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| Note: | A legal maxim is an established principle or proposition. |

**U.S. Department of Justice**

Civil Division

*Washington, D.C. 20530*

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March 8, 2012

This letter is in response to your Freedom of Information Act (FOIA) request, dated April 5, 2011, seeking a copy of the "Supreme Court Maxims", listed on the Civil Division page of the DOJNet. Your request was received in our office on April 5, 2011.

One document, totaling 291 pages, was identified as responsive to your request. Although this record is subject to exemption pursuant to attorney work product, deliberative process privileges of exemption 5 (5 U.S.C. 552(b)(5)), it was determined there is no existent harm in releasing this record. Therefore, it is being provided to you in full (enclosed).

If you have any questions, please contact our FOIA Requester Service Center at (202) 514-2336.

Sincerely,

James M. Kovakas

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# SUPREME COURT MAXIMS

Below is a collection of useful quotations from all opinions of the United States Supreme Court from its 1993 through 1998 Terms. These are intended to be used as a research tool for finding authority to cite in briefs and memoranda for common propositions of law. They are grouped into five categories: (1) Doctrines of Constitutional Construction (in the 1998 Term maxims only), (2) Doctrines of Statutory Construction, (3) Supreme Court Practice, (4) Procedural Doctrines, and (5) Substantive Law Doctrines. The maxims are arranged by Term, with the most recent 1998 Term first.

**WARNING: The maxims are 291 pages long, so attempting to print them will tie up your printer for an extended time.**

Instead of printing them, the maxims are designed to be used as a computer data base. For example, if you want to find a citation that courts should give deference to an agency's construction of a statute, you can search the maxims for the term "deference." You could then cut and paste either the citation or the full quotation into your document. You can also search the maxims for such terms as "plain meaning," "standing," "mootness," First Amendment," or "Title VII" to find the Supreme Court cases dealing with these matters.

## MAXIMS FROM

## THE SUPREME COURT 1998 TERM

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I. DOCTRINES OF CONSTITUTIONAL INTERPRETATION

**Construing Constitution in Accord with Original Intent**

"We look first to evidence of the original understanding of the Constitution." Alden v. Maine, 527 U.S. 706, 741 (1999).

**Construing Constitution in Accord with Early Practice**

"[E]arly congressional practice * * * provides 'contemporaneous and weighty evidence of the Constitution's meaning.'" Alden v. Maine, 527 U.S. 706, 743-744 (1999) (quoting Printz v. United States, 521 U.S. 898, 905 (1997) (internal quotation marks omitted)).

II. DOCTRINES OF STATUTORY CONSTRUCTION

**Statutory Language**

"When interpreting a statute, we look first to the language." Richardson v. United States, 526 U.S. 813, 818 (1999).

**Plain Meaning**

"As in any case of statutory construction, our analysis begins with the language of the statute. * * * And where the statutory language provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (citation and internal quotation marks omitted).

**Ordinary Meaning**

"In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress 'was dealing with a practical subject in a practical way' and that it intended the terms of the reservation to be understood in 'their ordinary and popular sense.'" Amoco Production Co. v. Southern Ute Tribe, 526 U.S. 865, 873 (1999) (quoting Burke v. Southern Pacific R. Co., 234 U.S. 669, 679 (1914)).

**Construed in Accord with Common-law Meaning**

"It is a well-established rule of construction that '"[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that

Congress means to incorporate the established meaning of these terms."'" Neder v. United States, 527 U.S. 1, 21 (1999) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992), and Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989)).

"'[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" Kolstad v. American Dental Assn., 527 U.S. 526, 539 (1999) (quoting Morissette v. United States, 342 U.S. 246, 263 (1952)).

**Construed in Accord with Past Practice**

"If a given statute is unclear about treating * * * a fact as [an] element [of the offense] or [a] penalty aggravator [in sentencing], it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." Jones v. United States, 526 U.S. 227, 234 (1999).

**Context**

"[T]he meaning of statutory language, plain or not, depends on context." Holloway v. United States, 526 U.S. 1, 7 (1999) (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994), and King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991)).

***Noscitur a Sociis* (Know a Word by the Company It Keeps)**

"Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'" Jones v. United States, 527 U.S. 373, 389 (1999) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).

**Same Language in Same Statute**

A statutory phrase "should ordinarily retain the same meaning wherever used in the same statute * * *." National Aeronautics and Space Admin. v. Federal Labor Relations Authority, 527 U.S. 229, 235 (1999) (agreeing to principle but rejecting argument based on this maxim).

**Express Language in One Section, Silence in Another**

"According to respondents, the presence of this express command in § 802, when coupled with § 803's silence, supports the negative inference that § 803 is *not* to apply to pending cases. * * * Because §§ 802 and 803 address wholly distinct subject matters, [this] negative inference does not arise from the silence of § 803." Martin v. Hadix, 527 U.S. 343, 355, 356 (1999).

