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Counsellors at Law

SUPREME COURT UPDATE
OCTOBER 2004 TERM IN REVIEW

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THE TERM IN REVIEW

Greetings, Court Fans, and welcome to our first-ever Term in Review!

For those of you who are new to the Supreme Court Update, Wiggin and Dana's Appellate Practice Group began the 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. This Term, at the suggestion of a few of our readers, we have compiled all the case summaries into a single document – think of it as the entire Term in the palm of your hand.

Of course, the Term gave us eighty written opinions, making this a hefty compilation. To make it a little more user-friendly, we've split it up into two sections: Part One includes all the civil cases, while Part Two contains the criminal cases (and their relatives – if you're a habeas practitioner or a Fourth Amendment enthusiast, you'll find those cases in this section). Within each Part, the cases are broken out into sections that reflect the dominant issue or subject matter of each case, with cross-references where appropriate. If you are after a specific case, you can locate it in the Index.

As with the individual Updates, we hope this compilation is as useful and fun for you to read as it has been for us to create. But before we get to the summaries, we thought we'd offer a few general thoughts on the major cases of the Term, along with some interesting statistics and some of our favorite snippets from the Justices' opinions.

HIGHLIGHTS OF THE TERM

Every Supreme Court Term is momentous in its own way, and this Term was no exception, particularly with Justice O'Connor's announcement that she is retiring from the Court (and with rumors continuing to swirl regarding the health of Chief Justice Rehnquist, notwithstanding his recent announcement that he is *not* retiring). With the President's nomination of Judge John Roberts to fill O'Connor's seat, most of the post-Term attention will continue to go to the makeup of the Court. The cases themselves, however, made for their share of controversy.

Civil Cases

On the civil side, the Court's decisions in two areas of the law hit close to home. First, the Court had a very active Term in the area of takings, with no case looming larger for us "nutmeggers" than *Kelo v. City of New London, Connecticut*, where a deeply divided Court upheld the City's use of eminent domain to take some residents' homes and transfer the properties to a private developer as part of an economic development plan intended to create jobs and increase the tax base. Justice Stevens led the five-Justice majority, which held that the takings satisfied the Court's longstanding "public purpose" test and that the benefit to private parties was only incidental. A key factor for the majority – particularly Justice Kennedy, who wrote a separate concurrence – was the absence of any evidence that the City had an improper motive to benefit particular private parties. The dissenters, led by Justice O'Connor, excoriated the majority for collapsing the distinction between private and public use of property, removing any and all

Justice Scalia Needs More Pets

Justice Scalia's dissents are often both illuminating and entertaining. This Term was particularly interesting for his repeated references to animals:

The "Ursine Rhapsody" in *Alaska v. United States*: "The only part of the Court's opinion on Glacier Bay that displays genuine enthusiasm is its Ursine Rhapsody, which implies that federal ownership of submerged lands is critical to ensuring that brown bears will not be shot from the decks of pleasure yachts during their 'distressing[ly] frequen[t]' swims to islands where they feast on seabirds and seabird eggs." Scalia went on to say that "[i]t is presumptively true that the seabirds consider these visits distressingly frequent, and demonstrably true that the brown bears do not. It is unclear why this Court should take sides in the controversy."

The "leashed puppy" from *National Cable & Television Comm'n v. Brand X Internet Services*, on the FCC's ruling that cable Internet service is not "telecommunications" because it is not a stand-alone product but is packaged with other services: "The pet store may have a policy of selling puppies only with leashes, but any customer will say that it *does* offer puppies – because a leashed puppy is still a puppy, even though it is not offered on a 'stand-alone' basis."

Finally, the "Canon of Canine Silence" in *Koons Buick Pontiac GMC, Inc. v. Nigh*: Criticizing the majority's reliance on an absence of legislative history, a/k/a "the dog that didn't bark" from Sir Arthur Conan Doyle's *The Hound of the Baskervilles*, Scalia wrote: "The Canon of Canine Silence that the Court invokes today introduces a reverse – and at least equally dangerous – phenomenon, under which courts may refuse to believe Congress's *own* words unless they can see the lips of others moving in unison."

constraints on a taking so long as the government can claim it will increase the tax base. Justice Thomas offered a bright-line alternative to the Court's "public purpose" test, which would require actual "public use" of the property. For blighted properties, Thomas suggested that the government use nuisance law, not the Fifth Amendment. Instead, the Court stuck with its precedents, guaranteeing that this area of the law will remain messy for the foreseeable future, with cases turning on the specific facts of development plans and governmental motives.

By contrast, the Term's principal regulatory takings case actually struck a blow for clarity. In *Lingle v. Chevron U.S.A. Inc.*, the Court overturned *Agins v. City of Tiburon*, 447 U.S. 255 (1980), which held that a regulation is a taking of private property if it does not substantially advance a legitimate state interest. The Court held that the *Agins* test was a "regrettable" misuse of due process principles: The existence of a taking turns on a regulation's burden on private property, not how well it serves a public interest. Justice O'Connor's majority opinion conceded that the Court's takings jurisprudence "cannot be characterized as unified" – a concession that the fractured *Kelo* decision certainly supports – but *Lingle* at least clarified the law regarding regulatory takings.

The second area in which the Term hit close to home was in religion, where the Court struggled with governmental displays of the Ten Commandments in *Van Orden v. Perry* and *McCreary County, Kentucky v. ACLU of Kentucky* (Wiggin and Dana filed an *amicus* brief in both cases on behalf of the Anti-Defamation League and Boston College theologian Philip A. Cunningham). The cases yielded different results: In *Van Orden*, a splintered Court upheld a Texas display that had stood for forty years without comment, while in *McCreary* a 5-4 majority struck down Kentucky courthouse displays that resulted from recent legislative efforts that the lower courts had found to have a religious purpose. The decisions were clearly fact-bound, but they offered two doctrinal items of note. First, in *McCreary* a majority of the Court reaffirmed that the Court's oft-maligned three-pronged test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), remains good law. Second, *Van Orden* yielded no majority opinion, with the Chief writing for a plurality that would have upheld the display (and not bothered with *Lemon*), and with Justice Breyer concurring in the judgment because the display was not "divisive." As a result,

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depending on the makeup of the next Court, future litigation over religious displays may well focus on Justice Breyer's "divisiveness" rule, much like affirmative action litigation turned on Justice Powell's single-Justice opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Other than that, the rule now appears to be this: Longstanding religious displays that no one has complained about before are constitutional, but controversial new displays that result from political posturing are not.

In addition, the Term provided us with two decisions involving controlled substances and the Commerce Clause, with the Court in both cases favoring federal policies over state regulation. In *Gonzales v. Raich*, a 6-3 majority of the Court held that California growers and users of medical marijuana that never entered interstate commerce could nevertheless be prosecuted under the federal Controlled Substances Act because of their substantial effect on the interstate market for marijuana. For those of you who remember Constitutional Law I, the Stevens-led majority believed the case was a rerun of the wheat case from the 1940s, *Wickard v. Fillburn*, 317 U.S. 111 (1942), while the O'Connor-led dissent thought the Court was reducing its more recent federalism-based holding in *United States v. Lopez*, 514 U.S. 549 (1995), to a mere "drafting guide." While that may or may not be the case, it is certainly true that

Raich, along with *Kelo*, represents a victory for Justice Stevens over his more conservative colleagues – leading some commentators to label him the dominant Justice of the Term. That said, he was in the minority in *Granholm v. Heald*, where a 5-4 Court struck down two state regulatory schemes that burdened out-of-state wine producers as running afoul of the "dormant" Commerce Clause, despite the dissenters' arguments that the 21st Amendment repealing prohibition left such regulation in the hands of the states. So perhaps the lesson is just that the Court likes its wine, but doesn't care for marijuana.

Other civil holdings were less newsworthy, but no less important. In the area of discrimination, the Court on four separate occasions expanded the ability of plaintiffs to challenge discriminatory policies under federal statutes and the Constitution. *Smith v. City of Jackson, Mississippi* held that the Age Discrimination in Employment Act allows for disparate impact claims, albeit on narrower grounds than similar claims under Title VII. *Jackson v. Birmingham Board of Education* construed Title IX to encompass claims of retaliation for complaining about sex discrimination in federally funded education programs. A fractured Court held that the Americans with Disabilities Act applies, at least in some instances, to foreign-flagged cruise ships in U.S. waters in *Spector v. Norwegian Cruise Lines, Ltd.* And in *Johnson v. California*, the Court held that the California prison system's race-based cell-assignment policy must satisfy strict scrutiny. Each of these decisions was supported by the slimmest of majorities, with Justice

Too Square To Be Hip

The Justices surprised us a few times with their efforts to overcome their ivory-tower reputations – though, it must be said, their efforts were not entirely successful.

From *Granholm* (Kennedy, J.), on the idea that Internet sales of wine would lead to an increase in underage drinking: "[M]inors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor." Does anyone still *make* wine coolers?

From *Metro-Goldwin-Mayer Studios, Inc. v. Grokster*, the file-sharing case (Souter, J.): "While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, *or the latest release by Modest Mouse*, are certain to be far more numerous than those seeking a free Decameron" Note to prospective Court clerks: Modest Mouse is a little *too* hip for a Court opinion that needs to stand the test of time.

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O'Connor writing the majority opinions in *Jackson* and *Johnson* and dissenting in the others. So once again, the future makeup of the Court will be quite important.

It was an equally notable, oddly unanimous Term on the intellectual property front. In *Metro-Goldwin-Mayer Studios, Inc. v. Grokster*, the Court unanimously held that peer-to-peer software developers can be held liable for copyright infringement committed by users of the software even if the software has substantial non-infringing uses, at least where the developers clearly intended to induce the infringing acts. *Grokster* was a big hit in the media (no surprise there), but its impact will be limited by its facts, which so clearly established the developers' intent to induce infringement that the case was easy for the Court. Other cases also seemed easy, although unlike *Grokster* they made it more difficult for parties seeking to protect their intellectual property. In *Merck KGaA v. Integra Lifesciences I, Ltd.*, the Court unanimously held that the use of patented compounds in preclinical drug testing is protected from patent infringement suits so long as there is a reason to believe the results would ultimately be relevant to an FDA submission. And in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, the Court again unanimously held that a trademark defendant asserting a "fair use" defense does not have the burden of proving that its actions will not be likely to confuse consumers, as the burden of proving likelihood of confusion always rests with the plaintiff.

Finally, the Court cleaned up the rules on what it takes to get to court – and, at least in the area of securities law, to stay there. In *Exxon Mobil Corp. v. Allapattah Services*, the Court held 5-4 that, in a diversity jurisdiction case, so long as one plaintiff meets the \$75,000 amount-in-controversy requirement, a federal district court can exercise supplemental jurisdiction over other plaintiffs in the same case who fall short. And, in a case that securities practitioners will find important, the Court unanimously held in *Dura Pharmaceuticals, Inc. v. Broudo* that securities fraud plaintiffs cannot simply allege that they paid an inflated purchase price to state a claim, but must do more to establish loss causation.

Criminal Cases

On the criminal side, two of the bigger cases of the Term bookended the Court's argument calendar. First, in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*, the Court held that because the Sixth Amendment right to a jury trial applies to the facts used in sentencing under the Federal Sentencing Guidelines, the Guidelines are now only advisory rather than mandatory. *Van Orden* and *Spector* might have been the Term's most splintered decisions, but *Booker* was the weirdest. Justices Stevens and Breyer each wrote for separate five-Justice majorities, and each dissented from the other's opinion. Justice Ginsburg was the pivot point of the decision: She joined with the Stevens majority to hold that sentencing facts require a jury trial, but she departed from Stevens' view that, unless Congress changed the law, the Guidelines should be retained as mandatory upon judges, but with a jury trial requirement for sentencing. Instead, she joined the Breyer majority to hold that Congress would not wish to retain the Guidelines with a jury trial requirement but would prefer that they be merely advisory. Unfortunately, Justice Ginsburg did not write anything herself. The upshot is that federal judges are back to discretionary sentencing, subject to review for reasonableness. As to what that means, we'll have to wait and see, as late in the Term the Court declined to review the first post-*Booker* challenge to a federal sentence, despite the Justice Department's

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recommendation that the Court take the case. The lower federal courts will have to sort things out for now.

Arthur Andersen LLP v. United States ended the Court's argument calendar – but was not nearly the last decision released. In a decision more newsworthy than legally significant, the Court unanimously reversed Arthur Andersen's conviction for destroying Enron-related documents. The case turned on the trial court's failure to instruct the jury properly on the consciousness-of-guilt requirement – a result that had to come as a blow to the prosecutors, who pushed hard for a jury instruction that they may not have needed to get a conviction. It's not clear what impact the Court's decision will have. The trial and verdict have already destroyed Arthur Andersen, so the decision is at best a Pyrrhic victory for the firm. And prosecutors have already announced that they will prosecute most document destruction cases under a different statute that will enable them to avoid the consciousness-of-guilt issue altogether.

The other big-ticket criminal case of the Term was *Roper v. Simmons*, in which yet another 5-4 majority held that the Eighth Amendment barred imposing the death penalty on offenders who were under eighteen at the time of their crimes. The Court had reached precisely the opposite result sixteen years ago in *Stanford v. Kentucky*, 492 U.S. 31 (1989), but the Kennedy-led majority held that a new national consensus against executing minors had emerged in the interim, and also independently concluded that juvenile executions were unacceptable. As one might have expected, the decision touched off a firestorm both within the Court and without. Justices Scalia and O'Connor both authored strong dissents, with Scalia lamenting the “evolving standards of decency” test under the Eighth Amendment, and both Justices taking issue with the majority's evidence of a purported “new consensus.” Justice Kennedy's role as author so incensed some death-penalty proponents that they suggested impeaching him (a movement that appears to have stalled).

One particular target for *Roper's* critics was Justice Kennedy's discussion of the views of other countries. While Kennedy was careful to note that it was not controlling that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty,” he did write that it provided “respected and significant confirmation for our own conclusions” that the punishment was disproportionate as matter of constitutional law. Although troubling to some Court observers (and to some Justices – witness Justice Scalia's dissent), the Court's effort to identify how much weight to give foreign and international sources of law is a trend worth watching. Indeed, but for the actions of the Bush Administration, the Court would have had to address the issue again in another death-penalty case, *Medellin v. Dretke*, which concerned whether a Mexican national on death row in Texas had an individually enforceable right as a result of an International Court of Justice (“ICJ”) ruling that the United States had violated a treaty requiring him to have access to the Mexican consulate. Shortly before argument, the Administration issued an executive order requiring Texas to “give effect” to the ICJ ruling (just how to do this, and how the President could order Texas to do it, are open questions), which led to a curious 5-4 *per curiam* opinion dismissing the writ of certiorari as improvidently granted. The Administration also announced that the United States is withdrawing its consent to ICJ jurisdiction under the treaty, so this case will not arise again – but the Court's uneasy dance with foreign and international sources of law is not going away.

Lies, Damned Lies, and Statistics

They Don't Take Cases to Affirm . . . : The Court's 80 written opinions covered 86 cases taken on writ of certiorari (counting all the consolidated cases, and not counting the two original jurisdiction cases), and reversed or vacated 59 of them, for a reversal rate of almost 70%.

. . . Especially If It's from the Ninth Circuit: The Court took 19 cases from the Ninth Circuit this Term, and reversed or vacated 16 of them or 84% (on the upside, two of the affirmances were unanimous). The First, Second, and Tenth Circuits all had 100% reversal rates, but with much smaller absolute numbers (no more than three cases each). The Seventh, Eleventh and Federal Circuits, and state courts, had the most success, with their rulings surviving 50% of the time.

Who Was Generally "Right": Justices O'Connor, Kennedy, and Breyer, who joined or concurred in 70 of the 81 holdings and/or judgments (there were 80 announced opinions, but *Booker* had two majorities).

Who Was Most Often "Wrong": Justices Scalia and Thomas, who each dissented in 20 cases.

Who Wrote the Most: Justice Breyer, with ten majority opinions – although it must be said that the Chief, with seven majority opinions despite not participating in 11 cases due to illness, made quite a strong showing.

The End – or the Beginning – of Bloc Voting (?): The Court issued 20 5-4 opinions this term, but the so-called conservative bloc (the Chief, O'Connor, Scalia, Kennedy, and Thomas) made up only 4 of the majorities. O'Connor was in the majority in 12 of these cases, however, including 3 with the supposed liberals. To state the obvious, her successor could have quite an impact on future results.

Separate Powers, Inseparable Branches

Because the Court only decides 80 or so cases each Term, and does so in such a reasoned, deliberative manner, we tend to forget that its *legal* opinions are necessarily part of the ongoing *political* life of the Nation. Beyond the obvious point that the Court's major decisions this Term were often sources of controversy, many of the Term's cases involved the Court's stepping into areas where other branches of government were still quite active. In *Kelo*, for example, the Court pointedly noted that state legislatures were perfectly capable of enacting restraints on the states' use of eminent domain authority, and in fact the case caused the Connecticut General Assembly to consider a law constraining its takings authority even as the Court was hearing the case (not to mention the various bills now floating through the U.S. Congress to change eminent domain law nationwide following the Court's decision). Likewise, bills that would exempt from federal criminal laws marijuana grown or consumed pursuant to a state medical marijuana statute have appeared in Congress in response to *Raich*. And in *Granholm*, the Court was careful to make clear that while its ruling barred states from discriminating against out-of-state wineries, states were still free to take neutral actions that might have the same effect – such as barring all Internet sales of wine, an initiative that is no doubt already underway in some states.

Sometimes, of course, other branches of government are involved precisely *because* the Court is hearing a case. *McCreary* is perhaps the prime example, where the local legislatures repeatedly tried to modify their displays of the Ten Commandments to satisfy judicial review *during* the litigation, even going so far as to submit a post-argument brief to the Court stating that they had repealed a prior, objectionable resolution characterizing the displays as religious. *Medellin* is yet another example, where the Bush Administration stepped in effectively to moot the case (and the general issue) rather than have the Court address the scope of the United States' obligations under the ICJ ruling. And in *Andersen*, even as the Court was preparing to overturn the

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conviction, federal prosecutors had already decided to switch gears for future prosecutions and use a different statute for similar offenses in the future.

In short, in case any of us needed a reminder of basic U.S. civics, the Court is deeply embedded in a divided federal government, of which no one part can move without having some effect on the others. The law cannot avoid politics, which brings us to . . .

FAREWELL TO JUSTICE O'CONNOR

The biggest news at the close of the Term was indeed Justice O'Connor's announcement that she would be leaving the Court – the first Justice to do so in eleven years. Others will no doubt provide lengthy articles discussing O'Connor's career and her legacy, but we thought we'd leave you with a few choice quotes from some of her opinions this Term – a “greatest hits” of sorts.

Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd. continued Justice O'Connor's pattern of being the early bird, as she once again issued a majority opinion on the first opinion day of the Term. The opinion is memorable for its opening line, which gives you some sense of how odd the case was: “This is a maritime case about a train wreck.”

More substantively, O'Connor wrote a powerful concurrence in *McCreary* regarding the importance of the Establishment Clause: “By enforcing the [Religion] Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or the bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?” She went on to note that “It is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment.”

O'Connor was equally vocal in her *Kelo* dissent, where she criticized the majority for deferring too much to local legislatures: “[W]ere the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. . . . States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.”

There was also her *Raich* dissent, where she lamented the Court's move away from its holding in *Lopez*: “The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between ‘what is national and what is local.’ It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at

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all, and to declare everything economic. We have already rejected the result that would follow – a federal police power.” To make clear that her dissent was not based on substance, but on federalism concerns, she continued: “If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California’s experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.”

Finally, perhaps her most characteristic opinion was her dissent in *Roper*, where she disagreed with the majority’s bright-line rule barring the death penalty for those under eighteen because, as she so often pointed out, individual cases – and individual seventeen-year-olds – need to be judged on their own facts: “Indeed, the age-based line drawn by the Court is indefensibly arbitrary – it quite likely will protect a number of offenders who are mature enough to deserve the death penalty and may well leave vulnerable many who are not.”

It should come as no surprise that some of O’Connor’s best lines came from her concurring and dissenting opinions rather than the opinions in which she spoke for the majority. Her majority opinions, however, will be no less significant given their doctrinal, rather than rhetorical, importance: e.g., correcting the legal test for regulatory takings (*Lingle*); requiring race-based prison cell assignment to satisfy strict scrutiny (*Johnson v. California*); and extending Title IX to include retaliation claims (*Jackson*).

Johnson and *Jackson* put O’Connor at the head of slim majorities – a position with which she became quite familiar during her tenure. To name just a few examples, O’Connor was a pivotal figure in the area of affirmative action, writing for the 5-4 majority in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), to require strict scrutiny for affirmative action in federal contracting, but she split her vote in the University of Michigan cases, voting in *Gratz v. Bollinger*, 539 U.S. 244 (2003), to strike down the University’s use of affirmative action in its undergraduate admissions process, while writing for the majority that upheld its policy for law school admissions in *Grutter v. Bollinger*, 539 U.S. 309 (2003). Similarly, she has been a critical vote in cases dealing with abortion, refusing to overturn *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and voting to invalidate a state partial-birth abortion ban in *Stenberg v. Carhart*, 530 U.S. 914 (2000). Most recently, O’Connor led the plurality in *Hamdi v. Rumsfeld*, 524 U.S. 507 (2004), taking the position that U.S. citizens held as enemy combatants are entitled to a meaningful opportunity to contest the basis of their detention before a neutral observer. It goes without saying that all these issues – and still others on which O’Connor was a crucial vote – remain in play. As a result, O’Connor’s replacement may well control the Court’s future jurisprudence on issues of fundamental importance to many Americans.

But before we (and everyone else) fixate on what is to come, we should wish a warm farewell to the Nation’s first female Justice. She will be missed.

With that, we leave you for the rest of the summer, and look forward to sending you more Updates starting in October 2005. Thanks, as always, for reading!

Ken & Kim

PART ONE: CIVIL CASES

ADMIRALTY/MARITIME

In *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.* (02-1028), the Court held that federal law governs the interpretation of maritime contracts even when they encompass a significant land component. In such cases, contractual liability limits for the original shipper can extend to all downstream carriers, including rail companies, and downstream shippers can further limit their exposure to a cargo owner through additional liability limits in their contracts with intermediate carriers.

As Justice O'Connor stated in the first line of the opinion, "[t]his is a maritime case about a train wreck." Needing to ship ten containers of machinery from Sydney, Australia to Huntsville, Alabama, Kirby hired a company called ICC to arrange for delivery. In its contract with ICC, Kirby did not declare the full value of the machinery but rather agreed to a \$500/package cap on ICC's liability for the sea leg of the trip. For the land leg of the trip, the contract specified a liability formula that yielded a higher cap. The contract also contained a "Himalaya Clause" – stemming from an old English case involving a ship of that name – extending these liability limits to any agents or independent contractors of ICC. ICC then hired a German company, Hamburg Sud, to ship the cargo from Sydney to Savannah, Georgia and then to Huntsville. The ICC-Hamburg Sud contract adopted a straight \$500/package liability cap for Hamburg Sud and had its own Himalaya Clause for any Hamburg Sud agents. Finally, Hamburg Sud hired Norfolk to move the cargo by rail from Savannah to Huntsville. Unfortunately, Norfolk's train derailed, and Kirby sued Norfolk for \$1.5 million in damages for the lost machinery. The district court capped Norfolk's liability at \$500/package (*i.e.*, \$5000), but the Eleventh Circuit reversed, on the ground that Norfolk was not in privity with ICC (so it could not benefit from ICC's land-leg liability formula) and that ICC was not Kirby's agent when it hired Hamburg Sud (so Norfolk could not benefit from Hamburg Sud's \$500/package cap either).

The Supreme Court reversed, capping Norfolk's liability at \$5000. First, the Court held that federal law governed the interpretation of the two shipping contracts (just before argument, the Court asked the parties and the Solicitor General to weigh in on that very issue). Kirby argued that the case was just a garden-variety diversity case, but the Court disagreed, quoting Justice Harlan from *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961): "[T]he question presented here has a more genuinely salty flavor than that." The Court's authority to make law for maritime contracts stems from its admiralty jurisdiction (art. III, § 2, cl. 1), so even though Kirby brought the case in diversity, the Court examined whether it would also have admiralty jurisdiction. That inquiry is "conceptual" rather than purely "geographic" or "spatial." Because both contracts had as their primary objective the shipping of goods by sea from Australia to the southern United States, the contracts were maritime in nature even though they necessarily involved a land component: "[S]o long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce – and thus it is a maritime contract." The Court also determined that the case was not "inherently local" because no state interest trumped the federal interest in uniform interpretation of maritime contracts. On the merits, the Court held that the Kirby-ICC contract's land-leg liability formula applied to Norfolk by virtue of the Himalaya Clause, which protected "any" agent who contributed to the contract's performance. The Court further held that the ICC-Hamburg Sud contract's even lower \$500/package limit also applied to

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Norfolk, thus adopting a default rule that a carrier's liability limits *vis-a-vis* an intermediary also protect the carrier against the cargo owner (and that Hamburg Sud's cap was passed on to Norfolk via the ICC-Hamburg contract's Himalaya Clause). The Court agreed that ICC was not Kirby's agent for all purposes in contracting with Hamburg Sud, but held nonetheless that an intermediary can negotiate enforceable liability limits with subcontractors. The Court rejected Kirby's argument that this default rule would be disastrous for the shipping industry, on the grounds that: (1) the rule tracks industry practice; (2) if limits negotiated with cargo owners were enforceable but limits negotiated with intermediaries were not, carriers would discriminate between the two in their shipping rates; (3) the result was equitable – Kirby could still sue ICC, the only company that knew about and was party to both contracts, for the difference between the two liability caps it negotiated; and (4) future parties could always negotiate around the default rule. The upshot: Norfolk is essentially off the hook, and the Court has transformed disputes over contracts contemplating international shipping into potential federal questions.

The Court addressed the definition of "vessel" under the Longshore and Harbor Workers' Compensation Act ("LHWCA") in ***Stewart v. Dutra Construction Co. (03-814)***, where the Court (minus the Chief) unanimously found that a dredge qualifies. The case involved Dutra's Super Scoop, "the world's largest dredge." Stewart was injured when the Super Scoop, then digging a trench in Boston Harbor, collided with a floating scow used to store sediment "scooped" from the ocean floor. He sued Dutra under the LHWCA, which authorizes negligence suits against the owners of "vessels." Dutra argued that the Super Scoop was not a vessel because its primary use was not for transportation. The Court, led by Justice Thomas, disagreed, holding that a vessel is a "watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." Nineteenth-century American courts regarded dredges as vessels, and the statute did not deviate from this understanding. Dutra used the Super Scoop to move equipment and workers over water, so it was, in fact, a vessel.

Finally, in ***Spector v. Norwegian Cruise Line, Ltd. (03-1388)***, a divided Court held that Title III of the Americans with Disabilities Act ("ADA"), which bars discrimination against the disabled in "public accommodations" and "specified public transportation," applies in some instances to foreign cruise ships in U.S. waters. A full discussion of ***Spector*** appears in the DISCRIMINATION section.

AGRICULTURE

The Court's agriculture cases are both discussed in full elsewhere. ***Bates v. Dow Agrosciences LLC (03-388)***, which held that the Federal Insecticide, Fungicide, and Rodenticide Act does not preempt certain state-law claims against pesticide manufacturers, appears in the PREEMPTION section. ***Johanns v. Livestock Marketing Ass'n (03-1164)***, involving a First Amendment compelled speech challenge by beef producers to the Beef Promotion and Research Act, appears in the FIRST AMENDMENT section.

