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The past term of the United States Supreme Court was dramatic, unexpected, and produced constitutional decisions that affect the nature and fabric of our society. The term had three or four "star" cases: the approval of affirmative action, the striking down of bans on gay sexual relations, the U-turn in the Court's federalism revolution, and the restriction on punitive damage awards. These decisions and the other rulings in constitutional law outside the criminal field made up the bulk of the Court's opinions for the 2002-2003 term.[1]

FIRST AMENDMENT: INTENTIONAL MISREPRESENTATIONS IN CHARITABLE SOLICITATIONS

In *Illinois v. Telemarketing Associates, Inc.*,[2] a unanimous Court held that the First Amendment leaves open fraud claims based on nondisclosure if charitable solicitations are accompanied by misleading statements regarding what percentage of donations fundraisers will retain for themselves. The Illinois Attorney General filed a complaint against a solicitor raising funds for a charitable organization, alleging common-law and statutory claims for fraud and breach of fiduciary duty on the grounds that the solicitor misrepresented to donors that a large part of their donations would be given to the charity, when in fact only 15%-20% actually were. The charitable solicitor moved to dismiss the fraud claims, "urging that they were barred by the First Amendment." Based on precedent, specifically *Schaumburg v. Citizens for a Better Environment*,[3] *Secretary of State of Md. v. Joseph H. Munson Co.*,[4] and *Riley v. National Federation of Blind of N.C., Inc.*,[5] the Court recognized that "had the complaint against Telemarketers charged fraud based solely on the percentage of donations the fundraisers would retain, or their failure to alert potential donors to their fee arrangements," it would dismiss the case. However, the complaint made different allegations, ones that "target misleading affirmative misrepresentations about how donations will be used." The Court concluded that First Amendment precedent did not protect these misrepresentations.

FIRST AMENDMENT: SYMBOLIC CONDUCT

In *Virginia v. Black*,[6] the Court determined that a Virginia statute banning cross burning with the intent to intimidate violated the First Amendment because it treated the act of the cross burning as prima facie evidence of intent. The statute provides that "[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." It further states, "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Respondents were separately convicted under this statute. The majority of the Court determined that cross burnings fall into a category of proscribed speech. In making this determination, the Court noted that states may "ban a 'true threat[:]' . . . statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." The speaker need not intend to carry out the threat, rather "the prohibition . . . protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." The majority concluded that the Virginia statute "does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." Yet, the Court still determined the statute to be unconstitutional.

Justice O'Connor, writing for a plurality, said, "The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional." Because the "jury instruction is the Model Jury instruction, and because the Supreme Court of Virginia had the opportunity to expressly disavow the jury instruction, the jury instruction's construction of the prima facie provisions 'is a ruling on a question of state law that is binding on us as though the precise words had been written into' the statute." Justice Scalia concluded that the Court "should vacate and remand the judgment to the Virginia Supreme Court so that the court can have an opportunity authoritatively to construe the prima-facie-evidence provision." Justice Souter, also concurring in the judgment and dissenting in part, said that no "exception should save Virginia's law from unconstitutionality under the holding in *R.A.V. v. St. Paul*,[7] or any acceptable variation of it." The statute discriminates against expression based on content, he said, and the prima facie evidence provision merely "skews the statute toward suppressing ideas." Justice Thomas dissented, arguing

Footnotes

1. For a more in-depth review of the decisions of the past term, *see* CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2002-2003 (Amer. Acad. of Jud. Educ. 2003).
2. 123 S. Ct. 1829 (2003).
3. 444 U.S. 620 (1980).
4. 467 U.S. 947 (1984).
5. 487 U.S. 781 (1988).
6. 123 S. Ct. 1536 (2003).
7. 505 U.S. 377 (1992).

that "this statute prohibits only conduct, not expressions" and "the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problem." In his view, an inference "does not compel a specific conclusion," and there is no "procedural consequence of shifting the burden of production." It neither chills speech nor violates "due process."

[T]he Court determined that a Virginia statute banning cross burning with the intent to intimidate violated the First Amendment . . . .

FIRST AMENDMENT: CORPORATE CONTRIBUTIONS TO POLITICAL CANDIDATES

Federal law "makes it 'unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with' certain federal elections."[8] The statute does allow the creation of political action committees (PACs), however, for the "administration, and solicitation of contributions." In *Federal Election Comm'n v. Beaumont*,[9] the Court, with Justice Souter writing for the majority, held the ban on direct corporate contributions under 2 U.S.C. § 441b, even as applied to nonprofit advocacy corporations, does not violate the First Amendment.

The Court begins with the history of and purposes behind the corporate contribution laws, stating, "Any attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections.'" Citing to *Federal Elections Comm'n v. National Right to Work Comm'n.*,[10] the Court said that prior decision "all but decided the issue against" the nonprofit group's position. *National Right to Work* involved "the provision of § 441b restricting a nonstock corporation to its membership when soliciting contributions to its PAC." In *National Right to Work*, the Court "considered whether a nonprofit advocacy corporation without members of the usual sort could be held to violate the law by soliciting donations to its PAC from any individual who had at one time contributed to the corporation." The Court held that solicitation beyond "members" violated section 441b and that the prohibition was not invalid under the First Amendment. The Court concluded that "the congressional judgment to regulate corporate political involvement 'warrants considerable deference' and 'reflects a permissible assessment of the dangers posed by [corporations] to the electoral process.'"

The Court noted that "later cases have repeatedly acknowledged, without questioning, the reading of *National Right to Work* as generally approving the § 441b prohibition on direct contributions, even by nonprofit corporations 'without great financial reserves.'" In *Federal Election Comm'n v. National Conservative Political Action Committee*,[11] the Court reaffirmed "that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." Similarly, in *Austin v. Michigan Chamber of Commerce*,[12] the Court "sustained Michigan's ban on direct corporate contribution, even though the ban 'included within its scope closely held corporations that do not possess vast reservoirs of capital.'"

FIRST AMENDMENT: OVERBREADTH DOCTRINE

In *Virginia v. Hicks*,[13] a unanimous Court found Virginia's Richmond Redevelopment and Housing Authority's (RRHA) trespassing policy, which resulted in a conviction for trespass of Kevin Hicks, was not facially invalid under the First Amendment's overbreadth doctrine. The RRHA owns and operates a housing development for low-income residents called Whitcomb Court. The streets were closed to public use. The RRHA also enacted a policy authorizing Richmond police, to serve notice, either orally or in writing, to any person who is found on the RRHA's property when "such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property." After notification, a person could be arrested.

The Court noted that under *Members of City Council of Los Angeles v. Taxpayers for Vincent*[14] and *Broadrick v. Oklahoma*,[15] the overbreadth doctrine is an exception to the normal rule regarding the standards for facial challenges, and that a showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep . . . suffices to invalidate all enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'"

The Court asserted that Hicks had not made a showing that the RRHA policy as a whole was unconstitutional, even assuming the unlawfulness of the policy's "unwritten" rule that demonstrating and leafleting at Whitecomb Court requires permission. As for the written provision authorizing the police to arrest those who return to Whitcomb Court after receiving a barment notice, the Court concluded that this provision "certainly" does not violate the First Amendment as applied to persons whose post-notice entry is not for the purpose of engaging in constitutionally protected speech. The Court said that this policy had nothing to do with the First Amendment, and was sufficiently similar to a person being lawfully banned from a public park for vandalizing it and then reentering the park to participate in a political demonstration. Simply, "[h]ere, as there, it's Hicks' nonexpressive *conduct*—his entry in violation of the notice-barment rule—not his speech, for which he is

8. 2 U.S.C. § 441b(a).
9. 123 S. Ct. 2200 (2003).
10. 459 U.S. 197 (1982).
11. 470 U.S. 480 (1985).
12. 494 U.S. 652 (1990).
13. 123 S. Ct. 2191 (2003).
14. 466 U.S. 789 (1984).
15. 413 U.S. 601 (1973).

