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Supreme Court Opinions: October 2003 Term

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George Costello
Legislative Attorney
American Law Division

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Summary

This report contains synopses of Supreme Court decisions issued from the beginning of the October 2003 Term through the end of the Term on June 29, 2004. Included in this listing are all cases decided by signed opinion and selected cases decided *per curiam*. In addition to the summary, the date of decision is indicated, and cites to *United States Law Week* and West's *Supreme Court Reporter* are provided. 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. These synopses are prepared throughout the Term and can be accessed through the CRS Home Page ([http://www.crs.gov/reference/general/law/03_term.shtml]), which also provides links from the synopses to the full texts of the Court's opinions.

Contents

Supreme Court Opinions: October 2003 Term 1
Index 42

Supreme Court Opinions: October 2003 Term

Aetna Health Inc. v. Davila 124 S. Ct. 2488, 72 USLW 4516 (6-21-04)

ERISA, preemption, suits against HMOs: Suits brought in state court alleging that HMOs violated their duty under the Texas Health Care Liability Act "to exercise ordinary care when making health care treatment decisions" are completely preempted by ERISA § 502(a), and are thus removable to federal court. The suits were brought to remedy denial of benefits under an ERISA-regulated health benefit plan. Removal questions are ordinarily determined by what appears on the face of a "well-pleaded complaint" (in this case a state law claim), but there is an exception when a federal statute wholly displaces the state-law cause of action. ERISA § 502, which authorizes suit "to recover benefits due [a participant] under the terms of his plan," wholly displaces the Texas law in these cases. ERISA establishes a uniform federal regulation of employee benefit plans, and calls for an integrated system of enforcement. A state law cause of action that "duplicates, supplements, or supplants" ERISA's remedy is preempted. The duties allegedly imposed by the Texas law in these cases "do not arise independently of ERISA or the plan terms." Rather, those duties derive from a failure to exercise ordinary care when making health care decisions denying benefits covered by a plan. The respondents were entitled to such benefits only because of the coverage of an ERISA-regulated plan. By its terms, the Texas law imposes no obligation on providers for refusals to provide treatment that is not covered by a plan. The Fifth Circuit's reasons for finding no preemption are rejected. Labeling the actions as ones for tort rather than contract damages does not change the scope of ERISA preemption, and the ERISA exception for laws that regulate insurance is inapplicable. Cases involving "mixed" eligibility and treatment decisions by physicians are not controlling.

9-0. Opinion for unanimous Court by Thomas. Concurring opinion by Ginsburg, joined by Breyer.

Alaska Dep't of Envtl. Conservation v. EPA 124 S. Ct. 983, 72 USLW 4133 (1-21-04)

Clean Air Act, PSD, EPA enforcement authority: EPA has the authority under the Clean Air Act to order a halt to construction of a major pollutant emitting facility in an attainment area governed by the prevention of significant deterioration (PSD) program when EPA finds that the state permitting authority's determination of best available control technology (BACT) for the facility is unreasonable. The act authorizes EPA to order construction halted "when a State is not acting in compliance" with the Act's requirements or if "construction or modification of a major emitting facility . . . does not conform to the requirements [of the PSD program]." The fact that the act entrusts state permitting agencies with initial and primary authority for identifying BACT does not preclude EPA oversight, and the Court "credit[s] EPA's longstanding

construction" that EPA retains authority to rule on the reasonableness of state BACT determinations. The act does not limit enforcement to state administrative and judicial processes. The burden of production and persuasion remains with EPA regardless of whether EPA initiates a civil enforcement action or whether the permittee brings a challenge in state or federal court to a stop-construction order. EPA did not abuse its discretion in this case in finding that the Alaska agency (ADEC) acted unreasonably in its BACT determination for a generator at a zinc concentrate mine. ADEC initially determined that selective catalytic reduction was the most stringent control technology that was technically and economically feasible for reducing nitrogen oxide emissions. The act requires a state agency making such a finding to designate the technology as BACT "absent technical . . . energy, environmental, or economic considerations" justifying a conclusion that the technology is not "achievable" for that particular source. ADEC, however, designated a different technology, Low Nox, as BACT, citing generalized concerns about economic diversity and the mine's role as employer in the area, but with no actual evidence that the mine would have to cut employment or raise prices. Because ADEC's action "had no factual basis in the record," it did not qualify as "reasonable," and EPA validly issued the stop orders.

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

Ashcroft v. ACLU 124 S. Ct. 2783, 72 USLW 4649 (6-29-04)

First Amendment, Child Online Protection Act: The court of appeals correctly affirmed a district court order enjoining enforcement of the Child Online Protection Act (COPA) because it likely violates the First Amendment. COPA imposes criminal penalties for knowingly posting on the World Wide Web for commercial purposes material that is "harmful to minors." COPA provides an affirmative defense for a defendant who has restricted access by minors by requiring use of a credit card or an age verification certificate, or by employing "any other reasonable measures that are feasible under available technology." The district court's conclusion that the plaintiffs are likely to succeed on the merits rested on the Government's failure to show that the less restrictive alternative of filtering, proposed by the plaintiffs, would not be as effective as the challenged restrictions. Filters for adult content are "less restrictive than COPA." Filters apply "selective restrictions on speech at the receiving end" rather than "universal restrictions at the source." Filters allow adults the right to see material without having to identify themselves, and "above all," promoting the use of filters does not involve reliance on criminal penalties, and would thus remove the "potential chilling effect" of criminal sanctions. Moreover, filters "may well be more effective than COPA." Filters "can prevent minors from seeing all pornography," while COPA prohibits only that pornography posted from within the United States. An estimated 40% of pornography on the Web comes from overseas, and of course domestic providers could simply move their operations overseas in order to avoid COPA coverage. The fact that Congress may not require use of filters does not remove filters as a legislative alternative, since Congress "undoubtedly may act to encourage the use of filters." There are also practical reasons for leaving the injunction in place. The potential harms of COPA enforcement, which would

place "a serious chill upon protected speech," outweigh those of enjoining enforcement, since there are no ongoing prosecutions that can be disrupted by the injunction. Moreover, the factual record is not current, and there are substantial factual disputes to be resolved by the district court on remand.

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

Baldwin v. Reese 124 S. Ct. 1347, 72 USLW 4227 (3-2-04)

Habeas corpus, fair presentation of federal claim in state court: The petitioner, who sought federal habeas corpus relief, did not fairly present his claim in state court proceedings, and therefore did not adequately alert the Oregon Supreme Court to the federal nature of his claim. The petitioner asserted ineffective assistance by both trial and appellate counsel in violation of Oregon law, and alleged that his trial court counsel violated several provisions of the Federal Constitution. He did not, however, allege that his separate appellate ineffective assistance claim rested on federal law. Because the state petition failed to alert the Oregon Supreme Court to the federal nature of the claim, the petitioner failed to satisfy the fair presentation standard. The Ninth Circuit erred in holding that the fair presentation requirement was satisfied because the Oregon Supreme Court had the "opportunity" to read the lower court decision they were asked to review. Such a rule would impose "a serious burden" on state appellate courts, especially those with discretionary review powers. On the other hand, no "unreasonable burden" is placed on state prisoners by requiring that they indicate the federal law basis for their claim in a state court petition or brief.

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

Banks v. Dretke 124 S. Ct. 1256, 72 USLW 4193 (2-24-04)

Due Process, prosecution's suppression of evidence: The petitioner established the three essential elements of his claim, based on *Brady v. Maryland* (1963), that the prosecution's suppression of evidence violated his due process rights. The petitioner also established cause for failing to raise the *Brady* claim in state court. The prosecution failed to disclose evidence that a prosecution witness whose testimony was "crucial" at the capital sentencing phase of the petitioner's murder trial was a paid informer. Moreover, the prosecution asserted before trial that it would disclose all "*Brady*" material, and did not correct the witness's perjurious trial testimony denying his connections to the state. Under the circumstances, "it was not incumbent on [the petitioner] to prove [the state's] representations false; rather the petitioner was entitled to treat the prosecutor's submissions as truthful." The appeals court should have issued a certificate of appealability with respect to a second *Brady* claim arising from another witness's perjured testimony denying that he had talked to anyone about his testimony, when in fact he had rehearsed his testimony with the prosecution.

7-2 (paid informer claim); **9-0** (coached testimony claim). Opinion of Court by Ginsburg, joined by Rehnquist, Stevens, O'Connor, Kennedy, Souter, and Breyer, and joined in part by Scalia and Thomas. Concurring and dissenting opinion by Thomas, joined by Scalia.

Barnhart v. Thomas 124 S.Ct. 376, 72 USLW 4001 (11-12-03)

Social Security Act, disability determination: The Social Security Administration's (SSA's) interpretation of a Social Security Act requirement for a finding of "disability" is reasonable, and entitled to deference under principles established in *Chevron v. NRDC* (1984). The statute provides that a person is disabled if he "not only is unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy." The SSA determined that the respondent is not disabled because she remains physically and mentally able to do her previous work as an elevator operator, and that it is irrelevant whether such jobs still exist in significant numbers in the national economy. Under this reading, the phrase "which exists in the national economy" modifies "any other kind of substantial gainful work," and does not modify "his previous work." Construing a statute in accord with the "rule of the last antecedent" is "quite sensible as a matter of grammar." Moreover, the interpretation does not lead to "absurd results." There is a "plausible reason" why Congress might have wanted to deny benefits to a person able to perform a job that no longer exists. In "the vast majority of cases" the test will serve as a "proxy" for the claimant's ability to do *some* work that does exist in the national economy, and in such cases the SSA will be spared the administrative burden of determining *which* jobs the claimant can perform.

9-0. Opinion for unanimous Court by Scalia.

Beard v. Banks 124 S. Ct. 2504, 72 USLW 4578 (6-24-04)

Habeas corpus, retroactive application of constitutional ruling: The Court's 1988 ruling in *Mills v. Maryland*, invalidating a law requiring capital sentencing juries to disregard mitigating factors that they have not found unanimously, does not apply retroactively to the respondent's sentence, which had become final when the Court denied *certiorari* in 1987. The fact that the Pennsylvania Supreme Court considered the respondent's *Mills* claim in 1995 under a discretionary "relaxed waiver rule" does not alter the conclusion that, for federal habeas corpus purposes, the conviction had become final in 1987. *Mills* announced a "new rule" of constitutional interpretation that was not "dictated by then-existing precedent," and cannot be applied retroactively. The exception allowing retroactive application of "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" does not apply. That exception applies only to "a small core of rules requiring observance of . . . procedures that are implicit in the concept of ordered liberty," such as the *Gideon v. Wainwright* rule requiring that indigent defendants be represented by counsel in felony cases. "However laudable the *Mills* rule might be, . . . it works no fundamental shift in 'our understanding of the *bedrock procedural elements*' essential to fundamental fairness."

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

Bedroc Limited, LLC v. United States 124 S. Ct. 1587, 72 USLW 4271 (3-31-04)

Pittman Act, "valuable minerals": Sand and gravel are not "valuable minerals" reserved to the United States in land grants issued pursuant to the

Pittman Underground Water Act of 1919. The Pittman Act authorized the Secretary of the Interior to designate certain "nonmineral" lands in Nevada on which settlers could obtain permits to drill for water. A settler who could demonstrate successful irrigation of at least 20 acres became entitled to a patent for up to 640 acres. Each patent issued under the act was to contain a "reservation to the United States of all the coal and other valuable minerals in the lands . . . , together with the right to prospect for, mine and remove the same." The Court refuses to overrule *Watt v. Western Nuclear, Inc.* (1983), interpreting the Stock Raising Homestead Act's reservation to the United States of "all the coal and other minerals" as reserving sand and gravel. The different interpretation of the Pittman Act is explained by the plurality as resulting from the different language of its reservation, and by the concurrence as resulting from "declin[ing] to extend *Western Nuclear's* . . . reasoning beyond the SRHA."

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

Blakely v. Washington 124 S. Ct. 2531, 72 USLW 4546 (6-24-04)

Jury trial, sentence enhancement by judge: Washington State's sentencing law, which allows a judge to impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence," is inconsistent with the Sixth Amendment right to trial by jury, as interpreted in *Apprendi v. New Jersey* (2000). In *Apprendi* the Court ruled that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In this case the petitioner plead guilty to second-degree kidnaping involving use of a firearm, for which the standard range set by Washington's Sentencing Reform Act was 49-53 months. The judge conducted a sentencing hearing, found that the petitioner had acted with "deliberate cruelty" – a statutory ground for departure – and sentenced him to 90 months. For *Apprendi* purposes, the statutory maximum a judge may impose is the maximum allowable solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, and here the facts supporting the deliberate cruelty ruling "were neither admitted by petitioner nor found by a jury," but instead were found by the judge. Cases that involved application of a statutory minimum or indeterminate sentencing are not on point. *Apprendi* reflects "the need to give intelligible content to the right of jury trial," a right that is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." Decision, therefore, "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." Alternatives to *Apprendi* – a rule that the jury trial right extends only to whatever facts the legislature chooses to label as elements of the crime, or a rule that the legislature may not go "too far" in defining crime elements and sentencing factors – are unsatisfactory.

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

Castro v. United States 124 S. Ct. 786, 72 USLW 4105 (12-15-03)

Habeas corpus, recharacterization of motion: A court may not recharacterize a *pro se* litigant's motion as his first habeas corpus motion under 28 U.S.C. § 2255 unless the court informs the litigant of its intent to recharacterize, warns the litigant that this recharaterization will subject subsequent § 2255 motions to the law's restrictions on "second or successive" motions, and provides the litigant with the opportunity to withdraw or to amend the filing. Because the court in this case did not so warn the *pro se* litigant about the consequences of its recharacterizing as a habeas petition his Rule 33 motion for a new trial, the recharacterized motion does not count as a § 2255 motion. The fact that the petitioner failed to appeal the recharacterization does not validate it. One of the "very point[s]" of the required warning is to help the *pro se* litigant understand whether he should appeal, and "the 'lack of warning' prevents his making an informed judgment" on the matter. The "law of the case" doctrine cannot prevent a court from disregarding an earlier holding in an appropriate case. The bar on certiorari to review the "grant or denial" of authorization to file a second or successive habeas petition (28 U.S.C. § 2244) is inapplicable; the subject of the certiorari petition in this case is not the "denial" of an authorization for a second habeas petition, but rather the lower court's refusal to recognize that the petition was the first, not the second, habeas petition.