BANKRUPTCY

In ***Rousey v. Jacoway (03-1407)***, a unanimous Court led by Justice Thomas held that IRA assets may be exempted from a bankruptcy estate under 11 U.S.C. § 522(d)(10)(E). The Rouseys

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declared bankruptcy several years after depositing distributions from their employer-sponsored pension plans (assets clearly exempt under the statute) into their IRAs. During the bankruptcy proceedings, they sought to shield portions of their IRAs by claiming them as similarly exempt. Jacoway, the bankruptcy trustee, disputed this claim, and the Eighth Circuit agreed with him, creating a split with the Fifth, Sixth, and Ninth Circuits. The Court reversed. In order to be exempt under the statute, the payment: (1) must be from a stock bonus, pension, profit-sharing, annuity, *or similar plan*; and (2) must be “on account of illness, disability, death, age or length of service.” Such assets are then exempt to the extent “reasonably necessary” to support the account holder or his dependents (an issue not before the Court). The Court found IRAs to be similar to the enumerated plans because they share the core characteristic of “provid[ing] a substitute for wages.” The Court rejected Jacoway’s claim that the right to payment from an IRA was not “on account of” age since IRA assets can be withdrawn at any time, explaining that the “substantial” 10% penalty for early IRA withdrawals effectively prevents access to the entire balance until age 59½.

COMMERCE CLAUSE

The most newsworthy Commerce Clause cases of the term involved medical marijuana and wine. Wine won, marijuana lost – and the states lost in both cases.

In ***Gonzales v. Raich (03-1454)***, the Court, over strong dissents, rejected an as-applied attack on the federal Controlled Substances Act (“CSA”) by individuals growing and using marijuana for medicinal purposes pursuant to California’s Compassionate Use Act of 1996, which permits regulated use of marijuana by individuals who are “seriously ill” and who meet certain criteria, including having a physician recommendation. The marijuana is grown and used entirely within California and is not intended for, and under California law is precluded from entering, the stream of interstate commerce. The opinion, concurrence and dissents contain a fascinating exploration of the history of the Commerce Clause and drug regulation in the United States, to which a summary simply cannot do justice.

In short, the Court, led by Justice Stevens, held that Congress had the power to regulate interstate markets for medicinal substances and that this power “encompasses the portions of the markets that are supplied with drugs produced and consumed locally.” The Commerce Clause permits federal regulation of (1) channels of commerce; (2) instrumentalities, persons, and things in commerce; and (3) activities that substantially affect interstate commerce. Here, only category three potentially applied to the respondents’ activities because they were purely local in nature (and probably were not commerce). The Court analogized this case to *Wickard v. Filburn*, where it rejected a Commerce Clause attack on federal regulations designed to control the volume of wheat produced to avoid crop surpluses and depressed prices. In that case, a farmer named Filburn argued that the regulations allotting him a certain acreage of wheat were invalid to the extent that they prohibited him from growing additional wheat for use on his own farm. The Court disagreed, based on evidence that home-consumed wheat had a substantial influence on the overall price and market conditions for wheat. Just like the wheat in *Wickard*, home-grown marijuana could substantially affect the national market for marijuana. Moreover, because of the difficulties in distinguishing home-grown California marijuana from marijuana grown elsewhere, the failure to regulate intrastate manufacture and distribution of marijuana “would leave a gaping

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hole in the CSA.” The Court emphasized that the CSA provides a comprehensive structure to regulate interstate commerce in drugs, classifying all drugs into schedules, each with its own set of controls on manufacture, distribution, and use. “That the regulation ensnares some purely intrastate activity is of no moment.”

Scalia concurred in the judgment, but wrote separately to stress that the CSA’s application to purely local conduct is not authorized by the Commerce Clause directly. For Scalia, the Court’s Commerce Clause cases are misleading because the “substantially affects” test is really derived from the Necessary and Proper Clause. Under this view, regulating an intrastate activity when doing so is essential to comprehensive regulation of interstate commerce is permissible “even though the intrastate activity does not itself ‘substantially affect’ interstate commerce.” The CSA’s application to local conduct is necessary to achieve the CSA’s goal of prohibiting interstate commerce in marijuana and is “appropriate” and “plainly adapted” for that purpose.

O’Connor (joined by the Chief and Thomas) dissented, arguing that the majority’s analysis will gut the limits on federal power and destroy the role of states as laboratories. The dissenters take the majority to task for focusing on the validity of the entire law, rather than the law *as applied* to the plaintiffs in this case – individuals using medical marijuana pursuant to state law. The government submitted no evidence (as opposed to conclusory congressional findings) that this use impacts interstate commerce – the Court merely assumed that it does, unlike *Wickard*, where the parties stipulated to interstate effects. The majority also encouraged improper regulation of local conduct by packaging it with broader regulation of interstate commerce. “[A]llowing Congress to set the terms of the constitutional debate in this way . . . is tantamount to removing meaningful limits on the Commerce Clause.” Thomas also penned a separate, typically history-based dissent that decried the end of our federalist system: “If Congress can regulate this under the Commerce Clause, it can regulate virtually anything – and the Federal Government is no longer one of limited and enumerated powers.”

Unlike the medical marijuana users in *Raich*, wine producers scored a major victory under the “dormant” or negative Commerce Clause in *Granholm v. Heald* (03-1116). There, the Court held that Michigan and New York restrictions on out-of-state wine producers violated the Commerce Clause’s prohibition on state laws that discriminate against interstate commerce. The 5-4 decision garnered an unusual coalition of Justices on each side: Kennedy led the majority, joined by Scalia, Souter, Ginsburg, and Breyer; and Thomas wrote the primary dissent, joined by the Chief, Stevens, and O’Connor. At the end of the day, it all came down to the Justices’ views of the 21st Amendment repealing Prohibition, with the majority holding that the Amendment did not exempt state liquor laws from the nondiscrimination rule, and the dissenters strenuously disagreeing. If you want more detail, or you’re a history buff, read on.

Under the Michigan law, in-state wineries could sell directly to consumers, but out-of-state wineries had to sell through Michigan wholesalers and retailers. New York technically allowed out-of-state wineries to sell directly to New York customers, but only if they established in-state distribution operations. Citing its dormant Commerce Clause jurisprudence holding that states cannot differentiate between in-state and out-of-state economic interests (a rule essential to avoiding “economic Balkanization” of the country), the majority easily found that these statutes discriminated against interstate commerce. Ordinarily, that would have ended the inquiry, but New York and Michigan argued that their laws were saved by the 21st Amendment, which

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repealed Prohibition at the federal level but provided that “[t]he transportation or importation into any State . . . of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited.” The states argued that “in violation of the laws thereof” exempted state liquor laws from the dormant Commerce Clause bar. After a lengthy discussion of history and case law, the majority rejected this argument: Before Prohibition, Congress enacted two statutes, the Wilson Act and the Webb-Kenyon Act, that the Court later interpreted to allow states to regulate the shipment of liquor so long as they did not discriminate against interstate commerce. The 21st Amendment tracked the language of these statutes, restoring this framework after Prohibition. Some Court decisions that came down soon after ratification of the 21st Amendment, notably *State Board of Equalization of California v. Young’s Market*, 299 U.S. 59 (1936), gave the states broad powers to erect trade barriers to out-of-state liquor, but – according to the majority – those cases “did not take account of this history and were inconsistent with this view” (*i.e.*, they were wrong). The Court construed its decision in *Bacchus Imports v. Dias*, 468 U.S. 263 (1984), which invalidated a Hawaii excise tax exemption that applied only to in-state liquors, to make clear that the 21st Amendment did not abrogate the nondiscrimination principle of the Commerce Clause. Finally, the majority rejected New York’s and Michigan’s attempts to justify their laws as advancing legitimate local purposes that could not be achieved in a nondiscriminatory way: There was no evidence that Internet purchasing of wine by minors was a serious problem (the Court noted that kids generally want “beer, wine coolers and hard liquor” – no comment as to what that says about Kennedy’s clerks), or that prohibiting only out-of-state direct shipments would solve it. The states’ tax-collection objectives were either illusory or achievable without discrimination.

Justice Thomas authored the hefty dissent, which provided an even more extensive historical discussion. The takeaway is this: The 21st Amendment and the Webb-Kenyon Act took policy choices about liquor out of the hands of judges and returned them to the states. The Webb-Kenyon Act says nothing about nondiscrimination, and the Court’s earlier jurisprudence rightly read that law as immunizing *all* state liquor laws from Commerce Clause restraints. The New York and Michigan statutes are also valid under the plain language of the 21st Amendment, which *Young’s Market* followed (in a decision that “was no outlier”) but today’s Court ignores. Thomas would limit *Bacchus* to its facts, which concerned a discriminatory tax exemption, not shipping regulations that the text of the 21st Amendment left to the states. Further, Thomas would resolve any conflict in the Court’s precedents in favor of the cases that closely followed ratification of the 21st Amendment.

Justice Stevens echoed that view in his own dissent (joined by O’Connor), writing that, while today we may think of alcohol as just like any other product in interstate commerce, we should defer to those who lived through ratification of the 21st Amendment (he mentioned Justices Black and Brandeis, who wrote *Young’s Market*), who clearly thought it expressly authorized “Balkanization” where alcohol was concerned. Stevens pointedly noted that “the younger generations who make policy decisions” have forgotten this fact, and it is noteworthy that the Chief, Stevens, and O’Connor – the three most senior members of the Court, and hardly traditional allies – lined up in the dissent with the history-minded Thomas. Stevens also pointed out that the 21st Amendment was the only amendment ratified by citizens in state conventions, another reason to give its terms their ordinary meaning.

The Court’s decision obviously represents a boon for wineries, for whom the Internet and direct shipment represent a significant commercial opportunity. But it may be short-lived, because the

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Court's decision would not bar a state from banning *all* direct shipment or Internet sales inside its borders (just as each state can still prohibit the sale of alcohol altogether).

In its second dormant Commerce Clause case of the Term, ***American Trucking Ass'ns v. Michigan Public Service Comm'n (03-1230)***, a unanimous Court upheld Michigan's \$100 fee on trucks engaged in point-to-point hauling within the state. Petitioners argued that the fee imposed an unconstitutional burden on interstate commerce because, as a per-truck fee rather than a per-mile fee, it imposed a disproportionate burden on interstate carriers who also carry intrastate loads (*e.g.*, by "topping off" their trucks carrying loads across Michigan with intrastate cargo) than it did on purely intrastate carriers. The Court, led by Justice Breyer, disagreed because the fee applied only to activities taking place within Michigan and applied evenhandedly to all carriers making these domestic journeys. Moreover, the record contained no evidence that the fee imposed a significant burden on interstate commerce or discriminated against interstate truckers (unlike a previous case invalidating a flat fee, *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), where the fee applied even to trucks doing no intrastate business). Finally, the fee passed the "internal consistency" test (a/k/a the "What if every state did this?" test), because a carrier would pay such fees only where it engaged in purely local business, just as other businesses with local outlets pay uniformly assessed local fees and taxes. Justices Scalia and Thomas each concurred in the judgment. Scalia would eschew the internal consistency test (and any other test from "our wardrobe of ever-changing negative Commerce Clause fashions") and uphold the law because it did not facially discriminate and was distinguishable from *Scheiner*. Thomas would simply chuck the dormant Commerce Clause altogether as atextual, nonsensical, and unworkable.

DISCRIMINATION

It was a significant Term in the discrimination arena, with a deeply divided Court finding that the Age Discrimination in Employment Act authorized disparate impact claims and that Title IX, which prohibits sex discrimination in federally funded education, provides a private right of action for retaliation claims. Of somewhat lesser impact (to all those except cruise ship owners) was the Court's ruling that the Americans with Disabilities Act applies to foreign cruise ships in U.S. waters.

In perhaps the biggest discrimination ruling of the Term, the Court considered whether the Age Discrimination in Employment Act ("ADEA") allowed for disparate impact claims in ***Smith v. City of Jackson, Mississippi (03-1160)***. Smith and other senior police officers challenged the city's revisions to its pay scale, which gave junior (generally younger) officers higher percentage raises than those given to senior (generally older) officers. This was probably not the strongest claim ever, since senior officers' raises were actually higher in absolute dollars, but we digress Smith argued, among other things, that even if the city had not *intentionally* discriminated against him, the Title VII disparate-impact theory from *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), was also available under the ADEA. The district court and the Fifth Circuit rejected this claim.

In three separate opinions, the Court unanimously held for the city, but by a 5-3 vote (no Chief) it recognized ADEA disparate-impact claims. Justice Stevens announced the judgment, joined

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by Souter, Ginsburg, Breyer, and (for the most part) Scalia. The Court noted that Congress enacted the ADEA hot on the heels (in legislative time) of Title VII and borrowed that statute's language almost verbatim, making it unlawful "to limit, segregate, or classify . . . employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

Here's where Scalia drops out, leaving the following a plurality only. *Griggs* authorized disparate-impact claims on the ground that the purpose of Title VII encompassed both the motivations and the consequences of employment actions, and subsequent cases made clear that disparate-impact claims also had a textual basis in Title VII. The close similarities between Title VII and the ADEA strongly suggested that a disparate-impact theory was also cognizable under the ADEA. Further, the ADEA's one textual distinction actually supported the viability of disparate-impact claims: Unlike Title VII, the ADEA contains an "RFOA provision" that allows employers to take an "otherwise prohibited action" (*i.e.*, an action with an age-related adverse effect) if it is based on "reasonable factors other than age discrimination." This precludes liability if the adverse effect results from a reasonable nonage factor, but it leaves open a challenge to effects caused by unreasonable factors (whatever those may be – the Court certainly did not say). Finally, the plurality read EEOC regulations to interpret the ADEA to authorize recovery under a disparate-impact theory. How does Scalia disagree with all this? He doesn't, really. He agrees with "all the Court's reasoning," but instead of making an independent determination on the disparate-impact question, he would defer to the EEOC under the *Chevron* doctrine. For Scalia, this is "an absolutely classic case for deference to agency interpretation," because the ADEA authorized the EEOC regulations, which are reasonable.

With that, Scalia jumps back on board, creating a true majority again: ADEA disparate-impact claims are narrower than those under Title VII, because the RFOA provision requires a claimant to show that the nonage factor was unreasonable, and the 1991 amendments expanding the scope of disparate-impact claims under Title VII did not amend the ADEA. For those reasons, Smith loses: He's merely pointed out that the city has been "relatively less generous to older workers" without identifying the specific factor in the pay scale responsible for the disparity, and the pay scale was a reasonable effort to make junior officer salaries more competitive in the marketplace.

Justice O'Connor, joined by Kennedy and Thomas, concurred in the judgment only; these Justices would have disallowed disparate-impact claims altogether. They rejected the plurality's interpretation of the "adverse effect" provision, arguing that the plurality wrongly read "because of . . . age" to refer to the *effect* rather than to the employer's *motive* (as it does elsewhere in the statute). In a point for the grammarians, they even chastised the plurality for ignoring "the comma separating the 'because of . . . age' clause from the preceding language." These Justices read the RFOA provision as a carve-out, not a carve-in, for disparate impact expressing Congress' clear intent for employers not to be liable for anything other than intentional discrimination. For them, the issue of reasonable vs. unreasonable nonage factors was not a distinction between two types of disparate-impact claims, but rather it was a codification in the ADEA of the "pretext" inquiry from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973): The employee alleges discrimination, the employer proffers a nondiscriminatory reason for its action, and the employee can try to show that the reason is only a pretext for discrimination. Moreover, *Griggs* was decided *after* ADEA's passage, so Congress could not have intended that decision to be applied to the ADEA. Finally, the "dissenters" gave no weight to EEOC

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regulations because they speak only to what employers should do to qualify for the RFOA safe harbor and say nothing about disparate-impact lawsuits – and even if they did, they would be unreasonable and not entitled to deference.

So Smith lost his battle, but employment lawyers may have a whole new war to fight.

Turning to Title IX, which prohibits sex discrimination in federally-funded education (most notably in athletic departments), a 5-4 Court found that the statute provides a private right of action for retaliation claims in ***Jackson v. Birmingham Board of Education (02-1672)***. After Jackson, a male high-school coach, complained about unequal funding and treatment of his girls' basketball team, the Board stripped him of his coaching duties. He sued under Title IX, 20 U.S.C. § 1681, but the Eleventh Circuit held that the statute's private right of action does not cover retaliation for reporting discrimination.

The Court reversed in a narrow majority led by Justice O'Connor. The majority relied heavily on the proposition that while Title IX does not expressly mention retaliation, Congress enacted a "broad prohibition" on sex discrimination when it wrote the statute. Retaliation *is* discrimination because it is an intentional act that subjects the victim to differential treatment, and it occurs "on the basis of sex" when it is a response to a complaint about sex discrimination; therefore, such retaliation constitutes a violation of Title IX. Moreover, Title IX was enacted only three years after *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which held that a general ban on race discrimination in housing provided a cause of action for those who advocate for minority tenants, and Congress presumably expected Title IX to be interpreted in similar fashion. Relying on *Sullivan* and on the fact that Title IX's effectiveness depends on whistleblowers, the Court rejected the Board's argument that Jackson could not sue because he was only an "indirect" victim of sex discrimination. Finally, although Title IX was an exercise of Congress' Spending Clause powers, making its provisions akin to a contract with the States, the Board could not claim that it lacked notice that it might be held liable for retaliation because the statute had been interpreted broadly and its implementing regulations prohibited retaliation.

Justice Thomas led the four dissenters (the others, you might have guessed, were the Chief, Scalia and Kennedy), who took issue with just about everything in the majority opinion. First, the dissenters believed that the alleged retaliation did not constitute discrimination "on the basis of sex," because the natural meaning of that phrase was on the basis of the *plaintiff's* sex (not somebody else's), and Jackson's sex had nothing to do with his removal as coach. Second, a retaliation plaintiff does not have to show that sex discrimination actually occurred, only that he thought it did and that he suffered retaliation as a result. Retaliation therefore is not itself discrimination but a separate and distinct claim that Congress chose not to include in Title IX. The dissent distinguished *Sullivan* as holding only that a white lessor had standing to assert the rights of his black lessee – a third-party claim in which, unlike Jackson, the lessor would necessarily have to prove that discrimination occurred. The majority's reasoning wrongly extends Title IX beyond its express class of intended beneficiaries: victims of *actual* sex discrimination. Third, "Congress must speak with a clear voice" to give notice when it is imposing liability on the States via its spending power, but "the Court's rationale untethers notice from the statute" by looking at regulations that say nothing about a private right of action and by "requir[ing] clairvoyance from funding recipients." Finally, a prophylactic whistleblower

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mechanism created “out of whole cloth” is unnecessary to effectuate the purpose of Title IX, as nothing prevents parents and students from bringing complaints.

Next, in *Spector v. Norwegian Cruise Line, Ltd.* (03-1388), a very splintered Court held that Title III of the Americans with Disabilities Act (“ADA”), which bars discrimination against the disabled in “public accommodations” and “specified public transportation,” applies in some instances to foreign cruise ships in U.S. waters. Spector and others had sued NCL seeking its compliance with ADA requirements for “reasonable modifications” and the removal of physical barriers where “readily achievable.” Relying on Court precedents requiring a clear statement of congressional intent to apply U.S. laws to foreign vessels, the Fifth Circuit dismissed the case. The Court reversed, but you’ll need a scorecard to keep the opinions straight. The actual majority holding, taken from Justice Kennedy’s opinion (where he was joined by Stevens, Souter, Ginsburg, and Breyer) is fairly simple: Title III’s definitions of “public accommodations” and “specified public transportation” do not expressly mention cruise ships, but “there can be no serious doubt” that cruise ships are covered “under conventional principles of interpretation” (so conventional that Kennedy does not discuss them). The majority, however, read the “readily achievable” provision as exempting changes that would violate international law or compromise safety (issues for remand).

Beyond that, the opinions get more complicated. Kennedy (with Stevens and Souter) noted that the clear-statement rule applied where a law would affect the internal affairs of foreign vessels (such as labor laws, where it made sense to defer to the law of the flag state). The rule could still be relevant to specific ADA requirements: For example, ADA provisions that would require permanent and significant structural modifications, if they satisfied the “readily achievable” test, might implicate fundamental issues of ship design, an internal matter (this is where Ginsburg and Breyer jumped ship, so to speak, because they read the clear-statement rule as deriving solely from the desire to avoid conflicts with international law – but here there were none, thanks to the majority’s reading of the statute, so the internal affairs of ships should be irrelevant). So on remand, the Kennedy plurality would have the Fifth Circuit determine, provision by provision, if any Title III requirements interfere with the internal affairs of foreign ships. Justice Thomas joined them on this point only, writing that the Fifth Circuit should consider only those claims that did not pertain to the structure of ships.

Justice Scalia, joined by the Chief, O’Connor, and Thomas, dissented on the ground that there was no way to square Title III with the clear-statement rule because the statute necessarily intrudes on internal affairs such as ship design. Minus Thomas, the dissenters rejected the Kennedy plurality’s remand guidance, because the belief that congressional intent varied section-by-section was “delusional.” The statute provided an expansive list of public accommodations and specified public transportation (which did not include foreign cruise ships), and Congress has demonstrated in other statutes that it knows how to express its intent to apply U.S. law to foreign cruise ships. So Scalia, the Chief and O’Connor would not extend Title III to these ships.

Finally, in *Johnson v. California* (03-636), a 5-3 majority (no Chief) held that the California prison system’s race-based initial cell assignment policy must satisfy strict scrutiny. For the first 60 days of incarceration, each new or recently transferred male inmate is assigned a cellmate based predominantly on race. No other aspects of prison life are segregated, and after 60 days inmates can request their own cellmates or receive assignments based on individualized review.

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California justified this policy on the ground that its prisons are overwhelmed by race-based gang violence and that this initial segregation period is necessary to protect inmates and corrections officials. Johnson, an inmate since 1987, challenged the policy under the Equal Protection Clause. The district court granted summary judgment for the state on qualified immunity grounds, and the Ninth Circuit affirmed. Applying the “reasonable relationship” test from *Turner v. Safley*, 482 U.S. 78 (1987), in which the Court upheld restrictions on inmate marriages and correspondence, the Ninth Circuit held that the policy was reasonably related to the legitimate penological objective of prison safety.

The Court, led by Justice O’Connor (joined by Kennedy, Souter, Ginsburg and Breyer) reversed and remanded for strict scrutiny review. Citing, among others, the Michigan affirmative action cases from two terms ago, *see Grutter v. Bollinger*, 539 U.S. 306 (2003), the majority noted that “all racial classifications” must be narrowly tailored to further a compelling interest. It refused to adopt *Turner*’s deferential standard, which has never been applied to racial classifications. In addition, the Court relied on *Lee v. Washington*, 390 U.S. 333 (1968), a *per curiam* opinion striking down Alabama’s segregated prison system, for the proposition that a heightened standard of review applies to prison segregation. Moreover, *Turner*’s “reasonable relationship” test applies only to restrictions on rights that are “inconsistent with proper incarceration.” Here, the Fourteenth Amendment’s ban on discrimination is entirely consistent with prison administration and bolsters the legitimacy of the system (this portion of the opinion notes a number of reasons why California’s policy might undermine its stated objective). Finally, under *Turner*, rank discrimination would be too easy to defend and prison officials arguably could segregate all aspects of prison life. The Court concluded by noting that strict scrutiny is not a death knell for the policy: Prisons are dangerous places, prison safety is a compelling interest, and California will simply have to show that its policy is narrowly tailored. In a separate concurrence, Justice Ginsburg (joined by Souter and Breyer) wrote that strict scrutiny should not apply to racial classifications used to redress past discrimination, but she agreed with its application to “stereotypical” classifications like California’s.

Justices Stevens and Thomas wrote wildly divergent dissents. Stevens would remand the case on the issue of qualified immunity, but he would find the policy unconstitutional *regardless* of the standard of review. California offered no evidence to support the need for a “blunderbuss policy” that ignores the circumstances particular to individual inmates (especially transferees, whose prison records are available for review). Further, there was no evidence in the record of interracial violence between cellmates or of gang recruitment during the first 60 days of incarceration. Stevens also noted that without individualized review, California risks housing together inmates of the same race who belong to rival gangs.

Justice Thomas, joined by Scalia, would have upheld the policy under *Turner*: “The Constitution has always demanded less within the prison walls,” and he would defer to prison officials on matters of safety. Thomas first noted the limited nature of the initial segregation period and the dangers inherent in housing inmates in tightly confined, hard-to-police double cells. He further noted that *Turner* adopted a “unitary, deferential standard for reviewing prisoners’ constitutional claims” and that the Court had adhered to that standard until today, even in cases involving First Amendment and due process rights. He categorically rejected the majority’s reliance on *Lee v. Washington*, a one-paragraph opinion that upheld a general rule that wholesale segregation in prisons is unconstitutional but also recognized that officials can “allow[] for the necessities of

prison security.” Contrary to the view of the majority, *Lee* simply did not speak to the standard of review. Applying *Turner*, Thomas would uphold the policy because it is reasonably related to the legitimate penological objective of safety and there are no obvious alternatives.

DUE PROCESS

In the heart-wrenching case of *Town of Castle Rock, Colorado v. Gonzales (04-278)*, the Court held 7-2 that the recipient of a restraining order in Colorado does not have a property right in its enforcement that is protected under the Due Process Clause of the 14th Amendment. Rebecca Gonzales obtained a restraining order against her husband, but the police ignored her requests to enforce the order after he abducted their three children – repeatedly telling her to call back later. The husband ultimately showed up at the police station, opened fire, and committed suicide. Gonzales’ three children were found dead in his car. She sued under 42 U.S.C. § 1983 claiming that she had a property interest in having the police enforce the restraining order because enforcement was mandatory under state law, and that she was deprived of this right without procedural due process (*i.e.*, the police refused to listen to her or to determine whether conditions were met for arrest).

Writing for the majority, Justice Scalia rejected Gonzales’ claim. The majority did not defer to the Tenth Circuit’s determination that Colorado law created a property right in enforcement because that decision did not “draw upon a deep well of state-specific expertise” and ultimately the question was one of federal constitutional law. On the merits, the Court first found that the “seemingly mandatory language” in the Colorado statute (*i.e.*, “you shall arrest”) was not sufficiently clear to override the long history of discretion in police enforcement (yes, this is plain-language Scalia writing for the Court!). Second, even if the statute clearly required arrest if the violator were present, here the whereabouts of the husband were unknown for portions of the evening, and state law required only that police obtain an arrest warrant – but the right to a warrant is nothing more than the right to process, not a protected form of property. Third, even assuming that the statute required mandatory enforcement, “that would not necessarily mean that state law gave *respondent* an entitlement to enforcement of the mandate.” If the statute had intended to create a private right to require arrest or to provide a private cause of action, it likely would have said so. Finally, even if the statute entitled an individual to enforcement, this was not a “property” interest for due process purposes because it was incidental to ordinary law enforcement functions, which are intended to protect the public as a whole and only incidentally benefit individuals. Together with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), which rejected a *substantive* due process claim under similar circumstances, *Gonzales* effectively sounded the death knell for § 1983 claims arising from failure to arrest: “This reflects our continuing reluctance to treat the Fourteenth Amendment as a ‘font of tort law.’” Justice Souter, joined by Breyer, concurred to emphasize that the right claimed by Gonzales is really just a right to state procedure, which is not “property.”

