WIGGIN AND DANA

Counsellors at Law

Supreme Court Update

OCTOBER 2005 TERM IN REVIEW

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Appellate Practice Group

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THE TERM IN REVIEW

Greetings, Court Fans, and welcome to the second annual Term in Review!

Wiggin and Dana's Appellate Practice Group began the Supreme Court Update during the October 2002 Term as a way to keep clients, friends of the firm, and ourselves up to speed on the Court's activities. Sent via e-mail, the Update is intended to provide readers with (relatively) quick summaries of the Court's latest rulings and orders of note. Back by popular demand, this compilation provides all the case summaries in a single document—think of it as a ready reference to the first Term of the Roberts Court.

The Court issued eighty-seven written opinions this Term. We've split them into two sections. Part One includes all the civil cases, while Part Two contains the criminal cases and their relatives. (You'll find Fourth Amendment and habeas cases in this section too.) Within each Part, we've organized the cases by section to reflect the dominant issue or subject matter of each case, with cross-references where appropriate. You can pinpoint specific cases in the Index.

Before we get to the summaries, here are our general thoughts on what was an eventful Term.

NEW FACES

Aside from a few high-profile cases, the biggest news this Term was the presence of new faces on the Court for the first time in many years. Following the death of Chief Justice Rehnquist last summer, D.C. Circuit Judge John Roberts, a former Rehnquist clerk originally nominated to succeed retiring Justice Sandra Day O'Connor, became the Court's seventeenth Chief. Justice O'Connor then remained on the Court—with decisive consequences in at least one case—while the Bush Administration searched for another successor. After the failed nomination of White House Counsel Harriet Miers, the President nominated Third Circuit Judge Samuel Alito, who was confirmed in late January.

The two new Justices affected the Court in different ways. As was perhaps to be expected, the new Chief's influence was more systemic than case-specific. What was not expected, however, was the degree of efficiency and harmony with which the Roberts Court began its work. Through the first week of March, the Court had issued decisions in thirty-nine cases, compared to twenty-six by the same point last Term. Those early opinions included a number of cases that were expected to be contentious, but in which the Court surprised observers by disposing of the cases unanimously, sometimes on very narrow grounds (for more details, see our Box Score below). To cite just a few examples:

- In ***Ayotte v. Planned Parenthood of Northern New England***, the Court considered a New Hampshire law requiring parental notification before a minor obtains an abortion, with no exception for cases where the health of the minor is at risk. In what was to be Justice O'Connor's last opinion, the Court noted that its precedents establish that states can require parental notification but cannot restrict abortion where necessary to protect the health of the mother. It then remanded the case to the lower courts, which had struck down the entire

Hail to the Chief

Even after his confirmation hearings, some observers still regarded Chief Justice Roberts as a bit of a cipher. His opinions, however, provide a pretty good sense of the man—and his dry wit.

On bureaucracy (from *UDV*): Rejecting the government's claim that barring a religious group's use of hallucinogens in its ceremonies served a compelling interest in uniformly enforcing drug laws, the Chief noted that this was "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."

"Old School" when it comes to the First Amendment (from *FAIR*): "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in [past precedents] to suggest that it is."

He went to a fight, and a Supreme Court case broke out (from *Brigham City, Utah v. Stuart*): Upholding a cop's ability to enter a home after seeing an assault through a window, the Chief wrote that "an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."

Something tells us he's not a fan of affirmative action quotas (from his dissent in *LULAC v. Perry*, the Texas gerrymandering case): "I do not believe it is our role to make judgments about which mixes of minority voters should count . . . . It is a sordid business, this divvying up by race."

law, to consider alternative remedies including severing the problematic provision from the statute or enjoining only its unconstitutional applications.

- In ***Gonzalez v. O Centro Espírita Beneficente União do Vegetal* ["*UDV*"]**, the Court took up the question of whether a Brazilian religious group could block the federal government from enforcing the Controlled Substances Act and barring its use of *hoasca*, an hallucinogen, in its religious ceremonies. Construing the case not as a drug case but as a religion case implicating the Religious Freedom Restoration Act, the Court unanimously put the burden of proof on the government and upheld the group's preliminary injunction.

- In ***Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ["*FAIR*"]**, the Court unanimously held that Congress can deny funding to universities that restrict military recruiting in opposition to "Don't Ask, Don't Tell." The Court upheld the "Solomon Amendment" as a straightforward exercise of Congress's Spending Clause powers, and rejected FAIR's claim that denying access to recruiters was "expressive conduct" or an "associational" right.

In short, the new Chief appears intent on fostering unanimity wherever possible, with the corollary that, in the Chief's own words, "[i]f it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more." Of course, as we'll see below, unanimity was not always possible.

Justice Alito, by contrast, made his biggest splash in those cases where his vote, having replaced O'Connor's, may have been decisive. By our count, there were several such cases, first among them the Court's holding in ***Garcetti v. Ceballos*** that a public employee's speech made within the context of his job duties is not subject to First Amendment protections. The result was a 5-4 decision, with the majority composed of the Chief and Justices Scalia, Kennedy, Thomas and Alito. Justice Souter wrote a lengthy dissent. ***Garcetti*** originally was argued in October but was reargued in March—suggesting that, before her departure, O'Connor was a fifth vote the other

way, and that Souter's dissent originally had the makings of a majority opinion. Another possibility was ***Hudson v. Michigan***, where a Scalia-led majority held that violations of the knock-and-announce rule do not require exclusion of the evidence seized at trial and suggested that the exclusionary rule should apply only where its deterrent effect outweighs its "substantial social costs." Finally, in ***Rapanos v. United States***, a plurality of the Court (together with Justice Kennedy in his solo concurrence in the judgment) restricted the scope of the Army Corps of Engineers' authority under the Clean Water Act based on a strict reading of the statute; four dissenters led by Justice Stevens would have deferred to the Corps. By the same token, O'Connor's continued presence on the Court through January probably made the difference in ***Central Virginia Community College v. Katz***, where she joined a majority holding that the Bankruptcy Clause trumped states' sovereign immunity from suits by bankruptcy trustees. There, Justice Thomas dissented for himself and the Chief, Scalia and Kennedy, arguing that there was no basis for giving the Bankruptcy Clause such a special status. It seems likely, had Justice Alito been on the Court, that he would have agreed.

BIG CASES—AND THE EMERGENCE OF JUSTICE KENNEDY

Although the Roberts Court certainly had a lengthy honeymoon period, all was not sweetness and light. The first inkling of discord came in January, with the Court's 6-3 decision in ***Gonzalez v. Oregon***, where the Court held that the Controlled Substances Act did not authorize the Attorney General to prohibit the use of drugs in physician-assisted suicides conducted in accordance with state laws. The majority, which included O'Connor and Kennedy, assumed that Congress could have exercised its Commerce Clause powers to bar the conduct at issue, but simply had not done so under the statute, and it declined to defer to the Attorney General's interpretation to the contrary. Alito likely would have joined the dissenters (the Chief, Scalia and Thomas) in deferring to the Attorney General, so ***Gonzalez*** was a bit of a harbinger of what was to come—split decisions in which Kennedy confirmed his role as the critical swing vote on the post-O'Connor Court.

Those decisions came in earnest starting in June, when the Roberts honeymoon officially ended with the 5-4 "conservative bloc" decision on the exclusionary rule in ***Hudson***. It was the 4-1-4 decision in ***Rapanos***, however, that began the real fireworks. There, Scalia led a "conservative" plurality that would have scaled back the scope of certain Clean Water Act protections to "relatively permanent" bodies of water, while Stevens led the four "liberals" who would have left the Corps of Engineers' much broader interpretation intact. Kennedy went his own way, adopting a test requiring a "significant nexus" with navigable waters, thereby angering both blocs (and lots of legal pundits). It remains to be seen, of course, but Kennedy's opinion could wind up governing future litigation in this area, much like Justice Powell's solo concurrence in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), did with respect to affirmative action in higher education for some twenty-five years.

The Court followed ***Rapanos*** with two fractured decisions in the area of election law. In ***Randall v. Sorrell***, the Court struck down Vermont's campaign finance laws, which imposed expenditure limits on candidates and contribution limits on donors and parties. The official vote was 6-3, but no opinion garnered more than three votes (Kennedy again wrote a solo concurrence in the judgment). And in ***League of United Latin American Citizens ["LULAC"] v. Perry***, Kennedy joined with the "conservatives" to uphold Texas Republicans' partisan gerrymandering of the state's congressional districts against challenges to the plan as a whole and to the partitioning of one district that diluted African-American votes. But he joined with the "liberals" in invalidating a "bacon-strip" shaped district created from two formerly Latino-dominated districts (leading the Chief to lament that the Court had decided the matter based on "style points").

Finally, the Court saved its biggest decision for the Term's last day, when it held in ***Hamdan v. Rumsfeld*** that the President lacked authority to establish the existing system of military commissions for trying Guantanamo Bay detainees. (The Chief, who was on the D.C. Circuit panel that upheld the tribunals, recused himself from the case.) The four "liberals" formed a plurality that held that Hamden himself could not even be tried by military commission given the specific nature of his alleged offenses. Kennedy did not join that opinion (in fact, he declined to consider that issue), but he did join them to create a five-Justice majority holding that the commissions were subject to the provisions of the Uniform Code of Military Justice and the Geneva Conventions. Despite the ongoing war on terror, Kennedy wrote, "Congress has not issued the Executive a 'blank check.'"

What Passes for One-Liners

The Justices generally were on good behavior in a time of transition, but they gave us a few quips that might come in handy someday.

Kennedy May Be Pivotal, but Scalia's Not Impressed: Harshly criticizing Kennedy's reading of the Clean Water Act in ***Rapanos***, Justice Scalia compared him to "an Eastern guru [who] affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies 'Ah, after that it is turtles all the way down.'"

They're not "the Brethren," They're "the Sopranos": Just a bit upset at the Court's order to grant, vacate and remand in ***Youngblood v. West Virginia***, Scalia wrote that it was "nothing more than our statement that it would be 'better' for the lower court to reconsider its decision (much as a mob enforcer might suggest that it would be 'better' to make protection payments)." If you don't like the mob analogy, maybe you'll like Scalia's comparison of the Court to a "neo-Victorian" schoolmarm giving West Virginia a "tutelary remand, as to a schoolboy made to do his homework again."

Federalism and the Animal Kingdom: In ***Gonzalez v. Oregon***, on whether the word "prescription" as used in the Controlled Substance Act shifted the federal-state balance of power, Justice Kennedy wrote that "Congress . . . does not, one might say, hide elephants in mouse holes."

Sarcasm, or Just *Really* Faint Praise? In ***Washington v. Recuenco***, Justice Thomas held that a trial judge's factfinding in place of the jury's for a sentencing enhancement was not automatic grounds for reversal, because, as the Court previously had noted, "We could not confidently say that judicial factfinding seriously diminishes accuracy."

The Term's Box Score

Failure is an inherent part of the game . . . : The Court's 87 written opinions covered 93 cases taken on writ of certiorari (counting the consolidated cases, and ignoring three cases the Court DIG'd). The Court reversed or vacated 69 of them, for a reversal rate of almost 75%—a five percent increase over last Term.

. . . and the Ninth Circuit's Extended Slump Continues: Just like last Term, the Court considered 19 cases from the Ninth Circuit, and reversed or vacated 16 of them, or 84% (two of the affirmances *were* unanimous, which is some consolation, but then again so were 12 of the reversals). On a percentage basis, however, the Second Circuit actually fared worse, as the Justices reversed or vacated that court in eight of nine cases, or 89%. The First, Third, and Seventh Circuits all had 100% reversal rates, as did the D.C. and Federal Circuits, but these courts really did not have enough at-bats to qualify (no more than four cases each). The Eighth Circuit (affirmances in two out of three cases) and the Tenth Circuit (affirmances in three out of four) did well, but similarly had low absolute numbers. For quantity and quality, once again the real "winners" were state courts, as the Court considered 18 state-court cases and reversed or vacated in 10, for a failure rate of "only" 56%.

Who Was on the Most Winning Teams: Once again, it depends on the at-bats. Justice O'Connor only participated in 24 decisions, but it was an impressive showing, as she was in the majority in *all* of them. In his first Term, the new Chief was almost as impressive, joining the majority or plurality in 93% of the 79 cases in which he participated. Of those Justices who participated in every case heard this Term, Scalia and Kennedy led the way by being on the winning team 89% of the time.

The Odd Justice Out: Justice Stevens was the Term's biggest dissenter, departing from the majority 23% of the time (though he did write for the majority in ***Hamdan***, the Term's biggest case). He was followed by Justice Breyer who dissented 20% of the time, while a trio of Justices (Souter, Thomas and Ginsburg) came in at a respectably independent 17%.

Who Wrote the Most: Justice Scalia authored the most majority/plurality opinions (9), but Justice Stevens wrote the most opinions overall (27, including 7 majorities, 5 concurrences, and 15 dissents).

The Rise of Unanimity: The Court issued a whopping 48 unanimous decision this Term, compared with only 31 last Term. Not surprisingly, there also were fewer five-Justice majorities this Term—only 16 compared to last Term's 23. But Justice Kennedy loomed large in those cases, confirming his pivotal role on the Court in the post-O'Connor era. In 11 of the 16 "split" decisions, Kennedy was the fifth vote, a key member of the plurality, or a pivotal concurrence in the judgment.

In short, it was quite a Term—and with that, it's on to the summaries themselves! We hope this Term in Review is as useful and fun for you to read as it has been for us to create. The Updates will return with the start of the October 2006 Term—until then, thanks, as always, for reading!

Ken & Kim

PART ONE: CIVIL CASES

ANTITRUST

It was a blockbuster Term for antitrust defendants, who went three for three. In perhaps the most significant antitrust case of the Term, ***Illinois Tool Works Inc. v. Independent Ink, Inc.* (04-1329)**, the Court held that ownership of a patent no longer creates an automatic presumption of market power. Illinois Tool Works ("ITW") makes ink jet printheads and ink containers, and sells them to manufacturers on the condition that they and their customers buy only ITW's special ink. The printheads and containers are patented, but the ink is not. Independent Ink, a competitor, claimed that ITW's condition was a *per se* illegal "tying" arrangement under the Sherman Act. Usually, a plaintiff must prove that the defendant has market power in the "tying" product that forces buyers to purchase the "tied" product, but Independent Ink claimed that ITW's patent was conclusive proof of market power. The Federal Circuit agreed, relying on the Court's decision in *International Salt Co. v. United States*, 332 U.S. 392 (1947), which borrowed the "patent equals market power" presumption from patent law's "patent misuse" defense. That defense allows patent infringement defendants to argue that a patent owner is abusing its patent to restrain competition in its other, unpatented goods. The Court repeated this assumption as recently as 1984, in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

But now it's gone, thanks to a unanimous opinion by Justice Stevens (Justice Alito did not participate). After noting that its "strong disapproval of tying arrangements has substantially diminished," the Court marched through an extensive history of its tying jurisprudence and the patent misuse doctrine. The key for the Court was that in 1988 Congress did away with patent law's market-power presumption by requiring actual proof of market power to support a patent misuse defense. In light of that congressional judgment, the Justice Department's and FTC's abandonment of the presumption, and the fact that the academic literature almost universally condemned the presumption, the Court concluded that tying arrangements involving patented products similarly should require actual proof of market power. The Court also rejected Independent Ink's fallback positions—either a rebuttable presumption of market power or a presumption that applies only to "requirements" ties that cover purchases over time (*i.e.*, ink refills)—finding no support for those positions even in *International Salt*. Stevens also put in a nod to Justice O'Connor, whose concurrence in *Jefferson Parish* questioned the propriety of treating *any* tying arrangement as a *per se* antitrust violation, as well as the "patent equals market power" presumption, which she observed came from patent law and not from anything in antitrust law. As Stevens put it: "Justice O'Connor was, of course, correct."

Next, in ***Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.* (04-905)**, a 7-2 Court held that a heavy-duty truck manufacturer's inconsistent discounts for dealers did not violate federal price-discrimination laws since the dealers were not competing for the same retail customers. Reeder-Simco sued Volvo under the Robinson-Patman Act, claiming that Volvo was giving other dealers more advantageous wholesale discounts for their bids on retail truck contracts. Dealers, before bidding, would go to Volvo and request a customer-specific discount that they would build into their bids. Where two Volvo dealers were bidding against each other, Volvo's policy was to give them both the same discount. Reeder-Simco nevertheless alleged price discrimination based on: (1) evidence that Volvo gave larger discounts to other dealers who were bidding on contracts for which Reeder-Simco did *not* bid; (2) one instance where

Reeder-Simco was bidding against another Volvo dealer and Volvo promised the two dealers the same discount during bidding but, after the other dealer won the bid, Volvo gave it a higher discount; and (3) one instance in which Volvo increased Reeder-Simco's discount to match the discount for another dealer bidding on the same contract. The jury found for Reeder-Simco, the district court awarded treble damages, and the Eighth Circuit affirmed. The Court, led by Justice Ginsburg, reversed and remanded. The Court expressly left open whether Robinson-Patman even applies to competitive bidding or special-order sales, as opposed to sales from inventory. Instead, it held that, regardless, Reeder-Simco did not show competitive injury because it was never in *actual competition* with a more favored dealer. Evidence regarding discounts Volvo gave to dealers for bidding that did not involve Reeder-Simco was irrelevant—particularly since the evidence was only anecdotal (Reeder-Simco did not look at all of Volvo's discounts, and admitted it might have gotten better discounts than other dealers on other bids). Reeder-Simco's head-to-head evidence fared no better, as in both instances Volvo gave each dealer the same discount during bidding, the only time it could have affected competition between the dealers.

Justice Stevens dissented, joined by Justice Thomas (yes, you read that correctly). Volvo was admittedly trying to streamline its dealer network, and they thought the jury reasonably could have concluded that it was doing so by giving different discounts to dealers in the same geographic area. Nothing suggests that price discrimination is a transaction-specific inquiry, and treating it as such would ignore the reality that "competition among truck dealers is a continuing war" not limited to single deals.

Finally, in ***Texaco Inc. v. Dagher*** **(04-805)** and ***Shell Oil Co. v. Dagher*** **(04-814)**, the Court unanimously held that where a joint venture by two oil companies sets a single price for its gas, there has been no *per se* violation of the antitrust laws. Texaco and Shell set up a joint venture, Equilon, to refine and sell gas to their stations in the western United States, but still under the Texaco and Shell brand names. Some station owners sued, claiming that by setting a single price for both brands Equilon had committed a *per se* violation of the Sherman Act. A divided panel of the Ninth Circuit agreed with the owners, and the Court unanimously reversed. Justice Thomas's opinion noted that the Court typically adopts a "rule of reason" analysis for antitrust claims, requiring plaintiffs to show that particular restraints on trade are unreasonable and anticompetitive. *Per se* liability is reserved for agreements that are "plainly anticompetitive" on their face. Price-fixing between two *competitors* falls within the *per se* category, but this case did not because it concerned a joint venture—that is, a single entity—between two companies that did not compete in the relevant market, western gas stations. Moreover, the joint venture had been approved by the FTC and the stations did not challenge the venture itself as anticompetitive, just its prices (a tactical mistake, perhaps, but then they would have had to show that the venture itself was unreasonable). Further, the stations conceded at argument that there would be no *per se* liability had Equilon simply sold gas under its own brand—but the Court found that a joint venture, like any other firm, should have discretion to set its own prices, including the discretion to sell a product under two different brands at the same price (lesson: think hard before conceding anything at argument!). Finally, the Court rejected the Ninth Circuit's approach, which invoked the "ancillary restraints" doctrine barring joint ventures from restricting nonventure activities, because the price of Equilon's gas was central to the joint venture.

ARBITRATION

The Court continued its trend of pro-arbitration decisions in ***Buckeye Check Cashing, Inc. v. Cardegna* (04-1264)**, where a nearly unanimous Court (7-1, with Justice Alito not participating) reaffirmed that the Federal Arbitration Act ("FAA") applies in state courts and requires them to apply substantive federal law to determine whether a court or an arbitrator decides challenges to the validity of a contract with an arbitration clause. Under federal law, an arbitration clause is severable from the rest of a contract, so unless a party challenges the arbitration clause *itself*, a challenge to the validity of the contract as a whole must go to the arbitrator in the first instance. In this case, Cardegna brought a class action in Florida state court, claiming that the class members' agreements with Buckeye were illegal and void because they charged usurious interest rates. Each agreement contained an arbitration clause, but the trial court declined to enforce it because Cardegna claimed that the contracts as a whole were void *ab initio* under Florida state law. The Florida Supreme Court agreed. Justice Scalia, writing for the majority in a short and straightforward decision, held that substantive federal law governed the issue of severability. Since Cardegna challenged the contracts as a whole, rather than the specific arbitration clause, the Florida courts should have enforced the arbitration clause and left it to the arbitrator to determine the validity of the contracts and the allegedly usurious interest rates. Justice Thomas issued a lone dissent to note his longstanding belief that the FAA was never intended to apply to state courts, but was merely a procedural vehicle to allow federal courts to require arbitration. He may be right historically, but that ship has long, long since sailed.

ASSISTED SUICIDE

In ***Gonzalez v. Oregon* (04-623)**, the Court, in a 6-3 decision led by Justice Kennedy, found that the Attorney General lacks authority under the Controlled Substances Act ("CSA") to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicides in accordance with Oregon's Death With Dignity Act ("ODWDA"). The AG had issued an Interpretive Rule concluding that the term "prescription" requires a "legitimate medical purpose" for the drug, that "assisting suicide is not a 'legitimate medical purpose' . . . and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the [CSA]." If the Rule was valid, Oregon doctors prescribing lethal doses of controlled drugs under ODWDA likely would have their federal registration to prescribe controlled drugs revoked and face criminal prosecution. Oregon, along with a physician, a pharmacist, and terminally ill state residents, filed suit to challenge the Rule. The district court permanently enjoined its enforcement, and the Ninth Circuit invalidated it altogether.

After pages of decidedly dry discussion regarding the different levels of deference accorded agency interpretation (if you need a primer on *Auer*, *Chevron*, and *Skidmore* deference, this is a good place to look), the Court agreed with the Ninth Circuit. The Court found that the AG's Interpretive Rule was subject only to *Skidmore* deference—that is, only as much deference as it had "power to persuade," and the Court was not persuaded. The CSA was designed to regulate and deter recreational drug use, not to infringe on a state's right to regulate medicine absent a positive conflict between the CSA and state law. While the AG's interpretation of "prescription" was not unreasonable, the Court would not read into the CSA a fundamental alteration of this balance between the federal government and the states based on the vague word "prescription"

(or the fact that the AG could deny registration of a physician based on the "public interest"). As the Court put it, Congress "does not, one might say, hide elephants in mouse holes." The majority also seemed to find it notable that an attempt to amend the CSA expressly to prohibit physician-assisted suicide did not pass, although this was not a cornerstone of the Court's analysis. (Justice Scalia certainly would not abide such logic, which he likely would view as akin to the "dog that didn't bark.") Perhaps the most surprising part of the majority's decision is the fact that it assumed that Congress *could* have prohibited the conduct at issue under its Commerce Clause authority—it just didn't do so here.

Justice Scalia dissented, joined by Justice Thomas and the Chief. They would have afforded the AG's Rule *Auer* or *Chevron* deference and, even absent deference, agreed that the AG's interpretation was the most logical one. Thomas wrote a separate dissent to say that he believed the CSA should be interpreted consistent with principles of federalism—thus his dissent in *Gonzalez v. Raich*, 545 U.S. 1 (2005), the medical marijuana case—but having just decided *Raich* (which found that the CSA constitutionally could regulate medical marijuana grown and used within one state), that issue was "water over the dam." Absent a constitutional challenge (not made here), Thomas found no problem with the AG's interpretation in this case.

BANKRUPTCY

The Court issued two fairly significant bankruptcy decisions this Term. In ***Howard Delivery Service, Inc. v. Zurich American Insurance Co.* (05-128)**, the Court held that an insurance carrier's claim for unpaid worker's compensation premiums owed by an employer is not entitled to priority treatment as a "contribution[] to an employee benefit plan" under § 507(a)(5) of the Bankruptcy Code. The majority, led by Justice Ginsburg (who was joined by the unusual grouping of the Chief and Justices Stevens, Scalia, Thomas and Breyer), admitted that it was a close question, but concluded that worker's compensation premiums are more like liability insurance premiums than other fringe benefits—such as pension plans and group health, life and disability insurance—that clearly constitute employee benefit plans under the Bankruptcy Code. Unlike those benefits, which operate as a substitute for wages, worker's compensation insurance usually is required by state law and is a compromise that benefits both the employee and the employer—providing a fixed and secure recovery for work-related injuries in lieu of an uncertain but potentially larger recovery available via the traditional tort system. The unusual nature of worker's compensation, coupled with the principle that preference provisions should be strictly construed since bankruptcy law ordinarily favors equal distributions among creditors, supported a finding that worker's compensation premiums do not fall under § 507(a)(5). Otherwise, employee benefits that clearly fall within the section (such as pensions and health insurance) might receive lesser distributions because the available funds would be spread to cover worker's compensation claims as well as other § 507(a)(5) claims. Finally, the fact that ERISA defines employee benefit plans as encompassing worker's compensation was not dispositive because the Bankruptcy Code does not refer to or incorporate ERISA's definition, and there was no reason to believe that Congress adopted § 507(a)(5) with ERISA's definition in mind. Further, ERISA itself exempts worker's compensation plans required by law—thus sending mixed signals.

Justice Kennedy led the three dissenters, who believed that both the text and purpose of § 507(a)(5) supported including worker's compensation premiums. First, while it is true that "a

Code provision must indicate a clear purpose to prefer one claim over another before a priority is found," that does not mean that, where Congress clearly intended to create a preference, the preference should be read to give priority to as few creditors as possible. Instead, preference provisions should be read to give equal treatment to like claims—and the dissent would treat worker's compensation premiums equally with other employee benefits. The fact that ERISA defines "employee benefit plan" to include worker's compensation also favored its inclusion within the § 507(a)(5) preference category. Moreover, worker's compensation serves as a literal wage substitute. While it might not be bargained for in exchange for lesser wages as some benefits are, in the end employers pass on the cost of worker's compensation to employees through lower salaries/wages. The fact that most states require employers to provide worker's compensation does not transform it into a non-benefit since, as the majority admitted, if states began requiring employers to provide health insurance, no one would argue that health insurance suddenly fell outside of § 507(a)(5).

The second case, ***Central Virginia Community College v. Katz* (04-885)**, deeply divided the Court. A 5-4 Stevens-led majority held that, when the states accepted the Bankruptcy Clause of the Constitution, they waived their sovereign immunity to suit by a bankruptcy trustee seeking to void a preferential transfer. This was quite a surprise, since other provisions in Article I of the Constitution (such as the power of the federal government to provide patent/copyright protection) consistently had been held *not* to waive state sovereign immunity. (In fact, even prior cases dealing with the Bankruptcy Clause implied that the Constitution's ratification had not waived sovereign immunity.) Thus, this case carves new ground in the area of sovereign immunity as well as bankruptcy law. It is also of interest to those intrigued by the role of *stare decisis* since the majority admitted that its holding went against language in a prior decision but noted, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." (As you might guess, the dissent disagreed about the status of this "dicta.")

By way of background, federal bankruptcy laws generally give the federal courts exclusive jurisdiction over the property of a person who declares bankruptcy. Two years ago, in *Tennessee Student Assistant Corp. v. Hood*, 541 U.S. 440 (2004), the Court held that a debtor could sue a state agency seeking a declaration of the dischargeability of a student loan debt. The Court rejected Tennessee's claim that it was immune from such a suit, finding that the proceeding was incidental to the federal court's *in rem* jurisdiction (that is, its jurisdiction over the "res," or property of the debtor). In ***Katz***, the Court faced a more difficult question—whether a state could be sued to give back property *already in its possession* because that property constituted a "preferential transfer" under the bankruptcy laws. Preferential transfers (*i.e.*, transfers made just before the debtor files for bankruptcy) are prohibited because the law wants to ensure that debtors don't favor certain creditors (such as their friends) over other creditors. If such transfers occur, the bankruptcy trustee may petition to have them declared void, get back the property, and administer it as part of the bankruptcy estate in which all the creditors will share. The majority found that the authority to void preferential transfers also was incidental to a federal court's *in rem* powers and inherent in the Bankruptcy Clause, which empowered the federal government to make "uniform laws" respecting bankruptcies. The majority emphasized the unique and compelling need for a uniform federal set of bankruptcy laws—because the patchwork quilt of state bankruptcy laws had left debtors who had gone through one state's bankruptcy process (and had all of their assets distributed) subject to suit and imprisonment by another state. The Bankruptcy Clause clearly empowers a federal court to issue a writ of habeas corpus (which

would involve a suit against a state officer) to free a debtor who had gone through the federal bankruptcy process from imprisonment for such discharged debts in a state jail. For the majority, suing a state to recover assets of the bankrupt estate (the preferential transfers) was similarly incidental to the bankruptcy court's *in rem* authority and necessary to its powers. Thus, when the states ratified the Constitution, they waived their immunity with respect to suits involving the federal bankruptcy laws.

