Order Code RL33026

CRS Report for Congress
Received through the CRS Web

Supreme Court Opinions: October 2004 Term

July 27, 2005

George Costello
Legislative Attorney
American Law Division

Supreme Court Opinions: October 2004 Term

Summary

This report contains synopses of Supreme Court decisions issued from the beginning of the October 2004 Term through the end of the Term on June 27, 2005. 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/04_term.shtml]), which also provides links from the synopses to the full texts of the Court's opinions.

Contents

Supreme Court Opinions: October 2004 Term 1
Index 46

Supreme Court Opinions: October 2004 Term

Supreme Court Opinions: October 2004 Term

Alaska v. United States 125 S. Ct. 2137, 73 USLW 4441 (6-6-05)

Submerged lands, Alaska Statehood Act: A special master correctly determined that the United States owns two disputed areas of submerged lands in southeast Alaska. Waters of the Alexander Archipelago do not qualify as "inland waters," and hence lands underlying those waters are not "submerged lands" that could have passed to Alaska at statehood. Alaska's claim that these waters are "historic" inland waters over which the United States has denied the ships of other nations the right of "innocent passage" is rejected. At best, Alaska's submissions establish that over the years the United States made one official statement consistent with such an assertion and seized one foreign vessel, but "[t]hese incidents are insufficient to demonstrate the continuous assertion of exclusive authority . . . necessary to support an historic inland waters claim." Juridical bays constitute inland waters, but the Archipelago cannot be divided into two distinct juridical bays. Glacier Bay, on the other hand, "is a textbook example of a juridical bay." The United States can rebut the presumption that lands underlying inland waters passed to the state at statehood by establishing that it set aside the lands prior to statehood and demonstrated a clear intent to retain title. The United States created Glacier Bay National Monument prior to statehood, and included in the Monument the submerged lands under the Bay. Congress expressed an intent to retain title to the entire Monument in section 6(e) of the Alaska Statehood Act. That provision conveyed to Alaska "all real and personal property" used for fish and wildlife protection under three specified laws, and provided that "such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." The Antiquities Act, the authority under which the Monument was created, was not one of the three specified laws, but the proviso "is best read . . . as expressing an independent and general rule uncoupled from the initial clause."

9-0 (Alexander Archipelago); **6-3** (Glacier Bay). Opinion of Court by Kennedy, unanimous in part, and joined in separate part by Stevens, O'Connor, Souter, Ginsburg, and Breyer. Opinion concurring in part and dissenting in part by Scalia, joined by Rehnquist and Thomas.

American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n 125 S. Ct. 2419, 73 USLW 4532 (6-20-05)

Commerce Clause, state hauling fee: Michigan's flat $100 annual fee imposed on trucks engaged in intrastate hauling does not discriminate against interstate commerce in violation of the "dormant" Commerce Clause. The fee "applies evenhandedly to all carriers that make domestic journeys," and does not tax activity that takes place outside the state. There is no precedent for

holding such "a neutral, locally focused fee" to be inconsistent with the dormant Commerce Clause. Nothing in the record indicates that the fee imposes "any significant practical burden on interstate trade." Levying the fee on a per-truck rather than per-mile basis is fairly related to the services provided, given the objectives of defraying costs of administering size and weight, insurance, and safety requirements. The 1987 *Scheiner* case, invalidating a flat fee a state imposed on all trucks using its roads, is distinguished; Michigan's fee on in-state hauling "does not tax an interstate truck's entry into the State nor does it tax transactions spanning multiple States." The "internal consistency" test, which requires consideration of what would happen if all states imposed a similar tax, is not offended. Any such cumulative fees would be imposed only because a carrier engages in local business in multiple states, not because the carrier engages in interstate commerce in multiple states.

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

Arthur Andersen LLP v. United States 125 S. Ct. 2129, 73 USLW 4393 (5-31-05)

Statutory interpretation, knowingly corrupt persuasion: Jury instructions failed to convey the requisite consciousness of wrongdoing embodied in a provision making it a crime to "*knowingly* use[ ] intimidation or physical force, threaten[ ], or *corruptly persuade*[ ]" another person to withhold or destroy documents for use in an official proceeding. The restraint that is "traditionally exercised" in determining the scope of a federal criminal statute "is particularly appropriate . . . where the act underlying the conviction — 'persuas[ion]' — is by itself innocent." The most "natural" reading of the statute is that "knowingly" modifies "corruptly persuades" as well as the other listed actions. This most natural grammatical reading is to be preferred even though the statutory formulation is "inelegant." Only persons conscious of wrongdoing can be said to "knowingly corruptly persuade." The jury was instructed, however, that it could convict if it found that the petitioner intended to "subvert, undermine, or impede" government factfinding, and that the petitioner could be found guilty even if it "honestly and sincerely believed that its conduct was lawful." By excluding the requirement of "dishonest" action, and by adding the term "impede" to the phrase "subvert or undermine" contained in the Pattern Jury Instruction, the district court's instruction swept in innocent persuasion, and departed from the statute's requirement that punishable persuasion be "knowingly . . . corrupt." The instruction also failed to require a nexus between the persuasion to shred documents and any particular proceeding. A proceeding need not be pending when the persuasion takes place, "but it is quite another [thing] to say a proceeding need not even be foreseen." The jury charge was an inadequate basis, therefore, for finding that the petitioner accounting company violated the law when it directed employees to destroy files, pursuant to its "document retention policy," relating to its audits of Enron Corporation.

9-0. Opinion for unanimous Court by Rehnquist.

Ballard v. Commissioner 125 S. Ct. 1270, 73 USLW 4194 (3-7-05)

Tax Court, report of special trial judges: The Tax Court may not exclude from the record on appeal reports submitted by special trial judges under Tax Court Rule 183. The rule provides that the Tax Court judge to whom a case is

assigned after submission of a special trial judge's report may adopt that report, may modify or reject it in whole or in part, or may seek further evidence or briefs. The rule further provides that the special trial judge's findings of fact "shall be presumed to be correct," and that "due regard" must be given to the fact the special trial judge had the opportunity to evaluate the credibility of witnesses. Changes to the rules adopted in 1983 eliminated a requirement that parties be served with a copy of the special trial judge's report and be allowed to file exceptions for consideration by the Tax Court judge, but did not change the requirement that "due regard" be paid to the special trial judge's findings of fact. The Tax Court implemented these changes by treating the special trial judge's report "essentially as an in-house draft to be worked over collaboratively by the [Tax Court] judge and the special trial judge." At the conclusion of this collaboration the Tax Court judge issues a decision in all cases "agree[ing] with and adopt[ing]" the opinion of the special trial judge. The extent to which the final, collaborative opinion departs from the original report of the special trial judge is not disclosed. "The Tax Court, like all other decisionmaking tribunals, is obliged to follow its own Rules," which do not authorize such procedures. "The Tax Court's practice of not disclosing the special trial judge's original report, and of obscuring the Tax Court judge's mode of reviewing that report, impeded fully informed appellate review of the Tax Court's decision." Concealment of the special trial judge's report runs counter to the "generally prevailing practice" under which reports of hearing officers, magistrates, and the like are made part of the record on appeal. An analogy to the practice of omitting a single Tax Court judge's opinion from the record when full court review occurs is misplaced; that procedure is authorized by statute, and full Tax Court review is designed for resolution of legal issues, not factual issues.

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

Bates v. Dow Agrosciences LLC 125 S. Ct. 1788, 73 USLW 4311 (4-27-05)

Preemption, FIFRA, common law actions: The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preempt all state common law suits for damages resulting from pesticide application. FIFRA prohibits States from imposing "any requirements for labeling or packaging in addition to or different from [federal requirements]." Although "the term 'requirements' . . . reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties," the provision sets two limits on the scope of preemption. The requirement must be "for labeling or packaging," and must be "in addition to or different from" federal labeling and packaging requirements. There are many common law claims, e.g., those for defective design, defective manufacture, negligent testing, and breach of express warranty, that do not impose labeling or packaging requirements. The fact that a finding of liability on any of these claims might induce a manufacturer to change its label does not turn it into a labeling requirement. "A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that motivates an optional decision is not a requirement." The petitioners' fraud and negligent-failure-to-warn claims are premised on common law rules that qualify as "requirements for labeling and packaging." The case is remanded, however, for consideration of whether

these claims are "in addition to or different from" FIFRA's misbranding standards, or whether they merely provide a remedy for violation of the federal standards. The state requirements for which the damage remedy is provided need not be identical to the federal requirements; it suffices if they are "genuinely equivalent." The presumption against preemption in areas of traditional state regulation strengthens the interpretation allowing states to provide additional remedies. "If Congress had intended to [eliminate] a long available form of compensation, it surely would have expressed that intent more clearly." FIFRA does not impose uniform regulation, but rather "authorizes a relatively decentralized scheme"; "[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA."

9-0 (design, manufacture, testing, fraud, and negligence claims); **7-2** (breach of warranty claims). Opinion of Court by Stevens, joined by Rehnquist, O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Concurring and dissenting opinion by Thomas, joined by Scalia.

Bell v. Cone 125 S. Ct. 847, 73 USLW 3432 (1-24-05)

Habeas corpus, deference to state courts: The Sixth Circuit's conclusion that the Tennessee Supreme Court failed to cure the constitutional deficiency in a statutory "aggravating circumstance" justifying imposition of the death penalty failed to comport with the deference required by 28 U.S.C. § 2254(d). The Sixth Circuit based its decision overturning the respondent's death penalty on the State's reliance on the unconstitutionally vague "especially heinous, atrocious, or cruel" aggravating circumstance, which is unconstitutional without a narrowing construction. Although the Tennessee Supreme Court did not mention a narrowing construction, it is clear that it applied one. Because the state court had previously construed the "heinous, atrocious, or cruel" circumstance narrowly "and had followed that precedent numerous times, we must presume that it did the same thing here." Even without the presumption, however, it is clear that the court applied the narrower construction. The facts on which the court relied to describe the brutal beating murder of an elderly couple were sufficient to satisfy "the torture prong" of the narrowed construction, which requires evidence that the defendant inflicted torture on the victim before his death. The narrowing construction itself was not unconstitutionally vague.

9-0. *Per curiam.* Concurring opinion by Ginsburg, joined by Souter and Breyer.

Bell v. Thompson 125 S. Ct. 2825, 73 USLW 4624 (6-27-05)

Appeals, habeas corpus: The Sixth Circuit Court of Appeals abused its discretion in a state prisoner's habeas corpus case by staying its mandate and issuing an amended opinion six months after the Supreme Court denied certiorari and five months after it denied a rehearing. "The consequence of delay for the State's criminal justice system was compounded by the [appeals court's] failure to . . . give notice to the parties that [it] was reconsidering its earlier opinion." This holding assumes *arguendo* that Federal Rule of Appellate Procedure 41 authorizes a stay of a mandate following denial of certiorari. The Sixth Circuit acted on the basis of a psychologist's report, negligently omitted from the original appeal in the federal habeas case, finding that the petitioner had been suffering from "severe mental illness" at the time of his capital

offense. Even if that psychologist's report had been included in the initial record reviewed by the appeals court, however, the respondent "would have faced an uphill battle" in obtaining federal habeas relief based on constitutionally inadequate representation by counsel. The psychologist's report had been prepared 13 years after the crime, and was contradicted by evaluations of two court-appointed experts. This evidence "would not come close to satisfying the miscarriage of justice standard" that would have applied had the appeals court recalled its mandate, and it did not justify the court's decision to withhold the mandate without notice to the parties. "Federalism concerns" relating to "finality and comity" are also implicated. The state "expended considerable time and resources" in scheduling and preparing for the respondent's execution, and the Sixth Circuit "did not accord the appropriate level of respect" to the state's judgment that the respondent's crimes merited "the ultimate punishment."

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.

Bradshaw v. Stumpf 125 S. Ct. 2398, 73 USLW 4463 (6-13-05)

Due Process, guilty plea, defendant's awareness of charges: There is no requirement that the judge himself must inform the defendant of the elements of each charge before accepting a guilty plea. Rather, the constitutional prerequisites for a valid guilty plea — that it be done voluntarily, knowingly, and intelligently — can be met if the record shows that "the nature of the charge and the elements of the offense were explained to the defendant by his own, competent counsel." In this case the defendant's guilty plea to aggravated murder is not inconsistent with his claim that it was his accomplice and not he who shot the victim, since Ohio law provides that aiders and abettors may be convicted of the offense. The defendant could have had the requisite intent to kill without having fired the gun that killed the victim. Nor is the guilty plea inconsistent with the defendant's desire to introduce evidence as to his role in the murder, since the judge had explained that the defense would have the opportunity to introduce mitigating evidence at the sentencing phase of his trial. The fact that the plea may, in retrospect, have been a poor bargain for the defendant is not a basis for invalidation. The prosecution's inconsistent identification of the triggerman in its case against the defendant and its case against his accomplice is not a basis for invalidating the defendant's guilty plea, but may have a bearing on the validity of the death sentence. The case is remanded for consideration of this sentencing issue.

9-0. Opinion for unanimous Court by O'Connor. Concurring opinions by Souter, joined by Ginsburg; and by Thomas, joined by Scalia.

Brosseau v. Haugen 125 S. Ct. 596, 73 USLW 3350 (12-13-04)

Fourth Amendment, qualified immunity of police officer: A police officer sued for using excessive force in seizing a suspect is entitled to qualified immunity if her understanding of the law governing seizure of the suspect, even though erroneous, was "reasonable" under the circumstances she confronted. An officer's misunderstanding of the law is reasonable if the law at the time did not "clearly establish" that the officer's conduct would violate the Constitution. Cases dealing with the shooting of a suspect who is fleeing in a car and who

presents a risk to others are very fact-specific, and create "a hazy border between excessive and acceptable force." The officer's conduct in this case — shooting a suspect who was attempting to flee in a vehicle after having ignored the officer's order to get out of the vehicle, and after the officer had used force in an effort to prevent him from starting the vehicle — was not clearly violative of the Fourth Amendment.

8-1. *Per curiam.* Concurring opinion by Breyer, joined by Scalia and Ginsburg. Dissenting opinion by Stevens.

Brown v. Payton 125 S. Ct. 1432, 73 USLW 4223 (3-22-05)

Habeas corpus, deference to state courts: The California Supreme Court's decision that there was no reasonable likelihood that a capital sentencing jury believed that it was required to ignore mitigating evidence was not "contrary to," or an "unreasonable application of" clearly established federal law, the standard set by the Antiterrorism and Effective Death Penalty Act for limiting federal habeas corpus relief for state prisoners. The Ninth Circuit, therefore, should not have granted habeas relief in this case. During the sentencing phase of his trial the defendant had introduced evidence of his post-crime religious conversion and work with a prison ministry. The jury instruction at issue, "factor (k)," directed the jury to consider "any other circumstance which extenuates the gravity of the crime." The prosecutor erroneously told jurors that factor (k) limited them to consideration of conduct that pre-dated the crime, and did not allow consideration of the defendant's evidence of post-crime conversion. The trial judge, despite the defense counsel's request, did not correct this erroneous assertion. The jury recommended death and the trial judge imposed that sentence. The California Supreme Court, upholding the sentence, relied on its reading of the U.S. Supreme Court's decision in *Boyde v. California* (1990), which held that factor (k) does not limit the jury's consideration to circumstances of the crime, but rather allows consideration of a defendant's background and character. In light of *Boyde*, the California court did not act unreasonably in declining to distinguish between pre-crime and post-crime mitigating evidence. Considering "the whole context of the trial," as required by *Boyde*, it was not unreasonable for the court to conclude that the jurors did not likely believe they were required to disregard the defendant's mitigating evidence. The defendant presented two days of testimony about his post-crime conversion, the prosecutor devoted substantial attention to discounting its importance, and the court did not instruct the jurors to disregard the evidence.