The dissenters, Stevens and Ginsburg, would have deferred to the Tenth Circuit on the state law issues (“[I]t is certainly *plausible* to construe . . . ‘shall arrest’ . . . as conveying mandatory directives to police.”), or else would have certified the issue to the Colorado Supreme Court. They disagreed with the majority’s treatment of the mandatory language in the Colorado restraining order statute as equivalent to the “seemingly mandatory” language in other criminal

laws that were interpreted to preserve police discretion. Legislative history (in Colorado and around the country) reflected that a wave of mandatory arrest statutes were passed specifically to remove police discretion in the domestic violence arena. Though the Colorado Supreme Court had not yet construed Colorado's statute, other state courts interpreting similar statutes had found no discretion for police to decline to act, and "it does seem rather brazen for the majority to assume that the Colorado Supreme Court would repudiate this consistent line of cases from other states." Further, the right to enforcement is personal (residing only in those protected by the particular restraining order) and resembles other types of protected property interests such as welfare and public education. Under these circumstances, the failure to listen to Gonzales and determine whether enforcement was necessary violated procedural due process.

ELECTIONS

In *Clingman v. Beaver* (04-37), the Court upheld Oklahoma's semi-closed primary law, under which parties can invite only members and registered independents to vote in their primaries. The Tenth Circuit struck down the law as violating the First Amendment right of association of Oklahoma's Libertarian Party ("LPO"), which wished to allow members of other parties to vote in its primaries, and of individual Democrats and Republicans who wanted to vote in LPO primaries. The Court, led by Justice Thomas, reversed 6-3. The Court distinguished an earlier precedent, *Tashjian v. Republican Party of Connecticut*, 497 U.S. 208 (1986), where the Court invalidated a Connecticut law limiting primaries to party members. The difference between *Tashjian* and this case was the level of scrutiny applied to the law: Severe burdens on associational rights merit strict scrutiny and must be narrowly tailored to a compelling state interest, but lesser burdens need only reasonably serve important interests. For a variety of reasons, the Court found that the Oklahoma law, unlike the Connecticut law, was not a severe burden on associational rights and did not warrant strict scrutiny. First, in a portion of his opinion joined only by the Chief, Scalia, and Kennedy, Justice Thomas noted that the right to associate was not truly at issue here: The individual Republicans and Democrats did not want to associate with the LPO, just vote in its primary while retaining their other affiliations. In the remainder of the opinion, which Justices O'Connor and Breyer joined to yield a majority, the Court found that by allowing voters to register as independents and vote in any willing party's primary, the Oklahoma law was less burdensome than Connecticut's law, which had limited primaries to party members. Oklahoma's "ordinary" burden on associational rights was justified by its interests in preserving the viability of parties, enhancing their electioneering and party-building efforts, and guarding against party raiding and "sore loser" candidacies by spurned primary contenders. Justice O'Connor (joined by Breyer) wrote separately to disagree with the plurality's gloss on the respondents' associational rights, but she concurred because these rights were not severely burdened.

Justice Stevens (joined by Ginsburg and Souter) dissented, arguing that the Court's ruling diminished the value of a citizen's right to vote and of a party's right to define its mission. In particular, Stevens wrote that by focusing on associational rights rather than the right to vote, the majority had missed the point. The Oklahoma law actually prohibited a non-member's exercise of the right to vote despite the LPO's willing invitation, a restriction that could not stand absent a state interest of overriding importance. Stevens also argued that the law advanced illegitimate

state interests in manipulating the outcome of elections, protecting major parties from competition, and stunting the growth of new parties.

EMPLOYMENT

The blockbuster employment decision of the Term, *Smith v. City of Jackson* (03-1160), where the Court recognized disparate impact claims under the Age Discrimination in Employment Act, appears above in the DISCRIMINATION section. The Court also rejected an employee's claim that his termination violated his right to free speech under the First Amendment in *City of San Diego, California v. Roe* (03-1669), which appears below in the FIRST AMENDMENT section.

Turning to the False Claims Act ("FCA"), in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson* (04-169), the Court held 7-2 that the statute of limitations for whistleblower retaliation claims under the FCA is not the FCA's six-year limitations period, but rather the most closely analogous state limitations period. The FCA prohibits fraudulent claims for payment to the United States, and allows private individuals to bring *qui tam* actions to recover in the government's name under 31 U.S.C. § 3730(b)(1). In 1986, Congress added a new cause of action under § 3730(h) for individuals facing retaliation from employers for assisting an FCA investigation. The FCA further provides that "a civil action under section 3730" cannot be brought "more than 6 years after the date on which the [false claim] is committed." In 2001, Wilson brought a *qui tam* complaint against her employer, alleging that it made false claims under a federal disaster relief program and that it had harassed her for cooperating with a federal investigation in 1996-97. Her employer moved to dismiss the retaliation claim, arguing that the 6-year limitations period did not apply and asking the district court to adopt North Carolina's 3-year limit for retaliatory discharges. The district court agreed, the Fourth Circuit reversed, and the Supreme Court reversed right back in an opinion by Justice Thomas.

For the Court, it was unclear whether § 3730(h) retaliation claims were "civil actions under section 3730" because the statute ties the limitations period to the date of the *false claim*. But a retaliation plaintiff does not even have to allege that her employer submitted a false claim, only that it retaliated against her for cooperating in an investigation. Given the choice between starting the clock at the date of the "suspected" false claim or simply reading retaliation suits out of the statute of limitations, the Court chose the latter approach for two reasons: (1) other sections of the statute use "action brought under section 3730" to refer only to actual false claims actions, not to retaliation actions, and (2) Congress generally drafts statutes of limitations to begin when the cause of action accrues (*i.e.*, when retaliation occurs, as opposed to a false claim that could have occurred many years earlier; if the retaliation occurred more than six years after the false claim, the retaliation claim would be untimely the moment it accrued!). On remand, the Fourth Circuit should rule on which state statute of limitations is most closely analogous.

Justice Stevens concurred in the judgment with a single sentence, essentially: "See my dissent in *Dodd v. United States* (04-5286)," which can be found below in the HABEAS CORPUS PROCEDURE section. Justice Breyer (joined by Ginsburg) dissented, on textual grounds and on the ground that while starting the limitations period before retaliation occurs is admittedly odd, Congress could reasonably desire to have a uniform limitations period for all *qui tam*-related

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claims, as opposed to a “crazy quilt” based on varying state limitations periods for retaliation claims (some of which are as short as 90 days). Moreover, neither the majority nor the parties could identify a single retaliation plaintiff who would be time-barred under the majority’s nightmare scenario, and Breyer would not “shed crocodile tears for the imagined plight of a nonexistent whistle-blower.”

ENVIRONMENT

In ***Orff v. United States (03-1566)*** the Court ruled 9-0 that the Reclamation Reform Act of 1982 did not waive sovereign immunity to direct suits against the United States. Orff and other farmers got their water from California’s Wetlands Water District, which in turn contracted for water from the U.S. Bureau of Reclamation. In 1993-94, the Bureau cut the District’s deliveries in half to comply with endangered-species regulations (apparently its pumps threatened Sacramento River salmon and a tiny fish called the delta smelt). The Water District challenged that cut in court, and the farmers intervened as plaintiffs, claiming standing as third-party beneficiaries of the District’s contract with the Bureau. They also argued that the United States had waived sovereign immunity in the Reclamation Reform Act, which gives consent “to join the United States as a necessary party defendant” in suits dealing with reclamation-related contracts. The Thomas-led Court disagreed, in a straightforward application of textualism and strict construction of sovereign immunity waivers. By its terms, the Act consents to *joinder* – that is, to bringing the United States into an existing case between two private parties where necessary. The Act did not consent to direct suits against the government. So the farmers lose, and the smelt can breathe (so to speak) more easily.

In ***Cooper Industries, Inc. v. Aviall Services, Inc. (02-1192)***, the Court held that section 113 of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9613, allows a private party that cleans up a contaminated site to seek contribution from other responsible persons *only* if that party itself has been sued under CERCLA. The loser in this case was Aviall, which discovered that some of its sites were contaminated, cleaned them up voluntarily, and then sought to recover some of its costs from Cooper (from whom it had bought the sites). Section 107, CERCLA’s original “cost recovery” provision, 42 U.S.C. § 9607, provides that “potentially responsible persons” (“PRPs”) are liable for response costs incurred by the U.S. government or “any other person.” Federal courts had construed this provision to allow a PRP that incurred response costs (*i.e.*, Aviall) to bring a recovery action against other PRPs (*i.e.*, Cooper). In 1986, Congress added section 113, which provides that a PRP “may seek contribution from any other [PRP] *during or following* any civil action under [CERCLA].” Aviall sued Cooper under both provisions in a Texas federal court. But the Fifth Circuit had previously held that *any* cost recovery claim under CERCLA must proceed under section 113 (even one based on section 107), so Aviall was forced to drop its independent section 107 claim. The district court then threw out the case on the ground that Aviall itself had not been sued, so it was not proceeding “during or following” a CERCLA action as required by section 113. The Fifth Circuit reversed, reasoning, in essence, that “may” in section 113 did not mean “may only.” Because it reversed on section 113, the Fifth Circuit did not address Aviall’s request to revisit its precedents and allow Aviall’s claim to proceed solely under section 107.

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By a 7-2 vote, the Court reversed and remanded. Writing for the majority, Justice Thomas saw the case as a matter of straightforward statutory construction (yet another one; the statutory construction junkies must have been in heaven this Term). Section 113 plainly authorizes certain contribution actions – that is, contribution actions “during or following” a CERCLA lawsuit – and no others. Otherwise, Congress would have had no need to put “during or following . . .” in the statute. While section 113 expressly does “not diminish the right of any person to bring an action for contribution in the absence of a [CERCLA] civil action,” that saving clause applies only to causes of action that exist *independently* of section 113. The majority declined to decide whether Aviall could proceed solely under section 107, because the Fifth Circuit did not address the question below and the parties did not fully brief it to the Court. Aviall will have to press that claim again in the Fifth Circuit, where it presumably will lose in light of the precedents that forced it to amend its complaint in the first place.

That fact was the basis for a dissent by Justice Ginsburg (joined by Justice Stevens). She did not take issue with the majority’s analysis of section 113, but she would have reached the section 107 issue because the Fifth Circuit had decided that question elsewhere and she saw no need to further protract the litigation. Barely unspoken, and *very* strongly implied, is that Justice Ginsburg thinks the Fifth Circuit’s construction of CERCLA is just wrong – in her view, the saving clause of section 113 does not alter any rights that already existed under section 107.

For now, the message to Fifth Circuit industries is: If you’re sitting on a contaminated site and want to go after others to recover your response costs, you should wait for the government to sue you before you actually clean up the site. Congress may want to think about changing that incentive.

ESPIONAGE

Unless you are a spy or routinely represent them, *Tenet v. Doe (03-1395)* will probably have little impact on your day-to-day life. In *Tenet*, a unanimous Court held that the longstanding rule announced in *Totten v. United States*, 92 U.S. 105 (1876), bars any claim predicated on the existence of a secret espionage agreement.

Plaintiff John Doe (he was a spy, after all) claimed that during the Cold War he was a high-ranking diplomat in a country considered to be an enemy of the United States. He and his wife entered into an agreement with the U.S. government under which he would provide intelligence to the United States and, in return, the government would later arrange for his entry into the United States and provide financial support and security for his lifetime. The government honored its part of the bargain for many years, finding Doe employment and assisting him with living expenses until he was self-sufficient. In 1997, however, Doe was laid off and could not find new employment due to the CIA’s restrictions on the types of jobs he could hold. He contacted the CIA for financial assistance, but the CIA declined his request. Doe sued, bringing estoppel and due process claims. The district court permitted these claims to go forward and a divided panel of the Ninth Circuit affirmed, finding that these claims were not prohibited because they did not sound in breach of contract (the cause of action at issue in *Totten*) and because the rule announced in *Totten* was just an earlier formulation of the evidentiary “state secrets” privilege, rather than a categorical bar to suit.

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The Court, in an opinion by the Chief, had no trouble rejecting this analysis, finding that “[n]o matter the clothing in which alleged spies dress their claims, *Totten* precludes judicial review in cases such as respondents’ where success depends upon the existence of their secret espionage relationship with the Government.” Suits based on espionage agreements are “altogether forbidden.”

The decision’s only potential ramification beyond its rather obscure subject matter is its holding that, because of the unique and categorical nature of the *Totten* bar, the Court could appropriately address this issue before determining whether it had subject-matter jurisdiction to hear the case (Doe argued that jurisdiction was appropriate only in the Court of Federal Claims). Justices Stevens and Ginsburg concurred to emphasize their agreement with the Court’s “wise” decision to address a clear issue on the enforceability of the contract before turning to the “arguably antecedent” jurisdiction question. Justice Scalia concurred separately to stress that the jurisdictional question was appropriately delayed here only because the *Totten* bar itself was of a jurisdictional nature.

FEDERAL INDIAN LAW

Native American tribes had mixed success this term. In *Cherokee Nation of Oklahoma v. Leavitt (02-1472)*, two tribes successfully argued to recover “contract support costs” that the government promised to pay them when the tribes took over various public services that the government ordinarily provides. Oral argument could not have been much fun for the government, which conceded that it promised to pay the costs, but argued that it was not bound by its promises because Congress failed to appropriate sufficient funds to cover the costs – even though it also conceded that “insufficient appropriations” is generally no excuse for ordinary government contracts (such as procurement contracts). In an opinion by Justice Breyer, a unanimous Court found for the tribes. The Court rejected the government’s argument that the tribes’ contracts were “special” because the tribes had stepped into the shoes of a federal agency, and agencies (unlike contractors) generally have no entitlement to funds from Congress. The statutes authorizing the contracts make clear that they function as binding promises (just like procurement contracts). The Court also rejected the government’s reliance on various statutory provisions suggesting possible wiggle room when funds are unavailable, on the ground that these provisions are similar to those governing procurement contracts, yet contractors are still entitled to payment (once again, using the government’s example against it). Justice Scalia did not join the part of the Court’s opinion that relied on legislative history.

In *City of Sherrill, New York v. Oneida Indian Nation of New York (03-855)*, on the other hand, the Oneida Indian Nation (“OIN”) tribe was unable to persuade the court that lands it had repurchased were exempt from taxation. Specifically, the Court considered whether the City of Sherrill could collect property taxes on land that was once part of the OIN reservation, was purchased and inhabited for generations by non-Indians, and then reacquired by OIN. Reversing the Second Circuit, the Court (Ginsburg, J.) held 8-1 that the land *is not* exempt from taxation. For those of you who are not Indian law buffs, the Court’s decision can be summed up in a sentence: “Given the longstanding distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneida’s long delay in seeking judicial relief against parties other than the United States, we

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hold that the Tribe cannot unilaterally revive its ancient sovereignty . . . over the parcels at issue.”

For those who want the details (and a history lesson), here goes: OIN is the descendent of the Oneida Nation, which once held six million acres of land in central New York. In a 1788 treaty with New York State, the Oneidas ceded all their land to the State except for a reservation of about 300,000 acres. In 1790, Congress passed the Indian Trade and Intercourse Act (“Nonintercourse Act”), which barred the sale of tribal land without the consent of the U.S. government, and in 1794 Congress entered into the Treaty of Canandaigua, which guaranteed the Oneidas’ “free use and enjoyment” of their reserved territory. Despite these federal efforts to safeguard tribal land, New York continued to purchase land from the Oneidas (and the government stopped trying to interfere with the sales). By 1920, the Oneidas held only 32 acres in New York.

OIN has recently repurchased pieces of its historic reservation, and the current controversy arose because OIN refused to pay taxes on those properties, arguing that their original purchase violated the Nonintercourse Act. The Court accepted a similar claim in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985), where it permitted OIN to pursue a claim for damages against the County premised on the fair rental value of the land at issue (a fairly small parcel). But the Court distinguished that prior case based on the type of relief sought: damages versus an injunction against the payment of taxes. This type of equitable relief was inappropriate given the “long lapse of time” before OIN exercised its rights and the “dramatic changes in the character of the property.” The Court clearly was concerned that if the reacquired land were held exempt from taxes, OIN would bring new challenges claiming that the land was exempt from all forms of regulation by the State, which might create a “checkerboard of alternating state and tribal jurisdiction in New York – created unilaterally at OIN’s behest” that would burden state and local administration and adversely affect neighboring landowners. Furthermore, in 25 U.S.C. § 465, Congress provided a method through which tribes may reacquire historic land and obtain sovereignty over it, and OIN should have pursued this process. Justice Souter filed a separate concurrence to note that OIN’s failure to act was relevant not only to the issue of remedy but also to the determination of sovereign status over the land. While laches was not raised in the questions presented, the Court properly addressed the issue since each side addressed it at argument.

Justice Stevens was the lone dissenter, which is pretty amazing since he had argued against the availability of damages in *County of Oneida*. For Stevens, the fact that the land was “Indian Country” – which no party disputed – required the conclusion that it was tax-exempt absent action by Congress. This remedy was far less invasive than the damages action authorized by *County of Oneida*: “It seems perverse to hold that the reliance interests of non-Indian New Yorkers that are predicated on almost two centuries of inaction by the Tribe do not foreclose the Tribe’s enforcement of judicially created damages remedies for ancient wrongs, but do somehow mandate a forfeiture of a tribal immunity that has been consistently and uniformly protected throughout our history.” Stevens also took issue with the majority’s consideration of issues such as laches and impossibility because the City had not preserved these defenses, and he chastised the majority for deciding the case “on the basis of speculation about what may happen in future litigation over other regulatory issues.”

FIRST AMENDMENT

The Court took a real interest in First Amendment cases this Term, issuing rulings in several speech cases, high-profile religion cases, and even a free-association case.

We'll begin with the speech cases, the first of which involved a claim of compelled subsidization of government speech. In *Johanns v. Livestock Marketing Ass'n* (03-1164), beef producers claimed that their First Amendment rights were violated by the Beef Promotion and Research Act, 7 U.S.C. § 2901 *et seq.*, which imposes a \$1 per head fee on cattle sales to fund government-sponsored ad campaigns bearing the attribution "Funded by America's Beef Producers." The beef producers argued that the law compelled them to subsidize speech they didn't like (perhaps they felt the "It's what's for dinner" catchphrase was underinclusive and should have included breakfast and lunch!). Even though the Court had invalidated a very similar fee for mushroom advertising in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), a 6-3 majority led by Justice Scalia upheld the beef law. The case turned on the distinction between compelled support of government speech as opposed to private speech. In *United Foods*, the mushroom campaign was *assumed* to be private speech, in which case forcing others to fund it was an unconstitutional compelled subsidy. This case was different because the beef campaign was *not* private speech, and "compelled support of a private association is fundamentally different from compelled support of the government," which is perfectly constitutional ("as every taxpayer must attest"). The Court found that the involvement in the ad campaign of a semi-private Cattlemen's Beef Board did not render the speech private because the government effectively controlled all aspects of the campaign, and the fact that the campaign was funded by targeted fees rather than general revenues was also irrelevant. Finally, the Court noted that the attribution of the ads to "beef producers" was not required by the statute, and thus did not support a facial challenge to the law. And there was nothing in the record to support an as-applied challenge, which would require a showing that individual ads were attributed to individual producers.

Justice Thomas concurred, noting that if there had been evidence objectively associating ads with individual producers, those producers would have a valid as-applied claim. Justice Breyer concurred to echo his dissent in *United Foods* that these assessments are best treated as economic regulations, not speech, but that he accepts the "government speech" theory as a solution. Justice Ginsburg concurred only in the judgment, as she preferred Breyer's economic-regulation rationale from *United Foods*. Justice Kennedy dissented, as did Justice Souter (joined by Stevens and Kennedy), who wrote that if the government compels specific groups to fund speech with targeted taxes, "it must make itself politically accountable by indicating that the content is actually a government message, not just the statement of one self-interested group the government is currently willing to invest with power."

In a case at the intersection of employment and freedom of speech, the Court issued a *per curiam* ruling reversing the Ninth Circuit in *City of San Diego, California v. Roe* (03-1669). Roe was a San Diego police officer with a very interesting second job: He would videotape himself performing sexually explicit acts in a police uniform, and then sell those videos on eBay. He also sold police equipment and other official items from the San Diego Police Department ("SDPD"). Roe was terminated after his supervisor discovered his activities after coming across Roe's eBay listing for an SDPD uniform and searching for other items Roe was selling. Roe

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sued the city under § 1983, claiming that his termination violated his First Amendment rights. The district court granted the city summary judgment on the ground that Roe's speech was not on a matter of "public concern" as required by *Connick v. Myers*, 461 U.S. 138 (1983). The Ninth Circuit reversed, exempting Roe from the *Connick* test based on another Supreme Court decision, *United States v. Treasury Employees*, 513 U.S. 454 (1995) ("*NTEU*"), which held that the government could not impose monetary limits on employee speaking engagements that did not affect the workplace. Predictably, thankfully and unanimously, the Court reversed, holding that the Ninth Circuit's reliance on *NTEU* was "seriously misplaced" because Roe had deliberately linked his activities to his job in a manner detrimental to the SDPD. The district court was therefore right to determine whether Roe's speech was on a matter of public concern under *Connick*, and, if so, to balance that speech against the SDPD's interest in performing its services as required by *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968). Based on the content, form and context of Roe's speech, there was no question that Roe's speech was *not* a matter of public concern: His activities did nothing to inform the public of SDPD operations or address political issues. So the city wins on summary judgment, and Roe presumably will make demonstrating novel ways to get out of speeding tickets his full-time job, albeit without an official uniform.

The Court issued a short opinion in *Tory v. Cochran* (03-1488). After finding that Ulysses Tory had repeatedly defamed Johnnie Cochran (yes, the same "if the glove doesn't fit, you must acquit" Johnnie Cochran) in an effort to extort money, a California trial court permanently enjoined Tory from making statements about Cochran's law firm in any public forum. The Court took the case to decide "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment," but Cochran died before the Court could decide the matter. As a result, the majority, led by Justice Breyer, concluded that while the case was not moot – the injunction was arguably still in effect – it would be "unwise" for the Court to opine on the question presented. Cochran's death, however, had negated the underlying rationale for the injunction (Tory could no longer extort funds from Cochran), and the Court found that the injunction was now an overly broad, unjustified prior restraint on speech. On remand, interested parties might request a more narrowly tailored injunction. Justices Thomas and Scalia dissented as they would have dismissed the writ of certiorari as improvidently granted once Cochran had passed away.

Turning to religion, the decisions that got the most media attention were the Court's split rulings in *McCreary County, Kentucky v. ACLU of Kentucky* (03-1693) and *Van Orden v. Perry* (03-1500), the two cases concerning government displays of the Ten Commandments (in the interest of full disclosure, Wiggin and Dana filed an *amicus* brief in both cases on behalf of the Anti-Defamation League and Boston College theologian Philip A. Cunningham, arguing that the displays violated the Establishment Clause). *McCreary* concerned displays in the hallways of two Kentucky county courthouses, which were erected in 1999 as prominent displays of the King James version of the Ten Commandments. After the ACLU sued in district court, the counties expanded the displays to include other historical documents (*e.g.*, the Declaration of Independence and the Mayflower Compact) with their religious references highlighted. The district court issued a preliminary ruling enjoining the revised displays, so the counties erected new displays that included the Commandments as part of a larger "Foundations of American Law and Government" display that noted their value as a source of Western law. Finding that

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these displays still had a religious purpose, the district court issued another preliminary injunction, and a divided Sixth Circuit panel affirmed.

A 5-4 majority led by Justice Souter upheld the preliminary injunction, finding that the ACLU was likely to prevail in its Establishment Clause challenge. The principal issue was the first prong of the now familiar (and oft-maligned) test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which asks whether the challenged law or display has a secular purpose (the other prongs ask whether its primary effect is to advance/inhibit religion, and whether it fosters excessive government entanglement with religion). The counties asked the Court to discard the purpose test because the government's true purpose is unknowable and because, in light of *Lemon's* inconsistent application, the test is really a cover for a judicial desire to invalidate a display; in the alternative, the counties sought to limit the test such that *any* stated secular purpose would pass it, regardless of the history of the display. In a strong reaffirmation of *Lemon's* purpose prong, the Court rejected both arguments and made clear that the *Lemon* test is to be judged from the standpoint of a reasonable observer familiar with history and context. "Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country," and official objectives are discernable from discoverable facts "without any judicial psychoanalysis of a drafter's heart of hearts"; such inquiries are not "hunts for mares' nests deflecting attention from bare judicial will." And the purpose test is not so timid that any statement of secular purpose will pass it – notably, this part of the opinion recasts the test as looking for "adequate secular objects, as against a *predominantly* religious one," a slight but possibly significant departure from past cases suggesting the purpose must be *wholly* religious to be impermissible. As to the history of a display, "reasonable observers have reasonable memories" that should account for probative contextual evidence. Here, the displays unmistakably began with a religious purpose, and the counties' subsequent effort to recast that purpose was merely a litigating position. The Court clarified that the counties' past actions did not, as a matter of law, forever taint the displays. But "an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." The Court also did not foreclose any government display of the Ten Commandments that integrated them into a display on law or history, such as the displays in the Court's own courtroom. Finally, the Court rejected the dissent's view of the Framers' understanding of the Establishment Clause, finding that there was "no common understanding" of its limits, leaving the Clause's "edges still to be determined. And none the worse for that."

Justice O'Connor wrote a brief but strong concurrence, finding that the purpose of the displays was unmistakably to endorse religion in the eyes of the reasonable observer. She noted that while reasonable minds can disagree about how to apply the Religion Clauses in a given case, their purpose is clear: to preserve religious liberty in a pluralistic society. "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" While many Americans may find the Ten Commandments in accord with their beliefs, "we do not count heads before enforcing the First Amendment."

Justice Scalia, joined by the Chief, Thomas, and (for the most part) Kennedy, wrote an equally impassioned dissent. First (without Kennedy), Scalia argued that, based on the historical

practices of the Framers acknowledging a monotheistic God, they saw a difference between government acknowledgment of a single Creator and the prohibited establishment of a religion. “Nothing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so,” based on the *Lemon* test that has been thoroughly discredited and is incapable of principled application. Second (now with Kennedy), he rejected the majority’s conversion of the *Lemon* purpose test from a subjective inquiry to an objective one, as well as the new requirement that a secular purpose now “predominate” over any religious purpose. Third, even accepting the majority’s recasting of *Lemon*, he would uphold the displays as serving the secular purpose of highlighting sources of Western law. Finally, he lamented the constitutional mess that has resulted from deriving purpose from context, with Kentucky being ordered, for reasons known only to the parties and their lawyers, to take down a display that has been upheld elsewhere.

McCreary was contentious enough, but *Van Orden* was downright messy. *Van Orden* concerned a much older display on the Texas statehouse grounds: a single monument with a version of the Ten Commandments that had been donated in 1961 by the Fraternal Order of Eagles, a benevolent society that gave similar monuments to communities nationwide in hopes of combating juvenile delinquency. Van Orden, a Texas lawyer, challenged the displays as endorsing the Jewish and Christian faiths. The district court and the Fifth Circuit disagreed, finding no purpose or effect of endorsing religion. The Court affirmed, but there was no majority – only a four-Justice plurality, three concurrences, and three dissents. The Chief led the plurality, which also included Scalia, Kennedy, and Thomas, in a typically (and, we might add, thankfully) succinct opinion. Notwithstanding the *McCreary* majority’s reaffirmation of *Lemon*, the plurality found it “not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.” The Ten Commandments are clearly religious. But given the unbroken history of governmental acknowledgement of religious belief, and the Commandments’ undeniable historical meaning, the mere presence of religious content does not violate the Establishment Clause. There are limits on such displays, as evidenced by *Stone v. Graham*, 449 U.S. 39 (1980), which struck down a display in a Kentucky schoolhouse, but the schoolhouse setting presented special concerns that are not present here. Justice Scalia wrote a brief concurrence to state that the Chief’s opinion “accurately reflects our current Establishment Clause jurisprudence – or at least the Establishment Clause jurisprudence we currently apply some of the time.” Justice Thomas also concurred to reiterate his previously stated view that the Establishment Clause was never incorporated against the states; even if had been incorporated, however, the Court should limit its inquiry to the Framers’ concern of guarding against actual coercion (which was not present here). At least that approach would avoid having courts act as “theological commissions, judging the meaning of religious matters.”