**Interpreting Congressional Silence**

"Now and then silence is not pregnant." El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 487 (1999) (explaining that Congress probably failed to provide for tribal-court removal in Price-Anderson Act actions because Congress never expected the situation to arise).

**Construed to Avoid Constitutional Questions**

"'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" Jones v. United States, 526 U.S. 227, 239 (1999) (quoting United States *ex rel.* Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

"[W]e must 'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999) (quoting Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 345 (1998), and Tull v. United States, 481 U.S. 412, 417, n.3 (1987)).

**Chevron Deference**

"The Secretary's reading of [the statute] frankly seems to us the more natural - but it is in any event well within the bounds of reasonable interpretation, and hence entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984)." Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449, 453 (1999).

"But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency, see Chevron [U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837,] 842-843 [1984]. We can only enforce the clear limits that the 1996 Act contains * * *." AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 397 (1999).

"Under Chevron, if a court determines that 'Congress has directly

spoken to the precise question at issue,' then 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" United States v. Haggar Apparel Co., 526 U.S. 380, 392 (1999) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984)).

"If, however, the agency's statutory interpretation 'fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give [that] judgment "controlling weight."'" United States v. Haggar Apparel Co., 526 U.S. 380, 392 (1999) (quoting NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995)).

"A statute may be ambiguous, for purposes of Chevron analysis, without being inartful or deficient." United States v. Haggar Apparel Co., 526 U.S. 380, 392 (1999).

"For purposes of the Chevron analysis, * * *[a statute is ambiguous if] the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." United States v. Haggar Apparel Co., 526 U.S. 380, 393 (1999).

"[Chevron] [d]eference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*." United States v. Haggar Apparel Co., 526 U.S. 380, 391 (1999).

"Because the Court of Appeals confronted questions implicating 'an agency's construction of the statute which it administers,' the court should have applied the principles of deference described in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). Thus, the court should have asked whether 'the statute is silent or ambiguous with respect to the specific issue' before it; if so, 'the question for the court [was] whether the agency's answer is based on a permissible construction of the statute.' Id. at 843." INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999).

"[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.' INS v. Abudu, 485 U.S. 94, 110 (1998). A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such

diplomatic repercussions." INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999).

The Board of Immigration Appeals "should be accorded Chevron deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication * * *." INS v. Aguirre-Aguirre, 526 U. S. 415, 425 (1999) (internal quotation marks omitted).

"[W]e have no occasion to review the call for deference here [to a construction of the agency's statutory jurisdiction first advanced in the government's Supreme Court brief], the interpretation urged in [that] brief being clearly the better reading of the statute under ordinary principles of construction." California Dental Assn. v. FTC, 526 U.S. 756, 766 (1999).

**Deference to Agency's Construction of Statute**

"In resolving this issue, the [Federal Labor Relations] Authority was interpreting the statute Congress directed it to implement and administer. 5 U.S.C. § 7105. The Authority's conclusion is certainly consistent with the [statute] and, to the extent the statute and congressional intent are unclear, we may rely on the Authority's reasonable judgment." National Aeronautics and Space Admin. v. Federal Labor Relations Authority, 527 U.S. 229, 234 (1999).

**Equitable Exceptions to Statutes**

"'[A]s a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text[.'] Although trust law may offer a 'starting point' for analysis in some situations, it must give way if it is inconsistent with 'the language of the statute, its structure, or its purposes.'" Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999) (quoting Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. 365, 376 (1990), and Varity Corp. v. Howe, 516 U.S. 489, 497 (1996)).

**Construction of Indian Treaties**

"[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

"Indian treaties are to be interpreted liberally in favor of the Indians * * * and * * * any ambiguities are to be resolved in their favor." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999) (citations omitted).

"[R]eview of the history and the negotiations of the agreements is central to the interpretation of [Indian] treaties." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).

**Construction of Foreign Treaty**

"'[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.'" El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999) (quoting Air France v. Saks, 470 U.S. 392, 399 (1985)).

"'Because a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux preparatoires*) and the postratification understanding of the contracting parties.'" El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999) (quoting Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996)).

"Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999).

"The 'opinions of our sister signatories,' we have observed, are 'entitled to considerable weight.'" El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999) (quoting Air France v. Saks, 470 U.S. 392, 404 (1985)).

III. SUPREME COURT PRACTICE

**Argument Raised Too Late**

"Respondent advanced this argument for the first time in his Brief in Opposition to Certiorari in this Court, * * * having failed to raise it before either the BIA or the Court of Appeals. We decline to address the argument at this late stage." INS v. Aguirre-Aguirre, 526 U.S. 415, 432 (1999).