The Court concluded that the Copyright Term Extension Act complied with the "limited times" requirement of the Constitution . . . .

punished as a trespasser." Most importantly, both the notice-barment rule and the "legitimate business or social purpose" rule apply to *all* persons who enter the streets of Whitcomb Court, not just to those who seek to engage in expression. "Hicks has not shown, based on the record in this case, that the RRHA trespass policy as a whole prohibits a 'substantial' amount of protected speech in relation to its many legitimate applications," the Court concluded.

FIRST AMENDMENT: COPYRIGHT TERM EXTENSION ACT

The Copyright and Patent Clause of the Constitution, Article I, § 8, cl. 8, provides as to copyrights: "Congress shall have Power . . . to promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings." In *Eldred v. Ashcroft*,[16] Justice Ginsburg, writing for a 7-2 Court, held the Copyright Term Extension Act's (CTEA) extension of existing copyrights does not exceed Congress's power under the Copyright Clause or violate the First Amendment. The CTEA,[17] enacted by Congress in 1998, extended the duration of copyrights by 20 years. Now, "for works created by identified natural persons, the term now lasts from creation until 70 years after the author's death" and "for anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120 years from creation, whichever expires first."

The Court concluded the CTEA complied with the "limited times" requirement of the Constitution and, furthermore, was a "rational exercise of the legislative authority conferred by the Copyright Clause." The Court adopted a traditional "rationality" test, rather than a three-part test that engages a heightened scrutiny as encouraged by Justice Breyer in his dissent, because "'it is not [the Court's] role to alter the delicate balance Congress has labored to achieve.'" The Court added, "The CTEA reflects judgments of a kind Congress typically makes, judgments [the Court] cannot dismiss as outside the Legislature's domain." The passage of the CTEA, and its extended time frame for copyright protection, clearly reflects Congress's intention of ensuring that "American authors would receive the same copyright protection in Europe as their European counterparts."

Moving to the petitioners' First Amendment claim, the Court rejected petitioners' arguments (1) that "the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment" and (2) "for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards." Considering the narrower version of petitioners' claim—the CTEA's extension of existing copyrights violated the First Amendment—the Court noted that the Copyright Clause and First Amendment were adopted close in time and this, according to the Court, indicates "copyright's purpose is to promote the creation and publication of free expression" by "establishing a marketable right to the use of one's expression." Furthermore, "copyright law contains built-in First Amendment accommodations." First, "it distinguishes between ideas and expression and makes only the latter eligible for copyright protection." Second, "the 'fair use' defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances."

FIRST AMENDMENT: CHILDREN'S INTERNET PROTECTION ACT

In *United States v. American Library Association*,[18] the Court found that Congress's condition that public libraries use filters on their computers to block internet access to obscene material and child pornography to secure federal funding, contained in the Children's Internet Protection Act (CIPA), does not violate the First Amendment, nor is it an invalid exercise of its spending power. Chief Justice Rehnquist announced the judgment of the Court and wrote the plurality opinion, in which Justices O'Connor, Scalia, and Thomas joined. Justices Kennedy and Breyer filed concurring opinions. Justice Souter filed a dissent, in which Justice Ginsburg joined. The plurality recognized that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives," with the caveat, of course, that it may "not 'induce' the recipient 'to engage in activities that would themselves be unconstitutional.'" In determining whether the restriction violates the First Amendment, the Court determined that a heightened judicial standard of review was "incompatible with the discretion that public libraries must have to fulfill their traditional missions"—"Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them." Furthermore, the possibility that a filter might "overblock" does not render the statute unconstitutional. The Court wrote, "Assuming that such erroneous blocking presented constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."

The Court next addressed the issue of whether the statute "imposes an unconstitutional condition on the receipt of federal assistance." It noted that "under this doctrine, 'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" The Court concluded that it need not decide that issue because, "even assuming that appellees may assert an 'unconstitutional conditions' claim, this claim would fail on the merits." The Court relied on its decision in *Rust v. Sullivan*,[19] where it upheld Congress's restriction on using federal funds in programs that provided

16. 123 S.Ct. 1505 (2003).
17. Pub. L. 105-298 § 102(b) and (d) amending 17 U.S.C. §§ 302, 304.
18. 123 S. Ct. 1012 (2003).
19. 500 U.S. 173 (1991).

abortion counseling. The Court recognized, as here, "that 'the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized.'"

FIRST AMENDMENT: PRISONERS' VISITATION RIGHTS

In *Overton v. Bazzetta*,[20] Justice Kennedy delivered the opinion of the Court, which held that restrictions on prisoners' visitation rights do not violate the First Amendment if rationally related to a legitimate penological interest. The regulations at issue in this case were enacted by the Michigan Department of Corrections and severely restricted the visitation rights of prisoners in order to maintain better control during visitation periods and to prevent smuggling, drug trafficking, and other harmful conduct, some of which was displayed before children who were visitors to the prison facilities. The regulations were challenged as they pertained to prisoners who were only entitled to noncontact visitations. In upholding the regulations, the Court addressed whether these regulations infringed upon the constitutional right of association under the First Amendment, recognizing that the Constitution "protects 'certain kinds of highly personal relationships.'" The Court noted, however, "many liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." The Court did not "attempt to explore or define" the asserted right of association because the regulations at issue in this case "bear a rational relation to legitimate penological interests," which "suffices to sustain the regulation in question."

FOURTEENTH AMENDMENT: EQUAL PROTECTION CLAUSE

In *Grutter v. Bollinger*,[21] the Court, in a 5-4 decision, endorsed Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*,[22] and determined that a law school admission policy that considers race as only one of many factors in evaluating applicants to achieve the institution's goal of a "diverse" student body does not violate the Equal Protection Clause. In *Bakke*, Justice Powell wrote that "'the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.'" Therefore, both must be accorded the same protection. When a "governmental" decision touches upon an individual's racial or ethnic ground, "he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." The only interest Justice Powell accepted as valid was "the attainment of a diverse student body," with the proviso that "constitutional limitations protecting individual rights may not be disregarded." Justice Powell was "careful to emphasize that in his view race 'is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." The Court in *Grutter* concluded that the law school's admission program was consistent with Powell's *Bakke* approach—a narrowly tailored system designed to achieve a diverse student body.

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FOURTEENTH AMENDMENT: AFFIRMATIVE ACTION

Addressing the issue of affirmative action, the Court, in *Gratz v. Bollinger,*[23] held an undergraduate admissions policy that assigned a certain number of "admission" points to individuals based on race or ethnicity was in violation of the Equal Protection Clause. Justice Rehnquist, writing for a 5-4 Court, reviewed the admission policy of University of Michigan's College of Literature, Science, and the Arts. Their policy automatically assigned 20 points to an applicant in an underrepresented class. First, in light of its opinion set forth in *Grutter v. Bollinger*, the Court found that "diversity" is a valid compelling state interest. However, the Court determined that the University's policies were not "narrowly tailored to achieve such an interest." The Court cited Justice Powell's opinion in *Bakke* for the proposition that such programs "'preferring members of any one group for no reason other than race or ethnic origins is discrimination for its own sake.'" While "race or ethnic background may be deemed a plus in a particular applicant's file," a policy must be "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.'" The Court found that the university's current policy "does not provide such individualized consideration."