5-3. Opinion of Court by Kennedy, joined by O'Connor, Scalia, Thomas, and Breyer. Concurring opinions by Scalia, joined by Thomas; and by Breyer. Dissenting opinion by Souter, joined by Stevens and Ginsburg. Rehnquist did not participate.

Cherokee Nation of Okla. v. Leavitt 125 S. Ct. 1172, 73 USLW 4177 (3-1-05)

Government contracts: The Federal Government is legally bound to pay "contract support costs" incurred by two Indian tribes pursuant to a contract by which the tribes agreed to supply health services and other services normally provided by the Government, in exchange for the Government's reimbursement of the tribes' costs and administrative expenses. The contracts were authorized by the Indian Self-Determination and Education Assistance Act (Act), which

specifies that "contract support costs" are a component of reimbursable administrative expenses. The Government did not deny its promise to pay these costs, or its failure to do so. Rather, the Government argued that its debts were not legally binding because Congress had failed to appropriate sufficient funds for paying the obligation. In each year at issue, however, Congress had enacted a lump-sum appropriation "to carry out" the act, and the amount of the appropriation was "far more" than the amounts at issue. The appropriations, being lump sum, "contained no relevant statutory restriction" on payment of the debts. A proviso stating that funding is "subject to the availability of appropriations" does not vest the Secretary with authority to disregard contractual obligations in favor of other spending. The act does not create a special contract that immunizes the Government from liability; a provision that a special services contract shall not be construed to be a procurement contract seems designed to avoid "technical burdens that often accompany procurement, not to weaken a contract's binding nature." Nor is the Government saved by a proviso that the Secretary need not reduce funds available to one tribe in order to provide for another tribe. The appropriations contained other unrestricted funds sufficient to pay the claims at issue, and the Government may not avoid a debt by obligating unrestricted funds for another purpose. A later-enacted statute restricting use of funds for contract support costs is open to the interpretation that it bars payment on claims arising under the reimbursement contracts, but that interpretation is rejected because of its questionable constitutionality.

8-0. Opinion of Court by Breyer, joined by all Justices except Rehnquist, who did not participate.

City of Rancho Palos Verdes v. Abrams 125 S. Ct. 1453, 73 USLW 4217 (3-22-05)

Telecommunications Act of 1996; 42 USC § 1983: An individual may not use 42 U.S.C. § 1983 to enforce limitations on local zoning authority imposed by the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996 (TCA). Section 332(c)(7) of the act, which creates a cause of action against state and local governments that fail to comply, is the exclusive remedy. Although section 1983 authorizes suits to enforce individual rights created by federal statutes, not all statutory rights are enforceable under section 1983. The issue is one of congressional intent. Provision of an express private right of action in a statute "is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." There is no indication that Congress intended the TCA remedy to complement rather than supplant § 1983. Section 332(c)(7) "limits relief in ways that § 1983 does not": judicial review under § 332(c)(7) must be sought within 30 days of final zoning action, it is unclear whether relief may include damages, and there is no provision for recovery of attorney's fees. The TCA's "saving clause," providing that TCA amendments shall not be construed to "impair" existing federal law, does not reflect congressional intent to allow §1983 actions. Section 332(c)(7) does not "impair" the operation of § 1983, but rather "has no effect on § 1983 whatsoever." The rights created by 332(c)(7) did not exist before the passage of the TCA, and the claims enforceable under § 1983 prior to enactment of the TCA continue to be available after its enactment.

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

City of San Diego v. Roe 125 S. Ct. 521, 73 USLW 3334 (12-6-04)

Public employment, freedom of expression: A police department that fired an officer for refusing to stop selling sexually explicit videos on the Internet auction site eBay did not violate the officer's First Amendment right to freedom of speech. One video showed the officer stripping off a police uniform and masturbating; the officer also offered to sell official uniforms of his department, and identified himself on his user profile as employed in law enforcement. The Ninth Circuit's reliance on *United States v. National Treasury Employees Union* (1995) (*NTEU*) is misplaced. The Court in *NTEU* protected public employees' speech that was unrelated to employment and that had no effect on the mission and purpose of the employer. Here the respondent "took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer." The case is governed instead by *Pickering v. Board of Education* (1968), which adopted a balancing test for speech of public employees upon "matters of public concern." But because the respondent's expression "does not qualify as a matter of public concern under any view of the public concern test," *Pickering* balancing "does not come into play." The respondent's expression "did nothing to inform the public about any aspect of [the police department's] functioning or operation," was "designed to exploit his employer's image," and "was detrimental to the mission and functions of the employer."

9-0. *Per curiam.*

City of Sherrill v. Oneida Indian Nation of N.Y. 125 S. Ct. 1478, 73 USLW 4242 (3-29-05)

Native Americans, reservation land, state taxation: Land originally held by the Oneida Nation as part of its reservation but sold to non-Indians in 1807 and not repurchased by the Nation until 1997 is not immune from taxation by the State of New York. The parcels of land at issue are now within the city of Sherrill, and the Oneida Nation uses them to operate a gas station, a convenience store, and a textile facility. Although the Nation "acquired the land in the open market and does not seek to uproot current property owners," recognition of sovereign control would have some of the same "disruptive practical consequences" that dispossession would have. A "checkerboard of alternating state and tribal jurisdiction . . . would seriously burden the administration of state and local governments." A statute authorizing the Secretary of the Interior to acquire land in trust for Indians after considering the impact on state and local tax rolls "provides the proper avenue for [the Nation] to reestablish sovereign authority" over territory once held. "[T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate."

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

Clark v. Martinez 125 S. Ct. 716, 73 USLW 4100 (1-12-05)

Immigration, detention of alien pending removal: The authority granted to the Secretary of Homeland Security by 8 U.S.C. § 1231(a)(6) to detain a removable alien beyond the removal period applies to inadmissible aliens in the same manner that the Court held it to apply to admitted aliens in *Zadvydas v. Davis* (2001). The provision permits detention for a period "reasonably necessary" to effectuate removal, but does not permit detention once removal is no longer reasonably foreseeable. The *Zadvydas* Court prescribed a six-month presumptive detention period for aliens already admitted, and that period applies to inadmissible aliens as well. By its terms, the language of § 1231(a)(6) applies to "an alien ordered removed who is inadmissible under section 1182." The provision's operative language "applies without differentiation to all three categories of aliens that are its subject," and to give the words a different meaning for each category "would be to invent a statute rather than interpret one." Although there may be different concerns present in the case of inadmissible aliens, there is no basis for interpreting the same language differently. "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of [its] applications"; in such instances "the lowest common denominator, as it were, must govern." Reliance on the constitutional doubt canon, as the Court did in *Zadvydas*, is not designed to allow litigants to invoke the constitutional rights of others or to allow courts to apply statutes until they approach constitutional limits. Rather, the canon is a tool for choosing between competing plausible interpretations of a statutory text.

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

Clingman v. Beaver 125 S. Ct. 2029, 73 USLW 4359 (5-23-05)

First Amendment, elections, semi-closed primary: Oklahoma's semi-closed primary system, under which a political party may allow only its own members and voters registered as Independents, but not those voters registered with other political parties, to vote in its party primary election, does not violate the First Amendment. The Libertarian Party's challenge to the Oklahoma law is rejected. *Tashjian v. Republican Party of Connecticut* (1986), applying strict scrutiny to void a law that limited primary voting to party members, is not controlling, and strict scrutiny is not required in this case. Strict scrutiny is required "only if the burden [on associational rights] is severe," and the burden imposed by Oklahoma's law is less substantial than that imposed by Connecticut's. The Connecticut law required voters to affiliate publicly with a party in order to vote in its primary; here independents need not register as Libertarians to vote in that party's primary, but need only declare themselves Independents. Election laws that do not place a heavy burden on associational rights can be justified by "important" state regulatory interests, and Oklahoma's law advances several such interests. Oklahoma asserts an interest in preserving political parties as "viable and identifiable interest groups," so that candidates who emerge from primary elections represent that party's interests, and so that the general voting population may rely on party labels to draw inferences about candidates' ideologies. Oklahoma also asserts interests in aiding parties' electioneering and

party-building planning by promoting stability, and in preventing party raiding and "sore loser" candidacies.

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

Commissioner v. Banks 125 S. Ct. 826, 73 USLW 4117 (1-24-05)

Income Tax, contingent fees: The portion of a money judgment or settlement paid to an attorney under a contingent fee agreement is income to the client under the Internal Revenue Code. The Code defines "gross income" as "income from whatever source derived." A taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to someone else. A contingent fee agreement should be viewed as an anticipatory assignment to the attorney of a portion of the client's income, and, as such, it is taxable to the client. In general, attribution of income is resolved by determining whether a taxpayer exercises "dominion" over the income in question. In litigation the income-generating asset is the cause of action, and "the plaintiff retains dominion over this asset throughout the litigation." The fact that the value of the claim is speculative does not limit application of the assignment doctrine. The attorney-client relationship is not a business partnership or joint venture for tax purposes; instead, it is "a quintessential principal-agent relationship." When a principal relies on an agent to realize an economic gain, that gain is treated as income to the principal. While it is possible that state laws could alter this principal-agent relationship, none appear to convert the attorney from an agent to a partner. These cases arose prior to enactment of, and hence are not covered by, the American Jobs Creation Act of 2004, which allows a taxpayer to deduct certain attorneys fees from gross income.

8-0. Opinion of Court by Kennedy, joined by all Justices except Rehnquist, who did not participate.

Cooper Industries v. Aviall Servs. 125 S. Ct. 577, 73 USLW 4041 (12-13-04)

Superfund, contribution, statutory construction: Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund Act) does not authorize persons who have incurred response costs while undertaking voluntary cleanup activities to seek contribution from other potentially responsible parties. That paragraph specifies that a party "may seek contribution . . . during or following" any CERCLA action under section 106 or 107(a). It does not authorize contribution outside the context of such actions. The word "may" is not used permissively to nullify the reference to section 106 and 107 actions. Rather, the "natural meaning of 'may' in the context of the enabling clause is that it authorizes certain contribution actions . . . and no others." A contrary reading would render the restriction "superfluous." A saving clause, providing that "nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [section 106 or 107]," does not change the interpretation. The saving clause does not itself create a cause of action; its "sole function" is to clarify that the subsection does nothing to diminish any right of contribution that may exist independently of 113(f)(1). The "whole" of section 113 reinforces interpretation of paragraph (f)(1). The

section provides one other avenue for contribution following certain approved settlements, and then provides two separate limitations periods for seeking contribution: one following judgments and one following settlements. Absence of a limitation period applicable when neither a judgment nor a settlement has occurred, as is the case with a voluntary cleanup, suggests that paragraph (f)(1) does not authorize contribution following voluntary cleanup. Arguments based on the general purposes of CERCLA are rejected. "Given the clear meaning of the text, there is no need . . . to consult the purpose of CERCLA at all."

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

Cutter v. Wilkinson 125 S. Ct. 2113, 73 USLW 4397 (5-31-05)

Establishment Clause, RLUIPA: Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which provides that governments may not impose "a substantial burden on the religious exercise" of an institutionalized person unless the burden furthers "a compelling governmental interest," does not violate the Establishment Clause. The Court has recognized that there is "room for play in the joints" between the Establishment Clause and the Free Exercise Clause, and section 3 of RLUIPA "fits within the corridor" between the two clauses. The provision is "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise." Moreover, RLUIPA does not run afoul of earlier decisions that require government to take account of burdens imposed on non-beneficiaries, and that require neutrality among different religions. This does not mean, however, that government must offer the same accommodations to secular entities that it extends to religious practitioners in order to facilitate their religious observances. Also, RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." "Prison security is a compelling state interest, and . . . deference is due to institutional officials' expertise in this area." Rejection of this facial challenge does not preclude later as-applied challenges.

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

Deck v. Missouri 125 S. Ct. 2007, 73 USLW 4370 (5-23-05)

Due Process, physical restraint of defendant during trial: The routine shackling of a defendant during the penalty phase of capital trial by jury violates his due process rights. The law has long prohibited routine use of visible shackles during the guilt phase of a criminal trial, and the same rule should apply to the penalty phase. The rationales underlying the guilt-phase rule apply with similar force at the penalty phase. The use of physical restraints impairs the right to counsel by interfering with an accused's right to communicate with his attorney. Maintaining a dignified process that includes the respectful treatment of defendants underscores the seriousness and importance of the proceedings. Use of physical restraints undermines the presumption of innocence that is accorded each defendant. While the presumption of innocence no longer applies at sentencing, "related concerns" are implicated. The decision between life and death "is no less important than the decision about guilt." Presence of the convicted defendant in shackles can be "a thumb on death's side

of the scale" for two important sentencing considerations: the jury's perception of the defendant's character, and of the danger to the community that the defendant presents. Although the ban against shackling is not absolute, and shackling may be imposed when justified by "an essential state interest" specific to the defendant, Missouri's claim that the shackling was justified in this case is rejected. The claim that the jury was unaware of the shackles is not supported by the record. Also lacking is evidence that the trial judge exercised discretion by finding exceptional circumstances warranting the use of shackles. Finally, because shackling is "inherently prejudicial," the defendant need not demonstrate that actual prejudice resulted.

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

Devenpeck v. Alford 125 S. Ct. 588, 73 USLW 4038 (12-13-04)

Fourth Amendment, arrest, probable cause: A warrantless arrest is valid under the Fourth Amendment whether or not the criminal offense for which there is probable cause to arrest is "closely related" to the offense stated by the officer at the time of arrest. The Ninth Circuit erred in invalidating an arrest on the basis that the offenses for which probable cause existed (impersonating an officer and obstructing an officer) were not "closely related" to the offense invoked by the officer in arresting the suspect (taping roadside conversations with police officers in alleged violation of a state privacy law). Existence of probable cause depends upon "the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." As the Court held in *Whren v. United States* (1996), an officer's reasons for making an arrest are irrelevant; the issue is "whether the circumstances, viewed objectively, justify that action." The Ninth Circuit's "closely related" rule makes the lawfulness of arrest turn on the officer's motivation, and, in addition, is "condemned by its perverse consequences." There is no constitutional requirement that officers inform a person of the reason for his arrest at the time he is taken into custody, and making the validity of arrest turn on what the officer tells the arrestee might cause officers to cease giving any reason at all.

8-0. Opinion of Court by Scalia. Rehnquist did not participate.