**Argument Not Raised Below**

"Because this argument was neither raised nor considered below, we decline to consider it." Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 n.3 (1999).

**Argument Not Raised in Brief in Opp.**

"'Under this Court's Rule 15.2, a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari "*may* be deemed waived."' [Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 n.13 (1996) (emphasis added)]. But we have not done so when the issue not raised in the brief in opposition was 'predicate to an intelligent resolution of the question presented.' Ohio v. Robinette, 519 U. S. 33, 38 (1996) (internal quotation marks omitted); see also Caterpillar, 519 U.S., at 75, n.13. In those instances, we have treated the issue not raised in opposition as fairly included within the question presented. This is certainly such a case. Assessing the error (including whether there was error at all) is essential to an intelligent resolution of whether any such error was harmless. Moreover, here, as in Caterpillar, '[t]he parties addressed the issue in their briefs and at oral argument.' Ibid. By contrast, in the cases that the dissent looks to for support for its position, there were good reasons to decline to exercise our discretion. In Roberts v. Galen of Va., Inc., 525 U.S. 249, 253-254 (1999) (*per curiam*), the 'claims [we declined to consider did] not appear to have been sufficiently developed below for us to assess them,' and in South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 171 (1999), the argument respondent raised for the first time in its merits brief was 'so far-reaching an argument' that '[w]e would normally expect notice [of it],' especially when, unlike this case, the respondent's argument did not appear to have been raised or considered below." Jones v. United States, 527 U.S. 373, 397 n.12 (1999).

**Court Considers Issues Not Raised**

"'On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered "fairly subsumed" by the actual questions presented.' Gilmer v. Interstate/ Johnson Lane Corp., 500 U.S. 20, 37 (1991) (Stevens, J., dissenting) (citing cases). The Court has not always confined itself to the set of issues addressed by the parties." Kolstad v. American Dental Assn., 527 U. S. 526, 540 (1999).

**Original Jurisdiction**

"We decline to exercise our original jurisdiction" over motions by the Federal Republic of Germany seeking "enforcement of an order issued this afternoon by the International Court of Justice * * * directing the United States to prevent [a state's] scheduled execution of" a German citizen. Federal Republic of Germany v. United States, 526 U.S. 111, 111-

112 (1999) (*per curiam*).

"[I]t is doubtful that Art. III, § 2, cl. 2 provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul." Federal Republic of Germany v. United States, 526 U.S. 111, 112 (1999) (*per curiam*).

"With respect to the action against the State of Arizona, * * * a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles." Federal Republic of Germany v. United States, 526 U.S. 111, 112 (1999) (*per curiam*).

**Reviewing State-Law Decisions**

"We do not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law." UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358, 368 (1999) (citing Runyon v. McCrary, 427 U. S. 160, 181-182 (1976)).

**Summary Reversal**

"[A] summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law." Maryland v. Dyson, 527 U.S. 465, 467 n.* (1999) (*per curiam*).

IV. PROCEDURAL DOCTRINES

**Administrative Law**

"[T]he traditional rule of administrative law [is] that an agency's refusal to reopen a closed case is generally committed to agency discretion by law and therefore exempt from judicial review." Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449, 455 (1999) (internal quotation marks omitted).

"[T]he judicial-review provision of the Administrative Procedure Act, 5 U.S.C. § 706[,] * * * is not an independent grant of subject-matter jurisdiction." Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449, 457-458 (1999) (citing Califano v. Sanders, 430 U.S. 99 (1977)).

**All Writs Act**

"While the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process 'in aid of' the issuing court's jurisdiction." Clinton v. Goldsmith, 526 U.S. 529, 534 (1999).

"'The All Writs Act . . . is not an independent grant of appellate jurisdiction.'" Clinton v. Goldsmith, 526 U.S. 529, 535 (1999) (quoting 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3932, p. 470 (2d ed. 1996)).

"The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." Clinton v. Goldsmith, 526 U.S. 529, 537 (1999).

"Although the United States suggests that there is statutory support for the present injunction in the All Writs Act, 28 U.S.C. § 1651, * * * we have said that the power conferred by the predecessor of that provision is defined by 'what is the usage, and what are the principles of equity applicable in such a case.'" Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 326 n.8 (1999) (quoting De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 219 (1945)).

**Allegations Presumed True**

"Petitioners' amended complaint was dismissed for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). Accordingly, we accept the allegations contained in their complaint as true for purposes of this case." Sutton v. United Airlines, Inc., 527 U.S. 471, 475 (1999).

**Appealable Final Orders**

"[A]n order imposing sanctions on an attorney pursuant to Federal Rule of Civil Procedure 37(a)(4) is [not] a final decision * * *, even where, as here, the attorney no longer represents a party in the case." Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 200 (1999).

"[A] decision is not final, ordinarily, unless it '"ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."'" Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 204 (1999) (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 521-522 (1988), and Catlin v. United States, 324 U.S. 229, 233 (1945)).

