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Supreme Court Opinions: October 1997 Term

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ABSTRACT

This report provides a reference guide for Supreme Court opinions issued during the Court's 1997-1998 Term, which ended June 26, 1998. It contains brief summaries of all cases decided by signed opinion and of a few additional *per curiam* decisions. Voting alignments of Justices are identified, and a subject index is appended.

Supreme Court Opinions October 1997 Term

Summary

This report contains synopses of Supreme Court decisions issued from the beginning of the October 1997 Term through the end of the Term on June 26, 1998. The purpose is to provide a quick reference guide for identification of cases of interest. These synopses are created throughout the Term and entered into the CRS Home Page on the Internet, and into the *Scorpio* database. The report supersedes an earlier cumulation issued as a general distribution memorandum dated March 20, 1998. Included are all cases decided by signed opinion and selected cases decided *per curiam*. Not included are other cases receiving summary disposition and the many cases in which the Court denied review. Each synopsis contains a summary of the Court's holding, and most contain a brief statement of the Court's rationale. In addition, the date of decision is indicated, and cites to *United States Law Week* and West's *Supreme Court Reporter* are provided if available. Following each synopsis the vote on the Court's holding is indicated in bold typeface, and authors of the Court's opinion and of any concurring and dissenting opinions, along with the Justices who joined those opinions, are identified. Cases are listed alphabetically, and a subject index is appended.

Supreme Court Opinions

October 1997 Term

Air Line Pilots Ass'n v. Miller 118 S. Ct. 1761, 66 USLW 4416 (5-26-98)

Railway Labor Act, agency shop: When a union covered by the Railway Labor Act adopts an arbitration process as a means of affording procedural protections to nonunion workers who object to the calculation of the agency fee they must pay to the union, the agency-fee objectors need not pursue and exhaust the arbitration remedy before challenging the union's calculation in federal court. Ordinarily, arbitration is a matter of contract, and a party that has not agreed to arbitrate cannot be required to submit a dispute to arbitration. The fact that the Air Line Pilots Association established the arbitration remedy as a means of complying with the Court's decision in *Teachers v. Hudson* (1986) does not mean that exhaustion must be required. Indeed, *Hudson's* emphasis on a speedy remedy might be undercut by exhaustion. Difficulties that could result from holding a federal court adjudication without a preparatory arbitration proceeding to flesh out issues may be avoided through “conscientious management of the pretrial process.” And the interest in avoiding multiple proceedings does not outweigh “objectors' resistance to arbitration to which they did not consent.”

7-2. Opinion of Court by Ginsburg, joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, and Thomas. Dissenting opinion by Breyer, joined by Stevens.

Alaska v. Native Village of Venetie Tribal Gov't 118 S. Ct. 948, 66 USLW 4145 (2-25-98)

Alaska Native Claims Settlement Act: Lands received by a Native corporation pursuant to the Alaska Native Claims Settlement Act are not within “Indian country” as defined by 18 U.S.C. § 1151. That provision, enacted in 1948, codified case law interpretations that had held that non-reservation land could qualify as “dependent Indian communities” within “Indian country” if two requirements were met: the land must have been set aside by the Federal Government for use by Indians as Indian land, and it must remain under federal superintendence. The Tribe's ANCSA lands do not satisfy either of these requirements. ANCSA, aimed at effecting Native self-determination, departed from the traditional practice of setting aside Indian lands. ANCSA not only revoked existing reservations, but also transferred reservation lands to private, state-chartered Native corporations without any significant restraints on alienation or use. Because non-Natives may own former reservation lands, and because the Native corporation may use them for non-Indian purposes, the federal set-aside requirement is not met. “Equally clearly, ANCSA ended federal superintendence over the Tribe's lands.” Neither ANCSA's “minimal” land-related protections nor the Federal Government's provision of social welfare assistance rises to the level of active control and effective guardianship characteristic of federal superintendence.

9-0. Opinion for unanimous Court by Thomas.

Allentown Mack Sales & Service v. NLRB 118 S. Ct. 818, 66 USLW 4100 (1-26-98)

Labor, review of NLRB decision: The NLRB’s standard that makes employer polling an unfair labor practice unless the employer had a “good faith reasonable doubt” about the union’s majority support is facially rational and consistent with the National Labor Relations Act. However, the Board’s factual finding that Allentown Mack lacked such a doubt is not supported by substantial evidence on the record as a whole. The Board’s adoption of the same “reasonable doubt” standard for employer initiation of a Board-supervised election, for unilateral withdrawal of recognition, and for employer polling, is not so irrational as to be arbitrary or capricious under the Administrative Procedure Act. A rational fact finder could not have concluded, however, that Allentown Mack lacked reasonable, good-faith grounds to doubt that the union enjoyed the continuing support of a majority of unit employees, and for this reason the Board’s decision was not supported by “substantial evidence.” “Doubt” means “uncertainty,” and information presented to the employer — 7 of 32 unit employees said they did not support the union and others voiced the opinion that most employees did not support the union — created a reasonable uncertainty about support for the union. Board precedents discounting unverified assertions by one employee about other employees’ preferences provide no justification for the Board’s refusal to weigh the probative value of the assertions in establishing the existence of the employer’s good-faith reasonable doubt.

5-4. Opinion of Court by Scalia, joined in part (reasonable doubt standard) by Stevens, Souter, Ginsburg, and Breyer; and joined in separate part (substantial evidence) by Rehnquist, O’Connor, Kennedy, and Thomas. Opinion by Rehnquist, concurring in part and dissenting in part, joined by O’Connor, Kennedy, and Thomas. Opinion by Breyer, concurring in part and dissenting in part, joined by Stevens, Souter, and Ginsburg.

Almendarez-Torres v. United States 118 S. Ct. 1219, 66 USLW 4213 (3-24-98)

Definition of crime, specificity of indictment, Due Process: Subsection (b)(2) of 8 U.S.C. § 1326 does not define a separate crime, but instead is a penalty provision that authorizes enhancement of a sentence for a recidivist. Subsection (a) makes it a crime punishable by up to two years’ imprisonment for an alien who has been deported to reenter the United States. Subsection (b)(2) provides that, “in the case of any alien described in [subsection (a)] . . . whose deportation was subsequent to conviction for commission of an aggravated felony, such alien shall be fined . . . , imprisoned not more than 20 years, or both.” Because subsection (b)(2) does not define a crime, the fact of earlier felony conviction is not an element of a crime that must be set forth in an indictment for violation of § 1326. Whether statutory language defines a crime or instead sets forth sentencing factors is ordinarily a matter of congressional intent. Here, various indications make it “reasonably clear” that Congress intended subsection (b)(2) to set forth sentence enhancement. The “relevant statutory subject matter” — recidivism — “is as typical a sentencing factor as one might imagine.” The original language of subsection (b), added by amendment in 1988, along with the title of the 1988 amendments, support this interpretation. A 1990 amendment that changed the language to parallel that of subsection (a) was merely a “housekeeping measure” not intended to effect substantive change. Moreover, the legislative history of the 1988 amendment speaks only about creation of new penalties. The doctrine of “constitutional

doubt,” requiring that a statute be construed in such a way as to avoid “grave doubts” as to its constitutionality, is inapplicable. Here “the interpretative circumstances point significantly in one direction” on the issue of whether the Constitution requires that a fact that substantially increases the maximum permissible punishment for a crime be charged in the indictment and found beyond a reasonable doubt by a jury. The Constitution does not require Congress to treat recidivism as an element of an offense. Although not all of the elements of the test set forth in *McMillan v. Pennsylvania* (1986) are satisfied, the fact that subsection (b)(2) increases a maximum penalty does not tip the scales against constitutionality.

5-4. Opinion of Court by Breyer, joined by Rehnquist, O'Connor, Kennedy, and Thomas. Dissenting opinion by Scalia, joined by Stevens, Souter, and Ginsburg.

Arkansas Educ. Television Comm'n v. Forbes 118 S. Ct. 1633, 66 USLW 4360 (5-18-98)

First Amendment, public broadcasting, candidate debate: The decision of a public television broadcaster to exclude a candidate from participation in a televised candidate debate did not violate that candidate's First Amendment rights. Although public broadcasting as a general matter is not subject to First Amendment “public forum” analysis, candidate debates present the narrow exception to the rule. Candidate debates differ from other public programming because the purpose is to present the candidates' views rather than the broadcaster's, and because of the “exceptional significance” of debates in the electoral process. However, the debate cannot be classified either as a traditional public forum (property traditionally open to assembly and debate) or as a designated public forum (a government-created forum open to a designated class of speakers). Instead, the debate was a “nonpublic forum” for First Amendment purposes — a forum open to a designated class of persons who must also be individually screened by the government. Exclusion of a person from a nonpublic forum may not be based on the speaker's viewpoint, but otherwise need only be “reasonable in light of the purpose of the property.” That test was met in this case — the candidate was excluded “not because of his viewpoint, but because he had generated no appreciable public interest.” It was a reasonable exercise of journalistic discretion to determine that inclusion of all ballot-qualified candidates might undermine the value of the debates.

6-3. Opinion of Court by Kennedy, joined by Rehnquist, O'Connor, Scalia, Thomas, and Breyer. Dissenting opinion by Stevens, joined by Souter and Ginsburg.

AT&T v. Central Office Tel., Inc. 118 S. Ct. 1956, 66 USLW 4483 (6-15-98)

Preemption, Communications Act, filed-rate doctrine: Two state law claims, one for breach of contract and the other a derivative claim for tortious interference with contractual relations, are preempted by the filed-rate doctrine embodied in section 203(a) of the Communications Act. Section 203(a) requires carriers to file tariffs (“schedules”) “showing all charges” and “showing the classifications, practices, and regulations affecting such charges.” It is unlawful for a carrier to extend to any person any privileges, or to employ any practices affecting charges, that are not specified in the tariff. In this case the respondent, a purchaser of “bulk” communications services from the petitioner long-distance provider, alleged that the petitioner had failed to provide various service, provisioning, and billing options that had been promised, but that had not been set forth in the tariff. Under the filed-rate doctrine, however, a carrier cannot be held to promised rates or services that conflict with the published tariff. In this context, services cannot be separated from rates; rates take on

meaning only through identification of the services to which they are attached. And in this case the claims related to provisioning and billing cannot be distinguished from the claims for additional services because the tariff did not require the provisioning and billing treatment that was allegedly promised.

7-1. Opinion of Court by Scalia, joined by Rehnquist, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Concurring opinion by Rehnquist. Dissenting opinion by Stevens. O'Connor did not participate.

Atlantic Mut. Ins. Co. v. Commissioner 118 S. Ct. 1413, 66 USLW 4256 (4-21-98)

Taxation, Federal; deference to administrative interpretation: The Commissioner's interpretation of the term "reserve strengthening," as used in the Tax Reform Act of 1986 to except certain amounts from an exclusion made available to property and casualty insurers, is reasonable. Because the term "reserve strengthening" was not defined in the Act, and had no established meaning either in the property and casualty insurance industry or in prior legislation, an administrative interpretation that is "reasonable" must be upheld. The Commissioner's determination that the term encompasses any increase in reserves, and is not limited to increases that result from changes in the methods or assumptions used to compute them, is reasonable. The term is broad enough to encompass all increases in reserves, "for whatever reason and from whatever source." The petitioner's hypothetical allegedly illustrating the possibility of absurd results is "unrealistic."

9-0. Opinion for unanimous Court by Scalia.

Baker v. General Motors Corp. 118 S. Ct. 657, 66 USLW 4060 (1-13-98)

Full Faith and Credit: A judicial decree approving a settlement agreement between two parties to civil litigation cannot determine evidentiary issues arising in a lawsuit initiated in another state by parties who were not covered by the decree, and raising issues the merits of which were not considered in the first proceeding. The Full Faith and Credit Clause does not require that the first state's decree be given such preclusive effect. Thus, a Michigan decree approving a settlement between General Motors Corp. and a former employee, in which the employee agreed not to testify against G.M. in any litigation involving G.M., does not prevent a Missouri court from requiring the former employee's testimony in a product liability action brought by plaintiffs who were not involved in the Michigan litigation. The Michigan decree could operate to prevent the former employee from volunteering his testimony in such an action, but cannot prevent the Missouri court from subpoenaing the employee's testimony.

9-0. Opinion of Court by Ginsburg, joined by Rehnquist, Stevens, Souter, and Breyer. Concurring opinions by Scalia; and by Kennedy, joined by O'Connor and Thomas.

Bates v. United States 118 S. Ct. 285, 66 USLW 4006 (11-4-97)

Criminal law, intent to injure or defraud: Specific intent to injure or defraud someone is not an element of the crime of misapplication of funds proscribed by 20 U.S.C. § 1097(a). At the time of the offenses charged in this case, that provision made it a felony for anyone "knowingly and willfully" to misapply student loan funds insured under Title IV of the Higher Education Act of 1965, and did not contain an explicit "intent to defraud" state of mind requirement. Moreover, because § 1097(d) does contain such a requirement, it is presumed that Congress intended a different interpretation of the two provisions. Section 1097(a) does not penalize every unauthorized transaction and thereby set a trap

for the unwary, but instead “catches only the transgressor who intentionally exercises unauthorized dominion over federally insured student loan funds for his own benefit or for the benefit of a third party.” The rule of lenity is inapplicable, since nothing in the text, structure, or history of the provision warrants importation of an intent to defraud requirement.

9-0. Opinion for a unanimous Court by Ginsburg.

Bay Area Laundry Pension Fund v. Ferbar Corp. of Cal. 118 S. Ct. 542, 66 USLW 4051 (12-15-97)

Multiemployer pensions, withdrawal liability, statute of limitations: The six-year statute of limitations governing withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1451(f)(1), does not begin to run on the date an employer withdraws from a pension plan, but instead begins when an employer fails to make a payment on the schedule set by the fund. By its terms, the limitations period runs from “the date on which the cause of action arose.” This language incorporates the standard rule that the period commences when the plaintiff has a “complete and present cause of action.” A pension plan cannot maintain an action against an employer until several things have happened. First, the plan trustees must calculate the employer's debt, set a schedule for installment payments, and demand payment, and then the employer must default on a scheduled payment. At this point, when the employer misses a scheduled payment, the plan can sue, and consequently this is when the statute of limitations begins to run. An action filed more than six years after an installment was due is barred as to that installment, but is not barred as to subsequent installments that were due within the six-year period.

9-0. Opinion for unanimous Court by Ginsburg.