Dodd v. United States 125 S. Ct. 2478, 73 USLW 4516 (6-20-05)

Habeas corpus, limitations period, start date: A one-year limitation period for a federal prisoner's filing of a habeas corpus petition begins to run on the date the Supreme Court initially recognized the right asserted by the prisoner, not on the date on which the right was made retroactive for purposes of habeas review. 28 U.S.C. § 2855 provides that the applicable limitation period begins to run on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The text of this provision is "clear," and "settles this dispute." "It unequivocally identifies one, and only one, date from which the 1-year limitation period is measured." That date is the "the date on which the right asserted was initially recognized." The petitioner's reliance on the second clause is "misplaced." The second clause "imposes a condition on the applicability" of the first. The date

established in the first clause "does not apply at all if the conditions in the second clause . . . have not been met." There is "the potential for harsh results," since the Court "rarely decides that a new rule is retroactively applicable within one year of initially recognizing that right," but it is for Congress and not the Court to "rewrite the statute." The disposition required in this case, "though strict, is not absurd." The petitioner's claim is barred because he filed it more than a year after the Supreme Court decided the *Richardson* case on which he sought to rely. It does not matter that he filed his claim less than a year after an appellate court had held *Richardson* applicable to cases on collateral review.

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

Dura Pharmaceuticals, Inc. v. Broudo 125 S. Ct. 1627, 73 USLW 4283 (4-19-05)

Securities, fraud, proof of loss: An allegation that the price paid for a security was inflated because of misrepresentations is inadequate to state a cause of action for securities fraud. The complaint must also allege that the misrepresentation proximately caused economic loss. "As a matter of pure logic," the purchaser does not suffer loss at the time of purchase. The purchaser may be able to sell the shares quickly without a loss "before the relevant truth begins to leak out," or, if a significant amount of time elapses before resale, subsequent events may control the shares' value. A purchase price inflated by misrepresentations may prove to be "a necessary condition of any [future] loss," but it is not the *cause* of such a loss. The Ninth Circuit's conclusion that proof of actual economic loss is unnecessary lacks support in precedent. The common law of deceit and misrepresentation on which the law of securities fraud is based requires proof of loss, and other courts of appeals have required it in securities fraud cases. In this case the complaint alleged that the petitioner drug company misrepresented the likelihood of FDA approval of a particular device and that the purchase price for shares was artificially inflated, but did not allege that the price fell significantly after the truth became known. The complaint was "legally insufficient" because it failed to give the petitioner/defendant adequate notice of the nature of the alleged loss and the causal connection to the misrepresentations.

9-0. Opinion for unanimous Court by Breyer.

Exxon Mobil Corp. v. Allapattah Servs., Inc. 125 S. Ct. 2611, 73 USLW 4574 (6-23-05)

Federal courts, supplemental jurisdiction: If one plaintiff meets the amount-in-controversy and other jurisdictional requirements of federal diversity jurisdiction, the court may exercise supplemental jurisdiction over other plaintiffs who do not meet the amount-in-controversy requirements. The supplemental jurisdiction statute, enacted in 1990, superseded *Zahn v. International Paper Co.* (1973), in which the Court had held that any diversity plaintiff not satisfying the amount-in-controversy requirement must be dismissed. The statute provides that, with certain listed exceptions, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related . . . that they form part of the same case or controversy." This is a "broad grant of supplemental jurisdiction." A diversity case in which the claims of some but

not all plaintiffs satisfy the amount-in-controversy requirement presents "a civil action of which the district courts have original jurisdiction," and the court therefore may exercise supplemental jurisdiction over other claims in the action unless one of the exceptions applies. In this case none does. The argument that the court must have original jurisdiction over every claim in the complaint rests on one of two untenable theories. The "indivisibility" theory is "inconsistent with the whole notion of supplemental jurisdiction," and the "contamination" theory, appropriate in the diversity context, "makes little sense with respect to the amount-in-controversy requirement." The supplemental jurisdiction statute is "closely analogous" to the removal statute, which has been interpreted to allow removal of state law claims along with the federal claim over which the district court has jurisdiction. There is no need to resort to legislative history because the supplemental jurisdiction statute is not ambiguous. Moreover, the legislative history is not only "murky" and inconclusive, but reveals a "post-hoc attempt" in the House Report to contradict what was acknowledged to be the provision's plain text.

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

Exxon Mobil Corp. v. Saudi Basic Industries Corp. 125 S. Ct. 1517, 73 USLW 4266 (3-30-05)

Federal-state court relations: The *Rooker-Feldman* doctrine, which bars losing state court litigants from obtaining federal district court review of the state court ruling, has no application when federal court proceedings have been initiated prior to state court judgment. *Rooker-Feldman* reflects the fact that federal district courts lack appellate jurisdiction over state court judgments. Such federal review authority is conferred solely on the Supreme Court. There is no interference with the Supreme Court's appellate jurisdiction, however, if a district court's subject-matter jurisdiction is properly invoked prior to entry of judgment in a parallel state court action. That situation is governed by preclusion law. The Full Faith and Credit Act requires a federal court to "give the same preclusive effect to a state-court judgment as another court of that State would give." In parallel litigation, therefore, the federal court may be required to recognize the preclusive effect of a state court judgment, "but federal jurisdiction over an issue does not terminate automatically on the entry of judgment in the state court." In this case, Exxon Mobil "plainly has not repaired to federal court in order to undo the Delaware judgment in its favor," but apparently sought "to protect itself in the event it lost in state court on grounds (such as the state statute of limitations) that might not preclude relief in the federal venue."

9-0. Opinion for unanimous Court by Ginsburg.

Florida v. Nixon 125 S. Ct. 551, 73 USLW 4047 (12-13-04)

Assistance of counsel, constitutional adequacy: A defense counsel's decision, in the absence of express consent by his client, to concede his client's guilt in a capital case and to concentrate on building a case to spare his client's life does not necessarily amount to prejudicial and ineffective assistance of counsel. The adequacy of a counsel's performance, after consultation with his client yields

neither consent nor objection to his proposed trial strategy, should be measured by the general reasonableness standard set forth in *Strickland v. Washington* (1984), and not by the presumption of prejudice created by *United States v. Cronic* (1984) for cases in which counsel fails meaningfully to oppose the prosecution's case. "A presumption of prejudice is not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant." Although a client's explicit consent must be obtained before certain basic trial decisions may be made, e.g., whether to plead guilty or waive a jury trial, what was done in this case is not the functional equivalent. Although the attorney conceded his client's guilt, the prosecution was still required to present competent, admissible evidence establishing the essential elements of the charged offense, and consequently there was no "truncated" proceeding. "Attorneys representing capital defendants face daunting challenges," and in some instances evidence of guilt may be so overwhelming that saving the client from execution may be "the best and only realistic result possible." In such cases "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'"

8-0. Opinion of Court by Ginsburg. Rehnquist did not participate.

Gonzales v. Raich 125 S. Ct. 2195, 73 USLW 4407 (6-6-05)

Commerce power; necessary and proper legislation: The Controlled Substances Act's (CSA's) categorical prohibition of the manufacture and possession of marijuana, is valid as applied to the intrastate cultivation, possession, and use of marijuana for medicinal purposes in compliance with California law. Congress, pursuant to its commerce and necessary and proper powers, may regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." Congress' regulation of intrastate activities may cover activities that are not themselves commercial if failure to regulate would undercut the regulation of the interstate market in that commodity. The case is "striking[ly] similar" to *Wickard v. Filburn* (1942), in which the Court upheld a restriction on production of wheat for home consumption. Just as Congress had a rational basis for believing that, in the aggregate, unregulated home-grown wheat would affect the market price of wheat, "here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." Congress could rationally have been concerned about enforcement difficulties in distinguishing between marijuana cultivated locally and that cultivated elsewhere, and about diversion from the home-consumption market into the commercial market. "[T]he absence of particularized findings [about the need to regulate medical marijuana use] does not call into question Congress' authority to legislate." The Court's decisions in *United States v. Lopez* (1995) and *United States v. Morrison* (2000) are not on point. Neither the Gun-Free School Zones Act, invalidated in *Lopez*, nor the Violence Against Women Act, invalidated in *Morrison*, regulated economic activity, while "the activities regulated by the CSA are quintessentially economic." Also, the CSA is "at the opposite end of the regulatory spectrum" from the Gun-Free School Zones Act because the latter was a "discrete prohibition," while the marijuana prohibition in the CSA is "merely one of many 'essential part[s]' of a larger regulation of economic activity." The CSA makes no exception for use of

marijuana for medical purposes on the advice of a physician. By classifying marijuana as a Schedule I drug, Congress itself determined that marijuana has no acceptable medical uses.

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

Gonzalez v. Crosby 125 S. Ct. 2641, 73 USLW 4568 (6-23-05)

Habeas corpus, motion for relief from judgment: A motion filed under Federal Rule of Civil Procedure 60(b) challenging the federal district court's ruling on the statute of limitations applicable to the movant's initial habeas corpus petition is not the equivalent of a successive habeas petition, and can be ruled upon by the district court without precertification by the appeals court. Rule 60(b) authorizes motions for relief from operation of a judgment. The rule was not expressly circumscribed by the Antiterrorism and Effective Death Penalty Act (AEDPA), but federal rules apply only to the extent that they are not "inconsistent" with the habeas statutes as amended by AEDPA. AEDPA's precertification and other requirements apply if the motion amounts to a "habeas corpus application" An "application" for habeas relief is a filing that contains one or more "claims." In the habeas context, a "claim" is "an asserted federal basis for relief from a state court's judgment of conviction." In this case the Rule 60(b) motion does not present a "claim" because it does not attack "the substance of the federal court's resolution of a claim on the merits," but rather attacks a "defect in the integrity of the federal habeas proceedings." The motion, therefore, "is not the equivalent of a successive habeas petition." The appeals court was nonetheless correct in denying the petitioner's motion. The alleged defect — an incorrect ruling as to whether AEDPA's limitations period was tolled during the pendency of a state habeas petition — is not an "extraordinary circumstance" that merits relief under Rule 60(b)(6).

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

Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg. 125 S. Ct. 2363, 73 USLW 4501 (6-13-05)

Federal courts, removal: Existence of a federal cause of action is not a prerequisite to removal of a case from state to federal court on the basis of federal question jurisdiction. "In certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues." Federal jurisdiction is permissible if there is a national interest in providing a federal forum for resolution of the federal issues, and if doing so would not distort the division of labor Congress has created between federal and state courts. In this case, in which the principal issue involves the type of notice a federal statute requires the IRS to give before seizing property to satisfy a tax delinquency, a state quiet title action may be removed. The Government has a "strong interest" in the collection of taxes, and "a direct interest in the availability of a federal forum to vindicate its own administrative action." This result is not inconsistent with the 1986 *Merrell Dow* case, which rejected federal jurisdiction in a state tort action involving an issue of federal misbranding. The Court in *Merrell Dow* "disclaimed the adoption of any bright-line rule," and treated the absence

of a federal cause of action "as evidence relevant to, but not dispositive of, the sensitive judgments about congressional intent that [the federal question provision] requires." Federal jurisdiction was rejected because accepting it "would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues." Here, by contrast, "because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve [this issue] will portend only a microscopic effect on the federal-state division of labor."

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

Graham County Soil & Water Conserv. Dist. v. United States ex rel. Wilson 125 S. Ct. 2444, 73 USLW 4544 (6-20-05)

False Claims Act, limitation period, retaliation actions: The False Claims Act's six-year statute of limitations, applicable to "a civil action under section 3730," does not apply to a retaliation action brought under section 3730(h). "Statutory language has meaning only in context," and in context the limitations language of section 3731(b)(1) "is ambiguous rather than clear" as to whether § 3730(h) retaliation actions are civil actions under section 3730. "Another reasonable reading" is that only § 3730(a) actions brought by the Attorney General to remedy violations of § 3729 [the False Claims Act's basic prohibition on filing false claims] and § 3730(b) *qui tam* actions brought by private persons in the government's name to remedy violations are "civil action[s] under section 3730." The start of the limitations period is keyed to "the date on which the violation of section 3729 is committed," i.e., the date on which the false claim was submitted. A retaliation plaintiff does not need to prove that a false claim was submitted, but only that his employer retaliated against him for alleging that it was. Two considerations argue in favor of resolving the ambiguity by reading the six-year limitations period as applicable only to 3730(a) and (b) actions, and not to 3730(h) retaliation actions. First, the very next subsection uses "action brought under section 3730" in a context that can refer only to (a) and (b) actions. The provision requires the United States to prove all elements of a § 3730 cause of action by a preponderance of the evidence, but the United States does not normally participate in a retaliation action. Second, statutes of limitations normally begin to run when the cause of action accrues. Section 3731(b), which begins to run when the false claim is filed, does not fit this "default rule" if applied to retaliation claims. There is even the possibility that a retaliation action could be time barred before it accrues if the employer learns of the employee's role in aiding an investigation more than six years after the alleged violation. Because there is no federal limitations period applicable to retaliation actions, the case is remanded for consideration of which state limitations period should be applied as most closely analogous.

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

Granholm v. Heald 125 S. Ct. 1885, 73 USLW 4321 (5-16-05)

Commerce Clause, Twenty-first Amendment: Michigan and New York laws that allow in-state wineries to sell wine directly to consumers but prohibit or discourage out-of-state wineries from doing so discriminate against interstate

commerce in violation of the Commerce Clause, and are not authorized by the Twenty-first Amendment. The Court has long held that state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests in a manner that benefits the former and burdens the latter. The restrictions on direct sale by out-of-state wineries constitute such prohibited discrimination. Section 2 of the Twenty-first Amendment, which prohibits the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof," "does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers." The Twenty-first Amendment repealed the Eighteenth Amendment, which had imposed nationwide Prohibition, and restored to the states the powers they had prior to Prohibition. Those powers were shaped by the Wilson Act, which authorized states to regulate imported liquor on the same terms that they regulate domestic liquor, and the Webb-Kenyon Act, which closed a loophole that had left states powerless to regulate direct imports for personal use. Although some of the early cases interpreting the Twenty-first Amendment did not take account of this history, modern cases have recognized that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." Discrimination can be upheld if the state "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," but neither Michigan nor New York has done so. The states' assertion that direct shipping of wine is likely to increase alcohol consumption by minors is "unsupported," and in any event does not justify a distinction between direct shipments from in-state producers and direct shipments from out-of-state producers. A "tax collection justification is also insufficient." Michigan does not rely on wholesalers to collect its taxes on imported wines, and New York could protect itself by requiring a permit for direct shipping. Objectives underlying other asserted rationales could "also be achieved through the alternative of an evenhanded licensing requirement."

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

Halbert v. Michigan 125 S. Ct. 2582, 73 USLW 4600 (6-23-05)

Assistance of counsel, appeal following guilty plea: Indigent criminal defendants who plead *nolo contendere* or guilty in Michigan courts are entitled to the appointment of counsel to seek "first-tier review" in the Michigan Court of Appeals. In *Douglas v. California* (1963), the court held that states must appoint counsel to represent indigents in first appeals as of right. Under *Ross v. Moffitt* (1974), however, indigents are not entitled to appointment of counsel for subsequent discretionary appeals to the state's highest court or to the U.S. Supreme Court. Although first-tier review for Michigan defendants who plead guilty or *nolo contendere* is discretionary with the court and not by right, *Douglas* and not *Ross* "provides the controlling instruction." Michigan has a two-tier appellate system under which the first tier, like California's first-tier review at issue in *Douglas*, serves an error-correction function. Indigent defendants seeking first-tier review "are generally ill equipped to represent themselves" in such proceedings. A *pro se* litigant will lack a record that has been reviewed by appellate counsel and will have no attorney's brief or appellate court opinion to help him identify and sharpen issues. In addition,

persons like the respondent, who have mental impairment, learning disabilities, and little education, "are particularly handicapped as self-representatives."

