

Recent Civil Decisions of the United States Supreme Court: The 2001-2002 Term

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The United States Supreme Court's 2001-2002 term marked Chief Justice Rehnquist's 30th anniversary on the bench. Given the continuing prominence of 5-4 splits along typically ideological lines, the chief justice's leadership is as significant as it ever was. In the context of the Court's civil decisions, the chief justice's importance to the conservative bloc was demonstrated in the case immunizing states from private-party complaints adjudicated by administrative agencies and in the Court's acceptance of a policy permitting public vouchers to be used for religious school tuition. The Court also confronted significant issues regarding the First Amendment and limitations on protecting children from pornography; regulation of HMOs; student privacy; and, possibly most noteworthy, the applicability and limitations of the Americans with Disabilities Act.¹

FIRST AMENDMENT – SPEECH

In *Ashcroft v. Free Speech Coalition*,² Justice Kennedy delivered the opinion of the Court, holding sections 2256(8)(B) and 2256(8)(D) of the 1996 Child Pornography Prevention Act overbroad and beyond remedy in their infringement on lawful speech protected by the First Amendment. The Court found Section 2256(8)(B), which encompasses any Hollywood movies, filmed with adult actors if the jury believes an actor “appears to be” a minor engaging in “actual or simulated . . . sexual intercourse,” in violation of a fundamental First Amendment rule—simply, that “[t]he artistic merit of a work does not depend on the presence of a single explicit scene.” Section 2256(8)(D) altogether prohibits computer-generated images of fictitious children as well as any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it depicts “a minor engaging in sexually explicit conduct.” The Court examined this section in comparison to *New York v. Ferber*,³ and in this light the Court finds a crucial distinction: computer-generated images create no victims, which is in direct contrast to the content at issue in *Ferber*. *Ferber* specifically said that “[i]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized.” The Court reasoned, “*Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting

its holding.” To the secondary assertion of the government that virtual images “are indistinguishable from real ones [and] . . . are part of the same market” and so contribute to the exploitation of real children, the Court found this reasoning implausible due to the belief that few pornographers would risk such severe penalties if computerized alternatives would be sufficient to satisfy the market force. Finally, to the government assertion that technology could make it more difficult for the prosecution of real child pornographers, the Court responded, “This analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech. The Constitution requires the reverse.”

In *Ashcroft v. American Civil Liberties Union*,⁴ Justice Thomas delivered the opinion of the Court, which held that “reliance on community standards to identify ‘material that is harmful to minors’ does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.” The Court deemed Congress’ effort to protect children from adult Internet content via the Child Online Protection Act (COPA) not to be overbroad in its definition of prohibited content or its evaluation of such content according to “community” standards. The Court’s ruling stood first on the distinctions between COPA and its unconstitutional forerunner the Communications Decency Act of 1996 (CDA). COPA represents a more limited ban compared to the CDA in three ways: COPA applies only to material displayed on the web, it covers only communications made for commercial purposes, and it prohibits “material that is harmful to minors” instead of the CDA’s prohibition of “indecent” and “patently offensive” communications. The Court fashioned its definition of “material that is harmful to minors” around its three-part test of obscene material in *Miller v. California*.⁵ The Court subsequently addressed the lower court’s concerns about the excessive burden of varying community standards by reasoning that a juror, regardless of instruction, will surely apply a personal knowledge of obscenity that will be, in part, a product of his geographic area. To buttress its position, the Court referred to its rulings in *Hamling v. United States*⁶ and *Sable Communications of California, Inc. v. FCC*⁷ and concluded that “this Court’s jurisprudence teaches that it is the publisher’s responsibility to

Footnotes

1. For a more in-depth review of the decisions of the past term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2001-2002 (Amer. Acad. of Jud. Educ. 2002).
2. 122 S. Ct. 1389 (2002).

3. 483 U.S. 747 (1982).
4. 122 S. Ct. 1700 (2002).
5. 413 U.S. 15 (1973).
6. 418 U.S. 87 (1974).
7. 492 U.S. 115 (1989).

abide by that community's standards. The publisher's burden does not change simply because it decides to distribute its material to every community in the Nation."