Justice Thomas, joined by the Chief and Justices Scalia and Kennedy, dissented. (This may be one of the cases that would have turned out differently had Justice Alito, rather than Justice O'Connor, been on the Court.) According to Thomas, there is no historical basis for giving the Bankruptcy Clause a special interpretation not applied to anything else in Article I. Further, while the Clause gave the federal government authority to enact legislation in this arena, it did not waive states' immunity from suits for monetary relief. And the fact that federal courts can use the writ of habeas corpus to free debtors from state prisons does not alter this analysis, because the writ was a well-recognized power not seen as compromising states' immunity generally. There is far more to this case (including some fascinating history that must have been compiled by an extremely over-worked law clerk), but it is beyond the scope of this Update.

CIVIL PROCEDURE

It is not too often that one finds practical trial pointers in the Court's decisions, but ***Unitherm Food Systems, Inc. v. Swift-Ekrich, Inc. d/b/a ConAgra Refrigerated Foods*** **(04-597)**, is an exception. The Court held 7-2 that a losing party who fails to file a post-verdict motion for judgment or new trial under Federal Rule of Civil Procedure 50(b) cannot challenge the sufficiency of the evidence on appeal. Rule 50 allows a party in a civil jury trial who believes the evidence cannot support a verdict against him to seek judgment as a matter of law. Usually, the party files a Rule 50(a) motion before the verdict, arguing that the case should not even go to the jury, and then, if he loses that motion and the trial, a Rule 50(b) motion for judgment notwithstanding the verdict or for a new trial. ConAgra lost a patent case against Unitherm after filing a pre-verdict Rule 50(a) motion, but it did not file a post-verdict Rule 50(b) motion. ConAgra nevertheless challenged the sufficiency of the evidence on appeal to the Federal Circuit, which reviewed the evidence and ordered a new trial. Led by Justice Thomas, the Court reversed, referring to past decisions holding that the failure to file a Rule 50(b) motion deprives an appellate court of the power to order a judgment contrary to the jury's verdict. Such a ruling requires review first by the judge who heard the evidence and has "the feel of the case," and a timely post-trial motion to that judge is an essential matter of fairness. That the Federal Circuit only ordered a new trial rather than judgment did not change the analysis. Having never asked the trial court for a new trial, ConAgra forfeited the right to seek one on appeal. Justice Stevens dissented along with Justice Kennedy, arguing that, because "Murphy's law apples to trial lawyers as well as pilots," the Rules should be read to preserve an appellate court's power to avoid manifestly unjust results in exceptional cases.

The Court also delved into the standard district courts should use for awarding attorney's fees when remanding a case to state court that has been improperly removed to federal court. In ***Martin v. Franklin Capital Corp.*** **(04-1140)**, Chief Justice Roberts delivered the Court's unanimous decision— and his first opinion as Chief. The Martins filed suit in New Mexico state

court, and the defendants removed the case to federal court only to see it remanded for failure to meet the amount-in-controversy requirement. The district court declined to award the Martins attorney's fees under 28 U.S.C. § 1447, and the Tenth Circuit affirmed, as did the Court. Section 1447 provides that fees "may" be awarded, so there is no automatic right to fees for the party opposing removal, but there also is no language in the statute indicating a presumption either for or against fee awards. To avoid undermining a defendant's right to remove while still deterring frivolous or abusive removals, the Court held that, absent unusual circumstances (left within a trial court's discretion), a court should award fees only where the removing party lacked an objectively reasonable basis for seeking removal. Because the Martins did not challenge the reasonableness of the defendants' removal arguments (they had sought a *per se* entitlement to fees, or at least a strong presumption in their favor), they were not entitled to fees.

DISCRIMINATION/CIVIL RIGHTS

The Court decided five discrimination cases this Term, including three under Title VII, one under the Americans with Disabilities Act, and one under 42 U.S.C. § 1981. Turning first to the Title VII cases, in ***Burlington Northern & Santa Fe Railway Co. v. White* (05-259)**, the Court held that the Civil Rights Act's bar on retaliation against employees who file discrimination complaints prohibits any conduct aimed at dissuading a reasonable worker from pursuing a claim. White, a Burlington forklift operator and track laborer, made a sexual harassment complaint against her immediate supervisor. He was disciplined, but Burlington also reassigned White and later suspended her without pay in connection with a separate incident (Burlington eventually reinstated her with back pay). White sued under Title VII, claiming that her reassignment and suspension were retaliation for her harassment complaint. The jury found in her favor, and the Sixth Circuit affirmed *en banc*. The Court took the case to resolve (1) whether the alleged retaliation must be an actual employment action, and (2) how harmful the action must be to constitute retaliation. If the first question presented seems odd to you (after all, White's allegations *did* concern actual employment actions), here's the story on why the Court considered it: The Sixth Circuit applied its rule that the retaliation bar encompasses any "adverse employment action" that affects the terms and the conditions of employment, and Burlington argued that the Court should adopt the Fifth and Eighth Circuits' rule barring only an "ultimate employment decision" like discharge, failure to promote or a compensation reduction. Because White's retaliation allegations easily fell under the Sixth Circuit rule, the Court technically faced a choice between only these two rules. The Circuit split, however, was even more dramatic than this, as the Seventh and D.C. Circuits treat as retaliation *anything* designed to dissuade a reasonable worker from pursuing a complaint. So the Court broadened its review to clarify a national standard for what counts as retaliation under Title VII, even though the last construction of "retaliation"—allowing non-employment actions to count—was not technically before it.

Justice Breyer wrote the Court's opinion (for all but Justice Alito), adopting the Seventh and D.C. Circuits' broader view of retaliation. While Title VII's "substantive" provision against employment discrimination is expressly limited to conduct regarding the workplace (*e.g.*, hiring, discharge, compensation, etc.), the retaliation provision bars discrimination generally, and Congress must have intended this distinction to mean something. Moreover, restricting retaliation claims to employment-related matters would leave a huge loophole in the Act, as

employers could harm employees outside the workplace to deter them from pursuing complaints. Having established that retaliation could occur within and without the workplace, the Court then held that a retaliation plaintiff must show that the alleged conduct was "materially adverse," meaning that it "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." An objective standard is necessary to avoid messy inquiries into employees' subjective feelings and to eliminate trivial harms, but it must remain general because context matters (*e.g.*, schedule changes might mean nothing to some employees but everything to mothers with young children). In White's case, her reassignment left her with more arduous and less prestigious duties, and a jury reasonably could have found that this change might have deterred a reasonable worker from pursuing a claim. And even though White's suspension was rescinded with back pay, she still had to live over a month without income, which by itself could be a deterrent despite the reinstatement.

Justice Alito concurred in the judgment only. He would adopt the Sixth Circuit's view and restrict the retaliation provision to materially adverse *employment* actions as viewed by a reasonable employee (and he agreed that White's case clearly fit this definition, hence his vote to affirm). He also thought the Court's test had multiple flaws: Do employees suffering severe discrimination get *less* protection from retaliation than others (because it will take more to deter reasonable employees with significant discrimination claims)? How many individual characteristics (*e.g.*, woman, young mother, etc.) are imported into the "reasonable employee" to account for context? What does "might well have dissuaded a reasonable employee" really mean? For Alito, this area of the law is complex enough, and the Court's decision will only complicate it further.

The Court also issued a *per curiam* decision in a Title VII racial discrimination action, vacating and remanding the Eleventh Circuit's decision in ***Ash v. Tyson Foods, Inc.* (05-379)**. After a trial resulted in hefty verdicts for two plaintiffs, Ash and Hilton, the district court granted Tyson Foods judgment as a matter of law or, in the alternative, a new trial, concluding that there was insufficient evidence of pretext to sustain either plaintiff's verdict. The Eleventh Circuit affirmed the lower court's decision as to Ash. As to Hilton, it found that there was enough evidence to go to the jury, but it still affirmed the alternative remedy of a new trial because the evidence did not support the jury's punitive damages awarded or the size of the compensatory damages award. While the Court did not reverse the Eleventh Circuit, it found two errors that required vacatur and remand. First, the Eleventh Circuit appeared to conclude, as a matter of law, that referring to the plaintiffs as "boy" (without more, such as black or white) could not be construed as anything other than benign. While the Court agreed that "boy" would not always connote racial discrimination, it might do so based on tone, context, historical usage and other factors. Second, the Eleventh Circuit used the wrong standard for determining whether Tyson Foods' asserted nondiscriminatory reasons were pretextual. The plaintiffs sought to show pretext by arguing that two less qualified white individuals were promoted above them. The Eleventh Circuit found that such comparative evidence was insufficient to demonstrate pretext except where "the disparity in qualifications is so apparent as to virtually jump off the page and slap you in the face" (that *is* a quote). While the Court declined to offer its own test (the Justices can be so helpful), "jump off the page and slap you in the face" simply couldn't be right. On remand, the Eleventh Circuit will decide whether these two aspects of its decision were essential to its holding, and, if so, it will try to come up with a better test for pretext.

In its third Title VII decision, ***Arbaugh v. Y&H Corp. d/b/a The Moonlight Café*** **(04-944)**, Justice Ginsburg, writing for a unanimous Court, found that Title VII's definition of employer, which excludes entities with fewer than fifteen employees, is *not* an unwaivable jurisdictional threshold. Instead, it's an element of a Title VII claim that *can* be waived if not asserted before judgment. Admitting that courts have given the term "jurisdictional" far too many meanings and that the Court itself has been "profligate in its use of the term," the Court adopted a bright-line rule for threshold limitations on the scope of statutes: If Congress does not say the requirement is jurisdictional, it's not. This case demonstrates the virtues of this approach. Y&H waited until two weeks *after* an adverse judgment to claim that the district court lacked jurisdiction over the plaintiff's Title VII claim because Y&H did not have fifteen employees. Discovery then ensued as to the number of individuals providing services to Y&H and whether they counted as "employees" under the law. The Court found this approach both unfair and a waste of judicial resources given that Congress had not clearly indicated that the fifteen-employee threshold was jurisdictional. Further, whether or not Y&H had fifteen employees was a factual matter that properly belonged to the jury. Since the fifteen-employee requirement is not jurisdictional, Y&H waived its claim by not raising it earlier, and Arbaugh will keep her judgment. And courts and Congress finally have clarity on this nettlesome issue of statutory construction.

Moving from Title VII to the Americans with Disabilities Act ("ADA"), in ***United States v. Georgia*** **(04-1203)** and the companion case ***Goodman v. Georgia*** **(04-1236)**, the Court held that Title II of the ADA abrogates state sovereign immunity, at least as to statutory violations that also violate the Fourteenth Amendment, allowing a disabled inmate in a state prison to sue the state for money damages. Goodman was a paraplegic in a Georgia prison who sued prison officials for, among other things, confining him in a cell too small for him to turn his wheelchair and refusing to help him get to the bathroom, forcing him to sit in his own waste for periods of time. The Eleventh Circuit held that these allegations, if true, would violate the Eighth Amendment's bar on cruel and unusual punishments and thus supported a civil rights suit under 42 U.S.C. § 1983. But it also held that Goodman could not sue under the ADA because the state enjoyed sovereign immunity under that statute. In an opinion by Justice Scalia, the Court quickly and unanimously reversed. The ADA allows suits for money damages against public entities, including state prisons. This abrogation of sovereign immunity is clearly valid to the extent that it reaches actual violations of the Fourteenth Amendment because Congress can create private remedies to enforce that Amendment. Given the uncontested ruling that Goodman had alleged at least some Eighth Amendment violations (and thus Fourteenth Amendment violations by the state), Title II of the ADA was a valid waiver of sovereign immunity as to these claims. The Court, however, left open the issue of whether Title II also waived sovereign immunity for ADA violations that did not rise to the level of constitutional violations. Instead, it ordered that on remand the district court should review Goodman's complaint on a claim-by-claim basis to see if his ADA allegations included any conduct that did not also violate the Fourteenth Amendment, and only then should the court reach that question. Justice Stevens, joined by Justice Ginsburg, concurred with that approach, and added that Eighth Amendment claims were not the only possible constitutional rights applicable in the prison context.

Finally, in ***Domino's Pizza, Inc. v. McDonald*** **(04-593)**, the Court (8-0, for all but Justice Alito), found that John McDonald, the sole shareholder and president of JWM Investments, could not sue under 42 U.S.C. § 1981 (which protects the right of all persons to make and enforce contracts without respect to race) for Domino's breach of contracts with JWM because of alleged racial

animus toward McDonald. The Court, led by Justice Scalia, explained that it would upend the law of corporations and agency to allow a shareholder to sue for breach of a contract to which the company—not the shareholder—was a party. Section 1981 is not a panacea for all racial injustice, but only provides a cause of action to those whose rights under a contract (or whose right to make contracts in the first place) are violated. Under general principles of corporate law, McDonald had no rights or responsibilities under the Domino's contracts, so he had no claim under § 1981.

DUE PROCESS

***Jones v. Flowers* (04-1477)**, a case (from Arkansas, no less) whose name conjured visions of a saucy match-up between two acquaintances of a recent President, sadly failed to live up to its enticing caption. Instead, the case yielded a rather dry holding that when a notice of a tax foreclosure is returned unclaimed, a state must take additional reasonable steps to provide notice before selling the property, if it is practical to do so. Here are the details: After Jones separated from his wife, he moved out of their Arkansas house, and the couple's property taxes went unpaid. The state mailed a delinquency notice to Jones at the house, but nobody was home to sign for it and it was returned to the state unclaimed. Two years later, the state published a notice in the newspaper and sold the property to Flowers. Jones learned of the sale and sued, claiming that the sale violated his due process rights. The Arkansas courts found for Flowers, but, in a fairly lengthy opinion by the Chief, the Court reversed 5-3. The key point is this: While due process requires only that notice be *reasonably calculated* to reach the recipient, when the state *actually* becomes aware that its effort has failed, not following up would be unreasonable. Although the Court declined to prescribe exactly what a state must do, it noted that here the state could have sent the notice by regular mail, so it could be left at the house, or posted notice on the door (in fact, Jones learned of the sale after the fact in this just way, when an occupant—his daughter—was served with an unlawful detainer notice). Justice Thomas dissented, joined by Justices Scalia and Kennedy, on the ground that the reasonableness of notice is supposed to be calculated *ex ante*, not *ex post*. Also, under the Court's new rule, any time a doubt is raised, a state will have to consider additional steps, a process that may have no end point short of ensuring actual notice—which the law never has required. Finally, the dissent found the Court's suggested alternatives no more reasonably calculated to reach Jones than what the state actually did.

EDUCATION

The Court issued two decisions this Term construing the Individuals with Disabilities Education Act ("IDEA"), both making litigation somewhat more difficult for parents. In the first, ***Schaffer v. Weast* (04-698)**, the Court held that the burden of persuasion in a challenge to an individualized education plan ("IEP") for a disabled student rests with the party seeking relief (usually the parents). To ensure that disabled students get a "free appropriate public education," IDEA requires school districts, together with parents, to develop IEPs for all disabled students. Parents can challenge IEPs in an administrative hearing (as can districts, if they want to change an IEP but the parents do not consent). The statute, however, is silent as to who bears the burden of proof. The Schaffers challenged the IEP developed by their son's school district, and an

administrative judge charged them with the burden of persuasion and upheld the IEP. The district court reversed, and the Fourth Circuit reversed right back, holding that IDEA followed the default rule that the burden of persuasion lies with the party seeking relief. The Court, led by Justice O'Connor, agreed by a vote of 6-2. While the default rule does have some exceptions, the Schaffers basically were arguing that every IEP is invalid until the school district proves otherwise, which was not supported by the statute. Also, while a litigant generally does not bear the burden of persuasion where the adversary has all the facts, that exception does not apply here because IDEA gives parents the right to all records regarding their child plus the right to an independent evaluation. Justice Stevens concurred to say that the Court's ruling did not foreclose a different result under another statute, and that he went with the majority because courts should first presume that public school officials are performing their responsibilities appropriately.

There were two dissents. As proof that not everything is about ideology, Justice Ginsburg echoed Judge Luttig's dissent in the Fourth Circuit, writing that the school district is far better situated to demonstrate that it has satisfied the statute than are parents to show that it has not, and that in any event the proponent of the IEP should have to prove its adequacy. Doing so cannot be that burdensome because nine states wrote as *amici* in favor of that position. Justice Breyer dissented to say that the issue should be left to the states, which under IDEA have to set up the administrative procedures to decide IDEA challenges. (The majority declined to decide whether states could depart from the default rule since Maryland had established no rule on the burden of proof in IDEA hearings.)

Next, in ***Arlington Central School District Board of Education v. Murphy*** **(05-18)**, the Court held that IDEA does not require school districts sued under the Act to reimburse prevailing parents for expert witness fees. IDEA provides that a court "may award reasonable attorneys' fees as part of costs" to prevailing parents. After the Murphys won an IDEA suit, the district court awarded them their expert fees under this provision. The Second Circuit affirmed, but the Court reversed by a vote of 6 to 3. Led by Justice Alito, the Court explained that IDEA was enacted pursuant to the Spending Clause, whereby Congress can attach strings to states' receipt of federal funds so long as states get clear notice of those obligations so they can evaluate whether to accept the funds. Far from providing clear notice that states could be liable for expert fees, the text of IDEA explicitly provides only for "attorneys' fees" and "costs," terms of art that cannot be interpreted to include expert fees (the Court noted that "costs" likely referred to costs as defined in other federal statutes, which did not include expert fees). Moreover, in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) and *West Virginia Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), the Court addressed very similar language in other statutes and found that it did not encompass expert fees. While the legislative history admittedly supported a contrary interpretation (including a Conference Committee Report specifically stating that Congress intended to include recovery of expert costs), this was "simply not enough" given that every other indicator cut against that history. This was particularly true because, "[i]n a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." Justice Ginsburg concurred in part and in the judgment. While she disagreed that any special "clear notice" requirement applied in Spending Clause cases, she agreed that the Court's prior precedent, along with the fact that Congress had expressly authorized recovery of expert fees in

statutes "too numerous . . . to ignore," required a finding that IDEA's cost-shifting provision could not reasonably be interpreted to cover expert fees.

In dissent, Justice Breyer (joined by Justices Stevens and Souter) walked through the legislative history, which he believed (and the majority did not really dispute) made abundantly clear that Congress intended to include expert fees. Further, the cost-shifting provision was enacted as part of the Handicapped Children's Protection Act, which also required the General Accounting Office ("GAO") to study the fiscal impact of the cost-shifting provision, including data on expert expenses. For the dissenters, this requirement would be nonsensical if expert fees were not reimbursable. Moreover, the word "costs" is not so unambiguous as to require the Court to ignore congressional intent. The dissenters also rejected application of the clear-notice rule to every detail of a statute enacted under the Spending Clause, finding that it should not be applied to mere remedies and other details unlikely to affect a state's decision whether to accept funds. (The dissent pointed out that the Court previously construed IDEA to require schools to reimburse parents for substantial expenses such as private school tuition, *without* applying the "clear notice" rule.) With respect to the majority's secondhand treatment of very compelling legislative history, Breyer made an impassioned plea to "retain all interpretive tools—text, structure, history and purpose." For Breyer, the majority's approach "divorces law from life." Souter issued a separate dissent to emphasize that, for him, the key was Congress's simultaneous enactment of the fee-shifting provision and the GAO reporting mandate—Congress wouldn't have required collection of expert witness data if it didn't believe such expenses were included in costs.

ELECTION LAW

The Court's election law cases yielded some of the most divided and controversial decisions of the Term. ***League of United Latin American Citizens* ["*LULAC*"] *v. Perry* (05-204)** resulted in an almost unbelievably splintered decision on a "partisan gerrymandering" challenge to Texas's most recent congressional redistricting plan. ***LULAC*** consisted of four cases challenging various aspects of the plan, which has a lengthy history. Texas gained congressional seats following the 1990 census, requiring the state to draw new district lines. At that time, the Democrats controlled the Texas legislature, and they enacted a plan that safeguarded their majority status in the state's congressional delegation. Texas Republicans challenged the plan but lost, and they continued to constitute a minority of the Texas congressional delegation despite making considerable gains at the state level. After the 2000 census, Texas again gained congressional seats, but a divided Texas legislature could not come up with new district boundaries, so a federal three-judge panel stepped in to draw the lines. In 2003, the Republicans captured both houses of the Texas legislature, and they proceeded to redraw the lines again, this time to their benefit. One group of citizens challenged the new plan, arguing that the "mid-decade" statewide redistricting was a blatant "partisan gerrymander" that violated the Voting Rights Act, while other groups claimed that the alleged use of race and politics to draw certain district boundaries violated the First Amendment and the Equal Protection Clause. Another three-judge panel upheld the new plan against these challenges, and the Court consolidated the cases on appeal.

Justice Kennedy wrote the principal opinion in the Court's decision, which affirmed in part (rejecting the challenge to the statewide plan and to one congressional district), reversed in part

(finding that another district's boundaries did violate the Voting Rights Act), and vacated in part (by not reaching certain claims in light of the other holdings). We'll take the various challenges one at a time, which *may* help keep the whole mess straight.

The Challenge to the Plan as a Whole

The challenge to the entirety of the statewide plan was that it was a partisan gerrymander that denied equal protection of the laws by burdening Democrats because of their views and association. The key cases in this area were *Davis v. Bandemer*, 478 U.S. 109 (1986), where a majority of the Court recognized political gerrymandering as a valid claim but could not agree on its elements, and *Vieth v. Jubelirer*, 541 U.S. 267 (2004), where a plurality of a differently-constituted Court thought such challenges were nonjusticiable and best left to the politicians. This time around, the Court declined to revisit the justiciability issue and again could not come up with a standard to apply to political gerrymandering. Instead, we have a cobbled-together holding that, whatever the standard should be for these claims, it can't be the appellants' preferred rule that *any* mid-decade redistricting (*i.e.*, one not done in response to census results requiring new districts) *must* have been done for partisan reasons and therefore *must* violate the First and Fourteenth Amendments. Justice Kennedy, writing for himself, noted that this rule would make no sense, as it would allow for expressly partisan redistricting just after a census but strike down a perfectly sensible plan done mid-decade. Also, there could be any number of valid reasons for a state to redraw lines that (as here) had been mandated by a court a few years earlier—including trying to match the balance of electoral power in the state as opposed to entrenching a minority (as the old plan had done). In a portion of his opinion joined by Justices Souter and Ginsburg, Kennedy also found that mid-decade partisan redistricting, by itself, was not "sufficiently suspect" to give shape to a "manageable" standard for determining when a gerrymander was unconstitutional. By failing to offer a reliable standard for review, the appellants had failed to state a claim. In a separate opinion, the Chief (joined by Justice Alito) agreed that appellants had offered no reliable standard for identifying unconstitutional partisan gerrymandering, and so their claim should be rejected. Given that finding, he took no position on the justiciability issue, keeping his powder dry for later.

Justice Scalia, joined by Justice Thomas, concurred in this part of the judgment, but they would hold that partisan gerrymandering is nonjusticiable. They felt that Kennedy's disposition of the case was just wrong—either the claim is nonjusticiable and should be dismissed, or there are standard elements to the claim and the case should be dismissed because the appellants failed to state them. But the Court cannot say "we don't know what the elements of this claim are yet" and then dismiss for failure to state them (it's kind of hard to argue, when he puts it that way).

Justice Stevens dissented from this part of the judgment and was joined by Justice Breyer. They would hold that purely partisan gerrymandering is unconstitutional because it serves no legitimate governmental purpose, retaliates against individuals based on their political preferences, and discriminates against a politically disfavored group. Stevens also thought that the appellants' mid-decade rule could give rise to a judicially manageable constitutional inquiry—here, for example, it was easy to identify the legislature's motive as partisan. In his own two-page opinion, Breyer agreed, finding that the partisan purpose behind the new plan was obvious. Stevens also wrote, this time only for himself, that much of Kennedy's opinion went to the merits rather than the "manageability" of the inquiry, as it focused on whether the

complaining party's "representative rights" were burdened. Stevens thought they clearly were: Democrats across the state lost both the chance to elect their candidates in many districts *and* the ability to influence Republicans who, because they had newly entrenched majorities, had no need to listen to the opposition. Recognizing that politics will always be a part of redistricting, Stevens would hold that where the predominant motive is to disadvantage a politically salient group, and that purpose is achieved, then the Constitution has been violated.

If you're trying to keep score, that's seven votes to reject the partisan gerrymandering claim (five because the appellants' rule is unmanageable and two because the claim is nonjusticiable), with Stevens and Breyer in the dissent. On justiciability, the four more liberal justices appear united in their belief that partisan gerrymandering is still justiciable, while Scalia and Thomas take the contrary view, and the Chief, Alito and Kennedy want to save the issue for another day. When that day comes, it will come down to their votes.

The Challenge to Districts 23 & 25

Another challenge in the case was to the particular borders of Texas Congressional District 23, which was redrawn to safeguard a Republican incumbent threatened by a rising Latino population (though the incumbent was himself Latino) by creating a new District 25 absorbing much of that population and linking it by a "bacon-strip" of land to another Latino area some 300 miles away. Here, at least, there was a clear majority (Kennedy, Stevens, Souter, Ginsburg and Breyer) holding that District 23 violated the Voting Rights Act. Under the Court's cases applying the Act, the test is whether a given district is a minority "opportunity district"—that is, whether the minority group is large enough, geographically compact enough, and politically cohesive enough to elect the candidate of its choice, but for majority bloc voting. If so, then the courts must look to the totality of the circumstances to see if the minority has been denied the chance to participate in the political process and elect its choice. Latinos in District 23 qualified for this analysis as they were geographically compact and a majority of the district's population (Texas argued that its creation of District 25 solved this problem by creating a new Latino opportunity district to compensate for the loss of the old one, but the Court did not agree because District 25 violated the principle of compactness—the two Latino groups put together in the new district were geographically distant and had different interests and needs: "The mathematical possibility of a racial bloc does not make a district compact.") Turning to the circumstances, the Court looked at the proportion of Latino opportunity districts in the state relative to the Latino share of the citizen voting-age population, and found that Latinos were two districts shy of proportional representation. Also, Latinos in District 23 had been poised to elect their choice of representative, having increasingly voted against the incumbent in recent elections, and the redistricting followed a history of voting-related discrimination against Latinos in Texas. Given these facts, the plan as to District 23 violated the Voting Rights Act—and given that statutory violation, the majority declined to reach the appellant's First Amendment and equal protection claims as to the district, or to decide whether District 25 also was invalid (since it would have to be redrawn anyway due to the ruling on District 23).

The Chief and Alito dissented from this ruling, principally on the issue of whether District 25 compensated for the loss of old District 23. The district court had found that District 25 had a Latino majority that acted as a voting bloc, such that it was a more effective Latino opportunity district than old District 23, and that the plan actually created more Latino opportunity districts in

that region of the state (*i.e.*, it looked at proportionality regionally, not statewide). For Roberts, the majority's holding was basically that the Texas plan maximized the possible Latino opportunity district "but loses on style points" because District 25 is an ungainly "bacon-strip" district (which was inevitable given the geography and demography of Texas). But there was no "freestanding compactness" requirement in the Voting Rights Act, which would impose counterproductive *per se* restrictions on states' ability to draw lines to comply with the Act's other requirements. Roberts closed by noting that "I do not believe it is our role to make judgments about which *mixes* of minority voters should count . . . . It is a sordid business, this divvying up by race."

Scalia's opinion also included a dissent from this holding; he and Thomas would have dismissed the District 23 challenge for failure to state a Voting Rights Act claim. As a result, Scalia noted that he was required to reach the appellants' constitutional equal protection claims. In an analysis joined by the Chief, Thomas and Alito, Scalia rejected those claims. Although the Court will not hesitate to apply strict scrutiny where racial concerns are the predominant motives behind state action, the district court found that the Texas legislature was not *racially* motivated when it redrew District 23—it was protecting the Republican incumbent, and it just so happened that the loyal Democrats it moved around were Latinos. This finding was not clearly erroneous. As to District 25, these Justices would have found that its creation *was* racially motivated (Texas was trying to create a majority Latino district), but that complying with the Voting Rights Act was a compelling state interest, and the new district was reasonably necessary for and narrowly tailored to doing so. So they would affirm the district court's ruling in all respects as to both districts.

For the scorekeepers, that's 5-4 to reverse and redraw District 23 (and by necessity District 25) under the Voting Rights Act. Had the Court reached the constitutional claims, four Justices would have upheld the districts. Since the majority did not speak to the issue, it's unclear what would have happened (paging Justice Kennedy . . .).

The Challenge to District 24

Finally, the appellants also challenged the borders for District 24 in the Dallas area, which were redrawn to break up an African-American population that consistently voted for a Democratic incumbent. Although blacks were not a majority in the old District 24, the appellants argued that they nevertheless dominated the district such that they too qualified for the Court's review under the Voting Rights Act. In other words, although District 24 was not a "majority-minority district," it was a "coalition district" whose minority population was entitled to Voting Rights Act protections. Assuming (without deciding) that this was a valid argument, a plurality led by Kennedy (along with, for this part of his opinion, the Chief and Alito) nevertheless found no error in the district court's ruling that old District 24 was not an African-American opportunity district: Whites controlled the district, and there was no evidence that blacks could elect the candidate of their choice, so there could be no Voting Rights Act violation. Scalia and Thomas concurred, as evidenced by Scalia's statement in his opinion that none of the statutory challenges stated a claim.