DUE PROCESS CLAUSE: SAME-SEX RELATIONSHIP

In a landmark decision, the Court in *Lawrence v. Texas*[24] held a Texas statute criminalizing certain private, consensual sexual acts between individuals of the same sex violates their liberty rights under the Due Process Clause of the Fourteenth Amendment. Justice Kennedy wrote the opinion for the court and Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice O'Connor filed an opinion concurring in the judgment. Justice Scalia, Chief Justice Rehnquist, and Justice Thomas dissented. In its decision, the Court began by recognizing "there are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases." Following its line of decisions from *Griswold v. Connecticut*,[25] to *Bowers v. Hardwick*,[26] the Court said that "our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." The Court said "the emerging recognition should have been apparent when *Bowers*

20. 123 S. Ct. 2162 (2003).
21. 123 S. Ct. 2325 (2003).
22. 438 U.S. 265 (1978).
23. 123 S. Ct. 2411 (2003).
24. 123 S. Ct. 2472 (2003).
25. 381 U.S. 479 (1965).
26. 478 U.S. 186 (1986).

The Court concluded, "*Bowers* was not correct when it was decided, and it is not correct today."

was decided." While "*stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law," it is not an inexorable command. The Court concluded, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent." The Court overruled *Bowers* and invalidated the Texas statute.

FOURTEENTH AMENDMENT: EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS

In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,[27] Justice O'Connor wrote the opinion for the unanimous court. In this decision, the Court held that a nonprofit housing agency, Buckeye Community Hope Foundation, failed to state a claim for an equal protection or substantive due process violation when it alleged the City of Cuyahoga Falls and its officials violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment "in allowing a site plan approval ordinance to be submitted to the electors of Cuyahoga Falls through referendum and in rejecting [its] application for building permits." The Cuyahoga City Charter granted voters "the power to approve or reject at the polls any ordinance or resolution passed by the Council within thirty days of the ordinance's passage." The voters of Cuyahoga, using this process, stalled the issuance of the building permits and subsequently passed a referendum repealing an ordinance allowing Buckeye to construct low-income housing. The Ohio Supreme Court subsequently declared the referendum unconstitutional and the necessary building permits were issued to Buckeye. However, Buckeye maintained this action in federal court for violation of the fourteenth Amendment.

Addressing the equal protection claim first, the Court said, "We have made clear that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Buckeye, however, did not claim injury from the referendum itself, but the "petitioning process." The Court concluded that "neither of the official acts [Buckeye] challenge[s] reflects the intent required to support equal protection liability." The "City acted pursuant to the requirements of its charter, which set out a facially neutral petitioning procedure." Likewise, the city engineer, in refusing to issue the appropriate permits while the referendum was still pending, "performed a nondiscretionary, ministerial act." Buckeye did not point to any evidence "suggesting these official acts were themselves motivated by racial animus." The Court also rejects Buckeye's reliance instead on the "allegedly discriminatory voter sentiment" to show an equal protection violation, stating "statements made by private individuals in the course of a citizen-driven petition drive, while sometimes relevant . . . do not, in and of themselves, constitute state action for the purposes of the Fourteenth Amendment." The Court concluded that there was no evidence presented to show that these private motives should be attributed to the state.

The Court also found that Buckeye failed to allege a substantive due process violation. Buckeye asserted two grounds by which the City violated its due process rights: (1) Buckeye had a "legitimate claim of entitlement to the building permits, and therefore a property interest in those permits . . . [and] the City engaged in arbitrary conduct by denying [Buckeye] the benefit of the plan"; and (2) "submission of an administrative land-use determination to the charter's referendum procedures constitutes *per se* arbitrary conduct." The Court did not consider whether Buckeye had a property interest in the permits "because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct," the type of conduct necessary to find a substantive due process violation. Instead, the city engineer acted according to the advice of the city attorney and the city charter. Second, the Court rejects Buckeye's arguments of *per se* arbitrary conduct. The Court has previously refused to make such a distinction between legislative and administrative referendums, as evidenced in *Eastlake v. Forest City Enterprises, Inc.*[28] In that case, the Court held that "because all power stems from the people, 'a referendum cannot . . . be characterized as a delegation of power,' unlawful unless accompanied by 'discernable standards.'" The people retain the power to govern through referendum "with respect to any matter, legislative or administrative, within the realm of local affairs." The Court said that "though the substantive result of a referendum may be invalid if it is arbitrary and capricious," Buckeye was not challenging the referendum itself, merely the city's compliance.

FOURTEENTH AMENDMENT: EXCESSIVE PUNITIVE DAMAGES AWARD

Addressing excessive punitive damages award in a civil action, the Court in *State Farm Mutual Automobile Insurance, Co. v. Campbell*[29] held a punitive damage award of $145 million, where full compensatory damages were $1 million, was excessive and violated the Due Process Clause of the Fourteenth Amendment. Justice Kennedy delivered the opinion of a 6-3 Court, which relied heavily on *BMW of North America, Inc. v. Gore.*[30] In *Gore,* the Court instructed reviewing courts to consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Justices Scalia, Thomas, and Ginsburg dissented on grounds that the Due Process Clause does not constrain the size of punitive damage awards.

27. 123 S.Ct. 1389 (2003).
28. 426 U.S. 668 (1976).
29. 123 S.Ct. 1513 (2003).
30. 517 U.S. 559 (1996).

FEDERALISM: FAMILY MEDICAL LEAVE ACT OF 1993

In *Nevada Dept. of Human Resources v. Hibbs*,[31] Justice Rehnquist delivered the opinion of the Court, which held that an individual may sue a state under the family-care provision of the Family Medical Leave Act (FMLA), which provides 12 weeks of unpaid leave, as the provision is a valid exercise of Congress's power under section 5 of the Fourteenth Amendment. The Court began by noting that "the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." However, "Congress may . . . abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." The Court held that here FMLA clearly "enables employees to seek damages 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction.'"[32] A "public agency," as defined by Congress, "include[s] both 'the government of a State or political subdivision thereof' and 'any agency of . . . a State, or a political subdivision of a State.'"[33] Furthermore, the Court determined that FMLA's enactment was appropriate under section 5 because it "aims to protect the right to be free from gender-based discrimination in the workplace."

FEDERALISM: SUPPLEMENTAL JURISDICTION

In *Jinks v. Richland County, South Carolina*,[34] a unanimous Court, in an opinion written by Justice Scalia, held that 28 U.S.C. section 1367(d), which tolls the statute of limitations for state law claims filed in a federal court under supplemental jurisdiction, is not unconstitutional even as applied to a state's political subdivisions. Petitioner filed an action in federal court, which included supplemental state claims against the county for wrongful death and survival. The district court dismissed these claims without prejudice, and petitioner filed a state action within 30 days of the dismissal. The county argued these claims were time-barred on the grounds that section 1367(d) is "facially invalid because it exceeds the enumerated powers of Congress" and, even if facially valid, "should not be interpreted to apply to claims brought against a State's political subdivision" because it interferes with their right to sovereign immunity.

The Court began by recognizing that Article I, section 8 of the Constitution authorizes Congress "'to make all Laws which shall be necessary and proper for carrying into Execution [Congress's Article I, § 8] Powers and all other Powers vested by this Constitution in the Government of the United States.'" The Court found section 1367(d) "necessary," because it is "'conducive to the due administration of justice' in a federal court and is 'plainly adapted' to that end." Furthermore, the Court concluded that section 1367(d) was "'plainly adapted to the power of Congress to establish the lower federal courts and provide for the fair and efficient exercise of their Article III powers." Neither party suggested that section 1367(d) was a "pretext" for an improper objective or is so attenuated with Congress's authority "as to undermine the enumeration of powers set forth in Article I, § 8."