In *City of Los Angeles v. Alameda Books, Inc.*,⁸ a 5-4 decision, Justice O'Connor wrote for a four-member plurality, upholding against facial challenge on a summary judgment motion a city ordinance prohibiting two adult-content operations traditionally existing in the same building and operated by the same enterprise. Her opinion concluded that the ordinance served a substantial government interest and did not constitute a content-based restriction of protected speech since the ordinance was supported by a study conducted by the municipality several years before the ordinance was enacted. Justice O'Connor specifically upheld the ordinance based on the three-part criteria set forth in *Renton v. Playtime Theatre, Inc.*⁹ The first of three criteria in *Renton*—that the ordinance be capable of construction as a proper time, place, and manner regulation—was considered to be satisfied because the ordinance did not ban, but only required relocation of establishments. The second criterion in *Renton*—whether the ordinance is content neutral or content based—was satisfied, for purposes of summary judgment, by the city's prior study demonstrating adverse secondary effects from concentrations of adult businesses. The third criterion in *Renton*—that the ordinance reflect a substantial government interest "and that reasonable alternative avenues of communication remain available"—also was satisfied for purposes of summary judgment by the city's prior study. In opposition to the Court of Appeals analysis of the third step in the *Renton* criteria, the plurality found that the 1977 study relied upon by the city successfully demonstrated that crime patterns were influenced by the number of adult entertainment establishments, and therefore satisfied the requirement in providing a substantial government interest in the city's attempts to reduce crime. The plurality specifically addressed the amount of evidence that the city must present to justify such an ordinance under *Renton*. If the Court accepted the arguments of respondents, the plurality opinion concluded, then "it would effectively require that the city provide evidence that not only supports the claim its ordinance serves an important government interest, but also does not provide support for any other approach. In *Renton*, we specifically refused to set such a high bar." Justice Kennedy provided a fifth vote in favor of upholding the city's ordinance at the summary judgment stage, but did not join the plurality opinion. He emphasized that the Court's decision in *Alameda Books* should not be read to expand the rules found in *Renton*, but agreed that there was sufficient evidence to uphold the ordinance at the summary judgment stage.

The Court considered the issue of judicial candidates announcing their views on legal or political issues in *Republican Party of Minnesota v. White*.¹⁰ In a 5-4 decision, Justice Scalia wrote for the majority and held that the

Minnesota Supreme Court's canon of judicial conduct that prohibits a judicial candidate from "announc[ing] his or her views on disputed legal or political issues" violates the First Amendment. Minnesota's process for the selection of state judges is a nonpartisan popular election. Since 1974, the "announce clause" has been in effect, creating a legal restriction that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." The Court began its analysis by noting that the prohibition on announcing applies to the candidate's statement of his current position, even if that is not maintained after election. The Court recognized there are limitations that the Minnesota Supreme Court placed upon the scope of the clause. The Court next determined whether a list of preapproved subjects that the judicial candidates may speak about adequately fulfills the First Amendment's guarantee of freedom of speech. Since the announce clause prohibits speech on the basis of its content, the Court used strict scrutiny to resolve its constitutionality. Strict scrutiny requires that the respondents prove that the announce clause is narrowly tailored and that it serves a compelling state interest. To demonstrate that the clause is narrowly tailored, the respondents must show that it does not "unnecessarily circumscribe protected expression." The Court noted that respondents claimed two interests as "sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary." These interests do not meet strict scrutiny, according to the Court. The Court concluded its decision by identifying an "obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits." However, the Court said that the First Amendment does not allow elections to occur while at the same time "preventing candidates from discussing what the elections are about."

In *Thompson v. Western States Medical Center*,¹¹ the Court held in a 5-4 decision that the prohibitions in the Food and Drug Administration Modernization Act of 1997 (FDAMA) on soliciting prescriptions for, and advertising, compounded drugs amount to unconstitutional restrictions on commercial speech. The FDAMA exempts "compounded drugs" from the Food and Drug Administration's standard drug approval requirements as long as several restrictions, including a prohibition on advertising or promoting compound drugs, are met. Drug compounding is mixing or altering ingredients to create a medication tailored to the needs of a particular patient. The Court began its analysis by pointing out that although commercial speech receives First Amendment protection, not all regulation of commercial speech is unconstitutional. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*,¹² the Court created a test to determine permissible regu-

8. 122 S. Ct. 1728 (2002).

9. 475 U.S. 4 (1986).

10. 122 S. Ct. 2528 (2002).

11. 122 S. Ct. 1497 (2002).

12. 100 S. Ct. 2343 (1980).

lation of commercial speech. First, the test asks whether the commercial speech concerns unlawful activity or is misleading. If so, then it is not protected by the First Amendment. If it is lawful activity that is not misleading, however, the next step is to determine “whether the asserted governmental interest is substantial.” If it is, then the third step is to “determine whether the regulation directly advances the governmental interests asserted,” and last, “whether it is not more extensive than necessary to serve that interest.” All of the last three inquiries must be answered in the affirmative in order for the regulation to be found constitutional. The Court then applied this test and noted that the government did not argue the first prong of *Central Hudson*. The Court recognized that the next prong is met: “Preserving the effectiveness and integrity of the . . . drug approval process is clearly an important governmental interest.” For the third prong, the Court assumed *arguendo* that the prohibition on advertising “might” directly advance the governmental interest. The court held, however, that the government failed the last step of the test, to “demonstrate that the speech restrictions are ‘not more extensive than necessary to serve [those] interests.’” Accordingly, the regulation cannot be found constitutional. The Court said, “If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.” Finally, the Court concluded that the advertising prohibitions were overbroad as they would “affect pharmacists other than those interested in producing drugs on a large scale.”