Beach v. Ocwen Federal Bank 118 S. Ct. 1408, 66 USLW 4263 (4-21-98)

Truth in Lending Act, rescission: A borrower in a consumer credit transaction may not assert a right of rescission under the Truth in Lending Act as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction. The Act creates a right of rescission if the lender fails to provide the borrower with a clear disclosure of credit terms, but provides in section 1635(f) that this right “shall expire” after three years. This “plain language” does not create a statute of limitation applicable only to the initiation of an action, but instead cuts off the right altogether. The provision “talks not of a suit's commencement but of a right's duration.” The Act's different treatment of recoupment or set-off claims, expressly permitted as a defense to an action to collect the debt after the applicable limitations period has run on damages actions, suggests a purposeful distinction. Treating rescission differently from recoupment “makes perfectly good sense, . . . since a statutory right of rescission could cloud a bank's title on foreclosure.”

9-0. Opinion for unanimous Court by Souter.

Bogan v. Scott-Harris 118 S. Ct. 966, 66 USLW 4163 (3-3-98)

Immunity from suit, local legislators: Local officials performing legislative functions are entitled to the same absolute immunity from civil liability under

42 U.S.C. § 1983 as are federal, state, and regional legislators. The common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and this was the understanding at the time section 1983 was enacted. The rationales for such immunity are fully applicable to local legislators: their exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of liability. The challenged actions in this case — a city council member’s vote for an ordinance that eliminated the respondent’s office and the mayor’s approval of that ordinance and introduction of a budget — were legislative in nature. Even though the mayor was an executive official, his actions “were legislative because they were integral steps in the legislative process.” It is “not consonant with our scheme of government for a court to inquire into the motives of legislators.”

9-0. Opinion for unanimous Court by Thomas.

Bousley v. United States 118 S. Ct. 1604, 66 USLW 4346 (5-18-98)

Habeas corpus, procedural default: A prisoner who has procedurally defaulted on his claim by failing to raise an issue on direct appeal may nonetheless pursue the issue in a habeas action if he can first demonstrate cause, actual prejudice, or actual innocence. In this case, a claim of actual innocence may be predicated on an incorrect understanding, by court, prosecution, and defense counsel, as to the scope of 18 U.S.C. § 924(c), which penalizes use of a firearm during commission of a drug trafficking offense. In 1995, the Supreme Court in *Bailey v. United States* interpreted this provision as requiring the government to show “active employment” of the firearm, yet the petitioner’s 1990 guilty plea had not been based on that understanding, and he did not raise that issue on direct appeal. A guilty plea must be knowing and intelligent. If the petitioner can establish that his guilty plea was based on misinformation about the elements of a section 924(c) offense, then his plea was constitutionally invalid. Petitioner’s claim is not barred under *Teague v. Lane* as being based on a “new rule” of constitutional law, since the requirement that a guilty plea be knowing and intelligent is not “new.” The Court’s 1995 interpretation of the statute stands on a different footing, since it creates the significant risk that a defendant has been convicted of an act that the law does not make criminal. This case is remanded to allow the petitioner to try to make a showing of actual innocence — *i.e.*, that it is more likely than not that no reasonable juror would have voted to convict him had the law been properly explained.

7-2. Opinion of Court by Rehnquist, joined by O’Connor, Kennedy, Souter, Ginsburg, and Breyer. Opinion by Stevens concurring in part and dissenting in part. Dissenting opinion by Scalia, joined by Thomas.

Bragdon v. Abbott 66 USLW 4601 (6-25-98)

Americans with Disabilities Act, HIV infection: A person who has tested positive for HIV virus but who is asymptomatic is covered by the Americans with Disabilities Act (ADA). HIV infection is a “disability,” defined by the ADA as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” Due to the immediacy with which the virus begins to damage a person's white blood cells and the severity of the disease, it constitutes an “impairment” from the moment of infection. Reproduction is a “major life activity,” since “reproduction and the sexual dynamics surrounding it are central to the life process itself.” The respondent's HIV infection “substantially limited” her reproductive activity because of the risk of infecting partner and child. This holding is consistent with settled administrative and judicial interpretations of the Rehabilitation Act prior to enactment of the ADA. Enactment of statutory language that has been given a settled interpretation generally indicates the intent to incorporate that settled interpretation. A separate issue is whether the petitioner dentist was justified in refusing to treat the respondent because her condition “pose[d] a direct threat to the health or safety of others.” This risk assessment by a health care professional must be based on the objective, scientific information available to him and others in his profession. The case is remanded so that this standard may be applied.

5-4. Opinion of Court by Kennedy, joined by Stevens, Souter, Ginsburg, and Breyer. Concurring opinions by Stevens, joined by Breyer; and by Ginsburg. Opinion by Rehnquist, concurring in part (on “direct threat” issue) and dissenting in part (on principal issue), joined by Scalia and Thomas, and joined in part by O'Connor. Opinion by O'Connor concurring in part and dissenting in part.

Breard v. Greene 118 S. Ct. 1352, 66 USLW 3684 (4-14-98)

Habeas corpus, international relations: The petition for an original writ of habeas corpus from the Supreme Court and for a stay of execution pending resolution of Paraguay's action against the United States in the International Court of Justice is denied. By not raising the issue in state court proceedings, the petitioner defaulted on his claim that the Vienna Convention on Consular Relations was violated when arresting authorities failed to inform him that, as a foreign national, he had the right to contact the Paraguayan Consulate. The Convention does not trump the procedural default doctrine. On the contrary, the general principle of international law that procedural rules of the forum state (nation) govern implementation of a treaty in that state is embodied in the Vienna Convention itself. Moreover, the Antiterrorism and Effective Death Penalty Act, enacted in 1996, supersedes the Convention to the extent of conflict. The AEDPA denies an evidentiary hearing to a habeas petitioner who failed to develop the factual basis of his claim in state court proceedings. Paraguay's suit against Virginia officials seeking to set aside the criminal conviction is not authorized by the Convention, and is also barred by the Eleventh Amendment. Neither Paraguay nor its Consul General is authorized to bring suit under 42 U.S.C. § 1983.

6-3. *Per curiam.* Concurring opinion by Souter. Dissenting opinions by Stevens, Breyer, and Ginsburg.

Brogan v. United States 118 S. Ct. 805, 66 USLW 4111 (1-26-98)

Criminal law, false statements, “exculpatory no”: There is no exception to liability under 18 U.S.C. § 1001 for a false statement that consists of the mere denial of wrongdoing — the so-called “exculpatory no.” The plain language of the provision admits of no such exception. By its terms, § 1001 prohibits making “any false, fictitious or fraudulent statements or representations” in any matter within the jurisdiction of a federal department or agency. The word “no” in response to a question makes a “statement” that, if false, brings the utterance within the coverage of the prohibition. Section 1001 is not limited to those falsehoods that pervert governmental functions, and, in any event, it would be difficult to argue that falsely denying guilt in a government investigation does not pervert a governmental function. The Fifth Amendment right to remain silent does not comprehend the right to lie. The potential for prosecutorial abuse of § 1001 is an issue best addressed by Congress. Although application of background interpretive principles of assumed legislative intent sometimes leads to a narrowing of the terms of a criminal statute, there is no general principle that allows courts to interpret every criminal statute more narrowly than it is written. The Supreme Court is not bound to apply a consensus that has developed among the courts of appeals.

7-2. Opinion of Court by Scalia, joined by Rehnquist, O’Connor, Kennedy, and Thomas, and joined in part by Souter. Concurring opinions by Souter; and by Ginsburg, joined by Souter. Dissenting opinion by Stevens, joined by Breyer.

Bryan v. United States 118 S. Ct. 1939, 66 USLW 4475 (6-15-98)

Statutes, interpretation, “willful” violation: A defendant who knew that his conduct was unlawful may be convicted under 18 U.S.C. § 924 of “willfully” dealing in firearms without a federal license even though he was unaware of the federal licensing requirement. The statute as amended in 1986 penalizes “knowingly” violating specified sections, and “willfully” violating others, including dealing in firearms without a license. “Knowingly” does not necessarily have any reference to a culpable state of mind or to knowledge of the law, but instead merely requires proof of knowledge of the facts that constitute the offense. “Willfully,” on the other hand, requires knowledge that the conduct is unlawful. It does not, however, require that a defendant have particularized knowledge of the specific provision under which he is charged. Such particularized knowledge may be required if a “highly technical” statute might otherwise ensnare an individual engaged in apparently innocent conduct, but that danger is not present in this case. Contrary statements by bill opponents during debate on the legislation are not a reliable guide to interpretation. No uniform interpretation emerged from cases interpreting “willfulness” requirements of related provisions.

6-3. Opinion of Court by Stevens, joined by O’Connor, Kennedy, Souter, Thomas, and Breyer. Concurring opinion by Souter. Dissenting opinion by Scalia, joined by Rehnquist and Ginsburg.

Buchanan v. Angelone 118 S. Ct. 757, 66 USLW 4075 (1-21-98)

Death penalty, mitigating evidence, jury instruction: The Eighth Amendment does not require that a capital sentencing jury be instructed on the concept of mitigating evidence generally, or on particular statutory mitigating factors. Virginia’s “pattern capital sentencing instruction” was constitutionally sufficient. That instruction permits the jury to fix the penalty at death if jurors find beyond a reasonable doubt that the defendant’s conduct in committing the

crime was “vile,” but allows the jury to opt for life imprisonment “if you believe from all the evidence that the death penalty is not justified.” In the selection phase of sentencing, complete jury discretion is constitutionally permissible. Although the pattern instruction contained no reference to mitigating evidence, it did not foreclose the jury’s consideration of relevant mitigating evidence. In the context of this case, in which the jury heard two days of testimony about the defendant’s family background and mental and emotional problems, “there is not a reasonable likelihood that the jurors . . . understood the challenged instructions to preclude consideration of relevant mitigating evidence.”

6-3. Opinion of Court by Rehnquist, joined by O’Connor, Scalia, Kennedy, Souter, and Thomas. Concurring opinion by Scalia. Dissenting opinion by Breyer, joined by Stevens and Ginsburg.

Burlington Industries, Inc. v. Ellerth 66 USLW 4634 (6-26-98)

Sexual harassment, employment: An employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer under Title VII of the Civil Rights Act without showing that the employer is negligent or otherwise at fault for the supervisor's actions. The employer may, however, raise an affirmative defense. Labeling such claims as “hostile work environment” claims rather than as “*quid pro quo*” claims does not settle the vicarious liability issue, and Title VII's general language prohibiting discrimination does not reach that level of specificity. Because the Act defines “employer” to include an “agent” of the employer, the general common law of agency, as reflected in the Restatement (Second) of Agency, provides some guidance. Agency law recognizes vicarious liability for misuse of supervisory authority, but it is not always clear that the agency relationship aids a supervisor's sexual harassment of an employee when no tangible employment action (e.g., discharge, demotion, or undesirable reassignment) is taken. Agency principles of vicarious liability and Title VII's “equally basic principles of encouraging forethought by employers and saving action by objecting employees” may be harmonized by a rule imposing vicarious liability on an employer for such sexual harassment of an employee by a supervisor, but allowing the employer to assert an affirmative defense. That defense has two components: that the employer exercised “reasonable care” to prevent and promptly correct any sexually harassing behavior, and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities.” Proof that the employer had implemented an anti-harassment policy with a complaint procedure is not always necessary, but proof that an employee failed to use an available complaint procedure “will normally suffice to satisfy the employer's burden under the second element of the defense.” The case is remanded for application of these principles.

7-2. Opinion of Court by Kennedy, joined by Rehnquist, Stevens, O'Connor, Souter, and Breyer. Concurring opinion by Ginsburg. Dissenting opinion by Thomas, joined by Scalia.

Calderon v. Ashmus 118 S. Ct. 1694, 66 USLW 4382 (5-26-98)

Justiciability, Declaratory Judgment Act: State death-row inmates may not sue state officials under the Declaratory Judgment Act to determine whether a state qualifies under Chapter 154 of the Antiterrorism and Effective Death Penalty Act for certain procedural advantages in federal habeas corpus proceedings. Such an action does not present a case or controversy, and hence is not justiciable within the meaning of Article III. The underlying

“controversy” is whether the respondent is entitled to federal habeas relief setting aside his sentence or conviction, yet he sought no such final or conclusive determination in this case. Instead, the respondent sought a declaratory judgment as to the validity of a defense that the state may, or may not, raise in a habeas proceeding. If the respondent files a habeas petition, and the state asserts Chapter 154, then the state's qualification to assert Chapter 154 may be litigated at that time.

9-0. Opinion for unanimous Court by Rehnquist. Concurring opinion by Breyer, joined by Souter.

Calderon v. Thompson 118 S. Ct. 1489, 66 USLW 4301 (4-29-98)

Habeas corpus, death penalty, federal courts of appeals: The U.S. Court of Appeals for the Ninth Circuit abused its discretion in *sua sponte* recalling its mandate denying habeas corpus relief to a state prisoner in order to consider an *en banc* rehearing. Although the terms of the Antiterrorism and Effective Death Penalty Act do not govern this case, an appeals court must exercise its discretion in a manner consistent with the objects of that Act, and also must be guided by the general principles underlying habeas corpus jurisprudence. An appeals court abuses its discretion in such cases unless its action is necessary to avoid a “miscarriage of justice.” A “miscarriage of justice” occurs only if a petitioner asserting actual innocence can show that it is more likely than not that no reasonable juror would have convicted him in light of new evidence presented in his petition, or if a petitioner challenging a death penalty can show by clear and convincing evidence that upon consideration of the new evidence no reasonable juror would have found him eligible for the death penalty. Unless the petitioner can make one of these requisite showings, “the State's interests in actual finality outweigh the prisoner's interest in obtaining yet another opportunity for review.” In this case the petitioner, who had been convicted of both rape and murder and sentenced to death, and who challenged his rape conviction, failed to satisfy either test.

5-4. Opinion of Court by Kennedy, joined by Rehnquist, O'Connor, Scalia, and Thomas. Dissenting opinion by Souter, joined by Stevens, Ginsburg, and Breyer.

California v. Deep Sea Research, Inc. 118 S. Ct. 1464, 66 USLW 4286 (4-22-98)

Eleventh Amendment, Abandoned Shipwreck Act: The Eleventh Amendment does not bar a federal admiralty court from asserting *in rem* jurisdiction over a shipwreck that the State does not actually possess. Earlier cases, reflecting the “special concern” in admiralty that maritime property in possession of the sovereign not be seized, are distinguished. On the other hand, cases involving the sovereign immunity of the United States do provide guidance. The principle that actions *in rem* to enforce a lien against property of the United States are barred only if the actual possession of the United States must be invaded to sustain the proceeding is applicable to the States as well. The issue of whether the wreck of the *S.S. Brother Jonathan* is “abandoned” within the meaning of the Abandoned Shipwreck Act is left for reconsideration on remand, with the clarification that the meaning of “abandoned” under the ASA conforms with its meaning under admiralty law. The issue of whether the ASA preempts application of California's statutory claim to ownership of abandoned shipwrecks is also not decided.

