S. 678 (2001).