Recent Civil Decisions of the United States Supreme Court:

The 2005-2006 Term

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In this article, I review the key civil decisions of the 2005-2006 Term. It was a tough term for First Amendment claims: almost all the major cases were decided against free-speech claims. The most widely noted case of the Term determined that the President lacked the authority to convene military commissions as part of the war on terrorism.

CIVIL RIGHTS

The Court decided two cases related to the Individuals with Disabilities Education Act (IDEA): *Schaffer v. Weast*[1] and *Arlington Central School Dist. Bd. v. Murphy*.[2] In *Schaffer*, the Court held that the party seeking relief under IDEA has the burden of persuasion. In *Arlington*, it held that IDEA does not authorize a district court to award expert fees to prevailing parents.

IDEA, passed by Congress in 1970, was designed to reverse a history of neglect of disabled students in the educational environment. IDEA establishes a cooperative process between parents and schools: "State educational authorities must identify and evaluate disabled children…develop an ["individualized education program" (IEP)] for each one . . . and review every IEP at least once a year." Among parents' rights are the right to "obtain an independent educational evaluation of their child" and, if they believe an IEP is inappropriate, to "seek an administrative impartial due process hearing." While Congress allows the states discretion in determining who conducts the hearings and establishing fair hearing procedures, it "has chosen to legislate the central components of due process hearings," i.e. minimal pleading standards, the presentation of evidence, and the ability of the parties to compel witnesses to testify.

In *Schaffer*, Brian Schaffer, who suffers from learning disabilities and speech-language impairments, was asked to leave his school. Brian's parents contacted the Montgomery County Public School System (MCPS), which convened an IEP team and eventually recommended placement in one of the two MCPS middle schools. The parents were not satisfied with the arrangement and enrolled Brian in a private school. They "initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education." As per Maryland's procedures, the hearing was conducted by an administrative law judge (ALJ). The ALJ "deemed the evidence close, held that the parents bore the burden of persuasion, and ruled in favor of the school district." The parents filed a civil action in the district court challenging the result. The district court reversed and remanded, concluding the school district held the burden of persuasion. The ALJ "deemed the evidence truly in 'equipoise,' and ruled in favor of the parents." The district court affirmed and a divided panel for the Fourth Circuit reversed.

A 6-2 Court affirmed, concluding that the parents bore the burden of persuasion. According to the Court, the term "burden of proof," of which the burden of persuasion is part, "is one of the slipperiest members of the family of legal terms." To decide who has the burden of proof in a statutory context, the Court first looks to the statute. The plain text of IDEA fails to specify which party bears the burden of persuasion. The Court, therefore, "begin[s] with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." While there are exceptions to this rule, the Court will not shift the burden "at the outset of a proceeding" unless there is reason to believe such a result was intended by Congress. Despite petitioner's arguments, the Court does not find such reason. The Court does not believe that "putting the burden of persuasion on school districts will further IDEA's purposes because it will help ensure that children receive a free appropriate public education." It concludes that "very few cases will be in evidentiary equipoise" and such assignment might make IDEA more costly to administer.

In *Arlington*, respondents filed an action under IDEA on behalf of their son, "seeking to require petitioner Arlington Central School District Board of Education to pay for their son's private school tuition." They prevailed in district court and the judgment was affirmed by the Court of Appeals for the Second Circuit. Respondents sought to recover fees for the services of an educational consultant, Marilyn Arons, who assisted respondents throughout the proceedings. The district court awarded respondents part of Arons' fees. The Second Circuit affirmed but the Court, in an opinion written by Justice Alito, reversed, finding IDEA does not authorize recovery of expert fees. Justice Ginsburg filed an opinion concurring in part and in the judgment. Justices Souter and Breyer filed dissenting opinions.

IDEA was enacted pursuant to the Spending Clause, which therefore guides the Court's decision. Under the Spending Clause, "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out unambiguously." In other words, the state must have clear notice regarding the liability at issue. The statutory text of IDEA does not provide that prevailing parents are entitled to recover expert fees. The relevant portion provides, "in any action of proceeding brought under this section, the court, in its discretion, may

Footnotes

1. 126 S.Ct. 528 (2006).
2. 126 S.Ct. 2455 (2006).

award reasonable attorneys' fees as part of the costs' to the parents of a child with a disability who is the prevailing party." The statute "does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts."

A unanimous Court held in *United States v. Georgia*[3] that Congress has the power to abrogate state sovereign immunity in circumstances where a claimant asserts a Title II claim for conduct that actually violates the Fourteenth Amendment. Tony Goodman is a paraplegic inmate currently incarcerated in the Georgia prison system. "After filing numerous administrative grievances in the state prison system, Goodman filed a *pro se* complaint" in the district court "challenging the conditions of his confinement." Among the more serious allegations, he complained that: (1) "he was confined for 23-to-24 hours per day in a 12-by-3 foot cell in which he could not turn his wheelchair around"; (2) "lack of accessible facilities rendered him unable to use the toilet and shower without assistance, which was often denied"; (3) "he had been denied physical therapy and medical treatment"; and (4) he was "denied access to virtually all prison programs and services on account of his disability."

The district court dismissed the action on the grounds that "the allegations in the complaint were vague and constituted insufficient notice pleading as to Goodman's § 1983 claims." It also dismissed Goodman's Title II claims and, after the Court's decision in *Board of Trustees of University of Alabama v. Garret*,[4] granted summary judgment against Goodman for his monetary claims on the grounds that those claims were barred by sovereign immunity. Goodman appealed and the United States intervened "to defend the constitutionality of Title II's abrogation of state sovereign immunity." The Court of Appeals for the Eleventh Circuit reversed "because Goodman's multiple *pro se* filings…alleged facts sufficient to support a limited number of Eighth-Amendment claims under § 1983 against certain individual defendants." The Eleventh Circuit did not "address the sufficiency of Goodman's allegations under Title II" and, instead, affirmed the district court's determination that Goodman's claims for monetary damages were barred by sovereign immunity. The Court granted certiorari on this issue.

Justice Scalia, writing for the Court, begins the opinion by stating that the Court will "assume without deciding" that Goodman "alleged actual violations of the Eighth Amendment" and that the same conduct that violated the Eighth Amendment violates Title II of the ADA. The Court also suggests that Goodman's claims for money damages might have been based "on conduct that independently violated the provisions of § 1 of the Fourteenth Amendment." Therefore, Goodman's claims differ in the sense that the Court's other cases address "Congress's ability to abrogate sovereign immunity pursuant to its § 5 powers."

The Court states that while its members have "disagreed regarding the scope of Congress's prophylactic enforcement powers under § 5 of the Fourteenth Amendment…no one doubts that § 5 grants Congress the power to enforce…the provisions of the Amendment by creating private remedies against the States for actual violations of those provisions." According to the Court, "[t]his enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States." Therefore, "insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." The Court instructs on remand that the lower court should determine on a claim-by-claim basis which of Goodman's claims fit under this rule.

A unanimous Court held . . . that Congress has the power to abrogate state sovereign immunity . . . where a claimant asserts a Title II claim for conduct that actually violates the Fourteenth Amendment.

In *Burlington Northern and Santa Fe Ry. Co. v. White*,[5] Justice Breyer delivered the opinion of the Court, in which all the justices joined except Justice Alito, who filed an opinion concurring in the judgment. The Court held Title VII's anti-retaliation provision covers those employer actions that are materially adverse to a reasonable employee, but does not confine the actions and harms it forbids to those that are related to employment or occur in the workplace.

Sheila White was the only female employee in her department. Shortly after she began employment as a forklift operator, she complained to Burlington officials that her supervisor, Bill Joiner, "had repeatedly told her that women should not be working in… [her] department" and also "made insulting and inappropriate remarks to her in front of her male colleagues." Burlington investigated and suspended Joiner for ten days. At the same time White was informed of Joiner's punishment, she was also informed that she was being removed from her duties and reassigned. Burlington "explained that the reassignment reflected co-worker's complaints that, in fairness, a more senior man should have the less arduous and cleaner job of forklift operator."

White filed a complaint with the Equal Employment Opportunity Commission (EEOC). After exhausting her administrative remedies, White filed an action against Burlington, claiming, in relevant part, that "Burlington's actions—changing her job responsibilities, and suspending her for 37 days without pay—amounted to unlawful retaliation in violation of Title VII." The jury found in favor of White and awarded her damages. The Court of Appeal for the Sixth Circuit, sitting *en banc*, affirmed. While the panel unanimously agreed on the outcome, the members disagreed as to the proper scope of the anti-retaliation provision.

3. 126 S.Ct. 877 (2006).
4. 531 U.S. 356 (2001).
5. 126 S.Ct. 2405 (2006).

The Court recognizes that there are some limits in the anti-retaliation provision . . . .

The Court determines that "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur in the workplace." It also held, however, that "the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." Title VII's anti-retaliation provision "forbids employer actions that discriminate against an employee (or job applicant) because he has opposed a practice that Title VII forbids or has made a charge, testified, assisted, or participated in a Title VII investigation proceeding or hearing." There is no dispute that "the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals." The dispute surrounds "whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation."