9-0. Opinion for unanimous Court by O'Connor. Concurring opinions by Stevens; and by Kennedy, joined by Ginsburg and Breyer.

Campbell v. Louisiana 118 S. Ct. 1419, 66 USLW 4258 (4-21-98)

Standing; discrimination in selection of grand jurors: A white criminal defendant has standing to raise equal protection and due process challenges alleging discrimination against black persons in the selection of grand jurors. Under Louisiana's system, the judge chooses the foreperson from the grand jury venire before the remaining members of the grand jury are chosen by lot. The foreperson has the same full voting powers as the other grand jury members. The case, therefore, must be treated as one alleging discriminatory selection of grand jurors, and not merely discriminatory selection of a grand jury foreperson. The requirements for "third-party standing" to raise an equal protection challenge are met. An accused suffers a significant injury in fact when the composition of the grand jury that indicts him is tainted by racial discrimination; in this case the possible injury is all the greater because alleged discrimination by the judge calls into question the judge's impartiality. A white defendant can be an effective advocate for excluded black grand jurors, since the defendant, if successful, can have his conviction overturned. Also, excluded grand jurors have "economic disincentives" to assert their own rights. A white defendant in Louisiana also has standing to raise a due process challenge to the appointment of a grand jury member. *Hobby v. United States* (1984), involving appointment of a federal grand jury foreperson from among already-appointed grand jurors, is not controlling. It is the foreperson's performance as a grand juror in voting to charge the suspect with a crime, not his performance of his duty to preside, that implicates principles of fundamental fairness that underlie due process.

7-2 (equal protection); 9-0 (due process). Opinion of Court by Kennedy, joined by Rehnquist, Stevens, O'Connor, Souter, Ginsburg, and Breyer; and joined in part by Thomas and Scalia. Opinion by Thomas, joined by Scalia, concurring in part and dissenting in part.

Caron v. United States 118 S. Ct. 2007, 66 USLW 4511 (6-22-98)

Statutes, interpretation, enhanced sentencing: Under federal law, a convicted felon may not possess a firearm, and an offender with three violent felony convictions receives an enhanced sentence. If the offender has had his civil rights restored, however, a conviction is not counted as a predicate for sentence enhancement, "unless such . . . restoration expressly provides that the person may not . . . possess . . . firearms." 18 U.S.C. § 921(a)(20). In this case the defendant, charged under the federal law with possession of rifles and shotguns, had three violent felony convictions in Massachusetts, and his civil rights had been restored. He was permitted by Massachusetts law to possess rifles or shotguns, but the law forbade him to possess handguns outside his home. The handgun restriction activates the "unless" clause, making the Massachusetts convictions count for purposes of sentence enhancement. The class of criminals who may not possess firearms includes those forbidden to have some guns but not others. It does not matter that the guns the offender possessed were ones that Massachusetts permitted him to have. Although state law is the source for restoration of other civil rights, it does not follow that state law governs the "unless" clause. To so hold would thwart "a likely, and rational, congressional policy" of providing "a single, national, protective policy broader than required by state law."

6-3. Opinion of Court by Kennedy, joined by Rehnquist, Stevens, O'Connor, Ginsburg, and Breyer. Dissenting opinion by Thomas, joined by Scalia and Souter.

Cass County v. Leech Lake Band of Chippewa Indians 118 S. Ct. 1904, 66 USLW 4453 (6-8-98)

Native Americans, state taxation of former reservation lands: State and local governments may impose *ad valorem* taxes on reservation land that was made alienable by Congress, sold to non-Indians by the Federal Government, and later repurchased by a tribe. When Congress removes Indian reservation land from federal protection by making that land freely alienable, as it did in this case through the Nelson Act, it manifests an unmistakably clear intent to render such land subject to state and local taxation. This is so whether the land is conveyed to Indians or to non-Indians. The repurchase of such alienated land by an Indian tribe does not cause the land to reassume tax-exempt status. Such a result would render partially superfluous section 465 of the Indian Reorganization Act, by which the Secretary of the Interior may acquire land that is to be held in trust for a tribe and exempt from state and local taxation.

9-0. Opinion for unanimous Court by Thomas.

City of Chicago v. International College of Surgeons 118 S. Ct. 523, 66 USLW 4041 (12-15-97)

Federal courts, removal jurisdiction: A case filed in state court containing claims that local administrative action violates federal law, but also containing state law claims for on-the-record review of the administrative findings, may be removed to federal court. The respondents raised federal constitutional challenges to Chicago's Landmarks Ordinance and to the manner in which the Landmarks Commission conducted the administrative proceedings, and hence the action qualifies for removal under 28 U.S.C. § 1441(a) as a civil action over which federal district courts have original jurisdiction. Under 28 U.S.C. § 1367(a), the district court could also exercise supplemental jurisdiction over the accompanying state law claims because they are "so related to [the federal claims] that they form part of the same case or controversy." The state and federal questions "derive from the same nucleus of operative fact." The state law claims need not qualify as "civil actions" within a district court's original jurisdiction in order to fall within the court's supplemental jurisdiction. Nor is there any necessary exception to supplemental jurisdiction for claims that require on-the-record review of state or local administrative proceedings.

7-2. Opinion of Court by O'Connor, joined by Rehnquist, Scalia, Kennedy, Souter, Thomas, and Breyer. Dissenting opinion by Ginsburg, joined by Stevens.

City of Monroe v. United States 118 S. Ct. 400, 66 USLW 3351 (11-17-97)

Voting Rights Act, preclearance: Preclearance under section 5 of the Voting Rights Act was not mandated for a 1990 Georgia statute amending the City of Monroe's charter and continuing in effect a requirement that mayors be elected by majority vote. Preclearance had already been obtained for a 1968 statute that allowed municipalities to continue to elect officials by a plurality vote if their charters so provided, but that set a default rule requiring majority vote in all other cities. The 1968 default rule applied to the City of Monroe. Prior to 1966 Monroe had no charter provision specifying plurality vote, and a 1966 charter amendment purporting to require majority vote was not precleared and hence did not take effect. Consequently, the 1968 default rule required Monroe to implement majority vote, and the 1990 law requiring majority vote effected no change in voting practices necessitating preclearance. The Court's 1980 decision in *City of Rome v. United States* dealt with different circumstances: the City of Rome did have a pre-existing charter provision specifying election by

plurality vote, the 1968 statute had preserved that provision, but there had been no preclearance.

7-2. *Per curiam*. Concurring opinion by Scalia. Dissenting opinions by Souter, joined by Breyer; and by Breyer, joined by Souter.

Clinton v. City of New York 66 USLW 4543 (6-25-98)

Line Item Veto Act, standing to sue, Presentment Clause: The Line Item Veto Act, which gives the President the authority to cancel the legal force or effect of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In exercising his cancellation authority to cancel a provision of the Balanced Budget Act of 1997 directing waiver by the Federal Government of recoupment of certain Medicaid payments from the State of New York, and to cancel a provision of the Taxpayer Relief Act allowing owners of food refiners and processors to defer recognition of gain if they sold stock to eligible farmers cooperatives, the President in effect amended the two laws by repealing a portion of each. The cancellation authority cannot be justified as a “return” of legislation within the meaning of Article I, § 7. That constitutional return is of the entire bill, and takes place before the bill becomes law. By contrast, the statutory return applies to part of a bill rather than the whole bill, and takes place after the bill becomes law. *Field v. Clark* (1892), in which the Court upheld provisions of the Tariff Act of 1890 directing the President to suspend tariff exemptions upon making specified findings, is distinguishable. Unlike the Tariff Act's suspension authority, the Line Item Veto Act's cancellation authority is not limited to situations arising after enactment, and the President is not required to exercise the authority upon making the requisite findings. Whenever the President cancels a spending measure or tax benefit, he is rejecting rather than implementing Congress' policy judgment. Nor can cancellation authority be justified as falling within the President's traditional authority to decline to spend appropriated funds. The Line Item Veto Act, unlike various discretionary spending measures, “gives the President the unilateral power to change the text of duly enacted statutes.” The plaintiffs in these two actions — the City of New York, a hospital, two hospital associations, and two unions in the one case, and a farmers' cooperative and one of its individual members in the other case — have standing to challenge the cancellations. The Act's authorization to “any individual adversely affected” should be construed broadly to apply not only to individuals, but also to corporations and other entities. The plaintiffs also alleged actual injury sufficient to confer standing.

6-3. Opinion of Court by Stevens, joined by Rehnquist, Kennedy, Souter, Thomas, and Ginsburg. Opinion by Scalia, concurring in part (on standing) and dissenting in part (on merits), joined by O'Connor, and joined in part by Breyer. Dissenting opinion by Breyer, joined in part by O'Connor and Scalia.

Cohen v. De La Cruz 118 S. Ct. 1212, 66 USLW 4209 (3-24-98)

Bankruptcy, debts obtained by fraud: Section 523(a)(2)(A) of the Bankruptcy Code exempts from discharge in bankruptcy all liability arising from fraud. This includes liability for punitive damages (in this case treble damages) and for attorney's fees and costs. The provision applies to “any debt . . . for money, property, [or] services . . . to the extent obtained by . . . fraud.” The “most straightforward reading” is that punitive as well as compensatory damages are covered. “Debt” plainly encompasses treble damages, and the phrase “to the extent obtained by” modifies “money, property,” etc., and not “any debt.” The

petitioner's argument that "debt for" is used only in the restitutionary sense, is refuted by the meaning of the same phrase in parallel provisions of the Code, by the history of the fraud provision in successive iterations of the Bankruptcy Code, and by the fact that restitution for the value of the property fraudulently obtained could in some cases fail to prevent even a compensatory recovery for losses occasioned by fraud.

9-0. Opinion for unanimous Court by O'Connor.

County of Sacramento v. Lewis 118 S. Ct. 1708, 66 USLW 4407 (5-26-98)

Due Process, high-speed police chase: A police officer does not violate the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. In this context, only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation. The Fourth Amendment does not provide an explicit textual source of constitutional protection that must be relied upon under these circumstances as an alternative to substantive due process analysis. The police chase constituted neither a "search" nor a "seizure" under the Fourth Amendment. The Due Process Clause protects individuals against arbitrary governmental action, but it is "only the most egregious official conduct" that can be said to be "arbitrary" or "conscience shocking." Context may determine whether conduct is sufficiently egregious. In a prison setting, for example, continuing and deliberate indifference to the basic human needs of prisoners may trigger liability, but a higher standard of fault than deliberate indifference is required when a prisoner's claim arises not from normal custody, but instead from actions taken to suppress a prison riot. A "sudden" police chase is analogous to reaction to a prison riot. In both situations, "unforeseen circumstances demand an officer's instant judgment." "High-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under [42 U.S.C.] § 1983."

9-0. Opinion of Court by Souter, joined by Rehnquist, O'Connor, Kennedy, Ginsburg, and Breyer. Concurring opinions by Rehnquist; by Kennedy, joined by O'Connor; by Breyer; by Stevens; and by O'Connor.

Crawford-El v. Britton 118 S. Ct. 1584, 66 USLW 4293 (5-4-98)

Unconstitutional motive cases, burden of proof: A plaintiff in a civil rights action under 42 U.S.C. § 1983 alleging improper motive by a government official in violating his constitutional rights need not present “clear and convincing evidence” of that improper motive in order to defeat a motion for summary judgment. The U.S. Court of Appeals for the District of Columbia Circuit erred in constructing such a rule. This heightened burden of proof is not required by the Court's holding in *Harlow v. Fitzgerald* (1982), recognizing a defense of qualified immunity for certain government officials. *Harlow* related only to the scope of an affirmative defense, and provides no support for changing the plaintiff's burden of proving a constitutional violation. Judicial revision of the law to bar claims that depend on proof of an official's motive is not warranted. There is no support in the text of 42 U.S.C. § 1983 or in other statutes, in the Federal Rules of Civil Procedure, or in the common law, for imposing the clear and convincing burden of proof on plaintiffs in improper motive actions. Congress has already addressed problems stemming from the increasing number of frivolous civil rights actions filed by prison inmates, and the Prison Litigation Reform Act draws no distinction between constitutional claims that require proof of improper motive and those that do not. Presumably Congress will address the matter if it sees a compelling need to do so.

5-4. Opinion of Court by Stevens, joined by Kennedy, Souter, Ginsburg, and Breyer. Concurring opinion by Kennedy. Dissenting opinions by Rehnquist, joined by O'Connor; and by Scalia, joined by Thomas.

Dooley v. Korean Air Lines 118 S. Ct. 1890, 66 USLW 4457 (6-8-98)

Death on the High Seas Act: Relatives of persons killed on the high seas may not recover under general maritime law for the pre-death pain and suffering of the victims. The Death on the High Seas Act (DOHSA) authorizes survivor actions, but limits damages to pecuniary losses. DOHSA thus expresses Congress' judgment that there should be no recovery for pre-death pain and suffering in cases of death on the high seas. The Court had already held in *Zicherman v. Korean Air Lines* (1996) that relatives of persons killed in the downing of KAL flight 007 in 1983 could not maintain an action for loss of society under state law or under general maritime law, and the same principles apply to these actions, which arose out of the same incident.

9-0. Opinion for unanimous Court by Thomas.

Eastern Enterprises v. Apfel 66 USLW 4566 (6-25-98)

Due Process, Takings, retroactive legislation: The Coal Industry Retiree Health Benefit Act of 1992 is unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal industry who had worked for Eastern prior to 1966. Eastern left the coal business in 1965 by transferring its coal-related operations to a subsidiary. There was no opinion of the Court. Four Justices (O'Connor, Rehnquist, Scalia, and Thomas) viewed the imposition of liability on Eastern as a violation of the Takings Clause, and one (Kennedy) viewed it as a violation of substantive due process.

5-4. Opinion by O'Connor, announcing the Court's judgment, joined by Rehnquist, Scalia, and Thomas. Concurring opinions by Thomas and by Kennedy. Dissenting opinions by Stevens, joined by Souter, Ginsburg, and Breyer; and by Breyer, joined by Stevens, Souter, and Ginsburg.

Edwards v. United States 118 S. Ct. 1475, 66 USLW 4293 (4-28-98)

Sentencing: A judge sentencing for drug possession and conspiracy under 21 U.S.C. §§ 841 and 846 need not rely on the jury's findings or assumed findings as to which drugs were involved, but instead may make an independent determination. The Sentencing Guidelines require the sentencing judge, not the jury, to determine both the kind and the amount of the drugs at issue in a drug conspiracy. The judge need not premise sentencing, therefore, on the assumption that only cocaine and not crack cocaine was involved, simply because the jury failed to differentiate between the two in returning a general guilty verdict after being instructed to determine whether the conspiracy involved “measurable amounts of cocaine or cocaine base [crack cocaine].” Moreover, the Guidelines instruct the sentencing judge to base a sentence on the drug-conspiracy offender's “relevant conduct,” and “relevant conduct” is defined to include not only the conduct that constitutes the offense of conviction, but also other conduct that “is part of the same course of conduct or common plan.” In any event, the sentences imposed in this case were within the statutory limits for a cocaine-only conspiracy.