"'That small category [of orders appealable under the collateral order doctrine] includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.'" Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 204 (1999) (quoting Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995)).

**Appellee's Failure to Cross-Appeal**

"Absent a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court,' but may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 479 (1999) (quoting United States v. American Railway Express Co., 265 U.S. 425, 435 (1924)).

"[The cross-appeal requirement] is not there to penalize parties who fail to assert their rights, but is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not." El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 481-482 (1999).

**Avoiding Constitutional Issues**

"'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" Department of Commerce v. United States House of Representatives, 525 U.S. 316, 343 (1999) (quoting Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)).

"'[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.'" Department of Commerce v. United States House of Representatives, 525 U.S. 316, 344 (1999) (quoting Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

**Brady Duty**

"In Brady [v. Maryland, 373 U.S. 83 (1963),] this Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt

or to punishment, irrespective of the good faith or bad faith of the prosecution.' 373 U.S., at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97,107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985). Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *Id*., at 682; see also Kyles v. Whitley, 514 U.S. 419, 433-434 (1995). Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' *Id*., at 438. In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.' Kyles, 514 U.S., at 437." Strickler v. Greene, 527 U. S. 263, 280-281 (1999).

"There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-282 (1999).

**Class Actions**

"'Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical . . . of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").'" Ortiz v. Fibreboard Corp., 527 U.S. 815, 828 n.6 (1999) (quoting Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613 (1997)).

"But the class certification issues are, as they were in Amchem [Products, Inc. v. Windsor, 521 U.S. 591 (1997)], 'logically antecedent' to Article III concerns, 521 U.S., at 612, and themselves pertain to statutory standing, which may properly be treated before Article III standing, see Steel Co. [v. Citizens For Better Environment, 523 U.S. 83, 92 (1998)]." Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999).

"In contrast to class actions brought under subdivision (b)(3), in cases brought under subdivision (b)(1), Rule 23 does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right." Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 n.13 (1999).

"[A]pplicants for contested certification * * * [of "a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B)"] must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members." Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

"[C]haracteristics [that are] presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory action" are:

"The first and most distinctive characteristic is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. * * *

"Second, the whole of the inadequate fund was to be devoted to the overwhelming claims. * * *

"Third, the claimants identified by a common theory of recovery were treated equitably among themselves." Ortiz v. Fibreboard Corp., 527 U.S. 815, 838-839, 842 (1999).

"Assuming, *arguendo*, that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses." Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999).

"[W]here a case presents a limited fund, 'it is impossible to make a fair distribution of the fund or limited liability to all members of the multitude except in a single proceeding where the claim of each can be adjudicated with due reference to the claims of the rest. The fund or limited liability is like a mince pie, which can not be satisfactorily divided until the carver counts the number of persons at the table.'" Ortiz v. Fibreboard Corp., 527 U.S. 815, 840-841 n.18 (1999) (quoting Z. Chafee, Bills of Peace with Multiple Parties, 45 Harv. L. Rev. 1297, 1311 (1932)).

"[M]andatory class treatment through representative actions on a limited fund theory was justified with reference to a 'fund' with a definitely ascertained limit, all of which would be distributed to satisfy

all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution." Ortiz v. Fibreboard Corp., 527 U.S. 815, 841 (1999).

"The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model." Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999).

"It is simply implausible that the Advisory Committee, so concerned about the potential difficulties posed by dealing with mass tort cases under Rule 23(b)(3), with its provisions for notice and the right to opt out, see Rule 23(c)(2), would have uncritically assumed that mandatory versions of such class actions, lacking such protections, could be certified under Rule 23(b)(1)(B)." Ortiz v. Fibreboard Corp., 527 U.S. 815, 844 (1999) (footnote omitted).

"[M]andatory class actions aggregating damage claims implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,' Hansberry v. Lee, 311 U.S. 32, 40 (1940), it being 'our "deep-rooted historic tradition that everyone should have his own day in court,"' Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981))." Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999).

"When a district court, as here, certifies for class action settlement only, the moment of certification requires 'heightene[d] attention,' Amchem [Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997)], to the justifications for binding the class members." Ortiz v. Fibreboard Corp., 527 U.S. 815, 848-849 (1999).

"[A] class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999).

"While we have not ruled out the possibility under the present Rule of a mandatory class to deal with mass tort litigation on a limited fund rationale, we are not free to dispense with the safeguards that have protected mandatory class members under that theory traditionally." Ortiz v. Fibreboard Corp., 527 U.S. 815, 862 (1999).

"[T]he settlement's fairness under Rule 23(e) does not dispense with the requirements of Rule 23(a) and (b)." Ortiz v. Fibreboard Corp., 527 U. S. 815, 863-864 (1999).