Souter dissented, joined by Ginsburg. They not only would assume that a coalition district can qualify for Voting Rights Act analysis, they expressly would hold that it can, at least where

minority voters are the majority of those voting in the primaries of the party that tends to win the general elections—meaning they can usually elect their choice. So they would not reject the District 24 claim out of hand, but would remand for the district court to review the other Voting Rights Act gatekeeping criteria and, if those criteria also were satisfied, the totality of the circumstances for discrimination. Stevens also dissented, but he would not have bothered to remand because District 24 was, for him, an unconstitutional partisan gerrymander. Breyer did not join this part of Stevens's dissent, but he seems implicitly to have agreed with the reasoning by finding the "entire" plan unconstitutional. Score: 5-4 to affirm.

Randall v. Sorrell* (04-1528 & 04-1697)** and ***Vermont Republican State Committee v. Sorrell* (04-1530)** yielded an equally fractured decision on campaign financing limits. ***Randall concerned Vermont's Act 64, which imposed two kinds of limits on campaign spending: (1) *expenditure* limits on spending by candidates within each two-year election cycle; and (2) *contribution* limits on donations by individuals and groups (including PACs and parties) to candidates during each cycle, ranging from $400 for governor to $200 for state legislators and a $2,000 cap on contributions to parties. Relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), the district court held that the expenditure limits violated the First Amendment; it also struck down the limits on party contributions to candidates; but it upheld the other contribution limits. On appeal, the Second Circuit upheld *all* the contribution limits, and also held that the expenditure limits might be constitutional under certain circumstances.

The Court reversed by a vote of 6-3, but no opinion garnered a majority of the Justices. Justice Breyer announced the Court's decision in a plurality opinion joined by the Chief and (with one exception) Justice Alito. That exception was Breyer's treatment of the expenditure limits under *Buckley*. *Buckley* struck down federal expenditure limits on the ground that, unlike contribution limits that leave donors free to speak about candidates and issues, expenditure limits actually restrict candidates' ability to speak, and this restriction could not satisfy strict scrutiny. Breyer and the Chief saw no reason to depart from *stare decisis* and overturn *Buckley*. Congress and the states have relied on the decision, and Vermont had made no showing of dramatically changed circumstances. They also rejected Vermont's (and the Second Circuit's) view that a new interest not expressly considered in *Buckley*—limiting the amount of time state officials spend fundraising—justified Act 64's expenditure limits. For Breyer and the Chief, the connection between spending and fundraising demands was obvious in the briefs in *Buckley* and thus implicitly rejected by that Court. Alito did not join this part of Breyer's opinion, taking an even harder line in his separate concurrence: He would refuse even to hear Vermont's request to reexamine *Buckley* on the ground that it had failed to make any presentation on the need to deviate from *stare decisis*.

On the contribution limits, Breyer (now joined by the Chief and Alito) again turned to *Buckley*, which upheld federal $1000 contribution limits as "closely drawn" to match a "sufficiently important interest" in preventing corruption. *Buckley* acknowledged, however, that in a future case the limits might be so low that they unduly magnified the advantages of incumbency or prevented candidates from amassing the resources needed for effective advocacy. Noting that it had "no scalpel to probe" every contribution level, the plurality recognized that there had to be some lower bound on limits, and in its view, Act 64 crossed it. Vermont's limits were lower than any other state's, and significantly lower in real dollars than the 1976 limits upheld in *Buckley*. Those "danger signs" warranted close examination of the record to make sure that Act

64 was "closely drawn." The plurality found that it was not based on five factors: (1) Act 64 likely would restrict the funding available for those challenging incumbents and from parties, particularly in hotly contested races (as it effectively would prevent parties from targeting resources at competitive districts); (2) applying such low limits to parties threatened the right to associate; (3) Act 64 appears to count campaign volunteers' incurred expenses (*e.g.*, travel, coffee and doughnuts, etc.) toward the limits, which could have a real effect since the limits are so low; (4) the limits are not adjusted for inflation; and (5) corruption seems no worse in Vermont than in other states.

Justice Kennedy wrote a curious concurrence in the judgment in which he agreed that both campaign limits in Act 64 violated the First Amendment, and that, "[v]iewed within the legal universe we have ratified and helped create, the result the plurality reaches is correct." But Kennedy felt the *Buckley* "universe" creates more problems than it solves, as it requires the Court, with no expertise on these matters, to explain why a $200 limit is no good while a $1500 limit is okay. Given his "skepticism regarding that system and its operation," Kennedy concurred in the judgment only.

Justice Thomas, joined by Justice Scalia, also concurred in the judgment. They would ignore *stare decisis*, overrule *Buckley*, and simply subject all of Act 64 to strict scrutiny (under which it would fail). Under their view, *Buckley* is illegitimate and unworthy of deference because it fails to offer sufficient protection for political speech (that is, they would make no distinction between expenditure and contribution limits, which they regard as equally severe restrictions on speech). In a stronger version of Kennedy's concurrence, they also argued that *Buckley* is incapable of principled application, citing the plurality's opinion as Exhibit A in that regard: How can the Court determine that a given limit is on the good or bad side of a line that cannot be drawn rationally?

There were two dissents. Justice Souter, who was joined by Justice Stevens (in the main) and Justice Ginsburg, felt that limiting fundraising time by state officials was a sufficiently compelling interest to support an expenditure limit under *Buckley*; the dissenters would remand to the district court for determination of whether Act 64 was narrowly tailored to further that interest. As to the contribution limits, the dissenters found that they were no more restrictive than the laws enacted by other states when adjusted for population and district size, and they pointed to anecdotal evidence that Act 64 did not give incumbents that much of an advantage. Given that "Vermont is not an eccentric party of one," the Court should defer to its legislature as to the risk of corruption that Act 64 aims to mitigate. Finally, Stevens wrote his own dissent to say that he too thought it was time to overrule *Buckley*—but unlike Thomas and Scalia, he would do so to *allow* expenditure limits. Stevens noted that *Buckley* itself upset longstanding expenditure limits, which he viewed as complementing corruption-prevention efforts, protecting equal access to the political arena, and "freeing candidates from the fundraising straitjacket" (which, he argued, the Framers would have found appalling). Stevens also noted that these limits were not so much content restrictions as they were time, place and manner restrictions that are valid so long as their purpose is "legitimate and sufficiently substantial" (and he clearly thought Act 64's was).

In ***Wisconsin Right to Life, Inc. v. Federal Election Commission*** **(04-1581)**, the Court issued a unanimous *per curiam* opinion in which it sent a constitutional challenge to the Bipartisan

Campaign Reform Act back to a district court for consideration as an "as-applied" challenge. BCRA bars corporations from using general funds to pay for "electioneering communications." Wisconsin Right to Life argued that the law was unconstitutional as applied to several "grassroots lobbying advertisements" it wanted to run during the 2004 election. A three-judge district court panel dismissed the case, interpreting a footnote in the Court's opinion in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), as foreclosing as-applied challenges to the ban. The Court corrected that misreading, noting that while *McConnell* held that the law was constitutional on its face, that did not foreclose future challenges to its application to a given advertisement. So the case goes back to the district court, for now.

The Court also considered ***Lance v. Dennis* (05-555)**, which ostensibly was an election-law case but which actually turned on the intricacies (or lack thereof) of the *Rooker-Feldman* doctrine. You can find that case *infra* in the JURISDICTION section.

EMPLOYMENT

Employment discrimination cases are discussed *supra* in the DISCRIMINATION/CIVIL RIGHTS section. As a result, this section includes somewhat of a hodgepodge of other employment-related statutes. For example, in the combined cases of ***IBP, Inc. v. Alvarez* (03-1238)** and ***Tum v. Barber Foods, Inc.* (04-66)**, a unanimous Stevens-led Court held that, under federal wage and hour statutes, workers are entitled to compensation for their "walking time" between production areas and locker rooms where they change into specialized gear, but not for "pre-donning waiting time" while they hang around waiting to pick up gear. The case involved the 1938 Fair Labor Standards Act ("FLSA") as amended by the 1947 Portal-to-Portal Act ("PPA"), both of which govern what employers must pay production workers while (amazingly) failing to define "work." Although the PPA excludes from the FLSA any walking time between principal work areas and "preliminary and postliminary activities," the Court had previously held that any activities that were "integral and indispensable" to principal work activities were covered—such as "donning and doffing" specialized gear in a locker room. The issue in these new cases was, accepting that walking to a locker room *before* work is excluded, what about walking from the locker room to and from the work station after one has put on specialized work gear or before one has removed it? The Ninth Circuit said this walking time was compensable under the FLSA, while the First Circuit said it was excluded by the PPA.

The Court sided with the Ninth Circuit. In essence, the Court held that because donning or doffing specialized gear is "integral" to a principal work activity, it is *itself* a principal activity and not excluded by the PPA. So in a continuous work day, any time between the beginning of the first principal activity and the last (*i.e.*, between donning the gear and doffing it) is not excluded by the PPA and is compensable. That settled the Ninth Circuit case, but the First Circuit case (***Tum***) added the bonus issue of what to do about the time workers spend waiting in the locker room to get their specialized gear before they put it on, or to get their regular clothes back. Because Tum's employer did not require its employees to arrive at a particular time to start waiting on their gear, the record did not establish that this waiting time was "integral and indispensable" to all the donning, so this "pre-donning" time was excluded by the PPA. But because doffing the gear remained a principal activity, the FLSA still covered the pre-doffing locker room time.

The Court also addressed the Federal Employee Health Benefits Act in ***Empire Healthchoice Assurance, Inc. v. McVeigh*** **(05-200)**, where the Court split 5-4. The case concerned whether FEHBA, which allows the federal government to contract with private health carriers, confers federal-question jurisdiction over plan reimbursement claims when covered employees win damages in state court for injuries treated under their plans. The answer: No. McVeigh's estate settled a wrongful death action in New York state court for about $3 million, and the health plan sued in federal court to recover about $160,000 it had paid toward his medical care. Although FEHBA did not expressly create a federal cause of action for reimbursement, the carrier and the United States as *amicus* argued that there was federal jurisdiction because Congress intended all rights stemming from FEHBA health contracts to be "federal in nature." The Court, led by Justice Ginsburg (who was joined by the Chief and Justices Stevens, Scalia and Thomas) was not persuaded. There were federal interests at stake—federal funds pay for the health plans, which cover federal employees—but any right to reimbursement was created not in FEHBA but in the carrier's individual plan contract, and contract interpretation is a typical state-law question. While FEHBA expressly provides that the terms of federal health plans preempt any state laws on health benefits, the Court declined to interpret that "unusual" provision broadly—if Congress intended to displace state law altogether and confer federal jurisdiction, "it may be expected to make that atypical intention clear." The Court also rejected the government's argument that federal law was a "necessary element" of the carrier's claim: The reimbursement claim was not triggered by a federal agency but by the settlement of a state-court lawsuit, and it depended not on a legal issue but on facts regarding the payment for health services.

The dissenters, led by Justice Breyer, were an interesting mix (including Justices Kennedy, Souter, and Alito) that argued that the reimbursement claim arose under federal common law. The right to reimbursement may be a creature of contract, but it is a contract written by a federal agency pursuant to a federal statute creating benefits for federal employees, and any funds recovered ultimately go to the U.S. treasury. The dissenters also pointed to *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), which recognized that federal contracts are governed exclusively by federal law. Congress's failure to spell out jurisdiction over these suits thus may reflect an oversight or its belief that doing so was unnecessary. Finally, the dissenters noted the need for uniformity regarding federal health plans, which argued against allowing different states' laws to govern reimbursement actions. (In response, the majority noted that post-*Clearfield* decisions and "enlightened commentary" had made clear that uniform federal law need not apply in all federal government litigation; unless there was a significant conflict between state law and the federal interest, there was no reason to dislodge state law or vest jurisdiction in federal courts.)

Finally, in ***Whitman v. Department of Transportation*** **(04-1131)**, the Court remanded to the Ninth Circuit a case involving a Federal Aviation Administration employee who challenged the agency's drug-testing policy without first filing a union grievance. The Court granted cert to review the Ninth Circuit's ruling that the suit was barred, but opted instead to ask the Ninth Circuit first to determine whether the drug-testing policy alleged by Whitman was a "prohibited personnel practice" under the Civil Service Reform Act and thus subject to different treatment from other kinds of grievances (potentially a jurisdictional issue for the Court).

ENVIRONMENT

The Court issued two decisions with potentially significant consequences for the environment. In fact, some commentators have proclaimed the decision in the combined cases of ***Rapanos v. United States*** **(04-1034)** and ***Carabell v. United States Army Corps of Engineers*** **(04-1384)**, to be the Court's highest-impact decision of the Term. In ***Rapanos,*** the Court vacated two lower court judgments regarding the scope of the Corps's authority to regulate wetlands under the Clean Water Act ("CWA"). The case yielded no majority opinion. Instead, there was a four-Justice plurality led by Justice Scalia that would scale back the Corps's authority dramatically, a four-Justice dissent led by Justice Stevens that would defer to the Corps's regulations, and a *Bakke*-like opinion from Justice Kennedy that concurred in the plurality's decision to vacate while forging its own definition (that, like *Bakke*'s impact on affirmative-action cases, may dominate future litigation for years). To top it all off, there were *serious* fireworks in the opinions—indeed, it's unclear who ticked off Scalia more, Kennedy or the dissenters.

The cases concerned four parcels of wetlands: three owned by Rapanos that ultimately drained into navigable waterways through "surface-water connections," and a fourth owned by Carabell that was next to a lake-bound drainage ditch (but which was separated from the ditch by a manmade berm). Rapanos backfilled his wetlands without a permit from the Corps, and the government brought civil and criminal charges against him; Carabell was denied a permit to fill her property and challenged the denial in court. Rapanos and Carabell both challenged the Corps's claim that their properties were "navigable waters" under the CWA, which the statute defines as "the waters of the United States, including the territorial seas." The district courts in both cases deferred to the Corps's construction of "the waters of the United States," which includes traditional navigable waters *plus* any tributaries with "an ordinary high-water mark" *and* wetlands "adjacent to" those waters or tributaries. Under the regulations, "adjacent" can include wetlands separated by river berms (also, in case you were wondering, the Corps defines "wetlands" as areas saturated by surface or ground water frequently enough that they normally support vegetation adapted for these conditions). The Sixth Circuit affirmed in *Rapanos* on the ground that his properties had "hydrologic connections" to adjacent tributaries of navigable waters; it similarly affirmed in *Carabell* on the ground that her property was "adjacent," if not directly connected, to navigable waters.

Thanks to the combination of the Scalia plurality (including the Chief and Justices Thomas and Alito) and Kennedy's opinion, the Sixth Circuit's opinions were vacated. The outcome was clear from the beginning of the plurality opinion, in which Scalia noted the costs of compliance and described the Corps as "an enlightened despot" and its regulatory activity over time as "an immense expansion of federal regulation of land use . . . without any change in the governing statute." He disparaged the Corps's construction of "the waters of the United States" as one that would encompass "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years." With that kind of a setup, it's hardly surprising that the plurality refused to defer to the Corps's definition. Scalia began by summarizing the Court's past two reviews of the Corps's regulations: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which upheld the Corps's view that wetlands "actually abutting" on traditional navigable waters fall under the CWA, and *SWANCC v. Army Corps of Engineers*, 531 U.S. 159 (2001), which rejected the Corps's view that it had jurisdiction over *any* wetlands accessible by migratory birds (noting that at least in *Riverside* the

abutting wetlands had a "significant nexus" to navigable waters). The plurality was annoyed that the Corps and lower courts had maintained an expansive view of the CWA after *SWANCC*, with one court holding that a "significant nexus" exists if even one molecule of water in a wetland inevitably would get to a navigable waterway. While agreeing that "navigable waters" as defined in the CWA—that is, "the waters of the United States"—were not limited to *actually* navigable waters, the plurality referred to Webster's Dictionary to find that the "the waters" referred to "relatively permanent, standing or flowing bodies of water," not "transitory puddles or ephemeral flows." Moreover, the CWA actually includes intermittent water sources like ditches and canals in its definition of "point sources" that *discharge into* "navigable waters," so it would not make sense for the latter to include items that are defined as the former. Further, while one purpose of the CWA was to curb water pollution, another purpose was to preserve the authority of the States to regulate water quality, and the Corps's expansive definition did exactly the opposite. As to the Sixth Circuit's "hydrologic connection" basis for affirmance in *Rapanos*, the plurality urged that *only* wetlands with a "continuous surface connection" to bodies that are "'waters of the United States' in their own right (so that there is no clear demarcation between "waters" and wetlands) should count. Scalia dismissed concerns that this limited definition would hinder efforts to curb water pollution by noting that the Corps's authority over "navigable waters" was distinct from the CWA's separate ban on pollution, which bars even indirect pollution of "navigable waters"; in any event, Scalia noted, backfill typically does not flow downstream, so the plurality's interpretation should not have a significant impact. The plurality would remand to apply its definition.

Kennedy's concurrence in the judgment took a wildly different tack. He first noted that the Corps's definition was not so outlandish as Scalia made it seem and was based on 100 pages of technical guidance on vegetation and hydrological requirements. He then chastised the plurality (and the dissent) for ignoring the "significant nexus" language from *SWANCC*. In Kennedy's view, the plurality's "relative permanence" and "continuous connection" requirements made little sense in light of the nexus rule—a mere trickle from a remote wetland would count if continuous, but an irregular torrent from a nearby wetland would not, despite the latter's far larger impact on downstream water quality (*e.g.*, the Los Angeles River, which is often dry but nevertheless can flow so violently that it is encased in concrete for fifty miles). Observing that the dictionary provides an alternative definition of "waters" as connoting "floods or inundations," Kennedy would: (1) stick to *Riverside Bayview* and allow the Corps jurisdiction over wetlands adjacent to actually navigable waters; and (2) apply *SWANCC* by requiring a case-by-case showing of "significant nexus" for wetlands (like Carabell's and Rapanos's) adjacent only to nonnavigable tributaries. While this test might not align perfectly with the traditional bounds of federal authority (an admission that Scalia thought "tested the limits of understatement"), Kennedy thought it would avoid constitutional problems most of the time. On remand, he would instruct the lower courts to see if the Corps had made a nexus showing. Kennedy appears to have *really* aroused Scalia's ire. Noting that Kennedy's alternative definition of "waters" was "somewhat poetic," Scalia wrote that it was "strange to suppose that Congress had waxed Shakespearean in the definition section of an otherwise prosaic, indeed downright tedious, statute." Also, Kennedy appeared to allow for the possibility that the Corps's jurisdiction "appear[ed] and evaporate[d]" along with water in intermittent waterways, which Scalia found even stranger. And while Kennedy dismissed the plurality's federalism concerns by noting that a majority of states appeared as *amici* to support the Corps, Scalia responded that the meaning of the CWA is independent of whether states would prefer to shift blame for

controversial decisions to someone else. Finally, Scalia wrote that Kennedy's use of the "significant nexus" test was taken entirely out of the context of *Riverside Bayview* and *SWANCC*—it was not, in fact, a test—and that his reasoning was "turtles all the way down" (as in the story of the guru who says that the earth sits on the back of a tiger on top of an elephant; when asked what supports the elephant, he says a turtle; when asked what supports the turtle, he says "it is turtles all the way down").

Now for the Stevens dissent, which says, in essence: The CWA was enacted to protect the nation's waters by preserving habitats and curbing pollution; the phrase "waters of the United States" is ambiguous; the Corps's decision to include wetlands adjacent to tributaries in its definition is reasonable; Congress has acquiesced in that decision for decades by failing to enact a different standard (we probably don't need to tell you what the plurality thought of this "curious appeal to entrenched Executive error"); the lower courts have enforced it repeatedly; so it should stand. Stevens dismissed the plurality's concerns over the cost of obtaining permits as "exaggerated" and utterly lacking in an examination of environmental benefits, a failure that "sheds a revelatory light on the quality (and indeed the impartiality) of its cost-benefit analysis." (Scalia responded that Stevens's dissent was "long on praise of environmentalism and notably short on analysis of the statutory text and structure"; in turn, Stevens retorted that his policy considerations came from Congress and that the plurality was simply deflecting attention from "its own antagonism to environmentalism.") The plurality's "relative permanence/continuous connection" requirements, while "creative," had no support in the CWA or in prior case law—indeed, no party or *amicus* had suggested them—and Stevens had no idea what "relative permanence" even meant or how lower courts would apply the standard. Moreover, the plurality's parsing of the terms "river," "stream," "ditch," "canal" and even "moat" struck Stevens as an "attempt to achieve its desired outcome by redefining terms [that] does no credit to lexicography—let alone to justice." As for Kennedy's "significant nexus" test, Stevens thought it would not be too different in practice from the Corps's regs, but saw no reason to deviate from "the Executive's sensible, bright-line rule" in favor of a case-by-case approach. While joining Stevens's dissent, Justice Breyer wrote his own dissent (after all, what's two more pages when 100 already have been written?) in which he stated his views that the Corps's authority extends to the limit of Congress's Commerce power, that the "significant nexus" test appears to be law but is unfounded, and that the Corps should issue new regulations to which the Court should defer.

Finally, the Chief wrote his own concurrence lamenting two things: (1) the fact that there was no majority, forcing lower courts to feel their way on a case-by-case basis; and (2) the Corps easily could have avoided this mess by issuing proper regulations after *SWANCC* that still would have left it with plenty of room to maneuver.

Before moving on, we should return to Stevens's dissent for an interesting point for appellate-law junkies. Usually, the need for a mandate on remand leads some Justices to join a judgment despite their disagreement with its reasoning. But here, while the plurality and Kennedy would remand, they came up with two different tests to apply. Stevens suggested, therefore, that since the dissenters would affirm anyway, the lower courts should uphold the Corp's jurisdiction if the Corps satisfied *either* Kennedy's "significant nexus" test or the plurality's "relative permanence/continuous flow" test—meaning, since it is a more liberal test, that Kennedy's one-Justice rule would control (hence the *Bakke* analogy).

The Court's other case under the CWA, ***S.D. Warren Co. v. Maine Board of Environmental Protection* (04-1527)**, was not nearly so contentious. In ***S.D. Warren***, the Court unanimously affirmed a Maine Supreme Court ruling that certain hydroelectric dams created the potential for "discharge" into navigable waters and therefore required state certification under the CWA. The CWA requires state certification before a federal license can be issued for an activity that may cause "discharge," but the Act does not define that term. S.D. Warren argued that its dams did not cause "discharge" because they only took water out of a Maine river, rerouted it through turbines, and returned it to the river without adding pollutants. The Court disagreed, in an opinion by Justice Souter. In past water cases, the Court had adopted the common dictionary understanding of "discharge" as "flowing or issuing out," which clearly encompassed the operation of the dams. While other CWA provisions note that "discharge" includes "discharge of a pollutant," that express inclusion did not *restrict* the meaning of "discharge" to require the addition of substances to the water in all cases. The Court also found no basis for S.D. Warren's argument in the CWA's legislative history (a portion of the opinion that Justice Scalia declined to join, as usual). Finally, S.D. Warren admitted that its dams could alter the circulation, flow, and oxygen-absorbing capacity of the water, which several *amici* noted could impact aquatic organisms. These changes in water quality fell under the CWA.

ERISA

In ***Sereboff v. Mid Atlantic Medical Services, Inc.* (05-260)**, the Court found that an ERISA plan administrator's claim against a plan beneficiary for restitution of funds received in a tort suit was an equitable remedy available under ERISA § 502(a)(3), which permits a civil suit by a plan fiduciary for "appropriate equitable relief." The Court previously had held that § 502(a)(3) did not permit a suit for mere compensatory damages, so the characterization of the relief sought—equitable versus legal—was critical. Here are the facts: Marlene Sereboff's employer sponsored a self-insured health plan administered by Mid Atlantic. When Marlene and her husband were in an auto accident, Mid Atlantic paid for their medical expenses. The Sereboffs sued those responsible for the accident and settled for $750,000, at which point Mid Atlantic sued the Sereboffs seeking reimbursement of approximately $75,000. Mid Atlantic's suit sounded in breach of contract, but the remedy it sought was restitution, a traditional equitable remedy. The plan documents required that the Sereboffs reimburse the plan from "all recoveries from a third party" and stated that the plan's share of the recovery would not be reduced because the beneficiary did not receive the full damages it sought from the third party. Thus, even if the Sereboffs were not made whole by the party causing the accident (*i.e.*, they only received enough settlement funds to cover their medical expenses, despite the fact that they also had claims for pain and suffering and loss of income), they were required to pay the plan back in full if sufficient funds were available from the settlement. Rejecting all of the Sereboffs' arguments that Mid Atlantic's chosen remedy was not a "traditional" equitable remedy (you'll have to read about these on your own time), the Court, led by the Chief, found that Mid Atlantic's contract claim seeking restitution was indeed equitable in nature and fell snugly within the confines of § 502(a)(3). Importantly, however, because the claim did not rest on a claim for subrogation based on an equitable lien (one implied due to the circumstances) but on a contract term specifically requiring reimbursement, the Sereboffs could not assert typical defenses to equitable subrogation—such as the defense that subrogation may be pursued only after the individual is made whole.

FEDERAL INDIAN LAW

In ***Wagnon v. Prairie Band Potowatomi Nation*** **(04-631)**, the Court upheld a Kansas fuel tax against a tribal sovereignty challenge. Kansas imposes a tax on fuel distributors at the time they receive fuel from suppliers, but allows distributors to pass on the cost of the tax to retail stations, including the Prairie Band Potowatomi Nation's on-reservation station. The Nation, which imposes its own gas tax on the station to support reservation infrastructure, argued that the Kansas tax crowded out its tax by making it impossible to levy the Nation's tax and still sell at a competitive price. Applying the interest-balancing test from *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Tenth Circuit held that Kansas could not apply its tax to fuel sold to the Nation because the Nation's taxing interest outweighed the State's. The Court reversed, in an opinion by Justice Thomas. It quickly dispensed with the Nation's argument that the tax was *categorically* barred as a tax on on-reservation tribal activities, because the tax was levied on fuel distributors who were not required to pass on the cost to the Nation's station. The Court then held that the tax also was not subject to the *Bracker* test, which applies only to state regulation of non-tribal members' activities *on a reservation* in light of the "significant geographical component" of tribal sovereignty. Since the tax is imposed upon the distributors' receipt of fuel off the reservation, it falls outside of *Bracker*'s scope. Finally, the Kansas tax did not really crowd out the Nation's tax because the Nation *owns* the station and gets to keep all revenues in excess of costs, regardless of whether these are labeled "profits" or "tax proceeds." For the Court, this was not a fight about competing tax regimes but just an attempt by the Nation to obtain cheaper wholesale fuel. (This comes at the end of the opinion, but it clearly motivated much of the Court's analysis.)

Justice Ginsburg dissented, joined by Justice Kennedy. Ginsburg accepted the profits/tax distinction and that the Nation's tax could not coexist alongside the Kansas tax. She also believed that the Kansas tax sufficiently "engaged" the Nation because, accounting for all the statutory exemptions (*e.g.*, for fuel sold to the government), Kansas ultimately taxed *only* fuel later sold to nonexempt retailers like the Nation's station. She would have applied *Bracker* and held for the Nation: "Balancing tests have been criticized as rudderless, affording insufficient guidance to decisionmakers. Pointed as the criticism may be, one must ask, as in life's choices generally, what is the alternative?"

FIRST AMENDMENT

The Court's First Amendment decisions were again among the most noteworthy of the Term, particularly its decisions denying First Amendment protection to public employees' workplace speech and upholding the Solomon Amendment. (The Court also touched on First Amendment principles in the cases discussed in the ELECTION LAW section.)

In ***Garcetti v. Ceballos*** **(04-473)**, the Court held 5-4 that when public employees make statements in the context of their official duties, their speech is not protected by the First Amendment and may be subject to employer discipline. (The case was reargued after Justice Alito joined the Court, and indeed he was the tiebreaker.) Ceballos was a prosecutor who, after becoming convinced that a search warrant was based on false representations, wrote a memo to his boss about the misconduct and testified at trial on behalf of the criminal defendant. He

claimed he suffered various adverse employment actions because of his speech, in violation of his First Amendment right to speak as a citizen on a matter of public concern—protection recognized by the Court in *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 562 (1968), for speech that does not unduly disrupt government operations. The Ninth Circuit agreed that Ceballos's speech was protected, but did not consider whether Ceballos was speaking as a citizen as opposed to an employee obligated to report misconduct to his boss.

The Court reversed, in an opinion by Justice Kennedy. For the majority, the key fact was that Ceballos wrote his memo as part of his duty to recommend to his supervisor how to dispose of a particular case. His speech, therefore, owed its existence to his professional responsibilities, and restricting it (by subjecting it to discipline) would not infringe on any personal rights of Ceballos as a citizen. The fact that he wrote and spoke while performing his duties did not mean that his employer could not evaluate his performance—if his supervisors thought Ceballos was inflammatory or misguided, they had the authority to discipline him. A holding to the contrary would require state and federal courts to perform the *Connick*/*Pickering* balancing test on all sorts of communications between public employees and their supervisors, inconsistent with the principles of federalism and the separation of powers. As a result, that test now simply does not apply to speech made pursuant to official responsibilities.