Surprisingly, the fifth vote for affirmance was *not* Justice O’Connor’s, as many had speculated it would be, but Justice Breyer’s. Breyer rejected the plurality’s approach in favor of a return to the Religion Clauses’ “basic purposes,” which he took to be avoiding “divisiveness based upon religion that promotes social conflict.” In borderline cases, Breyer sees “no test-related substitute for the exercise of legal judgment” to assess the uses of a display. Here, the Eagles’ effort to come up with a “nonsectarian” version of the Commandments demonstrated their non-religious purpose, the monument’s physical setting suggested nothing sacred, and it had stood for 40 years without challenge, suggesting that it is not divisive. In fact, to strike down such a display might encourage divisiveness. This opinion might take on the importance of Justice

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Powell's fifth-vote concurrence in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), with future challenges to religious displays devoting significant attention to Breyer's "divisiveness" test.

Justice Stevens (joined by Ginsburg) dissented. Observing that a majority of the Court has reaffirmed the rule of government neutrality toward religion, Stevens noted the impossibility of neutrality in a display of the Ten Commandments. "If a State may endorse a particular deity's command to 'have no other gods before me,' it is difficult to conceive of any textual display that would run afoul of the Establishment Clause." Stevens also criticized the plurality's reliance on selected statements of the Framers because he found the preincorporation history of the Clause too indeterminate to be a reliable interpretive guide.

Justice Souter (joined by Stevens and Ginsburg) also dissented, noting that the display was inherently religious from the standpoint of an observer. It was thus distinct from displays that would be constitutional, such as exhibits that explained how the Commandments have influenced modern law, or public-school courses on religion and history. Its presence on statehouse grounds with other monuments did not dilute its message because it stood largely in isolation and was not part of any unifying theme in the displays. Finally, responding to the plurality and to Breyer, Souter would not limit *Stone* to the school context, and he did not find the monument's previously peaceful 40-year existence to be dispositive. Though she did not join Souter's dissent, Justice O'Connor issued a one-sentence dissent that agreed "essentially" with his reasons and pointed to her *McCreary* concurrence.

In *Cutter v. Wilkinson* (03-9877), the Court unanimously rejected a facial Establishment Clause challenge to the institutionalized-person provision of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). RLUIPA provides: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest" and is accomplished by the "least restrictive means." Current and former Ohio inmates – a mix of Satanists, Wiccans, Norse Heathenists, and Church of Jesus Christ Christian white supremacists – sued the Ohio Department of Rehabilitation and Correction and prison officials, claiming that they had violated their rights under RLUIPA by retaliating against them for exercising "nonmainstream religions" and by denying them rights and opportunities afforded to "mainstream" worshippers. The defendants moved to dismiss, arguing that this provision of RLUIPA violated the Establishment Clause. The trial court denied the motion, but the Sixth Circuit reversed, on the ground that RLUIPA afforded greater protection to religious rights than other rights and because it might encourage prisoners to practice religion to improve their lives behind bars.

The Court reversed, led by Justice Ginsburg, who explained that there is "room for play in the joints" between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion without unlawfully fostering it. Here, two factors weighed heavily against the defendants' attack on RLUIPA. First, RLUIPA requires courts to consider government interests such as security concerns. Second, RLUIPA does not differentiate among bona fide faiths and confers "no privileged status" on any religious group. Ohio's challenge to RLUIPA was a facial challenge, so the Court's decision does not rule out a future as-applied challenge. Justice Thomas wrote separately to emphasize his understanding of the clause as a federalism provision restraining the federal government from interfering with state efforts to establish

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religion. Also, while RLUIPA concerns religion, it does not concern the “establishment” of religion (*i.e.*, “coercion of religious orthodoxy and financial support by force of law and threat of penalty”), so for Thomas it does not violate the Establishment Clause.

In its lone freedom-of-association case, ***Clingman v. Beaver (04-37)***, the Court upheld Oklahoma’s semi-closed primary law, under which parties are only permitted to invite their members and registered independents to vote in their primaries. A full summary of this case appears above in the ELECTIONS section.

IMMIGRATION

In a major victory for aliens, a 7-2 majority of the Court held in ***Clark v. Martinez (03-878)***, and ***Benitez v. Rozos (03-7434)***, that the government can detain inadmissible aliens beyond the statutory 90-day removal period only for as long as is reasonably necessary for removal. Martinez and Benitez were aliens from Cuba who were declared inadmissible. Under 8 U.S.C. § 1231(a)(1), they should have been removed within 90 days. They were not, so they filed habeas petitions challenging their continued detention. The Ninth Circuit ordered Martinez’s release, while the Eleventh Circuit upheld Benitez’s detention. This will shock some of you, but the Scalia-led majority agreed with the Ninth Circuit. In ***Zadvydas v. Davis, 535 U.S. 678 (2001)***, the Court held that under another provision, § 1231(a)(6), the government may detain an alien beyond 90 days for as long as “reasonably necessary” to remove him. This discretion has bounds, and ***Zadvydas*** established a presumptive six-month time limit. Benitez and Martinez were detained well beyond six months, and the government offered no evidence that it would be able to remove them to Cuba in the foreseeable future, so both habeas petitions should have been granted. Justice O’Connor wrote separately to note that the six-month period could be extended depending on the circumstances, and that any alien released as a result of the Court’s ruling would still be under supervision.

In what may come as another shock, Justice Thomas (joined in part by the Chief) dissented from the Scalia majority. Section 1231(a)(6) provides for the continued detention of two kinds of aliens: the “inadmissible” and those who had been admitted but were now “removable.” ***Zadvydas*** dealt only with “removable” aliens. Thomas would read the statute as authorizing indefinite detention for inadmissible aliens. Further, Thomas wrote that ***Zadvydas*** was just wrong and not worthy of *stare decisis* effect (the Chief did not join this part of the dissent). Notably, the bulk of the majority opinion was a response to Thomas, with the Court pointedly characterizing parts of his dissent as “quite wrong” and flatly stating that it made no sense to differentiate between inadmissible and removable aliens. The exchange calls to mind Scalia’s remark that a major difference between the two Justices is that Scalia believes in *stare decisis* while Thomas does not. Even if immigration is not your area, the opinions are worth reading.

Aliens also scored a victory in ***Leocal v. Ashcroft (03-583)***, where the Court (led by the Chief) unanimously held that a conviction under Florida Stat. § 316.193(3)(c)(2) for driving under the influence and causing serious bodily injury does not constitute a “crime of violence” under 18 U.S.C. § 16 and therefore cannot justify deporting a lawful permanent resident. Section 16 defines a crime of violence as: “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other

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offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” The Government contended that Leocal’s DUI offense constituted the “use” of force under § 16(a) or, alternatively, a felony involving a substantial risk of the use of force under § 16(b).

The Court disagreed. It first found that the natural and ordinary meaning of the word “use” in the phrase “use . . . of physical force” in the statute is the *intentional* avilment of force. The Court rejected the Government’s parsing of the phrase and focused on the ordinary and natural meaning of the term within the context of the statute. The Court then found that § 16(b) encompassed crimes that have a substantial risk of intentional physical force against another, such as a burglary, but that do not actually *result* in the use of physical force. According to the Court, § 16(b) did not alter the requirement that the use of force be intentional. Therefore, the Court held that a conviction under Florida’s DUI statute, which does not require proof of *mens rea* and encompassed acts that were merely negligent, could not constitute a “crime of violence” under § 16. The Court also pointed to the fact that Congress listed DUI offenses separately from “crimes of violence” in another statute, apparently reflecting Congress’ belief that “crimes of violence” did not encompass DUI offenses. The Court expressly reserved the question of whether an offense requiring proof of the *reckless* use of force was a “crime of violence.”

Finally, a 5-4 Court ruled for the government in ***Jama v. Immigration & Customs Enforcement (03-674)***, holding that, under certain circumstances, the government may remove an alien to another country without the advance consent of that country’s government. The INS sought to remove Jama to Somalia, where he was a citizen, under 8 U.S.C. § 1231(b)(2). As Justice Scalia’s majority opinion characterized the statute, it provides four options for the Attorney General: (1) a removable alien can go to the country of his choice (Jama declined to choose); (2) he can go to the country of his citizenship *if* its government will accept him (Somalia apparently said nothing); (3) he can go to a country with which he has some other connection (*e.g.*, his birthplace, his residence before the United States); or (4) if all else fails, he can go to “another” country that will take him. The issue was whether the Attorney General could just put Jama on a plane to Somalia (as his birthplace) under (3), which unlike (2) has no consent requirement. You can guess where this is heading: If Congress intended to require consent for category (3), it would have said so. In some cases (like Jama’s), this might allow the Attorney General to circumvent the consent requirement in (2), but that would not always be so (one can be a citizen of a country other than one’s place of birth). The possibility of circumvention was not reason enough to imply an absolute consent requirement. Finally, an implied consent requirement would violate the customary policy of deference to the Executive in foreign affairs.

Justice Souter (joined by Stevens, Ginsburg, and Breyer) dissented. While the majority described “categories” (3) and (4) as separate concepts, in fact they derived from seven subsections of the *same* statutory provision. By describing the last resort as “another” country that would accept the alien, Congress must have intended that *all* the options required consent. In addition, deference to the Executive was unwarranted because the Constitution (art. I, § 8, cl. 4) gives plenary authority over aliens to Congress.

INTELLECTUAL PROPERTY

The Court did its part to shut down free music swapping services that enabled billions of instances of copyright infringement, but also broadened the ability of drug companies to use others' patented compounds in "preclinical" research. All in all, it was a significant Term on the intellectual property front.

In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster (04-480)*, a unanimous Court found that a distributor of a product with both infringing and lawful uses can be held liable for acts of copyright infringement by its users, if the distributor intends to induce infringing uses as shown by clear expression or affirmative acts. Grokster and StreamCast distribute popular, free, peer-to-peer file sharing software that permits users to download digital files, including music and video files. Unlike Napster, peer-to-peer software does not utilize a central server, but instead permits users' computers to communicate directly with one another; the predominant use of this software has been to download copyrighted material. Despite that, Grokster and StreamCast argued that they should not be held secondarily liable for infringement because their software has substantial non-infringing uses and because they have no actual knowledge of unlawful file sharing. The district court agreed and granted summary judgment for the distributors; the Ninth Circuit affirmed.

Distributors of products that have both lawful and infringing purposes generally have a safe harbor in *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984), which held that Sony was not secondarily liable for infringing uses of its VCR based merely on its awareness that some consumers would likely use the VCR to infringe. The Ninth Circuit construed *Sony* to mean that whenever a product is capable of substantial lawful use, the distributor cannot be held liable for infringing uses absent failure to act on knowledge of specific infringing uses at specific times. The Court (Souter, J.) disagreed, explaining that *Sony* dealt only with a situation where there was no evidence of intent. But here, there was substantial evidence that Grokster and StreamCast intended to induce infringement. First, they marketed their services to former Napster users, who used that service almost exclusively for unlawful purposes. Second, they made no effort to filter out protected material despite knowledge that the vast majority of downloads involved copyrighted items. Third, they charged nothing for their services, depending on advertising revenues that were predicated on volume – volume driven by free access to copyrighted materials. There was also evidence of proposed advertising ("Napster has announced it will soon begin charging you a fee. . . . What will you do to get around it?") and an internal email saying: "The goal is to get in trouble with the law and get sued. It's the best way to get in the news." This evidence was sufficient to establish intent to induce or encourage direct infringement, and the scope of infringement by users was "staggering." Because this evidence was sufficient to survive summary judgment on an active inducement theory, the Court had no reason to reconsider *Sony* and modify the "substantial non-infringing use" requirement.

Despite agreeing that there was no need to reach the issue of how much non-infringing use is enough to be "substantial" and fall within *Sony's* safe harbor, the concurring justices plunged right in anyway. Justice Ginsburg, joined by the Chief and Kennedy, argued that the amount of lawful use here – perhaps 10% – was not sufficient and constituted an alternative basis to deny summary judgment on remand. Justice Breyer, joined by Stevens and O'Connor, would find that

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the non-infringing use here is sufficient to meet *Sony*'s threshold and would not "revisit" that threshold given that it has provided a workable rule for nearly two decades.

Turning to patent infringement, in *Merck KGaA v. Integra Lifesciences I, Ltd. (03-1237)* the Court unanimously held that the use of patented compounds in "preclinical" research (*i.e.*, non-human testing) is protected from patent infringement suits if there is reason to believe the results would be relevant to a subsequent FDA submission. At the risk of revealing our complete scientific ignorance, we'll try to explain this one. Integra owned five patents on a particular peptide sequence, which was used in Merck-funded preclinical trials looking at its effect in treating various ailments. Integra sued Merck for patent infringement, and Merck defended by claiming that it was exempt from suit under 35 U.S.C. § 271(e)(1), which allows the use of a patented invention "solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs." Merck pointed to the Food, Drug and Cosmetic Act of 1938 ("FDCA"), 21 U.S.C. § 355, which requires drugmakers seeking permission for human testing to submit an investigational new drug application ("IND") reporting the results of preclinical trials. The results of the Merck-funded trials were not ultimately submitted to the FDA, but they were used to identify drug candidates for future testing, and Merck argued that the trials were reasonably related to its ultimate IND submission. The district court sent the issue to the jury, instructing them that Merck needed to show that the trials contributed "relatively directly, to the generation of the kinds of information that are likely to be relevant" to FDA review. The jury found for Integra, and the Federal Circuit affirmed on the ground that the trials were only general research not conducted to supply information to the FDA.

A Scalia-led Court vacated and remanded, holding that § 271(e)(1) clearly exempts "all uses of patented inventions that are reasonably related to the development and submission of *any* information under the FDCA," necessarily including preclinical studies of patented compounds. The Federal Circuit's construction of the statute, which would exempt only studies that actually showed up in INDs, would wrongly render most drug research subject to infringement suits – you get to the IND stage only after a lot of fruitless preclinical testing, which involves trial and error and eliminating poor candidates for future research. If the only way to avoid an infringement suit is to know for certain that you'll submit an IND, researchers will only test generic drugs (which are identical to known effective drugs). Instead, the Court read the statute as leaving "adequate space for experimentation and failure on the road to regulatory approval." So long as a drug maker has a reasonable basis for believing that the research on a patented compound, if successful, would be appropriate for an FDA submission, it is "reasonably related" and exempt under the statute. Similarly, the nonsubmission of results, by itself, does not defeat the exemption if there is reason to believe the results may be relevant to a future IND or other FDA submission. The Court rejected Integra's attempt to limit the exemption to preclinical trials related to human safety because the FDA requires data in INDs that go beyond safety issues and can be found only through preclinical trials. On remand, the Federal Circuit is to review the sufficiency of the evidence consistent with this construction of § 271(e)(1).

Finally, the Court unanimously reversed a Ninth Circuit ruling that a trademark defendant who asserts the "fair use" defense must prove that its actions are not likely to cause consumer confusion. The case, *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc. (03-409)*, involved two companies that sell permanent makeup (the power to improve upon nature in an

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injectable liquid). KP had been using the term “microcolor” to describe its products since the early 1990s. Lasting Impressions, however, had registered the mark “micro-color” (in white letters separated by a green bar within a black square) in 1993 and the mark became incontestable in 1999. Lasting Impressions filed suit against KP, claiming that KP’s use of “microcolor” infringed its stylized “micro-color” trademark. KP argued, however, that its use was merely descriptive of the product and thus qualified as “fair use” under the Lanham Act. The district court agreed and granted KP’s motion for summary judgment. On appeal, the Ninth Circuit reversed, finding that KP also had to negate the possibility that its use of the term “microcolor” would cause consumer confusion. Lest you think this is another case of the “Ninth Circuit” rule, the Ninth Circuit was in the good company of the Fifth and Sixth Circuits, which also required defendants asserting “fair use” to prove no likelihood of confusion. The Second, Fourth and Seventh Circuits ruled the other way.

In an opinion by Justice Souter, the Court unanimously reversed, finding that a defendant does not bear the burden of negating the likelihood of confusion to prevail on a “fair use” defense. The burden of proving likelihood of confusion always rests with the plaintiff. Since the affirmative defense comes into play only once a plaintiff has met its burden of establishing the likely confusion, it would “def[y] logic to argue that [the] defense may not be asserted in the only situation where it becomes relevant.” The Court also emphasized the “undesirability of allowing anyone to obtain a complete monopoly on the use of a descriptive term simply by grabbing it first.” Some confusion must be tolerated where the use is “fair.” The Court did not go so far as to hold that likelihood of confusion was irrelevant to a determination of “fair use,” leaving that issue for another day. Justice Scalia declined to join footnotes 4 and 5 of the majority opinion because they examined legislative history (particularly the testimony of witnesses before Congress), and Justice Breyer declined to join footnote 6, which suggested that KP’s use of “microcolor” on its most recent brochures might have different “fair use” implications than the term’s use on older bottles and flyers.

JURISDICTION

The Court issued some key jurisdictional cases this Term. Beginning with diversity jurisdiction, in the consolidated cases of *Exxon Mobil Corp. v. Allapattah Services, Inc.* (04-70) and *del Rosario Ortega v. Star-Kist Foods, Inc.* (04-79), the Court answered the question of whether 28 U.S.C. § 1367 allows a federal court in a diversity action involving at least one plaintiff whose claim meets the \$75,000 amount in controversy requirement to exercise supplemental jurisdiction over other plaintiffs in the same case whose claims fall below the requirement. In a 5-4 decision, the Court held it does. If you’ve been hankering for a refresher course in federal jurisdiction, this is the case for you; we’ll do an abridged version.

The case represents the death throes of three Court cases that predated § 1367. In *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), the Court held that where jurisdiction depends on an amount in controversy, each plaintiff must independently meet the requirement. In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court similarly held that in Rule 23(b)(3) class actions, each class member must satisfy the jurisdictional amount. Finally, in *Finley v. United States*, 490 U.S. 545 (1989), the Court held that in a federal-question case (where there is no longer an amount-in-

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controversy requirement), federal courts lack jurisdiction over “pendent-party” defendants against whom only state claims are brought. In 1990, Congress enacted § 1367, which provides that “in any civil action of which the district courts have original jurisdiction,” federal courts shall have “supplemental jurisdiction over all other claims that are so related . . . that they form part of the same case or controversy.” Everyone agreed that § 1367 overturned *Finley*; the question here was whether it also overturned *Clark* and *Zahn*. The Kennedy-led majority said yes – if a district court has original jurisdiction over any claim in a complaint, it has original jurisdiction over a “civil action” under § 1367. Having original jurisdiction, the court can exercise supplemental jurisdiction over related claims involving other parties regardless of the amount in controversy. The Court rejected the “indivisibility theory,” requiring all claims in a complaint to stand or fall together for purposes of “original jurisdiction,” as fundamentally inconsistent with the notion of supplemental jurisdiction. In diversity cases, indivisibility is appropriate because a single nondiverse party eliminates the fear of state-court bias that justifies federal jurisdiction. But the presence of claims falling short of \$75,000 does not reduce the importance of larger claims. Because “no other reading of § 1367 is plausible,” the Court declined to rely on legislative history, which it denigrated as a “murky” effort by non-legislators to circumvent the text. Finally, the Court noted that the new Class Action Fairness Act, which abrogates the rule against aggregating claims, did not affect its analysis.

The primary dissent from Justice Ginsburg, joined by Stevens, O’Connor and Breyer, conceded that the majority’s position was plausible, but believed the better interpretation was that Congress knowingly enacted § 1367 in view of the longstanding rules from *Clark* and *Zahn* (by contrast, *Finley* had been around for only one year and had expressly invited Congress to change the law for federal-question jurisdiction). As a “precedent-preservative reading,” Ginsburg would read the amount in controversy into § 1367’s “original jurisdiction” requirement. Also, because the statute’s “enigmatic text defies flawless interpretation,” she would rely on its history, which made clear that Congress was only undoing *Finley*. Justice Stevens (joined by Breyer) dissented separately to register his complaint with the plain language approach; because “ambiguity is apparently in the eye of the beholder,” he would not make it a prerequisite for looking to legislative history. In any event, it took the majority “nearly 20 pages of complicated analysis, which explores subtle doctrinal nuances and coins various neologisms,” to find § 1367 unambiguous, a conclusion Stevens found “difficult to accept.”

Moving from diversity jurisdiction to federal-question jurisdiction, in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing (04-603)*, the Court explored the intricacies of federal-question jurisdiction in the removal of a state-law title dispute arising from a federal tax sale. Darue purchased Michigan property that the IRS had seized from Grable. Grable sued Darue to quiet title under Michigan law, claiming that the IRS had failed to give Grable proper notice of the seizure. Darue removed the case to federal court, where he won on summary judgment; the Sixth Circuit affirmed, holding on the jurisdictional issue that even though Grable had no federal cause of action parallel to his state quiet-title claim, the claim necessarily raised a substantial notice issue under federal law. A unanimous Court affirmed, in an opinion by Justice Souter. 28 U.S.C. § 1331 grants federal jurisdiction over cases “arising under” federal law, and the Court has long recognized that federal jurisdiction exists where state-law claims implicate substantial federal issues and where it is consistent with Congress’ judgments about the division of labor between state and federal courts. Here, the only contested

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issue was the adequacy of Grable's notice under federal law, a substantial issue given the federal interest in resolving federal tax cases. Also, while the absence of a parallel federal cause of action may be relevant to Congress' intent as to the division of labor, state title cases will rarely raise federal issues, so federal jurisdiction to resolve this question will have only a "microscopic effect" on the division of labor. Justice Thomas concurred to say that the Court's rule was clear and faithful to its precedents but that, with better evidence on the original meaning of § 1331, he might be willing to require a federal cause of action to support federal-question jurisdiction.

Turning to third-party standing, in *Kowalski v. Tesmer* (03-407), the Court (Rehnquist, C.J.) held that attorneys for indigent defendants lacked prudential standing to challenge a Michigan statute providing that, with some exceptions, indigents who "plead guilty, guilty but mentally ill, or nolo contendere" have no right to court-appointed appellate counsel. The Court assumed that the attorneys could demonstrate injury-in-fact (loss of revenues related to court-appointed representation) and thus satisfied the Article III standing requirement. But the Court found that the lawyers lacked prudential standing to vindicate the constitutional rights of third parties because they could not demonstrate a "close relationship" to the third parties or a "formidable hindrance" to the third parties' ability to assert their own rights.

While the Court had previously upheld third-party standing on behalf of attorneys for *existing* clients, here the Court emphasized that the relationship between counsel and future "hypothetical" clients was not close (it was, in fact, nonexistent). The majority also rejected the idea that indigent defendants faced formidable hindrances to pursuing their rights, citing cases in which *pro se* defendants had, in fact, raised similar issues. The Court also believed that this federal lawsuit was an attempted end-run around state-court review. The lawsuit was initially brought by both indigent defendants and the attorneys, but the defendants' claims were dismissed based on the absence doctrine from *Younger v. Harris*, 401 U.S. 37 (1971), which precludes ancillary challenges in federal court where a state court proceeding is ongoing. The majority believed that the attorneys should have brought these claims in direct appeals of criminal convictions and, if not victorious, through a collateral habeas petition in federal court. The attorneys' current approach would lead to "the Federal District Court effectively trumping the Michigan Supreme Court's ruling" and cause "unnecessary conflict between the federal and state courts." This last ground may have driven the majority's opinion.

Justice Thomas filed a concurring opinion to emphasize his belief that, while the Court got it right here, the Court's prior third-party standing cases had been too lenient and that third-party standing should rarely, if ever, be granted. Ever the realist, Justice Thomas noted that "[i]t may be too late in the day to return to this traditional view."

Justice Ginsburg, joined by Justices Stevens and Souter, dissented. They would have found standing to proceed based on the closeness inherent in the attorney-client relationship and the tremendous hurdles faced by *pro se* litigants in bringing these claims through direct appeal and habeas review. The dissent emphasized that the attorneys' prospective lawsuit could protect thousands of criminal defendants, while proceeding through a direct appeal would permit the attorneys to represent just a few defendants. With respect to hindrance, the dissent noted that the case was "unusual because it is the deprivation of counsel itself that prevents indigent defendants from protecting their right to counsel." In addition, the dissent pointed to the enormous procedural and legal complexities through which an indigent defendant (generally with little

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education and resources) would have to navigate in order to successfully appeal: “The rare case of an unusually effective *pro se* defendant is the exception that proves the rule. . . . The fact that a handful of *pro se* defendants has brought claims shows neither that the run-of-the-mine defendant can successfully navigate state procedures nor that he can effectively represent himself on the merits.”

Finally, in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.* (03-1696), the Court (Ginsburg, J.) illuminated the confines of the *Rooker-Feldman* doctrine – a real treat for federal jurisdiction junkies. In fact, should you feel compelled to write an article on the topic, the Court took pains to cite every single case in which the Court ever referenced the doctrine! The holding is simple: The doctrine is as narrow as the two cases that created it, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine requires a federal district court to dismiss *only* where the plaintiff is complaining of injuries caused by a state court judgment that *precedes* the filing of the federal action and where he essentially seeks appellate review of the state judgment in federal court. Those were the facts present in both the *Rooker* and *Feldman* cases – the only cases where the Court ever applied the doctrine (as the Court took pains to point out). The lower courts, however, had expanded the doctrine much further, as in this case, where a dispute arose between SABIC and Exxon regarding certain royalty payments. SABIC filed a preemptive state-court claim for declaratory relief, and a few weeks later Exxon filed in federal court seeking damages. The state case went to judgment (\$400 million for Exxon) while the federal court was still determining whether it had jurisdiction. During an appeal on the jurisdictional issue, the Third Circuit *sua sponte* held that the *Rooker-Feldman* doctrine required dismissal since the state case had proceeded to judgment; otherwise, “we would be encouraging parties to maintain federal actions as ‘insurance policies’ while their state court claims are pending.” The Supreme Court rejected this expansion of *Rooker-Feldman* because there was no question that the federal district court had jurisdiction over the matter when it was filed, and the district court was not suddenly divested of jurisdiction merely because the state case had later been resolved. This does not mean that comity and abstention doctrines go out the window – so don’t forget (if you haven’t already) about *Colorado River*, *Younger*, *Burford*, and *Pullman*! And, of course, disposition of a federal action, once a parallel state-court adjudication is complete, is governed by normal principles of preclusion law.

LENDING

If we had a statutory interpretation section, this case would be the heart of it – but we don’t, so here goes. In *Koons Buick Pontiac GMC, Inc. v. Nigh* (03-377), the Court ruled that Congress’ 1995 amendments to the Truth in Lending Act (“TILA”) did not alter the statute’s damage limits for violations relating to certain loans secured by personal property. If you have no interest in statutory interpretation or the evolution of TILA’s damage provisions, you can skip ahead. The debate between the Justices, however, is fascinating *and* entertaining.

Before 1995, section 2, subparagraph (A) of TILA provided for statutory damages as follows: “(i) in the case of an individual action twice the amount of any finance charge . . . or (ii) in the case of a consumer lease . . . 25 per centum of the total amount of the monthly payments under the lease, except that liability under this subparagraph shall not be less than \$100 nor greater than \$1000.” Courts universally construed the \$100/\$1000 limits to apply to *both* clauses (i) and (ii).

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But the plot thickened in 1995, when Congress added a new clause to the end of the statute, so that 2(A) now reads as follows: “(i) in the case of an individual action twice the amount of any finance charge . . . , (ii) in the case of a consumer lease . . . 25 per centum of the total amount of the monthly payments under the lease, except that liability under this subparagraph shall not be less than \$100 nor greater than \$1000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2,000.” This change provoked a Circuit split: The Seventh Circuit held that clause (i) was still subject to the \$100/\$1000 limits, but the Fourth Circuit concluded that Congress had altered the structure of the statute and had removed *any* limits on clause (i).