Petitioner and the Solicitor General argue that the Sixth Circuit's requirement that a link be established between the retaliatory action and terms, conditions, or status of employment is correct. Their argument progresses through three stages: (1) "that Title VII's substantive anti-discrimination provision protects an individual only from employment-related discrimination"; (2) "the anti-retaliation provision should be read *in pari materia* with the anti-discrimination provision"; and, therefore, (3) "the employer actions prohibited by the anti-retaliation provision should similarly be limited to conduct that affects the employee's compensation, terms, condition, or privileges of employment."

The Court disagrees. The language of the substantive provision of Title VII "differs from that of the anti-retaliation provision in important ways." Primarily, the anti-retaliation provision does not have the same limiting words as the anti-discrimination provision. Therefore, the question is not whether the two provisions should be read *in pari material*, but "whether Congress intended its different words to make a legal difference." The Court normally presumes that where different words are used, Congress purposely intended different results. The Court finds this presumption is also supported by the language of the provisions because they differ not only "in language but in purpose as well": "[t]he anti-discrimination provision seeks a workplace where individuals are not discriminated against" while "[t]he anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." To secure the first objective, Congress only needed to prohibit "employment-related discrimination." However, to secure the second objective, it needed to prohibit a broader range of behavior.

The Court recognizes that there are some limits in the anti-retaliation provision: the "anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." Adopting the formulation set forth by the Sixth and District of Columbia Circuits, the Court believes that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court uses the words "materially adverse" to "separate significant from trivial harms." It also uses the word "reasonable" because it believes "that the provision's standard for judgment harm must be objective."

A 5-2 Court held in *Hartman v. Moore*,[6] that in an action for civil damages against the government based on retaliatory criminal prosecution for exercising a constitutional right, the plaintiff has the burden of pleading and showing the absence of probable cause for the underlying criminal charges. Justice Souter delivered the opinion of the Court while Justice Ginsburg, joined by Justice Breyer, filed a dissenting opinion. Chief Justice Roberts and Justice Alito took no part in the decision.

The Postal Service put both respondent and his company, REI, under investigation for various crimes. Despite "very limited evidence," an Assistant United States Attorney brought charges against respondent, REI, and REI's vice-president. The district court granted the REI defendants' motion for judgment of acquittal and respondent subsequently filed an action in district court against the prosecutor and five postal inspectors for civil liability under *Bivens v. Six Unknown Fed. Narcotics Agents*.[7] Respondent raised five causes of action, including a claim "that the prosecutor and the inspectors had engineered his criminal prosecution in retaliation for criticism of the Postal Service, thus violating the First Amendment." Ultimately, only respondent's retaliation prosecution claim against the inspectors was not dismissed.

The Court states that the issue in this case is narrow: "whether a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges." The Court thinks "there is a fair argument for what the inspectors call an 'objective' fact requirement in this type of case," and the strongest argument for an objective fact requirement stems from "the need to prove a chain of causation from animus to injury." Turning to its prior cases, the Court states that even if it has not actually specified "any necessary details about proof of a connection between the retaliatory animus and the discharge," its cases "have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other." The Court also thinks its clear that "the causation is understood to be but-for causation, without which the adverse action would not have been taken."

The Court believes when the retaliatory action is criminal prosecution, there are two significant changes: (1) "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge"; and (2) "the req-

6. 126 S. Ct. 1695 (2006).

7. 403 U.S. 388 (1971).

uisite causation between the defendant's retaliatory animus and the plaintiff's injury is…more complex…and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven." As to the first, the Court believes that while this evidence will go a long way to show whether the government's actions were retaliatory, it does not necessarily mean that a plaintiff should be required to plead and prove no probable cause. As to the second, the Court states that the retaliation action in this scenario will not be brought against the prosecutor but an official "who may have influenced the prosecutorial decision," like the inspectors in this case. Therefore, "the causal connection required here is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another."

The Court identifies this as a "distinct problem of causation" because "[e]vidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise." Further, the Court states that there is the added difficulty that the plaintiff must overcome the "legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking." It believes that "[s]ome sort of allegation…is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity." It concludes that the "connection, to be alleged and shown, is the absence of probable cause."

[T]he Court held that . . . the Government bears the burden of showing that a compelling state interest significantly outweighs the burden placed on a specific religious group . . . .

FIRST AMENDMENT

Chief Justice Roberts delivered the opinion of the Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[8] in which all the justices joined except Justice Alito, who took no part in the decision. The Court held that under the Religious Freedom Restoration Act (RFRA), the government bears the burden of showing that a compelling state interest significantly outweighs the burden placed on a specific religious group by the Controlled Substances Act.

RFRA prohibits the federal government from substantially

8. 126 S. Ct. 1211 (2006).

It held that the Solomon Amendment does not violate the First Amendment by requiring law schools to provide equal access to military recruiters.

burdening "a person's exercise of religion, even if the burden results from a rule of general applicability." The only exception is when the government can show that the burden to the person "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[9]

Respondent is a Christian Spiritist sect based in Brazil with approximately 130 members in the United States. Central to its faith is "receiving communion through *hoasca*…a sacramental tea made from two plants unique to the Amazon region." One of these plants contains dimethyltryptamine (DMT), a hallucinogen, which is listed in Schedule I of the Controlled Substances Act (CSA). Under the CSA, Schedule I drugs are "subject to the most comprehensive restrictions, including an outright ban on all importation and use, except pursuant to strictly regulated research projects." After respondent had difficulties importing hoasca, it filed an action for declaratory and injunctive relief, including a preliminary injunction against the Attorney General and other federal law-enforcement officials, alleging that the application of CSA to its "sacramental use of hoasca violates RFRA."

At the preliminary injunction hearing, the district court determined that the evidence regarding the effects of hoasca, specifically whether it caused or minimized health risks and whether there was a market for hoasca outside its religious use, was in equipoise. It therefore determined that "the Government had failed to demonstrate a compelling interest justifying what it acknowledged was a substantial burden on…[respondent's] sincere religious exercise." The Court of Appeals for the Tenth Circuit affirmed.

The central issue before the Court is whether "evidentiary equipoise is an insufficient basis for issuing a preliminary injunction against enforcement of the Controlled Substances Act." The Court rejects the government's argument that a finding for a party based on a "mere tie in the evidentiary record" violates the "well-established principle that the party seeking pretrial relief bears the burden of demonstrating a likelihood of success on the merits." The government admitted that the enforcement of the CSA substantially burdened respondent's religious exercise; the district court's ruling, therefore, was based on whether the government met its burden in showing that its interests outweighed the burden on respondent. The Court does not agree the burden of disproving the asserted interests fell on respondent during the preliminary injunction hearing based on its prior decision in *Ashcroft v. ACLU*.[10]

The Court also dismisses the government's second argument "that the Act's description of Schedule I substances as having 'a high potential for abuse,' 'no currently accepted medical use in treatment…', and 'lack of accepted safety for use…,' by itself precludes any consideration of individualized exceptions such as that sought by [respondent]." The Court states, "RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach," as is evidenced from the government's necessity of "demonstrating that the compelling interest test is satisfied through application of the challenged law to the person." In addition, RFRA expressly adopts the tests set forth in *Sherbert v. Verner*[11] and *Wisconsin v. Yoder*,[12] which require a court to "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."

The Court believes that under the more "focused inquiry," the government's argument "cannot carry the day." Schedule I substances are exceptionally dangerous. However, the classification is not a "categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA." The Court finds support for this determination in the CSA itself, which allows the government to exempt certain manufacturers, distributors, and dispensers from registration if it "finds it consistent with the public health and safety." Further, peyote, a Schedule I drug, has been exempt from the ban for 35 years if used for religious purposes. According to the Court, the peyote exception "also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA."

Finally, the Court discusses the government's argument that it had an interest in complying with the 1971 United Nations Convention on Psychotropic Substances, which was signed by the United States and implemented by the CSA. The convention "calls on signatories to prohibit the use of hallucinogens, including DMT." The Court agrees with the government that the tea is covered by the convention. However, it does not believe that this "automatically mean[s] that the Government has demonstrated a compelling interest in applying the Controlled Substances Act…[to respondent's] sacramental use of the tea."

Chief Justice Roberts also filed the opinion for the Court in *Rumsfeld v. FAIR*,[13] in which all the justices joined except for Justice Alito who took no part in the decision. It held that the Solomon Amendment does not violate the First Amendment by requiring law schools to provide equal access to military recruiters. Respondent Forum for Academic and Institutional Rights (FAIR), "is an association of law schools and law faculties," which promotes "'academic freedom, support[s] educational institutions in opposing discrimination and vindicate[s] the rights of institutions of higher education.'" In 2003, FAIR sought a preliminary injunction against the enforcement of the Solomon Amendment. The Court and the parties agree that the amendment requires a law school to "offer military recruiters the same access to its campus and students that it provides to

9. 42 U.S.C. § 2000bb-1(a).
10. 542 U.S. 656 (2004).
11. 374 U.S. 398 (1963).
12. 406 U.S. 205 (1972).
13. 126 S. Ct. 1297 (2006).

the nonmilitary recruiter receiving the most favorable access" in order to receive federal funding.