Justice Souter wrote the principal dissent, joined by Justices Stevens and Ginsburg. Souter defended the use of the *Connick*/*Pickering* balancing test for "official" as opposed to "personal" speech, arguing that a citizen's interest in speaking does not evaporate simply because the speech relates to what he must do every day at work. While the majority's concerns about intrusion into the public workplace were valid, Souter believed that they can be accommodated by recognizing the weighty interest of public employers in performing their essential functions, such that only speech on very serious matters should be protected. Stevens also dissented, disputing the idea that a categorical distinction between citizen and employee was possible or that constitutional protection could hinge on a job description. He also noted that the Court seemed to establish a perverse incentive: To ensure First Amendment protection, employees should voice their concerns publicly rather than talk frankly with their superiors. Justice Breyer also dissented, rejecting both the majority's categorical rule and Souter's modified *Pickering* test, which Breyer believed still would not screen out enough speech (since most governmental issues are matters of public concern). Breyer would protect "official" speech only where there was an "augmented need" for constitutional protection and a low risk of judicial interference in the workplace; he thought both concerns were satisfied here.

Another First Amendment case that drew significant public attention was ***Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* [*"FAIR"*] (04-1152)**, in which a coalition of law schools and faculties challenged the constitutionality of the Solomon Amendment. That law provides that if any part of an educational institution denies equal access to military recruiters, the entire institution loses certain federal funds. Law schools represented by FAIR wished to restrict access to military recruiters in protest of "Don't Ask, Don't Tell." They challenged the Solomon Amendment on First Amendment grounds, arguing that forced inclusion of military recruiters violated their freedoms of speech and association by forcing them to appear to condone "Don't Ask, Don't Tell" and to associate with military recruiters. At the preliminary injunction stage, the Third Circuit agreed, holding that the Solomon Amendment unconstitutionally forced

FAIR member schools to choose between surrendering First Amendment freedoms and losing federal funding.

In an opinion by Chief Justice Roberts, the Court unanimously reversed (minus Justice Alito, who did not participate). The 8-0 vote certainly was a surprise, particularly in light of the substantive nature of the opinion and the controversy generated by the case. Although the case ostensibly fell within Congress's power under the Spending Clause of the Constitution, the Court noted that it really implicated Congress's "broad and sweeping" power to "raise and support Armies": If Congress could *directly* require schools to give equal access to military recruiters under that authority, then an *indirect* funding condition under the Spending Clause could not possibly be unconstitutional. The Court then proceeded to reject every one of FAIR's arguments, finding that it was "exaggerating the reach of our First Amendment precedents" and stretching them "well beyond the sort of activities these doctrines protect." On the compelled speech claim, the Court noted that while law schools may have to post notices that military recruiters will be interviewing in certain locations, that kind of "speech" is "plainly incidental" to conduct, which Congress generally can regulate. The Court compared the situation to requiring employers to take down "white applicants only" signs, which no one would claim involved employer speech as opposed to conduct. "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in [past precedents] to suggest that it is."

The Court then held that the law schools' decision to deny access to military recruiters was not "expressive conduct" protected by the First Amendment. This protection applies only to conduct that is "inherently expressive" (*e.g.*, flag-burning). Because schools have to explain (with speech) their reasons for denying access to recruiters, allowing or denying access is not, by itself, inherently expressive. Moreover, FAIR's argument stretched the notion of expressive conduct too far: "If an individual announces that he intends to express his disapproval of the [IRS] by refusing to pay his income taxes, we would have to . . . determine whether the Tax Code violates the First Amendment." And even if the Solomon Amendment did regulate expressive conduct, it satisfied past Court precedents by promoting the substantial interest in raising and supporting the armed forces, which would be hindered if the military were disfavored relative to other employers. Further, nothing about allowing military recruiting suggests that law schools agree with "Don't Ask, Don't Tell." The Court had previously held that high school students can tell the difference between a school-sponsored speech and one the school was required to allow by law, and "[s]urely students have not lost that ability by the time they get to law school."

Finally, as to the freedom-of-association claim, the Court rejected FAIR's argument on the ground that the Solomon Amendment required schools only to "interact" with recruiters, not to associate with them. Unlike the law struck down in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which required the Boy Scouts to accept a gay Scoutmaster, the Solomon Amendment did not require schools to make recruiters somehow part of the law school. In fact, students and faculty were free to voice disapproval of military recruiters' message without fear of losing federal funds.

Finally, in a rather odd First Amendment case, ***Hartman v. Moore* (04-1495)**, the Court held 5-2 (the Chief and Justice Alito did not participate) that a plaintiff must plead and prove the absence

of probable cause for an underlying prosecution in order to succeed on a claim for retaliatory prosecution allegedly resulting from the exercise of First Amendment rights. William Moore was the CEO of a company, REI, that manufactured multiline optical scanners—the handy devices that allow the Post Office to sort mail without requiring a nine-digit ZIP code. He vigorously lobbied Congress to support the use of multiline technology manufactured in the United States (presumably by REI), rather than single-line scanners (which mainly are manufactured abroad). He succeeded but did not win the resulting $250-$400 million bid, which went to a competitor. Moore's woes didn't end there: Postal inspectors looked into whether Moore was involved in paying kickbacks and whether REI was improperly involved in the search for a new Postmaster General. Moore ultimately was indicted, but when the government closed its affirmative case after six weeks, the district court acquitted him, finding a "complete lack of direct evidence" connecting him to any criminal wrongdoing. Moore then filed a *Bivens* action against six postal inspectors and the prosecutor (who got out based on prosecutorial immunity). After substantial litigation and two trips to the D.C. Circuit, Moore's claims for retaliatory prosecution based on his First-Amendment-protected lobbying activities remained, and the district court denied the inspectors' claims of qualified immunity based on the existence of probable cause for the underlying prosecution; the D.C. Circuit affirmed. Reversing, the Court, led by Justice Souter, explained that the absence of probable cause is a critical causation issue in any retaliatory prosecution case because, unlike most retaliation cases, retaliatory prosecution requires that the improper motive of one government actor (here the inspectors) be the "but for" cause of action taken by another government actor (the prosecutor—who could not himself be held liable for his decision to prosecute). Probable cause almost always will be a critical factor in determining whether such causation exists, particularly since there is a strong presumption of regularity in the exercise or prosecutorial discretion. While the majority could imagine a situation in which a prosecutor baldly states that the only reason he pursued a case was pressure brought by another government actor, this case will be so rare (indeed the Court described it as akin to winning the lottery) that it should not drive the legal standard developed by the Court. In the end, the Court's reasoning was pragmatic: "Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case . . . ." Justices Ginsburg and Breyer dissented: Just because a smoking gun is rare doesn't mean the courts should have to disregard it merely because there is a "barely sufficient" showing of probable cause. Where there's smoke, there may well be fire.

FOREIGN SOVEREIGN IMMUNITY ACT

In ***Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*** **(04-1095)**, the Court unanimously vacated a Ninth Circuit decision allowing Elahi to attach assets of Iran's Ministry of Defense to collect on a $300 million default judgment against Iran for the alleged murder of his brother. Elahi sought to put a lien on an arbitration award the Ministry was trying to enforce in a California federal court, and the Ministry claimed immunity from attachment under the Foreign Sovereign Immunity Act ("FSIA"). The district court held that the Ministry had waived sovereign immunity by suing to enforce the arbitration award in the first place. The Ninth Circuit disagreed, but affirmed on a ground not briefed by the parties, concluding that FSIA did not apply because, under certain conditions applicable here, the property of a foreign government's "agency or instrumentality" that is "engaged in commercial

activity in the United States" is not immune from attachment. The Court vacated and remanded for the Ninth Circuit to determine after proper briefing whether the Ministry is an "agency or instrumentality" of the Iranian government or "an integral part of the state itself" and thus immune from suit—the position advocated by the United States. (Yes, the government was arguing the Ministry's position, though probably only as a matter of general principle.)

IMMIGRATION

The Court held in ***Fernandez-Vargas v. Gonzales*** **(04-1376)** that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") applies to those who illegally reentered the United States before IIRIRA's effective date (1997). The Immigration and Nationality Act ("INA") long has provided that an order to remove an alien may be reinstated if he unlawfully reenters the country. Until fairly recently, however, this provision was limited to particular categories of aliens (such as anarchists or subversives), and even they could seek discretionary relief from deportation (for example, if the alien was here continuously for seven years and could show extreme hardship and good moral character). IIRIRA enlarged the class of illegal reentrants whose orders may be reinstated, insulated those orders from review, and foreclosed most forms of discretionary relief. Fernandez-Vargas, a Mexican citizen who was deported in the 1970s, returned illegally in 1982 and remained in the United States undetected for over twenty years. In 1989, he fathered a son who is a U.S. citizen, and in 2001 he married the boy's mother, also a citizen. His wife then filed a relative-visa petition for her husband, and he filed an application to adjust his status to that of a lawful permanent resident. The filings alerted the authorities to his presence, and in 2003 the government began proceedings to reinstate his earlier deportation order under IIRIRA without the possibility of adjusting his status. He was detained for ten months and then deported. Fernandez-Vargas argued that because he reentered the United States before IIRIRA's effective date, it should not apply to him and he should have the chance to become a lawful permanent resident.

Writing for a nearly unanimous Court (all but Justice Stevens), Justice Souter found that IIRIRA applies to Fernandez-Vargas and is not inappropriately retroactive. Of course, IIRIRA's reinstatement provision does not expressly state whether it applies to individuals that reentered before 1997 (otherwise, there wouldn't be much to talk about). Fernandez-Vargas argued that the pre-IIRIRA provision expressly applied to any reentered alien who was deported "before or after June 27, 1952," but that IIRIRA dropped the "before or after" language and therefore must have been intended to apply only to those who reentered *after* its effective date. The Court rejected this interpretation, explaining that the "before and after" language referred to deportation, not reentry, and probably was dropped because, by the time of IIRIRA's enactment, the reference to departures in or before 1952 was "purely academic." Further, other provisions of IIRIRA explicitly apply only to those who reenter after its effective date (such as criminal and civil penalty provisions), while still others explicitly apply to all reentrants, whether the reentry occurred before or after the effective date. The reinstatement provision's silence in this regard means that normal principles of statutory construction "fail to unsettle" the question of whether IIRIRA applies to individuals like Fernandez-Vargas. The majority also concluded that IIRIRA's reinstatement provision is not impermissibly retroactive because it is Fernandez-Vargas's continuing choice to remain in the country illegally after IIRIRA's effective date, not his reentry, that triggers the reinstatement provision. Since IIRIRA does not place further

burdens/penalties on an act already completed, it has no retroactive effect. Further, IIRIRA was enacted six months before it took effect, giving illegal immigrants ample warning of the new, harsher regime and an opportunity to leave the country or attempt to amend their status.

Stevens dissented. He would find that the Act was intended to apply only to post-1997 reentries and that any other interpretation would be impermissibly retroactive. The original INA provision was silent as to application, and the INS interpreted this silence as precluding it from obtaining reinstatement orders against any alien who reentered *or* was deported before 1950. In 1952, Congress added the "before or after" language, which Stevens read as an attempt to clarify that the statute applied to individuals deported before or after 1952 but to leave unchanged the fact that the statute would not apply to individuals who *reentered* after 1952. When Congress enacted IIRIRA and removed the date language again, presumably it still intended that the statute apply to preenactment deportations but not to preenactment reentries. Thus, the normal rules of statutory construction disfavor the government's (and the majority's) interpretation. Further, IIRIRA's effect is impermissibly retroactive if read to apply to individuals like Fernandez-Vargas. Prior to IIRIRA, the immigration rules favored behavior like Fernandez-Vargas's, making it easier to obtain discretionary relief the longer an individual remained in the country. IIRIRA obliterated these considerations. And while it may be true that Fernandez-Vargas could have avoided the effect of IIRIRA by leaving the country, that is a harsh choice and does not alter the fact that the IIRIRA places a great deal of importance on illegal reentry. Thus, the act of reentry, already completed, should be the basis for any retroactivity analysis, as that is the act which alters an immigrant's rights under the law.

The Court also issued a *per curiam* opinion in ***Gonzales v. Thomas*** **(05-552)**, in which it unanimously held that federal immigration officials, not a court of appeals, should get first crack at determining whether fear of persecution due to family ties can justify an asylum claim. Thomas and her family were white South Africans who sought asylum in the United States based on fear of persecution because of their race, political beliefs, and "membership in a particular social group." Thomas claimed her family fit this last category because they were all "relatives of Boss Ronnie," Thomas's father-in-law, who allegedly mistreated black employees at his company. An immigration judge and the Board of Immigration Appeals rejected their asylum claim but focused only on their racial and political concerns. The Ninth Circuit, sitting *en banc*, reversed, unanimously holding that family ties *might* constitute "membership in a particular social group" and, over the dissent of four judges, holding that kinship ties to Boss Ronnie satisfied this criterion. The dissenters argued that this factual determination should have gone to the relevant agency, the INS, first. The Court agreed and summarily reversed the Ninth Circuit's "obvious error." In so doing, it reaffirmed the "ordinary remand" rule that the role of courts in immigration cases is one of "review, not first view." So the case will go back for INS to take a look at Boss Ronnie's family.

INTELLECTUAL PROPERTY

The Court's decision in ***eBay Inc. v. MercExchange, LLC*** **(05-130)** was a biggie for intellectual property buffs. In a short, unanimous opinion by Justice Thomas, the Court rejected the Federal Circuit's conclusion that, in patent cases, a permanent injunction generally should issue upon a finding of patent validity and infringement, and instead held that trial courts should apply the

traditional four-factor test for permanent injunctive relief. The Court found nothing in the text or history of the Patent Act to suggest that Congress intended to supplant the venerable equitable test developed by courts, which requires a plaintiff seeking injunctive relief to demonstrate: (1) irreparable injury; (2) that remedies at law (*i.e.*, money) are inadequate; (3) that the balance of hardships supports equitable relief; and (4) that the public interest would not be disserved by a permanent injunction. While all the Justices agreed on the test to be used, they disagreed on how to apply the four factors. In a concurring opinion joined by Justices Scalia and Ginsburg, the Chief noted that the long tradition of granting injunctive relief in patent cases is not surprising given "the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention" and suggested that courts should not disregard this history. These Justices seemed to believe that applying the Court's test would lead very frequently to the issuance of an injunction. On the other hand, Justice Kennedy, joined by Justices Stevens, Souter and Breyer, concurred to stress that the historical near-uniformity of decisions granting injunctive relief must be viewed in light of the facts of those cases. With changes in the technology and the times come potential changes in the evaluation of the four factors. For example, a rising number of patent-holders have no intention of developing their inventions and sometimes use the threat of injunctive relief to extort inappropriately high licensing fees. In addition, the types of patents issued are changing, with increasing numbers of business method patents. Bottom line: Trial courts should not feel wedded to past decisions granting injunctive relief. So, trial courts now know what test to apply—but they will have to unscramble divided guidance in applying it.

The Court also dismissed as improvidently granted ("DIG'd") the writ of cert in ***Laboratory Corp. of America Holdings, d/b/a LabCorp v. Metabolite Laboratories, Inc.* (04-607)**, so we will have to wait for another day to find out the scope of the Patent Act's exception (in section 101) to patent protection for "laws of nature, natural phenomenon, and abstract ideas." Apparently, some members of the Court believed that LabCorp did not set forth its claim adequately in the lower courts by failing specifically to reference section 101, thus creating a technical preservation issue and the practical problem that the Court did not fully benefit from the views of the Federal Circuit. Therefore, they deferred deciding the issue. Justice Breyer, joined by Justices Stevens and Souter, dissented from the DIG. They would have decided the case on the merits and found Metabolite's patent claim invalid. (For the science nuts, Metabolite's patent provided a method for detecting a deficiency of cobalamin or folate by assaying for an elevated level of total homocysteine, as the latter correlates with deficiencies in the former. That's it—any doctor who does a blood test for homocysteine and knows that elevated homocysteine is related to a deficiency in cobalamin or folate violates the patent. Metabolite successfully sued LabCorp for advising doctors to do such a test created by another company, thereby inducing doctors to infringe Metabolite's method patent.) The dissenters would find that the patent protects nothing more than a rule of nature—that homocysteine levels are correlated with folate and cobalamin levels ("[T]he process involves no more than an instruction to read some numbers in light of medical knowledge."). Permitting such sweeping patent protection would impede rather than promote the progress of science. Further, the dissent found no reason to avoid deciding the issue now, as it was extensively briefed. Also, the Court knew that LabCorp had failed to cite section 101 when it granted cert, thus implicitly rejecting this rationale as a reason to deny cert. Finally, failing to decide the issue may impede doctors' medical judgment, force them to devote unnecessary time and energy to license agreements, and divert their attention from medical tasks.

***Illinois Tool Works Inc. v. Independent Ink, Inc.* (04-1329)**, in which the Court held that ownership of a patent no longer creates an automatic presumption of market power, is discussed *supra* in the ANTITRUST Section.

JURISDICTION

The Court decided numerous jurisdiction cases this Term, touching on myriad issues that could warm only a litigator's heart.

Two of those decisions dealt with diversity jurisdiction. In ***Lincoln Property Co. v. Roche* (04-712)**, Justice Ginsburg, writing for a unanimous Court, resolved the issue of whether an entity *not* named or joined as a defendant can nonetheless be deemed a real party in interest and destroy diversity jurisdiction. Simply put: It cannot. Roche filed suit against Lincoln Property and others in Virginia state court. The defendants removed the case to federal court on the basis of diversity of citizenship under 28 U.S.C. § 1441. Roche made no objection—until the federal court granted the defendants' motion for summary judgment. Then Roche moved to remand, claiming that Lincoln Property was actually a partnership and that one of its partners was a citizen of Virginia. The district court denied the motion based on evidence that Lincoln Property was a Texas corporation with its principal place of business in Texas. The Fourth Circuit reversed, finding that while Lincoln Property was a Texas corporation, it appeared likely that an unidentified Virginia subsidiary of the company was the "real and substantial party in interest," and Lincoln Property, as the party invoking federal jurisdiction, failed to demonstrate the non-existence of this entity. In arriving at its conclusion that courts need to look at the real parties in interest to determine whether diversity jurisdiction exists, the Fourth Circuit relied on Federal Rule of Civil Procedure 17(a), which provides that "[e]very action shall be prosecuted in the name of the real party in interest," and on case law holding that the joinder of a sham party with no real interest in the litigation cannot create diversity jurisdiction. The Supreme Court reversed, finding that "the Fourth Circuit had no warrant . . . to inquire whether some other person might have been joined as an additional or substitute defendant." Further, Congress specifically has provided that a corporation is a citizen only of its state of incorporation and of its principal place of business—not of any state in which its has an affiliate. So the case stays in federal court and the judgment for the defendants will stand.

In the second diversity case, ***Wachovia Bank, N.A. v. Schmidt* (04-1186)**, the Court unanimously held that, for purposes of diversity jurisdiction in federal courts, a national bank is a "citizen" only of the state where its main office is located. Justice Ginsburg wrote for the 8-0 Court (Justice Thomas did not participate). The opinion turned on the meaning of 28 U.S.C. § 1348, which provides that federally chartered national banks are citizens of "the States in which they are respectively located." In this case, the Fourth Circuit held that national banks were citizens of every state in which they had branches, a holding that would restrict dramatically the banks' access to federal courts (since diversity jurisdiction requires that the plaintiff and defendant be from different states). The Court reversed, on the ground that nothing in the statute indicates that Congress intended to depart from the norm for jurisdiction: Individuals who reside in more than one state are citizens of only one, and a corporation is a citizen only of its state(s) of incorporation and principal place of business. National banks should be no different—otherwise, they would be "singularly disfavored" entities. The Court

also criticized the Fourth Circuit's application of *venue* case law to the meaning of "located" for *jurisdictional* purposes, quoting a law journal article for the ominous notion that assuming that a word has the same meaning in different rules used for different purposes "has all the tenacity of original sin and must constantly be guarded against."

Next, the Court further narrowed the scope of the *Rooker-Feldman* doctrine in ***Lance v. Dennis* (05-555)**. *Rooker-Feldman* requires federal district courts to abstain from exercising jurisdiction where a losing party in state court litigation seeks what amounts to federal appellate review of the state court decision. (This case followed on the heels of last Term's decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), where the Court took pains to stress the limited scope of the doctrine—the Court has not applied it since the *Rooker* and *Feldman* decisions themselves, and perhaps would like to leave it that way.) ***Lance*** involved Colorado's congressional redistricting plan, which the Colorado state courts imposed after the state legislature failed to draft one in time for the 2002 elections. In 2003, the Colorado Supreme Court rejected a challenge by the state legislature claiming, among other things, that the court-imposed plan violated the Elections Clause of the U.S. Constitution. A group of citizens later brought the same claim in federal court. The district court ruled that it lacked jurisdiction under *Rooker-Feldman* because the citizens were in privity with the Colorado legislature, which lost the state case. The Supreme Court reversed, holding that privity was insufficient to bar federal jurisdiction. Otherwise, the preclusive effect of state court judgments often would be decided by a prudential federal doctrine rather than by state law, as contemplated in the Full Faith and Credit Act. So the district court should have exercised jurisdiction and then determined whether the plaintiffs were barred from relitigating under Colorado preclusion principles. Justices Ginsburg and Souter concurred to note that the question of Colorado preclusion law should be left for decision on remand. Justice Stevens agreed with everything the majority said (noting that *Rooker-Feldman* "created nothing but mischief for 23 years"), but still dissented because he believed that the plaintiffs' claims were precluded under Colorado law anyway. The take away: Don't rely on *Rooker-Feldman* any more—after this case, it is very nearly a dead letter.

The Court also reviewed the scope of the "collateral order" doctrine in ***Will v. Hallock* (04-1332)**, unanimously finding that a district court's order refusing to apply the "judgment bar" of the Federal Tort Claims Act is not subject to appeal under the doctrine—that is, it is not "sufficiently important and collateral to the merits" that it should be open to appeal like a final order disposing of the case. Hallock operated a software business from her house, but U.S. Customs seized all her computer equipment after her husband's credit information was stolen and used to buy online child pornography. The government dropped the investigation, but returned the equipment having destroyed all of Hallock's trade secrets and account files, forcing her out of business. Hallock sued the government for negligence under the Federal Tort Claims Act and brought a separate action against individual Customs agents for violating her due process rights. The first court dismissed the Tort Claims Act case because it fell under a statutory exception preserving sovereign immunity from suit. The agents then moved for judgment in their case, citing the "judgment bar" providing that an unsuccessful Tort Claims Act plaintiff cannot bring any other action against government employees arising out of the same matter. The district court denied the motion, holding that the first court's ruling was only procedural and thus did not trigger the judgment bar. The agents appealed under the collateral order doctrine, and the Second Circuit found that it had jurisdiction to hear the appeal but affirmed.

The Court granted the agents' petition for cert on the judgment bar question, but it directed the parties also to brief the jurisdictional issue. In the opinion by Justice Souter, the Court ruled that the Second Circuit did not have jurisdiction to hear the appeal and vacated that court's ruling (leaving intact the district court's ruling in Hallock's favor). The Court noted that the collateral order doctrine is narrow, allowing appeals only from interlocutory orders that are (1) conclusive rulings (2) on important questions completely separate from the merits of the case (3) that effectively would be unreviewable on appeal after the case is over. The Court stated that "we have meant what we said" about this being a "small class" of orders, for fear of allowing interlocutory appeals willy-nilly and swallowing the general rule that a party gets a single appeal after a final judgment. While the Court has allowed appeals from orders denying claims of immunity from suit, it has done so only when a "substantial public interest" is at stake, such as a presidential claim of absolute immunity or qualified immunity claims that need to be resolved quickly to preserve the "reasonable initiative" of government officials. There is no such interest at stake with the Tort Claims Act judgment bar—if Hallock only had sued the agents, they obviously could not have invoked the bar in the first place—and so the bar serves only to avoid litigation for its own sake, much like a standard claim preclusion argument. So the Second Circuit simply should have dismissed the government's appeal and never reached the issue of whether a procedural ruling can trigger the judgment bar.

Not to be outdone by the Court's decisions on *Rooker-Feldman* and the "collateral order" doctrine in the competition for most obscure jurisdiction case, ***Marshall v. Marshall* (04-1544)**, addressed the probate exception to federal court jurisdiction. But while the legal question at issue in *Marshall* was little known, the case certainly was not—it involved former Playboy Playmate Anna Nicole Smith's claim to monies from her late (and very aged) husband. You'll be happy to know that Anna Nicole prevailed and may well keep over $80 million awarded her by the district court on her claim that E. Pierce Marshall, the son of her very rich deceased husband, J. Howard Marshall II, tortiously interfered with a gift J. Howard intended to make to her before death. The facts were quite scintillating. After J. Howard's death, Anna Nicole filed for bankruptcy, and E. Pierce claimed that Anna Nicole had defamed him when her lawyers publicly stated that he had engaged in forgery, fraud, and overreaching to gain control of his father's assets. Anna Nicole then filed a tortious interference counterclaim, asserting among other things that E. Pierce imprisoned J. Howard, prevented him from contacting her, made misrepresentations to him and conspired to suppress or destroy a trust J. Howard directed his attorneys to create for her, which would have given her half of the appreciation of his assets from the date of their marriage. The bankruptcy court found for Anna Nicole, and the district court agreed, awarding Anna Nicole $44.3 million in compensatory damages and another $44.3 million in punitive damages. Meanwhile, the Texas probate court upheld J. Howard's will and trust—which gave all of J. Howard's assets to E. Pierce (who, we should add, passed away himself this June). The Ninth Circuit ultimately reversed the district court result, finding that the federal courts lacked jurisdiction because, even though Anna Nicole's tortious interference claim did not directly involve administration of an estate or the probate of a will, it raised issues that ordinarily would be determined by a probate court, and the Texas probate court already had ruled that it should have exclusive jurisdiction over Anna Nicole's claims.

Juxtaposed against this decidedly colorful factual backdrop, the Court addressed the not-so-colorful exception to federal court jurisdiction for probate matters, finding that the exception—to the extent one exists—is not nearly so broad as the Ninth Circuit found here. The idea of a

probate exception to federal jurisdiction derives from the notion that the English Court of Chancery's jurisdiction did not extend to probate matters—and thus, as it goes, the Judiciary Act of 1789 also did not afford that jurisdiction to federal courts. The Court, led by Justice Ginsburg, found no need to decide whether there was *any* basis for a probate exception because it certainly was not applicable here. In this case, Anna Nicole's claim was against E. Pierce and could be satisfied without interfering with the state probate court's efforts. Federal courts may not have jurisdiction to probate a will or administer an estate, but they do have jurisdiction to adjudicate rights in property so long as the final judgment does not affect the possession of property in the custody of a state court. And the Ninth Circuit erred in finding that it was bound by the Texas probate court's ruling that it had exclusive jurisdiction over Anna Nicole's claims—while a state court's judgment as to its own jurisdiction may be entitled to full faith and credit, this is not so of a state court's pronouncement of the scope of *federal* jurisdiction. Justice Stevens concurred in part and in the judgment; he would find no probate exception at all, stating: "I would provide the creature with a decent burial in a grave adjacent to the resting place of the *Rooker-Feldman* doctrine."

MEDICAID

In ***Arkansas Department of Health & Human Services v. Ahlborn*** **(04-1506)**, a unanimous Court held that, where a Medicaid patient obtains a tort settlement, a state can impose a Medicaid lien only on that portion of the settlement that covers medical expenses. As Arkansas had construed its law, it could impose a lien on the entirety of the settlement (or, for that matter, a jury verdict) if necessary to recover all its Medicaid expenses. In an opinion by Justice Stevens, the Court held that this went too far. First, Arkansas could not argue that federal law required such an assignment. The Medicaid statute requires recipients to assign to the states their rights "to payment for medical care from any third party," but not rights to other payments, and all other provisions of the Medicaid law dealing with assignments flow from that limitation. Second, the Medicaid statute was not a floor for a permissible assignment, but a ceiling. In fact, the law contains an "anti-lien provision," 42 U.S.C. § 1396p, that arguably prevents even a lien on medical expense payments (Ahlborn did not ask the Court to go that far, only to protect her other settlement proceeds). Third, the Court rejected the notion that an expansive lien ought to be allowed where a Medicaid patient settles without judicial oversight or input from the state (thereby raising the prospect of a manipulated settlement that "allocated away" any Medicaid lien by giving the proceeds another label). The Court felt that this problem could be dealt with by advance allocation agreements with the state or by submitting the allocation to the court for decision; Arkansas's preferred rule of absolute priority, however, might preclude settlement in a large number of cases (*i.e.*, the lien could be so high that the amount needed for the plaintiff to clear *any* money would be too high for the defense to pay).