In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*,¹³ the Court addressed an ordinance regulating the activities of solicitors and canvassers. The six-justice majority held that an ordinance that requires individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand violates the First Amendment. The ordinance at issue provided that any canvasser who intends to go on private property must obtain a “solicitation permit” from the office of the mayor if they intend to promote a cause. The ordinance itself lays out the grounds for denying or revoking a permit, although there was no evidence that any permit had been denied or revoked. Petitioner, a society that coordinates the preaching activities of Jehovah’s Witnesses, never applied for a permit on the grounds that their authority to preach stems from scripture and that seeking a permit would cause the petitioners to feel as though they were insulting God. The Court began its analysis by pointing out that restrictions on door-to-door canvassing and pamphleteering have been invalidated for over 50 years. Since door-to-door canvassing is mandated to Jehovah’s Witnesses through their religion, most of the cases dealing with First Amendment challenges to restrictions on door-to-door canvassing have involved this religious group. Through review of these past cases, the Court recognized that although the village’s interests are legitimate, precedent makes it “clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights.” The interests put forth by

the village were the prevention of fraud, the prevention of crime, and the protection of residents’ privacy. However, the Court said it must also look at the amount of speech covered by the ordinances and at the balance “between the affected speech and the governmental interests that the ordinance purports to serve.” Since the ordinance applies to more than commercial activities and solicitation of funds, the Court held it was not narrowly tailored to the village’s interests. The Court identified the permit as a burden on some speech of citizens holding religious or patriotic views, including those who will not apply for a license because of their religious scruples as well as those who would “prefer silence to speech licensed by a petty official.” The Court also noted that spontaneous speech would be banned by the ordinance. The Court concluded its analysis by pointing out that although the “breadth and unprecedented nature” of the regulation renders it invalid, the regulation also is not tailored to the village’s stated interests, which additionally renders the regulation invalid. Although the prevention of crime is a stated interest, the Court found it unlikely that “the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance.”

FIRST AMENDMENT – ESTABLISHMENT CLAUSE

In a 5-4 decision, the Court in *Zelman v. Simmons-Harris*¹⁴ held that Ohio’s pilot school voucher program does not offend the Establishment Clause as it is neutral with respect to religion and permits individuals to exercise genuine choice among public and private, secular and religious options. Ohio’s program provides tuition aid for students to attend a participating public or private school that their parents choose. “Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards,” the Court explained. Among the 56 private schools participating in the program, 46 (or 82%) are religiously affiliated. Most of the students participating in the program (96%) are enrolled in religiously affiliated schools. The Court began its analysis by recognizing that the Establishment Clause of the First Amendment, “prevents a State from enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion.” Though the program has a valid secular purpose, the Court must determine whether the effect of the program is to advance or inhibit religion. The Court said that in dealing with this issue, its decisions have “drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.” The Court determined that the Ohio program is one of true private choice and is neutral toward religion in all respects. The Court argued that there are no financial incentives that “skew the program toward religious schools.” Instead, the program creates disincentives for religious schools since magnet schools and adjacent public schools receive significantly more money

13. 122 S. Ct. 2080 (2002).

14. 122 S. Ct. 2460 (2002).

than private religious schools. Finally, the Court refused to use *Committee for Public Ed. & Religious Liberty v. Nyquist*¹⁵ as a framework to decide the current case. The Court in *Nyquist* found that a New York program that gave benefits exclusively to private schools and the parents of private school enrollees was unconstitutional. Although its purpose was secular, the program's function was to provide financial support for non-public, sectarian institutions. The Court concluded that *Nyquist* does not apply to the Ohio case, in part because the program in *Nyquist* provided incentives for students to attend religious schools and prohibited the participation of public schools.

FEDERALISM

In a 5-4 decision, Justice Thomas delivered the opinion of the Court in *Federal Maritime Commission v. South Carolina State Ports Authority*,¹⁶ holding that state sovereign immunity bars the Federal Maritime Commission (FMC), an executive branch agency, from adjudicating complaints filed by a private party's complaint against a nonconsenting state. The Eleventh Amendment states, "The judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." However, the Amendment "is but one particular exemplification of that immunity . . . [and the] Court has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." Since "the Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state," the Court relied on the presumption established in *Hans v. Louisiana*,¹⁷ where the Court explained "that the Constitution was not intended to 'raise up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" Upon evaluating the FMC adjudications, the Court observed that an administrative adjudication "walks, talks, and squawks very much like a lawsuit," and concluded that "the similarities between FMC proceedings and civil litigation are overwhelming." "The preeminent purpose of state sovereign immunity," the Court concluded, "is to accord States the dignity that is consistent with their status as sovereign entities." Accordingly, "if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC." Furthermore, "it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply." Justice Breyer began his dissent, joined by three other justices, by disputing the majority's characterization of the

agency: "[T]he Federal Maritime Commission, is an 'independent' federal agency . . . [and therefore] belongs neither to the Legislative Branch nor the Judicial Branch of Government." Moreover, "the Court [has] denied that [agency] activities as safeguarded, however much they might resemble the activities of a legislature or court, fell within the scope of Article I or Article III of the Constitution." Finally, Justice Breyer anticipated that the Court's decisions will lead to "less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforcement."