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

Central Laborers' Pension Fund v. Heinz 124 S. Ct. 2230, 72 USLW 4441 (6-7-04)

ERISA, "anti-cutback" rule: ERISA's "anti-cutback" rule, which provides that a pension plan amendment may not decrease a participant's "accrued benefit," prohibits amendment of a plan to expand the categories of post-retirement employment that trigger suspension of payment of early retirement benefits that have already accrued. When the respondent took early retirement in 1996, his pension plan provided that benefits would be suspended if he engaged in "disqualifying employment," defined at that time to include any job as a construction worker, but not to include any supervisory position. After the respondent took a job as a supervisor in the construction industry, the plan expanded the definition of disqualifying employment to include any job "in any capacity" in the construction industry, and plan administrators moved to suspend payments to the respondent. ERISA prohibits application of this plan amendment to the respondent. ERISA explicitly provides that a plan amendment which "has the effect of . . . eliminating or reducing an early retirement benefit . . . shall be treated as reducing accrued benefits." ERISA defines "accrued benefit" circularly, but "as a matter of common sense" a participant's benefits must be understood with reference to the conditions imposed on receiving those benefits, and "an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." Narrow technical arguments that a "benefit" is merely the amount that a plan is legally obligated to pay, and that a "suspension" of a benefit is not an elimination or reduction, are rejected. An IRS regulation implementing duplicative provisions of the Internal Revenue Code interprets the anti-cutback provision to "flatly" prohibit plan amendments that attach new conditions to benefits that an

employee has already earned, and "an unreasoned statement" in the Internal Revenue Manual cannot trump that formal regulation. A separate ERISA provision that refers to suspension of payments is "irrelevant," since it deals with "the entirely different question of benefit forfeitures," and because it relates to terms that can be offered "up front," not to adoption of retroactive amendments.

9-0. Opinion for unanimous Court by Souter. Concurring opinion by Breyer, joined by Rehnquist, O'Connor, and Ginsburg.

Cheney v. United States District Court 124 S. Ct. 2576, 72 USLW 4567 (6-24-04)

Mandamus, discovery against Vice President: The Court of Appeals erred in concluding that it lacked authority to issue mandamus to the district court to vacate discovery orders, issued to the Vice President and other federal officials who were members of the National Energy Policy Development Group, for information relating to participation in the Group by non-federal individuals. The plaintiffs in the district court had alleged a violation of the Federal Advisory Committee Act (FACA). Although each individual appointed to the Group was a federal official, and FACA exempts from coverage committees composed wholly of federal officers and employees, the plaintiffs alleged that FACA applied because the non-federal participants in Group meetings were *de facto* members of the Group. The Court of Appeals reasoned that it had no authority to exercise the "extraordinary remedy of mandamus" to halt discovery and that the government could protect its rights by asserting executive privilege with "narrow specificity" in response to the discovery requests. But the fact that the Vice President is a party "removes [the] case from the category of ordinary discovery orders where interlocutory appellate review is unavailable through mandamus or otherwise." Presidential confidentiality merits strong protection, and courts have recognized the "paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." The Appeals Court's reliance on *United States v. Nixon* (1974) is misplaced. *Nixon* was a criminal case, and the information sought was relevant to a criminal proceeding. Here the information was sought in support of a civil suit, and withholding the information "does not hamper another branch's ability to perform its 'essential functions.'" The Court of Appeals must reconsider the parties' arguments with respect to the *de facto* membership interpretation of FACA. "All courts must be mindful of the burdens imposed on the Executive Branch in any future proceedings."

7-2 (merits); **5-2-2** (relief). Opinion of Court by Kennedy, joined by Rehnquist, Stevens, O'Connor, and Breyer, and joined in part by Scalia and Thomas. Concurring opinion by Stevens. Concurring and dissenting opinion by Thomas, joined by Scalia. Dissenting opinion by Ginsburg, joined by Souter.

City of Littleton v. Z. J. Gifts D-4 124 S. Ct. 2219, 72 USLW 4451 (6-7-04)

First Amendment, licensing of adult business: The city's ordinance governing licensing of "adult businesses" is not facially unconstitutional. The ordinance requires denial of a license in certain circumstances, *e.g.*, if the applicant is underage, provides false information, has previously had a license revoked, has operated an adult business determined to be a "public nuisance," or has not paid taxes on time. Because the licensing criteria are objective, neutral, and

nondiscretionary, they do not pose dangers of censorship and an adult business is not entitled to an unusually speedy judicial decision if a license is denied. The city's argument that a prompt judicial "decision" is not required, but only prompt judicial "review," misreads precedent. The latter standard, set forth in *FW/PBS v. Dallas* (1990), is not different from the former, from *Freedman v. Maryland* (1965); in each case, the emphasis was upon issuance of a license within a reasonable period of time. What is a reasonable period of time, however, may vary in different circumstances. *Freedman's* special judicial review procedures, developed to expedite review of "prior restraint" arising from movie censorship, and requiring a decision within two or three days, are not necessary in this case. Instead, Colorado's ordinary judicial review procedures "suffice as long as the courts remain sensitive to the need to prevent First Amendment harms" that may arise. Here, the "typical First Amendment harm" is different from that at issue in *Freedman*, where censors reviewed the content of a film, and a denial "likely meant complete censorship." The ordinance at issue here does not seek to censor content, but instead applies "reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials."

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

Crawford v. Washington 124 S. Ct. 1354, 72 USLW 4229 (3-8-04)

Confrontation Clause, out-of-court testimonial statements: Testimonial statements by witnesses absent from trial are admissible in a criminal trial only if the declarant is unavailable to testify, and only if the defendant has had a prior opportunity to cross-examine the declarant. The rule of *Ohio v. Roberts* (1980), allowing such testimonial evidence if it bears "particularized guarantees of trustworthiness," is rejected as inconsistent with the requirements of the Confrontation Clause. The common law in 1791 conditioned admissibility on unavailability of the absent witness and on a prior opportunity to cross-examine, and those limitations were incorporated in the Confrontation Clause. The *Roberts* test departs from this historical understanding, in part by allowing *ex parte* testimony "upon a mere finding of reliability." The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Reliability is an "amorphous" concept that is "manipulable," and the *Roberts* test has been applied "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." Although this case, involving a police-station statement by the defendant's wife, whose testimony at trial was barred by the marital privilege, could have been resolved by reweighing reliability under *Roberts*, the Court "decline[s]" to do so. "The only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

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

Department of Transportation v. Public Citizen 124 S. Ct. 2204, 72 USLW 4445 (6-7-04)

NEPA, Clean Air Act: The Federal Motor Carrier Safety Administration's decision not to prepare an Environmental Impact Statement (EIS) to accompany application and safety-monitoring rules applicable to Mexican motor carriers operating within the United States did not violate the requirements of the National Environmental Policy Act (NEPA). For similar reasons, the agency's decision not to perform a "conformity review" under the Clean Air Act was permissible. The increase in cross-border operations of Mexican motor carriers, and the release of emissions by those trucks, is not an effect of the agency's safety rules, but rather results from the President's action in lifting the moratorium on such operations in order to comply with NAFTA. The agency "has no ability categorically to prevent the operations of Mexican motor carriers," and consequently preparation of an EIS on such increased operations within the United States could not fulfill NEPA's purpose of informing agency decision making. The agency was correct in limiting its environmental assessment to effects likely to arise from the increase in the number of roadside inspections occasioned by its new rules, and in concluding that these effects would be minor. Similarly, consideration of only those emissions that would result from the increased inspections was appropriate for purposes of determining whether emissions would exceed threshold rates and thereby activate the Clean Air Act's "conformity" restriction on federal actions that facilitate violation of state implementation plans. Emissions from the Mexican trucks operating in the United States are not "indirect emissions" that the agency can "practicably control" under a continuing program responsibility.

9-0. Opinion for unanimous Court by Thomas.

Doe v. Chao 124 S. Ct. 1204, 72 USLW 4178 (2-24-04)

Privacy Act, minimum damages: A plaintiff must prove some actual damages in order to qualify under the Privacy Act for the minimum statutory award of $1,000. The relevant statutory language specifies that the United States can be held liable "for actual damages sustained . . . , but in no case shall a person entitled to recovery receive less than the sum of $1,000." A "straightforward textual analysis" supports the conclusion that actual damages must be shown. The "simplest reading" of the phrase "a person entitled to recovery" is that it refers to the immediately preceding provision identifying an individual who has sustained "actual damages." Moreover, the phrase would serve no purpose if Congress had intended to require the minimum without proof of actual damages. There is a "traditional understanding" in tort law that recovery requires "proof of some harm for which damages can reasonably be assessed." The common law exception allowing for award of "general damages" to a privacy tort victim is unavailing because general damages are not authorized by the Privacy Act. Instead, Congress, in enacting the Privacy Act, directed a study commission to consider whether the Government should be liable for general damages. Also, the act's drafting history shows that Congress cut out the very language in the bill that would have authorized presumed damages. Language recognizing the right of "adversely affected" plaintiffs to sue limits that right to plaintiffs who satisfy Article III standing requirements, but does not supplant the actual damages requirement. There is precedent in the common law of defamation for presuming a minimum level of damages for those litigants able

to show some damages, but not for those who are unable to do so. Inferences drawn from the legislative history of two similarly worded but "completely separate laws enacted well after the Privacy Act" is insufficient to overcome the "reasonable interpretation" of the act gleaned from its language and pre-enactment legislative history.

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

Dretke v. Haley 124 S. Ct. 1847, 72 USLW 4336 (5-3-04)

Habeas corpus, procedural default, actual innocence: A federal habeas court faced with a state prisoner's allegations of actual innocence, whether of the crime charged or of the elements providing the basis for an enhanced sentence, must first address all nondefaulted claims for comparable relief. The Court "decline[s] to answer" whether the actual innocence exception to procedural default of constitutional claims should be applied to noncapital sentencing error. Instead, the case is remanded for consideration of an ineffective assistance of counsel claim. The respondent has served more than six years of a 16-year sentence imposed in error under the Texas habitual offender law, and the underlying theft crime for which he was convicted carries a maximum penalty of two years in jail. The respondent, however, has "a viable and significant" claim of ineffective assistance of counsel, and success on the merits "would give [him] all of the relief that he seeks – *i.e.*, resentencing" – and would also provide "cause" to excuse the procedural default. Furthermore, Texas has assured the Court that it will not incarcerate the respondent during the pendency of his ineffective counsel claim, so for him the negative effects of remand are "minimal." The fact that "many threshold legal questions" often accompany actual innocence claims provides additional justification for a "general rule of avoidance."

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

Elk Grove Unified Sch. Dist. v. Newdow 124 S. Ct. 2301, 72 USLW 4457 (6-14-04)

Standing to sue over recitation of Pledge of Allegiance: The respondent, a non-custodial parent who has been denied the right to sue on behalf of his daughter as "next friend," lacks prudential standing to challenge the actions of his daughter's public school district in requiring classroom recitation of the Pledge of Allegiance. Prudential standing, which consists of "judicially self-imposed limits on the exercise of federal jurisdiction," includes a general disinclination to "intervene in the realm of domestic relations" – a matter that "belongs to the laws of the States." In this case the mother has the final decision if the two parents disagree on a matter relating to the education or welfare of their daughter. The respondent has a right under California law to influence his daughter's religious upbringing, but this right does not extend to preventing his daughter's exposure to religious ideas that her mother endorses. Under the circumstances, where asserted standing is based on "family law rights that are in dispute," and where prosecution of the suit "may have an adverse effect" on the child on whose behalf the suit is brought, "the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty

question of federal constitutional law." The judgment of the Ninth Circuit, which held that the respondent had standing and that the school district's policy was unconstitutional, is reversed.

8-0 (judgment), **5-3** (standing). Opinion of Court by Stevens, joined by Kennedy, Souter, Ginsburg, and Breyer. Concurring opinions by Rehnquist, joined by O'Connor and joined in part by Thomas; by O'Connor; and by Thomas. Scalia did not participate.

Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist. 124 S. Ct. 1756, 72 USLW 4295 (4-28-04)

Clean Air Act, preemption of fleet rules: The District's "Fleet Rules," which require that fleet operators replacing fleet vehicles purchase or lease only alternative-fuel or low-emission vehicles, are not beyond the scope of preemption under Clean Air Act § 209. Section 209 prohibits states and their political subdivisions from adopting or enforcing "any standard relating to the control of emissions from new motor vehicles." The district and appeals courts erred in interpreting the word "standard" as applying only to regulations that compel manufacturers to meet specified emission limits for new cars, and in distinguishing between purchase restrictions and sale restrictions. The dictionary definition of "standard" includes a "criterion," "test," "model," or "example," and the criteria referred to in section 209 relate to the emission characteristics of a vehicle. Limiting the meaning of "standard" to a production mandate directed toward manufacturers "confuses standards with the means of enforcing standards." This distinction is evident in CAA § 246, which requires that restrictions on the purchase of fleet vehicles "meet clean-air standards." A requirement that certain purchasers may buy only vehicles with particular emission characteristics "is as much an attempt to enforce a standard" as is a command that manufacturers sell such vehicles. While it "appears likely that at least certain aspects of the Fleet Rules are pre-empted," the specifics of preemption can be addressed on remand.

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

Fellers v. United States 124 S. Ct. 1019, 72 USLW 4150 (1-26-04)

Sixth Amendment, right to counsel: The Eighth Circuit erred in holding that the absence of an "interrogation" precluded the petitioner's request for suppression of jailhouse statements alleged to be the "fruits" of statements taken at his home in violation of the Sixth Amendment. The home statements violated the rule of *Massiah v. United States* (1964) because they had been "deliberately elicited" by federal agents arresting the petitioner after he had been indicted and in the absence of his attorney. The appeals court erroneously conducted its "fruits" analysis under the Fifth Amendment rather than under the Sixth Amendment. The issue for the appeals court to decide on remand is whether the rationale for the Fifth Amendment rule of *Oregon v. Elstad* (1985), that the admissibility of jailhouse statements turns solely on whether the statements were "knowingly and voluntarily made," is applicable when those statements are made after earlier police questioning in violation of the Sixth Amendment.