**Concessions**

A "purported concession [that] was made only for the sake of argument and was treated as such by the District Court" does not "amount[] to a true concession." Department of Commerce v. United States House of Representatives, 525 U.S. 316, 330 n.2 (1999).

"[L]itigants cannot bind us to an erroneous interpretation of federal legislation * * *." National Aeronautics and Space Admin. v. Federal Labor Relations Authority, 527 U.S. 229, 245 n.9 (1999).

**Comity**

"Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999).

**Cross-Examination**

"[C]ross-examination [is] the 'greatest legal engine ever invented for the discovery of truth.'" Lilly v. Virginia, 527 U.S. 116, 124 (1999) (plurality opinion) (quoting California v. Green, 399 U.S. 149, 158 (1970) (footnote and citation omitted)).

**Deciding Constitutional Cases Narrowly**

"It is * * * an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 184 (1999).

**Equity Powers of Federal Courts**

"'Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73).'" Grupo Mexicano de

Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (quoting A. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928)).

The Supreme Court "follow[ed] the well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property." Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 321 (1999).

"We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief." Grupo Mexicano de Desarrollo S. A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999).

"[C]ourts of equity will '"go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."'" Grupo Mexicano de Desarrollo S. A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 326 (1999) (quoting United States v. First Nat. City Bank, 379 U.S. 378, 383 (1965), and Virginian R. Co. v. Railway Employees, 300 U.S. 515, 552 (1937)).

"[T]he equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence. Even when sitting as a court in equity, we have no authority to craft a 'nuclear weapon' of the law like the one advocated here." Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332 (1999).

**Expert Testimony Standards**

"We conclude that Daubert's general holding - setting forth the trial judge's general 'gatekeeping' obligation [requiring an inquiry into both relevance and reliability] - applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." Kumho Tire Co., Ltd. v. Carmichael, 526 U. S. 137, 141 (1999) (referring to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)).

"[T]he test of reliability [of an expert's testimony] is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141-142 (1999) (emphasis in

original) (referring to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993)).

"The objective of [Daubert's gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999).

"[W]here [expert] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, * * * the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 149 (1999) (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993)).

"[W]hether Daubert's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 153 (1999) (referring to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)).

"[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999).

"[A] court of appeals is to apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or exclude expert testimony." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999) (internal quotation marks and brackets omitted).

**Harmless Error**

"[A] federal court may grant habeas relief based on trial error only when that error '"had substantial and injurious effect or influence in determining the jury's verdict."'" Calderon v. Coleman, 525 U.S. 141, 145 (1998) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), and Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

"Our precedents establish, as a general rule, that a court's failure to give a defendant advice required by the Federal Rules is a sufficient basis for collateral relief only when the defendant is prejudiced by the

court's error." Peguero v. United States, 526 U.S. 23, 27 (1999).

"[W]e hold that petitioner is not entitled to habeas relief based on a [Federal Rules of Criminal Procedure,] Rule 32(a)(2) violation when he had independent knowledge of the right to appeal and so was not prejudiced by the trial court's omission." Peguero v. United States, 526 U.S. 23, 29-30 (1999).

"We hold that the harmless-error rule * * * applies to * * * the District Court['s error] in refusing to submit the issue of materiality to the jury with respect to those charges involving tax fraud." Neder v. United States, 527 U.S. 1, 4 (1999).

"[W]e have recognized a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.' Arizona v. Fulminante, 499 U.S. 279, 309 (1991); see Chapman v. California, 386 U.S. [18,] 23 (1967). Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome. For all other constitutional errors, reviewing courts must apply Rule 52(a)'s harmless-error analysis and must 'disregar[d]' errors that are harmless 'beyond a reasonable doubt.' *Id.*, at 24." Neder v. United States, 527 U.S. 1, 7 (1999).

"We have recognized that 'most constitutional errors can be harmless.' [Arizona v. Fulminante, 499 U.S. 279, 306 (1991)]. '[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.' Rose v. Clark, 478 U.S. 570, 579 (1986). Indeed, we have found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.' Johnson v. United States, 520 U.S. 461, 468 (1997)." Neder v. United States, 527 U.S. 1, 8 (1999).

"In Chapman v. California, 386 U.S. 18 (1967), we set forth the test for determining whether a constitutional error is harmless. That test, we said, is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *Id.*, at 24." Neder v. United States, 527 U.S. 1, 15 (1999).

"T]he harmless-error inquiry [is]: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error? To set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public

to ridicule it.'" Neder v. United States, 527 U.S. 1, 18 (1999) (quoting R. Traynor, The Riddle of Harmless Error 50 (1970)).

"Harmless-error review of a death sentence may be performed in at least two different ways. An appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict or it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined." Jones v. United States, 527 U.S. 373, 402 (1999).

**Jurisdiction: Subject-Matter and Personal**

"Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999).