In an 8-1 decision, the Court agreed with the Seventh Circuit, marking a victory for common sense over poor draftsmanship. Despite this near-unanimity, the decision produced five opinions, as almost all of the Justices took the opportunity to speak their minds about statutory interpretation. Justice Ginsburg (joined by everyone but Justices Thomas and Scalia) authored the majority opinion, which focused on the *absence* of evidence that Congress intended to change the rule applying the \$100/\$1000 limits to clause (i). For her, the lack of legislative history supporting such a change was akin to “the dog that didn’t bark” in Arthur Conan Doyle’s *The Hound of the Baskervilles*. She emphasized that the \$100/\$1000 provision expressly referred to the “subparagraph” – usually designated by a capital letter like (A) – as opposed to the “clause” – usually designated by small roman numerals like (i) or (ii). She took this as evidence that Congress intended the \$100/\$1000 limits to apply to all of 2(A) except for the new clause (iii), which was “carved out” from the rest of the subparagraph. Any other result would be absurd because it would permit higher recoveries in cases involving personal property than in cases involving real property, and there was nothing in the legislative history to support such a dramatic change.

In a remarkable concurrence, Justice Stevens (joined by Justice Breyer) wrote that, in his view, the new statute was unambiguous and, absent any other evidence of legislative intent, the \$100/\$1000 limits would no longer apply to clause (i). But he found that the legislative history was “perfectly clear” and outweighed the plain language of the language: The case “demonstrated that a busy Congress is fully capable of enacting a scrivener’s error into law.” He urged the Court to reconsider its precedents suggesting that legislative history is relevant only when a statute is ambiguous or yields absurd results. “It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’ true intent.” Justice Kennedy (joined by the Chief) also concurred, but wrote separately to emphasize that the statute was ambiguous, so the Court’s examination of other interpretive resources was appropriate. Justice Thomas concurred only in the judgment, finding that the statute was ambiguous, but, had the language been clear, “resort to anything else would be unwarranted.”

Justice Scalia was the lone dissenter. He agreed with Justice Stevens that the new statute unambiguously removed the \$100/\$1000 limits on clause (i). He excoriated the majority for relying on the lack of legislative history (“the dog that didn’t bark”). For Scalia, this “Canon of Canine Silence” was a “dangerous . . . phenomenon, under which courts may refuse to believe Congress’s own words unless they can see the lips of others moving in unison.”

PREEMPTION

States garnered significant support from the Court in two preemption cases this Term. In *Mid-Con Freight Systems, Inc. v. Michigan Public Service Comm'n* (03-1234), the Court, led by Justice Breyer, found that a Michigan law imposing a \$100 fee on Michigan-plated trucks that operate entirely in interstate commerce was not preempted by a federal trucking statute. For the closet “BJ and the Bear” fans and masochists among you, here are the details: Interstate truckers must obtain federal permits, and individual states used to be able to require truckers to “register” these federal permits and pay a fee for a stamp to put on a multistate “bingo” card as proof of registration. In a rare victory for efficiency, Congress replaced this system with the Single State Registration System (“SRSS”), under which a trucker can file in one state, pay a \$10 fee, and thus register his federal permit in every state where he does business, with the “base state” parceling out shares of the fee accordingly. The SRSS statute specifies that states cannot impose additional “registration requirements” on truckers, but the Michigan law required any Michigan carrier doing purely interstate business to pay a \$100 annual fee, identify its trucks, and carry a decal on the truck. At first blush, you might think this was an open-and-shut preemption case, but you would be wrong. The Court held that the SRSS statute did not preempt every state “registration requirement” covering interstate carriers, but only those that concerned SRSS registration – that is, registration with a state of the carrier’s federal permit. The Michigan law makes no reference to federal permits, and Michigan carriers can comply with the state’s SRSS registration process even if they do not comply with this separate requirement (and vice versa). The Court did not even find it noteworthy that Michigan waived the \$10 SRSS fee for truckers who paid the “separate” \$100 interstate carrier fee, regarding that as “an effort to provide modest, administratively efficient (because Michigan itself is handling both fees) recompense” to Michigan-plated truckers who also use Michigan as their SRSS base state. Because the Michigan law does not concern SRSS matters, it is not preempted.

Justice Kennedy (joined by the Chief and O’Connor) dissented, arguing that the plain text of the SRSS statute does not authorize a “subject matter exemption” for preemption analysis. Congress replaced the old bingo-card system with a new law containing a broad preemption clause, and does not have to say “We really mean it.” Kennedy would hold that the SRSS preempts only registration requirements that single out interstate carriers for additional burdens, as opposed to general requirements that apply only incidentally to interstate carries, and he would remand the case for Michigan courts to consider that issue.

Similarly, in *Bates v. Dow Agrosciences LLC* (03-388), the Court found that the Federal Insecticide, Fungicide, and Rodenticide Act, (“FIFRA,” 7 U.S.C. § 136 *et. seq.* if you’re interested), did not preempt all state-law claims against pesticide manufacturers. A group of Texas peanut farmers used Dow’s “Strongarm” weedkiller, advertised as safe for use “in all areas where peanuts are grown,” but suffered significant crop damage. After they notified Dow of their intent to bring various state-law claims, Dow brought a federal declaratory judgment action asserting FIFRA preemption. At the summary judgment stage, the district court and the Fifth Circuit agreed with Dow, based on a FIFRA provision barring states from imposing “any requirements for labeling or packaging *in addition to or different from*” those under FIFRA. These courts held that because a jury verdict against Dow would effectively require it to alter its label, the farmers’ case was preempted.

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The Court, led by Justice Stevens, vacated and remanded. The Court first marched through a lengthy (and truly fascinating) history of pesticide regulation and litigation in the United States, reaching the conclusion that FIFRA did not occupy the field but rather left “ample room” for states to supplement federal regulatory efforts. The Court then noted that FIFRA’s ban on other labeling laws simply did not apply to the common-law basis for the farmers’ claims that rested on the duty to manufacture safe products, to test them adequately, and to honor express warranties. While an adverse jury verdict might lead Dow to change its label, “an event . . . that merely motivates an optional decision is not a requirement.” The farmers’ fraud and failure-to-warn claims were another story, however, because they were premised on common-law rules regarding labeling. The Court agreed with the farmers that if these common-law duties were equivalent to FIFRA’s ban on false or misleading statements, then their claims would survive preemption because (1) FIFRA bars only “different” or “additional” state requirements, not “parallel requirements”; and (2) FIFRA does not bar new state *remedies* based on its requirements. The Court rejected Dow’s argument that this would lead to a “crazy-quilt” of jury verdicts in all fifty states because: (1) the statutory language had no other plausible meaning; (2) there is a general presumption against preemption absent clear congressional guidance; and (3) there is a long history of tort litigation against makers of poisonous substances. All that said, the Court remanded the issue of whether Texas common law was substantively “parallel to” or “different from” FIFRA, to give Dow the chance to brief the issue to the Fifth Circuit.

Justice Breyer concurred to note that, on remand, the Fifth Circuit should measure Texas’ requirements against EPA regulations under FIFRA. Justice Thomas (joined by Scalia) concurred in part and dissented in part, arguing that a state-law cause of action cannot impose liability where FIFRA would not. Thus, he would remand the farmers’ warranty claims to determine whether Texas law would impose liability for statements on Strongarm’s label where FIFRA would not (the majority noted that a breach of warranty claim only holds a company to its promises, and does nothing to require it to make promises in the first place).

SECURITIES

In *Dura Pharmaceuticals, Inc. v. Broudo* (03-932), Justice Breyer, for a unanimous court, reversed the Ninth Circuit’s holding that, in the context of a securities fraud class action, an allegation that purchasers paid an “inflated purchase price” was sufficient to allege loss causation. As a matter of logic, this could not be true, because at the moment individuals purchase inflated stock, they have suffered no loss – the stock is worth exactly what they paid. If they sell immediately, they incur no loss. Also, the link between an inflated purchase price and later economic loss is not invariably strong, since many factors affect stock price (9/11 is a prime example). Thus, the Court easily rejected the Ninth Circuit’s interpretation, which conflicted with decisions by the Second, Third, Seventh and Eleventh Circuits. As a matter of policy, if the mere allegation of an inflated purchase price was sufficient to allege loss causation, abusive lawsuits “with only a faint hope that the discovery process might lead eventually to some plausible cause of action” would be permitted and private securities litigation would transform into a “partial downside insurance policy.”

STATES

The Court decided two original jurisdiction cases this Term. ***Kansas v. Colorado (105 Orig.)***, involved a longstanding dispute between the two states over the use of the Arkansas River (a/k/a “the Nile of America”). Kansas won a finding that Colorado had unlawfully depleted the river, but it took several exceptions to the fourth remedial report of the Court’s Special Master: (1) his recommendation that the Court retain jurisdiction rather than appoint a “River Master” to oversee future compliance and (2) his decision to award prejudgment interest on damages accruing since 1985 rather than from the start of Colorado’s depleting activity around 1950. Other exceptions dealt with nifty technical subjects like “calibration procedures” and “dry-up acreage monitoring” – if you’re an aspiring River Master (and who isn’t?) feel free to read the opinion for the rest. Writing for a near-unanimous Court, Justice Breyer overruled each of the exceptions. Justice Thomas concurred in the judgment but did not join the majority opinion on the issue of prejudgment interest; he agreed to overrule Kansas’ exception because he believed that Kansas was entitled to no interest whatsoever. Justice Stevens concurred in part but dissented from the prejudgment interest ruling, writing that, on the facts, Colorado owed Kansas interest from 1969, the time it knew or should have known it was violating the Compact. Nothing noteworthy legally here, but it’s interesting to see the Justices act like trial judges.

In the other original jurisdiction case, ***Alaska v. United States (128 Orig.)***, the Court upheld a Special Master’s report recommending summary judgment for the United States in a dispute over submerged lands in the Alexander Archipelago and Glacier Bay National Park. States presumptively own lands beneath inland navigable waters, but the Court, led by Justice Kennedy, agreed with the Special Master that (1) the Alexander Archipelago lands were not beneath inland waters and (2) the United States had expressly retained title to the Glacier Bay lands when Alaska became a state. Justice Scalia (joined by the Chief and Thomas) dissented as to Glacier Bay, finding no evidence that the United States had retained title and pointedly mocking the majority’s apparent reliance on other factors in its decision (such as what Scalia called the majority’s “Ursine Rhapsody,” in which the majority implied that federal ownership was needed to protect brown bears that swim in the Bay). If you like sarcasm (and who doesn’t?), you will enjoy his dissent.

TAKINGS

In one of the most controversial cases of the Term, ***Kelo v. City of New London (04-108)***, a deeply divided Court upheld the City of New London’s taking of private property for the purpose of economic development. New London, which the State of Connecticut had designated as a distressed municipality, undertook a major redevelopment plan for the waterfront area in and around the closed Fort Trumbull naval center. Pfizer’s decision to construct a \$300M research facility adjacent to Fort Trumbull motivated the plan, as the City hoped to capitalize on the Pfizer project to attract other businesses. The City’s comprehensive development plan included a conference hotel, retail and restaurant area, a marina, research space, 80 new residential homes, and a parking area. The City purchased many of the homes in the area, but the plaintiffs refused to sell, arguing that the City’s plan constituted a “private use,” not a “public use” as required for a government taking under the Fifth Amendment, which provides that “private property [shall not] be taken for *public use*, without just compensation.”

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Led by Justice Stevens, the Court upheld the taking, finding that it was a rational means to achieve a legitimate “public purpose.” The majority’s holding hinged on the following: First, the Court has long eschewed a rigid test requiring actual *use* by the public, favoring instead a broader “public purpose” test. Second, the City’s taking was part of a “carefully considered” comprehensive development plan aimed at creating jobs, increasing tax revenues, and spurring economic development throughout the City, and it was undertaken pursuant to a state legislative finding that economic development served a public purpose. The City’s determination that the area was distressed and required redevelopment was entitled to deference. Finally, there was no evidence that the development plan was undertaken with an improper motive to benefit particular private individuals or entities. The fact that private parties (such as the developer, new home owners and Pfizer) incidentally benefit was irrelevant. In conclusion, the Court noted that states are free to impose restrictions on the taking of property – in fact, some states have done so (as *Kelo* was pending before the Supreme Court, a bill was introduced in Connecticut to do just that, and may well be reinvigorated with the release of the Court’s opinion). Kennedy concurred separately to note that courts should take seriously any claim that a taking is motivated by the improper desire to confer benefits on a specific private individual and should strike down any “pretextual” takings. But the government would enjoy a presumption that the taking was reasonable and intended to serve a public purpose, imposing a heavy burden on opponents.

Justice O’Connor, joined by the Chief, Scalia, and Thomas, passionately dissented (not exactly the cadre you’d expect to argue against states’ rights). O’Connor’s words say it best: The Court’s decision threatens to “wash out any distinction between private and public use of property – and thereby effectively to delete the words ‘for public use’ from the Takings Clause.” “Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded.” Historically, land has been taken to be owned by the government (such as a highway or park) or by private entities who make the property available to the public (such as a railway or stadium). This “public use” requirement is fundamental to fairness. Here, the government is taking property from one set of private owners to give to another, with no requirement that the land be open to or benefit the public. The majority’s holding threatens to remove all constraints on the power of eminent domain so long as the plan is rationally related to increasing the tax base. Moreover, the subjective purpose/motivation test is flawed: It will be nearly impossible to prove improper motive, and, more fundamentally, the government’s “motive” has no impact on whether the taking will actually benefit the public. Further, in other instances where the Court approved transfers from one private party to another, the current use (*i.e.*, blighted/uninhabitable housing) affirmatively damaged the public and its removal conferred a public benefit. These cases do not support the outcome sanctioned here. Finally, there is no basis for deferring to the government’s judgment about what constitutes a public use under the Fifth Amendment. “States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution is not among them.” Justice Thomas wrote a separate dissent to argue for abolishing the “public purpose” test altogether and returning to the plain language of the Constitution. Thomas would overturn all precedents permitting the government to transfer property from one private party to another, unless the transferee was required to open the property to the public. Moreover, allowing governments to take property for economic development (a/k/a gentrification) will disproportionately harm the poor, often minorities, who lack political power and economic clout. Thus, Thomas finds “the deferential standard” adopted by the Court “deeply perverse.”

The Court also considered two regulatory takings cases. In *Lingle v. Chevron U.S.A. Inc.* (04-163), the Court unanimously held that a property owner claiming a regulatory “taking” cannot simply allege that a regulation does not “substantially advance” a state interest. The case concerned a Hawaii statute limiting the rent that oil companies could charge when leasing service stations. Applying *Agins v. City of Tiburon*, 447 U.S. 255 (1980), in which the Court noted that a regulation amounts to a taking of private property if it does not substantially advance a legitimate interest, the district court struck down the law because it did not advance Hawaii’s stated goal of controlling gas prices; the Ninth Circuit affirmed. The Court reversed in an opinion by Justice O’Connor, who wrote that the “substantially advances” test was an unfortunate example of how “a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase – however fortuitously coined.” Conceding that its takings jurisprudence “cannot be characterized as unified,” the Court noted that the thrust of the case law was to identify regulatory actions that were functionally equivalent to appropriating private property or ousting the owner from his domain. *Agins* concerned a zoning regulation, and that Court derived the “substantially advances” language from a number of *due process* cases involving zoning. This was “regrettable” (*i.e.*, wrong) – while means-ends tests may be appropriate for due process cases (to test whether a regulation is arbitrary or irrational), they are not valid for takings analysis, which involves the regulation’s burden on private property regardless of how effective it is at serving a public interest. Also, the lower court’s reading of *Agins* would demand heightened review of almost any regulation of private property and require courts to substitute their predictive judgments for those of legislatures and agencies. In a somewhat sympathetic nod to the Ninth Circuit, the Court concluded by stating that while the lower courts followed *Agins* “to its logical conclusion, . . . today we correct course.” Justice Kennedy concurred to note that the decision addressed only the takings issue, not the due process issue, where the failure to accomplish a legitimate objective remained relevant.

In *San Remo Hotel, L.P. v. City & County of San Francisco* (04-340), the Court unanimously affirmed a Ninth Circuit decision (shocking, but true) dismissing San Remo’s Fifth Amendment takings case on issue preclusion grounds due to prior California court rulings on state-law takings claims. In a nutshell, the Court found that, while the California courts did not specifically address the federal takings claim, the state courts had interpreted California’s takings doctrine as co-extensive with federal doctrine and relied on federal law in denying San Remo’s claims. Therefore, federal courts were required to give full faith and credit to this determination. This case is about as juicy as dust and the procedural history is incredibly tortured, so only the intrepid need read on.

To preserve affordable rental housing, a San Francisco ordinance required hotels to pay a fee when converting residential hotel rooms to tourist rooms – resulting in a \$567,000 fee for San Remo! San Remo brought a mandamus action in state court, which the parties agreed to stay in favor of San Remo seeking relief in federal court. San Remo did just that, but the district court dismissed its facial takings claim as untimely and its as-applied claim as unripe because San Remo had not exhausted its state-court options for obtaining just compensation (such as an inverse condemnation action), as required by the Court’s ruling in *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Rather than seeking to overturn the district court’s decision, San Remo asked the Ninth Circuit to abstain under *Pullman* because a return to state court might moot the federal issues. The Ninth Circuit obliged as to San Remo’s facial takings claims, but noted that San Remo had to reserve its federal claims

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in state court to retain its right to return to federal court. The state case traveled all the way to the California Supreme Court, which found no state-law takings violation, noting that California “appear[ed] to have construed the [state and federal] clauses congruently.” It also stated that San Remo had reserved its federal claims and sought no relief under federal law. San Remo then went back to federal court, which dismissed on the basis of issue preclusion, finding that the “federal claims constituted the same claims that had already been resolved in state court”; the Ninth Circuit affirmed. The Stevens-led Court easily agreed. A federal reservation only works where state law claims are distinct from federal issues, but San Remo presented issues to the state court that were “functionally identical” to the federal questions. San Remo had every right to do so, but could not get a second bite at the apple in federal court.

The Chief, joined by O’Connor, Kennedy and Thomas, concurred in the judgment to argue that *Williamson County* (which the Chief had *joined*) was wrongly decided. A government entity’s final decision with respect to a claimant’s property is all that should be required before a federal as-applied takings case can be filed. The additional requirement that the claimant must seek compensation through all available state procedures is not supported by constitutional or prudential principles and undermines the federal courts’ ability to determine federal takings claims. Although this issue was not before the Court, these four Justices are on record that *Williamson County*’s “state litigation” requirement should be jettisoned.

TAX

The Court’s unanimous decision (minus the Chief, who did not participate) in *Commissioner of Internal Revenue v. Banks* (03-892) held that when a litigant’s recovery constitutes taxable income, any contingent-fee award paid to his attorney must be included as income. The Sixth Circuit had held that only the net amount Banks received from settling his employment discrimination lawsuit was income. In a second case consolidated with Banks, *Commissioner of Internal Revenue v. Banaitis* (03-907), the Ninth Circuit similarly held that a plaintiff should be taxed on only his net jury award and not the contingent fees paid to his attorney. The Court reversed both rulings in an opinion by Justice Kennedy. The Court held that a contingent-fee agreement is an anticipatory assignment to the attorney of a portion of the client’s income from litigation – and a taxpayer cannot avoid taxes by assigning his future gains to someone else. The case turned on control of the income-generating “asset”: Banks’ cause of action. While a client may rely on the attorney’s special skill, the client retains ultimate dominion and control over his claim – a lawsuit is not a joint venture of which the attorney is a part owner. Also, while the amount of income, if any, that the “asset” will generate may be speculative when the contingent-fee agreement is signed, such is the case with many anticipatory assignments. *Banks* resolves an issue that has split the circuit courts, but its practical effect will be limited by the American Jobs Creation Act of 2004, which amended the tax code to allow deductions for attorneys’ fees paid on any claim involving unlawful discrimination, federal whistleblower statutes, and any federal or state law regarding civil rights or the employment relationship.

In a more obscure tax decision in *Ballard v. Commissioner of Internal Revenue* (03-184) and *Estate of Kanter v. Commissioner of Internal Revenue* (03-1034), the Court considered whether the Tax Court can exclude special trial judges’ reports from the record on appeal. Short answer: No. For the tax lawyers, here’s the whole story: When more than \$50,000 is at issue, Tax Court

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Rule 183 allows the court to send a case to a special trial judge for initial findings of fact and opinion. The Tax Court can adopt the special trial judge's report, modify it, or reject it altogether, but it must presume that the special trial judge's factual findings are correct and give "due regard" to her firsthand evaluation of the witnesses. In 1983, the Tax Court began withholding special trial judges' reports from the record on appeal, and even stopped indicating whether and how its rulings deviated from the reports. Two taxpayers argued that this practice denied them due process by making it impossible to determine whether the Tax Court treated the reports with the "due regard" required by Rule 183. The Court (by a vote of 7-2) held for the taxpayers, but not on due process grounds. Justice Ginsburg's opinion characterized the Tax Court's practice as treating the reports as "an in-house draft to be worked over collaboratively by the regular judge and the special trial judge," a practice not authorized by any statute or by Rule 183. While the Tax Court has leeway in interpreting its rules, this practice was unreasonable in light of the Rule's language and the history of deference to special trial judges before 1983. Further, withholding the reports prevents informed appellate review and runs counter to the practice in other federal judicial and administrative decision-making. The Court left open whether the Tax Court could fix things in the future by adopting an explicit rule codifying its post-1983 practice (which would force the due process issue). Justice Kennedy (joined by Scalia) concurred, but he could not agree that the Tax Court had adopted a novel "collaborative" practice because the record did not reveal the fate of the special trial judges' reports in the petitioners' cases – if the Tax Court had not deviated from the reports, then it could not have violated Rule 183. On remand and in future cases, making the reports part of the record would address that problem. The Chief (joined by Thomas) dissented on the ground that the Court should defer to the Tax Court's interpretation of its own Rules, which he found reasonable (and supported by twenty years of practice). The Chief also frowned upon the majority's reliance on arguments that the taxpayers did not even make to the Court.

TELECOMMUNICATIONS

The biggest telecommunications decision of the year came in the consolidated cases of ***National Cable & Telecommunications Ass'n v. Brand X Internet Services (04-277)*** and ***FCC v. Brand X Internet Services (04-281)***, where the Court (6-3) upheld an FCC order allowing cable Internet providers to monopolize their transmission lines rather than open them up to other Internet service providers ("ISPs"). The case concerned the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, which governs "telecommunications carriers," who "offer" telecommunications services and must allow other carriers to connect to their networks, and "information-service providers," who do not. The FCC classified cable broadband companies as information-service providers – basically finding that although they own transmission facilities, they do not "offer" telecommunications services but use telecommunications to "offer" integrated information and computer services. Non-facilities-based Internet service providers challenged the ruling, which the Ninth Circuit vacated in light of its earlier holding in *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000), that cable Internet providers were telecommunications carriers.

Led by Justice Thomas, the Court reversed on the ground that the Ninth Circuit should have deferred to the FCC ruling notwithstanding *Portland*. As a quick refresher, *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), held that, when an agency has jurisdiction over a matter, statutory ambiguities effectively delegate authority to the agency, within reason, to fill in the

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gaps. Building on *Chevron*, the majority held that a prior court decision only trumps an agency interpretation if the court ruling *also* finds the statute unambiguous, leaving no gap for the agency to fill. Otherwise, the agency retains authority to construe the statute. This may seem odd, but it is no different from a state court adopting an authoritative interpretation of state law that conflicts with a prior federal court decision. *Portland* did not hold that the Communications Act was unambiguous, so the Ninth Circuit should have applied *Chevron*, under which the FCC ruling was reasonable. The FCC reasonably could interpret an “offer” of telecommunications services to mean a “stand-alone” offer of services that transmit messages unadulterated by computer processing, a definition that would rule out cable Internet providers. In an effort to distinguish data services provided by phone companies (who clearly are telecommunications carriers), the Court found that services like voice mail are *de minimis* and operate independently of the transmission path, unlike broadband where transmission is inextricably intertwined with data storage and processing (the Court’s examples included caching and DNS services). Finally, the fact that the FCC treated phone companies’ DSL Internet services differently did not make its cable ruling arbitrary or capricious because the FCC gave a reasoned explanation as to why market conditions in the cable industry warranted a different approach. Justice Stevens filed a short, but interesting, concurrence to note that the majority’s ruling would not “necessarily” allow an agency to disagree with the *Court’s* construction of a statute, which “would presumably remove any pre-existing ambiguity.” Justice Breyer also concurred, noting that the FCC ruling fell within *Chevron* – “though perhaps just barely” – and disagreeing with the dissent’s interpretation of prior case law.

Justice Scalia, joined by Souter and Ginsburg, dissented on the ground that the FCC’s “stand-alone” take on what it meant to “offer” telecommunications services was ridiculous. Here’s a paraphrase of his best analogies: If you called up a pizzeria and asked if they “offered” delivery, and they said no but that they would bring the pizza to your house in an integrated process along with their other home pizza services, you’d think they were nuts (“or following some too-clever-by-half legal advice”). Similarly, a pet store may sell only leashed puppies, but they still “offer” puppies, just not on a “stand-alone” basis (the majority’s response: “We . . . do not share the dissent’s certainty that cable modem service is so obviously like pizza delivery service and the combination of dog leashes and dogs that the Commission could not reasonably have thought otherwise.”). Here, the telecommunications component of cable Internet service is similarly independent, as the DSL world recognizes by selling the phone line separate from the Internet access. Scalia thought the majority’s *de minimis* exception for phone data services was equally ridiculous and indistinguishable from cable Internet features. In Part II of his dissent (now on his own), Scalia noted that there are probably large numbers of court decisions now agency-reversible for lack of an express finding that the statute was “unambiguous,” a result that was wholly unnecessary because *Portland* did not govern the Court’s reading of the statute in the first place. “It is a sadness that the Court should go so far out of its way to make bad law.”

And now, for all those hankering to build radio towers in your backyards: If your zoning board says no, don’t come to court under 42 U.S.C. § 1983. In *City of Rancho Palos Verdes v. Abrams* (03-1601), a unanimous Court held that the Telecommunications Act of 1996 (“TCA”) precludes a plaintiff from suing a zoning board under § 1983 for wrongfully denying his application. The TCA limits the ability of local governments to restrict wireless facilities and expressly provides a cause of action for anyone “adversely affected” by a decision that violates those limitations. When the local board denied Abrams’ application to build a radio antenna in

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his yard, he filed suit under the TCA and § 1983 (for violating his rights under the TCA). The district court found for Abrams under the TCA and ordered the city to grant his application, but it held that the TCA was his exclusive remedy and rejected his § 1983 claim for damages and attorneys' fees. Relying on a separate TCA provision stating that the statute was not meant to "impair" the operation of federal law, the Ninth Circuit reversed the § 1983 ruling because preclusion would "impair" the operation of § 1983. That ruling created a conflict with the Third and Seventh Circuits and practically asked for a reversal . . .

. . . which is exactly what happened, in an opinion by Justice Scalia: Assuming that the TCA created individually enforceable rights (an issue not before the Court), Congress did not intend the TCA's remedy to coexist with an alternative remedy under § 1983. The City had argued that the availability of the TCA's more restrictive private remedy was *conclusive* evidence of Congress' preclusive intent. The Court rejected that position in favor of an "ordinary inference" rebuttable "by textual indication," but found no such indication in the TCA, which limited relief in ways that § 1983 does not – for example, by establishing a 30-day limitations period and not providing for attorneys' fees (the district courts seem to be split on compensatory damages under the TCA, perhaps a topic for next Term). The Court rejected the Ninth Circuit's "impairment" reasoning because the TCA created new rights; limiting their enforcement to the TCA's remedy has no effect on the pre-TCA operation of § 1983.