[A]n individual may sue a state under the family-care provision of the Family Medical Leave Act . . . .

The Court also found that the tolling provision set out in section 1367(d) did not constitute "an impermissible abrogation of 'sovereign immunity.'" The Court determined that those provisions did not encroach upon a state's sovereign immunity as applied to its political subdivisions. First, as recognized in *Alden v. Maine*,[35] while "Congress lacks authority under Article I to override a *State's* sovereign immunity from suit in its own courts, it may subject a *municipality* to suit in state court if that is done pursuant to a valid exercise of its enumerated powers." Municipalities do not enjoy the same constitutional immunity as states.

FEDERALISM: NEGATIVE COMMERCE CLAUSE AND PRIVILEGES AND IMMUNITIES CLAUSE

In *Hillside Dairy, Inc. v. Lyons*,[36] the Court, in an opinion written by Justice Stevens, held a California state law that burdens or discriminates against out-of-state suppliers is subject to a challenge under the negative Commerce Clause. It is subject to challenge when it is not expressly immunized to such a challenge by federal statute, and is subject to a challenge under the Privileges and Immunities Clause, even when it does not on its face make a distinction against an individual based on residency or citizenship. In most of the United States, not including California, "the minimum price paid to dairy farmers producing raw milk is regulated pursuant to federal marketing orders." In California, "three related statutes establish the regulatory structure for milk produced, processed, or sold in California." In 1997, the California Department of Food and Agriculture "amended its plan to require that contributions to the pool be made on some out-of-state purchases." Petitioners, out-of-state producers, brought an action challenging the 1997 amendment as discriminatory against them. California argued that it was exempt from regulation based on § 144 of the Federal Agriculture Improvement and Reform Act of 1996.[37] Congress passed section 144, which exempts California only regarding the composition of milk products, because California's composition standards exceed some of those set by the federal Food and Drug Administration.

The Court concluded, based on the plain language of the statute, that section 144 "does not encompass pricing and pooling laws," and therefore, "California's pricing and pooling laws [are not insulated] from a Commerce Clause challenge." Furthermore, the Court also determined that the individual petitioners were not banned from raising a Privileges and Immunities Clause challenge. Article IV, section 2 of the

31. 123 S. Ct. 1972 (2003).
32. 29 U.S.C. § 2617(a)(2).
33. § 203(x), 2611(4)(A)(iii).
34. 123 S.Ct. 1667 (2003).
35. 527 U.S. 706 (1999).
36. 123 S. Ct. 2142 (2003).
37. 7 U.S.C. § 7254.

Justice Stevens concluded that the "question is whether there is a probability that Maine's program was preempted by the mere existence of the federal statute."

Constitution provides: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Court concluded that, while the lower courts correctly banned the corporate petitioners from raising this argument, the individual petitioners could go forward with their claims. The Court cited to its holding in *Chalker v. Birmingham & Northwestern R. Co.*,[38] stating that it could be interpreted two ways: (1) the Clause applies "to classifications that are but proxies for differential treatment against out-of-state residents"; or (2) it prohibits "any classification with the practical effect of discriminating against such residents." The Court concluded that, in this case, it did not matter which interpretation was correct because under either the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment was not sufficient for rejecting this claim.

FEDERALISM: STATE MEDICAID REGULATIONS

In *Pharmaceutical Research and Manufacturers of America v. Walsh*,[39] the Court determined that the petitioners did not meet their burden for a preliminary injunction by showing that the Maine statute providing "supplemental rebate programs to achieve additional cost savings on Medicaid purchases as well as purchases made by other needy citizens" (the "Maine Rx Program") was preempted by federal law, or that it violated the negative Commerce Clause. Justice Stevens announced the judgment of the Court. Prior to 1990, the Medicaid statute did not "specifically address" outpatient prescription drug coverage. In 1990, Congress created a rebate program for prescription drugs in an amendment contained in the Omnibus Budget Reconciliation Act of 1990 (OBRA 1990). The plan had two parts: (1) "It imposed a general requirement that, in order to qualify for Medicaid payments, drug companies must enter into agreements either with the Secretary or, if authorized by the Secretary, with individual States, to provide rebates on their Medicaid sales of outpatient prescription drugs," and (2) "Once a drug manufacturer enters into a rebate agreement, the law requires the State to provide coverage for that drug under its plan unless the State complies with one of the exclusion or restriction provisions in the Medicaid Act." The Court wrote, "Most relevant to this case, Congress allowed States, 'as a condition of coverage or payment for a covered outpatient drug,' § 1396r-8(d)(5), to require approval of the drug before it is dispensed." In the OBRA 1993, Congress further amended the Act to allow States to use "formularies" subject to strict limitations.

Justice Stevens concluded that the "question is whether there is a probability that Maine's program was preempted by the mere existence of the federal statute." In analyzing this question, Justice Stevens focused on "the centerpiece of petitioner's attack on the Maine Rx Program, [which] is its allegedly unique use of a threat to impose a prior authorization requirement on Medicaid sales to coerce manufacturers into reducing their prices on sales to non-Medicaid recipients." However, Justice Stevens recognized that it was petitioners' burden to show that "no Medicaid purpose" exists, and that a preliminary injunction is improper "if the program on its face clearly serves some Medicaid-related goal or purpose." He found that three such purposes existed. First, "the program will provide medical benefits to persons who can be described as 'medically needy' even if they do not qualify for AFDC or SSI benefits." Second, "there is a possibility that, by enabling some borderline aged and infirm persons better access to prescription drugs earlier, Medicaid expenses will be reduced." And third, patients will be protected from "inappropriate" prescriptions, and the use of cost-effective medications will be encouraged. While these reasons ultimately might not be enough to save the statute from preemption, it was "incorrect for the District Court to assume that any impediment, 'no matter how modest,' to a patient's ability to obtain the drug of her choice at the State's expense would invalidate the Maine Rx Program."

The Court said that petitioner's "Commerce Clause challenge focuses on the effects of the rebate agreements that will follow manufacturer compliance with the program." The Court concluded that Maine's Rx Program "does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect." First, "Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price." Second, "Maine is not tying the price of its in-state products to out-of-state products."

FEDERALISM:
PREEMPTION BY FEDERAL FOREIGN POLICY

In *American Insurance Association v. Garamendi*,[40] Justice Souter delivered the opinion of the Court, holding California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which requires an insurer doing business in the state to disclose information about policies sold by it or its affiliates in Europe between 1920 and 1945, was preempted under the foreign affairs doctrine of federal executive authority to set foreign relations. The Court began by recognizing that the President has independent authority under the Constitution to decide foreign policies and that "an exercise of state power that touches on foreign relations must yield to the National Government's policy." The President can execute executive agreements with foreign countries, requiring no ratification by the Senate or approval by Congress; this power includes "the settlement of claims."

In July 2000, the President and German Chancellor Schroder signed an executive agreement, called the German Foundation Agreement, to reach a remedy regarding the numerous unsettled claims individuals had against German companies that stemmed from the Nazi era in Germany. In terms of insurance policies, both countries agreed that the

38. 249 U.S. 522 (1919).
39. 123 S.Ct. 1855 (2003).
40. 123 S.Ct. 2374 (2003).

German Holocaust Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), a voluntary organization formed in 1998, whose primary purpose is to negotiate with European insurers "to provide information about unpaid insurance policies issued to Holocaust victims and settlement of claims brought under them."