In *Lapides v. Board of Regents of the University System of Georgia*,¹⁸ Justice Breyer, writing for a unanimous Court, held that a state waives its Eleventh Amendment immunity when it removes a case from state court to federal court. While the Eleventh Amendment grants a state immunity from suit in federal court by citizens of other states as well as by its own citizens, states remain free to waive that immunity. The Court reasoned, "It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." Although a state, as in this case, may be brought involuntarily into the state court as a defendant, if it "then voluntarily agreed to remove the case to federal court . . . [then] it voluntarily invoked the federal court's jurisdiction." The Court concluded that the voluntariness of the state's participation in federal court is what matters; removal to federal court is a sufficiently "clear" indication of the state's intent to waive its immunity.

In *Rush Prudential HMO, Inc. v. Moran*,¹⁹ the Court examined the interplay between federal Employee Retirement Income Security Act of 1974 (ERISA) claims and a state HMO Act providing for independent medical review of a denial of benefits. The Court held 5-4 that an Illinois statute regulating HMOs by providing a "right to independent medical review of certain denials of benefits" is not preempted by ERISA. Justice Souter, writing for the majority, pointed out that ERISA has two sweeping "antiphonal clauses" creating conflict: one preempting any state laws "relating to" employee benefit plans and another with similarly broad scope that "saves" any state laws from preemption if they regulate "insurance, banking, or securities." Since the challenged statute relates to ERISA plans, it can be saved only if it regulates HMOs in their capacity as insurers. The majority began with a commonsense test of the state statute and found that it is aimed specifically at the insurance industry. The Court then compared this outcome to the McCarran-Ferguson Act's three-factor test. The Court then noted that a statute may pass both tests and still not survive preemption if congressional intent is clear. The Court held that this statute is not preempted because it passes both tests and "imposes no new obligation or remedy." Thus, it does not cre-

15. 413 U.S. 756 (1973).

16. 122 S. Ct. 1864 (2002).

17. 134 U.S. 1 (1890).

18. 122 S. Ct. 1640 (2002).

19. 122 S. Ct. 2151 (2002).

ate a conflict between the federal remedies and the states' power to regulate insurers. Justice Thomas, writing for the four dissenting justices, would have held that ERISA preempts the Illinois statute. He pointed out that the "Court has repeatedly recognized that ERISA's civil enforcement provision . . . provides the exclusive vehicle for actions asserting a claim for benefits under health plans governed by ERISA, and therefore that state laws that create additional remedies are pre-empted."

DUE PROCESS – STUDENT PRIVACY

In *Gonzaga University v. Doe*,²⁰ the Court discussed whether to infer enforceable rights from a spending statute. The Court held in a 5-4 decision that "we have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA [the Federal Educational Rights and Privacy Act of 1974] can confer enforceable rights." The Court began its analysis by looking at FERPA, which Congress enacted "to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." Next, it looked to past decisions, and found that spending legislation has rarely given rise to enforceable rights. In those rare instances where enforceable rights have been found, the Court emphasized that those findings were based on unmistakable legislative intent: "The key to our inquiry was that Congress spoke in terms that 'could not be clearer,' and conferred entitlements 'sufficiently specific and definite to qualify as enforceable rights.'" The Court also noted that its "more recent decisions . . . have rejected attempts to infer enforceable rights from Spending Clause statutes." The Court explained that in both implied right of action cases as well as cases under 42 U.S.C. section 1983, the first determination must be whether Congress intended to create a federal right. Not only must the statute be phrased in explicit rights-creating terms, but a plaintiff suing under an implied right of action must also show that the statute manifests an intent to create a private remedy as well as a private right. The Court recognized that its role in determining whether personal rights exist in section 1983 suits should not be different from determining whether personal rights exist in implied right of action suits. In both instances, the Court is required to discern whether Congress intended to confer individual rights upon a class of beneficiaries. If the text and structure of the statute provide no indication of congressional intent to create new individual rights, there is no basis for a private suit in both section 1983 and implied right of action contexts. FERPA's nondisclosure provisions fail to confer enforceable rights. Ultimately, the Court emphasized that if Congress decides to create new rights to be enforced by section 1983, "it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." The Court pointed out that the nondisclosure provisions in FERPA do not contain "rights-creating language," have an aggregate focus as opposed to an individual one, and primarily serve to direct the Secretary

of Education's distribution of public funds to educational institutions. Thus, the Court concluded that no individual rights have been created that are enforceable under section 1983.