The two concurrences targeted Justice Scalia's disdain for legislative history. In the first, Justice Breyer (joined by O'Connor, Souter and Ginsburg) stated that he would add to the Court's opinion that "context, not just literal text, will often lead a court to Congress' intent." In the second, Justice Stevens concurred only in the judgment. Stevens felt that the Court unduly minimized the initial presumption that § 1983 relief is available where a statute creates individually enforceable rights – the city easily met its burden given the language and history of the TCA, but there will be "many other instances" where § 1983 is available even though Congress did not so specify. Stevens also felt that the Court "incorrectly assume[d] that the legislative history of the statute is totally irrelevant," contrary to "nearly every case we have decided in this area of law." Once again, "the dog that didn't bark" reared its head, as Stevens found Congress' silence on attorneys' fees probative.

PART TWO: CRIMINAL AND RELATED CASES

DEATH PENALTY

Death-penalty defendants fared well this Term: Offenders under the age of 18 are now ineligible for the ultimate penalty; defendants cannot be visibly shackled during the sentencing phase of a capital case (absent special circumstances); jury instructions must ensure that jurors are able to consider all mitigating evidence; and it is clear that defense counsel's conduct will be scrutinized closely in the face of an ineffective assistance claim.

In perhaps the most far-reaching and controversial of its death-penalty decisions, *Roper v. Simmons* (03-633), the Court held that the Eighth Amendment's prohibition on cruel and unusual punishments forbids the imposition of the death penalty on offenders under 18 years of age at the time of their crimes. By way of background, in 1988 a plurality of the Court concluded that the Eighth Amendment barred the execution of those under 16, *see Thompson v. Oklahoma*, 487 U.S. 815 (1988), but the very next year a 5-4 majority found that the Constitution allowed the execution of offenders age 16 or 17 at the time of their crimes, *see Stanford v. Kentucky*, 492 U.S. 361 (1989). In *Roper*, an equally slim 5-4 majority went the other way, based on (1) its finding that a national consensus against juvenile executions has arisen in the last 16 years, and (2) its own determination that juvenile executions are unacceptable.

Simmons was 17 when he committed a capital murder, for which he received a death sentence in Missouri state court. Shortly thereafter, the Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibited the execution of mentally retarded persons due to the emergence of a national consensus against such executions and to the fact that death was a disproportionate sentence given the limitations on the culpability of the retarded. *Atkins* overturned another Court decision, *Penry v. Lynaugh*, 492 U.S. 302 (1989), that just so happened to come down on the same day as *Stanford*. Simmons challenged his sentence on the ground that *Atkins*' reasoning applied equally to juveniles. Disregarding *Stanford*, the Missouri Supreme Court agreed and reduced his sentence to life without parole.

The Court affirmed, in an opinion by Justice Kennedy. Beginning with the now-familiar quote that it reviews punishments by referring to "the evolving standards of decency that mark the progress of a maturing society," the Court found objective indicia of a national consensus against the juvenile death penalty, as reflected by its rejection in a majority of states (30, including 12 that reject the death penalty outright and 18 that exempt juveniles) and its infrequent use where it remains on the books. Although states have been slower to reject the juvenile death penalty than they were to reject the execution of the retarded, the trend is toward abolition – and the slower pace is likely due to the fact that states began rejecting the juvenile death penalty many years earlier. The Court also noted that *Atkins* returned to the "rule," abandoned in *Stanford*, that in addition to discerning a national consensus the Court should exercise its own judgment on the acceptability of the death penalty. In that regard, the Court concluded that capital punishment is for offenders who commit "a narrow category of the most extreme crimes" and whose extreme culpability makes them "the most deserving of execution." Juveniles' immaturity, vulnerability to outside influences, and the "more transitory, less fixed" nature of their personalities means that they are not as culpable as adults. Although the Court usually insists on individualized sentencing, here there is an unacceptable risk that the brutality of a particular crime might

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overpower mitigating arguments based on youth, so a bright-line bar is needed. Finally, while the “overwhelming weight of international opinion” is not controlling, it confirms the Court’s determination that death is a disproportionate punishment for juveniles.

Justice Stevens (joined by Ginsburg) filed a one-page concurrence, in which he applauded the Court’s recognition that our understanding of the Eighth Amendment, and the Constitution, has changed over time – or else we would still allow the execution of 7-year-olds.

It will come as no great shock that Justice Scalia authored a strong dissent, joined by Justice Thomas and the Chief. Scalia noted that the majority had held not that *Stanford* was wrong, but that the *meaning of the Constitution* had somehow changed in the last 15 years. He disagreed with the philosophical underpinnings of the “evolving standards of decency” reasoning (though he acknowledged it as precedent) and regarded the evidence of the new “national consensus” as flimsy. Of the states that allow capital punishment, more than half allow the execution of juveniles, and only four have exempted juveniles since *Stanford*. Scalia would not count the views of those states that bar capital punishment altogether as evidence of a consensus on an exemption for juveniles: That would be like asking the Amish if they like the new electric cars – of course they wouldn’t, but that says nothing about evolving standards. Scalia harshly criticized the majority’s decision to disregard the enactments of democratically elected legislatures and appoint itself, with guidance from foreign sources of law, as “the sole arbiter of our Nation’s moral standards.” If the Court has adopted an “evolving standards of decency” rule, it must discern those standards from actual U.S. practice, not use its own “judgment” to prescribe them from on high. Finally, Scalia was upset with the Missouri Supreme Court for disregarding *Stanford*, as only the Court can overrule itself – but he also noted that, having made the Eighth Amendment a mirror of changing sentiments, into which any court can gaze, that is partly the Court’s fault.

Justice O’Connor also dissented. She agreed with the majority’s framework – discerning a national consensus coupled with the Court’s own judgment – but she disagreed with its findings. In *Atkins*, there was strong evidence of opposition to the execution of the retarded and no countervailing evidence of support. Here, there was at least some evidence of public support for juvenile executions, and the trend was not one of consistent opposition but of “halting” change. In any event, O’Connor believed that the real issue was not the national consensus but the Court’s judgment on the proportionality of the death penalty to a class of offenders. As to juveniles, that argument “is so flawed that it can be given little, if any, analytical weight.” While juveniles as a class are less mature than adults, state legislatures are surely right that *some* juveniles are sufficiently mature to deserve the death penalty, and there is no support for a bright-line rule that will protect some offenders who are mature but leave vulnerable others who are not. Finally, like Scalia, O’Connor was upset with Missouri for ignoring *Stanford* – apart from the constitutional issue, ignoring Court precedent was clear error.

In *Deck v. Missouri (04-5293)*, a more unified Court found 7-2 that the Constitution forbids the use of visible shackles during a capital trial’s penalty phase unless the use is justified by “an essential state interest” that is “specific to the defendant on trial.” The Court, led by Justice Breyer, first found that the routine use of visible shackles has long been precluded in the guilt phase of criminal trials, dating back to English common law. While this rule initially may have been animated by concerns regarding torture and physical pain caused by shackles, the Court

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found that modern case law had supplanted this rationale with three fundamental principles: (1) visible shackling can undermine the presumption of innocence; (2) shackles can interfere with a defendant's ability to participate in his defense and communicate with his lawyer; and (3) the use of shackles affronts the dignity and decorum of the court process. The last two considerations still apply in penalty proceedings. While the presumption of innocence is inapplicable, "related" concerns for the accuracy of the decision are present: The use of shackles signals to the jury that the defendant is dangerous, so "shackles can be a thumb on death's side of the scale." Therefore, due process precludes routine shackling in the penalty phase absent a judicial finding that an essential state interest particular to the defendant, such as security or the risk of escape, warrants their use. Prejudice is presumed unless the State can show beyond a reasonable doubt that shackling did not impact the verdict.

Justice Thomas, joined by Scalia, dissented. If you have any interest in the history of the use of shackles in English and U.S. courts, this is a must read. Otherwise, the bottom line is that Thomas (ever the originalist) reads the English rule against shackles as seeking to prevent torture and to ensure that defendants (who were not represented by counsel) were not so distracted by pain that they could not mount a defense. Thomas finds no consensus regarding the use of modern, pain-free shackles that could inform our understanding of due process. Thomas also disagrees with the presumption of prejudice: In the penalty phase, jurors are aware that the defendant has been convicted of a capital crime. Assuming that they would be influenced by the sight of handcuffs simply "does not comport with reality."

Turning to the adequacy of capital jury instructions, the Court issued a *per curiam* opinion in ***Smith v. Texas (04-5323)***, where it overturned a death sentence because the trial court's sentencing instructions did not adequately allow jurors to consider all mitigating evidence. While the Texas trial court instructed the jury to consider all mitigating evidence in determining the appropriate sentence, the verdict form contained only two special interrogatories relating to the deliberateness of the defendant's conduct and his future danger to society. The trial court instructed the jury that if the defendant's mitigation evidence convinced them that the appropriate penalty was one other than death, the jury would have to answer at least one of the interrogatories in the negative. Because the defendant's mitigation evidence had little to do with deliberateness or future dangerousness, the jury essentially would have had to answer one of the special interrogatories falsely in order to avoid a death sentence. The Court had already found this type of sentencing instruction improper in another Texas case, *Penry v. Johnson*, 532 U.S. 782 (2001). Despite this, the Texas Court of Criminal Appeals found the instruction was sufficiently distinguishable from *Penry* to survive scrutiny or was irrelevant because petitioner did not proffer "constitutionally significant" mitigation evidence, which it defined as evidence of a "uniquely severe permanent handicap with which the defendant was burdened through no fault of his own."

The Court reversed, finding the case indistinguishable from *Penry* and rejecting Texas' claim that the mitigation evidence had to be "constitutionally significant" in light of its prior rejection of a screening mechanism for mitigation evidence in *Tennard v. Dretke*, 542 U.S. 274 (2004) (yet another Texas case). Justice Scalia, joined by Justice Thomas, the same dissenters as in *Deck*, filed a one-sentence dissent.

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Because this case is governed entirely by *Penry* and *Tennard*, it does not alter the current state of criminal law. It only supports the conclusion that some Texas courts have difficulty following the Supreme Court's rulings!

In contrast, in ***Brown v. Payton (03-1039)***, the Court reversed the Ninth Circuit's grant of habeas relief for Payton based on jury instructions and prosecutor misstatements made during the penalty phase of his capital murder trial – demonstrating the critical difference in the standard of review applicable to habeas cases. Payton had presented mitigation evidence concerning his post-conviction religious conversion and character transformation. The trial court gave jury instructions listing certain mitigating factors, including a catch-all for “[a]ny other circumstance which extenuates the gravity of the crime,” but denied Payton's request for an instruction making clear that the jury could consider post-crime mitigation evidence. The prosecutor seized on this ambiguity and argued repeatedly that Payton's post-conviction rehabilitation was irrelevant. The trial court told the jury that the prosecutor's argument was not evidence, but it did not correct the prosecutor. Relying on *Boyde v. California*, 494 U.S. 370 (1990), which held that the catch-all instruction was broad enough to encompass character evidence, the California Supreme Court affirmed Payton's death sentence, finding it unlikely that the jury ignored his mitigation evidence. The district court granted Payton's habeas petition and a split *en banc* panel of the Ninth Circuit affirmed, relying on the fact that – unlike *Boyde* – Payton presented *post-crime* mitigation evidence (arguably not covered by the catch-all) and the prosecutor affirmatively misled the jury (a factor also not present in *Boyde*).

The Supreme Court reversed, in an opinion authored by Kennedy and joined by O'Connor, Scalia, Thomas and Breyer (the Chief did not participate). The Court emphasized that the case was not subject to *de novo* review but review under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which limited the Court to considering whether the state court unreasonably applied clearly established federal law. Given *Boyde*, the California Supreme Court's decision was not unreasonable, even though the facts were somewhat different. The majority stressed the breadth of the catch-all provision, the fact that the trial court admonished the jury that the prosecutor's argument was not evidence, and the fact that Payton's counsel argued to the jury that his post-conviction rehabilitation was relevant.

Justice Scalia concurred to state that “limiting a jury's discretion to consider all mitigating evidence does not violate the Eighth Amendment” (a little late, perhaps, to reconsider this issue . . .). Justice Breyer wrote separately to emphasize that, were the case subject to *de novo* review, he would “likely hold that Payton's penalty-phase proceedings violated the Eighth Amendment.” Finally, Justice Souter (joined by Stevens and Ginsburg) dissented, arguing that the “clearly established” law is not *Boyde* but the general rule that juries must be permitted to consider *all* mitigation evidence. Given the ambiguity in the trial court's instructions and the prosecutor's repeated, uncorrected misstatements, the California Supreme Court should have found that Payton's Eighth Amendment rights were violated – and Payton's impending execution obviously made this violation substantial and injurious.

In another decision dealing with the standard of review applicable to habeas petitions, ***Bell v. Cone (04-394)***, the Court issued a per curiam decision reversing the Sixth Circuit's grant of Cone's habeas petition because the Sixth Circuit did not grant adequate deference to the Tennessee Supreme Court as required by 28 U.S.C. § 2554(d). The Sixth Circuit had granted

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Cone's petition after concluding that the "especially heinous, atrocious, or cruel" aggravating circumstance, which supported the jury's death sentence for Cone, was unconstitutionally vague. In reversing, the Court explained that the Tennessee Supreme Court had previously adopted a narrowing construction of these terms (requiring a finding of "torture" or "depravity of mind," both of which the Court had further defined) and federal courts must presume that the Tennessee Supreme Court applied this narrowing construction when it reviewed Cone's direct appeal even though it did not make explicit reference to the narrowing construction. Justice Ginsburg, joined by Souter and Breyer, wrote a concurring opinion to stress that the Court did not address the situation in which a State court rules on other grounds and does not directly address the constitutional issue. There, it cannot be presumed from the court's silence that it considered the issue, applied any relevant case law, and rejected the petitioner's contentions.

Ineffective assistance of counsel claims also drew the Court's attention this Term. In a 5-4 split, the Court reversed a death sentence in *Rompilla v. Beard* (04-5462). Led by Justice Souter, the majority found that Rompilla's counsel provided ineffective assistance in the penalty phase, despite the fact that counsel interviewed Rompilla and his family members extensively and arranged for him to be examined by three mental health experts, because counsel failed to review the court file from a prior conviction that they knew the State intended to use as an aggravating circumstance. The State twice told counsel that it intended to introduce not just the fact of the conviction, but also gruesome testimony from that trial, yet counsel reviewed just part of the file only a day before the penalty hearing. Moreover, counsel relied heavily on a residual doubt theory, which was severely undercut by the existence of the prior conviction. The error was prejudicial because, had counsel reviewed the file, they would have found evidence of significant mitigating factors including severe childhood abuse, alcoholism, indications of schizophrenia, and low IQ. Instead, counsel merely presented the testimony of family members who asked the jury for mercy.

Justice O'Connor concurred to say that the Court was not announcing a "per se rule" that counsel must always review the files of prior convictions in death penalty cases, but was employing its usual individualized approach. Counsel's failure to review the file was unreasonable here in light of the factors highlighted by the majority, as well as the fact that counsel's decision not to review the file was the result of inattention, not strategic judgment.

Led by Justice Kennedy, the dissenters argued that the Court's new rule requiring review of prior conviction files will waste valuable defense resources and is unlikely to improve the quality of defense. The dissenters found counsel's investigation not only "effective," but "conscientious." Moreover, Rompilla could not demonstrate prejudice since it was unlikely that counsel would have come across the evidence cited by his appellate counsel (all found in a Bureau of Corrections report) – its discovery was the proverbial needle in the haystack and was sheer "serendipity."

In contrast to *Rompilla*, in *Florida v. Nixon* (03-931), the Court (Ginsburg, J., for all but the Chief, who did not participate) found that an attorney's decision to concede guilt in a death penalty case, without obtaining express consent from his client, is not automatically prejudicial ineffective assistance of counsel. Express consent, of course, is required prior to the entry of a guilty plea, and the Florida Supreme Court held that, by analogy, it was required to concede guilt at trial or else the counsel's unilateral decision to do so was per se ineffective and prejudicial.

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The Court reversed, finding the plea analogy inappropriate since the legal impact of a plea is different from that of a concession at trial (a guilty plea eliminates the right to jury trial, the protection against self-incrimination, and the right to confront one's accusers). Thus, an attorney's concession of guilt in a capital case without express consent of the defendant is subject only to the usual ineffective assistance analysis and not to any heightened standard.

This case is an excellent example of how facts can permit a unanimous ruling in what otherwise might have been more a contentious case. Nixon's attorney was an experienced death penalty counsel. He believed that the evidence against Nixon was so damning (including Nixon's own confessions to police and two witnesses, as well as physical evidence connecting Nixon to the gruesome murder) that he would lose all credibility in the penalty phase by making a frivolous argument in the guilt phase. The trial court agreed, noting at trial that "the tactic employed by trial counsel . . . was an excellent analysis of the reality of his case." Further, the attorney explained his strategy to Nixon on three occasions; Nixon did not expressly agree or disagree, which the attorney took as tacit agreement with the strategy. These facts undoubtedly made the Court's legal ruling more palatable for all eight participating Justices.

Bell v. Thompson (04-514), another habeas case involving a claim of ineffective assistance of counsel in a capital sentencing proceeding, caused the Court to confront an unusual procedural question: whether the Sixth Circuit abused its discretion by (1) withholding its mandate for five months after the Court disposed of Thompson's cert petition, and (2) reversing its earlier decision affirming summary judgment against Thompson. The issue presented was whether Rule 41 of the Federal Rules of Appellate Procedure required the Sixth Circuit to issue its mandate immediately after the denial of cert (subsection (d)(2)(D) provides that "the court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed") or whether appellate courts may extend the time for issuing the mandate (subsection (b) provides that the "court may shorten or extend the time"). The Kennedy-led majority, however, found no need to interpret Rule 41, because even assuming that appellate courts had discretion to extend the time, the Sixth Circuit abused that discretion.

Thompson's claim of ineffective assistance was based on his counsel's alleged failure to investigate whether he had a mental illness that would have served as a mitigating factor in sentencing. His habeas counsel obtained expert deposition testimony that Thompson was mentally ill at the time of the crime, but that testimony was inadvertently omitted from the record before the district court, which found that Thompson offered only evidence of his mental health *subsequent* to conviction and entered summary judgment. Habeas counsel realized the mistake a year later and attempted to supplement the record under Rule 60(b) of the Federal Rules of Civil Procedure, but the court denied their motion. On appeal, the Sixth Circuit affirmed, again finding no evidence that Thompson was mentally ill at the time of the crime; that court later denied Thompson's motion for reconsideration attaching the misplaced expert testimony. The Sixth Circuit's mandate was stayed while the Court reviewed Thompson's cert petition. While the petition was pending, one of the members of the Sixth Circuit panel that had reviewed Thompson's case came upon the testimony and began re-reviewing the record. While it is not clear why the Sixth Circuit panel did not previously notice the testimony, the re-review caused the panel unanimously to reconsider its earlier ruling, delay issuing the mandate and, ultimately, alter its result and remand to the district court.

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The majority found the panel's delay in issuing the mandate an abuse of discretion. First, the delay of five months was substantial. Second, the appellate court failed to give notice to the parties of its decision to reconsider. Third, the state relied on the apparent conclusion of the habeas case to move forward with other proceedings relating to Thompson's execution, expending valuable resources. Finally, litigation after the denial of cert should be "infrequent" and undertaken only in extraordinary circumstances to prevent a miscarriage of justice. Here, the expert testimony had been put before the appellate court prior to the cert petition, it was unlikely to alter the district court's result since it came so long after conviction, and it did not undercut the fact that Thompson's trial counsel *did investigate* his mental health (to no avail) and made a strategic decision not to pursue that mitigation strategy at trial. This evidence was simply not of the "character" to warrant such an "extraordinary departure from standard appellate procedures."

The dissenters, Justice Breyer, joined by Stevens, Souter and Ginsburg, would give appellate courts wider latitude to correct their errors. Regardless of how the expert testimony was overlooked, the Sixth Circuit unanimously found that it was "critical" evidence and warranted a different result. Moreover, as to the failure to notify and resulting prejudice to the state, the state easily could have determined the status of the mandate and not wasted its efforts with preparations for Thompson's execution. Rules should not override justice, which is why "the system often grants judges a degree of discretion, thereby providing oil for the rule-based gears." The rules allowed such discretion here and the Sixth Circuit should be commended for refusing to "divorce the rule-based result from the just result."

The Court's *per curiam* decision in ***Howell v. Mississippi (03-9560)*** provides a lesson in preserving federal issues for appeal. Howell claimed that his Eighth and Fourteenth Amendment rights were violated by the trial court's failure to charge the jury on lesser included offenses in his capital murder case. Howell, however, failed to make clear in the Mississippi Supreme Court that his claim was based on federal, rather than state, law. Before the Court, Howell argued that the issue was sufficiently raised because his citations to state cases in turn cited to other state cases that in turn relied on federal law. This "daisy chain" was insufficient to satisfy the Court, which dismissed the case.

Finally, in ***Medellin v. Dretke (04-5928)***, a curious 5-4 *per curiam* opinion, the Court dismissed the writ of certiorari as improvidently granted, thereby avoiding a thorny issue about the effect of international law in a capital case – which got Justice Kennedy into trouble in ***Roper v. Simmons***, discussed above. The following is probably for international law junkies only, but here goes: Medellin, a Mexican national on death row in Texas, challenged his detention on the ground that Texas never notified him of his right under the Vienna Convention on Consular Relations to contact the Mexican consulate after his arrest. The district court denied his petition, and Medellin sought a certificate of appealability from the Fifth Circuit. Meanwhile, Mexico took the United States to the International Court of Justice ("ICJ"), arguing that the United States had violated the Convention in Medellin's case and the cases of 50 other Mexican nationals. The ICJ agreed, ruling that the United States had to provide, "by means of its own choosing," review and reconsideration of Medellin's conviction and sentence. The Fifth Circuit nevertheless denied Medellin a certificate of appealability, holding that the Convention did not create an individually enforceable right and that Medellin's international law claim was not substantial enough to support a federal habeas petition.

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After briefing and argument, the Court dismissed the writ of cert based on several recent developments. First, a month before oral argument, the President announced that the United States would adhere to the ICJ ruling “by having State courts give effect to the decision” (the announcement set off a bit of a firestorm, as it is unclear just how the President can order the States around like this, but we’ll leave that issue for another day, along with the subsequent announcement that the United States is withdrawing from the Convention’s Optional Protocol consenting to ICJ jurisdiction over alleged violations, meaning that this case will never arise again). Second, relying on the President’s announcement, Medellin filed a new *state* habeas petition and asked the Court to stay its proceedings pending the outcome. The Court did not simply stay its proceedings, however, but dismissed the writ of cert because: (1) the new Texas proceeding might provide Medellin with “the review and reconsideration” required by the ICJ ruling, thereby mooting the issue before the Court; and (2) if Medellin or Texas did eventually seek Court review of the Texas outcome, the case would be in a better procedural posture.

As if the case weren’t complicated enough, Justice Ginsburg wrote a concurrence, and O’Connor, Souter and Breyer wrote dissents. There’s too much to summarize here, but these opinions reveal that a lot of back-and-forth led to what otherwise looks like an uncontroversial *per curiam* decision. The case seemed to break down like this: Initially, four Justices (Stevens, Souter, Ginsburg, and Breyer) would have stayed Medellin’s case pending the result in Texas, four others (the Chief, Scalia, Kennedy and Thomas) wanted simply to dismiss the writ, but neither camp could get Justice O’Connor, who wanted to reach the merits because state violations of the Convention were “a vexing problem” and “questions of national importance.” Realizing a stay was off the table, Stevens, Souter and Breyer joined up with O’Connor, yielding a four-Justice dissent that would have ordered the Fifth Circuit to address Medellin’s international law claims. That was too much for Ginsburg, who thought that doing so would create competing Fifth Circuit and Texas proceedings, so she joined the dismissal camp to generate a five-Justice majority.

Miller-El v. Dretke (03-9659) and ***Johnson v. California (04-6964)***, two capital cases involving challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the allegedly racially-biased use of peremptory challenges, are discussed below in the JURY SELECTION section.

DOUBLE JEOPARDY

In ***Smith v. Massachusetts (03-8661)***, the Court held that double jeopardy precludes a trial court from reconsidering a mid-trial dismissal of one count of an indictment after the defendant has begun putting on evidence, unless there is a clear preexisting rule that the dismissal is not a final ruling. Among other things, Smith was charged with unlawful possession of a firearm, which required proof that he possessed a weapon with a barrel under 16 inches in length. The State’s only evidence was the victim’s testimony that Smith shot him with a “pistol” or “revolver” that “appeared to be a .32 or a .38.” At the close of the prosecution’s case, the trial court granted Smith’s motion to dismiss this count, and Smith began his defense of the remaining counts against him. Before closing arguments that same day, the State moved the trial court to reconsider its ruling based on authority holding that testimony regarding the type of gun used could be sufficient to establish the length of its barrel. The trial court reversed its prior ruling, and the jury ultimately convicted Smith on the firearm count.

The case resulted in a 5-4 decision, and created very strange bedfellows. Justice Scalia authored the majority opinion (joined by Stevens, O'Connor, Souter and Thomas), while Justice Ginsburg drafted the dissent (in which Kennedy, Breyer and the Chief joined). The majority focused on a technical parsing of a state procedural statute (not surprising given the author), as well as the potential practical problems that could result if double jeopardy did not attach to a mid-trial dismissal – mainly, that a defendant, relying on the dismissal of one count, would choose to present a defense that would inure to his detriment if the count were later resurrected (e.g., admitting conduct consistent with guilt as to the dismissed count). In contrast, the dissent focused on the particular facts of Smith's case. Smith's defense was not affected by the court's ruling, and its reconsideration of its prior legal error caused him no prejudice. To this, the majority responded that prejudice is irrelevant: "[T]he Double Jeopardy Clause has never required prejudice beyond the very exposure to a second jeopardy."

FOURTH AMENDMENT

The Court issued a number of Fourth Amendment decisions this Term on issues ranging from false arrest to excessive force. In *Devenpeck v. Alford* (03-716), the Court unanimously held that an arrest is lawful under the Fourth Amendment where there is objective probable cause, even if the offense charged is *different* from the offense that initially established probable cause. The police pulled over Alford after receiving a tip that he was impersonating a police officer (he had pulled over behind a stranded motorist with his headlights "flashing" and led the motorist to believe he was a police officer; when stopped by police, he was listening to police frequency on a radio and had handcuffs and a hand-held police scanner in the car). They also found a recording device, and they arrested and charged him with violating Washington's privacy law, but not with impersonating an officer. The privacy law charge was eventually dismissed, however, because a Washington appellate court had previously held that taping police communications was not a privacy law violation. Alford then sued the officers, alleging, among other things, violations of 42 U.S.C. § 1983. The trial court charged the jury that, to find probable cause to support the arrest, it would need to find that the known evidence was sufficient for the police to suspect that a crime had been committed, but that this evidence could not include Alford's taping of his conversation with the officers since that was not a crime. The jury found for the officers, but a divided panel of the Ninth Circuit reversed, holding that the offenses for which probable cause existed (here, arguably impersonation and obstruction) had to be "closely related" to the offense police actually invoked (violation of the privacy act). Reversing the Ninth Circuit, the Court (Scalia, J.) stressed that an officer's subjective reason for arrest is irrelevant. If the officers possessed information sufficient to establish probable cause objectively, that is all that is required.