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

Illinois v. Caballes 125 S. Ct. 834, 73 USLW 4111 (1-24-05)

Fourth Amendment, dog sniff at traffic stop: A dog sniff for drugs conducted around the perimeter of a car following a legitimate traffic stop does not violate the Fourth Amendment if the duration of the stop is justified by the traffic offense. Police need not have any reasonable, articulable suspicion of drug activity before using trained narcotics detection dogs to sniff for drugs at traffic stops. Official conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment, and there is no legitimate privacy interest in possessing contraband. Properly conducted dog sniffs with properly trained dogs "are generally likely to reveal only the presence of contraband," and "generally do[ ] not implicate legitimate privacy interests." A 2001 decision (*Kyllo v. United States*) invalidating the use of a thermal imaging device to detect activity within a home is distinguished; the thermal imaging device was capable of detecting lawful activity and thus infringed reasonable expectations of privacy in the home.

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

Jackson v. Birmingham Bd. of Educ. 125 S. Ct. 1497, 73 USLW 4233 (3-29-05)

Title IX, retaliation as sex discrimination: The private right of action implied by Title IX encompasses claims of retaliation, and consequently a male high school girls' basketball coach relieved of his duties after complaining of unequal treatment of his team may maintain a Title IX suit. The Court has previously held that Title IX's prohibition against discrimination "on the basis of sex" by any educational program or activity receiving federal financial assistance extends to intentional discrimination, and retaliation against a person who has complained of sex discrimination is a form of intentional sex discrimination. The fact that Title IX makes no mention of retaliation does not limit its application; the term "discrimination" covers a wide range of treatment. Nor is the scope of Title IX limited by contrast with Title VII, which explicitly prohibits retaliation. Title VII spells out a number of practices that constitute prohibited discrimination. "Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." Moreover, the Court "presume[s]" that Congress, when it enacted Title IX, was "thoroughly familiar" with a decision three years earlier in which the Court had interpreted a civil rights statute as authorizing suit by a white person expelled from a recreational association for leasing his share to a non-white. A recent decision that restricted the scope of Title VI private actions by contrasting broad regulatory and narrower statutory prohibitions is distinguished; here the Court does not rely on regulations "because the statute *itself* contains the necessary prohibition." Title IX retaliation actions may be brought by persons who were not the victims of the original complaint; Title IX

does not limit its application, as some other civil rights provisions do, to discrimination on the basis of "such individual's" characteristics. Because Title IX was an exercise of Congress' spending power, private damage actions may be recognized only if the recipients of federal funding had adequate notice that they could be liable for the conduct at issue. Here there was adequate notice. Funding recipients have long been on notice that they could be subjected to private suits for intentional sex discrimination, and that courts have consistently interpreted Title IX's private right of action broadly to encompass diverse forms of intentional sex discrimination. Regulations prohibiting retaliation have been on the books for nearly 30 years, and, prior to the conduct at issue in this case, appeals courts had interpreted Title IX to prohibit retaliation.

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

Jama v. Immigration and Customs Enforcement 125 S. Ct. 694, 73 USLW 4090 (1-12-05)

Statutory interpretation; Immigration, removal of alien: The provision of immigration law that governs selection of the country to which an alien is to be removed from the United States, 8 U.S.C. § 1231(b)(2), does not require the explicit, advance consent of that country's government when the alien is ordered removed to his country of birth pursuant to § 1231(b)(2)(E)(iv). The statute provides a series of removal options. The last option, clause (vii) of subparagraph (E), provides that if the preceding options are "impracticable, inadvisable, or impossible," the alien shall be removed to "another country whose government will accept the alien into that country." No such acceptance requirement appears in clauses (i) through (vi). The fact that effects are attached to non-acceptance throughout the rest of paragraph (2) makes the failure to specify any such effect in most of subparagraph (E) "conspicuous" and "more likely intentional." Use of the word "another" in clause (vii) does not import the acceptance requirement into clauses (i) through (vi). That construction would run contrary to the rule of the last antecedent and to the structure of subparagraph (E), under which "each clause is distinct and ends with a period." Nor does the structure of paragraph (2) as a whole manifest a uniform acceptance requirement; the fact that the Attorney General "*may* disregard" an alien's selection under paragraph (A) when a country has not consented suggests discretion to proceed without advance consent. To infer an acceptance requirement when Congress has not clearly created one "would run counter to [the Court's] customary deference to the President in matters of foreign affairs." There was no settled interpretation that would warrant the conclusion that Congress' 1996 amendments ratified that interpretation. Neither of the two requirements for such "reenactment" were present: the provisions on removal were not reenacted without change (the removal provision combined what had been the two separate procedures of deportation and exclusion), and the presumed judicial consensus was not "so broad that we must presume Congress knew of and endorsed it."

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

Johanns v. Livestock Marketing Ass'n 125 S. Ct. 2055, 73 USLW 4350 (5-23-05)

First Amendment, compelled speech, government speech: A mandatory assessment of beef producers to promote advertising of beef and beef products does not compel them to subsidize speech in violation of the First Amendment. The beef promotions are government speech that the government may support through assessments. Although in general individuals may not be compelled to subsidize private speech with which they disagree, compelled support of government through taxes and assessments is "perfectly constitutional," and support of government can entail support of government speech. *United States v. United Foods* (2001), invalidating an assessment for mushroom advertising, is distinguished as based on the assumption that the advertising was private speech, not government speech. The Beef Promotion and Research Act of 1985 announces a federal policy of promoting the marketing and consumption of beef and beef products, and directs the Secretary of Agriculture to implement the policy by creating a Beef Board composed of beef producers and importers, and by imposing an assessment to fund promotional campaigns. Although the Beef Board and its operating committee play a role in developing the promotional campaigns, the content of the promotions "is effectively controlled by the Federal Government itself." The act requires that the promotional campaign include advertising "to advance the image and desirability" of beef products, requires that the campaign take into account different types of beef products, and prohibits reference to brand and trade names. Details of the advertising are developed by the Beef Board, but the Secretary of Agriculture must approve "every word that is disseminated." This degree of government supervision and control makes reliance on the government speech doctrine appropriate. The fact that the advertising is funded by a targeted assessment rather than by general tax revenues has no bearing on whether the speech is government speech or private speech, and does not change the compelled-subsidy analysis. Crediting the advertising to "America's Beef Producers" does not affect the validity of the facial challenge to the compelled subsidy, and an as-applied challenge to individual ads is not sufficiently supported in the record.

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

Johnson v. California 125 S. Ct. 1141, 73 USLW 4137 (2-23-05)

Equal protection, racial segregation in prisons: Strict scrutiny is the proper standard of review for judging the validity of the California Department of Corrections' unwritten policy of racially segregating prisoners in double cells for a 60-day period after they enter a new correctional facility. The Court has previously stated that reviewing courts must analyze under strict scrutiny "*all* racial classifications" imposed by government, and in *Brown v. Board of Education* (1954) rejected the idea that "separate" can ever be "equal." Strict scrutiny "is no less important" in the prison context. The CDC's invitation to apply the deferential standard of *Turner v. Safley* (1987), applicable to prison regulations generally, is rejected. *Turner* has not been applied to racial classifications, and the right to be free from racial discrimination "is not susceptible to the logic of *Turner*." The necessities of prison security and discipline "are a compelling government interest," but that interest justifies "only those uses of race that are narrowly tailored to address those necessities."

5-3. Opinion of Court by O'Connor, joined by Kennedy, Souter, Ginsburg, and Breyer. Concurring opinion by Ginsburg, joined by Souter and Breyer. Dissenting opinions by Stevens; and by Thomas, joined by Scalia. Rehnquist did not participate.

Johnson v. California 125 S. Ct. 2410, 73 USLW 4460 (6-13-05)

Jury selection, racial discrimination: California courts erred in requiring a defendant, in order to establish a *prima facie* case of racial discrimination in jury selection, to show that it is "more likely than not" that the prosecutor's peremptory challenges were based on racial grounds. The "more likely than not" standard "is an inappropriate yardstick by which to measure the sufficiency of a prima facie case" under *Batson v. Kentucky* (1986). *Batson* held that a *prima facie* case of discrimination can be established through "a wide variety of evidence, so long as the sum of the proffered facts gives rise to an inference of discriminatory purpose." The function of a *prima facie* case is not to persuade the judge that racial discrimination occurred, but merely to create an inference and to shift the burden to the state to offer permissible race-neutral reasons for its peremptory challenges. It is the third stage of the process, after the defendant has presented a *prima facie* case and the state has offered its justification, when the judge weighs the likelihood that racial discrimination occurred. In this case, as in *Batson*, the prosecution struck all black persons on the venire and the trial judge failed to demand an explanation from the prosecution "despite the fact that the [defendant's] evidence supported an inference of discrimination."

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

Johnson v. United States 125 S. Ct. 1571, 73 USLW 4270 (4-4-05)

AEDPA, limitations period: When a prisoner brings a habeas corpus petition challenging his federal sentence on the basis that a state conviction used to enhance his federal sentence has been vacated, the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA) begins to run when the prisoner receives notice of the order vacating his state sentence. AEDPA provides that the one-year period begins to run on "the date on which the facts supporting the claim . . . could have been discovered through the exercise of due diligence." The state court vacatur order is the "fact[ ] supporting the claim" for purposes of this rule. There is still the problem, however, of how to implement the "due diligence" requirement when it is the petitioner's own actions that initiate the state vacatur proceedings. "Diligence can be shown by prompt action [by] the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior conviction with its potential to enhance the later sentence." The diligence requirement is best activated on the date of federal judgment, not the date of the federal indictment or the date the judgment becomes final. In this case the petitioner waited more that three years after entry of judgment in his federal case before filing his state petition. The petitioner pointed to the fact that he had been acting *pro se* and lacked knowledge of the procedure, but his delay "fell far short of reasonable diligence in challenging the state conviction."

9-0 (vacatur as fact starting limitation period); **5-4** (due diligence). Opinion of Court by Souter, joined by Rehnquist, O'Connor, Thomas, and Breyer. Dissenting opinion by Kennedy, joined by Stevens, Scalia, and Ginsburg.

Kansas v. Colorado 125 S. Ct. 526, 73 USLW 4021 (12-7-04)

Arkansas River Compact, water allocation: Kansas' objections to the special master's report recommending resolution of remaining disputes over allocation of Arkansas River water under the Arkansas River Compact are overruled. Kansas' request for appointment of a river master is denied. The special master has not requested appointment of a river master, future issues may be resolvable by arbitration, and questions that may arise about assumptions underlying the complex hydrologic computer model used to estimate river flow may call for "highly judgmental decisionmaking" more related to the parties' basic legal claims than to the kinds of factual issues ordinarily handled by river masters. The special master's determination to calculate prejudgment interest only on damages incurred from 1985 onward, and not for earlier periods, was implicitly approved in prior litigation, and Kansas' objection that prejudgment interest should be based upon earlier damages is overruled. The State's objections to the methodology for applying the computer model, arguing that a one-year measurement period rather than a 10-year period should be used, are also rejected. The compact's language does not resolve the issue, and "practical considerations" favor the 10-year approach. The special master's allocation to the Colorado Water Court of initial responsibility for determining the amounts of replacement credits to be applied to Colorado's compact obligations is permissible, given Kansas' right to seek review in the Supreme Court. The special master's decision to postpone decision on other matters is also justified.

9-0, **8-1**. Opinion of Court by Breyer, unanimous in part, and joined in separate parts by Rehnquist, O'Connor, Scalia, Kennedy, Souter, and Ginsburg. Concurring opinion by Thomas. Concurring and dissenting opinion by Stevens (dissenting as to basis for calculating prejudgment interest).

Kelo v. City of New London 125 S. Ct. 2655, 73 USLW 4552 (6-23-05)

Taking of property, "public use": The city's condemnation of private property for an economic development project meets the "public use" requirement of the Fifth Amendment's Takings Clause. The city's plan, designed to create jobs, increase tax revenues, and revitalize an economically distressed downtown and waterfront area, authorizes private and commercial development, including a conference hotel, restaurants and shopping, new residences, and a marina. Although the "public use" restriction prevents the government from taking the property of one private entity for the sole purpose of transferring it to another private entity, there is no requirement that condemned property be made available for use by the general public. Rather, the Court has long "embraced the broader and more natural interpretation of public use as 'public purpose,'" and has construed the term "public purpose" "broadly, reflecting [a] longstanding policy of deference to legislative judgments." Economic development qualifies as a public purpose. Even though New London was not faced with the need to remove "blight" from the redevelopment area, and consequently *Berman v. Parker* (1954) is not directly on point, the city's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to . . . deference." A

public purpose "may be as well or better served through an agency of private enterprise than through a department of government," and the fact that the revitalization will benefit certain private parties does not require its invalidation. There is no requirement of "reasonable certainty" that public benefits will accrue from a condemnation; judicial inquiry ends "when the legislature's purpose is legitimate and its means are not irrational." So too, courts will not "second-guess [government's] determinations as to what lands it needs to acquire."

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

Koons Buick Pontiac GMC, Inc. v. Nigh 125 S. Ct. 460, 73 USLW 4013 (11-30-04)

Truth in Lending Act, statutory construction: 1995 amendments to the Truth in Lending Act did not alter the liability limits applicable to loans secured by personal property. The civil liability limits are contained in 15 U.S.C. § 1640(a)(2)(A). Prior to amendment in 1995 that subparagraph contained two clauses, the first of which (clause i) authorized damages of twice the finance charge for actions on secured loans, and the second of which (clause ii), applicable to consumer leases, capped damages at not less than $100 nor more that $1000 for "liability under this subparagraph." Appellate courts had interpreted the limit in clause (ii) as applicable to loan actions covered by clause (i). Congress in 1995 amended the subparagraph by adding a third clause (iii), raising the cap to the $200-2,000 range for a category of transactions formerly covered by clause (i) — closed-end loans secured by real property. Congress did not alter the language of the liability limitation in clause (ii). The "conventional meaning of 'subparagraph'" suggests applicability to (i) as well as (ii), and the "statutory history" resolves any ambiguities created by the odd placement of the limitation within the second of three clauses. If Congress had intended to "repeal the longstanding" understanding that this liability limitation applied to actions covered by (i) as well as those covered by (ii), it "likely would have flagged that substantial change" or at least would have amended the language to apply to "liability under this *clause*." The evident intent was to increase possible recovery for loans secured by real property, not to change the cap for loans secured by personal property.