In *Owasso Independent School District v. Falvo*,²¹ Justice Kennedy delivered the opinion of the court concluding that the instructional technique commonly referred to as peer grading is not an unconstitutional breach of privacy. The respondent brought a class action pursuant to 42 U.S.C. section 1983 against the school district, its superintendent, and a principal, alleging a violation of the Family Educational Rights and Privacy Act of 1974 (FERPA). The decision of the Court hinges on the determination of whether grades produced by peer grading are to be considered "educational records" as FERPA defines them. The Court of Appeals determined that grade books and the grades within are "maintained" by the teacher. As the Supreme Court summarized the Court of Appeals opinion, "It reasoned, however, that if Congress forbids teachers to disclose students' grades once written in a grade book, it makes no sense to permit the disclosure immediately beforehand." The Court concluded that the Court of Appeals' logic in determining that a teacher's grade book "maintains" student records in keeping with the definition of "educational records" is flawed. The Court cited two statutory indicators in support of this conclusion. "First, the student papers are not, at that stage, 'maintained' within the meaning of" the statute; "[e]ven assuming the teacher's grade book is an education record—a point the parties contest and one we do not decide here—the score on a student-graded assignment is not 'contained therein,' . . . until the teacher records it," the Court concluded. Second, the Court did not agree with the Court of Appeals in the finding that a student grader during an exercise of peer grading is "a person acting for an educational institution." The Court reasoned, "Just as it does not accord with our usual understanding to say students are 'acting for' an educational institution when they follow their teacher's direction to take a quiz, it is equally awkward to say students are 'acting for' an educational institution when they follow their teacher's direction to score it." Finally, in accordance with *Davis v. Michigan Dept. of Treasury*,²² the Court examined the sections of FERPA that include requirements for records of both requests for access and access to a student's records. The Court concluded, "It is doubtful Congress would have provided parents with this elaborate procedural machinery to challenge the accuracy of the grade on every spelling test and art project the child completes."

DUE PROCESS – SUING PRIVATE PRISONS

In *Correctional Services Corp. v. Malesko*,²³ the Court held in a 5-4 decision that the limited holding in *Bivens v. Six Unknown Named Fed. Narcotics Agents*²⁴ may not be extended to confer a right of action for damages against private entities acting under color of federal law. Respondent suffered a heart attack while imprisoned under the supervision of the Bureau of Prisons. He

20. 122 S. Ct. 2268 (2002).

21. 122 S. Ct. 934 (2002).

22. 489 U.S. 803 (1989).

23. 534 U.S. 61 (2001).

24. 403 U.S. 388 (1971).

filed an action against petitioner, Correctional Services Corporation, a private company that managed the halfway house at which he suffered his heart attack. The Court began its analysis by discussing its holding in *Bivens*, which was the first time the Court had recognized an implied private action for damages against federal officers who allegedly violated a citizen's constitutional rights. The Court in *Bivens* held that "a victim of a Fourth Amendment violation by federal officers may bring suit for money damages against the officers in federal court." Respondent's request that the *Bivens* holding be extended to grant a right of action for damages against private entities acting under color of federal law is a request to "imply new substantive liabilities," which the Court refused to do. The Court said that its holding in *Bivens* had only been extended twice in its history: once in *Davis v. Passman*,²⁵ where the Court recognized an implied damages remedy under the Due Process Clause of the Fifth Amendment, and once in *Carlson v. Green*,²⁶ where the *Bivens* holding was extended to the Cruel and Unusual Punishment Clause of the Eighth Amendment. The Court noted that the circumstances in both of these cases applied the "core holding in *Bivens*." The circumstances in *Davis* dealt with a plaintiff who lacked any other remedy for constitutional deprivation, while the circumstances in *Carlson* dealt with an unsatisfactory alternative. The Court has refused to extend *Bivens* in any situation since its holding in *Carlson*. The Court concluded by recognizing the importance of the available alternative remedies open to the respondent.