Illinois v. Caballes (03-923) addressed whether the Fourth Amendment "requires reasonable, articulable suspicion to justify using a drug detection dog to sniff a vehicle during a legitimate traffic stop." Caballes was stopped for going six miles over the speed limit. While the officer was issuing him a warning, another officer appeared with a drug detection dog and circled the car. The dog alerted upon the trunk, which, once opened, revealed marijuana. Caballes' warning ticket for speeding abruptly turned into a 12-year sentence for possession of marijuana. Applying *Terry v. Ohio*, 392 U.S. 1 (1968), the Illinois Supreme Court found that the dog sniff violated the Fourth Amendment because it "unjustifiably enlarged" the scope of the routine

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traffic stop into a drug investigation. Fruit of the unlawful dog sniff, the marijuana, was therefore inadmissible.

The Supreme Court disagreed. Justice Stevens, who drafted the majority opinion, explained that, under the Court's decision in *United States v. Place*, 462 U.S. 696 (1983), a dog sniff is not a "search" under the Fourth Amendment because the sniff can only reveal the possession of contraband – and, therefore, cannot compromise any legitimate privacy interest. Thus, where the dog sniff only involves the exterior of a vehicle and does not delay an otherwise lawful traffic stop, it is permissible under the Fourth Amendment.

Justices Ginsburg and Souter dissented. Ginsburg agreed with the Illinois Supreme Court that *Terry* was applicable and, absent any evidence supporting the conclusion that Caballes possessed drugs, the dog sniff unreasonably expanded the scope of the search. Ginsburg expressed concern that there was no stopping point in the majority's opinion, which could lead to widespread use of drug dogs to sniff parked cars and even pedestrians. Souter agreed with Ginsburg's analysis, but wrote separately to express his view that *Place* should be revisited because it was founded on the untenable assumption that drug dogs do not err. Because drug dogs are not perfect, it cannot be assumed that a dog sniff will reveal *only* contraband, it may instead reveal innocent possessions in a person's trunk over which the person has a legitimate expectation of privacy. Both Ginsburg and Souter noted that they might reach a different conclusion if the dog sniff was aimed at detecting bombs or biological weapons that present an immediate danger to human life.

If you've ever had a nightmare about waking up to armed police in your bedroom, you'll be sympathetic to the respondent in *Muehler v. Mena* (03-1423). While executing a search warrant, a SWAT team awoke Mena at 7 a.m., placed her in handcuffs without allowing her to change out of her bedclothes, and held her that way in her garage for several hours with three of her tenants while they searched her home and let an INS officer question her. Mena was not the subject of the investigation, which concerned a gang-related shooting allegedly committed by one of her tenants. Mena claimed that the officers violated her Fourth Amendment rights by detaining her for an "unreasonable time and in an unreasonable manner" and by questioning her regarding her immigration status. The jury found for Mena, and the Ninth Circuit affirmed on the ground that her detention was objectively unreasonable as a matter of law. The Supreme Court vacated and remanded, holding that Mena's detention in handcuffs for the duration of the search did not violate the Fourth Amendment.

The majority opinion (by the Chief, joined by O'Connor, Scalia, Kennedy and Thomas) relied on *Michigan v. Summers*, 452 U.S. 692 (1981), which held that police have "categorical" authority to detain an individual while searching her property. Under *Summers*, the police clearly had the initial authority to detain Mena – a proposition with which no Justice disagreed. The question was whether the duration of the detention and the extended use of handcuffs was reasonable. The majority found that it was, given the nature of the investigation (a search for weapons involved in a gang-related shooting) and the fact that four individuals were detained, thus heightening the risks to police and other residents. As to Mena's immigration status, mere questioning is not a discrete Fourth Amendment event. Because Mena's detention was otherwise lawful and she did not allege that it was extended by the questioning, no Fourth Amendment violation occurred.

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Justice Kennedy wrote separately to note that he did not support handcuffing for an unlimited duration in all *Summers* arrests. For Kennedy, handcuffs should come off when an objectively reasonable officer would conclude that it would not compromise officers' safety or when the duration of the detention causes real pain or discomfort (for at least long enough to attend to the needs of the detainee). Kennedy found Mena's detention reasonable because the officers were outnumbered. Justices Stevens (joined by Souter, Ginsburg and Breyer) concurred in the judgment. Stevens worried that the majority's logic would permit the "handcuffing of every occupant of the premises for the duration of every *Summers* arrest." Stevens agreed that the Ninth Circuit wrongly concluded that Mena's detention was unreasonable *as a matter of law*, but he found the facts sufficient to permit a *jury* to conclude that it was objectively unreasonable.

Finally, the Court issued a *per curiam* opinion in ***Brosseau v. Haugen* (03-1261)**, where it held that a police officer who shot a fleeing suspect in the back was entitled to qualified immunity in an excessive force action. Officer Brosseau was called to a fight at Haugen's home. Haugen fled to his car, and Brosseau believed he was going for a weapon. Brosseau succeeded in smashing the car window but was unable to take the keys from Haugen. When Haugen tried to drive off, Brosseau jumped back from the car and fired one shot into Haugen's back. Haugen later pleaded guilty to "eluding," which included the significant admission that he fled with "wanton or willful disregard for the lives of others." Still, he sued Brosseau under 42 U.S.C. § 1983, and the district court held that Brosseau was entitled to qualified immunity. The Ninth Circuit reversed, applying the two-step process set forth in *Saucier v. Katz*, 533 U.S. 194 (2001): It found that Brosseau had violated Haugen's Fourth Amendment right to be free from excessive force and that the right was clearly established, so no qualified immunity for Brosseau.

By an 8-1 vote, the Court reversed without briefing or argument. The Court took no position on whether Brosseau violated Haugen's constitutional rights because, even if she had, she was entitled to qualified immunity. The Ninth Circuit "clear[ly] misapprehen[ded]" the test for qualified immunity by not focusing its inquiry on her *specific* conduct. The Court noted that there were only a handful of conflicting decisions dealing with shooting "a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate vicinity are at risk from that flight." None of these cases was directly on point, and together they demonstrated only that Brosseau's actions fell in the "hazy border between excessive and acceptable force." Because it was not clearly established that Brosseau's conduct violated the Fourth Amendment, she was entitled to qualified immunity. Justice Breyer concurred, joined by Justices Scalia and Ginsburg. These Justices would have revisited *Saucier*, which requires lower courts first to determine whether a constitutional right has been violated and *then* reach the issue of qualified immunity. This rigid "order of battle" unnecessarily requires courts to reach difficult constitutional questions first, when qualified immunity might provide an easier basis for resolving a case.

Justice Stevens dissented. He believed that Brosseau violated the Fourth Amendment and that the qualified immunity question turned not on uncertainty in the law but on uncertainty in the facts – namely, the reasonableness of Brosseau's beliefs about the risk Haugen posed. That factual determination should have gone to the jury. Stevens also chided the Court for deciding the case summarily; had Haugen been shot dead, the legal issues would have been the same, but the Court undoubtedly would have required briefing or argument.

GUILTY PLEAS

In *Bradshaw v. Stumpf* (04-637), the Court, in an opinion by Justice O'Connor, unanimously held that a guilty plea can be knowing and voluntary, even where the trial court does not explain the elements of the offense to the defendant, so long as there is evidence that "the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel." The Court also held that a prosecutor's use of inconsistent theories to convict two individuals for the same murder does not violate due process or require the voiding of a guilty plea where the guilty plea could be sustained under either theory. The Court remanded to the Sixth Circuit for a determination of whether the prosecution's conduct required that the defendant's death sentence – as opposed to his conviction – be undone.

Here are the details: Stumpf admitted that, during the course of a robbery, he shot one individual twice in the head (remarkably, he lived), but insisted that his accomplice Wesley was responsible for killing a second individual. Nonetheless, Stumpf pled guilty to aggravated murder and one capital specification, making him death-penalty eligible. At the penalty phase, Stumpf argued that he played a minor role in the murder, while the State contended that Stumpf was the shooter (and even if he wasn't, Stumpf's actions as an accomplice were sufficient to impose death). The sentencing panel found that Stumpf was the shooter. Later, in trying Wesley, the State presented evidence (discovered after Stumpf's trial) that Wesley had confessed to the murder and argued that Wesley – not Stumpf – was the shooter. The Court found that Stumpf's guilty plea should not be set aside because the new evidence of Wesley's confession was not inconsistent with Stumpf's guilty plea (since an accomplice may be guilty of aggravated murder under Ohio law) and because the new evidence could not have affected the knowing, voluntary and intelligent nature of Stumpf's plea. On remand, however, the Sixth Circuit could consider whether the State's use of inconsistent theories impacted the validity of Stumpf's sentence. Souter and Ginsburg concurred to clarify that Stumpf's argument, on remand, is not that there was no evidentiary basis for the death penalty or that the prosecutor engaged in misconduct, but "is simply that a death sentence may not be allowed to stand when it is imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant." These Justices also wondered what the proper remedy would be for such a violation. Thomas and Scalia concurred to note that the Court has never previously recognized this type of due process claim; it appeared that Stumpf had failed to raise it in the state courts; and it would be subject to review under *Teague v. Lane*, 489 U.S. 288 (1989), before consideration on the merits.

HABEAS CORPUS PROCEDURE

Unlike death penalty petitioners, non-capital petitioners had only marginal success in their habeas challenges this Term, particularly when it came to critical procedural rulings that could close the door to many habeas corpus petitions.

The Court issued a series of decisions clarifying the time limit for filing federal habeas petitions. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides a one-year period within which a petition may be filed. The limitations period runs from the latest of four alternative trigger dates: (1) the date on which the conviction becomes final; (2) the date on

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which a government-created impediment to filing is removed; (3) the date on which the right was initially recognized by the Court if the right was made retroactively applicable; and (4) the date on which the facts supporting the claim could have been discovered with reasonable diligence.

The Court's 5-4 ruling in ***Dodd v. United States (04-5286)*** addressed the third AEDPA trigger date and will dramatically affect the ability of prisoners to bring habeas claims based on newly announced rules of law. Under 28 U.S.C. § 2255, a federal prisoner challenging his sentence under a new rule of law can do so within a year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Dodd sought to take advantage of the Court's holding in *Richardson v. United States*, 526 U.S. 813 (1999), that a jury must agree unanimously on each of the acts that constitute a continuing criminal enterprise under 28 U.S.C. § 841. Dodd filed his § 2255 petition more than a year after *Richardson* was announced, but within a year of the date that the Eleventh Circuit held that *Richardson* applied retroactively. The question for the Court was whether the 1-year limitation period runs from the date on which the Court "initially recognized the right" (*i.e.* when *Richardson* was decided) or when that right was found to be retroactive (a year later). Led by Justice O'Connor, the majority concluded that the statute was "clear" and ran from the date that the rule was initially announced – barring Dodd's claim. The Court recognized the potential for "harsh results," but felt it was not "free to rewrite the statute."

Justice Stevens, joined by Souter, Ginsburg and Breyer, dissented, arguing that "careless wording" and "incorrect assumptions" should not overcome Congress' clear intent, particularly where the statute is ambiguous. Congress likely believed that whenever the Supreme Court announced a new rule, it would also discuss its retroactivity, but in fact a decision on retroactivity almost never comes down within a year of a new rule's announcement. The majority's ruling will leave the vast majority of prisoners without relief, since they cannot file until a new rule is made retroactive. Congress would not specifically provide for appeals based on new rules of law only to have the provision rendered a nullity. In a part of the opinion joined by no others, Stevens notes that this case presents similar issues as ***Graham County Soil & Water Conservation District v. United States ex rel. Wilson (04-169)*** (released on the same day and discussed in the EMPLOYMENT section), involving the time limit for filing a whistleblower retaliation claim under the False Claims Act. There, Stevens felt that the Court got it right. Ginsburg and Breyer dissented separately to say that this case is not like ***Graham County*** (from which they dissented) because Dodd's case involves the true nullification of a statutory provision that will affect a multitude of prisoners, whereas the Court's ruling in ***Graham County***, no matter how one views the merits, will not wreak such havoc.

In ***Johnson v. United States (03-9685)***, the Court addressed the last of the AEDPA trigger dates: "the date on which the facts supporting the claim . . . could have been discovered through the exercise of reasonable diligence." ***Johnson*** concerned whether an order vacating a *state* court conviction that was the basis for a *federal* sentencing enhancement was a "fact" that would restart the limitations period. The majority (Justice Souter, for the Chief, O'Connor, Thomas and Breyer) held that it was, but also held that Johnson could not take advantage of this fact because he was not diligent in seeking to vacate his state conviction.

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A bit of history may be helpful: Johnson pled guilty to a federal drug charge, and his conviction became final on April 22, 1996 (just prior to the enactment of AEDPA). He received an enhanced sentence as a career offender based on two prior Georgia drug convictions. On April 25, 1997, Johnson sought an extension of time to file his federal habeas petition, which was denied as untimely (while courts have unanimously permitted those with pre-AEDPA convictions to file petitions within a year of AEDPA's enactment, Johnson's motion was still one day late under this rule!). In 1998, Johnson filed a habeas petition in Georgia that ultimately vacated one of the state convictions that gave him "career criminal" status, and three months after that victory he filed a federal habeas petition seeking to revise his sentence. If this petition was timely, he would have to be resentenced. The Eleventh Circuit, however, held that the state court order was not a "fact" but rather a legal proposition obtained at Johnson's behest and which did not restart the limitations period, meaning Johnson's time for filing a habeas petition expired back in 1997. The government did not argue this position to the Supreme Court, but instead argued that the one-year period should run from discovery of the facts that led to vacatur of state court convictions, rather than the vacatur itself.

The Court declined to accept any of these positions in its entirety, and instead carved its own path. The Court easily and unanimously concluded that an order vacating a conviction was a "fact." The majority, however, was concerned that a petitioner who was dilatory in challenging his state convictions might use this rule to avoid AEDPA's focus on the date when supporting facts "could have been discovered through the exercise of reasonable diligence." Therefore, the Court held that a petitioner must be diligent in seeking vacatur of his state court conviction once he knows or should know that it will enhance his federal sentence. Courts should measure diligence from the date of the federal court judgment (not the date it becomes final). If a petitioner has been diligent, the one-year limit will run from discovery of the order vacating the state court conviction. Here, Johnson was not diligent, waiting over three years from the federal court judgment to file his state habeas petition, and his federal petition was barred.

The dissent (Kennedy, joined by Stevens, Scalia and Ginsburg) would not engraft upon AEDPA an additional requirement that the petitioner's pursuit of state court relief must be diligent. In their view, states are in the best position to legislate the time period within which a state habeas petition may be filed. Moreover, to the extent that the Court chooses to impose this additional requirement, due diligence should be measured from the date that the federal judgment is final, not the date on which judgment is entered. Given the scarcity of criminal defense resources, those resources should first be focused on the direct appeal and not collateral state court proceedings.

The Court's decision in *Rhines v. Weber* (03-9046) dealt with the intersection of the one-year time limit and the exhaustion doctrine, which requires state court prisoners to adequately raise claims in state court before filing a federal habeas petition. Courts refer to habeas petitions raising both exhausted claims and unexhausted claims as "mixed" petitions. In *Rhines*, the Court, led by Justice O'Connor, unanimously held that the "stay and abeyance" procedure employed by some courts, whereby "mixed" habeas petitions are stayed while the petitioner attempts to exhaust the remaining claims in state court, is appropriate where: (1) the petitioner has good cause for failing to exhaust; (2) the unexhausted claims are potentially meritorious; and (3) the petitioner has not been dilatory. If the unexhausted claims are "plainly meritless," the district court should reject them on the merits and dispose of the entire petition (a very pragmatic

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approach). Where the district court determines that stay and abeyance is inappropriate, the court “should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair petitioner’s rights to obtain federal relief.”

While this procedural ruling may seem obscure, it is of great import to those who work in this area and may close a trap for the unwary (generally *pro se*) habeas petitioner. The stay and abeyance practice came about in response to two rules that collided to create a host of procedural problems. In *Rose v. Lundy*, 455 U.S. 509 (1982), the Court held that federal courts could not adjudicate habeas petitions containing both exhausted and unexhausted claims: These “mixed” petitions had to be dismissed to be refiled once all claims were properly exhausted. *Lundy*, however, was decided prior to the enactment of AEDPA, which requires petitioners to file their habeas petitions within one year of final judgment. The pendency of *state* habeas proceedings tolls this period, but *federal* habeas proceedings do not. So, if a district court took 16 months to dismiss a state prisoner’s petition because it had some unexhausted claims, the petitioner was essentially out of luck: If and when he attempted to refile, he would be time-barred as to *all* claims – even those that were properly exhausted in the original petition. In *Rhines*, the Court attempted to balance the interests of petitioners in having their potentially meritorious claims adjudicated against AEDPA’s interest in the finality of criminal judgments. If a court finds stay and abeyance to be proper in a given case, the stay should not be “indefinite” lest capital prisoners attempt to game the system to avoid execution – prisoners should be required to pursue their state remedies in a timely fashion, normally within 30 days, and must return to federal court promptly once state court review is complete.

Justice Stevens (joined by Ginsburg and Breyer) filed a concurrence to emphasize that “good cause” should not be read to “impose the sort of strict and inflexible requirement that would ‘trap the unwary *pro se* prisoner.’” Justice Souter (also joined by Ginsburg and Breyer) concurred to say that he would not condition stay and abeyance on a showing of good cause for “fear that threshold enquiries into good cause will give district courts too much trouble to be worth the time.” Instead, he would permit use of the stay and abeyance procedure unless there was an indication that the petitioner was being intentionally dilatory.

In a similar vein, the Court’s 5-4 decision in *Pace v. DiGuglielmo (03-9627)* clarified that untimely state court petitions for post-conviction relief are not “properly filed” and therefore *do not* toll the one year limitation period for filing a federal habeas corpus petition. *Pace* was convicted in Pennsylvania state court in 1986. He filed a post-conviction petition in state court in 1986, which was litigated until 1992, when the Pennsylvania Supreme Court denied review. At the time of his conviction, Pennsylvania’s post-conviction relief statute contained no statute of limitations. In 1995, it was amended to provide a limitations period, subject to certain exceptions. In November 1996, after passage of AEDPA but before *Pace*’s time for filing a federal habeas petition had expired, *Pace* filed another state court petition for post-conviction relief. The court of common pleas denied the petition on the merits in July 1997. On appeal to the Pennsylvania Superior Court, the state argued for the first time that *Pace*’s petition was untimely under the amended post-conviction relief statute. The court ultimately agreed and the Pennsylvania Supreme Court denied review on July 29, 1999. *Pace* filed the current federal habeas petition on December 24, 1999. The district court found that the state court petition tolled *Pace*’s limitations period under AEDPA and therefore found his federal petition timely.

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The Third Circuit disagreed, however, concluding that Pace's untimely state court petition was not "properly filed" and therefore could not toll AEDPA's limitations period.

The Chief authored the majority opinion, in which O'Connor, Scalia, Kennedy and Thomas joined. The majority concluded that time limits on post-conviction petitions are conditions to filing. Therefore, an untimely petition (just like a petition for which the filing fee is not paid) is not properly filed and provides no basis for statutory tolling. This is true regardless of whether the state post-conviction statute provides exceptions to its time limit for filing, as was the case here. Any other interpretation of "properly filed" would permit petitioners to avoid AEDPA's time limits by filing repetitive state court petitions. Federal habeas petitions may only be filed after state court options have been fully exhausted. Therefore, Pace argued that a prisoner could litigate for years in the state system, only to find out after it was too late that his petition was not timely filed and therefore did not toll the federal limitations period. Under these circumstances, the Court advises prisoners to file a "protective" federal petition and request that the federal court "stay and abey" the federal habeas proceedings until the state proceedings are concluded. The Court also found no exceptional circumstances warranting equitable tolling given Pace's long delay between conviction and the filing of his second state court petition.

Justice Stevens, joined by Souter, Ginsburg and Breyer, dissented. Given that the limitation period in Pennsylvania's post-conviction relief statute is subject to exceptions, it is odd to say that the *petition* is untimely and therefore improper. Each claim within the petition must be analyzed separately to determine whether an exception to the time limit applies. Thus, it cannot accurately be said that the *application* is "properly filed" or "improperly filed" – in fact, half of the application might be timely and half untimely. Under these circumstances, it is more appropriate to conclude that the petition is properly filed, but that some or all of the claims may be procedurally defaulted. Such a properly filed petition should toll the limitations period for filing a federal habeas petition. Further, litigation over the merits of the petition and the limitation period issues could go on for years before a decision is reached in state court. The majority's decision will lead to the filing of numerous "protective" federal court petitions, clogging district court dockets without any corresponding benefit. Finally, to the extent that the majority is concerned that adoption of a different rule would lead to repetitive state court petitions merely to toll the limitations period, that is unlikely for two reasons. First, there is no benefit to a prisoner in delaying resolution of his claims. Second, if a district court believes the state court petition was filed merely as a delay tactic, the district court could certainly find that petition "not properly filed."

Continuing to clarify the time limit for filing, in *Mayle v. Felix (04-563)*, the Court held 7-2 that an amended habeas petition does not relate back for purposes of the one-year limitation period when it asserts claims supported by different facts than those raised in the initial petition. Jacoby Lee Felix filed a timely habeas petition asserting that his Confrontation Clause rights were violated when the trial court permitted the prosecution to play videotaped testimony that was not subject to cross examination. Some months later (and after AEDPA's limitations period had run), Felix (now represented by counsel) sought to amend his petition to add a claim that the trial court improperly admitted damaging statements he made during a coercive police interrogation. The district court found against Felix on the merits as to the Confrontation Clause claim and found the coerced statements claim time-barred. The Ninth Circuit disagreed as to the latter determination, holding that the amended petition "related back" to the initial petition since it

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resulted out of the same “conduct, transaction, or occurrence” – Felix’s criminal conviction. The Court reversed, finding the Ninth Circuit’s interpretation far too broad: “Under that comprehensive [approach], virtually any new claim introduced in an amended petition will relate back, for federal habeas claims, by their very nature, challenge the constitutionality of a conviction or sentence” Instead, courts should look at the facts underpinning the new legal claim. If they differ from those supporting the initial claim, the petition does not relate back. This is particularly true given Congress’ desire, as expressed in AEDPA, to expedite habeas proceedings. Felix’s claims arose from two different sets of facts (a pretrial police interview and an in-court presentation of videotaped evidence) and, therefore, relation-back does not apply.

Justice Souter, joined by Stevens, dissented. Congress subjected habeas petitions to the same relation-back rules applicable to civil cases. Yet the majority’s decision will preclude a habeas petitioner from amending in the vast majority of instances – “unless a single trial ruling amounts to distinct errors or an underlying fact is the subject of distinct rulings.” And there is evidence that Congress intended the term “transaction” to encompass an entire criminal trial since that same term is used to preclude the filing of second or successive habeas petitions arising from the same “transaction.” Moreover, the majority’s concern about unconstrained petition amendment is not well-founded. Petitioners may amend as-of-right only once, and then only before the government has answered. After that, amendment requires leave of the court, which presumably will be denied in cases of unjustified delay. Finally, the Court’s rule disparately affects those unable to afford counsel, since *pro se* petitioners may fail to recognize potentially meritorious arguments unless and until the trial court exercises its discretion to appoint counsel – which generally occurs after the time limit has run.

Finally, in ***Gonzalez v. Crosby* (04-6432)**, the Court unanimously agreed that a habeas petitioner can use FRCP 60(b) to seek relief from a federal judgment denying his petition, so long as his 60(b) motion does not raise substantive arguments regarding his underlying conviction but challenges only procedural defects in the federal judgment. By a vote of 7-2, however, it rejected Gonzalez’s attempt to use the rule. Like all the habeas cases this term, ***Gonzalez*** is hard to summarize succinctly, but we’ll try. Twelve years into his sentence for armed robbery, Gonzalez challenged his conviction in Florida court. After losing there, he filed a federal habeas petition, which the district court dismissed as untimely because Gonzalez’s state court petitions were not “properly filed” and therefore did not toll the federal habeas limitations period. The Eleventh Circuit denied review. Subsequently, the Supreme Court’s ruling in *Artuz v. Bennett*, 531 U.S. 4 (2000), adopted a different reading of “properly filed,” and Gonzalez sought relief from the district court judgment under Rule 60(b)(6), which allows the reopening of a case for “any . . . reason justifying relief from the operation of the judgment.” The district court denied his motion, and the Eleventh Circuit affirmed, holding that the motion was in effect a “second or successive” habeas petition barred by 28 U.S.C. § 2244.

The Court (Scalia, J.) affirmed, but on different grounds. The Court agreed that § 2244 barred 60(b) motions that pressed “claims” – that is, substantive federal grounds for relief from the state conviction. But where the 60(b) motion *and* the federal judgment challenged do not go to substance, the motion should go forward because Rule 60(b) safeguards procedural integrity. Gonzalez argued only that the district court misapplied the federal statute of limitations, so his was a valid 60(b) motion. Gonzalez’s victory was short-lived, however, because the Court also held that his motion failed on the merits. Rule 60(b)(6) requires “extraordinary circumstances”

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to obtain relief, but it is not unusual for the Court to adopt a new interpretation of law, and that event does not warrant reopening cases “long since final.” Moreover, Gonzalez was not diligent in pursuing his statute of limitations argument, as he did not seek rehearing in the Eleventh Circuit or petition for cert (in which case he certainly would have been remanded for reconsideration in light of *Artuz*). Justice Breyer concurred, agreeing with the majority’s approach but expressing discomfort with its fixation on the word “claim.” Justice Stevens, joined by Souter, dissented; they also agreed with the basic approach but would have remanded the merits of Gonzalez’s 60(b) motion to the district court for review on a full record (the dissenters also thought the Court wrongly minimized the harm of Gonzalez getting shut out of court because of a “flatly mistaken” procedural ruling).

The Court’s decisions on habeas corpus petitions brought in capital cases appear above in the DEATH PENALTY section.

JURY SELECTION

The Court decided two cases this term arising under *Batson v. Kentucky*, 476 U.S. 79 (1986). As a quick refresher, in *Batson* the Court created a three-part test for reviewing a claim that the use of peremptory strikes in jury selection was discriminatory. First, the objector must make out a prima facie case by showing that the facts give rise to an inference of discrimination in the use of strikes. The other side must then come forward with a race-neutral explanation for the strikes. Finally, the trial court must decide whether the objector “has proved purposeful racial discrimination.” With that out of the way, on to the cases!

After two decades and two trips to the Supreme Court, Thomas Joe Miller-El’s conviction and death sentence were overturned. In *Miller-El v. Dretke (03-9659)*, the Court found that the State’s use of peremptory challenges to exclude black jurors from Miller-El’s jury violated the Equal Protection Clause. Justice Souter wrote for the majority, relying on the following facts: (1) the Dallas County prosecutor struck 10 of 11 qualified black jurors (91%); (2) the prosecutor struck black jurors while accepting nonblack jurors with similar views on the death penalty; (3) the prosecution twice requested that the jury be “shuffled” (randomly reseated) when black jurors were seated at the front; (4) the prosecutor tended to use different questions during the voir dire of black jurors in an apparent attempt to disqualify them (*e.g.*, graphically describing executions to a majority of black jurors but to few nonblack jurors); and (5) the Dallas County prosecutors’ office had a history of discriminatory jury selection. The Texas trial court made a factual finding that the peremptory challenges were not racially motivated, and under AEDPA Miller-El had to show this was wrong by clear and convincing evidence. The Court noted that while that standard is “demanding,” it is “not insatiable; as . . . deference does not by definition preclude relief.” The Court found the cumulative evidence “too powerful to conclude anything but discrimination.”