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

Kowalski v. Tesmer 125 S. Ct. 564, 73 USLW 4033 (12-13-04)

Third-party standing: Attorneys lack third-party standing to assert the rights of indigents denied appointed appellate counsel after pleading guilty in Michigan state courts. As a general rule, a litigant must assert his own legal rights, and may not rest his claim to relief on the legal rights of third parties. Narrow exceptions are recognized, however, if the party asserting the right has a "close relationship" to the person who possesses the right, or if there is a "hindrance" to assertion of the right by the person possessing it. Unlike an existing attorney-client relationship, a possible "future attorney-client relationship with as yet unascertained Michigan criminal defendants" does not

qualify as a "close relationship" on which third-party standing can be built. And, while an attorney "would be valuable," the lack of an attorney is not "the type of hindrance necessary to allow another to assert the indigent defendants' rights." The attorneys here could have attended state court to assist the indigent defendants there. Also, the three indigent defendants who were originally plaintiffs in this federal action under 42 U.S.C. § 1983 were appropriately dismissed under *Younger v. Harris* because they had ongoing state criminal proceedings that afforded them ample opportunity to raise their constitutional challenge.

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

KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc. 125 S. Ct. 542, 73 USLW 4028 (12-8-04)

Trademarks, infringement, fair use defense: A party raising the statutory affirmative defense of fair use to a claim of trademark infringement does not have the burden of demonstrating that the complained-of practice is unlikely to confuse consumers about the origin of the goods or services affected. A plaintiff claiming infringement of an incontestable mark under the Lanham Act must show likelihood of consumer confusion as part of the prima facie case "[T]he defendant has no independent burden to negate the likelihood of any confusion in raising the affirmative defense that a term is used descriptively, not as a mark, fairly, and in good faith." The fact that Congress made consumer confusion an explicit part of the plaintiff's case and omitted any mention of it in describing the affirmative defense raises a presumption that the omission was intentional. The fair use concept does not incorporate the likelihood-of-confusion test. Under the Lanham Act and under common law, "some possibility of consumer confusion [is] compatible with fair use." Trademark law is not designed "to deprive commercial speakers of the ordinary utility of descriptive words," and for that reason descriptive terms can qualify for trademark protection "only after taking on secondary meaning as distinctive of the applicant's goods." Moreover, placing the burden on the defendant to establish "nonconfusion" would create statutory "incoherence." The function of an affirmative defense is not to rebut the plaintiff's case, but instead to raise a bar to relief even if the prima facie case is sound. "[I]t is only when a plaintiff has shown likely confusion by a preponderance of the evidence that a defendant could have any need of an affirmative defense."

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

Leocal v. Ashcroft 125 S. Ct. 377, 73 USLW 4001 (11-9-04)

Immigration, deportation for "crime of violence": The Florida crime of driving under the influence [DUI] and causing serious bodily injury is not a "crime of violence" for which a lawful permanent resident alien may be deported. Under the Immigration and Nationality Act [INA], an alien convicted of an "aggravated felony" may be deported, and aggravated felony is defined to include "a crime of violence" as defined in 18 U.S.C. § 16. That provision, in turn, defines "crime of violence" to mean (a) an offense that has as an element

the use of force against the person or property of another, or (b) any other felony that, "by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense." Primary focus on the word "use" is too narrow; instead, the word should be construed "in light of the terms surrounding it." Because the "ordinary or natural" meaning of using physical force against someone suggests a higher degree of intent than negligent or accidental conduct, the DUI offense is not a crime of violence under (a). And, while (b) "sweeps more broadly," it "does not thereby encompass all negligent misconduct." That provision simply covers offenses, such as burglary, that, by their nature, involve the risk that the use of physical force may become necessary in completing the crime. This interpretation is reinforced by another provision of the INA that renders inadmissible certain aliens who have previously committed "any crime of violence . . . *or* any [DUI offense]." If possible, each part of a statute must be given meaning, and the separate provision for DUI offenses would be rendered superfluous if such offenses were encompassed within the definition of "crime of violence." The fact that Congress enacted the two separate INA references to "crime of violence" just nine months apart strengthens the argument that they should be interpreted similarly.

9-0. Opinion for unanimous Court by Rehnquist.

Lingle v. Chevron U.S.A. Inc. 125 S. Ct. 2074, 73 USLW 4343 (5-23-05)

Fifth Amendment, regulatory taking of property: The *Agins v. Tiburon* test for whether government regulation of private property constitutes a taking for which compensation is required by the Fifth Amendment is not a valid method for identifying regulatory takings. The *Agins* test, which finds a taking if the regulation "does not substantially advance legitimate state interests," derives from due process analysis, and "has no proper place in . . . takings jurisprudence." The "paradigmatic taking" is a government appropriation of property. The three principal categories of regulatory actions that have been found to be the "functional equivalent" of government appropriation — a permanent physical invasion of property, however small; deprivation of all economically beneficial use of property; and interference with "legitimate property interests" in violation of the *Penn Central* test — all focus on "the severity of the burden" imposed on the property owner. The *Agins* "substantially advances" test instead "probes the regulation's underlying validity" by focusing on whether the regulation is effective in achieving some legitimate purpose. This approach "reveals nothing about the magnitude or character of the burden [imposed] upon private property rights," or about "how any regulatory burden is distributed among property owners." The legitimacy of a regulation may be an appropriate due process inquiry, "but is logically prior to and distinct from" a takings inquiry. The Takings Clause presupposes that the government has acted in pursuit of a valid public purpose, and inquires whether that legitimate regulation has taken private property for public use. In tailoring its claim to *Agins*, Chevron has not alleged "that it has been singled out to bear any particularly severe regulatory burden," and thus has not alleged a takings violation. Consequently, Chevron should not have been granted summary judgment on its challenge to Hawaii's limitation on the rent that oil companies may charge dealers who lease company-owned service stations.

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

Mayle v. Felix 125 S. Ct. 2562, 73 USLW 4590 (6-23-05)

Habeas corpus, limitations period, amendment of petition: An amendment of a habeas corpus petition does not relate back to the original filing when it asserts a new ground of relief supported by facts that differ in both time and type from those the original pleading set forth. Such an amendment, therefore, must be filed within the one-year limitations period prescribed by the Antiterrorism and Effective Death Penalty Act (AEDPA). The petitioner's self-incrimination claim, based on allegedly coerced and inculpatory statements made during police interrogation, cannot relate back to his initial petition, which raised a confrontation issue stemming from the prosecution's use of a videotaped recording of a witness. The habeas statute allows amendment of pleadings as provided in the rules of procedure, and Federal Rule of Civil Procedure 15(c)(2) provides that amendments relate back to the date of the original pleading if they arise out of "the conduct, transaction, or occurrence set forth . . . in the original pleading." The "key" words "conduct, transaction, or occurrence" refer to the "a common core of operative facts," not to the same trial, conviction, or sentence. Interpretation is guided by the fact that requirements are more stringent for an original habeas petition than for a civil complaint. Habeas Corpus Rule 2(c) requires that a petition "specify all the grounds for relief" and "state the facts supporting each ground." The fact that the petitioner's confrontation and self-incrimination claims would have to be pleaded discretely as an initial matter suggests that "[e]ach separate congeries of facts supporting the grounds for relief . . . would delineate an 'occurrence'" for purposes of amendment. If claims asserted after AEDPA's one year period has run could relate back to an initial filing simply because they relate to the same conviction, trial, or sentence, the limitation period "would have slim significance," and Congress's purpose of advancing the finality of criminal convictions could be thwarted.

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

McCreary County v. ACLU of Kentucky 125 S. Ct. 2722, 73 USLW 4639 (6-27-05)

Establishment Clause, displays of Ten Commandments: Displays of the Ten Commandments in the courthouses of two Kentucky counties violate the Establishment Clause. A determination of the counties' purpose in erecting the displays is a proper basis for evaluating the Establishment Clause issue. The *Lemon v. Kurtzman* test of whether a governmental action has a secular legislative purpose "serves an important function." The First Amendment requires neutrality among religions, and between religion and nonreligion, and when government acts with the purpose of advancing religion, it violates the "central Establishment Clause value of official religious neutrality." "By showing a purpose to favor religion, the government 'sends the . . . message to nonadherents "that they are outsiders, not full members of the political community."'" Examination of legislative purpose is "a staple of statutory interpretation," and need not be abandoned as impractical; legislative purpose can sometimes be gleaned "from readily discoverable fact." Although courts will often accept a governmental statement of secular purpose, the secular

purpose must be genuine, not a sham, and courts may look behind the asserted purpose. Evaluation of the counties' claim of secular purpose for the current displays may take into account the evolution of the displays. "The same governmental action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." The counties' original displays had "two obvious similarities" to the classroom display invalidated in *Stone v. Graham* (1980): they set out the text of the Ten Commandments, "an unmistakably religious statement," and they displayed that religious text in isolation, not in a context that included nonreligious messages. Subsequent modifications of the displays did not change their religious purpose; an "indisputable" religious purpose was evident in the resolutions authorizing the second display, and statements of purpose accompanying authorization of the third displays "were presented only as a litigating position." There is "ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display."

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

Merck KGaA v. Integra Lifesciences I, Ltd. 125 S. Ct. 2372, 73 USLW 4468 (6-13-05)

Patents, infringement, preclinical studies: Use of patented inventions in preclinical drug studies is exempted from infringement so long as there is reasonable basis to believe that the compound tested could be the subject of an FDA submission and that the experiments will produce the types of information that are relevant to an application to investigate or market a new drug. The relevant statute, 35 U.S.C. § 271(e)(1), provides that "it shall not be an act of infringement" to use a patented invention "solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs." The Federal Food, Drug, and Cosmetic Act (FDCA) is such a law. The language provides a "wide berth," extending the exemption to "all uses of patented drugs that are reasonably related to the development and submission of *any* information under the FDCA." "This necessarily includes preclinical studies of patented compounds that are appropriate for submission to the FDA in the regulatory process." The exemption can apply to all types of preclinical data, including that related to a drug's efficacy, and is not limited to data relating to the safety of a drug in humans. Also, the exemption can cover experimentation on drugs that are not ultimately the subject of an FDA submission, and can cover the use of patented compounds in experiments that are not ultimately submitted to the FDA. This means that the exemption is not limited to "activities necessary to seek approval of a generic drug." The test is whether the experimental uses are "reasonably related to the process of developing information for submission." The exemption's breadth thus accommodates the fact that "scientific testing is a process of trial and error."

9-0. Opinion for unanimous Court by Scalia.

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. 125 S. Ct. 2764, 73 USLW 4675 (6-27-05)

Copyright, liability for secondary infringement: One who distributes a device with the object of promoting its use to infringe copyright, as shown by

clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. The respondents Grokster and StreamCast, who distributed free software products that allow computer users to share electronic files through peer-to-peer networks, may be held liable under this principle for copyright violations by users who share copyrighted music and video files. The case is not controlled by *Sony Corp. v. Universal City Studios* (1984), in which the Court held that there was no secondary infringement in the sale of VCRs; even though VCRs could be used for infringement, the Court found that their principal use was for time-shifting, a fair use. *Sony* did not displace all theories of secondary infringement, and did not involve active encouragement of infringement beyond the mere fact of distribution. The patent law rule on inducement of infringement is also appropriate for copyright. Active encouragement of direct infringement by others, through advertisements or other action, can support liability for infringement. Evidence showed that nearly 90% of the files available for download through Grokster's FastTrack system were copyrighted works, and both respondents conceded that most uses of their products were infringing. Both companies attempted to satisfy a "known source of demand for copyright infringement" by soliciting former users of Napster, "a notorious file-sharing service" that had been sued for infringement. Neither company attempted to develop filtering tools or other methods to diminish infringing activity by users. Moreover, the respondents' revenues, derived exclusively from sale of advertising directed to users' computers, were dependent on the high-volume, infringing uses. In addition to the evidence of intent to bring about infringement, there was undisputed evidence of actual infringement "on a gigantic scale."

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

Mid-Con Freight Systems v. Michigan Pub. Serv. Comm'n 125 S. Ct. 2427, 73 USLW 4535 (6-20-05)

Preemption, state registration of trucks: Michigan's $100 fee imposed on Michigan-licensed trucks operating entirely in interstate commerce is not a "State registration requirement" that is preempted by the federal statute that creates a single-state registration system (SSRS). The SSRS statute replaced a "bingo-card" system under which carriers had to register with each state, and allows an interstate carrier to register with a single "base" state by proving that it has secured a federal permit for operation of an interstate truck. The statute provides that a state "requirement" that an interstate carrier must "register with the state" is not an unreasonable burden on transportation when it is completed in accordance with federal standards, and that an unreasonable burden is created "when a State registration requirement imposes obligations in excess of [federal] standards." The prohibition of "state registration requirement[s]" in excess of federal standards does not apply to every state registration requirement, but rather applies only to those requirements that concern SSRS registration. The "statutory language makes clear that the federal provision reaches no further." The reference in the first sentence to registration in compliance with federal requirements means compliance with the SSRS obligations imposed by the statute, and "the same words in the second sentence"

cannot refer to "something totally different." There is no language elsewhere in the statute suggesting a broader meaning for "State registration requirement"; the whole focus of the statute is on SSRS standards. Nor is a broader reading suggested by anything in "the statute's basic purposes or objectives." Michigan's $100 fee on interstate trucks does not concern SSRS registration, and therefore is not preempted by the provision. The Michigan statute imposing the fee makes no reference to a federal permit or to other SSRS matters, Michigan imposed the fee before SSRS existed, and a carrier can comply with the SSRS requirements without paying the Michigan fee.

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

Miller-El v. Dretke 125 S. Ct. 2317, 73 USLW 4479 (6-13-05)

Jury selection, racial discrimination: The petitioner should prevail on his claim that the prosecutor's purposeful exclusion of blacks from his jury deprived him of equal protection. *Batson v. Kentucky* (1986) set the framework for analysis of such claims. A defendant can establish a *prima facie* case of discriminatory jury selection from the totality of the relevant facts about a prosecutor's actions, and the state can rebut this case by establishing a neutral explanation for its actions. The trial judge then determines whether the defendant has proved purposeful racial discrimination. In this case, "the numbers describing the prosecution's use of [peremptory challenges] are remarkable." Only one of the 20 black members of the venire panel was selected; nine were excused for cause, but ten were peremptorily struck. The one black juror who served was accepted late in the selection process when the prosecutor was running low on peremptories and had to save them for remaining panelists known to oppose the death penalty. Even "more powerful" is a comparison of some of the black panelists who were struck with white panelists who were allowed to serve; the prosecution's reasons for striking these black panelists "appeared equally on point as to some white jurors who served." Broader patterns of discriminatory practices are also apparent. The prosecution used a "jury shuffling" procedure, rearranging the order in which members of the panel are seated and questioned, when a number of blacks were at the front of the line, and requested another shuffle when blacks again appeared at the front. The prosecutor also used contrasting *voir dire* questions for blacks and whites, describing capital punishment in general terms when questioning whites as to their views, but using a "graphic script" for blacks; and depriving blacks of information, provided to whites, that would have enabled them to avoid for-cause disqualification. Finally, there was evidence that Dallas County prosecutors had long followed "a specific policy of systematically excluding blacks from juries."

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

Muehler v. Mena 125 S. Ct. 1465, 73 USLW 4211 (3-22-05)

Fourth Amendment, detention during search: While conducting a search of a house pursuant to a warrant to search for weapons and evidence of gang activity, officers may detain occupants in handcuffs. It is well established that officers executing a warrant to search premises may detain the occupants during

the search. Officers may use reasonable force to effectuate such a detention. In this case — "no ordinary search" because it entailed a search for weapons in a house in which a wanted gang member resided — use of handcuffs was reasonable, and the 2- to 3- hour duration of handcuffed detention was also reasonable. Questioning the handcuffed detainee about her immigration status did not violate her Fourth Amendment rights. Because there was no finding that the detention was prolonged by the questioning, the questioning did not constitute an additional seizure, and the officers did not need reasonable suspicion to inquire as to the detainee's name, date and place of birth, and immigration status.