The district court denied the preliminary injunction. In addition, the district court also determined that "recruiting is conduct and not speech…[and] any expressive aspect of recruiting is entirely ancillary to its dominant economic purpose." The Court of Appeals for the Third Circuit reversed, finding that the Amendment "violated the unconstitutional conditions doctrine because it forced a law school to choose between surrendering First Amendment rights and losing federal funding for its university." The Third Circuit also found that the Amendment regulated speech, not merely expressive conduct.

Congress enacted the Solomon Amendment through its spending powers instead of under its broad authority to raise armies under Article I, section 8. The Court believes this makes "Congress' power to regulate military recruiting under the Solomon Amendment…arguably greater because universities are free to decline the federal funds." Generally, the Court has rejected First Amendment challenges to Congress's spending power on the grounds that Congress attached restrictions to federal funding except in circumstances where the government has denied a benefit "to a person on a basis that infringes his constitutionally protected."[14] The Court believes that this case does not require it to decide if the amendment is an "unconstitutional condition" because "the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement." It believes, "[a]s a general matter, the Solomon Amendment regulates conduct, not speech."

To support its finding to the contrary, the Third Circuit determined that the Solomon Amendment violated the First Amendment in three ways; the Court discusses each in turn. First, the Court does not agree that because the law school might provide some services, i.e., sending e-mails and distributing flyers, the Solomon Amendment forces them to engage in speech. Second, the Court rejects the argument that because the military comes to campus to express a message, the Solomon Amendment "requires law schools to host or accommodate the military's speech." The Court points out that in its prior cases, which found this requirement unconstitutional, the "compelled-speech violation…resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." Finally, the Court rejects the Third Circuit's analysis that, if the Solomon Amendment does not regulate speech, it regulates expressive conduct that is protected by the First Amendment. The Court previously rejected the idea in *United States v. O'Brien*,[15] in that the First Amendment only applies to "conduct that is inherently expressive," for instance, burning the American flag. Here, the conduct is not inherently expressive.

The Court next discusses whether the Solomon Amendment violates a law school's First Amendment rights to "expressive association." FAIR argues that the amendment interferes with this right because it interferes with a law school's right to express its "message that discrimination on the basis of sexual orientation is wrong." FAIR, and the Third Circuit, relied heavily on *BSA v. Dale*.[16] In *Dale*, the Court held "the Boy Scouts' freedom of expressive association was violated by New Jersey's public accommodations law, which required the organization to accept a homosexual as a scoutmaster." The Court does not agree that the Solomon Amendment has the same impact. According to the court, the recruiters are just "outsiders who come onto campus for a limited purpose of trying to hire students." The law school is not required to "accept members it does not desire."

Beard v. Banks . . . determined that Pennsylvania's regulation denying certain inmates access to newspapers, magazines, and photographs does not violate the First Amendment.

Justice Kennedy delivered the opinion of a 5-4 Court in *Garcetti v. Ceballos*,[17] which held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Respondent was employed as the calendar deputy in the district attorney's office during the relevant period. He was contacted by a defense attorney who informed respondent that he had filed a motion to challenge the validity of a warrant. Respondent, in accordance with his job duties, reviewed the case. Respondent determined that the affidavit contained "serious misrepresentations" and relayed his findings to his superiors. The district attorney's office decided not to drop the charges and a hearing was held on the motion. Defense called respondent, who recounted his observations about the affidavit. The trial court ultimately rejected the challenge to the warrant.

Respondent claimed that in the aftermath "he was subjected to a series of retaliatory employment actions," including reassignment, transfer, and denial of a promotion. Respondent filed a grievance, which was denied, and then sought relief in district court under 42 U.S.C. § 1983, claiming "petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo." The district court granted summary judgment for petitioners because respondent, who drafted his memo as part of his employment, was not entitled to First Amendment protection or, alternatively, even if he was, "petitioners had qualified immunity because the rights Ceballos asserted were not clearly established." The Ninth Circuit reversed, relying on *Pickering v. Board of Ed. of Township High School Dist. 205, Will County*[18] and *Connick v. Myers*.[19]

14. US v. Am. Library Ass'n, 539 U.S. 194 (2002) (quoting Bd. of Comm'rs, Waubaunsee City v. Umbehr, 518 U.S. 668 (1996)).
15. 391 U.S. 367 (1968).
16. 530 U.S. 640 (2000).
17. 126 S. Ct. 1951 (2006).
18. 391 U.S. 563 (1968).
19. 461 U.S. 138 (1983).

Randall v. Sorrell . . . found that Vermont's campaign finance laws . . . violate the First Amendment.

The Court's prior decisions have noted "the unchallenged dogma…that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." However, there are qualifications: "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." According to the Court, *Pickering* and subsequent cases "identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech." First, the court must determine "whether the employee spoke as a citizen on a matter of public concern." If the employee did not, then he or she has no First Amendment protection. If the employee did speak as a citizen on a matter of public concern, then the court must determine "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."

The Court states that the overarching objectives of this inquiry are evident. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." On the other hand, the Court has also recognized that public employees are citizens. Therefore, they are entitled to First Amendment protections and the public employer cannot "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." The Court has also "acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." The Court concludes that its decisions "have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."

The Court turns to the present case. First, the Court does not think it dispositive that respondent did his "talking" inside his workplace as "it would not serve the goal of treating public employees like 'any member of the general public'…to hold that all speech within the office is automatically exposed to restriction." The Court also does not believe it is dispositive that the memo concerned the subject matter of respondent's employment since the "First Amendment protects some expressions related to the speaker's job." The Court believes the dispositive factor is that respondent's "expressions were made pursuant to his duties as a calendar deputy."

Justice Breyer announced the judgment of the Court in *Beard v. Banks*,[20] which determined that Pennsylvania's regulation denying certain inmates access to newspapers, magazines, and photographs does not violate the First Amendment. He was joined by Chief Justice Roberts and Justices Kennedy and Souter. Justice Thomas, joined by Justice Scalia, filed an opinion concurring in the judgment while Justices Stevens and Ginsburg filed dissenting opinions. Justice Alito took no part in the decision.

Pennsylvania has three special units for difficult prisoners, including the Long Term Segregation Unit (LTSU). Prisoners held in the most restrictive level of LTSU, Level 2, "face the most severe form" of restrictions and "have no access to newspapers, magazines, or personal photographs." This ban does not include legal correspondence, religious and legal materials, library books, and writing paper. Ronald Banks is confined to Level 2 and filed an action under 42 U.S.C. § 1983, claiming that the Level 2 Policy bears "no reasonable relation to any legitimate penological objective and consequently violates the First Amendment." The district court granted the secretary's motion for summary judgment. The Court of Appeals for the Third Circuit reversed on the grounds that "the prison regulation cannot be supported as a matter of law by the record in this case." The Court granted certiorari.

The plurality starts by citing to *Turner v. Safley*[21] and *Overton v. Bazzetta*,[22] which set forth the "basic substantive legal standards governing this case." In *Turner*, the Court held that "imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment." As pointed out in *Overton*, however, "the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere" and "substantial deference" is due to "the professional judgment of prison administrators." Ultimately, "restrictive prison regulations are permissible if they are 'reasonably related' to legitimate penological interests." *Turner* sets forth four factors used to determine reasonableness: (1) there must be a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) there must be "alternative means of exercising the right that remain open to prison inmates"; (3) "the court must weigh the impact made on guards, inmates, and prison resources if that constitutional right is accommodated"; and (4) "the court must also determine if there are 'ready alternatives' for furthering the governmental interest."

The secretary set forth multiple justifications for the prison's policy, which are not in dispute, "including the need to motivate better behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to assure prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire." The plurality believes it need go no further than the first justification to find that summary judgment in the secretary's favor was warranted. Analyzing the first justification under each of *Turner*'s four requirements, the plurality con-

20. 126 S. Ct. 2572 (2006).
21. 482 U.S. 78 (1987).
22. 539 U.S. 126 (2003).

cludes that the stated purpose is reasonably related to legitimate penological interests.

Justice Thomas concurs in the judgment. He believes that because "[j]udicial scrutiny of prison regulations is an endeavor fraught with peril," the framework he set forth in *Overton* is the best, least perilous "approach for resolving challenges to prison regulations." In his view, states are free to define incarceration as they see fit—"provided only that those deprivations are constituent with the Eighth Amendment." Therefore, "[w]hether a sentence encompasses the extinction of a constitutional right . . . turns on State law, for it is a State's prerogative to determine how it will punish violations of its law."

Justice Stevens dissents. Using the test set forth in *Turner*, Justice Stevens states that the regulation cannot survive constitutional scrutiny if "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary and irrational,…or if the regulation represents an 'exaggerated response' to legitimate penological objectives." He believes it is clear that the regulations infringe upon the inmates' First Amendment rights and that the secretary has failed, as a matter of law, to establish that the state's penological interests are sufficient to justify the regulations. Justice Ginsburg also dissents. She agrees with Justice Stevens's opinion and writes to emphasize that summary judgment was not appropriate in this circumstance.