9-0. Opinion for unanimous Court by Breyer.

Faragher v. City of Boca Raton 66 USLW 4643 (6-26-98)

Sexual harassment, employment: An employer can be held vicariously liable under Title VII of the Civil Rights Act for the acts of a supervisor whose sexual harassment of subordinates has created a hostile work environment. The employer, however, may assert the affirmative defense announced in *Burlington Industries v. Ellerth, supra*. The employer must establish that it exercised “reasonable care” to prevent and promptly correct any sexually harassing behavior, and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities.” There is no basis for remand under the facts of this case, which involves the sexual harassment of female lifeguards by their male supervisors. “[A]s a matter of law, . . . the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct.” The record establishes that the City “entirely failed to disseminate its policy against sexual harassment among the beach employees,” and that its officials “made no attempt to keep track of the conduct” of the lifeguards' supervisors.

7-2. Opinion of Court by Souter, joined by Rehnquist, Stevens, O'Connor, Kennedy, Ginsburg, and Breyer. Dissenting opinion by Thomas, joined by Scalia.

FEC v. Akins 118 S. Ct. 1777, 66 USLW 4426 (6-1-98)

Standing to sue, campaign finance law: Voters seeking information have standing to sue to obtain judicial review of the Federal Election Commission's dismissal of their complaint alleging that the American Israel Public Affairs Committee (AIPAC) was a “political committee” required to disclose information about its members, contributions, and expenditures. The Federal Election Campaign Act authorizes “any person “ who believes a violation of the Act has occurred to file a complaint with the Commission, and provides that “any party aggrieved” by a Commission order dismissing its complaint may obtain judicial review. The test for “prudential” standing is met because the language of the statute and the nature of the injury lead to the conclusion that “Congress intended to authorize this kind of suit.” History associates the word “aggrieved” with a congressional intent to “cast the standing net broadly.” Moreover, the injury of which the voters complain — their failure to obtain

relevant information — falls within the “zone of interests” protected by the statute. The three tests for standing under Article III are also satisfied. There is “injury in fact,” since the alleged inability to obtain information that the statute allegedly requires AIPAC to make public is both concrete and particular. Cases on taxpayer standing do not necessarily control voter standing. Moreover, the fact that the voters asserted a “generalized grievance” shared in substantially equal measure by all or a large class of citizens does not preclude a finding of injury in fact if the harm alleged is “concrete” and “specific” rather than “abstract.” The harm asserted is “fairly traceable” to the FEC’s decision even though that decision was discretionary; a discretionary agency decision may be challenged as being based on an improper legal ground. The alleged injury is also “redressable” by a court. The issue on the merits is remanded so that the FEC can consider application of new “membership organization” rules.

6-3. Opinion of Court by Breyer, joined by Rehnquist, Stevens, Kennedy, Souter, and Ginsburg. Dissenting opinion by Scalia, joined by O’Connor and Thomas.

Feltner v. Columbia Pictures Television 118 S. Ct. 1279, 66 USLW 4245 (3-31-98)

Jury trial, copyright damages: Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, “in a sum of not less than \$500 or more than \$20,000 as the court considers just,” does not grant the right to a jury trial on the amount of statutory damages. The Seventh Amendment, however, does require a jury determination of the amount of statutory damages. It is not “fairly possible” to give section 504(c) a construction that avoids the Seventh Amendment issue. The word “court” in section 504 (c) appears to mean judge, not jury. The section provides, for example, that “if the court finds” that an infringement was willful or innocent, “the court in its discretion” may increase or decrease the amount of statutory damages. The Act’s other remedies provisions use the word “court” to refer to a judge rather than a jury. The provision authorizing recovery of actual damages confers the right to a jury trial, but does not use the word “court.” Finally, section 504(c) lacks other language ordinarily associated with jury trials. The Seventh Amendment, which preserves the right to jury trial in “suits at common law,” has been interpreted as requiring jury trial in actions to enforce statutory rights that are analogous to common law actions that were brought in courts of law, as opposed to equity or admiralty courts. In England, copyright suits for monetary damages were tried in courts of law, and that practice was continued in this country, both at common law, in the Copyright Act of 1790, and in later copyright laws. Section 504(c) statutory damages are not equitable in nature. The Seventh Amendment, therefore, provides a right to a jury trial if the copyright owner elects to recover statutory damages.

9-0. Opinion of Court by Thomas, joined by Rehnquist, Stevens, O’Connor, Kennedy, Souter, Ginsburg, and Breyer. Concurring opinion by Scalia.

Fidelity Financial Services v. Fink 118 S. Ct. 651, 66 USLW 4057 (1-13-98)

Bankruptcy, perfection of lien: A Missouri law that treats an automobile loan as having been “perfected” on the date of its creation if the creditor files the necessary papers within 30 days of when the debtor takes possession does not extend the 20-day period for perfection of a security interest prescribed by § 547(c)(3)(B) of the Bankruptcy Code. The federal law provides that certain transfers may not be avoided by a bankruptcy trustee if the security interest is “perfected on or before 20 days after the debtor receives possession of such property.” Section 537(e)(1)(B) of the Code provides that a transfer of property

“is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.” The text, structure, and history of the provisions lead to the conclusion that the federal law’s 20-day period controls. The terms “when” and “cannot acquire” in § 537(e)(1)(B) appear to be references to time and action in the real world, rather than to turning back the clock for legal purposes. A related provision of the Bankruptcy Code that subordinates various powers of trustees — but not section 547 powers — to state relation-back laws, creates the negative implication that Congress did not intend section 547 powers to be so subordinated. 1994 amendments that extended the perfection period from 10 to 20 days would have accomplished very little if perfection could have been effected anyway under state relation-back laws. An isolated statement made during floor debate on the 1994 amendments, and addressing related areas of law, carries little persuasive force.

9-0. Opinion for unanimous Court by Souter.

Forney v. Apfel 118 S. Ct. 1984, 66 USLW 4497 (6-15-98)

Social Security Act; appeals, final judgments: A Social Security disability claimant seeking court reversal of an agency decision denying benefits may appeal a district court order remanding the case to the agency for further proceedings. Under the terms of the Social Security Act’s judicial review provision, 42 U.S.C. § 405(g), such an order is an appealable “final judgment” within the meaning of 28 U.S.C. § 1291. Section 405(g) provides that a judgment of a district court in a social security case affirming, modifying, or reversing the agency’s decision, “with or without remanding the cause for a rehearing,” “shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.” The Court had previously held in *Sullivan v. Finkelstein* (1990) that the Government could appeal from a remand order, and there is no basis in the statute for distinguishing an appeal by a disability claimant. The fact that the district court granted some, but not all, of the requested relief does not preclude appeal; a party is “aggrieved” and ordinarily can appeal a decision granting in part and denying in part the requested remedy.

9-0. Opinion for unanimous Court by Breyer.

Foster v. Love 118 S. Ct. 464, 66 USLW 4015 (12-2-97)

Congressional elections, Louisiana “open primary”: A Louisiana statute that provides for an “open primary” in October for election of Members of Congress and that provides that any candidate receiving a majority of the vote in that primary “is elected,” conflicts with the federal law, 2 U.S.C. §§ 1 and 7, that provides for a uniform federal election day in November, and is void to the extent of conflict. “[A] contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day . . . clearly violates § 7.” Both the Louisiana law and the federal law regulate the time of holding elections, and the Constitution provides that in such circumstances federal law supersedes inconsistent state law. Article I, § 4, cl. 1 gives states the authority to prescribe the “times, places, and manner” of holding elections for Senators and Representatives, but provides that Congress may at any time “make or alter such regulations.”

9-0. Opinion of Court by Souter, joined in full by Rehnquist, Stevens, O’Connor, Ginsburg, and Breyer; and joined in part by Scalia, Kennedy, and Thomas.

Gebser v. Lago Vista Indep. School Dist. 118 S. Ct. 1989, 66 USLW 4501 (6-22-98)

Sex discrimination, implied private action, damages: A school district may not be held liable for damages in an implied private action under Title IX of the Education Amendments of 1972 for the sexual harassment of a student by one of the district's teachers unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct. The school district's failure to promulgate and publicize an effective grievance procedure for sexual harassment claims does not establish the requisite actual notice and deliberate indifference. The parameters of an implied right of action should be fashioned in a manner that is consistent with statutory structure and purpose. It would frustrate the purposes of Title IX to permit a damages recovery against a school district based on principles of *respondeat superior* or constructive notice. The fact that Title IX is a spending measure that places conditions on the receipt of federal funds makes it especially important to ensure that the recipient entity has notice that it can be liable for a monetary award. There are also "clues" in Title IX that Congress did not intend to allow vicarious liability. An administering agency may not bring an enforcement action unless the appropriate person has been notified of the failure to comply and the agency has determined that compliance cannot be secured by voluntary means. The apparent purpose of these limitations is to avoid diverting education funding from beneficial uses if a recipient was unaware of discrimination in its programs and is willing to take corrective actions.

5-4. Opinion of Court by O'Connor, joined by Rehnquist, Scalia, Kennedy, and Thomas. Dissenting opinions by Stevens, joined by Souter, Ginsburg, and Breyer; and by Ginsburg, joined by Souter and Breyer.

Geissal v. Moore Medical Corp. 118 S. Ct. 1869, 66 USLW 4445 (6-8-98)

ERISA, health plan continuation coverage: ERISA, as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), authorizes a beneficiary of an employer's group health plan to obtain continued coverage under the plan following termination of employment. Under 29 U.S.C. § 1162(2)(D), the employer may cancel this continuation coverage on "the date on which the qualified beneficiary first becomes, after the date of the election," covered under another plan. In this case the employer offered continuation coverage to a terminated employee, and the employee accepted that coverage. Six months later, however, the employer, relying on section 1162(2)(D), canceled coverage after discovering that, on the date of election, the employee had already been covered by a group health plan provided through his wife's employer. The lower courts erred in ruling for the employer. The "plain meaning" of the provision governs. Because the employee was already covered under another plan before he made his COBRA election, he did not "first become" covered after the date of election, and the provision is inapplicable.

9-0. Opinion for unanimous Court by Souter.

General Electric Co. v. Joiner 118 S. Ct. 512, 66 USLW 4036 (12-15-97)

Evidence, standard of review, expert scientific evidence: Abuse of discretion is the proper standard by which an appeals court should review a district court's decision to admit or exclude expert scientific testimony. The Court of Appeals for the Eleventh Circuit erred in applying "a particularly stringent standard of review" to the district court's exclusion of expert testimony. The same abuse of discretion standard applies to appellate review of rulings excluding expert

scientific evidence that applies to rulings allowing such testimony. No more searching standard of review applies when the evidentiary rulings lead to summary judgment and are “outcome determinative.” The district court did not abuse its discretion in disallowing expert testimony drawing conclusions from animal and epidemiological studies. The animal studies, under which infant mice were injected with massive doses of PCBs, were “dissimilar” to the facts here alleged, that workplace exposure to PCBs caused human cancer. The epidemiological studies were also flawed. However, because the appeals court reversed the district court's ruling that the respondent had not been exposed to furans and dioxins, issues remain for resolution by the lower courts.

9-0 (standard of review); **8-1** (application of standard). Opinion of Court by Rehnquist, joined by O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Concurring opinion by Breyer. Opinion by Stevens concurring in part and dissenting in part.

Gray v. Maryland 118 S. Ct. 1151, 66 USLW 4202 (3-9-98)

Sixth Amendment, co-defendant's confession: Use of a co-defendant's out-of-court confession in a joint trial violates the defendant's Sixth Amendment right to cross examine witnesses even if a blank space or the word “deleted” is substituted for the defendant's name in the confession, and even if the judge instructs the jury to use the confession only against the co-defendant, and not against the defendant. The protective rule announced in *Bruton v. United States* (1968) — not the exception to *Bruton* recognized in *Richardson v. Marsh* (1987) — applies. *Bruton* was premised on the belief that an extrajudicial statement by a co-defendant naming the defendant is so prejudicial that limiting instructions to the jury cannot work. In *Richardson*, the confession was redacted to eliminate not only the defendant's name, but also any reference to his existence. This case, by contrast, involves a confession that refers directly to the existence of the non-confessing defendant. Such statements, “considered as a class, so closely resemble *Bruton's* unredacted statements that . . . the law must require the same result.” The jury will often realize that the confession refers specifically to the defendant, and the jury instruction not to consider the confession against the defendant will provide an obvious reason for the redaction. Although *Richardson* made an exception to *Bruton* for statements that incriminate inferentially, the exception is not so broad. *Richardson's* inferences did not refer directly to the defendant, and became incriminating only when linked with evidence introduced later in the trial.

5-4. Opinion of Court by Breyer, joined by Stevens, O'Connor, Souter, and Ginsburg. Dissenting opinion by Scalia, joined by Rehnquist, Kennedy, and Thomas.

Hetzl v. Prince William County 118 S. Ct. 1210, 66 USLW 3618 (3-23-98)

Seventh Amendment, remittitur, right to jury: The action of the Court of Appeals in ordering the district court to enter a judgment for reduced damages in a civil case without allowing the plaintiff the option of a new trial violated the plaintiff's Seventh Amendment right to trial by jury. When an appeals court affirms on the basis of liability but orders the damages award set aside as grossly excessive, the plaintiff has a right either to accept the reduced award or to have a new trial.

9-0. *Per curiam.*

Hohn v. United States 118 S. Ct. 1969, 66 USLW 4489 (6-15-98)

Habeas corpus: The Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1) to review decisions of the courts of appeals denying applications for

certificates of appealability from final orders in habeas corpus proceedings. Under the Antiterrorism and Effective Death Penalty Act, state prisoners may appeal denial of a habeas petition only by filing a certificate of appealability that makes a substantial showing of denial of a constitutional right. Such a certificate application is reviewable as a “case in the court of appeals” within the meaning of section 1254(1). The application seeks relief for the immediate and redressable injury of wrongful detention, and other requisite qualities of a “case,” e.g., adversity, are present. *House v. Mayo* (1945), holding that the Court lacked jurisdiction to review refusals to grant certificates of probable cause, is overruled.

5-4. Opinion of Court by Kennedy, joined by Stevens, Souter, Ginsburg, and Breyer. Concurring opinion by Souter. Dissenting opinion by Scalia, joined by Rehnquist, O'Connor, and Thomas.