The dissenters, Justice Thomas joined by Scalia and the Chief, took the majority to task for relying on evidence and arguments not specifically presented to the Texas courts (though the evidence was arguably accessible to the trial court). For habeas practitioners, this aspect of the case may have the most impact on their actual practice (another takeaway for prosecutors is that they must be clear and inclusive when providing their reasons for striking a juror because the

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strike will be evaluated based on the reasons given). The dissenters also presented a different statistical analysis of the strikes, concluding that the most likely factor driving the State's strikes was juror ambivalence toward the death penalty as reflected in initial juror questionnaires.

In a powerful concurrence, Justice Breyer argued for abolishing peremptory strikes altogether. It is difficult to devise a legal test "that will objectively measure the inherently subjective reasons that underlie the use of a peremptory challenge," and the practical problems of proving a *Batson* violation are nearly overwhelming, as this case demonstrates. Breyer cites numerous studies finding that the use of discriminatory challenges remains a problem, perhaps because those exercising strikes are not even aware of the stereotypes affecting their decisions. Moreover, peremptory challenges may undercut "the jury's democratic origins and undermine its representative function." Rather than a jury of our peers, we are left with a hand-molded jury of individuals acceptable to counsel and their hired jury consultants.

While *Miller-El* was the longer and more controversial of the Court's *Batson* decisions this term, ***Johnson v. California (04-6964)*** may have a broader impact on future *Batson* challenges. California required that, to make out a prima facie case and satisfy the first *Batson* prong, the objector "must show that it is *more likely than not* that the other party's peremptory challenges, if unexplained, were based on impermissible group bias." In Johnson's case, the prosecutor struck all three blacks in the jury pool, yielding an all-white jury (including the alternates). Nevertheless, the trial court found that Johnson did not satisfy his initial burden (and thus did not ask the prosecutor to explain himself) since, based on the jurors' questionnaire responses, the prosecutor *could* have had a race-neutral rationale for the strikes.

Justice Stevens wrote for a nearly unanimous Court (8-1, with Thomas dissenting), rejecting California's test as imposing too high a burden on *Batson*'s first prong. The "more likely than not" standard is not equivalent to an "inference of discrimination." Here, striking all black jurors in a case involving the murder of a white child by a black man was sufficient to satisfy the first prong. The trial court should have required the prosecutor to present his reasons for the strikes and obtain all relevant evidence before moving to *Batson*'s final prong and determining whether the strikes were purposefully discriminatory. Thomas dissented, arguing that *Batson* left states with wide latitude as to the process for evaluating equal protection challenges to peremptory strikes and that "California's procedure falls comfortably within its broad discretion to craft its own rules of criminal procedure."

PRISONS

Prisoners also scored some significant victories this term. Most notably, in ***Johnson v. California (03-636)***, the Court held 5-3 (without the Chief) that the California prison system's race-based initial cell assignment policy must satisfy strict scrutiny. A full summary of ***Johnson*** appears in the DISCRIMINATION section.

In ***Wilkinson v. Dotson (03-287)***, a case with potentially far-reaching ramifications, the Court held (in an 8-1 decision) that prisoners can challenge state parole procedures under 42 U.S.C. § 1983. Dotson and Johnson were serving lengthy sentences in Ohio prisons. Both complained that, in reviewing their sentences, their parole boards used guidelines adopted *after* their crimes

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were committed, in violation (they claimed) of the Ex Post Facto and Due Process Clauses. In addition, Johnson claimed that the parole board denied him due process because he did not have an adequate opportunity to speak and because too few members of the board were present. Both filed suit under § 1983, seeking new parole hearings. The district court held that their only recourse was via a habeas suit because they were implicitly challenging the fact or duration of their confinements. The Sixth Circuit reversed, finding § 1983 an appropriate avenue for Dotson's and Johnson's claims.

The Supreme Court affirmed, in an opinion by Justice Breyer. The Court held that claims regarding the constitutionality of parole procedures that would not *necessarily* provide immediate release or shorten a prisoner's confinement do not seek "core habeas relief" and, therefore, may proceed under § 1983. At most, respondents would receive new parole hearings, and the outcome of these hearings would be entirely uncertain. Therefore, their claims do not fall within the habeas corpus heartland and could proceed under § 1983. The Court left open whether these claims could *also* be pursued in a habeas petition. In his concurrence, Justice Scalia (joined by Thomas) addressed that question, arguing that § 1983 is the *exclusive* vehicle for Dotson's and Johnson's claims because the habeas statute does not permit federal courts to order relief that "neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody."

Justice Kennedy dissented, arguing that courts have routinely considered parole challenges in habeas corpus proceedings, and letting prisoners bring these same claims under § 1983 allows them to escape the more stringent exhaustion requirements of the habeas corpus statute. In addition, while "[t]he language of § 1983, to be sure, is capacious enough to include a challenge to the fact or duration of confinement; . . . because habeas is the most specific applicable remedy, it should be the exclusive means for raising the challenge." Relief such as that sought by Dotson and Johnson could be provided through a discretionary writ – one ordering the prisoner released or the error corrected.

Finally, in *Wilkinson v. Austin* (04-495), a unanimous Court led by Justice Kennedy found that inmates in Ohio's "supermax" facility possess a "liberty interest" in avoiding assignment to supermax because it imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Ohio inmates can be placed in the supermax facility indefinitely and are subject to 23 hour-a-day lock-down, continuous light in their cells, almost no human contact, and no eligibility for parole while in supermax. The Court found, however, that Ohio's New Policy for placing inmates in supermax provides adequate procedural safeguards, including notice of the basis for placement, an opportunity to attend the placement hearing and provide a rebuttal statement, multiple layers of review, a 30-day placement review, and annual reviews thereafter. The Court applied the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to reach this result, concluding that: (1) while the inmates have a liberty interest in avoiding supermax placement, it is not as substantial as that of a person entirely free from confinement; (2) the Ohio procedures provide significant safeguards such that the error rate is unlikely to be decreased significantly by requiring additional procedures (such as the opportunity to call witnesses); and (3) Ohio's interest in ensuring prison order and safety and in managing scarce funds is entitled to great weight. On remand, the Sixth Circuit may consider whether any prospective relief is required for due process violations under Ohio's Old Policy, which was admittedly much weaker than the New Policy.

RIGHT TO COUNSEL

In *Halbert v. Michigan* (03-10198), the Court considered whether individuals convicted by plea of guilty, nolo contendere, or guilty but mentally ill in Michigan State court are entitled to state-funded counsel in applying for leave to appeal to the intermediate state appellate court. This issue came up earlier in *Kowalski v. Tesmer* (03-407), where the Court dismissed the case, finding that petitioners (attorneys of indigent defendants) lacked standing to sue (a more detailed discussion of *Kowalski* appears in the STANDING section). Now reaching the merits, a 6-3 Court found that while nothing requires Michigan to provide appellate review, once that review is made available, the Due Process and Equal Protection Clauses require Michigan to provide state-funded counsel to indigent individuals filing applications for leave to appeal. A bit of background is helpful. Until recently, appeal to the Michigan Court of Appeals was as-of-right in all cases and appellate counsel was provided to indigent criminal defendants for this first tier of review. In 1994, however, Michigan voters amended the State constitution to require leave to appeal from convictions arising from pleas – resulting in discretionary first-tier review. Counsel is not generally provided to assist plea-convicted defendants in filing applications for leave to appeal, but is provided if leave is granted. Halbert pled guilty, but sought to withdraw his plea the following day. The court refused and Halbert sought appointment of counsel to assist him in applying for leave to appeal, which both the trial and appellate courts denied.

The majority and dissent agreed that the outcome of this case turned on whether it was governed by *Douglas v. California*, 372 U.S. 353 (1963), which required appointment of counsel for first-tier, as-of-right, appellate review of a criminal conviction, or *Ross v. Moffitt*, 417 U.S. 600 (1974), which found no right to counsel for a discretionary appeal to the State Supreme Court or the U.S. Supreme Court. The Ginsburg-led majority found that *Douglas* governed for several reasons: First, even though review by the appellate court is discretionary under Michigan’s framework, the filing of an application for leave to appeal is as-of-right. Having provided this right to all guilty plea defendants, the state should not effectively “fenc[e] out would-be appellants based solely on their inability to pay.” Second, the appellate court sits in an error-correction capacity and its determination as to whether to grant leave is based on the merits of that appeal – unlike *Ross*, which dealt with discretionary appeal to the state or federal court of last resort, where the decision to grant review is often based on factors external to the case, such as the general importance of the issues presented. Third, Michigan defendants seeking leave to appeal lack the benefit of a prior review by appellate counsel, whereas defendants seeking discretionary later-stage review have already had that benefit. These factors compel appointment of counsel to plea-convicted defendants seeking leave to appeal.

Justice Thomas, joined by Scalia and the Chief (as to all but one part), dissented. In their view, *Ross* governs because Michigan’s voters have decided that intermediate appellate review is discretionary, not as-of-right. Moreover, the Court’s decision will harm rather than help Michigan’s justice system (including defendants on the whole) because it will merely shift resources from cases more likely to be meritorious to those less likely to be so.

SENTENCING

The Court's decision on the Federal Sentencing Guidelines in *United States v. Booker* (04-104) and *United States v. Fanfan* (04-105) is probably the must-read criminal opinion of the year, generating two separate 5-4 majorities and numerous dissents, to which we cannot do justice in this limited space. Here's the extremely short version: The Sixth Amendment right to a jury trial applies to the Guidelines because they are binding on judges and thus have the force of law. But rather than maintain the Guidelines as modified by a jury trial requirement, the Court instead held that the Guidelines are now only advisory. District courts "must," however, consult the guidelines and "take them into account when sentencing," subject to appellate review for reasonableness.

Here's the longer version: Booker and Fanfan were convicted by juries of federal offenses, and the district judges found additional facts that, under the Guidelines, authorized harsher sentences than the facts found only by the jury. Relying on the Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), holding that Washington State's similar guidelines were subject to the Sixth Amendment, the Sixth Circuit found that Booker was entitled to either a new sentence based only on the jury verdict or a new sentencing hearing before a jury. For similar reasons, Fanfan's judge declined to follow the Guidelines and sentenced him only on the jury's verdict.

In the first of two majority opinions, Justice Stevens, joined by Scalia, Souter, Thomas and Ginsburg, found that the Sixth Amendment applies to the Guidelines because they are indistinguishable from the Washington scheme in *Blakely*. If the Guidelines were merely advisory, their use would not implicate the Sixth Amendment. But instead they have the force of law, and they rarely authorize downward departures based on facts found by judges – leading to mandatory sentences not authorized by verdicts and based on evidence never heard by a jury. That the Federal Sentencing Commission, and not Congress, promulgated the Guidelines was irrelevant to the Sixth Amendment inquiry, and a jury trial requirement for sentencing created no separation of powers concerns.

The second majority opinion, by Justice Breyer (with the Chief, O'Connor, Kennedy and Ginsburg), addressed what to do with the Guidelines in light of the first holding. The issue was whether Congress would prefer retaining the Guidelines with a new jury trial requirement or severing the incompatible provisions. Based on statutory language, the sheer complexity of a system using juries, and the fact that jury involvement would make it much harder to depart upward, the Court concluded that Congress would not want to retain the Guidelines with the Sixth Amendment grafted onto them. So severance of the incompatible provisions is necessary, and the provisions making the Guidelines mandatory are now history. But other parts of the sentencing statutes survive, so judges must still consider the Guidelines and other sentencing goals and impose sentences that reflect the seriousness of the offense and the need for punishment and deterrence. Moreover, the statutes still allow for sentencing appeals. The Court severed statutory provisions setting forth appellate standards of review (because they required *de novo* review of *any* downward departure), but found an implied standard of "unreasonableness" in the remaining statutory language and the need for "sound administration of justice."

So much for the majorities. Sadly, Justice Ginsburg, the *only* Justice common to both majorities, did not write her own opinion. Instead, Stevens and Breyer each dissented from the other's

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ruling. First, Justice Breyer (joined by the Chief, O'Connor and Kennedy) wrote that nothing in the Sixth Amendment barred a judge from determining the manner in which an offender committed his crime, and history does not support a right to a jury trial regarding sentencing facts. Moreover, the Stevens majority has deprived Congress of its constitutional authority to legislate regarding sentencing.

Not to be outdone, Justice Stevens, joined by Souter and Scalia (except for parts relying on legislative history), viewed the Breyer majority's "severance" remedy as a similarly "extraordinary exercise of authority" unauthorized by law. Severance usually follows a judicial determination that some statutory provision is unconstitutional and an effort to see if the rest of the statute can be saved. Here, however, the Court has determined that *some* unconstitutional applications of the Guidelines require the severance of two provisions that, by themselves, were clearly within Congress' power. This approach is so novel that no party or *amicus* even thought to ask for it, and it exceeds the Court's authority. Also, the Breyer majority's remedy will undermine Congress' goal of uniformity in sentencing. Stevens simply would have grafted the jury trial requirement onto the existing Guidelines – because so many cases plead out, and because so few convictions involve sentencing enhancements, the burden of a jury requirement would not be huge. Justice Scalia also dissented from the Breyer majority, noting that at least Stevens' approach was comprehensible. He decried the Breyer majority's implied "reasonableness" standard for sentencing appeals, which violates the principle that sentencing discretion is unreviewable without express statutory direction (and, after striking the only provision establishing an appellate standard, "only in Wonderland" could the Court concoct another one). Justice Thomas also dissented. Rather than invalidate any statutes on their face, Thomas would have treated these cases as "as applied" challenges. While the judicial factfinding in *Booker* was unconstitutional, it was "severable" from the constitutional application of the Guidelines to other defendants.

SPECIFIC FEDERAL OFFENSES

In one of the Court's most headline-grabbing rulings of the Term, the Court unanimously set aside Andersen's conviction for destroying documents related to the Enron debacle in *Arthur Andersen LLP v. United States (04-368)*. As set forth in the Chief's opinion for the Court, the basic facts are that after Andersen learned that Enron was in serious trouble, a number of Andersen partners and an in-house counsel reminded Andersen personnel to comply with Andersen's document retention policy. The policy provided for a central file that "should contain only that information which is relevant to supporting our work," thus calling for the destruction of other documents (but also calling for the preservation of documents in the event of litigation or a subpoena). In October 2001, when the SEC was informally investigating Enron but had not yet subpoenaed Andersen's records, Andersen employees shredded large numbers of documents. Based on the managerial reminders about the document retention policy, the Government indicted Andersen under 18 U.S.C. § 1512(b)(2)(A)-(B), which imposes criminal penalties on anyone who "*knowingly* uses intimidation or physical force, threatens, or *corruptly persuades* another person . . . with intent to . . . cause or induce any person to . . . to withhold testimony or withhold a record, document, or other object, from an official proceeding." The jury convicted Andersen based on the district court's instructions that it should convict Andersen for "corrupt persuasion" if it found that Andersen intended to "subvert, undermine or impede"

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the SEC's investigation. At the Government's request, the court omitted language from the Fifth Circuit's pattern jury instructions that defined "corruptly" as "knowingly and dishonestly." The court also told the jury that it could convict even if Andersen honestly believed that its conduct was lawful. The Fifth Circuit affirmed the conviction, holding that the jury instructions properly conveyed the meaning of "corruptly persuades" and that the jury did not need to find any consciousness of wrongdoing on Andersen's part.

The Court reversed unanimously, in an opinion that focused on the consciousness-of-guilt issue. The government argued that although the statute used the term "knowingly" in front of the list of proscribed activities, the word modified only "uses intimidation or force," not "corruptly persuades" further down in the list, because Congress would not employ "such an inelegant formulation as 'knowingly . . . corruptly persuades.'" The Court disagreed, noting its "[l]ong experience" with Congress' inelegance, and concluding that the statute's "most natural" reading was that "knowingly" modified the whole list. As a result, "[o]nly persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuade.'" The district court's instructions, by dropping language requiring dishonesty, diluted the meaning of "corruptly" so that it covered innocent conduct (earlier in the opinion, the Chief cited the example, among others, of a mother who suggests that her son invoke his Fifth Amendment rights with the police – she's technically impeding an investigation, but not dishonestly or wrongfully). The district court also wrongly led the jury to believe that it did not have to link the "persuasion" to destroy documents to a particular "official proceeding" – one cannot be a "knowingly corrupt persuader" if he does not seek to subvert some particular proceeding. So the conviction is reversed and the case is remanded, presumably for a new trial if the Government deems it worth the effort to retry a company that has effectively suffered the death penalty. This case definitely falls into the category of "moral victory only" for Andersen.

In another ruling favorable to defendants, *Shepard v. United States* (03-9168), the Court held that, under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 922(g)(1), district courts cannot consider police reports and complaint applications in determining whether a prior guilty plea admitted a "generic burglary conviction" that would qualify as a prior "violent felony" conviction. Under ACCA, individuals convicted of a felony involving a firearm who have three prior convictions for violent felonies or drug offenses must be sentenced to a mandatory minimum of 15 years. The Court previously held that only "generic burglary convictions" – those occurring in a building, and not in a car or boat – were intended to be encompassed as "violent felonies" under the Act. The issue in *Shepard* was determining what evidence a trial court can look at to decide whether a prior conviction was for "generic burglary" where the relevant statute was not limited to burglaries of buildings. The government argued that courts should consider police reports and complaint applications. Rejecting this approach, the Court held that "a later court determining the character of an admitted burglary is generally limited to examining the statutory definition [of the crime], charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."

The Court was somewhat splintered in its result. Justice Souter authored the opinion of the Court, which was joined in full by Stevens, Scalia and Ginsburg, and, in large part, by Thomas (the Chief did not participate). In *Taylor v. United States*, 495 U.S. 575 (1990), the Court had held that ACCA generally prohibits later courts from delving into the particular facts disclosed

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by the record of conviction, “thus leaving the court normally to ‘look only to the fact of conviction and the statutory definition of the prior offense.’” This interpretation of ACCA has been the law for 15 years, and Congress has not disturbed it, so the majority found no justification for upsetting the *Taylor* rule (it is a wee bit surprising that Scalia joined this part of the opinion given his strong dislike for the “dog that didn’t bark” method of ascertaining legislative intent). While *Taylor* involved a jury trial rather than a guilty plea, there was no compelling reason to treat these situations differently. Finally, if sentencing courts were permitted to look at the underlying record in a prior case, and to make a factual finding about whether the conviction was for a “generic burglary,” that inquiry could run afoul of the Sixth Amendment right to a jury trial – the same concerns animating the Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and, of course, ***Booker***.

Justice Thomas wrote separately to express his strong opinion that ACCA is unconstitutional because it violates a criminal defendant’s Sixth Amendment right to a jury trial. *Apprendi* and *Blakely* carved out an exception to this right to allow for judicial “factfinding that concerns a defendant’s prior convictions.” Thomas believes that this exception is unwarranted and that a majority of the Court would require that the prosecution bear the burden of proving the existence of prior convictions to a jury beyond a reasonable doubt. “Innumerable criminal defendants have been unconstitutionally sentenced . . . despite the fundamental ‘imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.’”

Justice O’Connor dissented, joined by Kennedy and Breyer. They would permit trial courts to determine the nature of a prior conviction based on any uncontradicted background documents – such as police reports and complaint applications. To find otherwise would “frustrate Congress’ scheme for punishing repeat violent offenders who violate federal gun laws” and undermine the uniform application of ACCA to all states. O’Connor (who opposed the decisions in *Apprendi* and its progeny) also expressed grave concern about expanding *Apprendi* to cover recidivism determinations: Such determinations raise few due process or jury trial concerns, and requiring prior convictions to be found by a jury would actually harm, rather than help, defendants because such evidence could bias the jury.

In ***Small v. United States (03-750)***, the Court held that an individual convicted of a crime in another country who subsequently purchases a gun in the United States cannot be prosecuted under 18 U.S.C. § 922(g)(1), which forbids possession of a firearm by anyone “convicted in *any* court” of a crime punishable by imprisonment for more than a year. Small was convicted in Japan of attempting to smuggle firearms and ammunition into the country and sentenced to five years. After returning to the United States, he purchased a gun and was ultimately charged and pled guilty under § 922(g)(1), while reserving his right to challenge the extraterritorial scope of the statute.

Justice Breyer delivered the opinion of the Court (joined by Stevens, Souter, O’Connor and Ginsburg – the Chief did not participate), finding that § 922(g)(1) was not intended to cover foreign convictions. Breyer noted that Congress likely did not consider this situation when drafting the statute; thus the use of “any” was not dispositive. Relying heavily on the fact that Congress “ordinarily legislates with domestic concerns in mind,” Breyer noted that while the

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presumption against extraterritorial application was not directly applicable, a similar presumption should apply because “convicted in any court” is a required element of the statute. Further, because other countries may criminalize conduct permissible (perhaps even desirable) under U.S. law, foreign convictions are less reliable indicators of dangerousness. In addition, if the statute encompassed foreign convictions, it would produce anomalies because certain exceptions, definitions, and specifications under the statute refer only to federal and state convictions. As a result, U.S. convictions for antitrust or business regulatory crimes would not bar gun ownership, while foreign convictions for the same conduct would. Similarly, U.S. convictions for misdemeanor crimes of domestic violence would bar gun ownership, while foreign convictions would not. These illustrations indicated that Congress failed to consider whether the generic phrase “convicted in any court” applied to foreign convictions.

Justice Thomas, joined by Scalia and Kennedy, authored a forceful dissent. In the event you haven’t already guessed their position, it’s “plain meaning”! The statute says “any court,” and it means *any* court. The dissent criticized the majority for “inventing” a new canon of statutory interpretation that “[the majority] terms ‘an ordinary assumption about the reach of domestically oriented statutes,’” in effect imposing a “clear statement” rule on Congress if it intends a statute to refer to something outside the United States. Further, the majority’s decision undermines the purposes of the statute by allowing dangerous individuals convicted in foreign courts to purchase guns. While the dissent recognized that its reading of the statute would lead to some results that are “at most, odd,” they are not absurd and do not warrant a departure from plain meaning.

While leading the dissent in *Small*, Justice Thomas penned the majority opinion (for the Chief, Stevens, O’Connor and Kennedy) in *Pasquantino v. United States* (03-725), holding that a plot to defraud Canada of tax revenues could fall under the federal wire fraud statute, 18 U.S.C. § 1343, which criminalizes the use of interstate wires “to defraud, or for obtaining money or property by means of false or fraudulent pretences, representations, or promises.” Pasquantino and two others were convicted for making interstate phone calls in order to smuggle large quantities of liquor into Canada without paying customs duties and taxes.

The Court first held that the defendants’ conduct technically violated the statute, as Canada’s right to receive tax revenue constitutes “property.” Next, the Court rejected Pasquantino’s argument that the common-law “revenue rule,” which precludes one nation from enforcing another nation’s revenue laws, required the Court to exempt frauds directed at evading foreign taxes. This prosecution was not barred because it was not an effort to collect foreign taxes, but rather “a criminal prosecution brought by the United States in its sovereign capacity to punish domestic criminal conduct.” While taxes might be collected and provided to Canada as victim compensation, the prosecution’s nexus with tax collection “was incidental and attenuated.” Further, even if prosecution would indirectly enforce Canadian tax laws, revenue rule cases relating to indirect enforcement were “not sufficiently well established to narrow the wire fraud statute in the context of this criminal prosecution.” The Court also rejected the notion that permitting enforcement under these circumstances could lead to international friction. The action was brought by the Executive, the sole organ of international relations, who is in the best position to evaluate the impact of prosecution. Finally, the Court found that its interpretation of the wire fraud statute *did not* give the law extraterritorial effect. The defendants used U.S. wires to execute a scheme to defraud. “Their offense was complete the moment they executed the scheme inside the United States: ‘the wire fraud statute punishes the scheme, not its success.’”

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The majority conceded that the prosecution in this case “may seem an odd use of the Federal Government’s resources,” but found that “the broad language of the wire fraud statute authorizes it to do so and no canon of statutory construction permits us to read the statute more narrowly.”

Justice Ginsburg, joined by Breyer, and by Scalia and Souter for Parts II and III, dissented. While the language of the wire fraud statute is broad, it should not be given “an exorbitant scope.” U.S. law explicitly addresses international smuggling in 18 U.S.C. § 546, providing for criminal enforcement of foreign customs laws *only* where the foreign nation reciprocally criminalizes smuggling into the United States, which Canada does not. It is unlikely that Congress intended to bypass this carefully crafted structure by permitting prosecutions under the generic wire fraud statute. There is also a treaty between the United States and Canada governing tax collection, which also would not provide for prosecution under these circumstances. For Ginsburg, the Court decision is “all the more troubling for its failure to take account of Canada’s primary interest in the matter at stake,” as Canadian courts are best positioned to decide whether Pasquantino actually violated its customs and revenue laws.

In Part I of her dissent (for Ginsburg and Breyer only), Ginsburg argues that the prosecution of Pasquantino and his colleagues is, in effect, an extraterritorial application of the wire fraud statute. Their guilt depended on their intent to violate Canadian law. But if no Canadian duty or tax existed, their actions would not have been unlawful. This dependence on Canadian law continued at sentencing, where the court determined the amount of loss by looking to the revenue supposedly lost by Canada. Absent some indicia of intent by Congress to encompass violations of foreign revenue laws under the wire fraud statute, the presumption against extraterritorial application requires a finding that the wire fraud statute does not apply to defendants conduct.

In Part II (where Scalia and Souter joined in), Ginsburg argues that the revenue rule also precludes construing the wire fraud statute so broadly. “[D]efendants’ conduct arguably fell within the scope of § 1343 only because of their purpose to evade Canadian customs and tax laws; shorn of that purpose, no other aspect of their conduct was criminal in this country.” It is therefore “unavoidably obvious” that this prosecution “directly implicates the revenue rule.” This point is reinforced by the fact that, at sentencing, the Government took the position that restitution should not be ordered under the Mandatory Victims Restitution Act (“MVRA”) because it would violate the revenue rule. While the Government changed its tune on appeal, the fact that it initially asked the trial court to overlook the MVRA out of concern for the revenue rule argues against the Government’s expansive reading of the statute. Finally, in Part III, the dissent argues that the rule of lenity also counsels against a broad construction of the wire fraud statute where its reach is ambiguous.

Small and ***Pasquantino*** were released on the same day, making them an interesting pair. Perhaps the biggest surprise: Scalia’s departure from plain language to join in the dissent in ***Pasquantino***.

Lastly, in ***Whitfield v. United States (03-1293)***, Justice O’Connor, writing for a unanimous Court, found that conviction for conspiracy to commit money laundering under 18 U.S.C. § 1956(h) does *not* require proof of an overt act in furtherance of the conspiracy. Before Congress enacted § 1956(h), money laundering conspiracies fell under the general conspiracy statute, 18 U.S.C. § 371, which does require proof of an overt act. Section 1956(h) provides that

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“[a]ny person who conspires to commit any offense defined in [§ 1956] shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.” Whitfield argued that this language was intended only to enhance the penalties available for money laundering conspiracies proven under § 371, not to establish a new substantive offense that omitted proof of an overt act. The Court rejected this argument, relying heavily on its decision in *United States v. Shabani*, 513 U.S. 10 (1994), in which it held that the drug conspiracy statute had no overt act requirement. First, Whitfield conceded that the language of § 1956, standing alone, was enough to establish a substantive offense for money laundering conspiracy – that is, § 371 was not needed as the basis for conviction. Second, the plain language of § 1956(h) did not support Whitfield’s interpretation, especially because conspiracies at common law did not require proof of an overt act – and *Shabani* made clear that Congress was presumed to adopt the common law meaning of statutory terms absent evidence to the contrary. Third, *Shabani* and other prior case law (of which the Congress was presumed to be aware) established that the Court would not infer an overt act requirement where none was expressly provided in the statute.

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