In *Randall v. Sorrell*,[23] Justice Breyer announced the judgment of the Court, which found that Vermont's campaign finance laws, which limit the amount of money a candidate can spend on his or her campaign and the amount of money an individual or corporation can contribute, violate the First Amendment. He was joined by Chief Justice Roberts and by Justice Alito in part. Justice Alito filed an opinion concurring in part and in the judgment. Justice Kennedy and Justice Thomas, the latter who was joined by Justice Scalia, filed opinions concurring in the judgment. Justice Stevens filed a dissenting opinion. Justice Souter also filed a dissenting opinion and was joined by Justice Ginsburg and Justice Stevens in part.

In 1997, Vermont enacted more stringent campaign financing laws (the Act), which impose mandatory expenditure limits and restrictions for contributions to campaigns for state candidates. The expenditure limits are indexed for inflation but the contributions limits are not. Petitioners filed an action in federal district court challenging the Act under the First Amendment. The district court agreed that the Act's expenditure limits violated the First Amendment but held that only certain of the contribution limits were unconstitutional. A divided panel of the Court of Appeals for the Second Circuit "held that all of the Act's contribution limits are unconstitutional" and "that the Act's expenditure limits may be constitutional." It found two compelling state interests—an interest in preventing corruption or the appearance of corruption and an interest in limiting the amount of time state official must spend raising campaign funds—and remanded to the district court to determine if "the Act's expenditure limits were narrowly tailored to those interest." The Court granted certiorari.

Ayotte v. Planned Parenthood . . . held that the lower courts should not have invalidated the New Hampshire statute requiring parental notification of a minor's abortion in its entirety . . . .

The plurality begins the opinion by discussing *Buckley v. Valeo*,[24] which considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA). In *Buckley*, the Court, "while upholding FECA's contribution limitations as constitutional, held that the statute's expenditure limitations violated the First Amendment." In *Buckley*, the government sought to uphold the statute by relying on its interest in preventing "corruption and the appearance of corruption." However, the Court believed that while "this rational provided sufficient justification for the statute's contribution limitations," it "did not provide sufficient justification for the expenditure limitations." The Court explained the basic reason for this difference: "Expenditure limitations impose significantly more severe restrictions on protected freedoms of political expression and association than do contribution limitations." The latter only marginally restrict "the contributor's ability to engage in free communication."

As to the Act's expenditure limits, the plurality believes that this case is not distinguishable from *Buckley*. In both cases, the expenditure limitations impose a "dollar cap" on a candidate's expenditures. Further, Vermont's justification for the Act, "preventing corruption and its appearance," is the same as offered by the government in *Buckley*. Respondents try to distinguish *Buckley* by arguing they have an interest also in reducing "the amount of time candidates must spend raising money." In the plurality's view, this "protection rationale" does not change the outcome mandated by *Buckley* and the "*Buckley* Court was aware of the connection between expenditure limits and a reduction in fundraising time" too when it issued its decision.

The plurality next addresses the Act's contribution limits. In *Buckley*, the Court upheld a $1,000 contribution limit on the grounds that "contribution limits are permissible as long as the Government demonstrates that the limits are 'closely drawn' to match a 'sufficiently important interest.'" The question here is whether the Act's restrictions are "too low and too strict to survive First Amendment scrutiny." The plurality cannot, as stated in *Buckley*, probe each possible contribution level or "determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." However, the plurality believes it "must recognize the existence of some lower bound" because "[a]t some point the constitutional risks to the democratic electoral process become too great." It finds "danger signs" present in this case because the Act's limits "are sufficiently low as to generate suspicion that they are not closely drawn."

The plurality next examines the record to determine if the limits are "closely drawn" to match Vermont's interests and con-

23. 126 S. Ct. 2479 (2006).

24. 424 U.S. 1 (1976) (per curiam).

Jones v. Flowers . . . held that the Fourteenth Amendment requires a State to take additional reasonable steps to notify a property owner of a pending tax sale if it knows its prior notice was ineffective.

cludes they are too restrictive. It bases its opinion "not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections." It concludes: "Taken together, Act 64's substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives."

Justice Alito concurs in part and in the judgment. He writes because he believes respondents' primary defense is different than that articulated by the plurality. Justice Kennedy concurs in the judgment. He believes that, with respect to campaign contributions, the parties have not asked the Court to overrule *Buckley* or challenge the level of scrutiny that should applied. He agrees with the plurality however that "respondents' attempts to distinguish the present limitations from those we have invalidated are unavailing." Justice Thomas also concurs in the judgment but disagrees with the rationale applied by the plurality. He "continue[s] to believe that *Buckley* provides insufficient protection to political speech, the core of the First Amendment." Justice Thomas writes that he still believes the Court "erred in *Buckley* when it distinguished between contribution and expenditure limits, finding the former to be a less severe infringement on First Amendment rights." He also believes that the plurality's opinion "demonstrates that *Buckley*'s limited scrutiny of contribution limits is 'insusceptible of principled application.'"

Justice Stevens dissents. He believes that *Buckley* never addressed the issue of "whether the pernicious effects of endless fundraising can serve as a compelling state interest that justifies expenditure limits," but believes if it did, the holding was wrong. He believes the limits placed on expenditures were a long-established practice prior to the *Buckley* decision and the Court's decisions prior to *Buckley* "provided solid support for treating these limits as permissible regulations of conduct rather than speech." He believes it is possible for candidates to work under these limits and the state's interest "in freeing candidates from the fundraising straitjacket" also provides a compelling reasons for expenditure limits. Justice Souter also dissents and would "adhere to the Court of Appeal's decision to remand for further enquiry bearing on the limitations on candidates' expenditures, and…think[s] the contribution limits satisfy controlling precedent."

FOURTEENTH AMENDMENT

In *Ayotte v. Planned Parenthood*,[25] a unanimous Court, in an opinion written by Justice O'Connor, held that the lower courts should not have invalidated a New Hampshire statute requiring parental notification of a minor's abortion in its entirety as this is the ultimate remedy to be applied only after a court determines it (1) cannot invalidate only the unconstitutional provisions of the statute and (2) the legislature would not have intended the statute to remain in force without the invalidated provisions. The constitutional defect was failure to provide a medical-emergency exception.

New Hampshire enacted the Parental Notification Prior to Abortion Act in 2003. "The Act prohibits physicians from performing an abortion on a pregnant minor…until 48 hours after written notice of the pending abortion is delivered to her parent or guardian." The Act provides for three exceptions but not an explicit exception for the "physician to perform an abortion in a medical emergency without parental notification." Respondents filed an action in federal court alleging the Act was unconstitutional on these grounds. The district court agreed and issued a permanent injunction. The Court of Appeals for the First Circuit affirmed. It found the Act unconstitutional because it did not contain an explicit health exception, and "its judicial bypass, along with other provisions of state law, is no substitute."

The Court begins by stating that the case comes to it with three propositions already established: (1) "States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy"; (2) "a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for preservation of the life or health of the mother"; and (3) "[i]n some very small percentage of cases, pregnant minors, like adult women, need immediate abortions to avert serious and often irreversible damage to their health." New Hampshire concedes that, under the Court's cases, "it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks."

The Court, therefore, turns to the remedy. When faced with an unconstitutional statute, the Court prefers to "limit the solution to the problem." For example, it would rather excise or enjoin enforcement of only that part of the statute instead of invalidating the statute in its entirety. The Court identifies [t]hree interrelated principles that inform its approach to remedies: (1) it tries "not to nullify more of a legislature's work than is necessary"; (2) it does not rewrite state laws to conform to constitutional requirements "even as we try to salvage it," as it is not the Court's role; and (3) it looks to legislative intent because "a court cannot use its remedial powers to circumvent the intent of the legislature." As to the latter, if the Court finds a statute unconstitutional, it asks whether "the legislature [would] have preferred what is left of its statute to no statute at all."

The Court believes in this case that the courts did not need to invalidate the entire Act because only certain portions of the statute present constitutional problems and "the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application." The Court does not know, however, whether the legislature would have preferred the statute to stay in effect without the invalidated provisions. It concludes: "Either an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating the statute *in toto* should obviate any concern about the Act's life exception."

Hamdan v. Rumsfeld . . . held that that President lacks the authority to convene the military commissions as described in his November 13, 2001 Order . . . .

In *Jones v. Flowers*,[26] a 5-3 Court held that the Fourteenth Amendment requires a State to take additional reasonable steps to notify a property owner of a pending tax sale if it knows that its prior notice was ineffective. Petitioner Gary Jones owned a house in Little Rock, Arkansas, but did not reside there. Jones paid his property taxes through the mortgage company until 1997, when the mortgage was paid off. After 1997, the property taxes were not paid and the property was certified as delinquent. In April 2000, the Commissioner of State Lands attempted to notify Jones of the delinquency by certified letter mailed to the house. The letter went unclaimed and was returned to the commissioner marked "unclaimed." Two years later, the commissioner published a notice of the public sale in the *Arkansas Democratic Gazette*. No bids were submitted and the state negotiated a private sale.