"We hold that in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy. Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter, but there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999).

"Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level. * * * Personal jurisdiction, on the other hand, 'represents a restriction on judicial power . . . as a matter of individual liberty.' Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). Therefore, a party may insist that the limitation be observed, or he may forgo that right, effectively consenting to the court's exercise of adjudicatory authority." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583-584 (1999).

**Jury Instructions**

"[T]he Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381 (1999).

"Our decisions repeatedly have cautioned that instructions must be

evaluated not in isolation but in the context of the entire charge." Jones v. United States, 527 U.S. 373, 391 (1999).

**Jury Instructions: Objections to**

"As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an accurate statement of the law." Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999).

"While an objection in a directed verdict motion before the jury retires can preserve a claim of error, Leary v. United States, 395 U.S. 6, 32 (1969), objections raised after the jury has completed its deliberations do not. See Singer v. United States, 380 U.S. 24, 38 (1965); Lopez v. United States, 373 U.S. 427, 436 (1963); cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-239 (1940). Nor does a request for an instruction before the jury retires preserve an objection to the instruction actually given by the court." Jones v. United States, 527 U.S. 373, 388 (1999).

**Jury Trial: Right to**

"[W]e have recognized that 'suits at common law' include 'not merely suits, which the *common* law recognized among its old and settled proceedings, but [also] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.' Parsons v. Bedford, 3 Pet. 433, 447 (1830). The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action '"analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty."'" Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708-709 (1999) (quoting Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998), and Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 42 (1989)) (emphasis in original).

"In actions at law, issues that are proper for the jury must be submitted to it 'to preserve the right to a jury's resolution of the ultimate dispute,' as guaranteed by the Seventh Amendment." Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 718 (1999) (quoting Markman v. Westview Instruments, Inc., 517 U.S. 370, 377 (1996)).

"In actions at law predominantly factual issues are in most cases allocated to the jury." Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720 (1999).

"[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question. * * * [I]n actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury." Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720-721 (1999).

**Law v. Equity**

"Damages for a constitutional violation are a legal remedy." Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710 (1999).

"Even when viewed as a simple suit for just compensation, we believe [plaintiff's] action sought essentially legal relief." Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710 (1999).

**Materiality**

"In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" Neder v. United States, 527 U.S. 1, 16 (1999) (quoting United States v. Gaudin, 515 U.S. 506, 509 (1995), and Kungys v. United States, 485 U.S. 759, 770 (1988) (internal quotation marks omitted)).

"[M]ateriality is an element of a 'scheme or artifice to defraud' under the federal mail fraud (18 U.S.C. § 1341), wire fraud (§ 1343), and bank fraud (§ 1344) statutes." Neder v. United States, 527 U.S. 1, 20 (1999).

**Military Correction Boards**

"'[D]ecisions [of Boards of Correction for Military Records] are subject to judicial review [by federal courts] and can be set aside if they are arbitrary, capricious, or not based on substantial evidence.'" Clinton v. Goldsmith, 526 U.S. 529, 539 (1999) (quoting Chappell v. Wallace, 462 U. S. 296, 303 (1983)).

**Mootness**

"Because the State's 1998 law provides that the State will revert to the 1997 districting plan upon a favorable decision of this Court, * * * this case is not moot." Hunt v. Cromartie, 526 U.S. 541, 546 n.1 (1999).

**Plain Error Doctrine**

"Under [review for plain error], relief is not warranted unless there has been (1) error, (2) that is plain, and (3) affects substantial rights. * * * Appellate review under the plain-error doctrine, of course, is circumscribed and we exercise our power under Rule 52(b) sparingly. * * * An appellate court should exercise its discretion to correct plain error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." Jones v. United States, 527 U.S. 373, 389 (1999) (citations, internal quotation marks, and brackets omitted).

**Preliminary Injunctions**

"Preliminary injunctions are, after all, appealable as of right." El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 482 (1999) (citing 28 U.S. C. 1292(a)(1) and noting that Federal Rules of Appellate Procedure 4 and 26 (b) cover such appeals).

"Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter. We have dismissed appeals in such circumstances. See, *e.g.*, Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 588-589 (1926). We agree with petitioners, however, that their potential cause of action against the injunction bond preserves our jurisdiction over this appeal. Cf. Liner v. Jafco, Inc., 375 U.S. 301, 305-306 (1964)." Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 314 (1999).

Because "[t]he resolution of the merits is immaterial to the validity of [defendants'] potential claim on the bond," defendants' "failure to appeal the permanent injunction does not forfeit their claim that the preliminary injunction was wrongful." Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 317 (1999).

"We stated that '[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally,' but that the injunction in that case dealt 'with a matter lying wholly outside the issues in the suit.'" Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 326-327 (1999) (quoting De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 220 (1945)).