RELIGION

In ***Gonzalez v. O Centro Espírita Beneficente União do Vegetal*** **[*"UDV"*] (04-1084)**, the Court (without Justice Alito) unanimously upheld a preliminary injunction in favor of UDV, a small Brazilian religious group that sought to block the federal government from banning its sacramental use of *hoasca*, an hallucinogenic tea. The government argued that even though the

group's religious use was sincere, the Controlled Substances Act ("CSA") banned all uses of the substance; UDV argued that under the Religious Freedom Restoration Act ("RFRA"), the government could not substantially burden its practices unless the ban was the least restrictive means of advancing some compelling interest. The district court gave UDV a preliminary injunction pending its final ruling, finding that the evidence on the government's various justifications for the ban was "in equipoise" and that therefore the government had not met its burden of proof under RFRA. Before the Court, the government did not challenge the finding that the evidence was "in equipoise," but argued that this was not enough to enjoin enforcement of the CSA because UDV had the burden of proof on its request for a preliminary injunction. Led by Chief Justice Roberts, the Court disagreed. Tracking its decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the Court reaffirmed that the burdens at the preliminary injunction stage track the burdens at trial, so the RFRA burdens on the government control. The Court then rejected the government's other principal argument, that it had a compelling interest in uniformly applying the CSA. As the Chief dismissively put it, this was "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." The Court held that RFRA expressly requires a focused inquiry regarding the burdens of a challenged law on particular claimants. Moreover, the CSA itself allows the Attorney General and the courts to make exceptions, and in fact there has been a religious exception in the regulations or the statute for *peyote* for thirty-five years. The Court did not buy the government's asserted, but undefined, "unique relationship" with Native American tribes that distinguished *peyote* from *hoasca*—if these hallucinogens are always dangerous, as the government claims, nothing about the tribes' political status makes them immune from their dangers. The Court agreed with the government that *hoasca* was covered under a U.N. convention banning hallucinogens, but held that the record supported only generalized concerns for honoring treaties and leading the international war on drugs that were not enough to satisfy RFRA. Finally, the Court noted that while the government kept citing Congress's purpose in enacting the CSA, it ignored that "Congress had reasons for enacting RFRA, too," and the compelling interest test was the means to strike a sensible balance.

REPRODUCTIVE RIGHTS/ABORTION

In the controversial parental notification abortion case, ***Ayotte v. Planned Parenthood of Northern New England* (04-1144)**, the Court managed to issue a unanimous opinion that left both pro-life and pro-choice proponents proclaiming victory, largely because it did not substantively alter the status quo. Writing her last majority opinion for the Court, O'Connor began: "We do not revisit our abortion precedents today, but rather address a question of remedy . . . ."

In 2003, New Hampshire joined numerous other states (forty-four in total) requiring either parental consent or notification before a minor can obtain an abortion. The New Hampshire law prohibits health providers from performing an abortion on a minor until forty-eight hours after written notice has been provided to the minor's parent or guardian. There are three exceptions: (1) the provider certifies that the abortion is necessary to prevent the patient's death; (2) the parent/guardian certifies that he or she already has been notified; or (3) the minor petitions a court to authorize the abortion without parental notification (the court must grant the petition if it finds that the minor is mature and capable of giving informed consent). The law contains no

exception for medical emergency. Physicians challenged the law, arguing that it is unconstitutional because it does not include an exception for situations where the health of the minor is endangered, that the judicial bypass mechanism is not speedy enough for medical emergencies, and, alternatively, that the "life" exception is inadequate because it requires physicians to make nearly impossible judgments about whether an abortion is necessary to prevent death and thus fails to protect good-faith medical judgment. The district court invalidated the entire law and the First Circuit affirmed. The Court vacated and remanded for the First Circuit to reconsider its choice of remedy.

Despite the opening line of her opinion, Justice O'Connor did in fact "revisit" the Court's prior abortion jurisprudence. She explained that two issues are now considered settled law. First, states may require parental notice or consent before a minor obtains an abortion. Second, states may not restrict access to an abortion that is "necessary, in appropriate medical judgment, for preservation of the life or health of the mother." The question for the Court was what should be done when a parental notification statute does not contain a health exception—should it be invalidated altogether (as the lower courts did here) or should the courts enjoin only unconstitutional applications of the statute (as New Hampshire asked the Court to do) or sever the problematic portion(s) of the statute. While a court normally should avoid invalidating the statute as a whole if possible, a court should look to legislative intent as a guide and ask whether the legislature would prefer to have what is left of the statute after the unconstitutional aspect is removed, or no statute at all. The Court remanded to allow the lower courts to take the first stab at answering this question (though the decision would appear to put a brick on the scale favoring an approach of only partial invalidation).

In ***Scheidler v. National Organization for Women, Inc.* (04-1244)**, the Court considered the scope of the Hobbs Act's prohibition on acts or threats of violence related to extortion as it applied to alleged conduct aimed at preventing women from obtaining abortions. That case is discussed below in the RICO/HOBBS ACT section.

RICO/HOBBS ACT

The Court reiterated in ***Anza v. Ideal Steel Supply Corp.* (04-433)** that only one whose injury is "proximately caused" by an alleged RICO violation may bring a civil suit, applying its earlier holding in *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258 (1992). Ideal Steel claimed that National Steel Supply, Inc. and its owners the Anzas violated RICO by failing to pay certain New York sales taxes and by submitting fraudulent state tax returns, enabling National to cut its prices (but not profits) and increase market share at Ideal's expense. Ideal claimed that this conduct violated 18 U.S.C. § 1962(c), which forbids conducting an enterprise's affairs through a pattern of racketeering activity, and § 1962(a), which prohibits using or investing income derived from racketeering activity in an enterprise engaged in interstate commerce (Ideal claimed National used its extra income to open a new office).

Justice Kennedy penned the seven-Justice majority opinion, explaining that this case presented a straightforward application of *Holmes*'s requirement that there be a "direct relation between the injury asserted and the injurious conduct alleged." Ideal's claim under § 1962(c) failed because it could not establish this link. New York—not Ideal—was the direct victim of National's

alleged tax fraud scheme. Ideal's alleged injury is too remote, indirect, and speculative: National's lower prices do not prove fraud (numerous factors may drive a drop in prices), and fraud would not necessarily lead to lower prices (the tax money saved could have been spent elsewhere). Thus, it would be extremely difficult to ascertain Ideal's damages, and permitting such claims would mire the courts in highly complex damage assessments involving speculative claims. The Court further emphasized that an allegation of an injurious motive is not a "panacea" that can overcome the absence of proximate cause: Even assuming that National's goal was to take market share from Ideal, the means it used directly injured New York, not Ideal. (Justice Scalia concurred to note that "it is inconceivable" that Ideal's alleged § 1962(c) injury is within the zone of interests protected by RICO.) Finally, the Court declined to reach Ideal's § 1962(a) claim since it was "at least conceivable" that the proximate cause analysis could differ between the two sections, and it remanded the case to the Second Circuit for a determination in the first instance.

Justice Thomas authored an extensive dissent (though he concurred in the remand of the § 1962(a) claim). Thomas found the injury alleged by Ideal to be sufficiently direct under RICO because it is not derivative or duplicative of New York's interest (tax revenue), but is a separate interest injured directly by National's conduct (the theft of market share). The fact that New York was a direct victim did not mean that Ideal was not also a direct victim. Further, difficulties in proof are no reason to find a lack of proximate cause—they are addressed adequately by the requirement that damages cannot not be speculative; in any event, Thomas believed that the majority overstated the difficulties of proof. Thomas would have approved the Second Circuit's approach, limiting RICO plaintiffs to "targets, competitors and intended victims of the racketeering enterprise." Thomas also emphasized that the majority's restrictive proximate cause test would cut at the heart of RICO's reach over organized crime, precluding a legitimate business from bringing a claim that a mob-run business was increasing market share by threatening customers because the competitor would not be injured directly by the alleged intimidation.

Justice Breyer also concurred in part and dissented in part. He would adopt a different test for proximate cause that would preclude any RICO claim based on competitive injury where the harm was traceable to an unlawful act *only* through a form of legitimate competitive activity. Thus, where a competitor alleges only that it was injured by legitimate business activity (here, decreasing prices or opening a new store) that was made possible due to a RICO predicate act (mail and wire fraud in connection with failing to pay state sales tax), that claim is not cognizable under RICO. However, if a mob-run business uses threats or extortion to increase its market share, that, in Breyer's view, would be sufficient to establish proximate cause. (Breyer's opinion is at least in part a proposed solution to the concern raised by Justice Thomas regarding the effect that the decision will have on organized crime cases.)

The Court dismissed as improvidently granted the writ of cert in ***Mohawk Industries, Inc. v. Williams*** **(05-465)**, a case concerning whether a corporation and its agents were an "association-in-fact enterprise" under RICO, and remanded the case for the Eleventh Circuit to reconsider in light of ***Anza***.

The Court also issued the final opinion and (dare we say?) final chapter in ***Scheidler v. National Organization for Women, Inc.*** **["*NOW III*"] (04-1244)**, a case that spanned over a decade and

made three trips to the Court. *NOW III* concerned the Hobbs Act, which makes it a federal crime to "obstruct[], delay[], or affect[] commerce" by (1) robbery, (2) extortion, or (3) "commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." The Court held that the bar on "threatening or committing violence" only applies to acts in furtherance of robbery or extortion, and does *not* extend to violence that merely affects interstate commerce. NOW and two abortion clinics sued certain pro-life groups, claiming that their acts or threats of violence aimed at preventing women from obtaining abortions violated both the Hobbs Act and RICO. The case made its first trip to the Court in 1994 (*NOW I*), when the Court reversed an initial decision by the district court to dismiss the case on the mistaken ground that a RICO claim required an economic motive. On remand, the case resulted in a plaintiffs' verdict on both the Hobbs Act and RICO claims. In 2004 (*NOW II*), the Court again reversed, concluding that the Hobbs Act requires a taking of "property," and that a woman's right to access an abortion clinic is not the kind of property interest contemplated by the statute. On remand, the Seventh Circuit agreed with NOW that the verdict could be upheld on the alternative ground that the evidence established four instances of violence or threats *unrelated* to extortion, and it remanded the case to the district court to make that determination.

Justice Breyer, writing for a unanimous court, reversed yet again. The question was whether the violence bar applies only to acts relating to robbery or extortion, or to any violence that affects commerce. The Court found that the more natural reading of the statute was the narrower one, and that earlier versions of the statute made clear that it intended to cover only violence in furtherance of robbery or extortion. While the latest version was not so clear, it came as part of a general revision of the Criminal Code that was intended not to create new crimes but merely to recodify existing laws. NOW's interpretation would hugely expand the scope of federal law to cover many crimes currently left to the states. And really, since when does Congress define the substance of a violation as "affecting commerce"—that is clearly a reference to the limits of Congress's authority. The Court rejected NOW's argument that a limited violence bar is superfluous (since the statutory definitions of robbery and extortion both incorporate violence and threats of violence), because it can still apply in narrow circumstances—but more importantly, because it is was clear that Congress did not intend such a broad interpretation. As Breyer said, "canons [of construction] are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent." (A good quote next time you need to convince a court to do what makes sense in the face of a poorly drafted statute.)

SECURITIES LAW

The Court issued two securities-law decisions this Term, both under the Securities Law Uniform Standards Act ("SLUSA"). In the significant case of ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*** **(04-1371)**, the Court held 8-0 that SLUSA preempts state-law class actions by those who have been fraudulently induced to hold onto their stocks, even though federal law gives these plaintiffs no right to sue. In an effort to put a stop to duplicative and abusive securities class actions, Congress enacted SLUSA to bar state-law class actions for securities fraud "in connection with the purchase or sale" of securities. In a class suit by former Merrill Lynch brokers and clients, the Second Circuit construed SLUSA narrowly to cover fraud in "purchases

and sales" only, but not fraud inducing clients to hold their stocks longer than they otherwise would have. Justice Stevens, writing for the Court, disagreed. While a narrow construction "would not, as a matter of first impression, have been unreasonable," the Court always has read the "in connection with" language in previous securities laws to require only that the fraud coincide with a securities transaction involving *someone*, not necessarily the plaintiffs. Congress had to have been aware of this broad construction when it used the phrase in SLUSA. Moreover, reading SLUSA narrowly would undercut Congress's goal of preventing class action abuse. Although this ruling may seem harsh, since federal law does not give "holders" a cause of action, the Court noted that SLUSA applies only to class actions of fifty or more persons—so individuals and smaller groups can still sue under state law.

In its second SLUSA decision, ***Kircher v. Putnam Funds Trust* (05-409)**, the Court held that a federal court order remanding a case to state court after removal under SLUSA is not appealable. A federal statute, 28 U.S.C. § 1447, provides that a remand order is not appealable if it is based on defects in jurisdiction or removal procedure. This reflects a federal policy of avoiding prolonged litigation over removal questions, and the Court has "relentlessly" upheld this rule even where a district court's ruling on these matters is plainly wrong. Despite this rule, a group of mutual funds appealed a remand order based on lack of subject matter jurisdiction, recharacterizing that decision as one based on SLUSA's "preclusion" provisions rather than on truly "jurisdictional" matters. They convinced the Seventh Circuit to keep the case in federal court, but the Court, led by Justice Souter, reversed. The discussion of preclusion versus jurisdiction is short but witheringly dull (through no fault of the author); in essence, the Court held that the district court was right to call the remand order jurisdictional, and it was not appealable. In a short concurrence, Justice Scalia declined to join that reasoning. For him, the fact that the district court *said* its order was jurisdictional was enough to bar any review altogether. Even if the district court was so badly mistaken that it misunderstood its own order, § 1447 barred any appellate review *at all*, and "recharacterization—being a form of review—is categorically forbidden." Thus, the Court had no place even saying that the district court was right, any more than the Seventh Circuit had the power to say it was wrong.

SOCIAL SECURITY

In ***Lockhart v. United States* (04-881)**, the Court, led by Justice O'Connor, unanimously held that the United States may offset Social Security benefits in order to collect a student loan debt, even where that debt has been outstanding for over ten years, resolving a split between the Eighth and Ninth Circuits (and the Ninth Circuit came out on top—it's about time!) The case deals with the intersection of several laws. The Debt Collection Act of 1982 permitted the collection of debts owed to the government through administrative offsets after certain other collection methods were exhausted, but it did not permit the collection of debts over ten years old. Further, the Social Security Act ("SSA") prohibited the attachment or offset of Social Security benefits absent a legislative act that specifically provided for such attachment by express reference to the SSA. So, if the law had not evolved further, Lockhart could have argued successfully that the government could not offset his Social Security benefits to collect on his student loans that were delinquent for more than a decade. Unfortunately for Lockhart, the law did evolve: In 1991, the Higher Education Technical Amendments ("HETA") eliminated the ten-year time-limit with respect to the collection of certain educational loans, and the 1996 Debt

Collection Improvement Act permitted Social Security offsets. Lockhart argued that the elimination of the ten-year limitations period in HETA could not have been intended to apply to Social Security offsets, which were only allowed five years later. The Court disagreed, however, based on the plain meaning of HETA. Justice Scalia concurred separately to voice his opinion that a prior legislature cannot tie the hands of future legislatures by including express reference requirements, as the SSA did here. Congress can repeal prior laws, and where it does so clearly, as it did here, that intent will be honored, whether or not it comports with any traps for the unwary laid by former lawmakers.

SOVEREIGN IMMUNITY

The Court issued several sovereign immunity decisions this Term. In ***Dolan v. United States Postal Service* (04-848)**, the Court held 7-1 that you can sue the Postal Service if you trip over a package it negligently leaves on your porch. The Third Circuit held that Dolan's suit was barred by a provision of the Federal Tort Claims Act ("FTCA") that makes the U.S. government liable "to the same extent as a private person in like circumstances," but preserves sovereign immunity from suit for the "loss, miscarriage, or negligent transmission of letters or postal matter." In an opinion by Justice Kennedy, the Court reversed, construing "negligent transmission" narrowly to mean only negligence causing mail to be lost, delayed or damaged. In a previous decision, *Kosak v. United States*, 465 U.S. 848 (1984), the Court noted that negligent operation of postal trucks did not fall within the exception—they may be "transmitting" mail, but you can still sue if the truck collides with your car. The current Court found that reasoning controlling. Also, construing FTCA exceptions too generously would defeat the purpose of the statute, which waives sovereign immunity in "sweeping language." Justice Thomas dissented. He would read "negligent transmission" broadly to exempt *any* claim arising out of negligent mail delivery, and would limit *Kosak* to auto accidents. He also would construe any ambiguity in favor of sovereign immunity, which is the general rule of construction (but which the majority rejected for the FTCA).

Next, in ***Northern Insurance Co. v. Chatham County* (04-1618)**, the Court, in a unanimous decision authored by Justice Thomas, held that a county does not have sovereign immunity from suit unless it qualifies as an "arm of the state." Chatham County, Georgia operated a drawbridge that failed and fell on a boat. It acknowledged that it did not have "Eleventh Amendment immunity" (conceding that it was not an "arm of the state"), but claimed there was "residual immunity" at common law where it exercised power delegated by the state. Bound by prior precedent, the district court granted summary judgment for the county, and the Eleventh Circuit affirmed. Reversing, Justice Thomas explained that "Eleventh Amendment immunity" is a misnomer: The Amendment did not create state immunity but merely recognized its existence before ratification of the Constitution. Given that "preratification sovereignty" is the source of state immunity from suit, it follows that only states and arms of states possess that immunity and there is no "residual immunity." Since Chatham County admitted that it did not qualify as an arm of the state, there was nothing more to decide. Further, the Court found that there was no admiralty exception to the rule that counties generally are subject to suit.

In addition to ***Northern Insurance***, the Court also considered states' sovereign immunity in ***Central Virginia Community College v. Katz* (04-885)**, which is discussed in the BANKRUPTCY

section, and ***United States v. Georgia* (04-1203)** and ***Goodman v. Georgia* (04-1236)**, which are discussed in the DISCRIMINATION/CIVIL RIGHTS section.

STANDING

In ***DaimlerChrysler Corp. v. Cuno* (04-1704)** and ***Wilkins v. Cuno* (04-1724)**, the Court unanimously held that state taxpayers cannot challenge state tax or spending decisions simply because they are taxpayers. After the city of Toledo and the state of Ohio gave DaimlerChrysler a break on its local property and state franchise taxes for a Jeep assembly plant, some Toledo residents sued, claiming that lower tax revenues would impose a disproportionate burden on them as taxpayers. The Sixth Circuit struck down the state tax break on Commerce Clause grounds, but the Court vacated that ruling on the ground that the plaintiffs lacked standing. The Chief's opinion noted that the Court long has denied *federal* taxpayers standing to object to particular expenditures. These alleged injuries are not concrete or particularized but rather shared with many others, and they are not "actual or imminent" but rather "conjectural or hypothetical." The Court saw no need for a different rule at the state level: Since the purpose of the tax break was to spur economic activity, there might be an *increase* in revenue, and in any event there was no guarantee that the legislature, in its "broad and legitimate discretion" on such matters, would react to any revenue shortfall to the plaintiffs' detriment. Affording standing in cases like this would turn federal courts into "continuing monitors" of state legislative judgments—a no-no under Article III. (Although the Court has conferred standing to taxpayers challenging spending decisions under the Establishment Clause, this is a narrow exception to the rule stemming from the Establishment Clause's specific limitations on legislative spending power.) Also, while the plaintiffs may have had "municipal taxpayer standing" to challenge Toledo's property tax breaks (because of the "peculiar relation of the corporate taxpayer to the [municipal] corporation"), the state franchise tax involved no municipal action. The Court closed by shooting down the plaintiffs' novel argument that, just as a federal court can exercise "supplemental jurisdiction" over state law claims that share the same nucleus of facts as a federal question in a case, it also could confer "supplemental standing" on all claims so long as there was standing for at least one claim. Such a rule would rewrite Article III, and "standing is not dispensed in gross." Justice Ginsburg concurred to note that while she agreed with the Court in this case, she disagreed with just about all the other recent Court decisions that have limited standing in other contexts.

STATES

The Court decided two original jurisdiction cases this Term. In the first, ***Alaska v. United States* (128 Orig.)**, the Court resolved a dispute between Alaska and the federal government over title to various "submerged lands" in the Alexander Archipelago and Glacier Bay National Park. You *might* remember a ruling in the case from last Term—particularly Justice Scalia's "ursine rhapsody" dissent lamenting the Court's fixation on the swimming habits of brown bears—but we doubt it. In essence, last Term the Court overruled Alaska's exceptions to the Special Master's report on the case. This Term, the Court issued a decree disposing of the case in favor of the United States. The second case, ***Arizona v. California* (8 Orig.)**, resolved a longstanding dispute among those states, Utah, Nevada, New Mexico, the United States government and

various Native American tribes over the use of numerous western bodies of water. (How longstanding? Well, it's docket number *eight* in the original jurisdiction cases.) The Court's final decree blessed a settlement worked out by all the parties with a special master, who was finally discharged with the Court's thanks.

UNITED STATES

Justice Breyer drafted the Court's unanimous opinion in ***United States v. Olson* (04-759)**, which held that courts considering claims against the United States under the Federal Tort Claims Act ("FTCA") must determine whether a *private* individual, not a state or municipal entity, would be held liable under *similar*, not identical, circumstances. The FTCA authorizes private tort suits against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." In ***Olson***, two injured mine workers and a spouse sued the United States claiming that the negligence of federal mine inspectors contributed to a serious accident at an Arizona mine. The district court dismissed the suit, in part because it found their allegations insufficient to establish the liability of a private individual under similar circumstances. Reversing, the Ninth Circuit found that (1) where "unique governmental functions" are at issue, the FTCA waives sovereign immunity if a state or municipality would be subject to liability under state law; and (2) federal mine inspectors perform unique governmental functions because there is no adequate private sector analogy. The Court took issue with both pieces of this approach, finding it at once "too broad" and "too narrow": too broad because the FTCA only authorizes courts to impose liability where such would exist against a *private* individual, not a government entity, and too narrow because the Ninth Circuit failed to look for appropriate analogies in the private context—the statute says "similar" circumstances, not "identical."

PART TWO: CRIMINAL AND RELATED CASES

BRADY VIOLATIONS

The Court issued a *per curiam* decision in ***Youngblood v. West Virginia* (05-6997)**, in which it granted cert and vacated and remanded ("GVR'd") the decision of the Supreme Court of Appeals of West Virginia for fuller review of Youngblood's *Brady* claim. Youngblood was convicted of sexual assault, brandishing a firearm and indecent exposure, based mainly on evidence from three young women who claimed he held them hostage. Several months after being sentenced, Youngblood sought to set aside the verdict, claiming that an investigator located a note written by two of the girls in which they allegedly taunted Youngblood and a friend for having been played for fools, warned him that the girls had vandalized the house to which they had been taken, and thanked Youngblood for performing sex acts on the third girl. According to Youngblood, the note had been provided to a police officer, who "declined to take possession of it" and instead told the person who produced it to destroy it. Relying on *Brady v. Maryland*, 373 U.S. 83 (1963), Youngblood argued that the state violated its constitutional obligation to disclose evidence favorable to the defense. The trial court rejected Youngblood's claim on the theory that the note provided only impeachment evidence, not exculpatory evidence, and because the prosecutor could not be faulted for failing to give the evidence to Youngblood since the officer never gave it to the prosecutor. The Supreme Court of Appeals of West Virginia narrowly affirmed, finding no abuse of discretion by the trial court, but without independently examining the *Brady* claim. The Court GVR'd, but not without first citing precedent that *Brady* applies to both impeachment and exculpatory evidence and extends to a failure to disclose evidence even where that evidence is known only to a police investigator and not the prosecutor. At that point, it would seem that a simple reversal would be in order, but no—the Court vacated and remanded because it would be "better to have the benefit of the full Supreme Court of Appeals of West Virginia on the *Brady* issue."

Now, the fun part comes not in the substance of the Court's decision, but in Justice Scalia's scalding rebuke of the Court's use of the GVR procedure "in light of nothing." For Scalia, joined by Justice Thomas (and Justice Kennedy, who dissented separately), the GVR procedure is inappropriate where the Court simply seeks additional analysis by the lower court. It should be used only where (1) an intervening factor, such as a change in the law, has arisen, (2) where clarification is necessary to assure the Court's jurisdiction, or (3) where the appellee acknowledges error in the judgment below. None of these applied to this case. Instead, Scalia chided, the Court used the procedure to obtain what is in effect an *amicus* brief from the state court to facilitate the Court's possible future review of the merits. Worse, the Court may have used the procedure to push the state court to reverse itself without doing so directly—lower courts have previously interpreted GVR orders in this manner, and "[h]ow much more is that suspicion justified when the GVR order rests on nothing more than our statement that it would be 'better' for the lower court to reconsider its decision (much as a mob enforcer might suggest that it would be 'better' to make protection payments)." For Scalia, Thomas and Kennedy, either the Court should decide the case or it should not grant cert at all; it should not use its authority to impose a "tutelary remand, as to a schoolboy made to do his homework again."

COERCED CONFESSIONS

In a *per curiam* one-line opinion in ***Maryland v. Blake*** **(04-373)**, the Court dismissed cert as improvidently granted. In that case, a police officer tried to get an arrestee to talk after he had asked for counsel by showing him a statement of charges that falsely indicated the possibility of the death penalty. Another officer immediately told the first that they could not talk to the suspect because he had asked for counsel, but thirty minutes later the suspect asked to talk. The Maryland Supreme Court held that the suspect's subsequent statements were inadmissible because his voluntariness was suspect. After briefing and argument, the Court must have decided that there was no issue worth resolving.

CONFRONTATION CLAUSE

Criminal defendants fared well in the combined cases of ***Davis v. Washington*** **(05-5224)** and ***Hammon v. Indiana*** **(05-5707)**, where a nearly unanimous Court provided guidance on what constitutes a "testimonial statement" subject to the requirements of the Sixth Amendment's Confrontation Clause. Justice Scalia penned the majority opinion (for all but Justice Thomas), which holds that statements made to enable police to meet an ongoing emergency are *not* testimonial in nature and thus are not subject to the strictures of the Confrontation Clause, whereas statements made primarily to assist police in investigating past events *are* testimonial and must be subject to cross examination. In ***Davis***, Michelle McCottry called 911 to report an assault by her boyfriend; during the course of the frantic call, she identified Davis. While McCottry did not testify against Davis (and therefore could not be cross-examined), the 911 tape was admitted and Davis was convicted. ***Hammon*** also involved a police response to a domestic violence incident. Upon the officers' arrival to her home, Amy Hammon initially denied that anything had happened, but upon further interrogation away from her husband, Hershel, she explained that he had broken furniture and shoved her onto the floor into broken glass. She also provided a written statement to that effect. Hammon was subpoenaed but did not show up to testify; her statements were admitted under the "present sense impression" and "excited utterance" exceptions to the hearsay rule, and Hershel was convicted. The majority found that McCottry's statements to the 911 operator (at least her initial statements, including her ID of Davis) were not testimonial because they were made while McCottry was in an unsafe situation for the purpose of obtaining assistance in an ongoing emergency. In contrast, Hammon's statements were made primarily for an investigatory purpose since there was no ongoing threat and police were attempting to obtain details about a past alleged criminal event. Therefore, those statements *were* testimonial in nature and had to be subject to cross-examination. The majority found no need for the statements to be made in the context of a formal setting (such as a deposition or at the police precinct) for the cross-examination requirement of the Confrontation Clause to apply—it was enough that the primary purpose of the interrogation was to establish or prove events potentially relevant to later criminal prosecution.

Justice Thomas dissented. He would have found both McCottry's *and* Hammon's statements to be nontestimonial since neither was made with any trapping of formality normally associated with statements considered to be testimonial for Sixth Amendment purposes. Thomas chided the majority for developing a test (based on the primary purpose for the interrogation) that was "neither workable nor a targeted attempt to reach the abuses forbidden by the Clause."

CRIMINAL PROCEDURE

In ***Eberhart v. United States* (04-9949)**, the Court issued a *per curiam* decision holding that Federal Rule of Criminal Procedure 33(a), which requires that a motion for a new trial based on anything other than new evidence be brought within seven days, is *not* jurisdictional, but is instead merely an "inflexible claim-processing rule." Therefore, the government waives any argument based on a defendant's failure to meet this deadline if it does not raise it in a timely fashion. The Court took responsibility for the many lower court decisions that got this wrong, acknowledging that its "repetition of the phrase 'mandatory and jurisdictional' has understandably led the lower courts to err on the side of caution." The Court also was remarkably candid in its appreciation for the Seventh Circuit's handling of the case; the Seventh Circuit found that it was bound to construe Rule 33 as jurisdictional, but recognized that other Supreme Court decisions raised the possibility that these types of rules were in fact claim-processing rules. "By adhering to its understanding of precedent, yet plainly expressing its doubts, it facilitated our review."

DEATH PENALTY

Once again this Term, the Court directed significant attention to death penalty cases. Unlike last Term, however, death penalty defendants did not fare so well. Challenges based on invalid sentencing factors may be somewhat more difficult after ***Brown v. Sanders* (04-980)**, and ***Kansas v. March* (04-1170)** permits a defendant to be sentenced to death even where a jury finds the aggravating and mitigating sentencing factors to be evenly balanced. Further, the Court's decision in ***Oregon v. Gruzek* (04-928)** permits states to limit the innocence-related evidence a capital defendant can offer in the sentencing phase of his trial to the evidence offered during the guilt phase. In ***Hill v. McDonough* (05-8794)**, the Court did allow a death penalty inmate to bring a challenge to the method of his execution under 42 U.S.C. § 1983, making it procedurally easier to bring such claims, but in ***Donahue v. Bieghler* (05A684)** the Court vacated a stay of execution that had been entered based on a method-of-execution challenge. Finally, the Court held in ***Schriro v. Smith* (04-1475)** that states may establish the method for determining whether a criminal defendant is mentally retarded and thus ineligible for the death penalty.