Linda Flowers submitted a purchase offer. The commissioner sent another certified letter to Jones at the house, which was also returned "unclaimed." Flowers purchased the home and, when the 30-day period of post-resale redemption had passed, sent an unlawful detainer notice to the property that was served on petitioner's daughter. The daughter contacted Jones and notified him of the sale. Jones filed a lawsuit in state court against the commissioner and Flowers, "alleging that the Commissioner's failure to provide notice of the tax sale and of Jones' right to redeem resulted in the taking of his property without due process." The state court granted summary judgment in favor of respondents, concluding that "the Arkansas tax sale statute, which set forth the notice procedure followed by the Commissioner, complied with constitutional due process requirements." The Arkansas Supreme Court affirmed.

Chief Justice Roberts, writing for the majority, begins by setting forth the due-process requirements. Due process does not require actual notice but only requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The Court has not addressed what additional steps are necessary, if any, when the state "becomes aware prior to the taking that its attempt at notice has failed." Even so, the Court has held that "'when notice is a person's due process…the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it,'…and that assess-

25. 126 S. Ct. 961 (2006).

26. 126 S. Ct. 1708 (2006).

Hamdan argues, and the Court agrees, that none of the specific allegations of "overt acts" made against him constitute a violation of the law of war.

ing the adequacy of a particular form of notice requires balancing the interest of the State against the individual interest sought to be protected by the Fourteenth Amendment." The Court concludes that it "do[es] not think that a person who actually desired to inform a real property owner of an impending tax sale…would do nothing when a certified letter sent to the owner is returned unclaimed." It believes that if the commissioner wanted to inform Jones, he would have taken "further reasonable steps if any were available."

The Court states that in prior cases it has required the government to consider the particular circumstances of the individual "regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." The commissioner, and the dissent, point out that in the Court's prior cases the government knew of the individualized circumstances prior to notice and here they did not. The Court agrees that the constitutionality of a particular procedure is assessed "*ex ante*, rather than *post hoc*." However, it concludes that "if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure." The Court also points to numerous additional steps it deems "reasonable," for example, resending the letter by regular mail, and those that it does not, for example, searching for Jones's current address in the phonebook or income tax rolls.

FEDERALISM

In *Gonzales v. Oregon*,[27] a 6-3 Court held that the Controlled Substances Act (CSA) does not prohibit state-licensed physicians from prescribing drugs for use in physician-assisted suicide under a valid state law. Justice Kennedy delivered the opinion of the Court. Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, dissented. Justice Thomas also filed a dissenting opinion.

In 1994, Oregon legalized physician-assisted suicide through the enactment of Oregon Death with Dignity Act (ODWDA). The drugs that can be used by physicians under ODWDA are covered by the CSA and classified as Schedule II substances, which are those that are "generally available only pursuant to a written, nonrefillable prescription by a physician." Under a regulation promulgated by the attorney general, every prescription for a controlled substance must "be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." The CSA requires that a "practitioner" register with the attorney general to lawfully prescribe Schedule II drugs. The attorney general has the power to "deny, suspend, or revoke" a physician's registration if "the physician's registration would be 'inconsistent with the public interest.'" In making this determination, the attorney general is instructed to consider five factors.

In 2001, Attorney General John Ashcroft issued the November 9, 2001 Interpretative Rule "announcing his intent to restrict the use of controlled substances for physician-assisted suicide" on the grounds that it "is not a 'legitimate medical purpose'" for which controlled substances can be used. The State of Oregon, joined by a number of physicians, pharmacists, and terminally ill patients, filed suit in federal district court seeking a permanent injunction against enforcement of the Interpretative Rule. The district court granted a permanent injunction and a divided panel of the Ninth Circuit affirmed. It determined that "by making a medical procedure authorized under Oregon law a federal offense, the Interpretative Rule altered the usual constitutional balance between the States and the Federal Government without the requisite clear statement that the CSA authorized such action."

The Court agrees. The Court does not believe that the attorney general's interpretation of the CSA is entitled to deference under *Auer v. Robbins*[28] or *Chevron U.S.A. Inc. v. NRDC*.[29] Under *Auer*, instead of giving specificity to a statute or regulation, the Interpretative Rule "does little more than restate the terms of the statute itself." Under *Chevron*, deference is not necessary because "the rule must be promulgated pursuant to authority Congress has delegated to the official." Under the CSA, the attorney general is "not authorized to make a rule declaring illegitimate a medical standard of care and treatment of patients that is specifically authorized under state law." According to the Court, the CSA only gives the attorney general limited authority: (1) "to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter"; and (2) to regulate the "registration" of state-licensed physicians. The Court finds that the Interpretative Rule does not fall under this latter authorization of power because "[i]t does not undertake the five-factor analysis and concerns much more than registration."

The Court next turns to whether the "CSA can be read as prohibiting physician-assisted suicide." The Court concludes that the "statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood." As structured, the CSA presupposes state regulation of medicine and, according to the Court, ODWDA is just one example. The Court recognizes that the federal government can set national standards but concludes that the CSA sets standards in only one area, how to treat narcotic addictions.

Finally, the Court addresses the government's argument that the phrase "written prescription of a practitioner" necessarily implies "that the substance is being made available to a patient for a legitimate medical purpose." The government argues that it is incumbent upon it to define "medical purpose." The Court

27. 126 S. Ct. 904 (2006).
28. 519 U.S. 452 (1997).
29. 467 U.S. 837 (1984).

concludes that the government's argument fails because it assumes that "the CSA impliedly authorizes an Executive officer to bar a use simply because it may be inconsistent with one reasonable understanding of medical practice." Further, the attorney general's ability to schedule drugs requires him only to make findings regarding abuse and the addictive substance of drugs.

Justice Scalia's dissent rests on the ground that the attorney general has the authority to ensure that prescriptions are issued for legitimate medical purposes, and that Congress's use of "prescription" and "legitimate medical purpose" are ambiguous. On this basis, he believes the majority's opinion is incorrect for three reasons: (1) "the Attorney General's interpretation of 'legitimate medical purpose'" is valid; (2) even if no deference is required, it is correct upon a de novo review; and (3) even if incorrect, "the Attorney General's independent interpretation of the statutory phrase 'public interest'…and…'public health and safety'…are entitled to deference under *Chevron*." Justice Thomas writes separately to point out the inconsistencies between the Court's opinion in this case and *Gonzales v. Raich*,[30] in which the Court determined that the CSA preempted California's medicinal-marijuana law on the grounds that "the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medical purpose, and in what manner."

PRESIDENTIAL POWER

In *Hamdan v. Rumsfeld*,[31] the Court held that the president lacks the authority to convene the military commissions as described in his November 13, 2001 Order, which were intended to try the individuals held in connection with the War on Terror. Justice Stevens announced the judgment of the Court and delivered the opinion of the Court in part. Justice Breyer filed an opinion concurring in the judgment. Justice Kennedy filed an opinion concurring in part. Justices Scalia, Thomas, and Alito filed dissenting opinions. Chief Justice Roberts took no part in the decision.

After the terrorist attacks on the World Trade Center, Congress adopted a joint resolution, the Authorization for Use of Military Force (AUMF), "authorizing the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks…in order to prevent any future acts of international terrorism against the United States." On November 13, 2001, "the President issued a comprehensive military order intended to govern the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (the November 13 Order). It covers any individual who the President deems (1) was or is a member of al Qaeda or (2) "has engaged or participated in terrorist activities aimed at or harmful to the United States." It provides that these individuals "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death."

[T]he Court rejected a statewide challenge to a Texas redistricting plan based on the claim that it was an unconstitutional political gerrymander.

The President deemed petitioner Salim Ahmed Hamdan, a Yemeni national being held in Guantanamo Bay, "eligible for trial by military commission" pursuant to the November 13 Order. The proceedings before the military commission commenced. However, on November 8, 2004, the district court granted Hamdan's habeas petition and stayed the military commission proceedings. The Court of Appeals for the District of Columbia reversed and the Supreme Court granted certiorari.

The Court does not believe the Detainee Treatment Act of 2005 (DTA) divests it of jurisdiction to hear this case and so addresses the substantive issues of the case. It begins with the history and formation of military commissions: "The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity." Subsequently, however, Congress enacted the Uniform Code of Military Justice (UCMJ). Article 21 of the UCMJ sets forth the president's power to convene military commissions, and the limitations on that power. In general, Article 21 preserved what power the president had under the Constitution and common law of war before 1916—"with the express condition that the President and those under his command comply with the law of war." Under these laws, the military commissions at issue here are not authorized.

The Court does not believe, as the government asserts, that the AUMF and DTA specifically authorize the president to convene the military commissions at issue here as neither of the Congressional Acts "expands the President's authority to convene military commission." Even if the Court assumes the AUMF activated the president's war powers, "and that those powers include the authority to convene military commissions in appropriate circumstances…there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ." The DTA also does not explicitly authorize it, only "recognizes the existence of the Guantanamo Bay commissions in the weakest sense."

Writing for the plurality, Justice Stevens turns to the inquiry of whether Hamdan's military commission is authorized under the president's authority as set forth in the Constitution and the laws of the United States. Under common law, military commissions were traditionally convened in three circumstances: (1) to replace civil courts when martial law has been declared; (2) in occupied enemy territory where civilian governments are not functioning; and (3) as "an 'incident to the conduct of war' when there is need 'to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'" As to the latter, certain preconditions must be met: (1) whether the indi-

30. 125 S. Ct. 2195 (2005).