DUE PROCESS – FORFEITURE

In *Dusenbery v. United States*,²⁷ petitioner sought to have his property returned after he was arrested by the Federal Bureau of Investigation. The FBI was allowed to dispose of the property seized pursuant to the Controlled Substances Act. The statute required the FBI to send written notice of the seizure with information on the applicable forfeiture proceedings to all parties who appeared to have an interest in the property. The FBI sent letters of intent to forfeit the cash to petitioner by certified mail in care of the federal prison where petitioner was incarcerated. As the FBI received no response to these notices within the time allotted, the items were declared administratively forfeited. Chief Justice Rehnquist, writing for the five-justice majority, held that the use of mail as a method of giving notice to federal prisoners about the right to contest the administrative forfeiture of property is constitutional. The Court noted that the government has carried its burden of showing that the procedures used to give notice were adequate. The FBI's use of the U.S. Postal Service to send certified mail to petitioner has been recognized as an adequate measure when notice by publication is insufficient and an address is known. The Court determined that the use of mail addressed to petitioner at the penitentiary was "clearly acceptable for much the same reason we have approved mailed notice in the past. Short of allowing the prisoner to go to the post office

himself, the remaining portion of the delivery would necessarily depend on a system in effect within the prison relying on prison staff. We think the FBI's use of [this] system . . . was 'reasonably calculated, under the circumstances, to apprise [petitioner] of the action.' Due process requires no more."

STATUTORY INTERPRETATION – SEX OFFENDERS

The Court addressed the Kansas Sexually Violent Predator Act (SVPA) in *Kansas v. Crane*.²⁸ The Court held that the SVPA does not require the state to prove an offender's total or complete lack of control over dangerous behavior. However, the Constitution does require a minimum lack-of-control determination to be made in order for civil commitment to be allowed. Respondent, Crane, a previously convicted sexual offender who suffers from exhibitionism and an antisocial personality disorder, was convicted of lewd and lascivious behavior and pleaded guilty to aggravated sexual battery for two incidents that occurred on the same day. Kansas sought the civil commitment of respondent. The Court's analysis discussed the prior case of *Kansas v. Hendricks*,²⁹ where the Court held that the statute's criteria for confinement of "mental abnormality or personality disorder" satisfied the substantive due process requirements. The Court now finds, however, that "*Hendricks* sets forth no requirement of *total* or *complete* lack of control." The Court pointed out that the Constitution does not permit commitment of the type of dangerous sexual offender found in *Hendricks* "without *any* lack-of-control determination." The Court admitted that *Hendricks* provides a constitutional standard that is not precise. The Court explained, however, that "the constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." Although the Court does not propose a bright-line rule, it is still able to provide constitutional guidance by "proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require. *Hendricks* embodied that approach." The Court, therefore, was able to reconcile its decision with the decision in *Hendricks*.

STATUTORY INTERPRETATION – EVICTING TENANTS FOR DRUG-RELATED ACTIVITIES

In *Department of Housing and Urban Development v. Rucker*,³⁰ the Court held 8-0 that the Anti-Drug Abuse Act of 1988 lawfully requires lease terms that allow a local public housing authority to evict a tenant when members of the tenant's household or a guest engages in drug-related criminal activity. Chief Justice Rehnquist, writing for the Court, indicated that the broad, plain language of the statute precludes any knowledge requirement for evictions based on drug-related offenses. Regardless of knowledge, a tenant who "cannot control drug crime, or other criminal activities by a household member which threaten the health or safety of other residents, is a threat to other residents and the project." The Court pointed

25. 442 U.S. 228 (1979).
26. 446 U.S. 14 (1980).
27. 534 U.S. 161 (2002).

28. 534 U.S. 407 (2002).
29. 521 U.S. 346 (1997).
30. 122 S. Ct. 1230 (2002).

out that due process concerns are not triggered since the government is “acting as a landlord of property it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required,” rather than attempting to criminally punish or to civilly regulate respondents as members of the general populace.

AMERICANS WITH DISABILITIES ACT

In *Barnes v. Gorman*,³¹ Justice Scalia, writing for a six-member majority, held that punitive damages may not be awarded in a private cause of action brought under section 202 of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act. The Court explained that “the remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally funded programs and activities.” The Court explained, “Title VI invokes Congress’s power under the Spending Clause . . . to place conditions on the grant of federal funds.” Moreover, the Court emphasized that it has “repeatedly characterized this statute and other Spending Clause legislation as ‘much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.’” Consequently, “the legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the ‘contract.’” Applying the contract analogy, the remedy may be considered “appropriate relief . . . only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.” The Court pointed out that “punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract.” Further, an implied punitive damages provision cannot be reasonably found in Title VI, and therefore should not be implied in section 202 of the ADA or section 504 of the Rehabilitation Act, either.