"[T]he District Court had no authority to issue a preliminary injunction preventing [defendants] from disposing of their assets pending adjudication of [plaintiffs'] contract claim for money damages." Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 333

(1999).

**Removal**

"[A] named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-348 (1999) (quoting 28 U.S.C. 1446(b)).

"It is the general rule that an action may be removed from state court to federal court only if a federal district court would have original jurisdiction over the claim in suit. See 28 U.S.C. § 1441(a). To remove a case as one falling within federal-question jurisdiction, the federal question ordinarily must appear on the face of a properly pleaded complaint; an anticipated or actual federal defense generally does not qualify a case for removal. See Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908). Suits against federal officers are exceptional in this regard. Under the federal officer removal statute, suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal question element is met if the defense depends on federal law." Jefferson County, Ala. v. Acker, 527 U.S. 423, 430-431 (1999).

"To qualify for removal, an officer of the federal courts must both raise a colorable federal defense, see Mesa v. California, 489 U.S. 121, 139 (1989), and establish that the suit is '*for* a[n] act under color of office,' 28 U.S.C. § 1442(a)(3) (emphasis added). To satisfy the latter requirement, the officer must show a nexus, a '"causal connection" between the charged conduct and asserted official authority.' Willingham v. Morgan, 395 U.S. 402, 409 (1969) (quoting Maryland v. Soper (No. 1), 270 U.S. 9, 33 (1926))." Jefferson County, Ala. v. Acker, 527 U.S. 423, 431 (1999).

**Ripeness**

"When * * * there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements." AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 386 (1999).

**Retroactivity**

The Prison Litigation Reform Act ("PLRA") "limits attorney's fees with respect to postjudgment monitoring services performed after the PLRA's effective date but it does not so limit fees for postjudgment monitoring

performed before the effective date." Martin v. Hadix, 527 U.S. 343, 347 (1999).

"[A] recurring question in the law [is]: When should a new federal statute be applied to pending cases? See, *e.g.*, Lindh v. Murphy, 521 U.S. 320 (1997); Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939 (1997). To answer this question, we ask first 'whether Congress has expressly prescribed the statute's proper reach.' Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994). If there is no congressional directive on the temporal reach of a statute, we determine whether the application of the statute to the conduct at issue would result in a retroactive effect. *Ibid*. If so, then in keeping with our 'traditional presumption' against retroactivity, we presume that the statute does not apply to that conduct. *Ibid*. See also Hughes Aircraft Co. v. United States *ex rel.* Schumer, *supra*, at 946." Martin v. Hadix, 527 U.S. 343, 352 (1999).

"[T]he usual rule [is] that legislation is deemed to be prospective." Martin v. Hadix, 527 U.S. 343, 357 (1999).

"[A]s applied to work performed after the effective date of the PLRA, the PLRA has future effect on future work; this does not raise retroactivity concerns." Martin v. Hadix, 527 U.S. 343, 360 (1999).

**Role of Government Attorney**

"[T]he United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" Strickler v. Greene, 527 U.S. 263, 281 (1999) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

**Service of Process**

"An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347 (1999).

"Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999).

"In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999).

"Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 351 (1999).

**Sixth Amendment: Confrontation Clause**

"[T]he accused's Sixth Amendment right 'to be confronted with the witnesses against him' was violated by admitting into evidence at his trial a nontestifying accomplice's entire confession that contained some statements against the accomplice's penal interest and others that inculpated the accused." Lilly v. Virginia, 527 U.S. 116, 120 (1999).

"'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" Lilly v. Virginia, 527 U.S. 116, 123-124 (1999) (plurality opinion) (quoting Maryland v. Craig, 497 U.S. 836, 845 (1990)).

"[T]he question whether the statements fall within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law." Lilly v. Virginia, 527 U.S. 116, 125 (1999) (plurality opinion).

"We now describe a hearsay exception as 'firmly rooted' if, in light of 'longstanding judicial and legislative experience,' Idaho v. Wright, 497 U.S. 805, 817 (1990), it rest[s] on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the "substance of the constitutional protection."' [Ohio v.] Roberts, 448 U.S. [56,] 66 [(1980)] (quoting Mattox [v. United States], 156 U.S. [237,] 244 [(1895)])." Lilly v. Virginia, 527 U.S. 116, 126 (1999) (plurality opinion).

"Established practice, in short, must confirm that statements falling within a category of hearsay inherently 'carr[y] special guarantees of credibility' essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony." Lilly v. Virginia, 527 U.S. 116, 126 (1999) (plurality opinion) (quoting White v. Illinois, 502 U.S. 346, 356 (1992)).

"[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." Lilly v. Virginia, 527 U.S. 116, 134 (1999) (plurality opinion) (footnote omitted).

"[W]hen deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause." Lilly v. Virginia, 527 U.S. 116, 137 (1999) (plurality opinion).