31. 126 S .Ct. 2749 (2006).

S.D. Warren . . . held that the use of the word "discharge" in section 401 of the Clean Water Act . . . includes discharge of water from a dam.

vidual violated a law of war; (2) whether the violation was committed during a war; (3) whether the military commission is trying an individual of the enemy's army; and (4) whether certain jurisdictional limitations are met.

Hamdan argues, and the Court agrees, that none of the specific allegations of "overt acts" made against him constitute a violation of the law of war. Therefore, this fact casts doubt on the legality of the charge and, hence, the commission. The Court recognizes that this is not always fatal to the military commission's viability, but, since Hamdan's crimes are not necessarily defined by statute or treaty, the precedent upon which the government relies to define the charge as a violation of the law of war must be plain and unambiguous. The standard is not met here.

Justice Stevens then continues for the majority and concludes that, regardless of whether Hamdan's offense violates a law of war, the commission lacks the power to proceed because the commission's procedures do not comply with the common law of war, the UCMJ, or "with the rules and precepts of the law of nations," including the Geneva Convention. Essentially, the Court concludes that because the commissions do not comport with the bodies of laws listed above, the president lacked authority to convene them by his November 13 Order. The Court points to a number of procedures that contravene the common law of war, the UCMJ, the laws of nations, and the Geneva Convention. For instance, if a criminal defendant chooses private counsel over appointed military counsel, "[t]he accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to close."

Justice Breyer concurs. He writes that the Court's conclusion rests on a single ground: "Congress has not issued the Executive a 'blank check.'" Justice Kennedy concurs in part. He also believes that this "is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority." Primarily, Congress "requires that military commissions like the ones at issue conform to the 'law of war.'"

Justice Scalia dissents. He believes that the DTA divests the Court of jurisdiction to hear this case. He rests his decision on the "ancient and unbroken line of authority" that establishes "that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date." In addition, even if the DTA had not explicitly divested the Court of jurisdiction, he believes the Court should have abstained from exercising jurisdiction under "equitable principles" governing "both the exercise of habeas jurisdiction and the granting of the injunctive relief sought by petitioner" since Congress provided an alternative avenue for petitioner's claims by enacting the DTA. Justice Thomas, also dissenting, agrees but writes also to express his disagreement with the Court's resolution of the merits.

Justice Alito also dissents. He too believes the Court lacks jurisdiction because of the DTA but writes to add further explanation for his disagreement with the majority. He believes that under Common Article 3 of the Geneva Convention, a "regularly constituted" court has been "appointed, set up, or established" under United States law. He does not believe that a "regularly constituted court" means that it must be "similar in structure and composition to a regular military court or unless there is an 'evident practical need' for the divergence."

ELECTIONS

In *League of United Latin American Citizens v. Perry*,[32] the Court rejected a statewide challenge to a Texas redistricting plan based on the claim it was an unconstitutional political gerrymander. It also rejected a challenge to the redistricting of the Dallas area based on § 2 of the Voting Rights Act, but determined that the state's redistricting of District 23 in southwest Texas did violate § 2. Justice Kennedy announced the judgment of the Court and delivered the opinion of the Court in part. Justice Stevens, joined by Justice Breyer, filed an opinion concurring in part and dissenting in part. Justice Souter, joined by Justice Ginsburg, also filed an opinion concurring in part and dissenting in part. Chief Justice Roberts, joined in part by Justice Alito, filed an opinion concurring in the judgment, concurring in part, and dissenting in part. Justice Scalia, joined by Justice Thomas and Chief Justice Roberts and by Justice Alito in part, filed an opinion concurring in the judgment in part and dissenting in part.

After the 2000 census, Texas received two additional congressional seats. However, the legislature was unable to pass a redistricting plan. This resulted in litigation and the issuance of a court-ordered plan, which is referred to as "Plan 1151C." In 2003, the legislature was able to enact a redistricting plan, called "Plan 1374C." The Court's opinion involves four consolidated cases where a three-judge court, convened under 28 U.S.C. § 2284, "heard appellants' constitutional and statutory challenges to Plan 1374C." In 2004, the district court found in favor of appellees, but the Court reversed for reconsideration in light of *Vieth v. Jublelirer*.[33] The district court, in *Henderson v. Perry*[34] again found for appellees.

In this case, appellants rely on two similar theories to argue that Plan 1374C should be invalidated as an unconstitutional political gerrymander: (1) they argue a presumption of unconstitutionality should apply because the Texas legislature's purpose for the redistricting plan was for partisan advantage; and (2) a mid-decade redistricting plan for partisan purposes violates the one-person, one-vote rule. The Court has not articulated a standard under which to analyze appellants' claims. In *Davis v. Bandemer*,[35] it held "that an equal protection challenge to a political gerrymander presents a justiciable case or contro-

32. 126 S. Ct. 2594 (2006).
33. 541 U.S. 267 (2004).
34. 399 F. Supp. 2d 756 (2005).

versy," but disagreed "over what substantive standard to apply." The disagreement persists. The Court does not believe it needs to revisit the issue and can instead address "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."

Justice Kennedy rejects appellant's first argument. Article I "leaves with the States the primary responsibility for apportionment of their federal congressional…districts," although Congress may set further requirements. It has "generally required single-member districts." In this case, and with appropriate authority, the district court drew a redistricting map when Texas failed to enact a plan that complied with the one-person, one-vote requirement. Appellants claim that the legislature was motivated by partisan objectives and argue that a rule or presumption of unconstitutionality is "salutary" when the legislature's sole motivation for replacing a court-ordered plan is partisan motivation. Justice Kennedy believes, however, that "appellants' case for adopting their test is not convincing." First, there is some merit to appellees' claim that this was not their sole motivation. Further, "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights."

The plurality addresses appellants' second political gerrymandering theory: "that mid-decade redistricting for exclusively partisan purposes violates the one-person, one-vote requirement." Appellants' argue that since the population of Texas shifted from 2000 to 2003, the 2003 redistricting which relied on the 2000 census, "created unlawful interdistrict population variances." The plurality believes, as did the district court, that "this is a test that turns not on whether a redistricting furthers equal-population principles but rather on the justification for redrawing a plan in the first place." In this regard, the plurality believes that appellants' argument merely "restates the question whether it was permissible for the Texas Legislature to redraw the districting map." It cannot agree with appellant "that a legislature's decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders."

In Part III of the opinion, Justice Kennedy, writing for the majority, addresses appellants' arguments that the redistricting plan made changes to district lines in south and west Texas that violated section 2 of the Voting Rights Act and Equal Protection Clause of the Fourteenth Amendment. A state violates section 2 if the totality of circumstances shows that the election process is "not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." In *Thornburg v. Gingles*,[36] the Court identified "three threshold conditions for establishing a § 2 violation: (1) the racial group is 'sufficiently large and geographically compact to constitute a majority single-member district'; (2) the racial group is 'politically cohesive'; and (3) the majority 'votes sufficiently as a bloc to enable it…usually to defeat the minority's preferred candidate.'"

The Court upheld the Corps' interpretation "to include wetlands that actually abutted on 'traditional navigable waters.'"

The most significant changes in Texas were made to District 23, which contains "an increasingly powerful Latino population that threatened to oust the incumbent Republican," and, consequently, District 25. Appellants' argue that the changes to District 23 diluted the voting rights of Latinos. The Court applies the *Gingles* requirements to this case and concludes that the preconditions are met. It then moves on to analyze the "totality of the circumstances" to determine whether the redistricting constituted impermissible voter dilution. It first conducts a proportionality inquiry, which it concludes should be conducted on a statewide basis in this instance, instead of a regional basis. In the Court's estimates, Latinos are two districts shy of proportionality. However, there is no "'magic parameter'…and 'rough proportionality'…must allow for some deviations." The Court does not feel it needs to decide if this degree of disproportionality is substantial because there is other evidence, which, coupled with the disproportionality, shows the Texas legislature's goal was voter dilution. Primarily, "District 23's Latino voters were posed to elect the candidate of their choice."

The Court holds that "Plan 1374C violates § 2 in its redrawing of District 23," and, therefore, does not "address appellants' claims that the use of race and politics in drawing that district violates the First Amendment and equal protection." It also does not address whether the drawing of District 25 violates the equal protection because the "districts in south and west Texas will have to be redrawn to remedy the violation in District 23."

Justice Kennedy continues for the plurality and discusses appellants' challenges to the redistricting around Dallas on the grounds that "they dilute African-American voting strength in violation of § 2." Appellants contend that African-American voters had "effective control" of District 24 prior to redistricting even though they made up only the second-largest racial group in the district. The Court assumes, for the sake of this argument, that a section 2 challenge can proceed for a racial group that makes up less than 50% of the population in a district. The Court does not, however, believe appellants' can show how they satisfy the *Gringles* prongs. Specifically, appellants cannot demonstrate that African-American voters could have elected the candidate of their choice. It is not relevant that African-Americans had "influence" in the district; they needed to prove they could "elect representatives of their choice."