Hopkins v. Reeves 118 S. Ct. 1895, 66 USLW 4449 (6-8-98)

Eighth Amendment, jury instruction: In a trial for the capital offense of felony murder, the Nebraska trial court did not err in refusing to instruct the jury on second-degree murder and manslaughter. The rule announced by the Court in *Beck v. Alabama* (1980), requiring instruction on available lesser included offenses, is inapplicable. Under Nebraska law, second degree murder and manslaughter are not lesser included offenses of felony murder. The Alabama death penalty statute at issue in *Beck* prohibited instructions on lesser included offenses even though such instructions were generally available in non-capital cases, and left the jury with only two options: acquittal, or conviction of a crime for which the jury was required to impose the death penalty. Nebraska did not treat capital cases differently from non-capital cases, its jury did not have the responsibility of imposing sentence, and the three-judge panel that did impose the sentence had an alternative of imposing life imprisonment. The constitutional requirement that a death penalty be based on a finding of a culpable mental state with respect to the killing does not require instruction on lesser offenses, since the required finding may be made at sentencing.

8-1. Opinion of Court by Thomas, joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer. Dissenting opinion by Stevens.

Hudson v. United States 118 S. Ct. 488, 66 USLW 4024 (12-10-97)

Double Jeopardy, civil penalties and debarment: Administrative proceedings that imposed monetary penalties and occupational debarment on bank officials for violation of federal banking laws were civil, not criminal, in nature, so subsequent criminal prosecutions for the same conduct were not barred by the Double Jeopardy Clause. The correct approach was set forth in *United States v. Ward* (1980); the analytical approach employed in *United States v. Halper* (1989) is disavowed. The Clause protects only against the imposition of multiple *criminal* penalties, and *Halper* omitted this initial inquiry. Also, the *Halper* Court did not evaluate the statute on its face. Here, Congress expressly provided that the money penalties are “civil,” and conferral of debarment authority on an administrative agency is indication that Congress intended that sanction to be civil. Neither sanction is so punitive in form or effect as to render it criminal despite Congress' intent to the contrary; under *Ward*, only the “clearest proof” will suffice to override congressional intent. The sanctions do not involve an “affirmative disability or restraint,” and neither sanction is predicated on a finding of scienter. Neither the fact that the conduct for which

the sanctions are imposed may also be criminal, nor the fact that the sanctions serve a deterrent effect, is sufficient to render the sanctions criminal.

9-0. Opinion of Court by Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas. Concurring opinions by Scalia, joined by Thomas; by Stevens; by Souter; and by Breyer, joined by Ginsburg.

Jefferson v. City of Tarrant 118 S. Ct. 481, 66 USLW 4019 (12-9-97)

Supreme Court, jurisdiction, “final” judgments: The Supreme Court lacks jurisdiction to review the decision of the Alabama Supreme Court on the petitioner's claim under 42 U.S.C. § 1983 because that decision is not yet “final” within the meaning of 28 U.S.C. § 1257(a). The Alabama Supreme Court decided the federal law issue on an interlocutory certification from the trial court, and then remanded the case for further proceedings on remaining state law claims. Because disposition of the state law claims may moot the federal question, the decision on the federal claim is not yet “final” for purposes of Supreme Court review. The case “presents the typical situation in which the state courts have resolved some but not all of the petitioner's claims,” and does not fit within the exception recognized in *Pennsylvania v. Ritchie* (1987).

8-1. Opinion of Court by Ginsburg, joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer. Dissenting opinion by Stevens.

Kalina v. Fletcher 118 S. Ct. 502, 66 USLW 4031 (12-10-97)

Immunity from suit, prosecutors: A prosecutor is not absolutely immune from suit for damages under 42 U.S.C. § 1983 for making false statements of fact in an affidavit supporting an application for an arrest warrant. The prosecutor in this action in Washington state court commenced a criminal proceeding by filing three documents: an unsworn information, a motion for an arrest warrant, and a “certification” for determination of probable cause. The certification summarized the evidence supporting the charge, and contained the prosecutor's personal attestation, under penalty of perjury, to the truth of the facts set forth. The prosecutor's activities in connection with the preparation and filing of the information and the motion for an arrest warrant, and indeed in connection with the preparation and filing of the certification, were all part of her traditional advocacy function, and are protected by absolute immunity. The prosecutor's act in personally attesting to the truth of the factual statements in the certification, however, was “an act that any competent witness might have performed,” and is not protected by absolute immunity. The prosecutor may be sued for damages under § 1983 to the extent that she performed the function of a complaining witness rather than the role of a professional advocate.

9-0. Opinion for unanimous Court by Stevens. Concurring opinion by Scalia, joined by Thomas.

Kawaauhau v. Geiger 118 S. Ct. 974, 66 USLW 4167 (3-3-98)

Bankruptcy, dischargeable debt: A debt arising from a medical malpractice judgment based on negligent or reckless conduct does not fall within the exception created by section 523(a)(6) of the Bankruptcy Code for debts arising from “willful and malicious injury by the debtor.” The debt is therefore dischargeable. Exceptions to discharge should be confined to those clearly expressed. The word “willful” in § 523(a)(6) modifies the word “injury,” thus indicating that nondischargeability requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. It is therefore intentional torts, not negligent or reckless torts, that fall within the exception.

9-0. Opinion for unanimous Court by Ginsburg.

Kiowa Tribe of Oklahoma v. Manufacturing Technologies 118 S. Ct. 1700, 66 USLW 4384 (5-26-98)

Immunity from suit, Indian tribes: Indian tribes are not subject to suit in state court for breaches of contract involving off-reservation commercial conduct. Indian tribes enjoy broad immunity from suit on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. An Indian tribe is subject to suit only if Congress has authorized the suit or if the tribe has waived its immunity. The Court rejects the respondent's request to limit immunity to on-reservation transactions and to governmental activity. While there are reasons to doubt the wisdom of perpetuating the doctrine of tribal immunity, Congress rather than the Court should determine whether to limit its scope. Congress has occasionally authorized limited classes of suits against tribes, but has not yet authorized suits based on contract.

6-3. Opinion of Court by Kennedy, joined by Rehnquist, O'Connor, Scalia, Souter, and Breyer. Dissenting opinion by Stevens, joined by Thomas and Ginsburg.

LaChance v. Erickson 118 S. Ct. 753, 66 USLW 4073 (1-21-98)

Due Process; public employment: Neither the Civil Service Reform Act nor the Due Process Clause of the Fifth Amendment precludes a federal agency from taking adverse action against an employee who made false statements in response to an underlying charge of misconduct. In *Bryson v. United States* (1969), the Court described a citizen's options in responding to a governmental inquiry: "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." A government employee has the same options. If an agency's investigatory question could expose the employee to a criminal prosecution, the employee may exercise his Fifth Amendment right to remain silent. Here the employees had a protected property interest in their employment, and consequently had a due process right to notice and a meaningful opportunity to be heard. The right to be heard, however, does not include a right to make false statements with respect to the charged conduct.

9-0. Opinion for unanimous Court by Rehnquist.

Lewis v. United States 118 S. Ct. 1135, 66 USLW 4194 (3-9-98)

Assimilative Crimes Act: The Assimilative Crimes Act (ACA) does not make Louisiana's first-degree murder statute applicable to the murder of a child on an Army base in Louisiana. Rather, the federal murder statute, 18 U.S.C. § 1111, governs such crimes. The ACA, 18 U.S.C. § 13(a), criminalizes "any act or omission . . . not made punishable by any enactment of Congress, [but which] would be punishable if committed or omitted within the jurisdiction of the State" in which a federal enclave is located. A literal reading of "any enactment" would "dramatically separate the statute from its intended purpose" of filling gaps in federal criminal law. If a particular "act" constitutes both assault and murder, for example, a federal prohibition on assault should not preclude the possibility of applying state murder law. Therefore, if there is a federal law that punishes the conduct in question, a court must ask the further question "whether the federal statutes that apply . . . preclude application of the state law in question." This question is phrased in terms of legislative intent — "whether the federal law indicates an intent to punish conduct such as the

defendant's to the exclusion of the particular state statute at issue.” In this case the answer is “yes.” Although the federal law does not, as Louisiana's law does, make murder of a child a category of first degree murder, the federal statute nonetheless covers all variants of murder, and provides for an extremely broad range of possible sentences. “There is no gap for Louisiana's statute to fill.” The case is remanded for resentencing based on the federal Sentencing Guidelines.

8-1. Opinion of Court by Breyer, joined by Rehnquist, Stevens, O'Connor, Souter, and Ginsburg. Concurring opinion by Scalia, joined by Thomas. Dissenting opinion by Kennedy.

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach 118 S. Ct. 956, 66 USLW 4158 (3-3-98)

Federal courts, case assignment: A federal district court conducting pretrial proceedings on a case transferred for that purpose by the Judicial Panel on Multidistrict Litigation has no authority under 28 U.S.C. § 1404(a) to transfer the case to itself for trial. That provision contains general authority for a district court to transfer a case in the interest of justice and for the convenience of the parties. However, 28 U.S.C. § 1407(a), the section that authorizes the Panel to transfer cases for coordinated or consolidated pretrial proceedings, provides that “[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred.” This is mandatory language. Its “plain command” must be given effect, even though the Panel has a longstanding practice permitting transferee courts to self assign cases. The age of an administrative practice “is no antidote to clear inconsistency with a statute.” Further arguments favoring self assignment are similarly unavailing. “With a straightforward application ready at hand, statutory interpretation has no business getting metaphysical.”

9-0. Opinion of Court by Souter, joined in full by all Justices except Scalia, who joined in part.

Lunding v. New York Tax Appeals Tribunal 118 S. Ct. 766, 66 USLW 4080 (1-21-98)

Privileges and Immunities Clause, discriminatory taxation: A New York law that effectively denies only nonresident taxpayers an income tax deduction for alimony paid violates the Privileges and Immunities Clause of Art. IV, § 2. New York has not adequately justified the discriminatory treatment of nonresidents. The Privileges and Immunities Clause requires substantial equality of treatment for resident and nonresident taxpayers. A state must have a “substantial reason” for treating nonresident and resident taxpayers differently, and any such discrimination must bear a “substantial relationship” to the state’s objective. A state may limit nonresidents’ deductions of various business and non-business expenses based on the relationship of those expenses to in-state property or income, but a state may not deny nonresidents a general tax exemption provided to residents. Also, the fact that deductions do not relate to business expenses, or may be characterized as relating to “personal expenses,” is not a “substantial reason” for treating residents and nonresidents differently. New York allows nonresidents to make pro rata deductions for personal expenses other than alimony, and offers no substantial justification for treating alimony differently. Moreover, the provision does not further New York’s “income splitting” policy, under which one resident taxpayer’s alimony deduction is offset by another resident taxpayer’s reporting of that amount as income. New York disallows the entire alimony expenses of nonresidents

without regard to whether recipients of the alimony will pay New York income tax on amounts received.

6-3. Opinion of Court by O'Connor, joined by Stevens, Scalia, Souter, Thomas, and Breyer. Dissenting opinion by Ginsburg, joined by Rehnquist and Kennedy.

Miller v. Albright 118 S. Ct. 1428, 66 USLW 4266 (4-22-98)

Citizenship, naturalization: A due process challenge to section 309 of the Immigration and Nationality Act is rejected, but with no Court majority agreeing as to rationale. Section 309 distinguishes between an illegitimate child born abroad to an alien mother and a citizen father, and an illegitimate child born abroad to an alien father and a citizen mother. Citizenship is established at birth for the child of the citizen mother, but the child of the citizen father must obtain formal proof of paternity by age 18 in order to establish citizenship. A child subject to section 309's proof of paternity requirement has standing to challenge that requirement, and also has standing to challenge the alleged discrimination against her citizen father.

6-3. No opinion of Court. Opinion by Stevens, announcing judgment of Court, joined by Rehnquist (rejecting claim on merits). Concurring opinions by O'Connor, joined by Kennedy (alleging lack of standing); and by Scalia, joined by Thomas (alleging that courts lack power to remedy). Dissenting opinions by Ginsburg, joined by Souter and Breyer; and by Breyer, joined by Souter and Ginsburg.

Monge v. California 66 USLW 4628 (6-26-98)

Double Jeopardy, non-capital sentencing: The Double Jeopardy Clause does not apply to non-capital sentencing proceedings. Ordinarily, sentencing decisions favorable to the defendant cannot be analogized to an acquittal. The Court in *Bullington v. Missouri* (1981), recognized a "narrow exception" for applying the Clause to capital sentencing proceedings, but the reasons for doing so are inapplicable to non-capital sentencing. The death penalty "is unique in both its severity and its finality," and in many respects the penalty phase of a capital trial is "a continuation of the trial on guilt or innocence of capital murder." Because the Double Jeopardy Clause was not implicated, therefore, a California appellate court could constitutionally remand a case to allow the prosecution a second opportunity to prove that the defendant had a prior conviction qualifying under the sentence enhancement law. The State had conceded on appeal that the record of the original sentencing proceedings did not contain sufficient proof as to the nature of the qualifying offense. California's recidivism enhancement process in its "three-strikes" law is properly categorized as a sentencing determination and not as an element of an "offense" for double jeopardy purposes.

5-4. Opinion of Court by O'Connor, joined by Rehnquist, Kennedy, Thomas, and Breyer. Dissenting opinions by Stevens; and by Scalia, joined by Souter and Ginsburg.

Montana v. Crow Tribe 118 S. Ct. 1650, 66 USLW 4368 (5-18-98)

Taxation: Neither the Crow Tribe nor the United States as its trustee may recover state and county taxes imposed on and paid by the Tribe's mineral lessee after the lessee has forfeited entitlement to a tax refund. Restitution in the form of disgorgement is not warranted for severance taxes paid to the State during the years 1975 to 1982. The argument that the Tribe, rather than the State, should have received those tax revenues is untenable because the Interior Department had denied the Tribe permission to impose its own taxes during those years. The fact that Montana's taxes were "extraordinarily high" does not justify

disgorgement, since the Tribe lacked permission to tax, since there is no evidence that the lessee would have agreed to pay the Tribe higher royalties if the State's taxes had been lower, and since, in any event, the Tribe did not seek damages based on actual losses incurred.

9-0. Opinion of Court by Ginsburg, joined by Rehnquist, Stevens, Scalia, Kennedy, Thomas, and Breyer. Opinion by Souter, joined by O'Connor, concurring in part and dissenting in part (arguing that district court should be allowed to weigh claim for partial disgorgement).