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

F. Hoffman-La Roche Ltd. v. Empagran S.A. 124 S. Ct. 2359, 72 USLW 4501 (6-14-04)

Foreign Trade Antitrust Improvements Act: The exception that allows antitrust suits to be brought when foreign anticompetitive practices cause domestic harm does not allow suit to be brought to redress foreign injury that is independent of domestic injury. The Foreign Trade Antitrust Improvements Act (FTAIA) removes from the Sherman Act's reach commercial activities that take place abroad, unless those activities affect domestic commerce, imports to the United States, or export trade of someone engaged in domestic commerce. For the sake of "comity" and international "harmony," the Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." Application of antitrust laws to foreign conduct "is nonetheless reasonable . . . insofar as they reflect a legislative effort to redress *domestic* antitrust injury." This justification for limited interference with a foreign nation's ability to regulate its own commercial affairs disappears, however, insofar as the anticompetitive conduct "causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim." The fact that "many nations" may prohibit the same "primary conduct" targeted by the Sherman Act does not render potential interference minimal; nations "disagree dramatically" about remedies, and imposition of treble damages on a foreign company could upset the balance struck by the laws of its own country. A case-by-case adjudication of comity issues could prove "too complex" to be "workable." The FTAIA's language and history "suggest that Congress designed [it] to clarify, perhaps to limit, but not to *expand* in any significant way, the Sherman Act's scope."

8-0. Opinion of Court by Breyer, joined by Rehnquist, Stevens, Kennedy, Souter, and Ginsburg. Concurring opinion by Scalia, joined by Thomas. O'Connor did not participate.

Frew v. Hawkins 124 S. Ct. 899, 72 USLW 4123 (1-14-04)

Eleventh Amendment, consent decree: The Eleventh Amendment does not bar enforcement of a consent decree entered into by state officials. The decree, which orders prospective injunctive relief against state officials acting in violation of federal law (provisions of the Medicaid law governing the Early and Periodic Screening, Diagnosis, and Treatment program for children), is enforceable under *Ex parte Young* (1908). The fact that the decree is more detailed than the brief and general mandate of the federal statute does not render it unenforceable. The decree is "a federal court order that springs from a federal dispute and furthers the objectives of federal law," and "vindicates an agreement that the state officials reached to comply with federal law." *Pennhurst v. Halderman* (1984), finding *Ex parte Young* inapplicable to suits alleging violation of state law by state officials, is inapplicable. Once issued, a consent decree, like an injunction, may be enforced. "Federal courts are not reduced to approving consent decrees and hoping for compliance." State concerns over implementation of consent decrees validly entered under *Ex parte Young* can be addressed through the federal court's equitable power to modify its decree in light of changed circumstances.

9-0. Opinion for unanimous Court by Kennedy.

General Dynamics Land Systems, Inc. v. Cline 124 S. Ct. 1236, 72 USLW 4168 (2-24-04)

ADEA; statutory interpretation: The Age Discrimination in Employment Act (ADEA), which prohibits discrimination "because of [an] individual's age" against individuals "at least 40 years of age," does not prohibit an employer from discriminating against younger employees within the protected class in favor of older employees within that class. "Text, structure, and history" support the conclusion that the purpose of the ADEA was to prohibit discrimination against older workers in favor of younger workers, not to protect relatively younger workers from discrimination in favor of relatively older workers. The argument that plain meaning of the word "age" requires the opposite conclusion is rejected. "Social history" reveals the understanding that "age discrimination" refers to discrimination against the old; "'age' means 'old age' when teamed with 'discrimination.'" The fact that the word "age" is used in its primary sense elsewhere in the act does not require that it be given the same broad meaning in the context of discrimination. The "cardinal rule that 'statutory language must be read in context'" defeats application of the presumption that a word must be given the same meaning throughout a statute. The presumption "is not rigid and readily yields" whenever different contexts "reasonably warrant" the conclusion that different meanings were intended. A sponsor's statement in a colloquy during congressional debate, asserting that the bill would prohibit age discrimination between a 42-year-old and a 52-year-old "whichever way [the] decision went," is dismissed as "a single outlying statement" washed away by "a tide of context and history." The EEOC's regulation adopting the sponsor's interpretation is "clearly wrong," and hence not entitled to deference. The fact that Title VII of the Civil Rights Act has been interpreted to prohibit discrimination against whites as well as against racial minorities does not require a parallel interpretation of the ADEA; the prohibition against age discrimination "is readily read more narrowly than analogous provisions dealing with race and sex."

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

Groh v. Ramirez 124 S. Ct. 1284, 72 USLW 4160 (2-24-04)

Fourth Amendment, search warrant particularity, qualified immunity: A search warrant that described the premises to be searched, but which did not describe the contraband to be searched for and seized, "was plainly invalid," and a search based on that warrant violated the Fourth Amendment. The fact that the application for the warrant adequately described the things to be seized does not save the warrant. The Fourth Amendment requires particularity in the warrant itself, not in the supporting documents, and in this case neither the application nor the affidavit was cross-referenced by the warrant, and neither accompanied the warrant. The search was not "reasonable" despite the invalid warrant. The warrant did not suffer from a mere technical mistake or typographical error, but "was so obviously deficient" that the search must be regarded as "warrantless." The fact that the scope of the search did not exceed the limits set forth in the application does not mean that the goals of the particularity requirement were otherwise satisfied, because the officers presented no written assurance that the magistrate had found probable cause to

search for and seize every item mentioned in the affidavit. The purpose of the particularity requirement extends beyond prevention of general searches; it also assures the individual whose property is searched of the lawful authority of the executing officer and of the limits of his power to search. The officer in this case was not entitled to qualified immunity in the *Bivens* action for damages. Qualified immunity is available only if the right transgressed was not "clearly established." No reasonable officer could believe that a warrant that plainly did not comply with the particularity requirement – set forth in the text of the Constitution itself – was valid. Since the officer himself prepared the warrant in this case, he cannot claim ignorance of its contents. And no reasonable officer could claim to be unaware of the rule that a warrantless search of a home is presumptively unconstitutional.

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

Grupo Dataflux v. Atlas Global Group 124 S. Ct. 1920, 72 USLW 4388 (5-17-04)

Diversity jurisdiction, post-filing change in citizenship: A party's post-filing change in citizenship cannot cure a lack of subject-matter jurisdiction that existed at the time of filing a complaint premised on diversity of citizenship. Subject-matter jurisdiction premised upon diversity of citizenship is measured by the state of facts that existed at the time of filing. For purposes of diversity, a partnership is a citizen of each state or foreign country of which any of its partners is a citizen. Diversity did not exist at the time of filing in this case because the respondent partnership had two partners who were Mexican citizens, and the petitioner was a Mexican corporation. The Mexican partners left the partnership before trial began, and thus diversity existed during the trial and when a verdict was rendered. Before entry of judgment, however, the corporation filed a motion to dismiss for lack of subject-matter jurisdiction. The Court has adhered to the time-of-filing rule "regardless of the costs it imposes." The exception recognized in *Caterpillar Inc. v. Lewis* (1996) for cases in which the jurisdictional defect is cured prior to verdict does not apply. The jurisdictional defect in *Caterpillar* had been cured by dismissal of the party that had destroyed diversity. Here there had been no change in party, but instead a change in the citizenship of a continuing party. The Court has never deviated from the rule stated by Chief Justice Marshall in 1829 that, "where there is no change of party," jurisdiction depending on the condition of the party is determined as of the time of filing. The time-of-filing rule serves the policy goal of minimizing litigation over jurisdiction, and recognition of an exception would counter that goal. The argument that an exception is needed for purposes of judicial economy in avoiding a retrial is misplaced; it is likely that parties would settle rather than relitigate.

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

Hamdi v. Rumsfeld 124 S. Ct. 2633, 72 USLW 4607 (6-28-04)

Detention of U.S. citizen designated "enemy combatant": The Authorization for Use of Military Force (AUMF), enacted in response to the attacks of September 11, 2001, authorized the President to detain as an "enemy combatant" a U.S. citizen who was seized in Afghanistan during hostilities

against the Taliban, and who allegedly had taken up arms with the Taliban. The AUMF provides that the President may use "all necessary and appropriate force against those nations, organizations, or people he determines planned, authorized, committed, or aided the terrorist attacks [or] harbored such organizations or persons." Reliance on the AUMF is necessary because a 1971 statute provides that no citizen may be imprisoned or otherwise detained "except pursuant to an Act of Congress." However, the Government may not detain the petitioner indefinitely for purposes of interrogation without giving him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney.

5-4 (authority to detain); **6-1-2** (procedural protections). No opinion of Court. Opinion by O'Connor announcing the Court's judgment, joined by Rehnquist, Kennedy, and Breyer. Opinion by Souter, joined by Ginsburg, concurring in part and dissenting in part. Dissenting opinion by Scalia, joined by Stevens. Dissenting opinion by Thomas.

Hibbs v. Winn 124 S. Ct. 2276, 72 USLW 4482 (6-14-04)

Tax Injunction Act: The Tax Injunction Act (TIA) does not bar a federal court suit by Arizona taxpayers seeking to enjoin on Establishment Clause grounds implementation of an Arizona law that allows an income tax credit for payments to "school tuition organizations" that grant scholarships to students in private schools. The suit does not fall within the categories of suits prohibited by the TIA, *i.e.*, suits to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." The taxpayers' suit is clearly not one to enjoin the "levy" or "collection" of the tax, so the case turns on the meaning of "assessment." The word, read in its statutory context, "is closely tied to the collection of a tax, *i.e.*, the assessment is the official recording of liability that triggers levy and collection efforts." This "collection-propelling" reading is reinforced by the interpretational rule against superfluous statutory language; if the word "assessment" by itself comprehended the entire scheme for charging or taxing, then the words "levy" and "collection" would have been superfluous. The TIA is modeled on the earlier Anti-Injunction Act, which bars any court from entertaining a suit to restrain "the assessment or collection of any [federal] tax." The Anti-Injunction Act has been interpreted to require that taxes first be paid, and that challenges to liability be litigated in a suit for refund. Similarly, the TIA "shields state tax collections from federal-court restraints" by incorporating the pay first, litigate later principle. The state tax director's petition for certiorari, filed within 90 days of when the appeals court denied rehearing *en banc*, was not untimely under statute or Supreme Court rule.

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

Hiibel v. Sixth Judicial Dist. Court 124 S. Ct. 2451, 72 USLW 4509 (6-21-04)

Fourth Amendment, stop and identify statute: Nevada's stop and identify statute does not violate the Fourth Amendment or the Fifth Amendment's prohibition of compulsory self-incrimination. A state may arrest and punish someone who refuses to disclose his name to police who are conducting a valid

stop under *Terry v. Ohio* (1968). Earlier cases striking down stop and identify laws, one when the initial stop was not based on specific, objective facts, the other when the suspect was required to give "credible and reliable" identification, are distinguished. Here the stop was based on "reasonable suspicion," and the Nevada statute is "narrower and more precise," requiring only that a suspect disclose his name. Questions concerning a suspect's identity "are a routine and accepted part of many *Terry* stops," and serve "important government interests." Statements in earlier cases that suspects are not obliged to answer such a request for identification are dicta, and not "controlling." "Petitioner's concerns are met by the requirement that a *Terry* stop must be justified at its inception," and in this case the request for identification "was reasonably related in scope to the circumstances which justified the stop." The petitioner's self-incrimination claim is rejected also. What is prohibited is compelled testimony that is incriminating, and disclosure of one's name is incriminating "only in unusual circumstances." This is not such a case.

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

Holland v. Jackson 124 S. Ct. 2736, 72 USLW (6-28-04)

Habeas corpus, ineffective counsel claim: The Sixth Circuit erred in finding unreasonable a Tennessee court's application of *Strickland v. Washington* (1984), and in finding that the state court measured proof of prejudice by the wrong standard. The Sixth Circuit ignored an independent ground for the state court's ruling. A court's application of *Strickland's* test for finding ineffective assistance of counsel must be measured on the basis of the record that the court had before it, and the Tennessee court had ruled that the statement on which the *Strickland* claim was based was not properly before it. The state court recited the correct "reasonable probability" standard for requiring proof of prejudice, and other language in its opinion does not establish that it substituted a "preponderance of the evidence" standard.

5-0-4. *Per curiam*. Justices Stevens, Souter, Ginsburg, and Breyer would have denied the certiorari petition.

Household Credit Servs. v. Pfennig 124 S. Ct. 1741, 72 USLW 4289 (4-21-04)

Truth in Lending Act, deference to administrative interpretation: The Federal Reserve Board's Regulation Z, which interprets the term "finance charge" as used in the Truth in Lending Act to exclude charges for exceeding a credit limit, is a reasonable interpretation of the act that is entitled to deference by the courts. The lender's failure to include the amount of over-limit fees in its disclosure of finance charges, therefore, did not violate the act's requirement that "the amount of any finance charge" be disclosed in its periodic balance statement to the consumer. The act itself does not explicitly address whether over-limit fees are included within the definition of "finance charges." The term is defined as "all charges . . . imposed directly or indirectly by the creditor as an incident to the extension of credit." The phrase "incident to" implies a necessary connection, but "does not make clear whether a substantial (as opposed to a remote) connection is required," and the act's recognition of two categories of charges – "other charges" as well as "finance charges" – indicates that the act is "at best ambiguous" with respect to whether over-limit fees

should be considered "finance charges." Because the provision is ambiguous, the Board's regulation is entitled to deference unless it is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." It is reasonable to consider an over-limit fee as a penalty for violating the credit agreement rather than as a charge for obtaining an extension of credit, and the Board's decision to adopt a uniform rule excluding from the term "finance charge" all penalties imposed for exceeding the credit limit was "rational." The case-by-case approach of the Court of Appeals would have proved "unworkable," and was based on "a fundamental misunderstanding of the workings of the credit card industry."

9-0. Opinion for unanimous Court by Thomas.

Illinois v. Fisher 124 S. Ct. 1200, 72 USLW 3533 (2-23-04)

Due Process, police destruction of evidence: Prosecution of the defendant after police had destroyed evidence more than 10 years after the defendant had requested the evidence in a discovery motion did not violate due process. The case is controlled by *Arizona v. Youngblood* (1988), holding that destruction of "potentially useful evidence" does not violate due process unless the defendant can show bad faith on the part of the police in destroying the evidence. The defendant in this case did not allege bad faith. The most that can be said of the evidence in this case (cocaine allegedly contained in a plastic bag seized from the defendant) is that it could have been subjected to tests, the results of which might have exonerated the defendant. This is, "at best, 'potentially useful' evidence" controlled by *Youngblood*, and not "exculpatory evidence" as to which no bad faith showing is required.

9-0. *Per curiam*. Concurring opinion by Stevens.