Justice Stevens concurs in part and in the judgment. He would hold that Plan 1374C is entirely invalid. Justice Stevens believes the Texas legislature's redistricting plan, "which creates districts with less compact shapes, violates the Voting Rights

35. 478 U.S. 109 (1986).

36. 478 U.S. 30 (1986).

The Court held that a violation of Article 36 of the Vienna Convention does not warrant suppression of evidence or relief for state procedural default rules.

Act, and fragments communities of interest—all for purely partisan purposes—violated the State's constitutional duty to govern impartially." Justice Stevens writes that the question posed by this case—"whether it was unconstitutional for Texas to replace a lawful districting plan in the middle of a decade, for the sole purpose of maximizing partisan advantage"—is narrower than the issue considered in *Vieth* and it is possible for the Court to create a "judicially manageable standard" under which to analyze appellant's claims.

Justice Breyer concurs in part and dissents in part. He agrees that the legislature's sole purpose for the mid-decade redistricting plan was to "maximize partisan advantage" and believes that because the redistricting "will likely have serious harmful electoral consequences," would find that the plan in its entirety violates the Equal Protection Clause. Chief Justice Roberts concurs in part, concurs in the judgment in part, and dissents in part. He believes that because appellants have not identified a "reliable standard for identifying political gerrymanders" or argued whether any standard exists, the Court properly disposed of this claim. He does not, however, agree with the Court's conclusions that the redistricting of District 23 violated section 2.

Justice Scalia concurs in the judgment in part and dissents in part. He believes that "claims of unconstitutional partisan gerrymandering do not present a justiciable case or controversy." He criticizes the Court for finding that appellants have not stated a claim for which relief can be granted but never articulating what elements constitute a claim. He also believes that appellants do not state a claim under section 2, arguing that "§ 2 jurisprudence continues to drift ever further from the Act's purpose of ensuring minority voters electoral opportunities."

CIVIL STATUTORY INTERPRETATION

The Court decided two cases relating to the Clean Water Act (CWA or Act): *S.D. Warren Co. v. Maine Board of Environmental Protection*[37] and *Rapanos v. United States*.[38] In *S.D. Warren*, the Court held that the use of the word "discharge" in section 401 of the Clean Water Act is interpreted by its ordinary meaning and includes discharge of water from a dam. Justice Souter delivered the opinion of the Court and was joined by all the Justices except Justice Scalia who joined only in part.

S.D. Warren operates hydropower dams for which it needs licenses to operate. The licenses are issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act. Under section 401 of the CWA, if an activity "could cause a 'discharge' into navigable waters; a license is conditioned on a certification from the State in which the discharge may originate that it will not violate certain water quality standards, including those set by the State's own laws." In 1999, Warren sought to renew its license for five dams and applied for water-quality certifications from Maine "but . . . under protest, claiming that its dams do not result in any 'discharge into' the river triggering application of § 401." The Maine agency issued the certifications with certain caveats and FERC eventually licensed the dams "subject to the Maine conditions." After filing unsuccessful administrative appeals, Warren filed suit in state court. The court rejected Warren's claims that its dams did not result in discharges and the Supreme Judicial Court of Maine affirmed.

The Court identifies the issue in this case as the meaning of the word "discharge." The Act does not define the term; it only "provides that the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." The Court concludes, however, that "'discharge' presumably is broader, else superfluous, and since it is neither defined in the statute nor a term of art, we are left to construe it in accordance with its ordinary or natural meaning." The ordinary meaning of discharge is "flowing or issuing out" and this meaning is consistent with the Court's interpretation of discharge in prior water cases. The Court states that in fact this meaning was accepted by all the members of the Court in its only prior case dealing with section 401, *PUD No. 1 v. Washington Dep't of Ecology*.[39] Finally, the Court states that both the Environmental Protection Agency and FERC "have each regularly read 'discharge' as having its plain meaning and thus covering releases from hydroelectric dams."

In *Rapanos*, the Court considered the consolidated cases of *Rapanos v. United States*[40] and *Carabell v. United States Army Corps of Engineers*.[41] The issue before it in both cases is the definition of "waters of the United States" as used in the Clean Water Act and whether wetlands qualify as a subset of "waters." Justice Scalia announced the judgment of the Court, which held that the phrase "waters of the United States" as used in the Act only includes those relatively permanent, standing, or continuously flowing bodies of water forming hydrographic features that are described in ordinary parlance. Justice Scalia also wrote the opinion for the plurality. Justice Kennedy filed an opinion concurring in the judgment. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, filed a dissenting opinion. Justice Breyer also filed a dissenting opinion.

The Act's main objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 1311(a) of the Act, provides "that the discharge of any pollutant by any person shall be unlawful." The Act defines "discharge of pollutant…broadly to include 'any addition of any pollutant to navigable waters from any point source.'" Pollutant[s] include "not only traditional contaminants but also solids such as dredged soil,…rock, sand, [and] cellar dirt." Navigable water is defined as "the waters of the United States, including the territorial seas."

Prior to the enactment of CWA, the Court "interpreted the

37. 126 S. Ct. 1843 (2006).
38. 126 S. Ct. 2208 (2006).
39. 511 U.S. 700 (1994).
40. No. 04-1034.
41. No. 04-1384.

The Court believes that the reasons it suppresses evidence for Fourth and Fifth Amendment violations are entirely absent in the consular notification context.

phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." After the Act's enactment, the Army Corps of Engineers, which is charged with enforcing the Act, ultimately adopted a broader definition. The Corps' current regulations define "the waters of the United States" to include "traditional navigable waters,…all interstate waters including interstate wetlands,…all other waters such as intrastate lakes, rivers, stream (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce,…tributaries of [such] waters,…and wetlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)." The regulation also defines "'adjacent' wetlands as those bordering, contiguous [to], or neighboring waters of the United States."

In *United States v. Riverside Bayview Homes, Inc.*,[42] the Court interpreted the phrase "water of the United States" as they related to "a wetland that was adjacent to a body of navigable water." The Court upheld the Corps' interpretation "to include wetlands that actually abutted on 'traditional navigable waters.'" It reasoned that "the transition from water to solid ground is not necessarily or even typically an abrupt one, and that the Corps must necessarily choose some point at which water ends and land begins." Since that decision, the Corp has further broadened its interpretation. The Court limited the Corps' broadening interpretation however and, in *Solid Waste Agency v. United States Army Corps of Eng'rs*[43] (hereinafter *SWANCC*), in which it held that "waters of the United States" did not include "nonnavigable, isolated, intrastate waters." Regardless of this decision, the Corps did not amend its regulations.

The plurality begins by addressing the breadth of the definition of "navigable waters." They do not believe "navigable waters" should be defined simply as those that are in fact navigable or capable of being made so. The plurality feels that it doesn't have to define the outer parameters of the definition, however, and needs only to state that it is not as expansive as the Corps defines it. They also believe that the term "the waters of the United States" includes "only relatively permanent, standing or flowing bodies of water." According to the plurality, this restriction stems from the wording of the phrase itself as well as commonsense.

The plurality also believes that "the Act's use of the traditional phrase 'navigable waters' (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water." The Act adopted the term from its predecessor statutes and the Court consistently interpreted this phrase to include "only discrete bodies of water." The plurality believes that even its more recent decisions limit the scope of the Act: "In *Riverside Bayview*,[44] we stated that the phrase in the Act ['the water of the United States'] referred primarily to 'rivers, streams, and other hydrographic features more conventionally identifiable as 'waters' than the wetlands adjacent to such features." The plurality believes that the "most significant" support for its interpretation, however, is that "the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source,'" which is a separate and distinct category from navigable waters.

Under its definition, the plurality concludes that wetlands do not qualify as a subset of "waters." In *Riverside Bayview*, the Court stated that there was an "inherent ambiguity in drawing the boundaries of any 'waters'" and because of this, deferred to the agency's inclusion of "wetlands actually abutting traditional navigable waters." However, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*." The plurality concludes, therefore, "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."

Chief Justice Roberts concurs. He writes that instead of responding the Court's opinion in *SWANCC* to promulgate useful regulations, "and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power." Justice Kennedy concurs in the judgment. To define the scope of the CWA, he relies heavily on the Court's use of the term "significant nexus" when it held in *SWANCC* that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."

Justice Stevens dissents. He believes that *Riverside Bayview* controls this case but still reaches a contrary conclusion. He also asserts that because the Corps has "reasonably interpreted" the CWA, its decision is required deference under *Chevron U.S.A. Inc. v. NRDC*.[45] Finally, he believes the plurality's opinion ignores the "fundamental significance of the Clean Water Act," which totally restructures and rewrote "existing water pollution legislation." Congress intended the Act to be all encompassing and Justice Stevens believes that the plurality's opinion contravenes this purpose. Justice Breyer, also dissenting, adds that "[i]f one this is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review)."

42. 474 U.S. 121 (1985).
43. 531 U.S. 159 (2001).
44. 474 U.S. 121.
45. 467 U.S. 837 (1984).