Muscarello v. United States 118 S. Ct. 1911, 66 USLW 4459 (6-8-98)

Drug trafficking, “carrying” a firearm: Both an individual who had a handgun locked in the glove compartment of a vehicle he used to transport drugs for sale, and other individuals arrested at a drug-sale point with guns present in the trunk of their car, are subject to the penalty imposed by 18 U.S.C. § 1924(c)(1) on anyone who “carries a firearm” during commission of a drug trafficking crime. The phrase “carries a firearm” is not limited to the carrying of firearms on the person. The generally accepted contemporary meaning of the word “carry” includes the carrying of a firearm in a vehicle, whether or not the firearm is immediately accessible. There is no reason to believe that Congress intended to limit the word “carries” to a special, more limited definition. The statute's basic purpose has been described by the Court as combatting the dangerous combination of drugs and guns, and various congressional sponsors of the legislation spoke of the need to persuade the criminal “to leave his gun at home.” Use of the general definition does not equate “carry” and “transport,” since “transport” is a broader category. The Court's narrow definition of the related phrase “uses a firearm,” found in the same statutory provision, was based in part on a distinction between “uses” and “carries,” so “carries” cannot be given the same narrow construction. There is insufficient ambiguity for application of the rule of lenity.

5-4. Opinion of Court by Breyer, joined by Stevens, O'Connor, Kennedy, and Thomas. Dissenting opinion by Ginsburg, joined by Rehnquist, Scalia, and Souter.

National Credit Union Admin. v. First Nat'l Bank & Trust Co. 118 S. Ct. 927, 66 USLW 4134 (2-25-98)

Standing to sue; deference to administrative interpretation: Commercial banks have standing to challenge the National Credit Union Administration's interpretation of § 109 the Federal Credit Union Act as permitting federal credit unions to be composed of multiple, unrelated employer groups. The prudential standing test for a challenge brought under the Administrative Procedure Act does not require a showing of congressional intent to benefit the would-be plaintiff, but merely requires that the interest the plaintiff asserts is “arguably within the zone of interests” to be protected by the statute in question. One of the interests arguably to be protected by § 109 is an interest in limiting the markets that federal credit unions can serve; commercial banks, as competitors of credit unions, share this interest. On the merits, Congress has made it clear that the same common bond of occupation must unite each member of an occupationally defined federal credit union. Because Congress has “directly spoken to the precise question at issue,” that unambiguously expressed intent must be given effect, and, under principles announced in *Chevron v. NRDC* (1984), courts may not defer to an agency's contrary interpretation. Section 109 declares that credit union membership “shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined

neighborhood, community, or rural district.” The NCUA’s interpretation makes the phrase “common bond” surplusage when applied to a credit union made up of multiple, unrelated employer groups, because each group within such a credit union by definition already has its own “common bond.” Moreover, the NCUA’s interpretation violates the “canon of construction” that “similar language” within the same section of a statute must be accorded a consistent meaning. - Section 109’s geographical limitation would be “meaningless” if it were interpreted as allowing a credit union to be composed of an unlimited number of unrelated geographic units, and the section’s occupational limitation should be interpreted “in the same way” as the geographical limitation.

5-4. Opinion of Court by Thomas, joined by Rehnquist, Kennedy, and Ginsburg, and joined in part (every part except footnote 6) by Scalia. Dissenting opinion by O’Connor, joined by Stevens, Souter, and Breyer.

National Endowment for the Arts v. Finley 66 USLW 4586 (6-25-98)

First Amendment, arts funding, decency standard: A requirement of the National Foundation on the Arts and Humanities Act (20 U.S.C. § 954(d)(1)) that the National Endowment for the Arts judge grant applications by “artistic excellence and artistic merit, . . . taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public,” is facially valid. The provision does not require the NEA to award grants on the basis of viewpoint discrimination. The language “imposes no categorical requirement,” but instead is merely “advisory.” The “decency” and “respect” criteria are “unlikely to introduce any greater element of selectivity” than is the “artistic excellence” standard itself. Content-based considerations “are a consequence of the nature of arts funding.” “The ‘very assumption’ of the NEA is that grants will be awarded according to the ‘artistic worth of competing applications,’ and absolute neutrality is simply ‘inconceivable.’” Nor is the provision unconstitutionally vague. The criteria could raise substantial vagueness concerns if they appeared in a criminal statute, but “when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.”

8-1. Opinion of Court by O’Connor, joined by Rehnquist, Stevens, Kennedy, and Breyer, and joined in part by Ginsburg. Concurring opinion by Scalia, joined by Thomas. Dissenting opinion by Souter.

New Jersey v. New York 118 S. Ct. 1726, 66 USLW 4389 (5-26-98)

Interstate Compact, Ellis Island boundary: Under the terms of an 1834 compact between New York and New Jersey, New Jersey has sovereign authority over filled land on Ellis Island. The compact provided that New York was to retain its jurisdiction over Ellis Island, located on the New Jersey side of the boundary formed by the midline of the Hudson River and New York Harbor, and that New Jersey was to have “the exclusive right of property in and to the land under water” surrounding the island. The Special Master correctly concluded that the filled portions of Ellis Island are subject to the sovereign authority of New Jersey under the common law doctrine of avulsion. The compact does not address the consequences of landfilling, so the principle of avulsion applies: a sudden shoreline change has no effect on boundaries. The Special Master also correctly rejected New York’s affirmative defense alleging that it obtained sovereign authority over the filled portions of the island through acts of prescription and through New Jersey’s acquiescence. The evidence is “too slight” to support prescription between 1890, when the United States first

added fill to the Island, and 1954, when New Jersey vigorously asserted its own sovereignty over the filled portions. New York was concededly vested with sovereignty over the original Island, so its acts pertaining to “Ellis Island” did not unambiguously refer to the filled as well as to the original portions. Occupation of the Island by the United States during the disputed period limited the range of prescriptive acts that New York could perform and also had the effect of limiting the notice afforded to New Jersey. The Court lacks the authority to follow the Special Master's recommendation that the boundary dividing the original from the filled portions of Ellis Island be adjusted “in the interest of practicality, convenience, and fairness” to place all of the main immigration building within New York.

6-3. Opinion of Court by Souter, joined by Rehnquist, O'Connor, Kennedy, Ginsburg, and Breyer. Concurring opinion by Breyer, joined by Ginsburg. Dissenting opinions by Stevens; and by Scalia, joined by Thomas.

New Mexico v. Reed 118 S. Ct. 1860, 66 USLW 3780 (6-8-98)

Extradition: The New Mexico Supreme Court lacked the authority to determine that a person sought by another State as a fugitive was not a “fugitive from justice” within the meaning of the Extradition Clause, but instead was a “refugee from injustice.” The Extradition Clause, Art. IV, § 2, cl.2, imposes a mandatory duty to deliver up a fugitive on demand of the state from which he fled, and the Extradition Act, 18 U.S.C. § 3182, provides the procedures by which this constitutional command must be carried out. The asylum state may not inquire into what actually happened in the demanding state, the law of the demanding state, or what may be expected to happen to the fugitive upon his return to the demanding state.

9-0. *Per curiam.*

Newsweek, Inc. v. Florida Dep't of Revenue 118 S. Ct. 904, 66 USLW 3553 (2-23-98)

Due Process, remedy for unconstitutional tax: Under the Court's decision in *Reich v. Collins* (1994), a state may maintain an exclusively “predeprivation remedial scheme” for taxpayers who wish to challenge the constitutionality of a tax if it is “clear and certain” that the predeprivation remedy is exclusive. A state may not, however, deny postdeprivation relief to taxpayers who paid a tax in reasonable reliance on the apparent availability of a postpayment refund. Florida had a long-standing practice of permitting taxpayers to seek refunds for taxes paid under an unconstitutional statute, so it cannot deny that remedy to the petitioners.

9-0. *Per curiam.*

Ohio Adult Parole Auth. v. Woodard 118 S. Ct. 1244, 66 USLW 4226 (3-25-98)

Self-incrimination, Due Process, clemency procedures: Giving a prison inmate the option of voluntarily participating in an interview as part of the clemency process does not violate that inmate's Fifth Amendment privilege against compelled self-incrimination. The inmate's testimony at a clemency interview is not “compelled” within the meaning of the Fifth Amendment merely because the clemency board may draw adverse inferences from his refusal to answer questions. The choice whether to participate in a clemency interview and thereby run the risk of providing information that may damage his case for clemency or for post-conviction relief is “quite similar” to choices that a criminal defendant must make during the course of trial, *e.g.*, whether to take

the stand in his own defense. A prisoner under a death sentence retains a due process interest in his life, and consequently “minimal” procedural due process protections apply to clemency proceedings for that prisoner. The process that the prisoner in this case received — notice of the clemency hearing and an opportunity to participate in an interview — satisfies whatever limitations the Due Process Clause may impose on clemency proceedings.

9-0 (self-incrimination); **5-4** (due process). Opinion for a unanimous Court by Rehnquist. Separate part of Rehnquist opinion joined by Scalia, Kennedy, and Thomas. Opinion by O'Connor, concurring in part and concurring in the judgment, joined by Souter, Ginsburg, and Breyer. Opinion by Stevens concurring in part and dissenting in part.

Ohio Forestry Ass'n v. Sierra Club 118 S. Ct. 1665, 66 USLW 4376 (5-18-98)

Ripeness, National Forest Management Act: The Sierra Club's challenge to the land and resource management plan developed by the Forest Service for the Wayne National Forest in Ohio is not ripe for adjudication. The plan identifies areas in which logging may take place, and sets a ceiling on the total amount of wood that may be cut over a 10-year period, but does not authorize the cutting of any trees. Several additional steps are required before the Forest Service can permit logging. The Service must, for example, identify the specific area to be logged, specify the harvesting methods, notify affected parties and provide an opportunity for comment, and prepare an environmental analysis pursuant to the National Environmental Policy Act. Allowing a suit to go forward before the Service has completed these actions would be premature. Withholding court consideration at this point will not cause the parties significant hardship; opponents of the plan will have ample opportunity to challenge logging at a later time when harm is more imminent and more certain. Moreover, immediate judicial review could hinder agency efforts to refine its policies, whether through revision of the plan or through site-specific application. Finally, such early review would require time-consuming judicial consideration of an elaborate plan without the benefit of the focus that a particular logging proposal could provide. Judicial review of the plan poses the risk of involving the courts in the kind of “abstract disagreements over administrative policies” that the ripeness doctrine is designed to avoid.

9-0. Opinion for a unanimous Court by Breyer.

Oncale v. Sundowner Offshore Services 118 S. Ct. 998, 66 USLW 4172 (3-4-98)

Sex discrimination, same-sex harassment: Same-sex sexual harassment can violate Title VII of the Civil Rights Act, which makes it unlawful for an employer to discriminate against an employee “because of . . . sex.” The provision protects men as well as women, and does not necessarily bar a claim simply because the plaintiff and the defendant are of the same sex. There is no justification in the statutory language or in Supreme Court precedent for a categorical rule excluding same-sex harassment claims. Nor is application of the prohibition limited by the fact that male-on-male sexual harassment was assuredly not the principal evil that Congress intended to address in Title VII. “It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

9-0. Opinion for unanimous Court by Scalia. Concurring opinion by Thomas.

Oubre v. Entergy Operations, Inc. 118 S. Ct. 838, 66 USLW 4118 (1-26-98)

Older Workers Benefit Protection Act: A release of claims under the Age Discrimination in Employment Act, signed as part of a termination agreement

between the employer and one of its employees, did not satisfy the requirements of ADEA amendments contained in the Older Workers Benefit Protection Act, and hence cannot bar the employee from bringing an ADEA claim. The OWBPA provides that an employee “may not waive” an ADEA claim unless the waiver is “knowing and voluntary,” and further provides that a waiver is not “knowing and voluntary” unless it satisfies certain enumerated requirements. The agreement in this case did not comply with three of these OWBPA requirements: it did not give the employee the requisite 21 days to consider her options, it did not give her 7 days after she signed the agreement to change her mind, and it made no specific reference to ADEA claims. The statutory requirements are precise and unqualified, and take precedence over common law contract rules that would have required the employee to “tender back” her settlement payment as a precondition to bringing suit.

6-3. Opinion of Court by Kennedy, joined by Stevens, O’Connor, Souter, Ginsburg, and Breyer. Concurring opinion by Breyer, joined by O’Connor. Dissenting opinions by Scalia; and by Thomas, joined by Rehnquist.

Pennsylvania Bd. of Probation and Parole v. Scott 118 S. Ct. 2014, 66 USLW 4524 (6-22-98)

Fourth Amendment, exclusionary rule, parole revocation hearing: The exclusionary rule, which bars the introduction at criminal trials of evidence obtained in violation of the Fourth Amendment, does not apply in parole revocation hearings. The rule is prudential rather than constitutionally mandated, and is applied only where its deterrence benefits outweigh its substantial social costs. This is not the case with respect to evidence introduced at parole revocation hearings. There would be only “minimal” deterrence benefits. The inadmissibility of seized evidence at any subsequent criminal trial would provide the principal deterrence, and any additional deterrent value relating to use at parole hearings would be marginal. On the other hand, the social costs are “particularly high” in the context of parole revocation hearings, where the state has an “overwhelming interest” in assuring compliance with parole requirements. Moreover, the exclusionary rule, designed to operate at a criminal trial overseen by a judge, is incompatible with the flexible and informal administrative procedures of parole hearings, generally not conducted by judges.

5-4. Opinion of Court by Thomas, joined by Rehnquist, O'Connor, Scalia, and Kennedy. Dissenting opinions by Stevens; and by Souter, joined by Ginsburg and Breyer.

Pennsylvania Dep't of Corrections v. Yeskey 118 S. Ct. 1952, 66 USLW 4481 (6-15-98)

Americans with Disabilities Act, state prison inmate: Title II of the Americans with Disabilities Act (ADA), which prohibits a “public entity” from discriminating against a “qualified individual with a disability,” covers inmates in state prisons. The plain text of the statute unambiguously extends to prison inmates, and consequently the clear statement rule of *Gregory v. Ashcroft* (1991), if applicable, is met. The ADA plainly covers state institutions and contains no exception that could cast the coverage of prisons into doubt. Moreover, prisons provide “programs, services, [and] activities” all of which may “benefit” prisoners within the meaning of the ADA. Indeed, the motivational boot camp from which the respondent was excluded is a “program.” The ADA's coverage is not limited to programs that are “voluntary,” and, in any event, participation in the boot camp is voluntary. Whether or not the ADA's statement of findings and purposes mentions prisons and prisoners is “irrelevant” in light of the “unambiguous statutory text.”

9-0. Opinion for unanimous Court by Scalia.