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

National Cable & Telecomms. Ass'n v. Brand X Internet Servs. 125 S. Ct. 2688, 73 USLW 4659 (6-27-05)

Telecommunications, regulation of broadband Internet providers: The FCC's determination that cable companies that sell broadband Internet service do not provide "telecommunications service" and hence are exempt from mandatory common-carrier regulation under the Communications Act of 1934, is a lawful construction that is entitled to deference under the principles of *Chevron U.S.A. v. NRDC* (1984). The appeals court's refusal to apply *Chevron* because the Commission's interpretation conflicted with an earlier decision by that court was in error. The appeals court's earlier decision had determined the "best" reading of the statute, not that its reading was the only permissible one. Under *Chevron*, courts should defer to reasonable agency interpretations of statutes they administer unless the statute speaks directly to the issue and requires a different interpretation. The Commission's determination that provision of cable modem service is not an "offering" of a "telecommunications service" is a "permissible" reading of the statute. The act distinguishes between "telecommunications service" and "information service," and the commission determined that cable modem service is an "information service," not an "telecommunications service." The term "telecommunications" is defined as the transmission of information without change in its form or content, but cable modem service provides users with the information-processing capabilities of Internet access. From the consumer's and the Commission's point of view, cable modem service has an "integrated character," and the transmission of information is "a necessary component of Internet access." The term "offer" is ambiguous. "Offering" of telecommunications service "can reasonably be read to mean a 'stand-alone' offering" not bundled with information services. Cable companies that provide Internet service "offer" an information service "via telecommunications," but that does not necessarily mean that they "offer" telecommunications service. The distinction between telecommunications and information services "substantially incorporated" the Commission's traditional distinction between "basic" and "enhanced" service. The Commission's interpretation was "a reasonable policy choice." The Commission provided a "reasoned explanation" for its different treatment of cable modem service and DSL service.

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

Norfolk Southern Ry. v. James N. Kirby, Pty Ltd. 125 S. Ct. 385, 73 USLW 4005 (11-9-04)

Maritime law, "through" bill of lading, liability limit: Federal maritime law governs liability for container goods shipped by sea from Australia to the United States, and damaged in a train wreck while being transported from the port of Savannah, Georgia, to their final destination in Huntsville, Alabama. The "through" bill of lading by which the Australian manufacturer Kirby contracted with an intermediary company to arrange for transportation to Huntsville contained a liability limitation as well as a "Himalaya Clause" extending the liability limitation to downstream parties. The intermediary company hired a German shipping company to transport the goods to the United States, and included the same liability limitation, made applicable to inland carriers. The shipping company in turn hired the petitioner railroad to transport the containers on the final leg from Savannah to Huntsville. The railroad is entitled to the protection of the liability limitations in both bills of lading (that between the manufacturer and the intermediary, and that between the intermediary and the shipper). The contracts are maritime contracts because their primary purpose is to transport goods by sea from Australia to the United States. The fact that the final leg of transportation was to be over land does not alter the "essentially maritime nature of the contracts." The maritime contracts are not "inherently local," and should be governed by uniform federal law. Protecting the uniformity of federal maritime law reinforces the liability regime that Congress established in the Carriage of Goods by Sea Act. Ordinary principles of contract law govern the issue of whether the railroad can take advantage of the liability limitations, and it is clear from the general language of the Himalaya Clause that the railroad was an intended beneficiary of the intermediary's contract with the manufacturer even though the railroad was not in "privity" with the intermediary when that bill was issued. The intermediary's contract with the shipper presents a "more difficult" question, but the issue is resolved by a default rule that a cargo owner's recovery against a carrier is limited by the liability limitations that the intermediary negotiates with downstream carriers. While the intermediary is not the cargo owner's agent for all purposes, it is for the purpose of limiting liability. This limited agency rule "tracks industry practices," and produces an "equitable result."

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

Orff v. United States 125 S. Ct. 2606, 73 USLW 4588 (6-23-05)

Sovereign Immunity, waiver: The limited waiver of sovereign immunity in the Reclamation Reform Act does not extend to a suit against the United States brought by third-party beneficiaries of a water supply contract between the Bureau of Reclamation and a state water district. The provision grants "consent to join the United States as a necessary party defendant in any suit to adjudicate . . . contractual rights [under a reclamation contract]." This language "is best interpreted to grant consent to join the United States in an action between other parties," and not to "permit a plaintiff to sue the United States alone." The traditional concept of joinder, reflected in Federal Rule of Civil Procedure

19(a), supports interpreting the language to permit joinder of the United States rather than initiation of a suit against the United States. This interpretation is strengthened by the contrast with broader language contained in other statutes that waive immunity from suits against the United States; these provisions confer jurisdiction over "any claim," or any "civil action or claim" against the United States.

9-0. Opinion for unanimous Court by Thomas.

Pace v. DiGuglielmo 125 S. Ct. 1807, 73 USLW 4304 (4-27-05)

Habeas corpus, AEDPA, tolling of limitations period: A state habeas corpus petition that is ultimately rejected by the state court as untimely is not "properly filed" for purposes of the provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) that tolls the one-year limitations period for filing a federal habeas corpus claim while a "properly filed application for State . . . review . . . is pending." "When a postconviction petition is untimely under state law, that is the end of the matter for purposes of [AEDPA]." The Court had previously stated that compliance with time limits is a condition to proper filing, but had reserved the issue of whether the existence of exceptions to a timely filing requirement can prevent a late application from being considered improperly filed. There are "no grounds" for so holding. "[A] petition filed after a time limit, and which does not fit within any exception to that limit, is no more 'properly filed' than a petition filed after a time limit that permits no exception." "Time limits, no matter their form, are 'filing' conditions." "Fairness" does not require a different interpretation; petitioners required by AEDPA to exhaust state remedies can file a protective petition in federal court and ask the federal court to "stay and abey" its proceedings until state remedies are exhausted. The petitioner is not entitled to equitable tolling for the time during which his state petition was pending because he did not establish the requisite diligence. The petitioner waited for years before raising his state claim of ineffective counsel, and waited five months after the state proceedings became final before filing in federal court.

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

Pasquantino v. United States 125 S. Ct. 1766, 73 USLW 4287 (4-26-05)

Statutory interpretation, wire fraud: A plot to defraud a foreign government of tax revenue violates the wire fraud statute, which prohibits the use of interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses. . . ." In this case the petitioners while in New York ordered liquor by phone from Maryland stores, and then smuggled the liquor into Canada without paying Canada's excise taxes. This conduct "falls within the literal terms of the wire fraud statute." By representing to Canadian officials that their drivers had no goods to declare, the petitioners engaged in "a scheme or artifice to defraud," and the object of their fraud was money or property in the victim's hands. Canada's right to uncollected excise taxes on the liquor smuggled into the country is "property." This latter interpretation is consistent with the common law of fraud, which covered schemes to deprive a victim of his money. The fact that the victim "happens to be the Government" is irrelevant. A case holding that

fraud in obtaining a video poker license did not deprive the Government of property is distinguished; there the Government's interest was "purely regulatory" rather than economic. Application of the wire fraud statute to the conduct at issue does not derogate from the common law "revenue rule," which generally bars courts from enforcing the tax laws of foreign countries. The prosecution is one to punish domestic criminal conduct, not to collect taxes owed to Canada. In 1952 when Congress enacted the wire fraud statute there was no common law precedent barring such enforcement of domestic criminal law. Restitution to Canada of its lost tax revenue, required by the Mandatory Victims Restitution Act of 1996, is not designed to collect a foreign tax, but instead "to mete out appropriate criminal punishment." Because the wire fraud statute is being used to punish domestic conduct, the presumption against extraterritorial effect presumption against inapplicable of statutes is inapplicable. Petitioners "used U.S. interstate wires" to further their scheme to defraud, and their offense was complete the moment they did so.

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

Rhines v. Weber 125 S. Ct. 1528, 73 USLW 4263 (3-30-05)

Habeas corpus, stay and abeyance: When a habeas corpus petitioner presents a federal district court with a "mixed" petition that contains some claims that have been exhausted in state courts and some that have not been exhausted, the district court may stay the petition and hold it in abeyance while the petitioner presents his unexhausted claims to the state court. This "stay-and-abeyance" procedure allows the petitioner to return to federal court without having his federal claims barred by the one-year statute of limitations imposed in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA). The limitations period is tolled while a properly filed application is pending in state court. Two principle purposes of AEDPA reflected in the one-year limitations period and the tolling requirement were to reduce delays in capital cases and to encourage petitioners to seek relief from state courts before coming to federal court. Because frequent use of stay and abeyance "has the potential to undermine these twin policies," the discretion of district courts in issuing such stays is circumscribed. Stay and abeyance may be used only "when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court," and may not be used when the unexhausted claims are "plainly meritless." Also, because "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution," district courts "should place reasonable time limits on a petitioner's trip to state court and back."

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

Rompilla v. Beard 125 S. Ct. 2456, 73 USLW 4522 (6-20-05)

Counsel, adequacy of representation in capital sentencing: Even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyers are bound to make reasonable efforts to obtain and review material that they know the prosecution

will probably rely on as evidence of aggravation at the sentencing phase of trial. In this case counsels' failure to examine the court file on the defendant's prior rape and assault conviction fell below the level of reasonable performance required by the Sixth Amendment in *Strickland v. Washington* (1984). Counsel knew that the prosecution intended to argue for the death penalty by relying, in part, on the aggravating factor that the defendant had a history of prior felony convictions indicating the use or threat of violence, and that the prosecution would introduce a transcript of the defendant's prior rape and assault trial in order to establish his violent character. Under those circumstances, defense counsel "had a duty to make all reasonable efforts to learn what they could about the offense." The duty was "particularly pressing" in this case due to the similarity of the violent prior offense to the crime charged, and in view of the defense strategy of stressing residual doubt. The requirement that defense counsel obtain information that the prosecution has and will use against the defendant is a basic principle embodied in the ABA Standards for Criminal Justice. The Pennsylvania courts' conclusion that the defense counsels' efforts to find mitigating evidence by other means excused them from looking at the file from the earlier trial was an "objectively unreasonable conclusion" within the meaning of the habeas corpus statute. Moreover, the petitioner has shown "beyond any doubt that counsel's lapse was prejudicial." It is "uncontested" that the file would have opened up "a range of mitigation leads" that no other source revealed, relating to the defendant's childhood, mental health, and alcohol dependence.

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

Roper v. Simmons 125 S. Ct. 1183, 73 USLW 4153 (3-1-05)

Death penalty for juveniles: The Eighth Amendment's prohibition against cruel and unusual punishment prevents imposition of the death penalty on persons who were under age 18 at the time they committed their offense. Missouri's law setting the minimum age at 16 for persons eligible for the death penalty is therefore unconstitutional as applied to persons who were under 18 at the time they committed their offense. A national consensus against execution of juveniles has developed since the Court held in 1989, in *Stanford v. Kentucky*, that execution of juveniles over age 15 was not cruel and unusual punishment. *Stanford* is "no longer controlling." The situation is now similar to that found by the Court in *Atkins v. Virginia* (2002) to merit the conclusion that there was a "consensus" against execution of the mentally retarded. Thirty states prohibit execution of juveniles: 12 that prohibit the death penalty altogether, and 18 that exclude juveniles from its reach. Only three states have executed juveniles in the last 10 years. Since *Stanford*, five states have eliminated authority for executing juveniles, and no states that formerly prohibited it have reinstated the authority. These "objective indicia of consensus" "provide sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" The Court's own judgment is also "brought to bear." The Eighth Amendment limits imposition of the death penalty "to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Three general differences between juveniles and

adults render juveniles less culpable. Because juveniles lack maturity and have an underdeveloped sense of responsibility, they often engage in "impetuous and ill-considered actions and decisions." Juveniles are also more susceptible than adults to "negative influences" and peer pressure. Finally, the character of juveniles is not as well formed, and their personality traits are "more transitory, less fixed." For these reasons, irresponsible conduct by juveniles "is not as morally reprehensible," they have "a greater claim than adults to be forgiven," and "a greater possibility exists that a minor's character deficiencies will be reformed." Because of the diminished culpability of juveniles, the penological objectives of retribution and deterrence do not provide adequate justification for imposition of the death penalty. A categorical rule is necessary rather than individualized assessment of each offender's maturity; "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." Although "not controlling," "the overwhelming weight of international opinion against the juvenile death penalty" lends "confirmation" to the Court's conclusion.

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

Rousey v. Jacoway 125 S. Ct. 1561, 73 USLW 4277 (4-4-05)

Bankruptcy, IRAs as exempt assets: Debtors may exempt assets in their Individual Retirement Accounts (IRAs) from the bankruptcy estate pursuant to 11 U.S.C. § 522(d)(10)(E). That provision authorizes the debtor in some circumstances to exempt from the bankruptcy estate the right to receive payment "under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of . . . age." The provision's two requirements at issue are met: petitioners' IRAs give them the right to receive payment "on account of age," and the IRAs are "similar" to the listed plans. The ordinary meaning of "on account of" is "because of," and there is no reason to believe that Congress intended to depart from that ordinary meaning. Although the IRAs provide a right to payment on demand, a 10% penalty applies if that right is exercised before the account holder has reached age 59½. This penalty "substantially deters early withdrawals" and "effectively prevents access" to the entire account balance. Because this restraint is removed when the account holder reaches age 59½, the right to receive payment is "on account of age." IRA accounts are "similar" to stock bonus, pension, profitsharing, and annuity plans. "The common feature of all of these plans is that they provide income that substitutes for wages earned as salary or hourly compensation." The income that the petitioners will receive from their IRAs "is likewise income that substitutes for wages." A variety of incentives, e.g., deferred taxation and penalties for early withdrawal, are designed to make IRAs "income substitutes for wages lost upon retirement," and "distinguish IRAs from typical savings accounts." The narrow exceptions to the early withdrawal penalty do not make IRAs more like savings accounts; "early withdrawal without penalty remains the exception, rather than the rule."

9-0. Opinion for unanimous Court by Thomas.

San Remo Hotel, L.P. v. City and County of San Francisco 125 S. Ct. 2491, 73 USLW 4507 (6-20-05)

Taking of property, full faith and credit statute: Federal courts should not carve out an exception to the full faith and credit statute for claims brought under the Takings Clause of the Fifth Amendment. The statute, 28 U.S.C. § 1738, which requires federal as well as state courts to give full faith and credit to the decisions of state courts, encompasses the doctrines of *res judicata* and collateral estoppel. *England v. Louisiana Board of Medical Examiners* (1964), authorizing federal courts to reserve decision of federal constitutional issues while state courts resolve antecedent issues of state law, does not mean that federal courts can reserve judgment on the very issues to be litigated in state courts. Federal court abstention under *England* operates when the antecedent state issue is distinct from the reserved federal issue and resolution of the state issue may moot the federal issue, but has no application when the state and federal issues are identical. Here the issues are identical. There is no exception from ordinary preclusion rules when a takings claim is forced into state court by application of the ripeness rule of *Williamson County* (1985). The request for an exception is premised on the belief that plaintiffs have a right to vindicate their federal claims in a federal forum, but the Court has repeatedly held that there is no such right. If federal issues have been litigated in state court, there is no general right to have them relitigated in federal court. Also rejected is the assumption "that courts may simply create exceptions to [the full faith and credit statute] whenever courts deem them appropriate." Exceptions can be justified "only if plainly stated by Congress," and Congress has not expressed any intent to exempt takings claims from operation of the statute. Litigation of takings claims in state courts is common, and "state courts are fully competent to adjudicate constitutional challenges to local land-use decisions."