Looking first at sentencing, in ***Brown v. Sanders* (04-980)** the Court clarified the law regarding when the jury's consideration of invalid sentencing factors will render a death sentence unconstitutional. By way of background, since *Furman v. Georgia*, 408 U.S. 238 (1972), states must limit the class of murderers eligible for the death penalty, which they typically do through statutory eligibility factors (such as killing during a robbery or killing a witness, both of which applied to this case). After finding that a defendant is death-eligible, the jury must then weigh the evidence favoring a death sentence against any mitigating evidence. In some states, which the Court has previously termed "weighing states," the *only* aggravating factors the jury can consider are the statutory criteria making the defendant death-eligible. Thus, if the jury's finding on any of these eligibility factors turns out to be invalid, the jury's treatment of evidence supporting that factor as aggravating necessarily skews the balance in favor of a death sentence and usually requires that a death sentence be reversed. Other states, which the Court has called "non-weighing states," specify permissible aggravating factors that go beyond or are different from the eligibility criteria. In non-weighing states, the Court has held that a jury's consideration

of an impermissible eligibility factor does not necessarily skew the balance in favor of death because the list of sentencing factors is open-ended, so in these states there is a different rule: Reversal is warranted only if the jury may have treated constitutionally protected or utterly irrelevant conduct as aggravating or if the jury considered aggravating evidence that otherwise would not have been before it. Thus, until the Court's decision in ***Brown***, there have been two different rules depending on whether the state is classified as "weighing" or "non-weighing," a distinction that the majority found "misleading" and outdated and one the dissent called "impractical and unrealistic."

Now that distinction is history. In this case, Sanders invaded a home to rob it, and in the process killed one occupant and attempted to kill another. The jury found four special circumstances making Sanders death-eligible, and sentenced him to death based on aggravating factors that included an omnibus "circumstances of the crime" factor. The California Supreme Court knocked out two of the jury's four eligibility findings but still affirmed the sentence. Sanders lost his federal habeas petition in the district court, but the Ninth Circuit reversed, finding that California was a weighing state and that the jury's consideration of two invalid eligibility criteria in sentencing Sanders to death was not harmless. The Supreme Court disagreed, in a five-Justice majority led by Justice Scalia. First, California is not a weighing state; the "circumstances of the crime" factor was not a discrete eligibility factor, but a broad factor that opened up the jury's inquiry and rendered it a non-weighing state, to use the Court's old terminology. More fundamentally, the majority threw out the weighing/non-weighing distinction in favor of the following rule: An invalid sentencing factor (whether or not it is also an eligibility factor) requires reversal unless another sentencing factor allows the jury to treat the same evidence as aggravating. In Sanders's case, the California Supreme Court threw out two of the jury's special factors: murder committed during a burglary, and a "heinousness" factor that it found unconstitutionally vague. But it upheld the murder-during-a-robbery factor, as well as the killing-a-witness factor, and these factors allowed the jury to consider as aggravating all the evidence that it would have considered anyway under the two impermissible factors. So there was no constitutional problem with the sentence.

There were two dissenting opinions. Justice Stevens, joined by Justice Souter, wrote to defend the "simple, categorical" distinction between weighing and non-weighing states, and to say that they thought California was a weighing state. Justice Breyer, joined by Justice Ginsburg, agreed to throw out the weighing/non-weighing distinction, but they would require appellate courts to determine whether the jury's consideration of the impermissible factor was harmless under general appellate review standards. For Breyer, the issue is not whether the jury could consider the same evidence under another factor, but whether the errors at trial impermissibly *emphasized* the evidence, even if admissible. Breyer would have remanded to the Ninth Circuit to address these questions—for example, whether the trial court's instructions on the unconstitutional heinousness factor tilted the jury's consideration of the evidence in front of it. (All four dissenters noted that, if presented with the question, they might have found the errors harmless.)

Next, in ***Kansas v. Marsh*** **(04-1170)**, the Court upheld Kansas's death penalty statute, which requires the death penalty if a jury unanimously finds that the State has proven, by clear and convincing evidence, that aggravating circumstances are not outweighed by mitigating circumstances (*i.e.*, death *must* be imposed if the factors are in equipoise). Justice Thomas authored the decision for the 5-4 Court, in which the Chief and Justices Scalia, Kennedy and

Alito joined. The Kansas Supreme Court invalidated the statute, finding that it violated the Eighth and Fourteenth Amendments. In reversing, the majority found *Walton v. Arizona*, 497 U.S. 639 (1990), controlling. There, the Court upheld a scheme requiring death if there were aggravating circumstances and any mitigating circumstances did not call for leniency. (Some *Walton* dissenters interpreted the statute as requiring proof that mitigating factors outweighed aggravating factors, making its application nearly identical to the Kansas rule.) The *Walton* Court found no constitutional dilemma in requiring a defendant to prove mitigating circumstances "sufficiently substantial to call for leniency." The Constitution requires only that a jury be permitted to consider any mitigating evidence as part of the "individualized sentencing" requirement; states remain free to determine *the manner* in which mitigating and aggravating factors may be considered. "So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death." Practically, the Court thought that the Kansas statute was far better for defendants than the statute addressed in *Walton*, since Kansas places the burden on the State to prove by clear and convincing evidence that aggravating factors are not outweighed by mitigating factors, while the Arizona statute required the defendant to prove, by a preponderance of the evidence, that mitigating factors called for leniency. Finally, even if *Walton* was not controlling, Kansas's system is constitutional because it (1) rationally narrows the class of death-eligible defendants and (2) permits a jury to render a reasoned, individualized decision. Kansas's system merely channels the jury's discretion by giving it criteria to determine whether a sentence of life or death is appropriate. The jury is instructed that a finding that the factors are in equipoise is a finding for death—so there is no substance to the dissent's argument that such a finding reflects juror confusion or indecision about imposing death. (Scalia issued a separate concurrence, which will be addressed in combination with the dissents.)

Justice Souter penned the principal dissent, in which Justices Stevens, Ginsburg and Breyer joined. They would find Kansas's system unconstitutional because the "Eighth Amendment requires that a 'tie go to the defendant when life or death is at issue.'" The Constitution precludes a mandatory death sentence in "doubtful cases" and a finding of equipoise cannot be said to be beyond doubt. *Walton*, the dissent would find, is not controlling, as the sentencing structure there arguably did not require death when the evidence was even. Moreover, the Constitution requires that death be imposed based on reasoned moral judgment and that the sentencer make an individualized decision based on specific facts relevant to the defendant and the nature of the crime. "[A] tie breaker system in favor of death fails on both counts." Further, requiring death where the aggravating evidence has failed to convince a jury is "morally absurd," and imposing death under these circumstances is all the more inappropriate given that new DNA evidence has cast doubt on the reliability of numerous capital convictions. In his concurrence, Scalia took the dissent to task over this line of argument. First, the DNA evidence cited by Souter was hardly convincing (Scalia spent pages debunking many of the alleged "innocence" cases) and the reliability of DNA evidence goes to guilt, not sentencing. To the extent such evidence is even relevant to sentencing, it represents a general attack on the death penalty, not a viable challenge to Kansas's system. It is not the business of the Court to second-guess the moral judgments of the states and the majority of individuals in the United States (who favor the death penalty), but merely to interpret the law.

Stevens dissented separately to argue that the Court should not have granted cert where the Kansas Supreme Court arguably had provided more protection than the federal Constitution

required. Left undisturbed, the Kansas decision would have had no precedential effect on other states; "what harm would have been done . . . if the Kansas court had been left undisturbed in its determination?" The only interest served by granting cert is "an interest in facilitating the imposition of the death penalty in Kansas." Historically, the Court has focused on the States' failures to protect federal rights, not their willingness to go above and beyond the call to protect them, and that history supports a decision not to grant cert here. For Scalia, this view on granting cert would create "a ludicrous rule"; Congress has a strong interest in uniform federal law and it is the Court's job to be the final arbiter of what that law is.

Turning from sentencing factors to the evidence that can be offered in the sentencing phase, the Court held in ***Oregon v. Guzek*** **(04-928)** that a state can limit the innocence-related evidence a capital defendant can offer in the sentencing phase of his trial to that evidence offered during the guilt phase. Guzek was convicted of capital murder and sentenced to death; after a series of appeals in which he obtained new sentencing hearings due to procedural faults (each time only to be sentenced to death yet again), the Oregon Supreme Court made a number of evidentiary rulings to govern what it hoped would be the final hearing. Among other things, Guzek wanted to offer live alibi testimony from his mother, who testified during the guilt phase that Guzek was with her at the time of the murders. The Oregon court held that the Eighth and Fourteenth Amendments gave Guzek a federal constitutional right to introduce this evidence at sentencing. The Court, led by Justice Breyer, disagreed, vacating the Oregon ruling and remanding the case. The Court first rejected Guzek's motion to DIG the case (that is, dismiss the writ of cert as improvidently granted). Guzek argued that state law independently gave him the right to offer this evidence and, therefore, the Court should decline to hear the case. The Court found that this was only a *possibility* that did not stand in the way of reviewing a decision that rested on federal law. As to the case itself, the Court held that nothing in the Constitution gives a capital defendant who has been found guilty the right to introduce new evidence on his guilt during sentencing—the issue at sentencing is *how*, not *whether*. Even if the Eighth Amendment gave capital defendants *some* right to introduce "residual doubt" evidence at sentencing (a question the Court ultimately, and maddeningly, left open), that right would not cover Guzek's case, because the Amendment still allows states to set reasonable limits on mitigating evidence. Guzek sought to make a collateral attack on his verdict, which is discouraged. Also, Oregon law still allows him to offer *transcripts* from his guilt phase, which would allow him to put in his mother's testimony. Justice Scalia (with Justice Thomas) concurred with the Court's judgment but not its reasoning—they would address what the Court left open and reject all Eighth Amendment residual-doubt claims.

Moving on to the method of execution, in ***Hill v. McDonough*** **(05-8794)** the Court unanimously held that a death-row inmate seeking to challenge the method of his execution as cruel and unusual can bring a civil-rights suit under 42 U.S.C. § 1983, as opposed to a petition for a writ of habeas corpus, so long as the method of execution is not prescribed by law. This is significant in that there are far fewer procedural hurdles to bringing a § 1983 claim. Hill challenged Florida's injection sequence under § 1983 as likely to cause him severe pain and suffering, but the lower courts construed his action as a habeas petition and dismissed it on procedural grounds. The Court reversed, in an opinion by Justice Kennedy that noted the distinction between challenges to the lawfulness or duration of confinement, which *must* be brought via a habeas petition, and challenges to the circumstances of confinement, which need not be. The difference is that the former, but not the latter, necessarily challenge the legality of a sentence (*i.e.*, finding that a state

cannot detain or execute an inmate in one particular manner does not mean that it cannot detain or execute him at all). The key for the Court in ***Hill*** was that although Florida law prescribed lethal injection as the means of execution, it left the specific method of injection up to corrections officials, and Hill challenged only the particular, three-drug sequence intended for his execution. Because he left open the possibility that Florida could execute him by lethal injection in some other manner, a decision in his favor under § 1983 would not imply that his sentence—lethal injection generally—was unlawful. The Court was sympathetic to the concerns raised by Florida, the Solicitor General, and others that death-row inmates will simply challenge individual aspects of their planned executions one at a time and thus effectively block their executions. Still, it rejected a proposal to require inmates like Hill to identify in their complaints alternative means of execution that they would accept. According to the Court, heightened pleading requirements should result from changes to the Federal Rules (hint, hint), not case-by-case litigation. The Court also noted that filing a § 1983 action does not entitle an inmate to an automatic stay of execution, so a court faced with a motion for a stay can consider factors such as whether a suit is speculative or filed too late in the day.

Notwithstanding its procedurally favorable decision in ***Hill***, in ***Donahue v. Bieghler* (05A684)** the Court vacated, by a 6-3 vote, a Seventh Circuit order to stay the execution of another death-row inmate who planned to bring a method-of-execution challenge. The Seventh Circuit entered a stay order late in the night, and the Court's ruling came down after midnight that same night, allowing Bieghler's execution to proceed. Justices Stevens, Ginsburg and Breyer dissented. Bieghler's case was a direct challenge to the constitutionality of lethal injection (which has thus far survived repeated judicial review).

Finally, the Court issued a *per curiam* opinion (with no recorded dissents) in ***Schriro v. Smith* (04-1475)**, a case involving Arizona's right to select the method for determining whether a criminal defendant is mentally retarded and therefore exempt from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). The Ninth Circuit had ordered that the issue of retardation be decided by jury trial. The Court reversed, reiterating its holding in *Atkins* that states may adopt their own measures for adjudicating claims of retardation. While these measures ultimately may be subject to constitutional challenge, the states must be given the first crack at developing procedures and cannot be preempted by the federal courts.

DURESS

The Court held 7-2 in ***Dixon v. United States* (05-7053)** that, absent statutory language to the contrary, a state may require a criminal defendant to prove the defense of duress by a preponderance of the evidence. Keisha Dixon purchased firearms at two gun shows, each time providing an incorrect address and falsely affirming that she was not under indictment for a felony. At trial, she admitted that she knew both that she was under indictment when she made the purchases and that it was a crime to do so, but claimed that her boyfriend had threatened to kill her if she didn't buy the guns. Dixon sought a jury charge requiring the Government to disprove duress beyond a reasonable doubt, arguing that a finding of duress would negate *mens rea* (and thus the Due Process Clause required the government to bear the burden because *mens rea* is an element of the offense) and that modern federal common law required the instruction.

The trial court instead put the burden on Dixon to prove duress by a preponderance of the evidence. Dixon was convicted, and the Fifth Circuit affirmed.

Led by Justice Stevens, the majority found no basis for requiring the government to bear the burden of disproving duress beyond a reasonable doubt. First, duress does not controvert the *mens rea* requirements of Dixon's alleged crimes, which were that she acted "knowingly" and "willfully." "Knowingly" means that a defendant acted with "knowledge of the facts that constitute the offense"—here, that she was under indictment and/or made false statements (which Dixon admitted at trial). "Willfully" requires that a defendant "acted with knowledge that his conduct was unlawful" (and Dixon further admitted that she knew it was a crime to purchase guns with false statements or while under indictment). Duress may *excuse* this conduct, but it does not negate *mens rea*. Second, modern common law does not require placing the burden of proof on the government. Historically, the burden of proving all affirmative defenses rested on the defendant. The Court departed from this rule in *Davis v. United States*, 160 U.S. 469 (1895), where it required the government to prove a murder defendant's sanity beyond a reasonable doubt on the ground that insanity would controvert the unique *mens rea* requirement for murder, and thus evidence of sanity also would tend to prove *mens rea*. (In 1984, Congress put the burden back on defendants, requiring them to prove insanity by clear and convincing evidence.) Unlike the insanity defense in *Davis*, however, duress does not controvert *mens rea* for Dixon's crimes, and there is no evidence that *Davis* sparked a revolution with respect to duress the way that it did for insanity. Finally, the facts relating to duress are peculiarly in the defendant's possession, so it makes sense to place the burden of proof on her.

Justice Kennedy concurred to note that "it seems altogether a fiction to attribute to Congress any intent one way or the other in assigning the burden of proof." Further, Congress surely would not want the burden to vary statute by statute, based on the state of the common law at the time of enactment, but presumably wanted courts to apply traditional principles for allocating burdens. Because proof of duress lies peculiarly in the knowledge of the defendant, the usual rule giving her the burden should apply. Justice Alito, joined by Justice Scalia, also concurred to emphasize that the majority opinion should not be read to permit the burden of establishing duress to vary from statute to statute; the burden should remain where it was when Congress began enacting criminal statutes (with the defendant), because it is unrealistic to "assume that Congress makes a new, implicit judgment about the allocation of these burdens whenever it creates a new federal crime or . . . revises an existing criminal statute."

Justice Breyer, joined by Justice Souter, dissented. They agreed that there is no constitutional requirement that the government bear the burden of proving duress and that Congress therefore may place the burden on either party. But they believed that Congress made no such determination, instead implicitly delegating the function of assigning burdens to the judiciary. While the issue admittedly is "a close one," they would assign the burden to the government because, while duress may not negate *mens rea*, it is similar to *mens rea* in that one who acts under duress has no meaningful choice and hardly can be said to be a criminal. Further, federal courts have put the burden on the government with respect to other affirmative defenses that resemble duress, such as self-defense and entrapment, and there is substantial benefit to adopting a uniform approach. Finally, numerous courts previously had required the government to bear the burden on duress, and there has been no showing that this approach has been unworkable.

EVIDENCE

In ***Holmes v. South Carolina*** **(04-1327)**, the Court unanimously struck down a South Carolina rule of evidence that precluded a defendant from offering evidence that another person committed the crime where the prosecution's evidence against the defendant was "strong." Bobby Lee Holmes was convicted of the rape and murder of an 86-year-old woman. Holmes claimed he had been framed and presented experts who criticized the state's forensic evidence. He also claimed that another man, Jimmy White, had committed the crime. Although White denied it at a pretrial hearing, Holmes had witnesses who heard White admit to the crime and who could refute White's alibi. The trial court excluded the evidence based on a rule that allowed evidence of third-party guilt if it raised a reasonable inference as to the defendant's innocence, but excluded it if it merely cast a "bare suspicion" on another. The South Carolina Supreme Court affirmed, holding that where there is strong evidence—especially forensic evidence—of the defendant's guilt, evidence of third-party guilt does not raise an inference as to the defendant's innocence. The Court reversed. In a straightforward and concise opinion, Justice Alito noted that the case did *not* concern standard rules governing evidence of third-party guilt, which generally bar evidence that is speculative or not probative of anything pertaining to the defendant. South Carolina's rule was different because the state courts wrongly had shifted the focus from the probative value of the proffered evidence to the strength of the prosecution's case—if the case against the defendant is strong, the third-party guilt evidence is excluded even if, viewed independently, it would be highly probative. That court also ignored Holmes's challenges to the forensic evidence—and since the prosecution's case was not conceded, any assessment of its strength would be a factual determination for a jury. As a result, the South Carolina rule as construed below was "arbitrary" and violated Holmes's right to mount a complete defense.

FOURTH AMENDMENT

With one notable exception, criminal defendants came out on the losing end of the Court's Fourth Amendment decisions. From the Court's conclusion that a knock and announce violation does not require exclusion at trial of seized evidence, to its decision that anticipatory search warrants are valid, to its holding that suspicionless searches of parolees are reasonable, and, finally, to its conclusion that police may enter a home without a warrant if there exists reason to believe that an occupant is seriously injured or imminently threatened with injury, criminals lost. The lone exception was the Court's conclusion that one occupant's consent to the search of a home was invalid in the face of an objection by a second present occupant.

The Court's decision in ***Hudson v. Michigan*** **(04-1360)**, delivered a serious blow to criminal defendants and the exclusionary rule. Under ***Hudson***, violation of the "knock-and-announce" requirement of the Fourth Amendment (*i.e.*, police must knock and announce their presence before entering a home) does not require exclusion of evidence obtained in a search. For the five-Justice majority, led by Justice Scalia (who was joined by the Chief and Justices Thomas, Alito and Kennedy), exclusion is not an appropriate remedy for all Fourth Amendment violations. Instead, it should apply only where the "deterrence benefits" of exclusion outweigh the "substantial social costs." Here, those costs included: (1) the risk of setting dangerous criminals free; (2) miring the courts in fact-laden inquiries into whether a police officer waited a

sufficient period after knocking or whether one of the exceptions to knock-and-announce applies; and (3) the risk that police will be overcautious and wait too long before entering, leading to preventable violence against officers and the destruction of valuable evidence. Also, for the majority, there was no reason to believe that civil suits would not be a sufficient deterrent to ensure that the knock-and-announce rule is ordinarily followed. Further, the failure to knock and announce is not a "but for" cause of obtaining evidence in most cases. Here, the officers had a valid warrant when they went to Hudson's house, and they would have seized the evidence (a gun and drugs) whether they entered lawfully or unlawfully—the fact that the method of entry was unlawful was simply too attenuated from the seizure of the evidence to justify exclusion. Suppression also would not serve the interests protected by the knock-and-announce rule, which include the protection of life (since surprised inhabitants might resort to violence), property (damage to the door), and privacy and dignity (allowing the citizen time to get out of bed and get dressed). The rule is not intended to protect an interest in preventing the government from seeing or seizing inculpatory evidence, and, therefore, exclusion is inappropriate. Justice Kennedy concurred in part and in the judgment, joining all but one section of the majority opinion that relied on three inevitable/independent discovery cases to support the result reached. Kennedy also stressed that the Court's decision does not threaten the exclusionary rule in general but is limited to knock-and-announce violations. (Notwithstanding Kennedy's soothing remarks, criminal defense attorneys no doubt will be very worried, since much of the Court's reasoning would appear to apply in other Fourth Amendment contexts.)

Justice Breyer issued a lengthy dissent (joined by Justices Stevens, Souter and Ginsburg), bemoaning the destruction of "the strongest legal incentive to comply with the Constitution's knock-and-announce requirement." With respect to the deterrence benefits versus social cost analysis, the dissenters clearly placed greater value on the privacy/dignity interests protected by knock-and-announce, and they did not believe that civil suits would deter violations. The dissent also took issue with the majority's claim that "but for" causation did not exist: The entry here admittedly was unlawful, and the evidence would not have been found absent the entry. It may be true that the same evidence would have been seized if the officers had entered in a lawful manner, but that is the same as arguing that evidence seized after a warrantless search should be admitted because the police *could* have obtained a warrant—and this has never been the rule. Further, never before had the Court required a *direct* link between the Fourth Amendment interests furthered and the exclusion of evidence. Certainly, applying the exclusionary rule to contraband seized in warrantless arrest cases does not stem from the desire to protect an individual's interest in avoiding seizure of inculpatory evidence. Finally, Breyer found no precedent to support doing away with the exclusionary rule in knock-and-announce cases. The only previous exceptions to the rule were (1) where there was a specific reason to believe that the rule would not result in appreciable deterrence (and there's no reason to believe that exclusion would not deter knock-and-announce violations); and (2) where the proceeding involved was not a criminal trial (because sufficient deterrence is already afforded by requiring exclusion in the criminal context). The inevitable/independent discovery cases also were inapposite because, here, the evidence was seized as part of the unlawful search of the home, not as part of an independent, untainted process.

Next, in ***United States v. Grubbs*** **(04-1414)**, the Court, led by Justice Scalia, held that anticipatory search warrants are constitutional so long as there is probable cause to believe that (1) the event triggering the search (*e.g.*, the arrival of a package) will occur, and (2) if the

triggering event occurs, contraband (*e.g.*, drugs or pornography) will be found on the premises. The case was largely unanimous, with all Justices (except Justice Alito, who did not participate) concurring in the central holding and in the judgment finding the warrant valid. The majority further found that the warrant itself need not state the triggering event since the Fourth Amendment expressly requires only that the warrant contain a description of the property to be searched and the items to be seized. Justice Souter, joined by Justices Stevens and Ginsburg, concurred to note that it would be better practice for the triggering event to be stated on the face of the warrant—since the officer executing the warrant may not be the officer that provided the affidavit establishing probable cause and, thus, may not be aware of the trigger.

In ***Samson v. California*** **(04-9728)**, the Court ruled 6-3 that the Fourth Amendment does not prohibit police from performing a suspicionless search of a parolee. Under California law, to be eligible for release on parole, a prisoner must agree in writing that he may be searched or seized at any time "with or without a search warrant and with or without cause." Samson was stopped by a police officer while walking down the street and searched solely on the basis of his status as a parolee. The search uncovered a bag of methamphetamines, and Samson was charged with possession. At trial, Samson moved to suppress because the search violated the Fourth Amendment. The motion was denied and Samson was convicted and sentenced to seven years. The California Court of Appeals affirmed, finding that suspicionless searches of parolees were permitted under California law and "reasonable within the meaning of the Fourth Amendment." The Court, led by Justice Thomas, agreed. Under the Fourth Amendment, the reasonableness of a search is based on "the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests." Just last Term, in *United States v. Knights*, 534 U.S. 112 (2005), the Court upheld a warrantless search of a probationer based on reasonable suspicion and his probationary status. In doing so, the Court noted that probationers have a diminished expectation of privacy, given that probation is on the continuum of punishments ranging from solitary prison confinement to community service. Parolees, the majority reasoned, have even lower expectations of privacy since, on the continuum of punishments, parole is closer to prison—in fact, parolees remain in the legal custody of the Department of Corrections. Further, California has an overwhelming interest in effectively supervising parolees given the extremely large number it must monitor and their incredibly high recidivism rate. Therefore, California's approach of conducting suspicionless searches of parolees was reasonable. The majority did not address California's additional arguments that Samson consented to the search by signing the parole agreement and that the search was valid as a "special needs" search under *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

Justice Stevens, joined by Justices Souter and Breyer, dissented, arguing that the Fourth Amendment provides at least some protection to parolees and, therefore, suspicionless searches by police with no special relationship to the parolee cannot be considered "reasonable." The dissenters argued that this is the first time that the Court has found a search reasonable in the absence of either individualized suspicion or "special needs." Further, the majority's near-equating of parolees to prisoners, while superficially appealing, was unsupported by precedent and by policies allowing such searches in prison (*i.e.*, the need to maintain order within the facility). Special needs searches by parole officers, who have a close relationship to a parolee, might be acceptable, but a blanket authorization allowing a parolee to be searched by any police officer is not. Further, the dissenters worried that there were no procedural protections in the

California law to ensure that searches were performed evenhandedly (though the statute does preclude arbitrary, capricious and harassing searches).

In ***Brigham City, Utah v. Stuart*** **(05-502)**, the Court held, unanimously and to no one's surprise, that police may enter a home without a warrant when there is an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with serious injury. Utah police, responding to complaints about a loud party, arrived at a residence where, through a window, they saw a juvenile strike an adult and cause him to spit blood and then saw several adults try to restrain the juvenile. The police entered and arrested all involved. The Utah courts held that evidence obtained after the officers' entry had to be suppressed because the "emergency aid" exception to the Fourth Amendment did not apply since: (1) the juvenile's punch did not give rise to an objectively reasonable belief that anybody inside was unconscious or semi-conscious, and (2) the officers were motivated to make an arrest rather than to help the injured adult. The Chief wrote for the Court, which rejected the Utah courts' focus on the officers' subjective motivations for entering the house. Even assuming that the officer's actual motives could be unraveled, the Fourth Amendment issue is whether the circumstances *objectively* justified entry. Here, they did, as there was an objectively reasonable basis for believing that the injured adult might need help and that the violence at the home was just beginning. The Court also rejected the Utah courts' threshold for emergency aid, holding that the Fourth Amendment does not require police to wait until someone is rendered semi-conscious: "[A]n officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."

Noting that this was "an odd flyspeck of a case," Justice Stevens wrote an equally odd concurrence. Stevens agreed with the Court's Fourth Amendment ruling, stating that "it is hard to imagine the outcome was ever in doubt." But Stevens actually would have *denied* cert in the first place, based on the Utah Supreme Court's request in its decision below that any future suppression challenges come under the Utah Constitution rather than (as Stuart had done here) under just the Fourth Amendment. Stevens read this invitation to signal that Utah would adopt its restrictive reading of the Fourth Amendment under its own constitution, which of course any state is free to do. Stevens, however, did not explain why this would have justified leaving an erroneous reading of the *federal* Constitution intact, which denying cert would have done.

Finally, ***Georgia v. Randolph*** **(04-1067)** provided criminal defendants with one ray of light in an otherwise gloomy Fourth Amendment picture. The Randolphs had separated, and Ms. Randolph briefly had moved to Canada with her son before returning to the Randolphs' home in Americus, Georgia. One morning, she called the police complaining that Mr. Randolph had taken their son away, and when the police arrived she told them that her husband had cocaine in the house. Mr. Randolph then returned (having left the son with neighbors). The police asked for consent to search the house, which Mr. Randolph refused but which Ms. Randolph provided, and the police found a straw with cocaine residue in the bedroom. At Mr. Randolph's trial, the court admitted the evidence based on Ms. Randolph's common authority to consent to the search. The Georgia Supreme Court disagreed, holding that one occupant's consent is invalid in the face of objections by another, physically present occupant (thereby distinguishing *United States v. Matlock*, 415 U.S. 164 (1974), which held that consent to a search by one occupant with common authority is valid against an *absent* occupant).