Phillips v. Washington Legal Found. 118 S. Ct. 1925, 66 USLW 4468 (6-15-98)

IOLTA, interest as clients' property: For purposes of the Fifth Amendment's Takings Clause, interest income earned on clients' funds held in accounts under Texas' Interest on Lawyers Trust Account (IOLTA) program is the property of the clients. The Fifth Amendment protects rather than creates property interests, so the existence of a property interest is usually determined by reference to state law. Texas follows the general rule, tracing to English common law, that “interest follows principal.” There is no dispute that the principal held in IOLTA accounts is the private property of the clients. Therefore, by operation of the general rule, the interest from that principal is also the property of the clients.

5-4. Opinion of Court by Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas. Dissenting opinions by Souter, joined by Stevens, Ginsburg, and Breyer; and by Breyer, joined by Stevens, Souter, and Ginsburg.

Quality King Distrib. v. L'Anza Research Int'l 118 S. Ct. 1125, 66 USLW 4188 (3-9-98)

Copyright, first sale doctrine: The first sale doctrine embodied in the Copyright Act, 17 U.S.C. § 109(a), qualifies 17 U.S.C. § 602(a), which provides that importation into the United States, without the authority of the copyright owner, of copies of a work that have been acquired outside the United States, constitutes “an infringement of the exclusive right to distribute copies . . . under section 106.” Section 602(a) does not categorically prohibit the unauthorized importation of copyrighted materials. Rather, the “exclusive right to distribute copies `under section 106” is limited by the provisions of section 107 through 120, and this includes §109(a), which expressly permits the owner of a lawfully made copy to sell that copy. After the first sale of a copyrighted item, a subsequent purchaser — whether from a domestic or from a foreign reseller — is an “owner” of the item who may, in accordance with § 109(a), sell the item “without the authority of the copyright owner.” Section 602(a) is not superfluous if modified by § 109(a)'s first sale doctrine. Even though § 602(b) prohibits importation of piratical copies, and importation almost always implies a first sale, § 602(b) does not, as does § 602(a), create a private cause of action. Also, the first sale defense is available only to the “owner” of a lawfully made copy, and § 602(a) applies more broadly to various categories of non-owners. And § 602(a) applies to a category of copies that are neither piratical nor “lawfully made under this title.” Section 501's textual distinction between violations of exclusive rights conferred by § 106 and importation “in violation of section 602” is consistent with an interpretation that section 602 violations are not subject to the first sale doctrine, but this inference is “outweighed” by other considerations.

9-0. Opinion for unanimous Court by Stevens. Concurring opinion by Ginsburg.

Regions Hospital v. Shalala 118 S. Ct. 909, 66 USLW 4125 (2-24-98)

Medicare; deference to agency interpretation: The HHS Secretary's interpretation of § 9202(a) of the Medicare and Medicaid Budget Reconciliation Amendments of 1985, Pub. L. 99-272, is reasonable, and is entitled to deference under principles announced in *Chevron v. NRDC* (1984). The section directs the Secretary to determine, for the base year 1984, “the average amount recognized as reasonable” for a hospital's graduate medical education (GME) costs, and to use that figure in calculating reimbursable GME costs for subsequent years. The Secretary interpreted this language as allowing a recalculation of the reasonableness of the 1984 costs, rather than as requiring use of figures already determined to have been reasonable. The provision is ambiguous as to timing; other provisions of the Medicare Act clearly address the timing of determinations by referring to cost limits “to be recognized as reasonable” or to obligations “previously recognized as reasonable.” Moreover, the Secretary's interpretation, which allows for correction of 1984 figures before using those figures as a baseline for the indefinite future, is consistent with the GME Amendments' purpose of limiting payments to hospitals for GME costs.

6-3. Opinion of Court by Ginsburg, joined by Rehnquist, Stevens, Kennedy, Souter, and Breyer. Dissenting opinion by Scalia, joined by O'Connor and Thomas.

Rivet v. Regions Bank of Louisiana 118 S. Ct. 921, 66 USLW 4132 (2-24-98)

Federal courts, removal: An action brought in state court may not be removed to federal court on the ground that the claim asserted is precluded by a prior federal judgment. Removal is appropriate only when a federal question is presented by a properly pleaded complaint. A case may not be removed to

federal court on the basis of a federal defense. Although the “artful pleading doctrine” allows removal if federal law completely preempts a plaintiff’s state-law claim, claim preclusion (*res judicata*) is a different matter. Unlike total preemption, a prior federal judgment does not transform state-law claims into federal claims, but rather extinguishes them altogether. Claim preclusion thus remains an affirmative defense, and there is no preclusion exception to the basic rule that removal may not be based on a federal defense.

9-0. Opinion for unanimous Court by Ginsburg.

Rogers v. United States 118 S. Ct. 673, 66 USLW 4069 (1-14-98)

Certiorari, dismissal as improvidently granted: The question on which the Court granted certiorari — whether the district court’s failure to instruct the jury on an element of an offense is harmless error if the defendant admitted that element at trial — was not fairly presented on the record. Consequently, the writ of certiorari is dismissed as improvidently granted. The defendant admitted at trial that he knew that the item found in his truck was a silencer, and this admission constituted evidence sufficient to satisfy the *mens rea* element of the charged offenses of violating 18 U.S.C. § 5861(d), which makes it unlawful for anyone to possess an unregistered firearm. He contended, however, that the trial judge failed to instruct the jury adequately on this *mens rea* element. The judge’s instruction first explained that the statute defines the term “firearm” to include a silencer, and then directed that conviction must be based on a finding that the defendant “knowingly” possessed a firearm. This instruction is at least ambiguous as to whether the jury was asked to find that the defendant knew that the item he possessed was a silencer, so the harmless error issue is not squarely presented.

6-3. No opinion of Court. Opinion by Stevens announcing the decision of the Court, joined by Thomas, Ginsburg, and Breyer. Concurring opinion by O’Connor, joined by Scalia. Dissenting opinion by Kennedy, joined by Rehnquist and Souter.

Salinas v. United States, 118 S. Ct. 469, 66 USLW 4011 (12-2-97)

Bribery; RICO conspiracy: 18 U.S.C. § 666(a)(1)(B), which extends federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds, does not require proof that the bribe in question had any particular effect on federal funds. As applied to the facts of this case, in which a deputy sheriff allegedly accepted a bribe from a federal prisoner held in a county jail pursuant to agreement with the Federal Government, the statute is constitutional. An individual may be convicted under the RICO conspiracy statute, 18 U.S.C. § 1862(d), without any proof that he committed or agreed to commit two of the predicate acts requisite for the underlying substantive RICO offense. The RICO conspiracy statute incorporated the common law principle that, so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators, whether or not they themselves agree to commit the underlying crime. So, even if the deputy sheriff did not accept or agree to accept two or more bribes, he could be convicted of RICO conspiracy for agreeing to facilitate the sheriff’s bribery scheme.

9—0. Opinion for unanimous Court by Kennedy.

South Dakota v. Yankton Sioux Tribe 118 S. Ct. 789, 66 USLW 4092 (1-26-98)

Dawes Act, diminishment of tribal reservation lands: Implementation of the Dawes Act (also known as the General Allotment Act of 1887), operated to

diminish the boundaries of the Yankton Sioux Reservation in South Dakota. Unallotted lands within the original boundaries of the 1858 Reservation that were sold to non-Indians did not remain within “Indian country,” but instead are subject to the primary jurisdiction of the State. Consequently, a solid waste disposal site located on such unallotted, non-Indian fee land is subject to state environmental regulations. The Dawes Act authorized the Federal Government to allot tracts of tribal land to individual Indians, and, with tribal consent, to open the remaining holdings to non-Indian settlement. Tribal consent was obtained in 1892, and Congress ratified the agreement in 1894. The 1894 Act, which contained explicit language of cession and also provided a fixed-sum compensation to the tribe, bore the hallmarks of congressional intent to diminish the reservation. The savings clause in the Act, purporting to conserve the provisions of the 1858 treaty creating the reservation, should not be read as eviscerating the agreement, but instead as referring to continuation of annuities paid to the tribe. The contemporary historical context supports the conclusion that Congress intended to diminish the reservation. Subsequent congressional and administrative references to the reservation, along with demographic trends, present a “mixed record” that is insufficient to rebut that conclusion.

9-0. Opinion for unanimous Court by O’Connor.

Spencer v. Kemna 118 S. Ct. 978, 66 USLW 4152 (3-3-98)

Mootness, parole revocation, expiration of incarceration: A petition for a writ of habeas corpus seeking to invalidate an order revoking parole is moot once the prisoner has completed the entire term of imprisonment underlying the parole revocation. While it may be presumed that a wrongful criminal conviction has “continuing collateral consequences” that can satisfy Article III “case or controversy” requirements, no such presumption is warranted for wrongful termination of parole status. Most criminal convictions do in fact entail adverse collateral legal consequences, but “the same cannot be said of parole revocation.” The petitioner has not established injury-in-fact in this case. Although the record of parole revocation could be used against the petitioner in a future parole hearing, it would simply be one factor among many that the parole authority could consider. By avoiding future criminal conduct, the petitioner is able to prevent the possibility that his parole revocation will be used to increase his sentence in a future criminal proceeding. And it is “purely a matter of speculation” whether the petitioner will appear in future litigation in which his parole revocation could be used to impeach him as a witness or as a criminal defendant.

8-1. Opinion of Court by Scalia, joined by Rehnquist, O’Connor, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Concurring opinions by Souter, joined by O’Connor, Ginsburg, and Breyer; and by Ginsburg. Dissenting opinion by Stevens.

State Oil Co. v. Khan 118 S. Ct. 275, 66 USLW 4001 (11-4-97)

Antitrust, vertical maximum price fixing: Vertical maximum price fixing, under which a manufacturer or distributor sets maximum retail prices for a product, is not a *per se* antitrust violation. *Albrecht v. Herald Co.* (1968), holding that such price fixing is a *per se* violation, is overruled. Challenges to vertical maximum price fixing should instead be decided on a case-by-case basis through application of the “rule of reason” that normally determines what constitutes a violation of section 1 of the Sherman Act. A *per se* rule is appropriate for types of trade restraints that have predictable and pernicious anticompetitive effects, but is inappropriate if the economic impact of a practice is “not immediately obvious.” It is difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify *per se* invalidation. *Albrecht* rested on theoretical assumptions that no longer justify the rule. The Court has since recognized that vertical maximum price fixing “may have procompetitive interbrand effects,” and has also described the primary purpose of the antitrust laws as protecting interbrand competition. Although the Court, applying the principle of *stare decisis*, is usually very reluctant to overrule decisions resting on statutory interpretation, in the antitrust law area there is a competing interest in “recognizing and adapting to changed circumstances and the lessons of accumulated experience.” The Sherman Act reflects a congressional expectation that courts will draw on common law tradition in giving shape to the Act’s broad mandate.

9-0. Opinion for unanimous Court by O’Connor.

Steel Co. v. Citizens for a Better Environment 118 S. Ct. 1003, 66 USLW 4174 (3-4-98)

Standing to sue: The plaintiff environmental group lacked standing to sue for declaratory and injunctive relief under the citizen suit section of the Emergency Planning and Community Right-to-Know Act of 1986. The complaint alleged that the defendant had failed to file timely reports for past years, but alleged no current or continuing violation, and sought no relief that would redress the alleged injury to the plaintiff. The complaint thus failed one of the three “irreducible” requirements under Article III for standing to sue — that of “redressability.” A declaratory judgment in this case is “worthless,” there being no controversy over the defendant’s failure to file reports. Civil penalties are payable only to the United States, and vindicate “the undifferentiated public interest” in implementation of the law. Although recovery of investigation and prosecution costs would assuredly benefit the plaintiff as opposed to the public at large, “a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.” The injunctive relief sought (inspection authority and receipt of future reports) “cannot conceivably remedy any past wrong.” The issue on the merits — whether the scope of the EPCRA cause of action extends to past violations — is not a jurisdictional issue that may be considered before the jurisdictional issue of Article III standing. Courts lack authority to apply the doctrine of “hypothetical jurisdiction,” under which jurisdiction is assumed for purposes of deciding the merits.

9-0. Opinion of Court by Scalia, joined by Rehnquist, O’Connor, Kennedy, and Thomas, and joined in part by Breyer. Concurring opinions by O’Connor, joined by Kennedy; by Breyer; by Stevens, joined in part by Souter and joined in part by Ginsburg; and by Ginsburg.

Stewart v. Martinez-Villareal 118 S. Ct. 1618, 66 USLW 4352 (5-18-98)

Habeas corpus, successive petitions, competency to be executed: A federal habeas petition asserting a *Ford v. Wainwright* claim that the petitioner was incompetent to be executed was not a “second or successive” petition barred by section 2244(b) of the Antiterrorism and Effective Death Penalty Act. An earlier *Ford* claim by the petitioner had been dismissed as premature since his execution was not then imminent; the petitioner renewed his claim after Arizona obtained a warrant for his execution, conducted hearings on his mental condition, and found him fit to be executed. Because the initial *Ford* claim was never adjudicated, and was not ripe for resolution until petitioner's current request that it be reopened, this request does not amount to a “second or successive” claim. The habeas petitioner was entitled to a hearing in district court on the merits of his *Ford* claim.

7-2. Opinion of Court by Rehnquist, joined by Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Dissenting opinions by Scalia, joined by Thomas; and by Thomas, joined by Scalia.

Swidler & Berlin v. United States 66 USLW 4538 (6-25-98)

Attorney-client privilege: The attorney-client privilege survives the death of the client. Notes of an attorney for former White House Deputy Counsel Vincent Foster, based on an interview with Foster shortly before his death, are protected by the attorney-client privilege from disclosure in a criminal investigation conducted by the Office of Independent Counsel. The privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. With few exceptions, courts have presumed that the privilege survives the death of the client. Cases making an exception in testamentary disputes are rationalized as furthering the client's intent, but there is “no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client's intent.” The Independent Counsel's argument that only clients intending to perjure themselves will be chilled by a rule of disclosure after death overlooks the fact that the attorney-client privilege serves broader purposes than the privilege against self-incrimination. Attorneys are consulted for a wide range of personal, family, financial, and business matters having nothing to do with criminal liability. Moreover, without the assurance of confidentiality protected by the privilege, “the client may not have made such communications in the first place,” and any loss of evidence may be “more apparent than real.” An exception limited to information of importance to a particular criminal case would introduce “substantial uncertainty” into application of the privilege. Arguments against survival of the privilege are “based in large part on speculation,” and the Independent Counsel “has not made a sufficient showing to overturn the common law rule.”

6-3. Opinion of Court by Rehnquist, joined by Stevens, Kennedy, Souter, Ginsburg, and Breyer. Dissenting opinion by O'Connor, joined by Scalia and Thomas.