Illinois v. Lidster 124 S. Ct. 885, 72 USLW 4120 (1-13-04)

Fourth Amendment, highway checkpoint: A highway checkpoint set up by police to solicit information from motorists about a recent hit-and-run accident was "reasonable," and hence did not violate the Fourth Amendment. Such an informational checkpoint is not governed by the rule of *Indianapolis v. Edmond* (2000), under which highway checkpoints set up to catch motorists committing drug offenses are presumptively invalid. The checkpoint here "differs significantly from that in *Edmond*." The purpose was not to determine whether motorists were committing a crime, but rather to seek assistance in solving a crime "in all likelihood committed by others." The law ordinarily permits police to seek assistance from the public in investigating a crime. Although stopping a motorist constitutes a "seizure" and asking a pedestrian for information ordinarily does not, that distinction "is not important enough to justify an *Edmond*-type rule" that presumes unconstitutionality. Rather, the reasonableness of informational checkpoints should be measured by the individual circumstances. In this case the checkpoint was reasonable. The public concern – investigating a "specific and known crime" that resulted in death – was "grave," and the checkpoint advanced this concern "to a significant degree." Moreover, the stop, which detained motorists for only a few minutes and which consisted "simply of a request for information and the distribution of a flyer," "interfered only minimally with liberty [protected by] the Fourth Amendment."

9-0 (general rule); **6-3** (application of rule rather than remand). Opinion of Court by Breyer, unanimous in part, and joined in separate part by Rehnquist, O'Connor, Scalia, Kennedy, and Thomas. Concurring and dissenting opinion by Stevens, joined by Souter and Ginsburg.

Intel Corp. v. Advanced Micro Devices, Inc. 124 S. Ct. 2466, 72 USLW 4528 (6-21-04)

Federal courts, discovery in aid of foreign proceedings: A federal statute, 28 U.S.C. § 1782(a), authorizes but does not require federal district courts to order someone residing or "found" in the district to give testimony or produce documents for use in a foreign proceeding. This discovery aid may be available for use in resolution of an antitrust complaint filed with the Directorate-General for Competition of the Commission of the European Communities. The statute's caption, referring to "foreign and international tribunals and to litigants before such tribunals," does not restrict its availability. The statute provides that discovery aid may be rendered to "any interested person," and "the caption of a statute cannot undo or limit that which [its] text makes plain." The complainant who triggers a European Commission investigation has "a significant role in the process," and therefore qualifies as an "interested person" whether or not he is a "litigant." The European Commission qualifies as a "foreign or international tribunal" when it acts as a "first-instance decisionmaker" whose findings are subject to review by European courts. The statute does not limit the provision of assistance to "pending" proceedings. In 1964 Congress eliminated the requirement that a proceeding be "judicial" and "pending," and courts presume that Congress "intends its amendment[s] to have real and substantial effect." Nothing in the text or legislative history of the provision limits its operation to materials that could be discovered in the foreign jurisdiction if they were located there. Also irrelevant is whether the United States would allow discovery in domestic litigation analogous to the foreign proceeding.

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

Iowa v. Tovar 124 S. Ct. 1379, 72 USLW 4241 (3-8-04)

Sixth Amendment, waiver of right to counsel: The Sixth Amendment requires that a trial judge, before accepting a guilty plea from an uncounseled defendant, inform him of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea. The Sixth Amendment does not require the trial judge to advise the defendant that "waiving the assistance of counsel in deciding whether to plead guilty entails the risk that a viable defense will be overlooked," or to "admonish the defendant that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty." The Supreme Court of Iowa erred in holding that these warnings are required by the Sixth Amendment. A waiver of the right to counsel must be "knowing, voluntary, and intelligent," but it need not be based on a full and complete understanding of all of the consequences. The detailed and "scripted

admonitions" required by the Iowa court overlook the fact that the constitutional minimum will vary with the facts and circumstances of each case.

9-0. Opinion for unanimous Court by Ginsburg.

Jones v. R. R. Donnelley & Sons 124 S. Ct. 1836, 72 USLW 4332 (5-3-04)

Limitations period, federal actions: The catchall 4-year statute of limitations established by 28 U.S.C. § 1658, applicable to actions arising under federal statutes enacted after December 1, 1990, applies to hostile work environment, harmful discharge, and refusal to transfer actions brought under 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991. The meaning of "arising under" in section 1658 is not clear. Interpretation is clarified, however, by looking beyond the "bare text . . . to the context in which it was enacted and the purposes it was designed to accomplish." The absence of a uniform statute of limitations applicable to federal actions had created a "void" under which a state limitation period would be borrowed if the federal statute did not specify a period. This practice had "generated a host of issues," *e.g.*, in determining which of the forum state's limitation statutes was the most appropriate to apply, in determining which state's laws to borrow, and in resolving state-by-state variances in the class action context. A "central purpose of section 1658 was to minimize the occasions" for borrowing state statutes of limitations. That purpose is furthered by "an interpretation that fills more rather than less of the void that has created so much unnecessary work for federal judges." To restrict application to actions that are based solely on post-1990 statutes would defeat this central purpose by covering "only a small fraction of post-1990 enactments." Instead, section 1658 applies to claims "made possible by a post-1990 enactment," even if that enactment amends an earlier enactment. The original version of §1981 was enacted as § 1 of the Civil Rights Act of 1866. That law, as interpreted by the Supreme Court in 1989 in *Patterson v. McLean Credit Union*, did not authorize hostile work environment claims. The 1991 amendment, designed to overcome the *Patterson* interpretation, did authorize such actions. Because the hostile work environment and other claims were made possible by the 1991 amendment, the 4-year limitations period applies.

9-0. Opinion for unanimous Court by Stevens.

Kontrick v. Ryan 124 S. Ct. 906, 72 USLW 4126 (1-14-04)

Bankruptcy, timeliness: A debtor forfeits the right to rely on Rule 4004 of the Federal Rules of Bankruptcy Procedure if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge. The statute is silent on a time limit for objections to discharge, and the Rule's time limit is not jurisdictional. A claim-processing rule, unlike a provision governing subject-matter jurisdiction, can be forfeited through delay. Rule 4004 affords the debtor an affirmative defense that "generally must be raised in an answer or responsive pleading." Here, the debtor not only failed to raise the defense in a pleading or amended pleading responding to the complaint, but also failed to raise the issue in response to a request for summary judgment. The defense may not be recognized "after the party has litigated and lost the case on the merits."

9-0. Opinion for unanimous Court by Ginsburg.

Lamie v. United States Trustee 124 S. Ct. 1023, 72 USLW 4152 (1-26-04)

Bankruptcy; Statutory interpretation: A 1994 amendment to Bankruptcy Code § 330 removed the authority of a court to award fees for services to a debtor's attorney who was not employed by the trustee in accordance with § 327. Although the language of the amended section is "awkward, and even ungrammatical," its meaning is "straightforward." Prior to amendment, § 330(a)(1) authorized reimbursement of fees "to a trustee . . . , to a professional person employed [by a trustee] under section 327 . . . , or to a debtor's attorney." The amendment deleted the words "or to a debtor's attorney," and did not add an "or" prior to what then became the last category in the list, "a professional person employed under section 327." The amended section retained the language of § 330(a)(1)(A) describing what could be awarded: "reasonable compensation for . . . services rendered by such trustee, examiner, professional person, *or attorney*." The missing conjunction "or" does not change the provision's "plain meaning." Nor does the elimination of the parallel categories created by removal of § 330(a)(1)'s reference to a "debtor's attorney" and retention of "or attorney" in § 330(a)(1)(A) cloud the provision's meaning. Subparagraph (A)'s reference to "attorney" can be read to refer to those attorneys whose fees are authorized because they qualify as § 327 "professional persons." Although the word "attorney . . . may well be surplusage" under this interpretation, the "preference for avoiding surplusage is not absolute." Application of a "plain meaning" that limits the debtor in incurring expenses for professional services without the trustee's approval, is not an "absurd result." Moreover, reading the word "attorney" to refer to "debtor's attorneys" runs counter to a canon of interpretation that disfavors the addition of "absent words" to statutes. It is unnecessary to rely on legislative history of the 1994 amendment, and, in any event, that history "creates more confusion than clarity about the congressional intent."

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

Locke v. Davey 124 S. Ct. 1307, 72 USLW 4206 (2-25-04)

Free Exercise Clause, exclusion of theology students from scholarship: Washington State's exclusion of students pursuing a theology degree from a scholarship program designed to assist academically gifted college students does not violate the Free Exercise Clause of the First Amendment. The statute implements the State's constitutional prohibition on providing funds to students to pursue degrees that are "devotional in nature or designed to induce religious faith." "[T]here is room for play in the joints" between the Establishment Clause and the Free Exercise Clause. Washington could constitutionally permit scholarship recipients to pursue a degree in devotional theology, and it can also deny them such funding. The Court's decision in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), invalidating an ordinance that sought to suppress ritualistic animal sacrifices of the Santeria religion, is not controlling. Here the "disfavor of religion (if it can be called that) is of a far milder kind," the State "merely [having chosen] not to fund a distinct category of instruction." Both federal and state constitutions treat religion differently from other pursuits. The fact that many early state constitutions contained provisions prohibiting the use of tax money to support the ministry "reinforces [the] conclusion that religious

instruction is of a different ilk." Washington's constitutional provision is not a "Blaine Amendment," and neither it nor the scholarship program at issue evidences an "animus toward religion." On the contrary, the program "goes a long way toward including religion in its benefits" by allowing recipients to take devotional theology courses as long as they do not major in that subject.

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.

Maryland v. Pringle 124 S. Ct. 795, 72 USLW 4103 (12-15-03)

Search and seizure, passenger in car: A police officer had probable cause to arrest all three occupants of a car that had been stopped for speeding, after a search of the car revealed $783 in the glove compartment and cocaine behind the back-seat armrest, and the driver and passengers all denied ownership of the drugs and money. After discovering the cocaine, the officer had probable cause to believe that a felony had been committed. Before he could arrest an occupant of the car, however, the officer needed individualized suspicion. Under the circumstances, a "reasonable inference" could be made that "any or all three" men had knowledge of and dominion over the drugs. *Ybarra v. Illinois* (1979) and *United States v. Di Re* (1948) are distinguished. The Court in *Ybarra* found probable cause lacking because there was no individualized suspicion justifying search of a tavern patron on the basis of a warrant to search the tavern and its bartender. A car passenger, unlike a tavern patron, will often be engaged in a common enterprise with the driver, and that inference is warranted in this case. In *Di Re* the Court found probable cause lacking to arrest a car passenger on the basis of another passenger's possession of counterfeit ration tickets and a tip implicating the driver. Any inference of common enterprise was eliminated by the informer's singling out of the driver.

9-0. Opinion for unanimous Court by Rehnquist.

McConnell v. FEC 124 S. Ct. 619, 72 USLW 4015 (12-10-03)

BCRA, campaign finance restrictions, First Amendment: The Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act of 1971 (FECA) and other laws applicable to federal elections, is upheld in most respects against facial constitutional challenges. The principal holdings include the following. Title I of BCRA, which amended FECA § 323 to prohibit national political party committees from soliciting, receiving, directing, or spending any "soft money" contributions, does not violate the First Amendment. The restrictions on political party activities satisfy the less rigorous standard of review applicable to limits on campaign contributions because they are "closely drawn" to match the "sufficiently important interest" of preventing corruption and the appearance of corruption. Similar restrictions on the use of soft money contributions by state and local party committees to affect federal elections are also upheld. Preventing state and local committees from financing federal election activity with soft money is necessary to make the restrictions on national committees effective. The restrictions are not overbroad. Also upheld are other portions of section 323 that prohibit party committees from soliciting for or making donations to tax-exempt organizations that make election expenditures, and that prohibit state and local candidates

from raising and spending soft money to promote or attack federal candidates. Most challenges to title II of BCRA, which amended FECA § 304 to extend disclosure requirements to a broader range of political advertising and issue advocacy, and which amended FECA § 316 to restrict such advertising and advocacy by corporations and unions, are also rejected. BCRA's extension of coverage to the new category of "electioneering communication," defined to extend beyond the express advocacy of the election of candidates approved in *Buckley v. Valeo* (1976), is permissible. The Court's distinction in *Buckley* between express advocacy and issue advocacy was the result of statutory interpretation, not constitutional command. "The presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." Requiring disclosure of the identity of persons who fund electioneering ads is not facially invalid, although future as-applied challenges are not foreclosed. Although corporations and unions are prohibited from using general treasury funds for electioneering communications, they remain free to run electioneering ads through segregated funds (PACs). The restriction on using general corporate or union funds for such ads is not overbroad, because the "vast majority" of ads subject to the restriction (issue ads broadcast within 30 days before a federal primary or 60 days before a general election) have an electioneering purpose. The restriction is not underinclusive as a result of its application to broadcast ads but not to print ads; Congress may take one step at a time and address problems thought to ensue from the "virtual torrent of televised election-related ads" in recent campaigns. Extension of FECA § 316's prohibition to non-profit entities is valid, as construed to be inapplicable to entities, described in *FEC v. Massachusetts Citizens for Life* (1986), that are formed for the express purpose of promoting political ideas. BCRA § 213, which amends FECA § 315 to require parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, is unconstitutional because it burdens parties' right to make unlimited independent expenditures. BCRA § 214, which amends FECA § 315 to provide that expenditures may be treated as "coordinated" with a candidate or political party in the absence of "agreement or formal collaboration," is not overbroad or unconstitutionally vague. Several petitioners lack standing to challenge certain provisions of title III of BCRA. BCRA § 311's expansion of FECA § 318 to require disclosure of electioneering-communications disbursements is valid. BCRA § 318, which adds FECA § 324, prohibiting persons "17 years old or younger" from contributing to candidates or political parties, is invalid as violating the First Amendment rights of minors. The challenged portions of BCRA title V's amendments to the Communications Act of 1934 are not facially invalid. Upheld are the requirements of Section 504 that broadcasters keep publicly available records of broadcasting requests made "by or on behalf of" any candidate ("candidate requests"), of requests by anyone for broadcast messages that refer to a candidate or to a federal election (message requests"), and of requests for broadcast messages related to any national legislative issue of public importance ("issue requests").

5-4 (BCRA titles I, II (except for § 213), and V), **6-3** (BCRA § 305, FECA § 323(f)), **8-1** (BCRA § 311), **9-0** (BCRA §§ 213, 304, 307, 315, 316, 318, 319, 403(b)). Opinion of Court with respect to titles I and II by Stevens and O'Connor, joined by Souter, Ginsburg, and Breyer. Opinion of Court with respect to titles III and IV by Rehnquist, joined by O'Connor, Scalia, Kennedy,

and Souter, and joined in part by Stevens, Ginsburg, and Breyer, and joined in separate part by Thomas. Opinion of Court with respect to title V by Breyer, joined by Stevens, O'Connor, Souter, and Ginsburg. Opinions concurring in part and dissenting in part by Scalia; by Thomas; by Kennedy, joined by Rehnquist; by Rehnquist, joined by Scalia and Kennedy; and by Stevens, joined by Ginsburg and Breyer.