The German Foundation Agreement does not expressly state that it preempts laws like HVIRA, leaving the government only with the argument that preemption rests because of "interference with foreign policy those agreements embody." Turning to its decision in *Zschering v. Miller*,[41] in which the majority reasoned "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict," the Court concluded that HVIRA is sufficiently in conflict with foreign policy as to require preemption.

First, the Court concluded that resolving Holocaust-era insurance claims "is a matter well within the Executive's responsibility for foreign affairs." Second, in this instance, the government has a foreign policy regarding the law addressed by HVIRA: "the three settlement agreements are enough to illustrate that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." Finally, the Court determined that HVIRA "conflicts" with these policies: "California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail."

The Court refused to address whether California's "iron fist" approach was superior to the President's "kid glove" approach as it is not within its role to make such a determination. However, it did address the state's arguments "that even if HVIRA does interfere with the Executive Branch foreign policy, Congress authorized state law of this sort in the McCarran-Ferguson Act, . . . and the more recent U.S. Holocaust Assets Commission Act of 1998." The Court rejected both claims. First, the McCarran-Ferguson Act leaves insurance regulation generally to the States, but even if HVIRA could be considered as a law regulating the business of insurance, "a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs." Second, the Holocaust Commission Act, set up to study and develop a historical record of the collection and disposition of Holocaust era assets, clearly focuses on assets held by the Government "and, if anything, the federal Act assumed it was the National Government's responsibility to deal with returning those assets." Furthermore, the reference to "compiling information" specifically states that "to the degree information is available," and does not authorize "state sanctions interfering with federal efforts to resolve such claims."

STATUTORY INTERPRETATION: CIVIL RIGHTS ACT OF 1964

A unanimous Court . . . held that direct evidence of discrimination is not required to obtain a mixed-motive instruction under Title VII . . . .

A unanimous Court in *Desert Palace, Inc. v. Costa*[42] held direct evidence of discrimination is not required to obtain a mixed-motive instruction under Title VII of the Civil Right Act of 1964. The Court's decision in *Price Waterhouse v. Hopkins*[43] left open the issue of when the burden of proof may be shifted to an employer to prove the affirmative defense of legitimate purpose in a mixed-motive case. In its 1991 Act, Congress addressed this issue with two new provisions. The first established an alternative for proving that an "unlawful employment practice" occurred, allowing an employee to move forward with his or her action once they had established "an unlawful employment practice."[44] If discrimination is proven, an employer can affirmatively show it would have taken the same action even absent the impermissible factor. The limited defense does not absolve the employer of liability, but limits the remedies of the plaintiff.[45] After the 1991 Act was enacted, the Courts of Appeals "divided over whether a plaintiff must prove by direct evidence that an impermissible consideration was a 'motivating factor.'"

In determining that direct evidence was not required, the Court first turned to the text of the statute and determined that section 2000e-2(m) clearly states that an employee "need only 'demonstrate' that an employer used a forbidden consideration with respect to 'any employment practice,'" not "make a heightened showing through direct evidence." Second, the Court concluded that Congress "explicitly defined the term 'demonstrates' in the 1991 Act, leaving little doubt that no special evidentiary showing is required." Third, the Court noted that "[t]he adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." Finally, the Court also noted, that the use of the term "demonstrate" in other provisions of Title VII tends also to show that "§ 2000e-2(m) does not incorporate a direct evidence requirement."[46]

CIVIL STATUTORY INTERPRETATION: FEDERAL TRADEMARK DILUTION ACT

In *Moseley v. Victoria's Secret Catalogue, Inc.*,[47] the Court determined that under the Federal Trademark Dilution Act (FTDA), objective proof of actual injury to the economic value of a famous mark is required for relief, as opposed to a presumption of harm arising from a subjective "likelihood of dilution" standard. In 1995, through the FTDA, Congress amended section 43 of the Trademark Act of 1946 to provide a

41. 398 U.S. 429 (1968).
42. 123 S. Ct. 2148 (2003).
43. 490 U.S. 228 (1989).
44. 42 U.S.C. § 2000e-2(m).
45. 42 U.S.C. § 2000e-5(g)(2)(B).
46. *See*, *e.g.*, 42 U.S.C. §§ 2000e-2(k)(1)(A)(i), 2000e-5(g)(2)(B).
47. 537 U.S. 418 (2003).

"[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, . . . the general words are construed to embrace only objects similar in nature . . . .

remedy for the "dilution of famous marks." The Court first noted that, unlike infringement law, dilution law does not stem from common law and is not motivated by consumer protection. Therefore, competition between the two enterprises is irrelevant. The Court noted that to avoid possible First Amendment challenges, Congress included two provisions, one to allow use of a mark in comparative advertising, and the other to allow the use of a mark for noncommercial use. The committee report stated that the "purpose [of the bill] is to protect famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it, even in the absence of a likelihood of confusion." The Court reasoned that the contrast between the state statutes, which expressly refer to both "injury to business reputation" and to "dilution of the distinctive quality of a trade name or trademark," and the federal statute, which refers only to the latter, supports a narrower reading of the FTDA. The relevant text of the FTDA provides that "the owner of a famous mark is entitled to injunctive relief against another person's commercial use of a mark or trade name if that use 'causes dilution of the distinctive quality' of the famous mark. . . ." This text unambiguously requires a showing of actual dilution, rather than a likelihood of dilution. The Court cautioned that its conclusion does not mean direct proof of dilution, such as an actual loss of sales, is always necessary; circumstantial evidence of dilution may be sufficient in a given case.

CIVIL STATUTORY INTERPRETATION: SOCIAL SECURITY ACT

In *Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler*,[48] the Court, in a unanimous opinion written by Justice Souter, determined that the Washington State Department of Social and Health Services (DSHS), as payee representative to children beneficiaries of Social Security benefits under both Social Security Income scheme and Old-Age, Survivors, and Disability Insurance plan, is not barred by 42 U.S.C. section 407(a) from recovering its initial expenditures under state law for the care and maintenance of such beneficiaries in their state foster-care program. Washington, through the DSHS, makes foster care available to abandoned, abused, neglected, or orphaned children who have no other guardians or custodians available. Although the state pays for such care, it has a policy "to attempt to recover the costs of foster care from the parents of the children." The department adopted a regulation providing "that public benefits for a child, including under SSI or OASDI, 'shall be used on behalf of the child to help pay for the cost of foster care received.'" Section 407(a), commonly referred to as the "anti-attachment" provision, provides, "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

A class of children who are in the department's foster care and who receive OASDI or SSI benefits brought an action in state court alleging that the "department's use of their Social Security benefits to reimburse itself for the costs of foster care" violated this provision. The Court determined it does not. The Court began by stating, "Section 407(a) protects SSI and OASDI benefits from 'execution, levy, attachment, garnishment, or other legal process,'" not "creditor-type acts." It recognizes that "the questions to be answered in resolving this case, then, do not go to the State's character as a creditor . . . [but to] whether the department's effort to become a representative payee, or its use of respondents' Social Security benefits . . . amounts to employing an 'execution, levy, attachment, garnishment, or other legal process.'" The Court easily dismissed the possibilities that the state's activities involve an "execution, levy, attachment, or garnishment," as these are legal "terms of art" and refer to "formal procedures" by which a person gains control over the property of another. The Court said "the case boils down to whether the department's manner of gaining control of the federal fund involves 'other legal process.'" The Court determined the answer is no: "[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, 'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" In this instance, since the phrase "other legal process" is used after execution, levy, attachment, and garnishment, therefore, at a minimum, section 402(a) "would seem to require utilization of some judicial or quasi-judicial mechanism . . . by which control over property passes from one person to another."