Texas v. United States 118 S. Ct. 1257, 66 USLW 4234 (3-31-98)

Ripeness: A declaratory judgment action brought by the State of Texas seeking a determination that preclearance under the Voting Rights Act is not required for implementation of certain Education Code amendments is not ripe for adjudication. The amendments at issue authorize appointment of a master or a management team to administer a school district that fails to meet specified standards of student performance. The Attorney General did not object to the

changes, but cautioned that “under certain circumstances” preclearance might be required. Texas sought a declaration that imposition of these sanctions can under no circumstances constitute a change affecting voting. This claim is contingent upon future events that may not occur. Moreover, Texas suffers little or no hardship if courts withhold consideration. If Texas chooses in the future to implement one of the non-cleared sanctions, it may simply go ahead and do so, and trust its judgment that any challenge will be unsuccessful. A “threat to federalism” is an “abstraction” that is inadequate to support suit in this context.

9-0. Opinion for unanimous Court by Scalia.

Textron Lycoming Reciprocating Engine Div. v. UAW 118 S. Ct. 1626, 66 USLW 4356 (5-18-98)

Labor, jurisdiction of district court: The federal district court lacks jurisdiction under section 301(a) of the Labor Management Relations Act over an action by the Union for a declaratory judgment that its collective bargaining agreement is voidable as fraudulently induced. Section 301(a) confers jurisdiction over “suits for violation of contracts between an employer and a labor organization.” The case cannot be decided by reference to one of the multiple definitions of the word “for.” Rather, it is the meaning of the phrase “suits for violation of contracts” that is determinative. The phrase means suits that claim a contract has been violated, not suits that claim the contract is invalid. The fact that the union seeks voidability under the Declaratory Judgment Act does not alter the conclusion. Neither party has alleged an interest in the contract's voidability, so there is no case or controversy on the issue that might otherwise give the Union access to federal court.

9-0. Opinion of Court by Scalia, joined by Rehnquist, Stevens, O'Connor, Kennedy, Souter, Thomas, and Ginsburg. Concurring opinions by Stevens and by Breyer.

Trest v. Cain 118 S. Ct. 478, 66 USLW 4023 (12-9-97)

Habeas corpus, procedural default: A federal court, ruling in a habeas corpus case, is not required to raise *sua sponte* a petitioner's possible procedural default in state court. In the habeas context, procedural default is not a jurisdictional matter, but is ordinarily a defense that a state is obligated to raise in order to preserve. This is not an appropriate case in which to determine whether the law *permits* a federal appellate court to raise the issue *sua sponte*.

9-0. Opinion for unanimous Court by Breyer.

United States v. Bajakajian 118 S. Ct. 2028, 66 USLW 4514 (6-22-98)

Excessive Fines Clause, forfeiture: Forfeiture of the entire \$357,144 that the respondent was transporting out of the country without reporting, as required by federal law, that he was taking out more than \$10,000 in currency, violated the Excessive Fines Clause of the Eighth Amendment. Forfeiture of all of respondent's currency was grossly disproportional to the gravity of his offense. The forfeiture was imposed under 18 U.S.C. § 982(a)(1), which provides that anyone convicted of willfully violating the reporting requirement shall forfeit “any property . . . involved in such offense.” Such a forfeiture constitutes punishment, and is thus a “fine” within the meaning of the Excessive Fines Clause. The forfeiture serves no remedial purpose of compensating the Government for a loss, since the Government's only loss is of information. No precedent derives from the tradition of civil *in rem* forfeiture of property involved in crime, since such forfeitures were in theory directed against “guilty

property” and were not considered punishment. The test for whether a fine is “excessive” is one of proportionality, and “grossly disproportional to the gravity of a defendant's offense” best reflects the constitutional standard. The fine in this case was grossly disproportional. The respondent's crime was solely a reporting offense. It was lawful to take the currency out of the country if that action was reported, the money was lawfully obtained, and the money was to be used to pay a lawful debt. The harm caused by the reporting violation was “minimal,” and the maximum fine that could have been imposed under the Sentencing Guidelines was \$5,000.

5-4. Opinion of Court by Thomas, joined by Stevens, Souter, Ginsburg, and Breyer. Dissenting opinion by Kennedy, joined by Rehnquist, O'Connor, and Scalia.

United States v. Balsys 66 USLW 4613 (6-25-98)

Self-Incrimination Clause, foreign prosecution: Concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause. A resident alien may not assert the privilege, therefore, as a bar to testifying at a deposition probing his possible involvement in Nazi war crimes, on the basis that his responses could subject him to criminal prosecutions in Lithuania, Israel, and Germany. The Clause affords protection “in any criminal case,” but that language must be read in the context of the Fifth Amendment's other protections, each of which is implicated only by action of the government that it binds. Early interpretation of the Clause established that probable incrimination under state law was not a valid basis for asserting the privilege in federal court, and also that state courts could compel testimony that might incriminate under federal law. These interpretations were modified after the Court ruled in 1964 that the Self-Incrimination Clause applies to the states, but the underlying rationale for the Clause did not change. The Clause applies the principle that “the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt.” For purposes of applying this principle, federal and state jurisdictions are considered as one, and the Court created an exclusionary rule prohibiting federal courts from using testimony compelled by states. There is no parallel extension of the self-incrimination principle to foreign courts, and consequently there is no “cooperative internationalism” that parallels this cooperative federalism.

7-2. Opinion of Court by Souter, joined by Rehnquist, Stevens, O'Connor, and Kennedy, and joined in part by Scalia and Thomas. Concurring opinion by Stevens. Dissenting opinions by Ginsburg; and by Breyer, joined by Ginsburg.

United States v. Beggerly 118 S. Ct. 1862, 66 USLW 4436 (6-8-98)

Quiet Title Act: Neither Federal Rule of Civil Procedure 60(b) nor the Quiet Title Act affords a basis for reopening a 1982 judgment incorporating a settlement agreement confirming the Government's title to land situated on Horn Island, Mississippi. Rule 60(b) authorizes an “independent action” to relieve a party from a judgment for such reasons as fraud, mistake, or newly discovered evidence. Such actions should be available “only to prevent a grave miscarriage of justice.” The allegation in this case, that Government officials searched public land records prior to the settlement and told the respondents that they had found nothing proving that any part of Horn Island had ever been granted to a private landowner, does “not nearly approach this demanding standard.” The Quiet Title Act includes a 12-year statute of limitations, and provides that the period does not begin to run until the plaintiff “knew or should have known of

the claim of the United States.” The Court of Appeals for the Fifth Circuit erred in ruling that the Act is subject to additional “equitable tolling.” Equitable tolling is impermissible if it is inconsistent with the text of the relevant statute, and the Quiet Title Act by its terms sets the limits for equitable tolling.

9-0. Opinion for unanimous Court by Rehnquist. Concurring opinion by Stevens, joined by Souter.

United States v. Bestfoods 118 S. Ct. 1876, 66 USLW 4439 (6-8-98)

CERCLA, liability of parent corporation: A corporate parent that actively participated in, and exercised control over, the operations of a polluting facility owned by a subsidiary may be held directly liable under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act. The corporate parent may be held derivatively liable only if the “corporate veil may be pierced” through operation of common law principles; nothing in CERCLA purports to alter this “bedrock principle” of corporate law. But CERCLA liability may turn on operation as well as ownership. The district court in this case incorrectly focused on whether the parent corporation operated the subsidiary. The issue instead is whether the parent corporation operated the facility — in particular, whether agents of the corporation managed or conducted operations specifically related to pollution or to compliance with environmental regulations. It is not enough to show that directors of the parent corporation also served as directors of the subsidiary. Rather, the issue is whether these officers were acting in their capacities as officers of the parent company, and not as subsidiary officers, when making policy decisions and supervising activities at the facility. The case is remanded for development of such findings.

9-0. Opinion for unanimous Court by Souter.

United States v. Cabrales 118 S. Ct. 1772, 66 USLW 4423 (6-1-98)

Federal courts, venue, money-laundering offenses: Missouri is not a proper place for trial of federal money laundering offenses that occurred entirely in Florida, even though the currency allegedly laundered derived from unlawful distribution of cocaine in Missouri. Both the Constitution (Art. III, § 2, cl. 3; and the Sixth Amendment) and Rule 18 of the Federal Rules of Criminal Procedure require that a person be tried for an offense where that offense was committed. The determination of where an offense was committed is controlled by the nature of the offense and the location of the act or acts constituting it. Here, the statutes (18 U.S.C. §§ 371 and 1957) proscribe only the financial transactions, not the anterior criminal conduct that yielded the funds allegedly laundered. The defendant was not charged with conspiracy in completing the drug offenses, and was not charged as an aider or abettor of the drug offenses begun and completed by others. Nor was the defendant charged with acquiring the funds in Missouri and transporting them to Florida. Under these circumstances, there is no basis for venue in Missouri.

9-0. Opinion for unanimous Court by Ginsburg.

United States v. Estate of Romani 118 S. Ct. 1478, 66 USLW 4295 (4-29-98)

Estates, Federal Tax Lien Act: The federal priority statute, 31 U.S.C. § 3713(a), which provides that a Government claim “shall be paid first” when a decedent's estate cannot pay all of its debts, does not require that a federal tax claim be given preference over a judgment creditor's perfected lien on real

property. Such a preference is not authorized by the Federal Tax Lien Act of 1966, 26 U.S.C. § 6321, which was enacted after the priority statute. The Tax Lien Act provides that a federal tax lien “shall not be valid” against judgment lien creditors until a prescribed notice has been given. Because the Tax Lien Act is the later statute, and the more specific statute, and because its comprehensive provisions reflect “an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens,” its policies should prevail over the general policy of the priority statute. The fact that Congress failed to enact bills that would have amended the priority statute to harmonize it with the Tax Lien Act “provides no support for the hypothesis that both Houses of Congress silently endorsed” the proposition that the priority statute should supersede the Tax Lien Act in adjudication of federal tax claims.

9-0. Opinion of Court by Stevens, joined by Rehnquist, O'Connor, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Concurring opinion by Scalia.

United States v. Ramirez 118 S. Ct. 992, 66 USLW 4169 (3-4-98)

Fourth Amendment, “no-knock” entry: A no-knock entry by police officers executing a search warrant is not unlawful simply because property is destroyed in the course of entry. Rather, the general Fourth Amendment touchstone of “reasonableness” governs the method of execution of a warrant. No Fourth Amendment violation occurred in this case. Police officers seeking a dangerous fugitive and possessing a “no-knock” search warrant went to respondent’s home in the “early morning” hours, simultaneously announced their presence over a loudspeaker, broke a window in the garage, and pointed a gun through it in order to dissuade occupants from rushing to a weapons stash believed to be in the garage. The police had a “reasonable suspicion” that knocking and announcing would be dangerous to themselves or to others, and breaking a single window in the home’s garage was “clearly reasonable” under the circumstances. There was no violation of 18 U.S.C. § 3109, which permits an officer to break open a door or window “if, after notice of his authority and purpose, he is refused admittance.” Section 3109 codified the common law norm of prior notice before entry, but also codified common law exceptions to the announcement requirement, including the exigent circumstances exception.

9-0. Opinion for unanimous Court by Rehnquist.

United States v. Scheffer 118 S. Ct. 1261, 66 USLW 4235 (3-31-98)

Military justice, polygraph evidence: Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings, does not unconstitutionally abridge the right of accused members of the military to present a defense. There is no consensus that polygraph evidence is reliable, and Rule 707 represents a rational and proportional means of advancing the legitimate interest in barring unreliable evidence. Cases in which the Court has held exclusion of evidence to be unconstitutional as significantly undermining fundamental elements of the accused’s defense are distinguishable. Rule 707 did not prevent the accused from testifying on his own behalf, and did not prevent him from introducing any factual evidence. The rule merely operated to bar the accused from introducing expert opinion testimony to bolster his credibility. The Court cannot conclude, therefore, that the accused’s defense was “significantly impaired” by the exclusion of polygraph evidence.

8-1. Opinion of Court by Thomas, joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer. Separate parts of Thomas opinion joined by Rehnquist,

Scalia, and Souter. Concurring opinion by Kennedy, joined by O'Connor, Ginsburg, and Breyer. Dissenting opinion by Stevens.

United States v. United States Shoe Corp. 118 S. Ct. 1290, 66 USLW 4251 (3-31-98)

Export Clause, Harbor Maintenance Tax: The Harbor Maintenance Tax (HMT) imposed by 26 U.S.C. § 4461(a) violates the Export Clause of the Constitution, Art. I, § 9, cl. 5, to the extent that the tax is applied to goods loaded at United States ports for export. The HMT requires shippers to pay a uniform charge, currently set at 0.125% of cargo value, on commercial cargo shipped through the Nation's ports. The Export Clause provides that “no tax or duty shall be laid on articles exported from any State.” The Clause has been interpreted as allowing no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit. On the other hand, “user fees” may be imposed if they “fairly match the exporters' use of port services and facilities” provided by the Government. The HMT does not qualify as a user fee. The tax does not represent compensation for services rendered. The value of export cargo “does not correspond reliably with the federal harbor services used or usable by the exporter.” Instead, the extent and manner of port use depends on such factors as size and tonnage of a vessel, and the length of time it spends in port. The Court of International Trade properly exercised jurisdiction in this case under 28 U.S.C. § 1581(i)(4).

9-0. Opinion for unanimous Court by Ginsburg.

Wisconsin Dep't of Corrections v. Schacht 118 S. Ct. 2047, 66 USLW 4531 (6-22-98)

Federal courts, removal jurisdiction: In a case removed from state to federal court, and involving several claims arising under federal law, presence of a claim barred by the Eleventh Amendment does not destroy jurisdiction over the other federal law claims that are not barred. Under 28 U.S.C. § 1441(a), a defendant in state court may remove “any civil action . . . of which the district courts of the United States have original jurisdiction.” The district courts have original jurisdiction over any claim arising under federal law. Analogies to cases involving both federal law and state law claims, and to cases based on diversity of citizenship, are not persuasive in this case. Presence of even one claim arising under federal law is a sufficient basis for removal in a case containing state law claims. In such cases, however, the state law claims may be adjudicated under the federal court's pendent jurisdiction. On the other hand, federal courts may not adjudicate claims against which the state has asserted a valid Eleventh Amendment defense. In diversity cases, presence of one claim brought against a non-diverse defendant automatically destroys original jurisdiction, which must be based on complete diversity. The Eleventh Amendment, however, does not automatically destroy original jurisdiction, since a state can waive the defense. This case is more closely analogous to cases in which a change in circumstances destroys previously existing jurisdiction; in such instances, a federal court will keep a removed case. Finally, 28 U.S.C. § 1447(c), which requires remand of “the case” if it appears that the court lacks subject matter jurisdiction, does not require remand if it is discovered that the court lacks jurisdiction over one claim, but not over other claims, within a case.

9-0. Opinion for unanimous Court by Breyer. Concurring opinion by Kennedy.

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