Justice O’Connor writing for a unanimous Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,³² held that in order to be substantially limited in performing manual tasks under the ADA, an individual must have an impairment that prevents or severely restricts the performance of activities that are of central importance to most people’s daily lives. Further, “[t]he impairment’s impact must also be permanent or long term.” The ADA “requires covered entities . . . to provide ‘reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability’ . . . unless . . . the accommodation would impose an undue hardship.” A disability is defined in the statute as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” The Court began its analysis guided by the regulations interpreting the Rehabilitation Act of 1973, which lists examples of “major life activities,” including “walking,

seeing, hearing,” and “performing manual tasks.” However, they “do not define the term ‘substantially limits.’” The Court then turned to the Equal Employment Opportunity Commission (EEOC) regulations that indicate that “‘substantially limited’ means ‘unable to perform a major life activity that the average person in the general population can perform,’” and then lists a number of factors to consider. Ultimately, the Court relied on the dictionary definition of the ADA’s terms. Since “‘substantially’ in the phrase ‘substantially limits’ suggests ‘considerable’ or ‘to a large degree,’” it “clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.” Also, “‘major’ in the phrase ‘major life activities’ means important,” and “thus refers to those activities that are of central importance to daily life.” Consequently, “[i]t is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment,” but instead, individuals must offer “evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial.” Focusing its attention on carpal tunnel syndrome, the Court explained that “[w]hile cases of severe carpal tunnel syndrome are characterized by muscle atrophy and extreme sensory deficits, mild cases generally do not have either of these effects and create only intermittent symptoms of numbness and tingling.” Consequently, “an individual’s carpal tunnel syndrome diagnosis, on its own, does not indicate whether the individual has a disability within the meaning of the ADA.” Finally, the Court instructed, “[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.”

In *Chevron U.S.A. v. Echazabal*,³³ a unanimous Court held that the ADA allows a company to refuse to hire an individual on the basis that his performance on the job would endanger his own health, owing to a disability. The Act prohibits “discrimination against a qualified individual with a disability . . . by an employer” but also creates an affirmative defense for refusal to hire because of a “qualification standard” demonstrated to be “job-related for the position in question.” This standard may include a requirement that the individual not pose a direct threat to the health or safety to oneself or others in the workplace. The direct-threat defense demands a “particularized inquiry into the harms the employee would probably face,” based on “reasonable medical judgment . . . and individualized assessment of the individual’s present ability to safely perform the essential functions of the job” after considering facts such as “the imminence of the risk and the severity of the harm portended.”

In *U.S. Airways, Inc. v. Barnett*,³⁴ the Court considered the interplay between seniority systems and the ADA. The Court held, in a 5-4 decision written by Justice Breyer, that ordinar-

31. 122 S. Ct. 2097 (2002).

32. 122 S. Ct. 681 (2002).

33. 122 S. Ct. 2045 (2002).

34. 122 S. Ct. 1516 (2002).

ily the ADA does not require an employer to assign a disabled employee to a particular position even though another employee is entitled to that position under an established seniority system because such an accommodation is not “reasonable.” An employer who makes a showing that the assignment would violate the rules of a seniority system is entitled to summary judgment, unless a plaintiff can present evidence that “special circumstances” in the particular case demonstrate that the assignment is nonetheless reasonable. The Court acknowledged that reaching the ADA’s “equal opportunity goal” will sometimes require “preferential” treatment, so a difference in treatment that violates an employer’s disability neutral rule cannot by itself place the accommodation beyond the Act’s potential reach. The Court further indicated that giving the operative words in the Act their ordinary English meanings supports the Court’s decision.

EMPLOYMENT LAW

The Court considered the requirements for pleading an employment discrimination lawsuit in *Swierkiewicz v. Sorema N. A.*,³⁵ where it held that an employment discrimination complaint does not need to include specific facts establishing a prima facie case of discrimination. The Court determined that all that is needed is a short and plain statement of the claim showing that the pleader is entitled to relief. Petitioner filed a lawsuit contending he had been fired on account of his national origin in violation on the Civil Rights Act of 1964, and on account of his age in violation of the Age Discrimination in Employment Act of 1967. The Court noted that specific requirements of a prima facie case are flexible and were not intended to be rigid. Since discovery may reveal relevant facts and evidence, it may be difficult to define the required formulation of the prima facie case. The Court stressed that “given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.” The Court concluded by pointing out that petitioner’s complaint satisfied the requirements of Rule 8(a) of the Federal Rules of Civil Procedure and did not need to contain specific facts to do so.

In *National Railroad Passenger Corp. v. Morgan*,³⁶ a highly fractured Court held that while Title VII of the Civil Rights Act of 1964 “precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period,” courts may consider “the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time limit” so long as “any act contributing to that hostile environment takes place within the statutory time period.” Justice Thomas wrote the majority opinion, part of which was joined by only five justices and part of which was joined by all nine. Justice O’Connor wrote a concurring and dissenting opinion that was joined at least in part by four other justices. Writing for the Court, Justice Thomas said that hostile work environment claims are “different in kind from discrete acts”

since their “very nature involves repeated conduct.” Such claims focus on the “cumulative affect of the individual acts,” any one of which “may not be actionable on its own” but “collectively constitute one ‘unlawful employment practice.’”