Middleton v. McNeil 124 S. Ct. 1830, 72 USLW 3687 (5-3-04)

Due process, jury instruction, clarification by prosecutor: The Ninth Circuit did not give "appropriate deference" to the California Court of Appeal's determination that an incorrect jury instruction was not reasonably likely to have misled the jury in convicting the defendant of second-degree murder rather than voluntary manslaughter. At one point the jury instruction on manslaughter erred in explaining that response to an "imminent peril" must have appeared to the slayer as a "reasonable person" to have required an immediate response, but in at least three other places the instruction stated the correct standard that the belief did not have to be "reasonable" but only "genuine," and the prosecutor also stated the correct standard in his closing argument. The state courts could assume that the prosecutor's argument clarified what was at worst an ambiguous jury charge.

9-0. *Per curiam.*

Missouri v. Seibert 124 S. Ct. 2601, 72 USLW 4634 (6-28-04)

Miranda warning, two-step questioning: An incriminating statement made during the first stage of police questioning and repeated during the second stage is inadmissible if police deliberately questioned the suspect in two stages, deliberately withheld a *Miranda* warning until the first stage had produced the statement, and took no curative measures designed to alert the suspect that her first statement was likely inadmissible. *Oregon v. Elstad* (1985), in which the Court held that a suspect's initial statement before receiving a *Miranda* warning did not render inadmissible his later statement after a proper *Miranda* warning, is distinguished. *Elstad*, unlike the present case, did not involve a deliberate violation of *Miranda*.

5-4. No opinion of Court. Opinion by Souter announcing the Court's judgment, joined by Stevens, Ginsburg, and Breyer. Concurring opinions by Kennedy and by Breyer. Dissenting opinion by O'Connor, joined by Rehnquist, Scalia, and Thomas.

Mitchell v. Esparza 124 S. Ct. 7, 72 USLW 3305 (11-3-03)

Habeas corpus, statutory restrictions: The Court of Appeals for the Sixth Circuit erred in affirming the grant of habeas corpus relief to a state prisoner without making the findings required by 28 U.S.C. § 2254(d)(1). The statute's requirements were not met. The petitioner's conviction was not "contrary to," and did not involve "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." Although Ohio law authorizes the death penalty only for a "principal offender" in the defendant's circumstances, and the indictment failed to charge that the defendant was a "principal offender," that omission may be judged by the harmless error standard, and to do so is not contrary to "clearly established" Supreme Court precedent. Nor was the Ohio court's decision objectively "unreasonable." There was no evidence that anyone

other than the defendant had participated in the robbery and murder, and "the jury verdict would surely have been the same had it been instructed to find that the defendant was a 'principal' in the offense."

9-0. *Per curiam.*

Muhammad v. Close 124 S. Ct. 1303, 72 USLW 4216 (2-25-04)

Section 1983 action, exhaustion requirement: A prisoner's action under 42 U.S.C. § 1983 seeking damages from a prison official raised no claim on which habeas corpus relief could have been granted, and therefore the rule requiring exhaustion of state and federal opportunities to challenge the underlying conviction or sentence should not have been imposed. The prisoner's § 1983 action sought damages for "physical, mental, and emotional injuries" sustained as a result of detention pending a hearing on a threatening behavior charge allegedly brought by the prison official in retaliation for earlier grievances by the prisoner. Because the prisoner's action did not challenge his conviction or the length of his sentence, habeas relief could not have been granted and the exhaustion rule was inapplicable.

9-0. *Per Curiam.*

National Archives and Records Admin. v. Favish 124 S. Ct. 1570, 72 USLW 4265 (3-30-04)

Freedom of Information Act, law enforcement data, privacy: The interest in "personal privacy" protected by Exemption 7(C) of the Freedom of Information Act (FOIA) includes the interest of surviving family members in being protected from public disclosure of death-scene images of a close relative. Exemption 7 excuses from disclosure "records or information compiled for law enforcement purposes" if production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The right of "personal privacy" protected by the provision includes the right to control information about oneself, but can encompass other privacy interests as well. A family's control over the body and death images of a deceased has long been protected at common law and by cultural traditions, and "[w]e can assume Congress legislated against this background." Because it is only "unwarranted" invasions of privacy that are protected by Exemption 7, the family's privacy interest must by balanced against "the public interest in disclosure." In this case, involving access to four photos taken at the death scene of Vincent Foster, deputy White House counsel, the Ninth Circuit erred in defining the balance between privacy and the public interest. The Ninth Circuit ruled that the requester need not show knowledge of government misfeasance, and held irrelevant the fact that other agencies had conducted similar investigations and had all concluded that the death was a suicide. A requester must establish more than "a bare suspicion" that government officials acted improperly, but instead "must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Moreover, "[i]t would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion."

9-0. Opinion for unanimous Court by Kennedy.

Nelson v. Campbell 124 S. Ct. 2117, 72 USLW 4410 (5-24-04)

42 U.S.C. § 1983, relation to habeas corpus: A death row inmate may use 42 U.S.C. § 1983 to challenge the constitutionality of the "cut-down" method of preparing him for administration of the death penalty by lethal injection, and need not use habeas corpus. Although section 1983 authorizes suits for deprivation of constitutional rights by anyone acting under color of state law, it must yield to the more specific and restrictive habeas corpus statute if an inmate's claims fall within the "core" of habeas corpus, e.g., if he seeks injunctive relief challenging the fact of his conviction or the duration of his sentence. It is not necessary to decide whether section 1983 may be used to enjoin the use of a particular method of execution in order to approve reliance on the section to challenge use of the cut-down method to gain venous access to a prisoner. Applicability of section 1983 was conceded if the purpose of access were to provide medical treatment of an inmate not facing execution, and there is no reason to rule differently if the purpose is preparation for execution. Here the inmate's claim is premised on the assumption that the cut-down procedure is unnecessary in order to gain venous access. If, on remand, the district court determines that the procedure is necessary for administration of the lethal injection, then it will have to consider how to treat method-of-execution claims generally. Similarly, the court may have to consider the appropriateness of habeas corpus in the broader context if the inmate renews his request for a stay of execution rather than merely seeking to stay the pre-execution cut-down procedure.

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

Nixon v. Missouri Municipal League 124 S. Ct. 1555, 72 USLW 4256 (3-24-04)

Telecommunications; Preemption, clear statement: Missouri's law prohibiting its political subdivisions from offering telecommunications services is not preempted by 47 U.S.C. § 253, which bans any state or local laws that "prohibit . . . the ability of any entity to provide any . . . telecommunications service." A state's political subdivision is not "any entity" within the meaning of section 253. The word "'any' can and does mean different things depending upon [context]." In this context, "Congress used 'any entity' [as] a limited reference to any private entity." Using federal preemption to free public entities from state limitations would produce "strange and indeterminate results." Removing a prohibition on government-run utilities "would not necessarily accomplish much," since a political subdivision would still require affirmative authorization from the state before it could run a utility. Ordinarily, federal preemption of a state statute prohibiting private conduct allows that conduct to occur. Because, however, section 253 if applied to a governmental unit "would not work like a normal preemptive statute," and would hold out no promise of national uniformity, it is "farfetched" in the absence of a "clearer signal" to hold that Congress intended such preemption. Application of the "complementary principle" of *Gregory v. Ashcroft* (1991), produces the same result: Congress must speak in "unmistakably clear" language if it wishes to constrain traditional state authority, and has not done so in section 253.

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

Norton v. Southern Utah Wilderness Alliance 124 S. Ct. 2373, 72 USLW 4472 (6-14-04)

Administrative Procedure Act, action unlawfully withheld: The Administrative Procedure Act (APA) does not authorize the Alliance's suit to compel the Bureau of Land Management to act to restrict use of off-road vehicles (ORVs) in certain wilderness study areas in Utah. The APA authorizes suits to "compel agency action unlawfully withheld," but the restrictions sought by the Alliance do not qualify as "agency action." The agency actions subject to APA suit are all "discrete" actions such as issuance of a rule, order, license, or sanction. Moreover, "the only agency action that can be compelled under the APA is action legally *required*." The actions sought by the Alliance are not legally required, but fall within the agency's discretion in managing the public lands. The Federal Land Policy and Management Act directs that wilderness study areas be managed "in a manner so as not to impair [their] suitability . . . for preservation as wilderness." This language is "mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it." "General deficiencies in compliance . . . lack the specificity requisite for agency action." The claim that BLM must implement a formal program to monitor ORV use in a specific area because the governing land use plan states that the area "will be monitored and closed if warranted" is rejected. FLPMA requires that BLM manage "in accordance with" land use plans, but the statement at issue is not the sort of "binding commitment" that can be compelled under the APA. Moreover, "a land use plan is generally a set of priorities [that] guides and constrains actions, but does not [ordinarily] prescribe them," and implementation is necessarily subject to budget constraints. The contention that a "hard look" is required under the National Environmental Policy Act is also rejected; the environmental impact statement for the land use plan is already completed, and there is no ongoing "major federal action" that requires EIS supplementation.

9-0. Opinion for unanimous Court by Scalia.

Olympic Airways v. Husain 124 S. Ct. 1221, 72 USLW 4187 (2-24-04)

Warsaw Convention, "accident": A flight attendant's refusal to assist a passenger who requested to be moved further away from the smoking section on a flight, and who subsequently died on the flight after inhaling smoke, was an "accident" for which the carrier can be held liable under Article 17 of the Warsaw Convention. The Court determined in *Air France v. Saks* (1985) that the term "accident" in the Convention refers to an "unexpected or unusual event or happening that is external to the passenger," and the refusal of assistance in this case qualifies under that definition. Intentional conduct that is "unexpected or unusual," and that constitutes a link in the chain of causation of a passenger's death or injury, can fall within the definition. The carrier's argument that the death resulted from the presence of smoke in the cabin – a normal, not an "unusual" event at the time because smoking was permitted on international flights – is misplaced. There can be multiple, interrelated events that combine to cause an injury, and rejection of a request for assistance can be an "event" or "happening." The argument that the denial of assistance cannot constitute an "accident" because it is not an "affirmative act" fails for the additional reason that "inaction can give rise to liability."

6-2. Opinion of Court by Thomas, joined by Rehnquist, Stevens, Kennedy, Souter, and Ginsburg. Dissenting opinion by Scalia, joined in part by O'Connor. Breyer did not participate.

Pennsylvania State Police v. Suders 124 S. Ct. 2342, 72 USLW 4493 (6-14-04)

Civil rights, sexual harassment, constructive discharge: An affirmative defense may be available to an employer in a Title VII sexual harassment case involving a claim of constructive discharge resulting from a hostile work environment. In two 1998 decisions the Court determined that an affirmative defense is available when a hostile work environment case involves a claim of sexual harassment in the absence of a "tangible employment action," but is unavailable if the harassment culminates in a "tangible employment action." The distinction is derived from principles of agency law. Tangible employment actions such as hiring, firing, failure to promote, or reassignment are easily attributable to the employer because they "fall within the special province of the supervisor," an agent of the employer's. In cases not involving such tangible actions, however, it is less obvious that the agency relation is the driving force, and the employer may defeat vicarious liability by establishing that it had a readily available and effective policy for reporting and resolving sexual harassment complaints, and that the employee did not avail herself of that complaint process. In such instances the employee has the duty to mitigate harm, but the employer bears the burden to allege and prove the affirmative defense. In a constructive discharge case, in which it is alleged that the working conditions were so intolerable that a reasonable person would have felt compelled to resign, the employee's decision to leave involves no official action, but the precipitating conduct may or may not involve official action. When an official act does not underlie the constructive discharge, the affirmative defense must be available to the employer. The Third Circuit erred in ruling that a constructive discharge constitutes a tangible employment action that precludes employer recourse to the affirmative defense.

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

Pliler v. Ford 124 S. Ct. 2441, 72 USLW 4523 (6-21-04)

Habeas corpus, "mixed" petitions, pro se litigant: The Ninth Circuit erred in holding that the district court should not have dismissed *pro se* habeas corpus petitions without giving the habeas petitioner two particular warnings about how to preserve his actions. When the petitioner filed his initial federal habeas petitions just five days before the expiration of the one-year limitations period prescribed by the Antiterrorism and Effective Death Penalty Act, he also requested that the petitions be stayed so that he could return to state court to exhaust some of his claims. Because the petitions contained both unexhausted and exhausted claims, the district court dismissed this "mixed" petition in accordance with governing precedent. The Ninth Circuit concluded that the district court should have advised the petitioner to renew his stay motions after dismissal of the unexhausted claims, and also should have advised about the limitation-period consequences of dismissal without amendment. District courts, however, are not required to give *pro se* litigants such warnings; district judges "have no obligation to act as counsel or paralegal to *pro se* litigants." Explaining the intricacies of habeas procedure and the filing deadlines imposed by statutes of limitations are "tasks normally and properly performed by trained counsel," and

requiring judges to perform this role could "undermine [their] role as impartial decisionmakers." Moreover, the two warnings "run the risk of being misleading themselves."

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

Rasul v. Bush 124 S. Ct. 2686, 72 USLW 4596 (6-28-04)

Habeas corpus, detainees at Guantanamo Bay: The federal courts have jurisdiction to consider habeas corpus petitions brought by foreign prisoners captured during hostilities abroad and held by the United States at Guantanamo Bay Naval Base in Cuba. Under a 1903 lease agreement with Cuba, the United States recognizes Cuba's "ultimate sovereignty," but exercises "complete jurisdiction and control" over Guantanamo. Jurisdiction is conferred by 28 U.S.C. § 2241, which authorizes district courts "within their respective jurisdictions" to entertain habeas corpus petitions brought by any person claiming to be held in violation of the laws of the United States. "At its core," habeas corpus is "a means of reviewing the legality of Executive detention," and operates "in wartime as well as in times of peace." The Court's decision in *Johnson v. Eisentrager* (1950), denying habeas relief to German citizens captured and tried by military tribunal in China, and incarcerated in Germany, is distinguished. The prisoners in this case are not citizens of a country at war with the United States, and allege that they have not committed acts of aggression against the United States. They have never been afforded access to any tribunal, and are imprisoned in territory over which the United States exercises exclusive jurisdiction and control. Moreover, *Eisentrager's* "statutory predicate" – that jurisdiction under § 2241 requires the petitioner's presence within the district court's territorial jurisdiction – has been overruled by *Braden v. 30th Judicial Circuit Court* (1973), which looks instead to whether the jailer-custodian can be reached by service of process. Because no party questions the district court's jurisdiction over petitioners' custodians, section 2241 confers jurisdiction. The presumption that legislation has no extraterritorial effect "has no application to the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States." Jurisdiction is also present under the federal question statute and the Alien Tort statute.