The Court affirmed in an opinion by Justice Souter. The Court characterized *Matlock* as turning on one occupant's "assumption of risk" that, in his absence, a co-occupant might admit visitors that he would rather exclude. In *Minnesota v. Olson*, 495 U.S. 91 (1990), however, the Court held that a houseguest has a legitimate expectation that her host will not let in people looking for her over her active objections, and it follows that a present co-occupant would have an even stronger expectation. But if one occupant has no authority to prevail over the objections of another present occupant, then the police here had no better claim to reasonableness in entering than if there was no consent at all, especially given the "centuries-old principle of respect for the privacy of the home." There was nothing stopping Ms. Randolph from giving evidence to the police, or from telling them what she knew so they could get a warrant, but she could not authorize a warrantless search over Mr. Randolph's objections. This sounds all well and good, but the Court had to deal with "two loose ends" (*i.e.*, its own opinions that seemed to support a different outcome). The first was *Matlock*, in which the defendant was only "absent" because he was in the squad car out on the street (admittedly, it was a big front yard). The second was *Illinois v. Rodriguez*, 497 U.S. 177 (1990), in which the Court upheld a search where the unconsenting occupant was asleep inside the home and could have been roused. Here's the majority's explanation: "[W]e have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." Perhaps anticipating a future case, the Court noted that police cannot remove a potential objector from the premises for the sake of avoiding his objection.

Reading the majority opinion, one could almost feel the dissents coming—and the primary dissent came from Chief Justice Roberts, joined by Justice Scalia. For the Chief, the key was that the Fourth Amendment protects privacy, not societal expectations created by the Court's "surmise." If someone shares information or a home with another, he assumes the risk she will share that information—or that place—with the government. If Ms. Randolph could have walked inside, retrieved the straw and given it to the police, she also could consent to a valid search. The majority's rule protects not privacy but "happenstance"—if the objector is lucky enough to be at the door, he can stop a search, but not if he is watching TV in the next room. The Chief also was concerned that the rule could have severe consequences in domestic abuse cases where police might be prevented from entering by an abuser's refusal to consent. (Souter's majority opinion called this concern a "red herring," citing to the exigent circumstances exception to the warrant requirement.) The Chief anticipated that one day this case will be another "loose end" that a future Court will have to resolve.

Beyond the majority opinion and the Chief's dissent, there was some interesting back-and-forth in the other Justices' opinions. Justice Breyer concurred to say that if he had to choose a bright-line rule, he would side with the Chief; however, "the Fourth Amendment does not insist upon bright-line rules" but looks at the totality of the circumstances, which in this case did not justify abandoning respect for the privacy of the home. (He too thought abuse would be a different case.) Justice Stevens concurred to say that the case could not turn on the "original understanding" of the Fourth Amendment, because at that time the consent of the wife would have been considered irrelevant because she had no real property rights. That prompted a dissent from Scalia, who noted that it was not the Fourth Amendment that had changed, but rather women's rights under property law, and there was nothing unusual about the "unchanging

Constitution" interacting with other bodies of law that might themselves change. In any event, Scalia found Stevens's "panegyric" to equal rights irrelevant, as men and women would be equal regardless of the rule—either both could veto a search, or neither could. Justice Thomas also dissented, going entirely his own way by relying on *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), which held that the Fourth Amendment is not implicated when an accused's spouse voluntarily leads police to evidence.

HABEAS CORPUS PROCEDURE

As usual, habeas corpus procedure and practice was one of the most frequent topics addressed by the Court this Term. The one-year time limit for filing habeas petitions under the Antiterrorism and Effective Death Penalty Act ("AEDPA") generated two decisions, as did the exhaustion requirement. The Court also reiterated that habeas relief for state prisoners is inappropriate where the federal right allegedly violated is not clearly established, and explained that federal courts should follow state-court interpretations of state law (big surprise) even where those interpretations technically may be *dicta.*

Turning first to the AEDPA cases, in ***Evans v. Chavis* (04-721)** the Court reversed a Ninth Circuit decision after concluding that it conflicted with the Court's opinion in *Carey v. Saffold*, 536 U.S. 214 (2002). Writing for all but Justice Stevens (who concurred in the judgment), Justice Breyer found that the Ninth Circuit incorrectly applied AEDPA's one-year limitation period for filing a federal habeas corpus petition, which runs from the date that conviction is final but is tolled while a "properly filed" *state* habeas petition is pending. Where the petitioner has lost his state petition in a lower court but appeals that ruling to the state appellate courts, federal law will consider the petition as still "pending" so long as the petitioner's appeal is timely under state law. While most states specify the number of days a petitioner has to appeal, California merely provides that a petitioner must request review within a "reasonable time." In this case, Chavis waited over three years to appeal his state habeas claims to the California Supreme Court, which simply denied the decision without stating any basis for its ruling. In reviewing Chavis's subsequent federal petition, the Ninth Circuit read this general denial as a decision on the merits of the state petition, not its timeliness, and found Chavis's federal habeas petition timely despite the three-year delay in appealing his state petition.

The Court disagreed, holding that where California courts are silent as to the reason for their denial of a petition, a federal court must independently determine whether the state petition was filed within a "reasonable time" under California law. Chiding the Ninth Circuit a bit, Justice Breyer wrote: "This is what we believe we asked the Circuit to do in *Saffold*. This is what we believe it should have done." Here, three years was far too long, and Chavis did not offer an adequate explanation for the entirety of the delay. Because the petition for review was not filed within a "reasonable time," it did not toll the AEDPA limitations period and the federal habeas petition was time-barred.

Justice Stevens disagreed, arguing that federal courts should attempt to determine only what the California Supreme Court *actually decided* and should not conduct an independent review of a California procedural question. Where the state court makes clear its determination that a petition is time-barred, the federal court must apply that decision. (There appears to be no

disagreement among the Justices on this.) Where the state court specifically finds the petition to be timely, federal courts also must honor this decision. (There's probably no disagreement here either.) But where the California Supreme Court enters a general denial, Stevens would adopt a rule of thumb that if the request for review was filed within six months of the lower court's decision (the rule for death-penalty petitions), it would be presumed that the California court found the petition timely, and if later than six months, it would be presumed that the court found the petition untimely. Stevens admits that this system would not be perfect, but he believes it would be much more efficient and also more likely to be correct than the "ad hoc" system adopted by the Court.

The Court's second decision regarding AEDPA's time limit, ***Day v. McDonough* (04-1324)**, split the Court 5-4, but it's unlikely to keep anyone awake at night. The Court, led by Justice Ginsberg, found that a district court could (but was not required to) raise the time-bar issue *sua sponte* if the state mistakenly failed to do so. Day waited 353 days to file a state post-conviction petition, and then another 36 days from the date his state petition was denied on appeal to file his federal habeas—all together, that's 388 untolled days (assuming that the 90 days in which Day could have sought cert to challenge the denial of state post-conviction relief should not be included as tolled time under AEDPA—a question that will be decided next Term in *Lawrence v. Florida* (05-8820)). The state miscalculated the untolled days at 352 and mistakenly stated that the petition was timely in its answer. Recognizing the miscalculation, the district court invited the parties to respond as to why the petition should not be dismissed. On appeal, Day claimed that the district court should not have raised the issue *sua sponte* since timeliness is waived if not raised as a defense.

The majority held that the district court acted properly. While a trial court certainly is not required to help out the state, it also is not required to ignore an obvious defect. The Court recognized that a state could intentionally waive a statute of limitations defect and that such a waiver could not be overridden by the court. Here, however, the waiver was not knowing but rather the obvious result of a numerical miscalculation.

Justice Stevens, along with Justice Breyer, dissented because they would have delayed judgment on the case until the Court decided *Lawrence*, which would determine substantively whether Day's petition was timely or untimely. Finally, Justice Scalia, joined by Justices Thomas and Breyer, dissented. In their view, a trial court should not suggest dismissal based on timeliness *sua sponte*; however, they would allow a trial court to raise the issue and permit the state to amend its answer to set forth the time-bar defense. Hence, a difference in opinion (and an interesting assortment of dissenters), but likely not a difference in outcomes.

Turning to the second major procedural hurdle facing habeas petitioners, the Court issued two exhaustion decisions. In ***House v. Bell* (04-8990)**, the Court held 5-3 (without Justice Alito) that a death-row inmate's federal habeas petition could proceed, even though he had defaulted on his petitions in state court, because he satisfied the "actual innocence" exception based on new evidence. The case is complicated and fascinating, but fact-intensive, and the opinions are lengthy (Justice Kennedy for the majority, the Chief in dissent for himself and Justices Scalia and Thomas). The gist of the case is this: House was convicted of kidnapping, raping and murdering a Tennessee woman, based on evidence including, among other things, her blood on his clothes, his semen on hers, and his otherwise inexplicable presence late at night near where

her body was found. The Tennessee courts rejected House's state habeas petitions based on prosecutorial misconduct and ineffective assistance of counsel, finding that he had forfeited these arguments. House then raised the same arguments in a federal petition. Although House's state default ordinarily would have forfeited these claims too, he argued that his federal claims should proceed under the "actual innocence" exception, which allows an otherwise forfeited claim to proceed where the inmate can show that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt. Just to be clear, "actual innocence" is not itself a ground for habeas that will set an inmate free, but rather a "gateway" exception to waiver that allows courts to hear the merits of otherwise forfeited claims (like ineffective assistance) because the inmate probably should not have been convicted in the first place. House argued that he met this exception based on several new pieces of evidence: DNA evidence establishing that the semen found on the dead woman's clothing belonged to her husband; testimony from the state's assistant chief medical examiner that her blood probably was on House's clothes due to a spill at the crime lab; and witness accounts of the husband confessing to the crime. House also argued that this evidence made out a "freestanding innocence" claim, based on *dicta* in past Court decisions suggesting (but not actually holding) that executing the innocent would, by itself, be unconstitutional—in other words, not only did he satisfy the "actual innocence" gateway to have his prosecutorial misconduct and ineffective assistance claims heard, he should be set free because he really is innocent. After an evidentiary hearing, the district court rejected the petition. The Sixth Circuit affirmed *en banc* by a vote of 8-7: The seven dissenters agreed with House's "actual innocence" claim for letting his habeas petition proceed, and six of them simply would have set him free based on his "freestanding innocence."

After a lengthy examination of the evidence and its reliability, the Court reversed on House's "actual innocence" claim. While the evidence did not exonerate House conclusively (his presence at the crime scene, and other evidence, did suggest guilt), the new DNA evidence and accounts of the husband's confession were such that no juror looking at the new evidence would lack reasonable doubt. The Court thus remanded the case to the district court to allow House's petition to go forward based on his claims of prosecutorial misconduct and ineffective assistance of counsel. The Court, however, did *not* reach House's "freestanding innocence" claim that he had established his innocence altogether such that he simply should be released. Continuing to leave open the question of whether "freestanding innocence" claims are even possible, the Court held that the standard for such claims would be even higher than the "actual innocence" standard and that, whatever it was, House had not satisfied it. So for the time being, "freestanding innocence" remains a hypothetical basis for habeas. The dissenters' main problem with the majority's reasoning was that it usurped the fact-finding role of the district court by engaging in an extensive review of the reliability of the new evidence and credibility of the witnesses, who in this case were testifying some fourteen years after the crime. These should be matters left to the expertise of trial courts and subject to review only for clear error; finding no error, the dissenters would have affirmed.

The Court's second exhaustion decision came in a *per curiam* reversal in ***Dye v. Hofbauer* (04-8384)**. There, the Court found that Dye adequately had exhausted his arguments in state court and that his federal habeas claims therefore could go forward. Dye claimed that the state prosecutor engaged in misconduct during his trial. A Michigan district court denied habeas relief, but a divided panel of the Sixth Circuit reversed, finding flagrant misconduct. After additional procedural wrangling and the retirement of a majority panel member, the Sixth Circuit

issued *another* ruling, this time finding that Dye had failed adequately to raise his federal constitutional claim in state court and therefore could not bring this claim in federal court. The basis for this conclusion: that the Michigan Appellate Court's decision analyzed only state law. Alternatively, the Sixth Circuit found that Dye's habeas claim was too vague to be cognizable. The Court reversed on both grounds. First, the Court found that Dye adequately raised his federal claim—his state court briefs specifically relied on the Fifth and Fourteenth Amendments and on federal case law, and it was not Dye's fault that the state court chose to ignore the federal claim. On the second issue, the Court found that while the petition itself was vague as to the alleged prosecutorial misconduct, Dye had appended to the petition a supporting brief fleshing out the claim in more than adequate detail.

In ***Kane v. Espitia* (04-1538)**, the Court analyzed the requirement that a state court decision must be contrary to clearly established law before federal habeas relief may be granted to a state prisoner. The Ninth Circuit had granted relief based on the petitioner's allegation that he was denied access to a law library to prepare his *pro se* defense. In granting relief, the Ninth Circuit relied on the Court's decision in *Faretta v. California*, 422 U.S. 806 (1975), which established the right of a criminal defendant to self-representation. Because the Court found that *Faretta* did not guarantee any specific right of access to a law library, and lower courts had split on that issue in the wake of *Faretta*, it concluded that the law in this area was not clearly established. Therefore, the California state court's decision denying the petitioner's claim could not be "contrary to, or involv[e] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," as required for federal habeas relief.

Finally, the Court issued a unanimous *per curiam* opinion in ***Bradshaw v. Richey* (05-101)**, where it reversed the Sixth Circuit's grant of habeas relief to Kenneth Richey. An Ohio jury convicted Richey of felony murder and sentenced him to death after a fire he started with the aim of killing his ex-girlfriend and her husband ultimately killed his ex-girlfriend's two-year-old child. After the Ohio Supreme Court affirmed the conviction, the district court denied Richey's habeas claims. The Sixth Circuit reversed, finding that habeas relief was warranted for two reasons: (1) "transferred intent" was not a permissible theory for aggravated felony murder under Ohio law (thus, there was no felony murder because Richey intended to kill his ex-girlfriend, not her child); and (2) his counsel provided ineffective assistance in retaining and mishandling an arson expert and in his inadequate treatment of the state's expert. With respect to the first ground, the Court found that the Ohio Supreme Court already had decided that transferred intent was a viable basis for felony murder in Richey's direct appeal. While that statement was arguably *dicta*, the Sixth Circuit should have followed it. With respect to Richey's ineffective assistance claim, the state argued that the Sixth Circuit should not have granted relief because Richey had failed to present the factual basis for his claim to the state habeas courts first. Richey responded that the state had waived this argument by failing to raise it below. The Court remanded to the Sixth Circuit to give it the first bite at this apple.

INSANITY

In ***Clark v. Arizona* (05-5996)**, the Court upheld Arizona's treatment of the insanity defense against a due process challenge by a paranoid schizophrenic convicted of killing a police officer. Clark made two arguments: (1) Arizona's test for insanity was too narrow, as it considered only

whether a defendant was *morally* incapacitated (unable to know that what he was doing was wrong), as opposed to *cognitively* incapacitated (unable to know what he was doing at all); and (2) Arizona law did not allow him to use expert evidence of his insanity as a means to negate *mens rea* for the intent to kill, but only to excuse it (meaning Clark carried the burden of proof). Justice Souter's opinion for the Court rejected both claims. As to the test, the Court noted that Clark's preferred rule came from *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), the classic Victorian-era decision recognizing the insanity defense, but it found no indication that the decision had become a "fundamental principle" trumping a state's authority to define crimes and defenses. (If you're interested, Souter walks though the states' various formulations of the insanity defense, the upshot being that there is no "baseline for due process" as to the minimum content of an insanity test.) In any event, the Court also held that cognitive incapacity is a subset of moral incapacity, so it was present in Arizona's test anyway—in essence, if you can prove that you didn't know what you were doing, the jury also will probably find that you didn't know it was wrong. As to Clark's *mens rea* argument, Souter walked through an even longer recitation of the evidence Clark wanted to offer as to what was going though his mind when he killed the officer. The crux of the holding is a distinction between factual "observation" evidence (*e.g.*, Clark told me that he thought the cop was an invading alien) and expert evidence on his cognitive or moral incapacity (*e.g.*, a paranoid schizophrenic likely would have perceived the cop as an invading alien). For the majority, there is no due process violation if a state restricts expert evidence to a single issue—the affirmative defense as opposed to *mens rea*—for fear of avoiding jury confusion. Clark did not dispute that Arizona could define an insanity defense and put the burden on him to prove it, and he could not expect the Court to let him do an end-run around that rule by letting him displace the presumption of sanity on *mens rea*. A state *could* do that—some states have "bursting bubble" rules that shift the burden to the prosecution upon a showing of some evidence of mental illness—but due process does not *require* it. Justice Breyer concurred in part. He agreed with the Court's analysis of the *mens rea* issue, but he would remand the case for the Arizona courts to make sure that their rule conformed to the Court's distinction among the kinds of sanity evidence that could be excluded from a *mens rea* determination.

Justice Kennedy dissented along with Justices Stevens and Ginsburg. Kennedy did not address the content of Arizona's insanity test because he would have reversed on the *mens rea* issue. It's a fairly lengthy dissent, but the point is that Arizona cannot convict Clark of intentionally or knowingly killing a police officer when he was not allowed to offer evidence showing that he did not have that intent or knowledge. Kennedy rejected the distinction between observation and expert evidence, as he thought that expert testimony was necessary to understand how Clark was processing information at the time of the crime. And allowing lay observation evidence, but excluding expert testimony, perversely excludes the most reliable, well-documented psychiatric testimony in favor of mere descriptions of unexplained and uncategorized behavior. Finally, the issue was not whether insanity excused Clark's actions—if it made him unaware that he was shooting a human being, he needs no excuse, and denying him the chance to offer evidence on *mens rea* violated the Due Process Clause.

JURY SELECTION

In ***Rice v. Collins*** **(04-52)**, the Court reversed the Ninth Circuit's grant of habeas relief predicated on a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Justice Kennedy wrote for

the unanimous Court, holding that while the state prosecutor's reasons for using a peremptory challenge on a young, black juror (her youth and lack of community involvement, alleged eye-rolling in response to a question from the court, and her gender—a factor the state court refused to consider as impermissible) were open to question, the state court did not unreasonably determine that the strike was not motivated by race and the Ninth Circuit acted improperly by substituting its factual determination for that of the state court. Justice Breyer, joined by Justice Souter, concurred separately to say that, in their view, the *Batson* framework no longer works and that the peremptory system should be abolished. Because peremptories may be exercised based on instinct (which may be colored by impermissible factors, such as race, of which even the prosecutor may be unaware), it is difficult to unearth the true reason a prosecutor makes a given challenge, and this will only be compounded by deference to state court decisions. In the end, a defendant is unlikely to prevail on a *Batson* challenge under the current system. If forced to choose, Breyer and Souter would opt for no peremptories at all to ensure that criminal defendants have a jury chosen in conformity with the Fourteenth Amendment.

LAW OF WAR

Hamdan v. Rumsfeld* (05-184)** was perhaps the defining decision of the Roberts Court's first Term (even though the Chief himself did not participate). The case makes clear that this is still a deeply divided Court and never more so than when dealing with the difficult issues of executive authority and the law of war. Composed of six opinions, the ***Hamdan decision nears 200 pages, but the short version is this: A five-Justice majority, led by Justice Stevens, found that the Court had jurisdiction to decide the case because (1) the Detainee Treatment Act ("DTA"), which eliminated jurisdiction over habeas petitions filed by Guantanamo Bay detainees, does not apply to petitions that already were pending when the DTA was enacted, and (2) abstention under *Schlesinger v. Councilman*, 420 U.S. 738 (1975), whereby the courts avoid interfering in court-martial proceedings involving U.S. military personnel, also was unwarranted. On the merits, the Court found that the military commissions convened to try Hamdan and other Guantanamo Bay prisoners could not proceed because the President's power to establish such commissions is contingent upon compliance with the Uniform Code of Military Justice ("UCMJ"), which imposes its own requirements and incorporates others from international law, such as the Geneva Conventions. The Guantanamo commissions fail to comply with either the UCMJ or Common Article 3 of the Third Geneva Convention, particularly because they do not, to the extent practicable, mirror the structure and procedures applied to courts-martial. A four-Justice plurality (the majority minus Justice Kennedy, who would not have addressed these issues), also found that Hamdan could not be tried by a military commission in any event because (1) he did not engage in any overt act on the battlefield after 9/11 (the beginning of hostilities), (2) he is not being held and tried in the theatre of war but instead in Guantanamo Bay years after capture, far away from the exigencies of battle, and (3) his alleged offense, conspiracy, is not a violation of the law of war and therefore not triable even by a proper law-of-war military commission. The same plurality further found that the military commissions violated the UCMJ and international law because of specific procedural failings, most glaring among them that the defendant (and his paid civilian lawyer) may be excluded from the proceedings and that he may be found guilty based on evidence he has never seen. Justices Thomas, Scalia and Alito dissented, and the Chief took no part in the decision because he sat on the D.C. Circuit panel that upheld the commissions.

Now, for those who want all the nitty-gritty, here it is: Salim Ahmed Hamdan was captured by Afghan militia forces in November 2001, turned over to the United States, and ultimately transported to Guantanamo Bay. About two years later, the President deemed him eligible for trial by military commission and he was later charged with one count of conspiracy "to commit . . . offenses triable by military commission." According to the charges, Hamdan, allegedly bin Laden's body guard and driver, committed certain overt acts in furtherance of the conspiracy, including transporting weapons used by al Qaeda members and receiving weapons training at an al Qaeda training camp. The military commission that was to try Hamdan was established by President Bush pursuant to a November 13, 2001 Executive Order governing the "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism." The commissions were organized under a subsequent order, Commission Order No. 1, providing that each commission shall have a presiding officer (a military lawyer) to rule on questions of law and evidentiary issues and at least three other voting members (commissioned officers). The accused is entitled to appointed military counsel and may hire civilian counsel, so long as the attorney has SECRET security clearance. The accused is entitled to a copy of the charges against him and a presumption of innocence, but the accused and his civilian counsel may be prevented from learning the evidence presented against him if the presiding officer decides to "close" the hearing. (Military counsel is permitted to attend the hearings, but may be precluded from revealing any information about what happened there to his client.) Any evidence may be admitted if the presiding officer feels it would have "probative value to a reasonable person"—including hearsay testimony, evidence obtained through coercion, and unsworn written statements—and the accused may be denied access to the evidence if it is deemed "protected information" so long as the presiding officer determines that admission will not deny the accused a "full and fair trial." If the presiding officer determines that evidence should not be admitted, that decision may be overturned by a vote of two of the commission's three voting members. Conviction and sentencing is by majority vote unless death is imposed, which requires unanimity. The accused may then appeal to a three-member review panel composed of military officers, one of whom must have experience as a judge.

Hamdan filed a habeas petition challenging the use of a military commission to try him and the commission's specific procedures. The district court stayed the commission's proceedings, finding that the President's authority to establish military commissions extends only to offenses triable by military commission under the law of war, including protections in the Third Geneva Convention for prisoners of war ("POWs"), and that Hamdan is entitled to these protections until adjudged not to be a POW. Further, whether or not Hamdan is a POW, the commission still would be invalid because its procedures (including the power to convict the accused upon unseen evidence) violate the UCMJ and Common Article 3 of the Third Geneva Convention (which offers some protections to "non-traditional" combatants). The D.C. Circuit (including then-Judge Roberts) reversed, finding that the Geneva Conventions are not judicially enforceable by individuals but can only be enforced by signatory nations. Two of the judges (including Roberts) also concluded that the Convention's protections do not apply to Hamdan because the conflict with al Qaeda falls outside their scope.

Before the Court could address Hamdan's substantive claims, it had to deal with the government's motion to dismiss based on the DTA and *Councilman* abstention. In relevant part, the DTA eliminates court jurisdiction to review any application for habeas corpus filed by a prisoner held at Guantanamo Bay (section 1005(e)(1)). The DTA provides for limited judicial

review by the D.C. Circuit of the decision that an alien is an enemy combatant (section 1005(e)(2)), and of the final decision of a military commission (section 1005(e)(3)), but the scope of the review is circumscribed. The DTA provides that it shall take effect on the date of enactment, and further states that the D.C. Circuit review provisions apply to any claim "pending *on* or after" the date of enactment. So, it is clear that Congress intended the review provisions in (e)(2) and (e)(3) to apply retroactively—the question is what to make of (e)(1), eliminating jurisdiction to review habeas petitions, which is not mentioned in the section explicitly making other pieces of the DTA retroactive. The majority found this difference dispositive, concluding that ordinary principles of statutory construction required them to find that (e)(1) does *not* apply to petitions pending when the DTA was enacted because if Congress had so intended, it would have said so. The majority believed that the drafting history provided further support for this view, since Congress considered but rejected a provision that expressly would have stated that section (e)(1) applied retroactively. (The majority also found helpful some floor statements rejecting application of (e)(1) to pending cases.) The majority similarly rejected the government's attempt to have the Court abstain, under *Councilman*, from hearing the case until the military commission proceedings were complete. *Councilman* abstention (which has been applied in cases where U.S. military personnel seek to involve civilian courts in matters subject to court martial) is grounded in the need for military discipline and the conclusion that the military justice system functions best when not subject to regular interference by the civilian courts. Further, the military justice system is based on a balance struck by Congress between the needs of the military and fairness to the individual service member, and is a system with a multitude of structural and procedural safeguards. Neither of these considerations is present here: Hamdan is not a service member (thus, no military discipline rationale applies) and the military commissions were not the subject of considered thought and balancing by Congress, but instead the product of an Executive Order creating commissions with few of the safeguards applicable to courts-martial.

Scalia issued the dissent as to this issue, which both Alito and Thomas joined in full. (Scalia and Thomas issued the principal dissents and appeared to break up the issues between them, with Scalia addressing the jurisdictional issues and Thomas tacking the merits—a decision for which their law clerks are surely thankful. We'll be making references to all three dissenting opinions as applicable.) You probably can guess Scalia's reasoning . . . . The plain meaning of (e)(1), revoking jurisdiction to review Guantanamo Bay habeas petitions, combined with language providing that the section shall be effective upon enactment, is clear and unambiguous: After the DTA's enactment, the courts have no jurisdiction to review habeas petitions, pending or otherwise. The fact that Congress did not mention (e)(1) in the section addressing the retroactivity of the D.C. Circuit review proceedings is irrelevant. Past Court decisions demonstrate that there is a presumption against retroactivity in applying jurisdiction-*creating* provisions, but no such presumption applies to jurisdiction-*stripping* provisions. Thus, under prior precedent, there was a legitimate reason why Congress would want to take extra care to ensure that (e)(2) and (e)(3) applied immediately—particularly because Suspension Clause problems might have arisen if the habeas route eliminated in (e)(1) had not been replaced immediately with an adequate alternative. "Worst of all," according to Scalia, "is the Court's reliance on the legislative history of the DTA to buttress its implausible reading." The legislative history is all over the place, with statements going each way, and all of them "were undoubtedly opportunistic and crafted *solely* for use in the briefs of this very litigation." The drafting history fares no better, as the earlier version of the DTA was substantively different in many areas

beyond the retroactivity language and, thus, the change in that language could be driven by any number of reasons. Finally, the revocation of jurisdiction over pending habeas petitions posed no constitutional problems as the DTA provides an adequate substitute by permitting review of final commission decisions by the D.C. Circuit, with review by the Court available via its appellate jurisdiction. Turning to *Councilman* abstention, Scalia acknowledged that the facts of *Councilman* were not quite aligned with this case, but he believed that even stronger concerns warrant abstention here. The military necessity ground is at least as valid as in *Councilman*, and the availability of review by the D.C. Circuit of all final commission decisions strongly weighs in favor of abstention. Finally, there are inter-branch comity considerations: The Executive's competence is at its zenith in managing a foreign war, while the judiciary's is "virtually nonexistent." A conflict between the Executive and the judiciary should be avoided if at all possible under these conditions, but instead "the Court rushes headlong to meet it."

So, finally, we come to the merits. A plurality (the majority, minus Kennedy again), found that Hamdan was not subject to trial by military commission. This piece of Stevens's opinion takes us deep into the underbrush of the history of military commissions (most of which is *way* outside the scope of this summary). Suffice it to say that military commissions were not expressly authorized by the Constitution nor created by statute. They are instead a product of historical necessity. They were used in three circumstances: (1) as a substitute for civilian courts during times of martial law, until civilian courts could be reopened; (2) when the United States occupied foreign land, until a civilian government could be established; and (3) as an incident to the conduct of war to try enemy violations of the law of war. The first two categories are clearly inapplicable, leaving us with only the third as a potential justification for Hamdan's military commission. Historically, however, law-of-war commissions only can exercise jurisdiction over offenses committed in the theatre of war, during the period of conflict, and only for violations of the law of war. These limitations on the use of law-of-war commissions were incorporated in the UCMJ, which acknowledges the concurrent jurisdiction of courts-martial and military commissions regarding "offenses that by statute *or by the law of war* may be tried by military commissions." (The plurality found that while the DTA mentions and thus recognizes the existence of the military commissions established by the November 13, 2001 Executive Order, it does not create or authorize those commissions, and so the commissions can rely only on the historical law of war for their existence.) Hamdan's alleged acts occurred almost exclusively before 9/11: He was charged with no act in the theatre of war during the period of armed conflict. Thus, he is not subject to trial by military commission under the law of war. Further, while aiding and abetting and command liability are recognized as violations of the law of war, conspiracy historically has not been so recognized. As a result, Hamdan cannot be tried by military commission. Kennedy did not join the portion of Stevens's opinion relating to conspiracy, but also did not join the dissent (instead opting not to opine on the issue at all), leaving us with a 4-3 decision on this issue (query the *stare decisis* effect of such a ruling).