The Court considered the interaction between the Federal Arbitration Act and the Equal Employment Opportunity Commission’s power to seek victim-specific relief in *Equal Employment Opportunity Commission v. Waffle House, Inc.*³⁷ There, the Court held 6-3 that an arbitration agreement between an employer and an employee does not bar the EEOC from “pursuing victim-specific judicial relief” in enforcement actions alleging employer violation of Title I of the Americans with Disabilities Act of 1990. Justice Stevens, writing for the Court, explains that while the Federal Arbitration Act manifests a “liberal federal policy favoring arbitration agreements,” a contract “cannot bind a nonparty” such as the EEOC. EEOC claims are not “merely derivative” and may be “seeking to vindicate a public interest” even when the relief sought appears to be “entirely victim-specific.” Thus, drawing a line “between injunctive and victim-specific relief” to determine what remedies the EEOC may use to vindicate public interests would be an ineffective way of “preserving the EEOC’s public function while favoring arbitration.”

In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*,³⁸ the Court held in a 5-4 decision that federal immigration policy embodied in the Immigration Reform and Control Act of 1986 (IRCA) foreclosed the power of the National Labor Relations Board to award backpay to an undocumented alien who had never been legally authorized to work in the United States. Petitioner impermissibly fired four employees in an effort to rid its business of known union supporters, one of whom was subsequently discovered to be an illegal alien. While generally broad, the NLRB’s discretion to select and fashion remedies for employment violations is not unlimited and may be curtailed by congressionally enacted federal immigration law policy. The Court said that the IRCA combats employment of illegal aliens via a verification system requiring employers to confirm the identity and eligibility of all new hires by examining specified documents before they begin work and corresponding criminal sanctions for unauthorized aliens who subvert the employer verification system by tendering fraudulent documents. The Court concluded that awarding backpay to illegal aliens is beyond the NLRB’s remedial discretion because it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Justice Breyer, writing for the four dissenting justices, found the order awarding backpay was lawful since the NLRB’s limited backpay order reasonably helped to deter unlawful activity that both labor laws and immigration laws seek to prevent.

35. 534 U.S. 506 (2002).
36. 122 S. Ct. 2061 (2002).

37. 534 U.S. 279 (2002).
38. 122 S. Ct. 1275 (2002).

OTHER SIGNIFICANT DECISIONS

In a 6-3 decision, Justice Stevens, writing for the Court in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,³⁹ held that two temporary moratoria on land development instituted by the Tahoe Regional Planning Agency (TRPA) were not per se takings of property requiring compensation under the Takings Clause. In its effort to develop standards to protect the Lake Tahoe area from further deterioration, the TRPA enacted Ordinance 81-5 and later Resolution 83-21, which together “effectively prohibited all construction” on particular California lands in the Lake Tahoe Basin for 32 months and certain lands in Nevada for eight months. The Court explained that its jurisprudence regarding “physical takings . . . involves the straightforward application of *per se* rules,” whereas its “regulatory takings jurisprudence . . . is characterized by ‘essentially ad hoc, factual inquiries’ designed to allow ‘careful examination of all the relevant circumstances.’” The Court emphasized that the “longstanding distinction between acquisitions of property for public use . . . and regulations prohibiting private uses . . . makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.” The Court noted “two reasons why a regulation temporarily denying an owner all use of her property might not constitute a taking.” First, it is within the state’s authority to enact safety regulations. Second, there are “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.” The Court has previously held that “compensation is required when a regulation deprives an owner of ‘all economically beneficial uses’ of land.” However, this “holding was limited to ‘the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.” Consequently, “anything less than a ‘complete elimination of value,’ or a ‘total loss’ . . . would require” a fact-based analysis. The Court said that the temporary nature of the restriction was of great significance: “Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use because the property

will recover value as soon as the prohibition is lifted.” In Justice Thomas’s brief dissenting opinion, joined by Justice Scalia, he responded forcefully to this assertion, saying the majority’s assurance that the loss in value will only be temporary serves “cold comfort to the property owners in this case or any other.” “After all,” he said by quoting John Maynard Keynes, “[i]n the long run we are all dead.”

CONCLUSION

Contrary to the Court’s criminal decisions this term, 5-4 splits were prevalent in the Court’s civil decisions. There were numerous concurring opinions this year, as justices were less inclined to join majority opinions in their entirety. Also, there were times when the justices departed from the typical conservative and liberal blocs, which seems to suggest that certain issues could create strange bedfellows. However, there remains a ubiquitous concern regarding the future validity of these numerous ideologically split decisions in the face of the possible retirement by a few justices. The alignment that would result from the potential future appointments would categorically impact the strengthening or weakening of the Supreme Court’s decisions during these recent terms. This may prove especially true in the federalism area.



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39. 122 S. Ct. 1465 (2002).

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