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

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon 124 S. Ct. 1330, 72 USLW 4219 (3-2-04)

ERISA, business owner plan "participant": The working owner of a business may qualify under ERISA as a pension plan "participant" if the plan covers one or more employees other than the business owner and his or her spouse. ERISA's definitions of "employee" and "participant" are "uninformative," but other provisions of the act are instructive. Several provisions of Title I "partially exempt certain plans in which working owners likely participate" from operation of otherwise mandatory ERISA requirements. Such exemptions "would be unnecessary if working owners could not qualify as participants" in those plans. Although ERISA's text "is adequately informative," and consequently there is no

need to "look outside ERISA itself to conclude that Congress intended working owners to qualify as plan participants," that conclusion is supported by congressional purposes in enacting ERISA, and by the Department of Labor's interpretation. The appeals court mistakenly relied on ERISA's anti-inurement provision, which provides that plan assets shall never inure to the benefit of "any employer." That provision "demands only that plan assets be held for supplying benefits to plan participants, . . . [and] does not address the discrete question whether working owners . . . may be participants."

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

Raytheon Co. v. Hernandez 124 S. Ct. 513, 72 USLW 4009 (12-2-03)

ADA, rehiring standards: The Ninth Circuit erred in ruling that an employer's policy of not rehiring employees who had been lawfully dismissed for workplace misconduct was not a legitimate nondiscriminatory reason sufficient to defeat a *prima facie* case of disparate treatment under the Americans With Disabilities Act. Instead, the appeals court conflated disparate treatment analysis with disparate impact analysis by rejecting the neutral no-rehire policy because it "serves to bar the re-employment of a drug addict despite his successful rehabilitation." Liability in a disparate treatment cases depends upon whether the protected trait actually motivated the employer's decision. Therefore, once the employer established the existence of a legitimate, nondiscriminatory policy, "the only relevant question" was whether the employer's decision was nonetheless based on the applicant's status as disabled.

7-0. Opinion of Court by Thomas. Souter and Breyer did not participate.

Republic of Austria v. Altmann 124 S. Ct. 2240, 72 USLW 4423 (6-7-04)

Foreign Sovereign Immunities Act, retroactivity: The Foreign Sovereign Immunities Act (FSIA), which grants foreign states immunity from jurisdiction of United States courts, but which exempts "cases . . . in which rights in property taken in violation of international law are in issue," applies to claims that arise from property expropriations that occurred before the act's enactment in 1976, and before the United States adopted the "restrictive theory" of sovereign immunity. The "default" anti-retroactivity presumption announced in *Landgraf v. USI Film Products* (1994), does not control. The FSIA defies the easy distinction drawn by *Landgraf* between substantive rights and procedure. Prior to 1976, foreign states "had a justifiable expectation that, as a matter of comity, United States courts would grant them immunity for their public acts, ... but they had no 'right' to such immunity." Sovereign immunity does not address the same concerns as the anti-retroactivity presumption. The presumption is aimed at avoiding "unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct," while sovereign immunity merely "reflects current political realities and relationships, and aims to give foreign states . . . some *present* protection from the inconvenience of suit as a gesture of comity." FSIA's preamble, which provides that "claims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles set forth in this [Act]" is "unambiguous" evidence that Congress intended the act to apply to pre-enactment conduct. The reference to immunity "claims" – not to actions protected by immunity – is a reference to all post-enactment claims

whether those claims relate to pre-enactment or to post-enactment conduct. This conclusion is supported by FSIA's overall structure; FSIA includes "numerous provisions that unquestionably apply to claims based on pre-1976 conduct."

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

Rumsfeld v. Padilla 124 S. Ct. 2711, 72 USLW 4585 (6-28-04)

Habeas corpus, jurisdiction, incarceration in another district: The federal district court for the Southern District of New York lacks habeas corpus jurisdiction over the respondent, a U.S. citizen being held as an "enemy combatant" in a naval brig in Charleston, South Carolina. The commander of the naval brig in Charleston, not the Secretary of Defense, is the immediate custodian and the proper respondent for the habeas petition. The federal habeas statute provides that the proper respondent for a habeas petition is "the person who has custody over [the petitioner]." The statute's use of the definite article in reference to the custodian "indicates that there is generally only one proper respondent." This has long been interpreted to mean the person who has immediate custody, and who is able to produce the petitioner's body before the habeas court. A supervisory official such as the Secretary of Defense is not the immediate custodian. Exceptions to the immediate custodian rule employed when a petitioner challenged something other than his present physical confinement (*e.g.*, a detainer lodged by another state), are inapplicable because here the habeas petitioner did challenge his physical confinement. *Ex parte Endo* (1944), allowing a habeas petitioner to remain in federal court in California after the government moved her to Utah, is not on point. In *Endo* the habeas petition had been filed before the prisoner was transferred out of the district; here the petition was filed in New York after the petitioner had been moved to South Carolina.

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

Sabri v. United States 124 S. Ct. 1941, 72 USLW 4398 (5-17-04)

Spending power, bribery of state and local officials: The federal prohibition on bribery of state, local, and other agents whose agencies or organizations receive federal funding, 18 U.S.C. § 666(a)(2), is a valid exercise of congressional power under the Spending and Necessary and Proper Clauses. The fact that the statute does not require proof of nexus between the bribery and the expenditure of federal money does not render it unconstitutional. The spending power, supplemented by the Necessary and Proper Clause, authorizes Congress to assure that taxpayer dollars "are in fact spent for the general welfare, and not frittered away in graft." Corruption does not have to be connected to expenditure of federal funds to "affect the federal interest," since "money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value." The threshold for federal dollars ($10,000) that must be received annually by the employing agency is "enough" to ensure existence of a federal interest, and the threshold value of agency activity that must be targeted by a bribe before it is prohibited assures that offers of mere "liquor and cigars" are not covered. Legislative history confirms that the legislation was designed to fill gaps in coverage in order to protect "the vast sums of money

distributed through Federal programs." Recent decisions striking down the Gun-Free School Zones Act and the Violence Against Women Act as too tenuously linked to the regulation of interstate commerce are not on point; authority "to keep a watchful eye on expenditures and on those who use public money" is "bound up" with the spending power.

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

Scarborough v. Principi 124 S. Ct. 1856, 72 USLW 4340 (5-3-04)

Equal Access to Justice Act, amendment of claim: A timely application for award of attorney's fees under the Equal Access to Justice Act (EAJA) may be amended after the 30-day filing period has ended in order to cure an initial failure to allege that the Government's position in the underlying litigation was not substantially justified. The governing section of the EAJA provides that a party seeking an award shall within the 30-day period file an application which shows that the party was "prevailing," which specifies the amount sought, and which itemizes fees and rates. A second sentence provides that the party "shall also allege that the position of the United States was not substantially justified." The latter requirement is "nothing more than an allegation or pleading requirement." The burden is on the Government to establish that its position was substantially justified. In allocating the burden of pleading to the applicant, "Congress apparently sought to dispel any assumption that the Government must pay fees each time it loses." Thus understood, the burden to plead is merely "a 'think twice' prescription that 'stems the urge to litigate irresponsibly,'" and that can be likened to signature or oath or affirmation requirements that the Court has held may be cured after a filing deadline. The relation-back principles now codified in civil procedure Rule 15(c), and applicable to "pleadings," are appropriately applied to the fee applications. The Government's argument that its waiver of sovereign immunity for liability for fees is narrowly limited to cases involving full compliance with every requirement within the 30-day period is rejected. Allowing amendment of the fee application will not prejudice the Government or "expose [it] to any unfair imposition."

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

Schriro v. Summerlin 124 S. Ct. 2519, 72 USLW 4561 (6-24-04)

Habeas corpus, retroactive application of constitutional ruling: The Court's ruling in *Ring v. Arizona* (2002), holding that juries and not judges must find the existence of aggravating factors on which imposition of the death penalty may be based, does not apply retroactively to cases already final on direct review when *Ring* was decided. Generally, new "substantive" rules apply retroactively to convictions that are final, and new "procedural" rules do not. *Ring* announced a new procedural rule, not a new substantive rule. A rule is substantive if it alters the range of conduct or the class of persons that the law punishes. *Ring* did not alter the range of conduct punishable by the death penalty, but rather "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death." This is a "prototypical procedural" rule. *Ring* did not modify the elements of an offense, but rather held that, "because Arizona has made a certain fact essential to the death penalty, that fact must be found by a

jury." Procedural rules can be applied retroactively if they are "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Ring*, however, is not such a watershed rule. The evidence is "simply too equivocal" to support the conclusion that judicial fact finding "so seriously diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach." There is widespread disagreement as to whether juries are better fact finders than judges, and it cannot be "confidently" concluded that judicial fact finding "*seriously* diminishes accuracy." The Court has refused to apply retroactively its ruling that the right to jury trial applies to the states, and "if a trial held entirely without a jury [is] not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be."

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

SEC v. Edwards 124 S. Ct. 892, 72 USLW 4111 (1-13-04)

Securities, "investment contract": An investment scheme promising a fixed rate of return can be an "investment contract" and thus a "security" subject to registration requirements and anti-fraud provisions of the federal securities laws. The test for whether a particular scheme is an investment contract, set forth in *SEC v. W. J. Howey Co.* (1946), is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." This test does not distinguish between promises of fixed returns and promises of variable returns. A case applying *Howey* that listed two examples with variable returns should not be read as providing an exclusive list of the different kinds of investment contracts. Moreover, the SEC has consistently maintained in adjudications and enforcement actions that a promise of a fixed return does not preclude a scheme from being an investment contract.

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

Sosa v. Alvarez-Machain 124 S. Ct. 2739, 72 USLW 4660

Federal Tort Claims Act; Alien Tort Statute: The respondent's suit against the United States for false arrest stemming from the DEA's arrangement of his abduction from Mexico and transportation to the United States to face criminal charges is not authorized by the Federal Tort Claims Act (FTCA). The foreign country exception in the FTCA, excepting from the FTCA's waiver of sovereign immunity claims "arising in a foreign country," bars all claims based on an injury suffered in a foreign country, regardless of where the tortious act or omission occurred. "On its face," the foreign country exception "seems plainly applicable" to this case. Reliance on the "headquarters doctrine," allowing suits if damages sustained in foreign countries were caused by actions that were planned or directed from this country (in this case DEA agents in California allegedly planned and directed the abduction), is not authorized by the FTCA. Application of the headquarters doctrine "threatens to swallow the foreign county exception whole." Two considerations counsel against reliance on the doctrine. One is that there can be multiple causes that are "proximate"; it is quite possible in this case that both domestic planning and foreign actions were proximate causes of the abduction. The other is that Congress used the phrase "arising in a foreign country" to refer to injury occurring in a foreign country. When the FTCA was

enacted, choice of law in tort cases required courts to apply the law of the place where the injury occurred, and Congress intended the foreign country exception to relieve federal courts of the task of finding and applying foreign law in FTCA cases. Although choice of law methodology has become more flexible since enactment of the FTCA, application of the headquarters doctrine would still likely require federal courts to apply foreign law in "a substantial number of cases." The Alien Tort Statute (ATS) does not authorize the respondent's suit against the Mexican petitioner, who allegedly participated in the abduction. The ATS is primarily a jurisdictional statute, and by itself authorized only a limited category of suits under the law of nations. Actions initially authorized by the ATS, e.g., suits relating to offenses against ambassadors, or prize captures and piracy, were "principally incident to whole states or nations," and not to private rights. The respondent's claim of arbitrary detention, based on the fact that his arrest outside the United States was not authorized by law, does not implicate a binding customary international law rule of sufficient specificity to require recognition under the ATS.

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

South Florida Water Mgmt. Dist. v. Miccosukee Tribe 124 S. Ct. 1537, 72 USLW 4247 (3-23-04)

Clean Water Act, point source, distinct bodies of water: Pumping water from a canal into an undeveloped wetland can constitute a "discharge of a pollutant" prohibited by the Clean Water Act even if the canal merely transports water from one area to another without treating the water or adding any pollutants to it. The phrase "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." A "point source" is "any discernable, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit." Under this definition it is "plain that a point source need not be the original source of the pollutant, [but] need only convey the pollutant to 'navigable waters.'" This interpretation is reinforced by the fact that one of the act's "primary goals" was to impose permitting requirements on municipal treatment plants, sources which "do not themselves generate pollutants," but which treat and discharge pollutants added to water by others. The case is remanded for resolution of disputed facts concerning whether the canal and the undeveloped wetland are distinct bodies of water. If, as the water district alleges, the canal and wetland are merely two parts of the same body of water, then pumping water from one part into the other cannot constitute the "addition" of pollutants to that water body. On remand, the district court may also consider the United States' broader argument as *amicus* that all "navigable waters" are "unitary," so that no permit is required for the transfer of pollutants from one navigable water body to another.

9-0 ("point source"); **8-1** (remand). Opinion of Court by O'Connor, unanimous in part, and joined in separate part by Rehnquist, Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Concurring and dissenting opinion by Scalia.

Tennard v. Dretke 124 S. Ct. 2562, 72 USLW 4540 (6-24-04)

Death penalty, low intelligence as mitigation: The Fifth Circuit applied the wrong test in concluding that the petitioner was not entitled to a certificate of appealability on his claim that his low intelligence (an IQ of 67) should have been considered as a mitigating factor during his capital sentencing. The Fifth Circuit interpreted the Supreme Court's decision in *Penry v. Lynaugh* (1989), holding that Texas law provided a constitutionally inadequate means for jury consideration of the defendant's mental retardation, to authorize a threshold screening test for constitutional relevance of evidence showing low intelligence. The screening test required a determination of whether the evidence shows "a uniquely severe permanent handicap," and whether the criminal act was attributable to this permanent handicap. Such a screening test "has no foundation in the decisions of this Court." Instead, the general evidentiary standard of "any tendency" applies, and "relevant mitigating evidence is any evidence that tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." Neither part of the screening test is valid. The severity of a condition is relevant, but the "question is simply whether the evidence is of such a character that it 'might serve as a basis for a sentence less than death.'" Impaired intellectual functioning is "inherently mitigating" whether or not the defendant has established a nexus to the crime. The petitioner is entitled to a certificate of appealability because "reasonable jurists would find debatable or wrong the District Court's disposition of [petitioner's] low-IQ-based *Penry* claim."