The dissenters, led by Thomas, would find Hamdan subject to trial by military commission. In Part I of Thomas's dissent (a portion not joined by Alito because he found it unnecessary to the resolution of the case), Thomas found that the President, as Commander in Chief and via the powers given to him by Congress under the Authorization for Use of Military Force ("AUMF"), is authorized to create military commissions *and determine their scope and procedures* as an incident of the conduct of war. The President is at the height of his power when acting as Commander in Chief with the backing of Congress, and the courts owe deference to his

judgments. "Second-guessing" by the Court in such circumstances is inappropriate. In Part II (joined by Alito, for the most part), Thomas went on to find that Hamdan was subject to trial by military commission. While agreeing with the majority as to the basic criteria for trial by military commission, Thomas found that Hamdan clearly met those criteria. Hamdan's charging document alleges that he was involved in overt acts between 1996 and November 2001. During this entire period, the Executive had determined that al Qaeda was at war with the United States (having made a declaration of war and attacked several U.S. targets). The fact that the AUMF was not enacted until 2001 is of no import given that the enemy had already begun hostilities (and even if the date of enactment of AUMF were relevant, the AUMF clearly was backward-looking). The overt acts allegedly committed by Hamdan also occurred in lands in which al Qaeda had training camps, thus fulfilling the requirement that Hamdan engage in acts in the "theatre of war." The Executive's determinations of the geographic and temporal scope of the war are entitled to substantial deference and are backed up by overwhelming evidence here. While the dissenters acknowledged a greater role for judicial review in determining whether the conduct charged is triable by military commission, they would find that criteria met as well. Courts have never required the same level of specificity in charging documents used in military commissions as they require in civilian courts. And the majority is wrong to require that, where the elements of the offense and permissible punishments are not set out by statute or treaty, past precedent must plainly and unambiguously establish that such conduct is triable by military commission. There is no "clear statement" rule—rather, this is a circumstance "for which a flexible, evolutionary common-law system is uniquely appropriate." The determination must be permitted to evolve to address different circumstances and different types of wars, from traditional battlefield confrontations to this new type of war, in which "a hydra-headed enemy . . . lurks in the shadows conspiring to reproduce the atrocities of September 11." However, even under the majority's rule, Hamdan's conduct is suitable for trial by commission. All three dissenters would find that the conspiracy charge is triable by military commission, reciting numerous historical instances in which a conspiracy charge was so tried. (The plurality attempted to refute this precedent by explaining that such trials took place before hybrid law-of-war and martial-law commissions.) Thomas and Scalia further would find that Hamdan's charging document includes, in addition to the conspiracy charge, a charge of membership in a "war-criminal enterprise." This allegation creates an adequate and independent violation of the law of war suitable for trial by military commission. Finally, Thomas (again joined by both Scalia and Alito) explained that Hamdan's imprisonment in Guantanamo, far from the field of battle, does not alter the Executive's right to try him by military commission. '[R]etributive justice for heinous war crimes is as much a military necessity as the demands of military efficiency . . . ."

We now turn back to Stevens, who was rejoined by Kennedy to form a true majority on the propriety of the Guantanamo military commissions. Stevens explained that, even assuming that Hamdan was charged with an offense triable by military commission, the commissions established by President Bush lacked power to proceed. Through the UCMJ, Congress limited the power of the President to create military commissions, permitting their establishment only where the commissions complied with the UCMJ, which incorporates the law of nations (including the Geneva Conventions). These commissions woefully fail to meet those requirements. Specifically, the UCMJ permits the President to prescribe the procedures for courts-martial *and* military commissions, but requires that the rules and regulations (1) conform with the UCMJ's requirements; (2) conform with the procedures employed by Article III courts

to the extent the President "considers practicable"; and (3) be "uniform insofar as practicable." The Court expressed no opinion as to whether the commissions violate any specific procedural requirement of the UCMJ, and found that it owes complete deference to the President as to his decision to apply the procedures of Article III courts to the commissions. The problem, for the majority, was that the procedures being applied to the commissions differed very substantially from those applied to courts-martial, and the government provided no evidence to support a finding that uniformity between the commissions and courts-martial was not practicable. Further, this uniformity (at least to the extent practicable) is consistent with past practice, in that military commissions historically employed the same procedures used by courts-martial. ("The military commission was not born of a desire to dispense a more summary form of justice . . . ; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction. . . .") Thus, a majority of the Court found the commissions illegal.

The Court then went on to hold that Hamdan's military commission also is subject to the Third Geneva Convention's requirements. The majority did not decide whether or not the Convention is privately enforceable. Instead, it held that "compliance with the law of war" is a condition of establishing a military commission under the UCMJ. Therefore, the commission lacks power to proceed if it does not satisfy the requirements of the Convention, even if Hamdan cannot bring a separate action to enforce those requirements or seek damages for their violation. The Court found that at least Article 3 of the Convention applied to Hamdan (overruling the D.C. Circuit's 2-1 decision in this regard). Article 2 governs war between two nations that are both signatories to the Convention. Article 3, by contrast, apples to any "conflict *not of an international character* occurring in the territory of one of the [signatory nations]." The D.C. Circuit found that Article 3 applied only in cases such as civil war that were not "international" in character, and thus there was a gap between the coverage of Articles 2 and 3 through which Hamdan fell (along with all al Qaeda detainees). The Court disagreed, finding that Article 3 must be read literally to mean that any dispute that is not between two nations is not "international." Thus, Article 3 applied to Hamdan because the fight against al Qaeda is not between two nations (and is therefore not "international") but was occurring within the territory of a signatory nation (Afghanistan). A plurality (minus Kennedy, who again would decline to reach the issue) then concluded that specific procedural failings in the military commissions established by President Bush violated the requirements of the UCMJ and the Convention. Chief among them: the ability to exclude the accused and his counsel from the proceedings, the ability to convict on evidence not seen or heard by the accused, and the lack of evidentiary safeguards.

In sum, while the majority recognized that the legislature is free to authorize commissions like those created by the President, it held that the Executive cannot do so in violation of the existing requirements of the UCMJ. In his separate opinion, Kennedy emphasized that this is where coordination between the branches of government is needed most and where our system of checks and balances is most critical. As the majority decision ends, "the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction." Similarly, Kennedy states, "Congress has not issued the Executive a 'blank check.'" Thus, we should expect to see some serious inter-branch negotiating starting very soon.

The three dissenters (led by Thomas) wholeheartedly disagreed with the majority's conclusion that the military commissions were illegal. First, they found no requirement imposed by the UCMJ for procedural uniformity between military commissions and courts-martial. Instead, the

UCMJ merely *recognizes* the President's authority to create military commissions and to develop the procedures employed by those commissions. The requirement that the "rules and regulations *made under this article* shall be uniform insofar as practicable" does not apply to military commissions at all, but is an attempt to create uniformity between the three branches of the armed service. (There's even a sheepish footnote citing legislative history to support this interpretation.) Further, even assuming that the UCMJ required uniformity between military commissions and courts-martial "where practicable," the Executive has provided an adequate rationale for the disparities in procedure: "[E]ach deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike the balance between individual justice and the broader war policy." Second, the commissions do not lack power to proceed based on any alleged violation of the Geneva Convention. As an initial matter, the exclusive mechanism for enforcing the Convention's requirements is via "diplomatic measures" by signatory nations. The Convention cannot be enforced by private individuals—and the majority disregards the Court's holding in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), by finding otherwise. Moreover, this exclusive mechanism cannot be circumvented by arguing that the UCMJ incorporates the requirements of the Convention (if it did, it also would incorporate the exclusive enforcement mechanism along with the substantive provisions). Finally, the majority's conclusion that the UCMJ incorporates the requirements of Article 3 of the Third Geneva Convention was simply implausible: The UCMJ merely incorporates the law of war to determine *who* may be tried by military commission—it nowhere incorporates any substantive trial rights created by international law. Thomas and Scalia also would find that Hamdan has no rights under the Geneva Convention, deferring to the government's interpretation of Article 3 as applying only to circumstances such as civil war that occur wholly within the territorial land of one of the signatory nations. Since the conflict with al Qaeda has an international character and is occurring in various countries around the globe, Article 3 is inapplicable. Article 2 likewise was inapplicable since it applies only to conflicts between two signatory nations—a criterion that al Qaeda clearly does not meet. Joined again by Alito, the three dissenters also would find that, even if Article 3 were judicially enforceable and applied to the present conflict, Hamdan would be entitled to no relief for two reasons: Any claim for relief under Article 3 is unripe because Hamdan is not yet sentenced, and because his commission meets the substantive requirements of Article 3 since it is "regularly constituted" in compliance with the domestic laws of the United States, which have permitted the President to establish commissions and create their procedures throughout history. Alito drafted a separate dissent in which he emphasized that the Geneva Convention's requirement that trial be by a "regularly constituted court" did not require that the procedures used mirror those employed by courts-martial. If such a uniformity principle had been intended, the Convention would have said so, as it did in other places. Further, military commissions cannot be said to constitute "special tribunals," since the hundreds of commissions that will be conducted under Commission Order No. 1 all will follow the same procedures. However, even if there was some limited uniformity requirement imposed by the UCMJ or the Geneva Convention, it would not make the commissions themselves unlawful: "[T]he appropriate remedy is to proscribe the use of those [unlawful] procedures, not to outlaw the commissions." Finally, Alito would find that the commission procedures, including the provision for review by the D.C. Circuit, meet the Convention's requirement that the commissions "respect[] universally recognized fundamental rights."

PRISONERS

Prisoners did not fare too well this Term. The Court found that, under certain circumstances, prisoners may be deprived of access to magazines, newspapers and personal photographs. Further, prisoners must cross their t's and dot their i's when filing grievances, as only those who *properly* exhaust grievance procedures will be permitted to bring a suit under 42 U.S.C. § 1983. The only bright spot for prisoners came in the Court's decision that disabled inmates may sue states for money damages under Title II of the Americans with Disabilities Act.

***Beard v. Banks* (04-1739)** required the Court to consider whether Pennsylvania's policy of denying its most dangerous prisoners, lodged in its Long Term Segregation Unit ("LTSU"), access to magazines, newspapers and photographs violated the First Amendment. Justice Breyer issued the plurality opinion, joined by the Chief and Justices Kennedy and Souter. For them, while constitutional rights are not lost entirely when in prison, they can be restricted in ways that would be inappropriate elsewhere. In determining whether a particular restriction passes muster, the plurality looked to the test developed in *Turner v. Safly*, 482 U.S. 78 (1987): whether the restriction is "reasonably related to legitimate penological interests" and is not an "exaggerated response," giving substantial deference to the professional judgments of prison officials. *Turner* sets forth four factors to consider in evaluating a restriction: (1) whether there is a valid, rational connection between the regulation and the governmental interest; (2) whether alternative means of exercising the right are available to prisoners; (3) the impact of accommodating the prisoner's right; and (4) whether ready alternatives exist to further the government's interest. Here, the Department of Corrections provided evidence (deposition testimony of the deputy superintendent of prisons) of the reasons for its policy, chief among them encouraging better behavior on the part of Pennsylvania's Level 2 LTSU prisoners (the "worst of the worst"), and preventing backsliding by Level 1 LTSU inmates (who have slightly greater privileges). Since taking away "virtually the last privilege left to an inmate" logically would provide a significant incentive to improve behavior, factor 1 was satisfied. Factor 2 cut against the rule, while factors 3 and 4 cut in favor, but ultimately the plurality found these factors not very useful because "deprivation theory does not map easily onto several of the *Turner* factors." Thus, the real test is not in balancing the factors, but in determining whether Pennsylvania's policy is not just rationally related, but *reasonably* related, to the interest at stake. And the plurality believed it was. Pennsylvania applied the policy only to its forty or so most intractable inmates, and even those inmates were permitted writing paper and certain reading materials like legal materials, a prison library book, and a Bible. Further, deprivation is not necessarily permanent as a prisoner may move out of LTSU Level 2 through good behavior (though only a small percentage do). Finally, the policy was based on the professional judgment of prison officials, and that judgment was owed substantial deference. The plurality rejected Banks's argument (based not on evidence he presented but on cites to other court opinions and the lack of sufficiency of the state's evidence), that there is no evidence that such incorrigible prisoners will change their ways in response to such deprivations (relying in part on the low "graduation" rate of prisoners out of LTSU Level 2), but are in fact more likely to be rehabilitated by increased contact with the outside world. This argument was not enough to create a disputed issue of fact.

While reaching the same result as the plurality, Justice Thomas, joined by Justice Scalia, would apply a different test (one developed by Thomas in his concurrence in *Overton v. Bazzetta*, 539 U.S. 126 (2003)). Thomas believed that states can define the meaning of incarceration to include

the deprivation of rights, including constitutional rights, provided only that they comply with the Eighth Amendment. Here, Pennsylvania implicitly defined incarceration to include an implied delegation to prison officials to discipline and supervise criminals. So long as the officials are not acting *ultra vires*, the restrictions imposed by them become part of the sentence. Here, the prison officials acted well within their discretion. Further, Pennsylvania's policy is supported by the historical understanding of incarceration as involving restrictions on access to reading materials. And, while the policy satisfies the *Turner* criteria, it highlights their inability to address privilege deprivation cases, since such policies always will fail on factor 2, but likely will pass based on the other three factors (another plug for Thomas's alternative approach).

Justice Stevens, joined by Justice Ginsburg, dissented and would have allowed the case to go to a jury. The rights to know the news of the day, through newspapers and magazines, and to remain connected to family and individuality, through photographs, are core First Amendment rights. A restriction on these rights cannot be reasonably related to a legitimate penological interest if the logical connection between the policy and the goal is "so remote as to render the policy arbitrary or irrational" or if the policy represents an "exaggerated response." Here, the Department could not establish that no reasonable jury could find that the policy was arbitrary, irrational or exaggerated, even assuming deference to prison officials. While one official stated that the policy encouraged rehabilitation, there was no evidence that it actually did so, and the state provided no expert testimony supporting such a psychological effect. Further, *Turner*'s factors really do not work in cases of "deprivation theory" because they will always allow the deprivation no matter how severe, particularly if a state is not required to provide better evidence than it did here. Ginsburg wrote separately to emphasize her disagreement with the majority's approach to summary judgment. While Banks may not have presented evidence to contradict the Department's, and thus there was no genuine issue as to any material fact, the conclusions to be drawn from the facts were not so clear as to warrant summary judgment. A reasonable jury could have concluded that Pennsylvania's policy was not reasonably related to its stated goal.

Turning from substance to procedure, in ***Woodford v. Ngo*** **(05-416)** the Court held that a prisoner cannot satisfy the exhaustion-of-remedies requirement in the Prison Litigation Reform Act of 1995 ("PLRA") by filing a defective administrative grievance; he must *properly* exhaust remedies. After Ngo was barred from participating in various California prison programs, he failed to file a written complaint within fifteen days as required by the prison grievance process. When he did file a complaint six months later, it was rejected as untimely. He later sued corrections officials under 42 U.S.C. § 1983, and the district court dismissed the complaint because Ngo had failed first to exhaust his remedies as required by the PLRA. The Ninth Circuit reversed on the ground that, under the PLRA, exhaustion meant simply that no remedies were "available to" Ngo at the time of suit, regardless of the reason why. The Court reversed in an opinion by Justice Alito (for himself, the Chief, and Justices Scalia, Thomas and Kennedy), holding that the PLRA "strongly suggested" that "exhaustion" meant proper exhaustion, because the express purpose of the requirement was to reduce the quantity and increase the quality of prisoner suits and allow corrections officials to fix problems internally. Requiring proper exhaustion gives prisoners an incentive to make full use of the grievance process, which is particularly important given a state's strong interest in running its prisons, and ensures the creation of an administrative record while the facts of a case are fresh in the parties' minds. The majority rejected a slew of arguments by Ngo that are beyond the scope of this summary, but two points bear mention: (1) for the majority, this will not be a trap for unwary prisoners because

prison officials have an incentive to provide meaningful opportunities for prisoners to air grievances, if only to avoid chaos; and (2) this also will not be harsh for uneducated prisoners given the relative simplicity of prison grievance systems (as compared to civil suits, which thrust *pro se* prisoners into a plethora of unforgiving procedural requirements). Justice Breyer concurred in the judgment, agreeing that the PLRA requires proper exhaustion but arguing that the statute implicitly incorporates the traditional exceptions to the requirement from administrative and habeas law (*e.g.*, futility, hardship, constitutional claims, miscarriage of justice). For Breyer, on remand Ngo should get the chance to argue that his case fits one of these exceptions.

Justice Stevens dissented for himself and Justices Souter and Ginsburg. For the dissenters, the big problem with the Court's holding was that it allows states to impose what are effectively draconian statutes of limitation on a prisoner's right to access the courts (here, Ngo missed his fifteen-day window to complain and forever lost his right to sue). Also, the text of the PLRA itself does not require *proper* exhaustion, but only that whatever remedies "as are *available*" be exhausted. The dissent would use the same standard for exhaustion that applies for habeas claims, which requires prisoners to file internal grievances but imposes no waiver sanction for procedural defaults like Ngo's. This would serve the purposes of the PLRA cited by the majority because prison officials still would get the chance to respond to complaints internally, cutting down on litigation and creating an administrative record. As to the threat of abuse by prisoners who deliberately decline to exhaust on time, federal courts can always use traditional abstention principles to refuse jurisdiction to prisoners acting in bad faith.

The Court's decision in ***United States v. Georgia*** **(04-1203)** and the companion case ***Goodman v. Georgia*** **(04-1236)**, addressing a disabled inmate's ability to sue the state for money damages under Title II of the Americans with Disabilities Act, is addressed *supra* in the DISCRIMINATION Section.

RIGHT TO COUNSEL

In ***United States v. Gonzalez-Lopez*** **(05-352)**, the Court held 5-4 that a court's erroneous deprivation of a criminal defendant's choice of counsel requires reversal of his conviction. The facts of the case are rather strange—they involve a Missouri district court's denial of *pro hac vice* admission to Gonzalez-Lopez's preferred counsel because, among other things, he passed notes to another attorney performing cross-examination at a hearing. At trial, the court made the attorney sit in the audience with a marshal and barred him from communicating with Gonzalez-Lopez or even his trial counsel outside of court. The Eighth Circuit held that the denial of admission was unfounded and threw out Gonzalez-Lopez's conviction because he was denied his Sixth Amendment right to paid counsel of his choosing. The Court affirmed, but this was no ordinary 5-4 vote. Justice Scalia led the majority, joined by Justices Stevens, Souter, Ginsburg and Breyer. First, the Court rejected the government's position that Gonzalez-Lopez had to show that his substitute counsel was ineffective, or that he had been prejudiced because his preferred counsel would have pursued a strategy that probably would have altered the outcome. For the Court, "the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details." In particular, the government ignored the critical distinction between the right to *effective*

assistance of counsel and the right to counsel of choice *regardless* of skill. As to the former, counsel can't be ineffective unless his actions have harmed the defendant, so a prejudice requirement makes sense. But the right to counsel of choice is different—it is "the root meaning of the constitutional guarantee," and the wrongful deprivation of that right is enough to "complete" a Sixth Amendment violation. Second, the Court held that this error is not subject to harmless-error analysis because it is a "structural error" affecting the entire trial framework.

Justice Alito authored a dissent for himself, the Chief, and Justices Kennedy and Thomas, rejecting the majority's distinction between the two rights to counsel. The Sixth Amendment speaks not of the identity of the chosen counsel but of the "assistance" he provides. Therefore, if deprivation of choice does not impair the assistance the defendant receives, there can be no constitutional violation. The dissenters would not go so far as to require a defendant to make a full ineffective-assistance showing, but would require at least "an identifiable difference in the quality of representation." They also rejected the majority's holding that denial of choice of counsel was structural error, as the result was not *always* an unfair trial—substitute counsel could perform brilliantly, or it may be obvious that any difference in ability or strategy would have been irrelevant.

SENTENCING

The Court continued to develop its jurisprudence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), in ***Washington v. Recuenco* (05-83)**, where the Court found that a trial court's application of a sentencing enhancement based on its own factual findings was subject to harmless-error review. This was a major revelation as many courts believed that any *Apprendi/Blakely* error required automatic reversal.

A jury found Arturo Recuenco guilty of second-degree assault "with a deadly weapon" but did not make an express determination as to whether that weapon was a firearm. Nevertheless, the trial court imposed a three-year firearm sentencing enhancement based on its own finding that Recuenco used a firearm during the assault. While Recuenco was appealing his sentence, the Court decided *Apprendi* and *Blakely*, holding that a sentence may not be enhanced based on facts not found by a jury. Washington conceded that Recuenco's sentence violated those decisions but argued that the error was harmless (because Recuenco had used a firearm). The Washington Supreme Court disagreed, finding that a *Blakely* error is structural and always requires reversal, but seven members of the Court disagreed. Led by Justice Thomas, the Court relied on *Neder v. United States*, 527 U.S. 1 (1999), where it found that failure to charge the jury on a particular element of an offense in favor of a judicial finding was not structural error because it did "not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (The Court could not find that judicial fact-finding "seriously diminishe[d] accuracy.") As there is no reasonable basis to distinguish between failing to charge on an element of the crime and failing to charge on a sentencing enhancement, the Court reversed and remanded to the Washington courts to determine whether the error was harmful. Justice Kennedy issued a short concurrence to note that the Court did not revisit *Apprendi* and *Blakely* (two decisions with which he disagreed), but merely "describes their holdings accurately."

Justices Ginsburg and Stevens dissented. They would find the Washington Supreme Court's remedy of reversal for recharging in accordance with the verdict (as found by the jury) to be appropriate given that the prosecutor shifted courses after trial but before sentencing. There are separate pattern jury instructions and interrogatories for assault "with a deadly weapon" and assault "with a firearm." The prosecutor tried Recuenco under the first theory, and the jury provided a complete verdict on that theory (unlike *Neder*, where the jury was not charged and thus did not consider one element of a crime). The prosecutor than changed horses and sought a different, and more severe, sentencing enhancement based on the alleged use of a firearm (which carried a longer sentence compared to mere use of a deadly weapon). The dissent found it inappropriate for Recuenco to be charged with one crime (assault with a deadly weapon) and convicted of another (assault with a firearm) "*sans* charge, jury instructions, or a jury verdict." Stevens dissented separately to emphasize that he would not have granted cert in this case because Washington's decision "overprotected" federal rights and because, arguably, Washington's decision had an adequate and independent state-law basis.

And in ***Salinas v. United States* (05-8400)**, a decision reminding us that the Sentencing Guidelines are not yet dead, the Court held *per curiam* that simple possession of controlled substances (*i.e.*, having a baggie of pot for your own use) does not constitute a "controlled substances offense" under section 4B1.1(a) of the Guidelines, because that section defines a controlled substances offense as requiring possession *with intent to manufacture, import, export, distribute or dispense*.

SPEEDY TRIAL ACT

In ***Zedner v. United States* (05-5992)**, the Court, led by Justice Alito, unanimously held that a defendant cannot prospectively waive his rights under the Speedy Trial Act of 1974. (Justice Scalia joined all parts of the opinion except that portion mentioning legislative history; given Alito's free reliance here on legislative history, perhaps that "Scalito" nickname is inappropriate.) The Act provides that federal criminal trials shall begin within seventy days after charge, but excludes delays resulting from a continuance so long as "the ends of justice served by [the delay] outweigh the best interest of the public and the defendant in a speedy trial," and so long as the court considers specific factors and gives its reasoning on the record. In this case, Zedner was caught trying to open an account with very poorly made counterfeit U.S. bonds (as in, bonds from the "Ministry of Finance" of "Thunted States"—these bonds could not have fooled your dog). After Zedner was indicted, his counsel requested and received two "ends-of-justice" continuances. When Zedner requested a third continuance, the trial judge, concerned that another continuance might lead to an extended delay due to scheduling conflicts with other pending trials, suggested that Zedner waive his speedy trial rights "for all time" and provided him a form to do so, which Zedner signed. After the case dragged on for several years (in part because of concerns over Zedner's competency), Zedner moved to dismiss on speedy trial grounds, claiming that his prospective waiver was invalid. The district court denied the motion, and the Second Circuit affirmed

The Court reversed unanimously. First, the Court found prospective waivers inconsistent with the goals, language and structure of the Speedy Trial Act, which was concerned not just with a defendant's rights but with the *public's* interest in swift justice. The Court recognized that there

are circumstances where the defendant, government and court all would be happy to delay a trial, but where the public interest would not be served by such a result. Further, a defendant can obtain an excludable continuance only if the court expressly finds that the "ends-of-justice" exception is satisfied. If a criminal defendant could just waive application of the Act, that exception would be rendered a virtual nullity. The Court rejected the government's suggestion that the trial court be permitted on remand to give its reasons for granting Zedner's third continuance—creating a possible basis for excluding the delay under the "ends-of-justice" exception after the fact—because the Act requires the court's reasons to be put on the record at some point *before* the court rules on a defendant's motion to dismiss. Finally, the Court declined to exercise "harmless error" review because the Act expressly requires dismissal where its provisions are not followed. The Court left it to the district court to determine whether the dismissal should be with or without prejudice.

VIENNA CONVENTION ON CONSULAR RELATIONS

In the combined cases of ***Sanchez-Llamas v. Oregon* (04-10566)** and ***Bustillo v. Johnson* (05-51)**, the Court held that foreigners detained by police without access to their consulates cannot invoke the Vienna Convention on Consular Relations to suppress evidence or to avoid procedural deadlines. The Convention provides that authorities must, upon request, inform a foreign consulate of the detention of its national, and that authorities must inform the detainee of his right to consular access. Sanchez-Llamas was a Mexican national arrested for murder without notification of his access right, and he moved to suppress his subsequent incriminating statements to police. The Oregon Supreme Court held that suppression was unwarranted because the Convention was among *states* and did not create a judicially enforceable *individual* right. Bustillo was a Honduran national similarly arrested for murder without notification of his access right, and he challenged his conviction in a habeas petition claiming (for the first time) that his consulate would have helped him find the man who really committed the crime. The Virginia Supreme Court held that Bustillo waived this claim by not raising it at trial or on appeal.

The Court affirmed both rulings 6-3. While the primary issue in the cases had been whether the Convention created a judicially enforceable individual right to consular access, the Court, led by the Chief, declined to reach that question because, even if the answer was yes, Sanchez-Llamas could not suppress his statements and Bustillo had waived his claim. (This is the second time the Court has ducked this issue, as the Court DIG'd a similar case last Term.) As to Sanchez-Llamas, the Convention did not provide for suppression of evidence, and absent such a provision the Court would not impose a judicial remedy on state courts. In any event, the exclusionary rule is an extraordinary remedy with considerable social costs, and it was not warranted here because the consular access right has little to do with evidence-gathering. (Together with the Court's decision in *Hudson v. Michigan*, this does not bode well for the exclusionary rule.) On Bustillo's default, the Court held that the case was controlled by its ruling in *Breard v. Greene*, 523 U.S. 71 (1998) (*per curiam*), that the Convention did not trump state procedural rules for raising claims. Bustillo had argued that *Breard* conflicted with two recent decisions (known as *LaGrand* and *Avena*) by the International Court of Justice ("ICJ"). The Court disagreed, in a ruling that will please critics upset at the Court's references to foreign sources of law in other cases. The majority noted that because ICJ rulings are technically binding only on the parties to a particular case, and are not even binding precedent on the ICJ itself, they cannot displace the Court's

constitutional duty to "say what the law is." Also, while the United States still adheres to the Convention, it has withdrawn its consent to ICJ jurisdiction over claims based on the Convention, so *LaGrand* and *Avena* are not entitled to decisive weight here. The majority then looked to the text of the Convention, which provides that the access right is to be exercised pursuant to member nation's "laws and regulations." In the Court's view, that includes being subject to procedural default rules; if not, then the consular access right would get more protection under U.S. law than the warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), which seems implausible. Justice Ginsburg concurred in the judgment; she would recognize a judicially enforceable individual right to access, but she agreed that neither Sanchez-Llamas nor Bustillo were entitled to the remedies they sought.

Justice Breyer dissented in an opinion joined by Justices Stevens, Souter and, on the issue of judicially enforceable individual rights, Ginsburg. The dissent noted that the Convention is "self-executing," meaning that it operates of itself with no need for Congress to enact implementing legislation, and it speaks directly to the rights of individuals. Together with the ICJ's interpretation of the Convention, these factors strongly supported the existence of an individually enforceable right. Turning to the procedural default issue, Breyer accepted that *LaGrand* and *Avena* were not "binding," but nevertheless he regarded them as "persuasive evidence" of what international law is—for him, the Court's ruling created a conflict with *LaGrand* and *Avena* that was "unprecedented." He would remand for Virginia to modify its rules to give "full effect" to the access right, perhaps by allowing exceptions where the procedural default is the state's fault rather than the detainee's. On suppression, Breyer agreed that the Convention did not create an automatic right to the exclusion of evidence, but he felt that it was wrong to rule out suppression in all cases: "Much depends on the circumstances."

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