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

Shepard v. United States 125 S. Ct. 1254, 73 USLW 4186 (3-7-05)

Armed Career Criminal Act, prior burglary convictions: In determining whether a prior guilty plea under a state burglary statute that defines burglary broadly constituted a conviction for burglary within the narrower "generic" definition of burglary used for purposes of sentence enhancement under the federal Armed Career Criminal Act, a court should not look to a police report submitted to the state trial court. Rather, the court should look to more conclusive records relied upon in adjudicating guilt. In pleaded cases such records may be found in "the statement of factual basis for the charge . . . shown by a transcript of the plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." These formal records are the closest analogs to the indicia held permissible in *Taylor v. United States* (1990) for assessing convictions that resulted from jury verdicts: statutory elements, charging documents, and jury instructions. The Government's position "amounts to a call to ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction [for burglary as defined for federal purposes] be confined to records of the convicting court approaching the certainty of the record of conviction in

a generic crime State." There is not "sufficient justification" for upsetting precedent; "considerations of *stare decisis* have special force in the area of statutory interpretation, for . . . Congress remains free to alter what we have done." Nearly 15 years have passed since *Taylor*, and Congress has not modified the statute.

5-3. Opinion of Court by Souter, joined by Stevens, Scalia, Ginsburg, and Thomas. Separate part of Souter opinion joined by Stevens, Scalia, and Ginsburg. Opinion by Thomas concurring in part. Dissenting opinion by O'Connor, joined by Kennedy and Breyer. Rehnquist did not participate.

Small v. United States 125 S. Ct. 1752, 73 USLW 4298 (4-26-05)

Statutory interpretation, firearm possession by felon: The prohibition on possession of a firearm by anyone who has been "convicted in any court" of a crime punishable by a prison term exceeding one year does not apply to persons who have been convicted in a foreign court. "The word 'any' considered alone cannot answer [the] question" of whether the prohibition covers foreign convictions; "any" means different things in different contexts. Although the presumption against extraterritorial application of statutes "does not apply directly in this case," Congress nonetheless "generally legislates with domestic concerns in mind." This "assumption" about the domestic reach of "domestically oriented statutes" can be overcome by contrary "statutory language, context, history, or purpose," but here there is no such "convincing" contrary indication. If the provision were interpreted to apply to foreign convictions, other provisions would create "anomalies." For example, an exception that allows gun possession despite a prior conviction under "Federal or State" antitrust laws would mean that persons with foreign antitrust convictions would be banned from possessing guns while persons with domestic convictions would not. Other provisions extend the prohibition to persons convicted of certain misdemeanor offenses also described by reference to federal and state law; the "anomaly" here is that the prohibition would apply to persons with such domestic convictions but not to persons with similar foreign convictions. The statute's "lengthy legislative history confirms the fact that Congress did not consider" whether foreign convictions should serve as predicates. References to federal and state crimes were removed during bill consideration, but without any mention of foreign convictions. While the statute's purpose of keeping guns out of the hands of dangerous people would be served by including persons convicted in foreign courts, the force of this argument is "weakened significantly" by the fact that "there have probably been no more than 10 to a dozen" prosecutions that relied on a foreign conviction as a predicate. Given the statute's total silence and "no reason to believe that Congress considered the added enforcement advantages flowing from inclusion of foreign crimes," the assumption against "extraterritorial coverage" stands.

5-3. Opinion of Court by Breyer, joined by Stevens, O'Connor, Souter, and Ginsburg. Dissenting opinion by Thomas, joined by Scalia and Kennedy. Rehnquist did not participate.

Smith v. City of Jackson 125 S. Ct. 1536, 73 USLW 4251 (3-30-05)

ADEA, disparate impact: The disparate impact theory of recovery that has been held available under Title VII of the Civil Rights Act also applies to actions brought under the Age Discrimination in Employment Act (ADEA).

The prohibition in the ADEA uses identical language to that of Title VII, except for the substitution of the word "age" for the words "race, color, religion, sex, or national origin." Two textual differences between the ADEA and Title VII, however, "make it clear that . . . the scope of disparate-impact liability under the ADEA is narrower than under Title VII." One difference is that the ADEA allows employers to take an otherwise prohibited action "where the differentiation is based on reasonable factors other than age discrimination." The second is that 1991 amendments to Title VII, designed to modify the Supreme Court's *Wards Cove* decision narrowly construing disparate-impact liability, have no application to the ADEA. The "reasonable factors other than age" qualification reflects the fact that "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." The petitioners in this case, police officers who challenged a pay plan giving officers with less than five years of tenure a higher percentage raise than those with more seniority, failed to satisfy the *Wards Cove* requirement that they identify the specific employment practices allegedly responsible for the observed statistical disparities. It is also "clear from the record that the City's plan was based on reasonable factors other than age." The city based raises on seniority and position, and attempted to make salaries competitive with those of comparable communities in the Southeast.

8-0 (judgment); **5-3** (disparate impact). Opinion of Court by Stevens, joined by Scalia, Souter, Ginsburg, and Breyer. Separate part of Stevens opinion joined by Souter, Ginsburg, and Breyer. Concurring opinion by Scalia. Opinion by O'Connor, joined by Kennedy and Thomas, concurring only in the judgment. Rehnquist did not participate.

Smith v. Massachusetts 125 S. Ct. 1129, 73 USLW 4125 (2-22-05)

Double jeopardy, midtrial acquittal: The trial judge's granting of a motion requesting a finding of not guilty on one of three counts constituted an acquittal for purposes of double jeopardy, and the judge's later submission of that count to the jury was barred by the Double Jeopardy Clause. The court's finding, which occurred after the prosecution rested its case, constituted an acquittal despite the fact that Massachusetts characterizes the finding as a purely legal matter, and despite the fact that the jury had no role. The finding was final, and could not be reconsidered later in the trial. As a general matter, a state may prescribe that a judge's midtrial determination of the sufficiency of the prosecution's proof may be reconsidered. Massachusetts has done so, however, only with respect to clerical and other minor errors, and has not adopted any rule of non-finality applicable to acquittals on the merits. Also, "the possibility of prejudice arises" when, as in this case, the acquittal precedes the defendant's presentation of his case. Interpretation of the Double Jeopardy Clause "cannot be allowed to become a potential snare for those who reasonably rely upon it." The fact that the judge's acquittal ruling was based on an erroneous interpretation of precedent does not defeat application of double jeopardy; "the bar will attach to a pre-verdict acquittal that is patently wrong in law." Courts can protect themselves from such mistakes by deferring consideration of a motion until after the verdict, and prosecutors can protect themselves by asking for a continuance or for reconsideration before the trial is allowed to proceed.

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

Smith v. Texas 125 S. Ct. 400, 73 USLW 3294 (11-15-04)

Death penalty, mitigating evidence: Texas courts erred in requiring that the defendant establish a nexus between his crime and mitigating evidence relating to his troubled childhood and his limited mental capacity. The Court rejected this threshold test in *Tennard v. Dretke* (2004), ruling that the jury must be allowed to consider evidence of low intelligence as mitigating evidence whether or not a nexus to the crime is established. The constitutional infirmity was not cured in this case by an oral "nullification instruction" allowing the jury to give effect to the mitigating evidence by negating what would otherwise be affirmative responses to two special issues on a verdict form that dealt with deliberateness and future dangerousness, and that made no mention of mitigation. The mandatory language in the oral nullification instruction, telling jurors to return a false answer to a mandatory written instruction in order to defeat a death sentence, "could possibly have intensified the dilemma faced by ethical jurors."

9-0. *Per curiam.*

Spector v. Norwegian Cruise Line Ltd. 125 S. Ct. 2169, 73 USLW 4429 (6-6-05)

ADA, foreign flag cruise ships: Title III of the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination against the disabled in the enjoyment of public accommodations and public transportation services, applies to foreign-flag cruise ships in United States waters. Although the definitions of public accommodations and public transportation services do not expressly mention cruise ships, "there can be no serious doubt" that cruise ships "fall within both definitions under conventional principles of interpretation." There is no broad clear-statement rule requiring a clear expression of congressional intent before a federal statute may be applied to any facet of the business and operations of foreign-flag ships. A clear statement of intent is required, however, before statutes may be applied in a manner that interferes with at least some aspects of a cruise ship's "internal order." Application of federal law to foreign-flag cruise ships is barred if compliance would interfere with international legal obligations. By its terms, Title III requires barrier removal that is "readily achievable," defined as "easily accomplishable and able to be carried out without much difficulty or expense." A barrier removal requirement that would bring a vessel into noncompliance with the Safety of Life at Sea Convention or some other international legal obligation would not be "readily achievable." Similarly, structural modifications are not "readily achievable" if they "would pose a direct threat to the health or safety of others."

6-3 (Title III can apply to foreign-flag cruise ships). Opinion of Court by Kennedy, joined by Stevens, Souter, Ginsburg, and Breyer. Separate parts of Kennedy opinion joined by Stevens and Souter, and by Stevens, Souter, and Thomas. Concurring opinion by Ginsburg, joined by Breyer. Concurring and dissenting opinion by Thomas. Dissenting opinion by Scalia, joined by Rehnquist and O'Connor, and joined in part by Thomas.

Stewart v. Dutra Constr. Co. 125 S. Ct. 1118, 73 USLW 4130 (2-22-05)

Maritime law, dredge as "vessel": The *Super Scoop*, a dredge used to dig a tunnel in Boston Harbor, is a "vessel" for purposes of the Longshore and Harbor Workers' Compensation Act (LHWCA). The term "vessel" is not defined in the LHWCA, so the general definition from the Rules of Construction Act, 1 U.S.C. § 3, governs. That provision, derived from the Revised Statutes and reflective of general maritime law, defines a "vessel" as "every description of watercraft . . . used, or capable of being used, as a means of transportation on water." Cases long ago established that dredges as commonly used are "vessels." Although dredges are typically transported from job to job by towing, while being used for dredging they are moved for short distances by a system of anchors, windlass, and rope, and in the process they transport machinery, equipment, and crew over water. The respondent misreads cases holding a floating drydock and a wharfboat not to be vessels. The drydock had been moored in one place for 20 years, and the wharfboat was secured to land by cables, and also had water, electricity, and phone lines connected. The distinction is between watercraft "temporarily stationed" in a particular location and those "permanently affixed" to shore or ocean floor. The appeals court erred in relying on a case that turned on the "primary purpose" of a watercraft. Section 3 does not require that a watercraft be used primarily for water transportation, and neither is the test a "snapshot" to determine whether the vessel was actually being used for transportation at the time of the event giving rise to the claim. Rather, the only test is whether the craft is capable of being used for transportation, and whether that capability is a "practical," not merely "theoretical," possibility.

8-0. Opinion of Court by Thomas, joined by all Justices except Rehnquist, who did not participate.

Tenet v. Doe 125 S. Ct. 1230, 73 USLW 4182 (3-2-05)

Judicial review, enforcement of espionage agreement: The respondents' suit against the Director of Central Intelligence, asserting estoppel and due process claims for the CIA's alleged failure to honor an agreement to provide financial assistance in return for espionage services, is barred under the doctrine of *Totten v. United States* (1876). In *Totten*, the Court held that public policy barred a suit by a Civil War spy to enforce obligations arising from his agreement with the Government. The service stipulated by the espionage contract was a secret service, and the *Totten* Court found it "entirely incompatible with the nature of such a contract that a former spy could bring suit to enforce it." *Totten* was not a narrow contract rule inapplicable to claims based on estoppel or due process. Rather, the *Totten* Court declared that "public policy forbids the maintenance of any suit . . . , the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *United States v. Reynolds* (1953), involving the state secrets privilege in the context of a wrongful-death action, did not represent a retreat from *Totten*'s broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden. Cases brought by covert CIA employees are also distinguished as not implicating "*Totten's* core concern [of] preventing the [spy's] relationship with the Government from being revealed." The Court "adhere[s] to *Totten*." "The state secrets privilege and the more frequent use of *in camera* judicial proceedings

simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule."

9-0. Opinion for unanimous Court by Rehnquist. Concurring opinions by Stevens, joined by Ginsburg; and by Scalia.

Tory v. Cochran 125 S. Ct. 2108, 73 USLW 4404 (5-31-05)

Mootness; First Amendment, prior restraint: The petitioner's challenge to an injunction restraining him from picketing the respondent attorney, and from uttering public statements about the respondent or his law practice, is not moot even though the respondent has died. The injunction is permanent, and, under California law, it is not clear that the injunction can become legally void before a court so rules. "Given the uncertainty of California law, [the Court] take[s] it as a given that the injunction . . . continues significantly to restrain petitioners' speech, presenting an ongoing federal controversy." The respondent's death, however, "makes it unnecessary, indeed unwarranted," to explore petitioners' First Amendment claims. The injunction has "lost its underlying rationale" of restraining defamatory activity designed to coerce payment of money, and "now amounts to an overly broad prior restraint upon speech, lacking plausible justification."

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

Town of Castle Rock v. Gonzales 125 S. Ct. 2796, 73 USLW 4611 (6-27-05)

Due Process, enforcement of domestic violence restraining order: A person who has obtained a state-law domestic violence restraining order does not have a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been broken. The respondent's suit alleging a due process violation by the town must therefore be dismissed. Deference to the 10th Circuit's determination that Colorado law has created a property interest is "inappropriate." Colorado law, providing that a peace officer "shall use every reasonable means to enforce a restraining order," and "shall arrest . . . or seek a warrant for the arrest of a restrained person" when the officer has probable cause to believe a violation has occurred, has not "truly made enforcement of restraining orders *mandatory*." A "true mandate of police action would require some stronger indication," given that "a well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." Even in the domestic violence context, it is "unclear" how a mandatory-arrest requirement would apply in cases such as this, when the offender is not present to be arrested. Moreover, the statute does not confer an "entitlement" to enforcement on persons protected by a restraining order. Although the statute confers a right to initiate civil contempt proceedings, it merely confers a right to "request" initiation of criminal contempt proceedings, and is silent about any power to request or demand an arrest. And even if there were an entitlement, "it is by no means clear that [such] an entitlement . . . could constitute a 'property' interest for purposes of the Due Process Clause." The Court has held that there is no property interest in indirect benefits, i.e., in "government action that is directed against a third party and affects the citizen only indirectly or incidentally."