CIVIL STATUTORY INTERPRETATION: ERISA

In *Kentucky Ass'n of Health Plans, Inc. v. Miller*,[49] a unanimous Court, in an opinion written by Justice Scalia, found that Kentucky's "Any Willing Provider" statutes, which mandate that health insurers not discriminate against willing providers, were saved from preemption by ERISA under the new rule adopted by the Court to determine whether a state law "regulates insurance" under 29 U.S.C. section 1144(b)(2)(A). State laws are saved from preemption under section 1144(b)(2)(A) if they are laws that "regulate insurance." Making a clean break from the McCarran-Ferguson factors it had used previously, the Court decided that "for a state law to be deemed a 'law . . . [that] regulates insurance' under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance . . . . Second . . . the state law must substantially affect the risk pool-

48. 537 U.S. 371 (2003).

49. 123 S.Ct. 1471 (2003).

ing arrangement between the insurer and the insured." Although the McCarran-Ferguson factors were never an "essential component" of the analysis surrounding section 1144(b)(2)(A), the Court had used them to "buttress" its decisions. This has "misdirected attention, failed to provide clear guidance to lower federal courts, and . . . added little to the relevant analysis."

CIVIL STATUTORY INTERPRETATION: HIGHWAY SAFETY ACT

In *Pierce County v. Guillen*,[50] a unanimous Court found that 23 U.S.C. section 409, which protects information "compiled or collected" in connection with certain federal highway safety programs from being discovered or admitted into evidence, is a valid exercise of Congress's authority under the Commerce Clause. The Highway Safety Act of 1966 was enacted "to improve the safety of our Nation's highways by encouraging closer federal and state cooperation with respect to road improvement projects." This act includes the Hazard Elimination Program, "which provides state and local governments with funding to improve the most dangerous sections of their roads." To implement the Hazard Elimination Program, Congress adopted section 409 to protect certain data from discovery. The Court analyzes the scope of section 409 with regards to two well-recognized principles: (1) "Evidentiary privileges must be construed narrowly because privileges impede the search for the truth," and (2) "'When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'" With these principles in mind, the Court concluded section 409 protects all documents "compiled or collected for § 152 purposes, but does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point 'collected' by another agency for § 152 purposes."

After determining the scope of section 409, the Court addressed its constitutionality. Relying on the Commerce Clause and Congress's "well established . . . [power] to 'regulate the use of the channels of interstate commerce,'" the Court found that "both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce." The adoption of section 409 was reasonable to eliminate the "unforeseen side effect of the information-gathering requirement of § 152" and encourage "more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decision making, and, ultimately, greater safety of the Nation's roads."

CIVIL STATUTORY INTERPRETATION: FAIR HOUSING ACT

In *Meyer v. Holley*,[51] Justice Breyer delivered the opinion for a unanimous Court holding that the traditional principles of vicarious liability apply to actions brought under the Fair Housing Act. It imposes liability on a corporation, not its directors and officers, for discrimination by one of its employees or agents. The respondents brought an action against the sole shareholder, president, and licensed "officer/broker" of a real estate agency, claiming he was "vicariously liable in one or more of these capacities" for a real estate agent's discriminatory conduct. The Fair Housing Act forbids "'any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate.'"[52] It states that a "'person' includes, for example, individuals, corporations, partnerships, associations, labor unions, and other organizations," but, it says nothing about vicarious liability.[53] The Court noted that "it is well established that the Act provides for vicarious liability" as "an action brought for compensation by a victim of housing discrimination is, in effect, a tort action." In finding that the traditional rules of vicarious liability apply, the Court said, "When Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." Furthermore, it "found no convincing argument in support of the Ninth Circuit's decision to apply nontraditional vicarious liability principles."

"When Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules . . . .

CIVIL STATUTORY INTERPRETATION: TRIBAL ACTIONS UNDER 42 U.S.C. SECTION 1983

In *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*,[54] the Court held the tribe's complaint was not actionable under 42 U.S.C. section 1983, because a tribe did not qualify as a "person" for the purposes of that statute. Justice Ginsburg delivered the opinion of the Court, in which all the justices except Justice Stevens, who wrote an opinion concurring in the judgment, joined. The tribe filed a section 1983 action against the county alleging that by acting beyond the scope of its jurisdiction and without authorization of law in executing a search warrant to obtain employment records from its casino, the county violated the tribe's and its corporation's Fourth and Fourteenth Amendment rights and the tribe's right to self-government. Section 1983 permits "'citizens' and 'other persons within the jurisdiction' of the United States to seek legal and equitable relief from 'persons' who, under the color of state law, deprive them of federally protected rights." The Court determined, however, that a tribe is not a "citizen" for the purposes of maintaining a section 1983 action. The Court first turned to its decision in *Will v. Michigan Dept. of State Police*,[55] where it held that "a State is not a 'person' amenable to suit under § 1983," and reasoned, "'Congress did not intend to override well-established immunities or defenses

50. 537 U.S. 129 (2003).
51. 537 U.S. 280 (2003).
52. 42 U.S.C. § 3605(a).
53. 42 U.S.C. § 3602(d).
54. 537 U.S. 701 (2003).
55. 491 U.S. 58 (1989).

[A] 7-2 Court held a shareholder-director may qualify as an "employee" under the American with Disabilities Act.

under the common law,' including 'the doctrine of sovereign immunity.'" The Court recognized that the present case did not necessarily fit within this holding, but determined, with the agreement of the parties, that tribes, like states, "are not subject to suit under § 1983." With this determination in place, the Court focused on the issue as presented by the parties and said that "[a]s we have recognized in other contexts, qualification of a sovereign as a 'person' who may maintain a particular claim for relief depends not 'upon bare analysis of the word person,' but on the 'legislative environment' in which the word appears.'" The Court concluded, "Section 1983 was designed to secure private rights against government encroachment, not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation." Therefore, the Court said, "[W]e hold that the Tribe may not sue under § 1983 to vindicate the sovereign right it here claims."

EMPLOYMENT LAW: FEDERAL EMPLOYERS' LIABILITY ACT (FELA)

In *Norfolk & Western Railway Co. v. Ayers*,[56] Justice Ginsburg delivered the opinion of the Court, which held: (1) mental anguish damages are recoverable under the Federal Employers' Liability Act (FELA) by an employee suffering from actionable asbestosis if the claim is part of asbestos-related pain and suffering damages and the fear is genuine and serious; and (2) a railroad employer is not entitled to reduction in damages for the contributory negligence of a non-railroad employer. Section 1 of FELA[57] "renders common carrier railroads 'liable in damages to any person suffering injury while . . . employed . . . if the injury or death resulted in whole or in part from the [carrier's] negligence.'" With respect to a claim under FELA, "Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers." Turning to its decisions in *Consolidated Rail Corporation v. Gottshall*,[58] and *Metro-North Commuter R.R. v. Buckley*,[59] the Court said that "stand-alone emotional distress claims not provoked by any physical injury, for which recovery is sharply circumscribed by the zone-of-danger test; and emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted." The Court concluded, therefore, that plaintiffs who suffer from asbestosis, but not cancer, can recover damages for fear of cancer under FELA without proof of physical manifestations of the claimed emotional distress with two important caveats: first, it must be a part of his "asbestosis-related pain and suffering damages," and second, he must "prove that his alleged fear is genuine and serious."