OTHER SIGNIFICANT DECISIONS

In a per curiam decision in *Lance v. Dennis*,[46] the Court held that a party is not barred by the *Rooker-Feldman* doctrine from filing a federal court action even if that party is in privity with a party who received an adverse state-court judgment. In May 2001, the Colorado General Assembly failed to pass a redistricting plan and, thus, one was created by the district court. In 2003, the General Assembly passed a redistricting plan, "prompting further litigation—this time about which electoral map was to govern, the legislature's or the court's." The Colorado Supreme Court held in *People ex rel. Salazar v. Davidson*[47] (hereinafter *Salazar*), that the legislature's plan violated Article V, section 44 of the Colorado Constitution, "which the court construed to limit congressional redistricting to 'once per decade.'"

A second action that was also filed was removed to federal court based on federal-law claims. The district court held, however, that defendant could not assert any challenges to *Salazar*. This suit, filed in the district court, was filed by Colorado citizens who were unhappy with the Colorado Supreme Court's decision in *Salazar*. They alleged "that Article V, § 44, of the Colorado Constitution, as interpreted by the Colorado Supreme Court, violated the Elections Clause of Article I, § 4, of the U.S. Constitution…and the First Amendment's Petition Clause." A panel of three district court judges dismissed the Elections Clause claim under the *Rooker-Feldman* doctrine.

The Court begins by stating that it "is vested, under 28 U.S.C. § 1257, with jurisdiction over appeals from final state-court judgments." This jurisdiction is exclusive and, therefore "under what has come to be known as the *Rooker-Feldman* doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." The *Rooker-Feldman* doctrine is derived from two cases. In *Rooker v. Fidelity Trust Co.*,[48] a party who lost in the state court did not obtain review with the Supreme Court but instead filed an action in federal district court challenging the constitutionality of the state-court judgment. The Court held that the federal action was "tantamount to an appeal of the Indiana Supreme Court decision, over which only this Court had jurisdiction, and said that the 'aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly.'" In *District of Columbia Court of Appeals v. Feldman*,[49] the plaintiff had been denied admission to the District of Columbia bar by the District of Columbia Court of Appeals and sought relief in federal court. The Court held "that to the extent plaintiffs challenged the Court of Appeals decisions themselves—as opposed to the bar admission rules promulgated nonjudicially by the Court of Appeals—their sole avenue of review was with this Court."

The Court's cases since *Feldman* "have tended to emphasize the narrowness of the *Rooker-Feldman* rule." The Court states that it has never addressed the issue presented here, but has held that *Rooker-Feldman* is "inapplicable where the party against whom the doctrine is invoked was not a party to the underlying state-court proceedings." In this case, the plaintiffs were not parties to *Salazar*. Instead, the district court relied on privity, judging it by "the preclusive effect that state courts are required to give federal-court judgments." The Court believes that the district court "erroneously conflated preclusion law with *Rooker-Feldman*." It states that the "doctrine applies only in limited circumstances,…where a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court." It does not "bar actions by nonparties to the earlier state-court judgments simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment."

Justice Stevens dissents, stating that "*Rooker* and *Feldman* are strange bedfellows." He believes that *Rooker* was correctly decided but *Feldman* was not. He believes that Court correctly "interred" the doctrine last term and by precluding the district court from resuscitating it today. He dissents from the majority's opinion, however, because the Court fails to address the fact that Colorado state law precludes this action.

In *Sanchez-Llamas v. Oregon*,[50] the Court considered the companion cases of *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*. The Court held that a violation of Article 36 of the Vienna Convention does not warrant suppression of evidence or relief for state procedural default rules. Chief Justice Roberts delivered the opinion of the Court and was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Ginsburg filed an opinion concurring in the judgment. Justice Breyer filed a dissenting opinion. He was joined by Justices Stevens and Souter and by Justice Ginsburg in part.

In *Sanchez-Llamas,* petitioner Moises Sanchez-Llamas, a Mexican national, was arrested in December 1999 after a shootout with the police. He was read his rights pursuant to *Miranda v. Arizona*[51] but was never informed of his right to have the Mexican Consulate notified of his detention pursuant to Article 36, which essentially provides that the police must, without delay, inform a detainee of his right to have the consular officers of his home country notified of his detention. During interrogation, Sanchez-Llamas made a number of incriminating statements. He moved to suppress his statements on various grounds, including that "the authorities had failed to comply with Article 36." His motion was denied and Sanchez-Llamas was convicted. His conviction was affirmed on appeal.

In *Bustillo*, petitioner Mario Bustillo, a Honduran national, was arrested for murder. He was never informed of his Article 36 rights. At trial, his defense rested on the fact that another man, Sirena, who had subsequently fled the country, was responsible for the attack. Bustillo was convicted and, after his conviction became final, filed a state habeas petition. In his petition, he argued for the first time that the authorities had violated his rights under Article 36. Bustillo also argued ineffective assistance of counsel since defense counsel failed to notify him of his rights under Article 36. The consulate provided a letter stating that if it had known of Bustillo's detention, it would have "helped him locate Sirena prior to trial." His claim was dismissed on state procedural default grounds.

46. 126 S. Ct. 1198 (2006).
47. 19 P.3d 1221 (2003)(en banc).
48. 263 U.S. 413 (1923).
49. 460 U.S. 462 (1983).
50. 126 S. Ct. 2669 (2006).
51. 384 U.S. 436 (1966).

The Court identifies the three questions for which it granted certiorari: "(1) whether Article 36…grants rights that may be invoked by individuals in a judicial proceeding; (2) whether suppression of evidence is a proper remedy for a violation…; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial." The Court reaches two conclusions quickly: the "exclusionary rule as we know it is an entirely American legal creation," which is universally rejected by most other countries and the law is clear that the Court "do[es] not hold supervisory power over the courts of the several States." The Court concludes, therefore, as argued by the state and United States, that its "authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself."

The Court agrees with Sanchez-Llamas that the Vienna Convention "implicitly requires a judicial remedy because it states that the laws and regulations governing the exercise of Article 36 rights 'must enable full effect to be given to the purposes for which the rights are intended.'" However, it notes that the Convention also states that "Article 36 rights 'shall be exercised in conformity with the laws and regulations of the receiving State.'" In the United States, the exclusionary rule is not applied lightly and the Court mainly has applied it to deter constitutional violations. It has only applied it in a limited number of circumstances involving the violation of a statute and then only when "the excluded evidence arose directly out of the statutory violations that implicated important Fourth and Fifth Amendment interests."

The Court believes that the reasons it suppresses evidence for Fourth and Fifth Amendment violations are entirely absent in the consular-notification context. The Court excludes coerced confessions because it disapproves of coercion and "such confessions tend to be unreliable." It excludes the fruits of unreasonable searches because otherwise "the constraints of the Fourth Amendment might too easily be disregarded." Failure of the police to inform the defendant of his Article 36 rights is (1) unlikely to result in a coerced or unreliable confession and (2) police would not benefit in terms of a search and seizure by ignoring Article 36.

The Court next discusses Bustillo's claim. Virginia's state procedural default rules provide that if a habeas petitioner fails to raise a claim on direct appeal, he is barred from raising that claim on collateral review. "There is an exception if a defendant can demonstrate both 'cause' for not raising the claim at trial, and 'prejudice' from not having done so." Bustillo argues that "state procedural default rules cannot apply to Article 36 claims" because "the Convention requires that Article 36 rights be given "full effect" and Virginia's procedural default rules 'prevented any effect (much less "full effect") from being given to' those rights."

The Court notes that this is not the first time it has been "asked to set aside procedural default rules for a Vienna Convention claim." In *Breard v. Greene*,[52] the petitioner did not raise his Article 36 claim until he filed a federal habeas petition. The Court rejected petitioner's argument that since the convention was the supreme law of the land, it trumped the procedural-default doctrine. It observed, "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." Further, the Court "reasoned that while treaty protections such as Article 36 may constitute supreme federal law, this is no less true of the provisions of the Constitution itself, to which rules of procedural default apply."

The Court also rejects Bustillo's argument that two decisions by the International Court of Justice (ICJ), which have "interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims," should direct the Court's decision. Under the judicial power created by the Constitution, the courts are vested with "the duty to say what the law is." The Court believes, therefore, that if "treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution." The Court does not believe that anything in the "structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our court." In fact, any decision the ICJ renders has no binding effect "even as to the ICJ itself."

Finally, Article 36 states that "the rights it provides 'shall be exercised in conformity with the laws and regulations of the receiving State' provided that 'full effect…be given to the purposes for which the rights accorded under this Article are intended.'" In the United States, this means the application of the procedural-default rules, which even apply to claims under the Constitution. The Court believes that the ICJ's ruling fails to give effect to the purpose of the procedural default rule, "which relies chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." In addition, the Court believes "[p]rocedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention."

In concluding its analysis of Bustillo's claim, the Court likens the failure to warn a defendant of his Article 36 rights to the failure of the police to inform a defendant of his rights pursuant to *Miranda*. Similarly, without the warning a defendant might not be aware he even had such rights. Regardless, if a defendant fails to object to a *Miranda* violation prior to trial, he may be barred from raising it in a collateral proceeding.

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52. 523 U.S. 371 (1998).