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

Tennessee v. Lane 124 S. Ct. 1978, 72 USLW 4371 (5-17-04)

14th Amendment enforcement power, ADA Title II, Eleventh Amendment: Title II of the Americans With Disabilities Act (ADA), which provides that no qualified person shall be excluded from or denied benefits of a public program by reason of a disability, and which authorizes damages against states, is a valid exercise of congressional power under section 5 of the Fourteenth Amendment, as applied to enforce the constitutional right of access to the courts. Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity, so the issue is whether Congress had power to do so. "When Congress seeks to remedy or prevent unconstitutional discrimination, §5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." Congress enacted Title II "against a backdrop of pervasive unequal treatment" in the administration of state services and programs, including the administration of justice. Congress found that many persons were being excluded from courthouses and court proceedings by reason of their disabilities. Title II is "an appropriate response" to this history of unequal treatment, "congruent and proportional to its object." The requirement of "reasonable modifications" is "limited," and can be satisfied in a number of ways. The ADA's duty to accommodate is in line with other requirements derived from "the well-established due process principle that 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts."

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

Tennessee Student Assistance Corp. v. Hood 124 S. Ct. 1905, 72 USLW 4351 (5-17-04)

Bankruptcy, discharge of student loan debt, state sovereign immunity: A proceeding initiated by a debtor to determine the dischargeability in bankruptcy of a student loan debt is not a suit against the state for purposes of the Eleventh Amendment, so there is no need to rule on whether Congress may abrogate states' Eleventh Amendment immunity pursuant to the Article I power to establish "uniform" bankruptcy law. The discharge of a debt by a bankruptcy court is an *in rem* proceeding. The Court has previously held that the Eleventh Amendment does not bar federal jurisdiction over *in rem* admiralty actions when the state is not in possession of the property, and the same principle holds for *in rem* bankruptcy proceedings. The bankruptcy court determines all claims that anyone, including a state, has to the property in question. "States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order, no less than other creditors." Student loan debts are not included in a general discharge order unless excepting the debt from the order would impose an "undue hardship" on the debtor, but the undue hardship determination is still a part of the *in rem* proceeding. Service of process, required by the rules but not by the statute when the debtor initiates an undue hardship determination, does not offend the Eleventh Amendment. Issuance of process "is normally an indignity to the sovereignty of a State because its purpose is to establish personal jurisdiction over the State." Here, however, the discharge claim is adjudicated under the Bankruptcy Court's *in rem* jurisdiction, without assertion of *in personam* jurisdiction over the state.

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

Thornton v. United States 124 S. Ct. 2127, 72 USLW 4403 (5-24-04)

Automobile search incident to arrest: A police officer may search the passenger compartment of a vehicle as a contemporaneous incident of a lawful custodial arrest of a vehicle occupant regardless of whether the officer first makes contact with the occupant before the occupant gets out of the car. *New York v. Belton* (1981), authorizing such passenger compartment searches, should not be limited to situations in which the occupant is still in the vehicle when the officer confronts him. A search incident to arrest is justified by the need to protect officer safety by removing any weapons that the arrestee may be able to reach, and by the need to prevent the concealment or destruction of evidence. "There is simply no basis to conclude that the span of area within the arrestee's immediate control is determined by whether the arrestee exited the car at the officer's direction," or whether he did so prior to confrontation by the officer. Officers "should be free" to decide whether to arrest a suspect while he is still in his vehicle, or whether to wait until the suspect has exited his vehicle. Although weapons and contraband within a vehicle may not be readily accessible to someone standing outside the vehicle, "there is need for a clear rule, readily

understood by police officers and not depending on different estimates of what items were or were not within reach of an arrestee at any particular moment."

7-2. Opinion of Court (except as to footnote 4) by Rehnquist, joined in full by Kennedy, Thomas, and Breyer, and, except as to footnote 4, by O'Connor. Concurring opinion by Scalia, joined by Ginsburg. Dissenting opinion by Stevens, joined by Souter.

Till v. SCS Credit Corp. 124 S. Ct. 1951, 72 USLW 4358 (5-17-04)

Bankruptcy, "cram down" valuation: Under the "cram down" option permitted in a Chapter 13 bankruptcy petition, the court may approve a debt adjustment plan that provides each allowed, secured creditor with "value, as of the effective date of the plan, of property to be distributed under the plan," that is not less than the allowed amount of the creditor's claim. If the "property" is money that is to be paid in installments, that "value" must incorporate an interest rate that will sufficiently compensate the creditor for losses attributable to the time value of money. A rate of 9.5% that is higher than the "risk-free" prime rate (then 8%) satisfies this compensation requirement. The statute does not require that the debt adjustment plan incorporate the original contract rate (in this case 21%) or various other options that lower court judges endorsed in the case.

5-4. No opinion of Court. Opinion announcing the Court's judgment by Stevens, joined by Souter, Ginsburg, and Breyer. Concurring opinion by Thomas. Dissenting opinion by Scalia, joined by Rehnquist, O'Connor, and Kennedy.

United States Postal Serv. v. Flamingo Industries (USA) Ltd. 124 S. Ct. 1321, 72 USLW 4212 (2-25-04)

Antitrust, Postal Service: The Postal Service is not subject to liability under the antitrust laws. Under the Postal Reorganization Act of 1971 (PRA), the Postal Service is "an independent establishment of the executive branch," and exercises "significant governmental powers." The PRA waives the Postal Service's immunity from suit by giving it the power to "sue and be sued." Waiver of sovereign immunity, however, does not subject the Service to antitrust liability. A necessary second step to the analysis is to determine whether the antitrust laws apply to the Service. Although the PRA exempts the Service from a number of laws and subjects it to others, the PRA is silent as to antitrust liability. The Sherman Act imposes liability on "any person," defined to include corporations and associations existing under the laws of the United States. After the Court held in 1941 that the United States is not a "person" subject to antitrust liability, Congress amended the law to allow the United States to bring antitrust suits. It did not, however, change the definition of "person," and thus did not change the fact that the United States cannot be an antitrust defendant. Because the PRA makes the Service an establishment of the executive branch, the Service is not an antitrust "person" separate from the United States. The Service's governmental nature holds true in function as well; the Service has powers and responsibilities more characteristic of government than of private business.

9-0. Opinion for unanimous Court by Kennedy.

United States v. Banks 124 S. Ct. 521, 72 USLW 4005 (12-2-03)

Search, knock-and-announce entry: Officers executing a warrant to search for illegal drugs at a residence did not violate the Fourth Amendment by forcing entry after knocking, announcing "police search warrant," and waiting 15 to 20 seconds

with no response. Reasonableness of a search is determined through a "fact-specific" examination of "the totality of circumstances." Officers who have a "reasonable suspicion" of exigent circumstances may conduct a "no-knock" entry rather than knocking and announcing; similarly, officers may conduct a forced entry based on a reasonable suspicion of exigent circumstances that arise immediately after they knock and announce. Here the exigent circumstance was the risk that the suspect would quickly flush away the illegal drugs upon learning of the impending search. Although it was a "close call" in this case, the police could have "fairly suspect[ed] that [the] cocaine would be gone if they [waited] any longer." 18 U.S.C. § 3109, which authorizes forced entry if officers are "refused admittance," contains a similar implicit exception for exigent circumstances. Consequently, the entry satisfied § 3109 even though there was no refusal of admittance.

9-0. Opinion for unanimous Court by Souter.

United States v. Dominguez Benitez 124 S. Ct. 2333, 72 USLW 4478 (6-14-04)

Guilty plea, Rule 11 error: To prevail on an unpreserved claim that the district court committed reversible plain error by failing to comply with Rule 11's requirement to warn the defendant that he could not withdraw his guilty plea if the court did not accept the prosecutor's sentencing recommendations, the defendant must show a reasonable probability that he would not have pleaded guilty if he had been properly warned. With few exceptions, not even preserved error requires reversal without regard to the mistake's effect on the proceeding. The standard used in Rule 52, which governs claims of error not preserved by timely objection, is "error that affects substantial rights," and this means error with a prejudicial effect on the outcome. There are reasons why "the burden should not be too easy for someone in [the respondent's] position." Rule 52 encourages "timely objections" and avoidance of "wasteful reversals," and the rule governing unpreserved objections should recognize "the particular importance of the finality of guilty pleas." The appeals court's test – whether the error was "minor or technical" and whether the defendant understood the rights at issue – "requires no examination of the effect of the omitted warning on a defendant's decision" whether to go to trial. In this case the fact that the plea agreement itself, read to the defendant, contained the required warning "tends to show that the Rule 11 error made no difference to the outcome."

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

United States v. Flores-Montano 124 S. Ct. 1582, 72 USLW 4263 (3-30-04)

Fourth Amendment, border search: The Government's authority to conduct routine, suspicionless searches at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. The Court has stated many times that searches made at the border "are reasonable simply by virtue of the fact that they occur at the border." The reasons that might support a requirement of some level of suspicion for "nonroutine" border searches such as strip searches and other intrusive searches of the person "simply do not carry over to vehicles." Automobiles, including their passenger compartments, may be searched at the border, and a motorist has no greater privacy interest in his fuel tank. The respondent cites no damage to his vehicle, and his reliance on cases involving

exploratory drilling into a vehicle is "misplaced." The delay of one to two hours necessary for the procedure results in a "not insignificant" interference with the motorist's possessory interest in his vehicle, but that interference is "nevertheless . . . justified by the Government's paramount interest in protecting the border."

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

United States v. Galletti 124 S. Ct. 1548, 72 USLW 4252 (3-23-04)

Federal Taxation, partnership and partners: Assessment of a tax against a partnership within the three-year period after filing a return suffices to extend the statute of limitations for another 10 years for collection of the tax from the general partners as well as from the partnership. It was not necessary for IRS to separately assess the partners within the original three-year limitations period. It is the partnership that is primarily liable for the employment taxes at issue here. Under section 6203 of the Internal Revenue Code, a tax assessment records "the liability of the taxpayer." The liability in this case arose from the partnership's failure to pay employment taxes. Under section 3402, "every employer" is required to deduct and withhold from wages an employment tax, and section 3403 provides that "the employer shall be liable for the payment of [that] tax." The "employer" in this case is the partnership, and it is the partnership, therefore, that is the "taxpayer" for purposes of assessment under section 6203. The fact that California law makes individual partners jointly and severally liable for the debts of the partnership is irrelevant to the "taxpayer" determination. Taxes are ordinarily "self-assessed" by filing; if the taxpayer fails to file, the IRS can assess "all taxes" and penalties owed. It is the tax that is assessed, not the taxpayer, and the statute of limitations attaches to the debt as a whole. "Nothing in the Code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are, by reason of state law, liable for payment of the taxpayer's debt."

9-0. Opinion for unanimous Court by Thomas.

United States v. Lara 124 S. Ct. 1628, 72 USLW 4277 (4-19-04)

Tribal sovereignty, double jeopardy: The "dual sovereignty" doctrine defeats a non-tribal Indian's double jeopardy defense to a federal prosecution for assaulting a federal officer, brought after a conviction of the Indian in tribal court for "violence to a policeman" stemming from the same incident. The source of the tribe's power to punish nonmember Indian offenders such as the respondent lies in inherent tribal sovereignty, not in delegated federal authority. In *Duro v. Reina* (1990), the Court held that tribes lack inherent criminal jurisdiction over nonmember Indians. Congress subsequently amended the Indian Civil Rights Act to "recognize and affirm" an "inherent" tribal power to prosecute nonmember Indians for misdemeanors. The amendment's language as well as its legislative history confirm that Congress intended to recognize inherent tribal sovereignty. The Constitution "authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians," and Congress has done so. Consequently, the Spirit Lake Tribe's prosecution of the respondent was not an exercise of delegated federal power, but instead was the act of a separate sovereign. The subsequent federal prosecution of the respondent was not barred by the Double Jeopardy Clause, therefore, because the Clause does not prohibit successive prosecutions brought by separate sovereigns.

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

United States v. Patane 124 S. Ct. 2620, 72 USLW 4643 (6-28-04)

Miranda warning, admission of physical evidence: Failure to give a *Miranda* warning does not bar introduction at trial of "nontestimonial physical fruits" of the unwarned statement, in this case a pistol. Here the suspect had interrupted officers who had started to give him a *Miranda* warning, and the suspect's subsequent responses to questions were voluntary. *Dickerson v. United States* (2000), invalidating a statute that purported to replace *Miranda* with a voluntariness test, does not undermine *Oregon v. Elstad* (1985) and other precedents allowing in some circumstances admission of evidence obtained as a result of interrogation unaccompanied by a *Miranda* warning.

5-4. No opinion of Court. Opinion announcing Court's judgment by Thomas, joined by Rehnquist and Scalia. Concurring opinion by Kennedy, joined by O'Connor. Dissenting opinions by Souter, joined by Stevens and Ginsburg; and by Breyer.

Vieth v. Jubelirer 124 S. Ct. 1769, 72 USLW 4301 (4-28-04)

Congressional districting, political gerrymandering: Pennsylvania's congressional redistricting plan adopted after the 2000 Census is not invalid political gerrymandering under *Davis v. Bandemer* (1986). Although judicial relief from political gerrymandering may be possible "if some limited and precise rationale" is found, the obstacles to relief have not been overcome in this case. No "workable model" for measuring burdens on representational rights – including that suggested by the *Bandemer* plurality – has been proposed, and no principles to confine judicial intervention have been developed. The arguments for holding political gerrymandering cases to be nonjusticiable, however, are not so compelling as to require the Court to bar all future claims. It is possible that a workable standard may emerge in the future, based on equal protection or First Amendment principles. If a workable standard is developed, "courts should be prepared to order relief."

5-4. No opinion of Court. Opinion by Scalia, joined by Rehnquist, O'Connor, and Thomas. Concurring opinion by Kennedy. Dissenting opinions by Stevens; by Souter, joined by Ginsburg; and by Breyer.