The Court next considered the second issue in the case: whether the trial court "erred in instructing the jury 'not to make a deduction [from the damages awards] for the contribution of non-railroad [asbestos] exposures' to the asbestosis claimants' injuries," and concluded that it did not. The statutory language supports the trial court's instructions: "Every common carrier by railroad while engaging in [interstate commerce], shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part form the negligence of . . . such carrier."[60] The Court said the conclusion that "FELA does not mandate apportionment is also in harmony with this Court's repeated statements that joint and several liability is the traditional rule."

EMPLOYMENT LAW: AMERICAN WITH DISABILITIES ACT

In *Clackamas Gastroenterology Associates, P.C. v. Wells*,[61] Justice Stevens, delivering the opinion for a 7-2 Court, held a shareholder-director may qualify as an "employee" under the American with Disabilities Act (ADA). The Court determined that the question was answered by applying common-law principles of the master-servant relationship and determining whether that person acts independently and participates in the managing of the organization, or whether the individual is subject to the organization's control. Referencing its decision in *Nationwide Mutual Ins. Co. v. Darden*,[62] the Court stated, "When Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." The ADA does not provide much insight and "simply states that an 'employee' is 'an individual employed by an employer.'" Therefore, the Court will look to common-law principles to define the term. At common law, which is in accord with the view of the Equal Employment Opportunity Commission, the relevant factors defining the master-servant relationship focus on the master's control over the servant.

The Court rejected the argument that it should answer the question by asking whether the shareholder-director appears to be the functional equivalent of a partner, concluding partnerships may include hundreds of members, "some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." Furthermore, the Court determined that the Ninth Circuit's view, which did indeed pay "particular attention to 'the broad purpose of the ADA,'" could not be adopted because it ignored two important considerations: (1) "the congressional decision to limit the coverage of the legislation to firms with 15 or more employees has its own justification that must be respected—namely, easing entry into the market and preserving the competitive positions of smaller firms" and (2) "congressional silence often reflects an expectation that courts will look to the common law to fill gaps."

56. 538 U.S. 135 (2003).
57. 45 U.S.C. § 51.
58. 512 U.S. 532 (1994).
59. 521 U.S. 424 (1997).
60. 45 U.S.C. § 51.
61. 123 S.Ct. 1673 (2003).
62. 503 U.S. 318 (1992).

THE JUDICIARY: FEDERAL MAGISTRATE ACT OF 1979

In *Roell v. Withrow*,[63] a 5-4 Court held that a party's consent to having any or all proceedings in a civil matter held before a magistrate judge under 28 U.S.C. section 636(c)(1) does not need to be express and may be inferred from a party's conduct during litigation. Justice Souter delivered the opinion of the Court. The Court first concluded that 28 U.S.C. section 636(c)(2) and Rule 73(b) require "advance, written consent communicated to the clerk" by the parties for a magistrate judge to hear the proceedings. However, given the language of the statute and the Rule, the Court concludes that, aside from the fact that § 636(c)(2) and Rule 73(b) require specific written consent and that neither of these provisions are only "advisory," "the text and structure of the section as a whole suggest that a defect in the referral to a full-time magistrate judge under § 636(c)(2) does not eliminate that magistrate judge's 'civil jurisdiction' under § 636(c)(1) so long as the parties have in fact voluntarily consented."

THE JUDICIARY: ARTICLE IV JUDGES

In *Nguyen v. United States*,[64] a 5-4 Court, in an opinion written by Justice Stevens, held an appellate panel consisting of two Article III judges and one Article IV judge did not constitute an appropriate panel. Petitioners, pursuant to 28 U.S.C. section 1294(4), appealed their convictions in a federal district court to the Court of Appeals for the Ninth Circuit. Two of the three judges on the panel were Ninth Circuit Article III judges and the third judge, the Chief Judge of the District Court for the Northern Mariana Islands, was an Article IV judge. Petitioners did not challenge the make-up of the panel until their petition for certiorari before the Court. The Court began with "the congressional grant of authority permitting, in certain circumstances, the designation of district judges to serve on the court of appeals." The statute, 28 U.S.C. section 292(a), authorizes "the chief judge of a circuit to assign 'one or more district judges within the circuit' to sit on the Court of Appeals 'whenever the business of that court so requires.'" The statute "does not explicitly define the 'district judges' who may be assigned to the Court of Appeals." The Court concluded, however, that other provisions of law make it perfectly clear that Article IV judges are not included. The Court also concludes that petitioners' failure to raise the issue earlier in the proceedings did not bar the claim. The Court said that it was confronted with a "fundamental" question of "judicial authority" in this case. The appointment is one that "could never have been taken at all," not one "which could have been taken, if properly pursued." It was impermissible from the start and was not a waivable error.

THE JUDICIARY: REMAND TO THE BUREAU OF IMMIGRATION APPEALS

In a per curiam decision, the Court in *Immigration and Naturalization Service v. Ventura*[65] held that the Ninth Circuit should have applied the ordinary rules of review and remanded the case to the Bureau of Immigration Appeals for its consideration of the changed circumstances issue instead of determining the issue in the first instance. In this case, respondent petitioned for asylum based upon "fear and threat of persecution 'on account of' a 'political opinion.'" His petition was denied by the immigration judge and by the BIA. The Ninth Circuit reversed the BIA's holding, determining the evidence "compelled" such a contrary finding and, furthermore, "changed country conditions," which were not considered by the BIA, warranted a different result. In reversing and remanding the case to the BIA for consideration of this issue in the first instance, the Court determined the ordinary remand rules applied and the Ninth Circuit's decision not to remand the case "seriously disregarded the agency's legally-mandated role" and "independently created potentially far-reaching legal precedent about the significance of political change in Guatemala," without giving the BIA the opportunity to address it first.

[A] 5-4 Court held an appellate panel consisting of two Article III judges and one Article IV judge did not constitute an appropriate panel.

ELECTIONS: JUDICIAL REDISTRICTING

In *Branch v. Smith*,[66] Justice Scalia wrote the opinion for the Court, holding a district court could, pursuant to 2 U.S.C. section 2c, create a redistricting plan instead of ordering at-large elections pursuant to 2 U.S.C. section 2a(c)(5). Mississippi failed to create and submit for preclearance a redistricting plan after the 2000 census. In anticipation of the March 1, 2002 state deadline for the qualification of candidates, "Beatrice Branch and others filed suit in a Mississippi State Chancery Court in October 2001, asking the state court to issue a redistricting plan for the 2002 congressional elections." In November 2001, John Smith filed a similar suit in the United States District Court for the Southern District of Mississippi, "claiming that the current district plan, dividing the State into five, rather than four congressional districts, was unconstitutional and unenforceable." He also asked the court to enjoin the state court's redistricting plan. Initially, the district court declined to act, but, when it became clear that no new plan would be forthcoming, it "enjoined the State from using the Chancery Court plan and ordered use of the District Court's own plan in the 2002 elections and all succeeding elections until the State produced a constitutional redistricting plan that was precleared."

The Court addressed the issue of "whether . . . the District Court was governed by the provisions of 2 U.S.C. § 2c; or . . . by provisions of 2 U.S.C. § 2a(c)(5)." The Court wrote, "The tension between these two provisions is apparent: Section 2c requires States entitled to more than one Representative to elect their Representatives from single-member districts, rather than from multimember districts or the State at large. Section

63. 538 U.S. 580 (2003).
64. 123 S. Ct. 2130 (2003).
65. 537 U.S. 12 (2002).
66. 123 S.Ct. 1429 (2003).

[T]he Court held that it was a matter for the arbitrator to interpret and apply rules of the NASD.