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

United States v. Booker 125 S. Ct. 738, 73 USLW 4056 (1-12-05)

Sentencing Reform Act, Sentencing Guidelines, right to jury trial: The Sixth Amendment right to jury trial in criminal cases limits the sentences that courts may impose pursuant to the federal Sentencing Guidelines. Under principles applied in *Apprendi v. New Jersey* (2000), *Ring v. Arizona* (2002), and *Blakely v. Washington* (2004), "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." The Guidelines direct a judge in some instances to enhance sentences in a manner that violates this principle; a judge who makes certain factual findings supported by a preponderance of the evidence must enhance the sentence beyond the range otherwise authorized by the jury's verdict or the defendant's admissions. The fact that the Guidelines were developed by the Sentencing Commission rather than by Congress "lacks constitutional significance." Application of *Blakely* to the Guidelines is not precluded by recent cases dealing with other issues. A separation of powers argument is precluded by the Court's decision in *Mistretta v. United States* (1989). The remedy for this constitutional defect that can arise in application of the Guidelines is to hold unconstitutional two provisions of the Sentencing Reform Act: one that makes the Guidelines mandatory, and one that sets forth standards of review for appeals of departures from the mandatory Guidelines. The remainder of the act is constitutional, can function independently, and is consistent with Congress' basic objectives in enacting the act. "Without the 'mandatory' provision, the act still requires judges to take account of the Guidelines together with other sentencing goals." And excision of the appellate review provision "does not pose a critical problem for handling of appeals." The alternative of "maintaining all provisions of the act and engraft[ing] [the jury trial requirement] onto that statutory scheme" is "less consistent with Congress' likely intent" in enacting the act than is the excision of the two provisions and the preservation of the remaining provisions.

5-4 (application of Sixth Amendment), **5-4** (remedy). Opinion of Court (Sixth Amendment) by Stevens, joined by Scalia, Souter, Thomas, and Ginsburg. Opinion of Court (remedy) by Breyer, joined by Rehnquist, O'Connor, Kennedy, and Ginsburg. Opinion dissenting in part by Stevens, joined by Souter, and joined in part by Scalia. Opinions dissenting in part by Scalia, and by Thomas. Opinion dissenting in part by Breyer, joined by Rehnquist, O'Connor, and Kennedy.

Van Orden v. Perry 125 S. Ct. 2854, 73 USLW 4690 (6-27-05)

Establishment Clause, displays of Ten Commandments: The Establishment Clause is not violated by the presence on the grounds of the Texas State Capitol of a monument inscribed with the Ten Commandments. Although the text of the Ten Commandments is undeniably religious, the context of the display communicates not simply a religious message, but a secular message as well. The monument is one of 17 monuments and 21 historical markers on the Capitol grounds; it was paid for by a private, civic, and primarily secular

organization; and it has been in place, unchallenged, for 40 years. Under the circumstances, it is unlikely that the monument will be understood to represent an attempt by government to favor religion.

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

Whitfield v. United States 125 S. Ct. 687, 73 USLW 4053 (1-11-05)

Conspiracy, money laundering; statutory interpretation: Conviction under 18 U.S.C. § 1956(h) for conspiracy to commit money laundering does not require proof of an overt act in furtherance of the conspiracy. Subsection (h) provides that anyone who conspires to commit a referenced money laundering offense shall be subject to the same penalties that apply to the offense that was the object of the conspiracy, and makes no mention of an overt act. In *United States v. Shabani* (1994), the Court held that "nearly identical language" of the drug conspiracy statute does not require proof of an overt act. *Shabani* relied on earlier cases establishing the general rule that courts will not read an overt act requirement into a conspiracy statute if Congress has not included one. Common law conspiracy did not require an overt act, and, absent contrary indication, courts presume that Congress intends to adopt the common law definition of statutory terms. Moreover, the general conspiracy statute, 18 U.S.C. § 371, superseded the common law by expressly including an overt act requirement. Congress thus had a "formulary" when it enacted the money laundering conspiracy provision: it could model its text on section 371 and impose an overt act requirement, or it could dispense with an overt act requirement by modeling its text on other laws held not to contain one. "Congress has included an overt act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so." The argument that subsection (h) does not create a new conspiracy offense is rejected. The statute is so plain that the legislative history on which the argument is based need not be consulted, but even if it is, it is unpersuasive. "Congress is presumed to have knowledge of the governing rule described in *Shabani*."

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

Wilkinson v. Austin 125 S. Ct. 2384, 73 USLW 4473 (6-13-05)

Due Process, procedures for assignment to "Supermax" prison: Ohio prisoners have a due process liberty interest in not being confined to the Ohio State Penitentiary (OSP), a "Supermax" prison that isolates the most dangerous prisoners from the general prison population and from each other. The test for whether a liberty interest is implicated by a change in conditions of confinement, set forth in *Sandin v. Connor* (1995), is whether an assignment "imposes atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life." *Sandin* held that 30 days' segregated confinement did not meet that test. Confinement at the OSP does. At the OSP almost all human contact is prohibited. Inmates are kept in solitary cells 23 hours a day, conversation between cells is prevented, exercise is allowed for only one hour a day in a small room, a cell light is kept on continuously, the inmate's status is reviewed only once annually, and placement in OSP

disqualifies an otherwise eligible inmate for parole consideration. The district court erred, however, in imposing additional procedural requirements for assignment to OSP and in requiring more frequent review of status. The Ohio procedures strike "a constitutionally permissible balance" under the framework established in *Mathews v. Eldridge* (1976). The inmate's interest in avoiding erroneous placement in OSP, while sufficient to constitute a due process liberty interest, must be evaluated "within the context of the prison system and its attendant curtailment of liberties." Ohio's procedures, though informal and non-adversarial, protect against erroneous placement by providing the inmate with notice of the factual basis for assignment and a fair opportunity for rebuttal, and by providing multiple levels of review that can reverse OSP assignment but cannot overturn a decision against OSP placement. The state's interest in prison security is "a dominant consideration."

9-0. Opinion for unanimous Court by Kennedy.

Wilkinson v. Dotson 125 S. Ct. 1242, 73 USLW 4204 (3-7-05)

Section 1983 actions, relation to habeas actions: State prisoners may sue under 42 U.S.C. § 1983 to challenge the constitutionality of state parole procedures, and are not limited to seeking relief under the federal habeas corpus statutes. The general rule, set forth in *Preiser v. Rodriguez* (1973), is that section 1983 may not be used for actions that lie "within the core of habeas corpus," defined as actions challenging the fact or duration of confinement. This bar applies whether actions seek to invalidate the duration of imprisonment directly, e.g., through an injunction compelling speedier release, or indirectly, e.g., "through a judicial determination that necessarily implies the unlawfulness of the State's custody." The challenges in these two consolidated cases are to parole-eligibility proceedings and parole-suitability proceedings, and success will not necessarily result in immediate release from prison or in a shortening of the term of confinement. In the one case, success "means at most new [parole] eligibility review," and in the other case "means at most a new parole hearing at which [state] authorities may, in their discretion, decline to shorten [the prisoner's] term."

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

Index

Administrative law
deference to administrative interpretation . . . 31
Age Discrimination in Employment Act
disparate impact actions . . . 38
Alaska Statehood Act
federal retention of submerged lands . . . 1
Americans with Disabilities Act
foreign-flag cruise ships . . . 40
Antiterrorism and Effective Death Penalty Act
clearly established federal law standard . . . 6
limitations period, amendment of petition . . . 27
limitations period, start date . . . 22
limitations period, stay and abeyance . . . 34
scope, habeas corpus "application" . . . 16
tolling of limitations period . . . 33
Appeals
authority of appeals court to withhold mandate and amend opinion . . . 4
record on review, Tax Court proceedings . . . 3
right to counsel for appeal following guilty plea . . . 18
Appropriations
lump sum, payment of contract debts . . . 7
Arkansas River Compact
allocation of river water between states . . . 23
Armed Career Criminal Act
prior burglary convictions . . . 37
Associational rights
elections, semi-closed primary . . . 9
Attorney's fees
contingent fees taxable to client . . . 10
Bankruptcy
IRAs as exempt assets . . . 36
Bills of lading
maritime law, coverage . . . 32
Civil rights, § 1983 actions
relation to habeas corpus . . . 45
Commerce Clause
dormant commerce, state fee for intrastate hauling . . . 1
prohibition on medical marijuana use . . . 15
state discrimination against sales by out-of-state wineries . . . 17
Conspiracy
money laundering, no need for overt act . . . 44
Contribution
scope of right under Superfund law . . . 10
Copyright
liability for secondary infringement, software for file sharing . . . 28
Counsel, assistance of
adequacy, capital sentencing, duty to examine file on priors . . . 34
adequacy, decision not to contest guilt in capital case . . . 14

appointment of counsel for appeal following guilty plea 18
Criminal statutes
knowingly inducing wrongful conduct 2
Death penalty
adequacy of representation, decision to focus on sentencing 14
juveniles 35
mitigating evidence, nexus to crime 40
narrowing of "especially heinous [or] cruel" jury charge 4
sentencing, adequacy of representation, investigation 34
shackling of defendant during penalty phase 11
Disparate impact
age discrimination actions 38
Domestic violence
no due process right to enforce restraining order 42
Double jeopardy
mid-trial acquittal, one count 39
Drugs
drug-sniffing dogs, Fourth Amendment 19
medical marijuana, federal prohibition 15
preclinical studies, use of patented drugs 28
Due Process
considerations not appropriate in taking analysis 26
enforcement of domestic violence restraining order 42
guilty plea, awareness of charges 5
procedures for assignment to “Supermax” prison 44
shackling of defendant during penalty phase of capital trial 11
DUI
not deportable "crime of violence" under Immigration law 25
Elections
Oklahoma’s semi-closed primary 9
Equal protection
racial segregation, prisons 21
strict scrutiny review 21
Espionage contract
unenforceable by courts 41
Establishment Clause
display of Ten Commandments on grounds of Texas State Capitol 43
displays of the Ten Commandments in county courthouses 27
False Claims Act
limitation period, retaliation actions 17
Federal courts
habeas, stay and abeyance pending state proceedings 34
jurisdiction, parallel state court proceedings 14
removal, significant federal interest 16
supplemental jurisdiction, amount in controversy 13
Felons
firearm possession, foreign conviction 38
Fourth Amendment
drug-sniffing dogs at traffic stop 19
handcuffed detention during search 30

probable cause, reason stated by officer 12
qualified immunity, police officer, shooting of fleeing suspect 5
Full faith and credit statute
federal courts, takings decisions of state courts 37
Government contracts
obligation to pay debts, availability of appropriation 6
Guilty plea
defendant's awareness of charges 5
Habeas corpus
AEDPA, deference to state courts 6
AEDPA, limitations period 22, 34
AEDPA, tolling of limitations period 33
limitations period, amendment of petition 27
limitations period, start date 12
motion for relief from judgment not barred as "application" 16
relation to § 1983 actions 45
stay and abeyance, AEDPA 34
Immigration
country to which alien can be removed 20
detention of inadmissible alien pending removal 9
Immunity from suit
police officers, use of excessive force 5
waiver of sovereign immunity, reclamation law 32
Indian Self-Determination and Education Assistance Act
contract support costs 6
Judicial review
espionage agreement 41
statutory right of action, relation to § 1983 7
Jury selection
racial discrimination by prosecutor 22, 30
Jury trial
right to, constitutionality of Sentencing Guidelines 43
Juveniles
death penalty prohibited 35
Limitations period
AEDPA, federal petitions, start date 22
AEDPA, federal petitions, tolling, stay and abeyance 34
False Claims Act retaliation actions 17
habeas corpus, "properly filed" state application 33
Longshore and Harbor Workers' Compensation Act
definition of "vessel" 41
Marijuana
medical uses, prohibition 15
Maritime law
dredge as "vessel" 41
inland transportation, "through" bill of lading 32
Money laundering
conspiracy, no need for overt act 44
Mootness
challenge to permanent injunction 42

Native Americans
acquired land, state taxation 8
service contracts with Govt 6
Necessary and Proper Clause
marijuana prohibition 15
Patents
infringement, preclinical drug studies 28
Preemption
California medical marijuana law 15
FIFRA, common law actions 3
state registration of trucks 29
President
conduct of foreign affairs, deference by courts 20
Prisons
procedures for assignment to "Supermax" prison, due process 44
racial segregation of inmates, strict scrutiny review 21
security, compelling state interest 11
Public employment
freedom of expression by employees 8
Public use
taking of property for economic development 23
Racial discrimination
prosecutor's peremptory challenges 22, 30
segregation in prisons 21
Reclamation Reform Act
water supply contracts, suits by beneficiaries 32
Religion
display of Ten Commandments on pubic property 27, 43
Establishment Clause, RLUIPA 11
Securities
fraud action, proof of loss 13
Sentencing Guidelines
constitutionality, continuing status 43
Sex discrimination
Title IX retaliation action 19
Shackles
use on defendant during trial 11
Sovereign immunity
limited waiver, Reclamation Reform Act 32
Speech
compelled subsidy 21
freedom of expression, public employees 8
government speech 21
prior restraint, injunction 42
Spending power
notice to recipient of potential liability 20
Standing to sue
third-party standing, attorneys suing on behalf of indigents 24
Statutes, interpretation
clear statement rule, foreign-flag ships 40

clear text trumps reliance on purpose 11
common law meaning, presumption Congress has adopted 44
Congress knows how to say (and hasn't here) 44
congressional intent, private right of action 7
constitutional doubt canon 9
different language implies different interpretation 20, 39
different language, same interpretation 19
domestic reach of "domestically oriented statutes" 38
extraterritorial effect, presumption against inapplicable 34, 38
grammatical reading, preference for 2
last antecedent rule 20
legislative history inconclusive and unreliable 14
legislative history, no record issue considered 38
leniency in interpreting criminal statutes 2
longstanding interpretation, no indication of intent to change 24
meaning of "subparagraph" 24
ordinary meaning 26, 36
parallel construction of language for every applicable category 9
plain meaning 12
preemption, presumption against 4
proviso not limited by associated clause 1
ratification by reenactment 20
Rules of Construction Act 41
saving clause 7, 10
stare decisis 38
statutory context 17, 26
term used in one part of statute, omitted in another 25
word "may" in context of authorization of actions 10
word "any" context dependent 38

Submerged lands
transfer to states at statehood 1

Superfund
right to contribution, voluntarily incurred response costs 10

Taking of property
state court judgments, full faith and credit statute 37
test, regulatory taking 26

Tax Court
report of special trial judges 2

Taxation, Federal
contingent fees as income to client 10

Taxation, State
land acquired by Indian tribe 8

Telecommunications
FCC regulation of broadband Internet providers 31

Telecommunications Act of 1996
relation to 42 USC § 1983 7

Ten Commandments
display on public property 27, 43

Trademarks
infringement, fair use affirmative defense 25

Truth in Lending Act
liability limits, loans secured by personal property 24
Twenty-first Amendment
limited by non-discrimination principle of Commerce Clause 17
Unconstitutional federal laws
Sentencing Reform Act 43
Unconstitutional state laws
Michigan and New York laws on direct sale of wine 17
Michigan law denying appellate counsel 18
Missouri law authorizing death penalty for juveniles 35
Water allocation
Arkansas River Compact 23
Wine
interstate sales, protection from discriminatory state laws 17
Wire fraud
use of U.S. phones to defraud Canada 33