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP 124 S. Ct. 872, 72 USLW 4114 (1-13-04)

Sherman Act, Telecommunications Act of 1996: Breach of a local exchange carrier's duty under the Telecommunications Act of 1996 to share its network with competitors is not an antitrust violation under section 2 of the Sherman Act, which makes it a crime to "monopolize" or "attempt to monopolize" trade. Because the 1996 Act contains a saving clause that preserves antitrust remedies, the act's detailed regulatory scheme does not shield regulated entities from antitrust liability through operation of the doctrine of implied immunity. No remedy is available, however, through application of antitrust law. As a general matter, the Sherman Act does not prohibit refusal to deal, and breach of a statutory obligation to deal does not fit within the few narrow exceptions to this general principle. The exception recognized in the *Aspen Skiing* case (1985),

involving a company that terminated a cooperative venture with competitors and declined to accept retail prices for its product, is distinguished because the statutory obligation to deal makes the defendant's prior conduct irrelevant, and because the services the defendant withheld are not otherwise marketed or offered to the public. The "essential facilities" doctrine is inapplicable because "the 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access." Creating a new exception is not justified by "traditional antitrust principles." The existence of the 1996 Act, designed to deter and remedy anti-competitive harm, suggests that there are only "slight benefits" to be gained by antitrust intervention. Any such benefits may be outweighed by the costs, which include the possibility of "false positives" derived from "mistaken inferences," and the difficulty antitrust courts could encounter in the necessary "continuing supervision of a highly detailed decree."

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

Virginia v. Maryland 124 S. Ct. 598, 72 USLW 4093 (12-9-03)

Potomac River water, withdrawal rights: Virginia may withdraw water from the Potomac River without Maryland's permission. Virginia's rights to Potomac River water trace to a 1785 Compact and an 1877 arbitration award (the Award). The Compact recognized that the citizens of each state have the privilege of making "wharves and other improvements" in the River, and the Award recognized Virginia's "right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership." "Notably absent" from the Compact "is any grant or recognition of sovereign authority to regulate the exercise of [the] privilege of [building improvements.]" Similarly, "nothing in the [1877 Award] suggests that Virginia's rights are subject to Maryland's regulation." The "arbitrators did not differentiate between Virginia's dominion over the soil and her right to construct improvements beyond low-water mark." Virginia did not lose her sovereign riparian rights by acquiescing in Maryland's regulation of water withdrawal. Maryland established a permit system for water withdrawals in 1933, and in 1956 Fairfax County became the first Virginia jurisdiction to apply for such a permit. After issuing at least 29 water withdrawal permits to Virginia entities, in 1997 Maryland for the first time refused to issue such a permit, and then issued the disputed permit subject to a condition. It is "far from clear" that a prescriptive period of 43 years (from Maryland's first issuance of a permit in 1957 to Virginia's Supreme Court filing in 2000) is "sufficient as a matter of law" to overcome a sovereign right. In any event, Virginia did not acquiesce, but "vigorously protested" Maryland's assertion of authority in 1976 during congressional deliberations on water resources legislation that addressed apportionment of River water at low flow and disclaimed any alteration of "any riparian rights."

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

Yarborough v. Alvarado 124 S. Ct. 2140, 72 USLW 4415 (6-1-04)

Miranda warning, "in custody" determination, AEDPA: The state court's determination that the 17-year-old respondent was not "in custody" when

questioned at the police station, and consequently that no *Miranda* warning had been required, was "reasonable." The Ninth Circuit's contrary decision, applying the Antiterrorism and Effective Death Penalty Act (AEDPA) to hold on habeas review that the state court had unreasonably applied clearly established federal law, was in error. The respondent's parents had brought him to the police station at the request of police officers, and he was taken to an interview room and questioned for two hours. His parents were not allowed to accompany him, and he was not given a *Miranda* warning. The determination of whether a suspect is "in custody" for *Miranda* purposes is an "objective" test that depends upon whether "a reasonable person" would have felt that he was "not at liberty to terminate the interrogation and leave." Here there were conflicting indications, and "fair minded jurists could disagree over whether [the respondent] was in custody." Weighing against an in-custody finding are the facts that the police did not transport the respondent to the station, he and his parents were told the interrogation would be brief, he was not threatened, and he was allowed to leave after the interrogation. Other facts "point in the opposite direction": the interrogation lasted two hours, respondent was not told he could leave, and his parents were not allowed to be present. The Ninth Circuit erred in relying on the respondent's age; the Court's decisions have not established that the suspect's age is a factor. Similarly, the suspect's prior history with law enforcement should not have been considered.

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

Yarborough v. Gentry 124 S. Ct. 1, 72 USLW 3275 (10-20-03)

Habeas corpus; ineffective assistance of counsel, closing argument: The Ninth Circuit erred in granting habeas corpus relief based on its holding that California court rulings rejecting a Sixth Amendment ineffective assistance of counsel claim were in error and objectively unreasonable. The right to effective assistance of counsel extends to closing arguments, but judicial review of a defense counsel's summation is "highly deferential," and "doubly deferential when it is conducted through the lens of federal habeas." In this case, which turned on whether a stabbing was accidental, the defense attorney pointed out some conflicts in an eyewitness account, cautioned that neither his client's criminal record nor the victim's state of pregnancy was relevant to his client's guilt, and emphasized that the jury had to sift through the conflicting testimony and determine who was lying. The Ninth Circuit based its ruling in part on counsel's failure to highlight other potentially exculpatory evidence, and in part on his reminding the jury about his client's criminal record. But "judicious selection of arguments for summation is a core exercise of defense counsel's discretion," and there is a "strong presumption" that a counsel's emphasis is a matter of "tactics" rather than "sheer neglect." Acknowledging the client's shortcomings is a "calculated risk" in seeking to build credibility with the jury. A "low-key strategy that stresses the jury's autonomy is not unreasonable" as a means of countering "a patronizing and overconfident summation by a prosecutor."

9-0. *Per curiam.*

Index

Administrative law
    deference not warranted for "clearly wrong" EEOC regulation 13
    deference to administrative interpretation, FRB, finance charges 16
    deference to agency interpretation, Skidmore rule applied 29
    deference to agency interpretation, SSA determination 4
    formal regulation trumps agency manual 7
Administrative Procedure Act
    action unlawfully withheld, discrete and required actions 26
Adult businesses
    licensing, city ordinance, constitutionality 7
Age Discrimination in Employment Act
    discrimination in favor of older workers 13
Alien Tort Statute
    tort action based on arbitrary detention 32
Americans With Disabilities Act
    rehiring standards 29
    title II, damages actions against states 34
Antitrust
    foreign conduct, Foreign Antitrust Improvements Act 12
    Postal Service exempt from liability 36
    Sherman Act and Telecommunications Act of 1996 39
Appeals
    certificate of appealability, standard for issuing 34
Bankruptcy
    chapter 13 "cram down," valuation, interest rate 36
    discharge of student loan debt, nature of proceeding 35
    forfeiture of time limit on objection to discharge 19
    reimbursement of attorney's fees 20
Campaign finance
    BCRA, constitutionality 21
Child Online Protection Act
    constitutionality, age verification affirmative defense 2
Citizenship
    U.S. citizen, detention as "enemy combatant" 14
Civil rights
    Title VII, sexual harassment, constructive discharge, defense 27
Civil Rights, section 1983
    challenge related to lethal injection, relation to habeas corpus 25
    exhaustion rule, relation to habeas actions 24
Clean Air Act
    conformity review, rule on inspection of Mexican trucks 9
    EPA enforcement authority, unreasonable state determination 1
    new vehicle emissions, fleet rules 11
Clean Water Act
    point source, distinct bodies of water 33
Confrontation Clause
    out-of-court testimonial statements 8
Congressional districting

political gerrymandering, Pennsylvania plan 39
Consent decree
state officials, Eleventh Amendment defense to enforcement 12
Counsel, assistance of
ineffectiveness claim, Strickland standard 16
ineffectiveness, closing argument, habeas corpus 41
Sixth Amendment right, acceptance of waiver by trial judge 18
Sixth Amendment right, post indictment 11
Death penalty
challenge to "cut-down" venous access 25
low intelligence as mitigation 34
Discovery
against Vice President 7
in aid of foreign proceedings 18
Diversity jurisdiction
time-of-filing rule, partnerships 14
Double jeopardy
dual sovereignty applied for tribal court conviction 38
Due process
ambiguous jury instruction, clarification by prosecutor 23
destruction of evidence by police 17
suppression of evidence by prosecution 3
Eleventh Amendment
ADA title II, right of access to courts 34
bankruptcy, discharge of student loan debt 35
consent decree entered into by state officials 12
Enemy combatant
detention, rights to hearing before neutral decision maker 15
location of imprisonment, federal court jurisdiction 30
President's authority to designate U.S. citizen as 14
Energy
President's taskforce, discovery against 7
Equal Access to Justice Act
timeliness, amended application for attorney's fees 31
ERISA
anti-cutback rule, retroactive change, suspension of payment 6
business owner as plan participant 28
preemption, state tort action for benefits denial 1
Federal Advisory Committee Act
discovery against Nat'l Energy Policy Development Group 7
Federal courts
discovery order to aid foreign proceeding 18
diversity jurisdiction, post-filing change in citizenship 14
Federal Land Policy and Management Act
wilderness study areas, challenge to management 26
Federal Tort Claims Act
exception, torts arising in foreign country 32
First Amendment
BCRA campaign finance reform 21
Child Online Protection Act 2

licensing of adult business, prompt judicial review 7
Foreign Sovereign Immunities Act
retroactive application of exception 29
Foreign Trade Antitrust Improvements Act
scope of coverage, foreign injury 12
Fourteenth Amendment
enforcement power, ADA, right of access to courts 34
Freedom of Information Act
privacy right of survivors, law enforcement records 24
Guantanamo Bay detainees
jurisdiction of federal courts to hear habeas petitions from 28
Guilty plea
Rule 11 error, showing for reversal 37
Habeas corpus
clearly established federal law, harmless error 23
clearly established federal law, Miranda warning 40
detainees at Guantanamo, federal court jurisdiction 28
exhaustion rule inapplicable in § 1983 action 24
fair representation of federal claim in state court 3
federal court jurisdiction, immediate custodian rule 30
ineffective assistance of counsel claim, standard 16
ineffective assistance of counsel, closing argument 41
mixed petition, dismissal, stay and abeyance 27
pro se litigant, role of court in advising 27
procedural default, claim of actual innocence 10
recharacterization of motion by court 6
retroactive application of constitutional ruling, Mills v. Md. 4
retroactive application of constitutional ruling, Ring v. Ariz. 31
Highway checkpoint
informational purpose, legitimacy 17
HMOs
liability for denial of benefits 1
Identification
duty to identify self to police in valid Terry stop 15
Immunity from suit
Foreign Sovereign Immunities Act, retroactive exception 29
police officer not entitled to qualified immunity 13
Interstate compacts
Potomac River water, withdrawal rights 40
Judicial review
promptness, licensing of adult business 8
Juries
ambiguous instruction, due process 23
role in finding aggravating facts, capital sentencing 31
Jury trial
sentence enhancement by judge 5
Limitations period
employment tax, assessment against partnership 38
general federal standard, laws amended after effective date 19
Mandamus

appellate order halting district court discovery order 7
Mental retardation
low intelligence, death penalty 34
Miranda warning
age of suspect, "in custody" determination 40
deliberate violation, 2-step questioning by police 23
violation, admission of physical evidence obtained 39
National Environmental Policy Act
BLM land use planning, EIS requirement 26
EIS, adoption of rule on inspection of Mexican trucks 9
Native Americans
tribal court conviction, dual sovereignty, double jeopardy 38
Necessary and Proper Clause
spending power, prohibition of bribery of state officials 30
Overruled decisions
Ohio v. Roberts (1980) 8
Pittman Act
sand and gravel not "valuable minerals" 4
Pledge of Allegiance
standing to sue to stop classroom recitation 10
Pornography
Child Online Protection Act, constitutionality 2
Postal Service
not subject to liability under antitrust laws 36
Potomac River
Virginia's right to withdraw water 40
Preemption
Clean Air Act, new vehicle emissions, fleet rules 11
ERISA, state tort action for benefits denial 1
telecommunications, scope of coverage 25
traditional state authority, clear statement required 25
President
authority to detain U.S. citizen as "enemy combatant" 14
protection of confidentiality of advice to 7
Privacy
FOIA, right as extending to surviving family members 24
Privacy Act
minimum damages, entitlement 9
Public Lands
off-road vehicles in wilderness study areas 26
sand and gravel extraction, Pittman Act 4
Religion, Free Exercise Clause
exclusion of theology students from scholarship 20
Retroactivity
Foreign Sovereign Immunities Act 29
habeas corpus, constitutional ruling 4, 31
Search and seizure
automobile search incident to arrest 35
border search, disassembly of vehicle fuel tank 37
highway checkpoint, informational purposes 17

knock and announce rule, exigent circumstances 36
lack of particularity in warrant 13
passenger in car, common enterprise with driver 21
stop and identify law 15
Securities
"investment contract" 32
Self-incrimination
compelled identification to police during Terry stop 16
Sentencing
enhancement based on judge's findings, jury trial requirement 5
Sexual harassment
constructive discharge, affirmative defense 27
Sherman Act
Postal Service not "person" subject to liability 36
relation to Telecommunications Act of 1996 39
Social Security Act
disability determination 4
Sovereign immunity
federal, not implicated by amendment of EAJA fee application 31
Spending power
bribery of state officials, nexus to federal funds 30
Standing to sue
challenge to Pledge of Allegiance 10
Statutes, interpretation
addition of "absent words" disfavored 20
avoidance of surplus language 15, 20
caption of section as not limiting text 18
context defeats presumption of uniform meaning throughout 13
contextual narrowing of phrase "any entity" 25
grammatical rule of the last antecedent 4
plain meaning despite awkward, ungrammatical wording 20
plain meaning rejected 13
plain meaning, last antecedent rule 9
preemption, clear statement required 25
presumption against extraterritorial application 28
presumption against interfering with foreign nation's authority 12
presumption that amendments have some effect 18
purpose ("goal") as reinforcing interpretation 33
purposes, context of enactment 19
reliance on "social history" 13
reliance on dictionary definition 11
reliance on drafting history 9
reliance on earlier statute as model 15
retroactivity, Landgraf rule, sovereign immunity 29
sponsor's statement in colloquy rejected as guide 13
subsequent legislative history unreliable 10
suspension of payment as reduction of benefits, ERISA 6
Tax Injunction Act
challenge to state tax credit 15
Taxation, Federal

partnership, limitation period on employment taxes 38
Telecommunications
scope of preemption 25
Telecommunications Act of 1996
relation to Sherman Act 39
Truth in Lending Act
Regulation Z, definition of "finance charges" 16
Unconstitutional Federal laws
Bipartisan Campaign Reform Act, two provisions 22
Unconstitutional state laws
Washington State's sentencing law 5
Warsaw Convention
flight attendant's refusal to assist as "accident" 26