2a(c), however, requires multi-member districts or at-large elections in certain situations." The Court recognized that prior to the enactment of section 2c, many district courts reviewing redistricting plans "had suggested that if the state legislature was unable to redistrict to correct malapportioned congressional districts, they would order the State's entire congressional delegation to be elected at large." The Court concluded, "With all this threat of judicially imposed at-large elections, and (as far as we are aware) no threat of legislatively imposed change to at-large elections, it is most unlikely that § 2c was directed solely at legislative reapportionment." In support of this conclusion, the Court said that "every court that has addressed the issue has held that § 2c requires courts, when they are remedying a failure to redistrict constitutionally, to draw single-member districts whenever possible."

ELECTIONS: SECTION 5 OF THE VOTING RIGHTS ACT—PRECLEARANCE

In *Georgia v. Ashcroft*,[67] the Court, in an opinion written by Justice O'Connor, decided that when determining whether a redistricting plan results in a retrogression of a minority group's "effective electoral franchise," a court must look at the plan on a statewide basis and make a determination in light of the totality of circumstances, not only whether a minority group can elect the candidate of its choice. After the 2000 census, Georgia created a senate redistricting plan and sought preclearance pursuant to section 5 of the Voting Rights Act by filing an action for a declaratory judgment in the United States District Court for the District of Columbia. The district court, after having reviewed ample evidence from both sides, "held that Georgia's State Senate apportionment violated § 5, and was therefore not entitled to preclearance." The Supreme Court reversed on the grounds that the district court had failed to consider all the relevant factors when examining whether Georgia's Senate plan resulted in a retrogression of black voters' effective exercise of the electoral franchise. The Court noted that section 5 "has a limited substantive goal: 'to [e]nsure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" To determine if the plan should be precleared, a court must determine whether the plan leads to a retrogression in the position of racial minorities with respect to their effective exercise of the "electoral franchise," a concept the Court undertook to delineate for the first time in this case.

First, the Court concluded that "in examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole." Second, "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances," *i.e.*, "assessing a minority group's opportunity to participate in the political process." The Court noted that the "totality of the circumstances" is not limited to "the comparative ability of a minority group to elect a candidate of its choice." The Court pointed to another factor important for consideration—"the extent to which a new plan changes the minority group's opportunity to participate in the political process." Last, the Court said that in "assessing the minority group's opportunity to participate in the political process," a court can "examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts."

IMMIGRATION: DETENTION PRIOR TO REMOVAL PROCEEDINGS

In *Demore v. Kim*,[68] the Court reviewed and upheld the constitutionality of section 236(c) of the Immigration and Nationality Act,[69] which provides that "the Attorney General shall take into custody any alien who is removable from this country because he has been convicted of one of a specified set of crimes." Forgoing a hearing to determine whether he was covered by section 1226(c), respondent filed a petition for habeas corpus attacking the constitutionality of section 1226(c). Justice Rehnquist, writing for the majority, found the provision constitutional. The majority began by noting the statute, which "mandates detention during removal proceedings for a limited class of deportable aliens—including those convicted of an aggravated felony," was adopted "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." In the end, "Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." The Court followed by stating, "'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" While "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings," the Court, nonetheless, has recognized "detention during deportation proceedings as a constitutionally valid aspect of the deportation process."

OTHER SIGNIFICANT DECISIONS: INDIAN TUCKER ACT

In *United States v. White Mountain Apache Tribe*,[70] the Court held the 1960 Act creating a tribal trust in favor of the White Mountain Apache Tribe gives rise to Indian Tucker Act jurisdiction in the Court of Federal Claims over the tribe's suit for money damages against the United States. In 1960, Congress enacted a statute that provides that the "'former Fort Apache Military Reservation' would be 'held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purpose.'" In 1993, the tribe "commissioned an engineering assessment of the property, resulting in a finding that as of 1998 it would cost

67. 123 S. Ct. 2664 (2003).
68. 538 U.S. 510 (2003).
69. 8 U.S.C. § 1226(c).
70. 537 U.S. 465 (2003).

about $14 million to rehabilitate the property occupied by the Government . . . ." In 1999, the tribe sued the United States in the Court of Federal Claims claiming damages in this amount, "citing the terms of the 1960 Act, among others, and alleging breach of fiduciary duty to 'maintain, protect, repair, and preserve' the trust property." The Court of Federal Claims dismissed the complaint for lack of subject matter jurisdiction because under the Tucker Act, which invests the Court of Federal Claims with jurisdiction over action by tribes against the United States, the waiver of sovereign immunity is only applicable "when underlying substantive law could fairly be interpreted as giving rise to a particular duty, breach of which should be compensable in money damages." In a 5-4 decision, the Court, with Justice Souter writing for the majority, reversed.

The Court first recited the basic rules of subject matter jurisdiction: "Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity." The Tucker Act contains such a waiver "giving the Court of Federal Claims jurisdiction to award damages upon proof of 'any claims against the United States founded either upon the Constitution, or any Act of Congress.'"[71] The Indian Tucker Act[72] "confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.'" The Court then noted that "[n]either Act, however, creates a substantive right enforceable against the Government by a claim of money damages." However, the 1960 Act creates such a right, providing a "fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee" based on "elementary trust law," which "confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch."

OTHER SIGNIFICANT DECISIONS: ARBITRATION AND JUDICIAL REVIEW

In *Howsam v. Dean Witter Reynolds, Inc.*,[73] Justice Breyer delivered the opinion of the Court. Here, the Court held that it was a matter for the arbitrator to interpret and apply rules of the NASD. In this action, an arbitration agreement was in place between the parties that allowed the petitioner to choose the forum. She did, choosing the National Association of Securities Dealers (NASD) and signing the NASD's uniform submission agreement, which stipulates that no dispute shall be eligible for submission after six years has elapsed. Respondent filed an action in the district court arguing that the six-year time period had lapsed. The Court began by stating "the 'question of arbitrability,' is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'" The "question of arbitrability" as a "gateway dispute" hinges on whether the parties would have been likely to expect a court to have decided the gateway matter. At the same time, the Court has found the phrase "question of arbitrability" not applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter. Thus procedural questions that grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide. The Court concluded that the NASD time limit rule closely resembles the gateway questions that the Court has found not to be "questions of arbitrability," but a question presumptively for the arbitrator to decide.

OTHER SIGNIFICANT DECISIONS: SUPREME COURT JURISDICTION

In *Nike, Inc. v. Kasky*,[74] the Supreme Court initially granted certiorari to decide two questions: (1) "whether a corporation participating in a public debate may 'be subjected to liability for factual inaccuracies on the theory that its statements are commercial speech because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions,'" and (2) assuming it was commercial speech, "whether the First Amendment permits subjecting speakers to the legal regime approved" by the California Supreme Court. After 34 briefs were submitted and oral argument heard, the Court decided to dismiss the writ "as improvidently granted." Justice Stevens, with whom Justice Ginsburg joined, and Justice Souter joined only as to part, wrote to concur in the dismissal because he said that "the Court's decision to dismiss the writ of certiorari is supported by three independently sufficient reasons: (1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. § 1257; (2) neither party has standing to invoke the jurisdiction of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case." Justice Breyer, dissenting, wrote that in his view, "under similar circumstances, the Court has found that failure to review an interlocutory order entails 'an inexcusable delay of the benefits [of appeal] Congress intended to grant.'"

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71. 28 U.S.C. 1491(a)(1).
72. 28 U.S.C. § 1505.
73. 537 U.S. 79 (2002).
74. 123 S. Ct. 2554 (2003).