**Standards of Appellate Review**

"[W]hen the Federal Circuit reviews findings of fact made by the Patent and Trademark Office," it "must use the framework set forth in" section 706 of the Administrative Procedure Act, 5 U.S.C. 706. Dickinson v. Zurko, 527 U.S. 150, 152 (1999).

"Federal Rule of Civil Procedure 52(a) * * * says that the appellate court shall set aside those findings only if they are 'clearly erroneous.' Traditionally, this court/court standard of review has been considered somewhat stricter (*i.e.*, allowing somewhat closer judicial review) than the APA's court/agency standards." Dickinson v. Zurko, 527 U.S. 150, 153 (1999) (citing 2 K. Davis & R. Pierce, Administrative Law Treatise § 11.2, p. 174 (3d ed. 1994)).

"This Court has described the APA court/agency 'substantial evidence' standard as requiring a court to ask whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.' Consolidated Edison [Co. v. NLRB,] 305 U.S. [197,] 229 [(1938)]. It has described the court/court 'clearly erroneous' standard in terms of whether a reviewing judge has a 'definite and firm conviction' that an error has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). And it has suggested that the former is somewhat less strict than the latter. Universal Camera [Corp. v. NLRB,] 340 U.S. [474,] 477, 488 [(1951)](analogizing 'substantial evidence' test to review of jury findings and stating that appellate courts must respect agency expertise). At the same time the Court has stressed the importance of not simply rubber-stamping agency factfinding. *Id.*, at 490. The APA requires meaningful review; and its enactment meant stricter judicial review of agency factfinding than Congress believed some courts had previously conducted. *Ibid.*" Dickinson v. Zurko, 527 U.S. 150, 162 (1999).

"A reviewing court reviews an agency's reasoning to determine whether it is 'arbitrary' or 'capricious,' or, if bound up with a record-

based factual conclusion, to determine whether it is supported by 'substantial evidence.' *E.g.*, SEC v. Chenery Corp., 318 U.S. 80, 89-93 (1943)." Dickinson v. Zurko, 527 U.S. 150, 164 (1999).

**Standing**

"We have repeatedly noted that in order to establish Article III standing, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" Department of Commerce v. United States House of Representatives, 525 U.S. 316, 329 (1999) (quoting Allen v. Wright, 468 U. S. 737, 751 (1984)).

"To prevail on a Federal Rule of Civil Procedure 56 motion for summary judgment - as opposed to a motion to dismiss - however, mere allegations of injury are insufficient. Rather, a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits." Department of Commerce v. United States House of Representatives, 525 U.S. 316, 329 (1999) (citing Lujan v. National Wildlife Federation, 497 U.S. 871, 884 (1990)).

"[The] presence of one party with standing assures that [the] controversy before Court is justiciable." Department of Commerce v. United States House of Representatives, 525 U.S. 316, 330 (1999) (citing Director, Office of Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297, 303-305 (1983)).

By enacting a statute providing that "any person aggrieved" can bring suit, "Congress has eliminated any prudential concerns in this case * * *." Department of Commerce v. United States House of Representatives, 525 U.S. 316, 328 (1999).

A voter's "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing. * * * In addition, * * * [the voter] meets the second and third requirements of Article III standing. There is undoubtedly a 'traceable' connection between the use of sampling in the decennial census and Indiana's expected loss of a Representative, and there is a substantial likelihood that the requested relief - a permanent injunction against the proposed uses of sampling in the census - will redress the alleged injury." Department of Commerce v. United States House of Representatives, 525 U.S. 316, 331, 332 (1999).

"Appellees have also established standing on the basis of the expected effects of the use of sampling in the 2000 census on intrastate

redistricting. * * * [The] expected intrastate vote dilution satisfies the injury-in-fact, causation, and redressibility requirements." Department of Commerce v. United States House of Representatives, 525 U.S. 316, 332, 334 (1999).

**Summary Judgment**

"Summary judgment * * * is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Hunt v. Cromartie, 526 U.S. 541, 549 (1999).

"Summary judgment in favor of the party with the burden of persuasion * * * is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." Hunt v. Cromartie, 526 U.S. 541, 553 (1999) (footnote omitted).

"Just as summary judgment is rarely granted in a plaintiff's favor in cases where the issue is a defendant's racial motivation, such as disparate treatment suits under Title VII or racial discrimination claims under 42 U.S.C. § 1981, the same holds true for racial gerrymandering claims of the sort brought here." Hunt v. Cromartie, 526 U.S. 541, 553 n.9 (1999).

"Summary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial.'" Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 805-806 (1999) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

**Venue**

"[V]enue in a prosecution for using or carrying a firearm 'during and in relation to any crime of violence,' in violation of 18 U.S.C. § 924 (c)(1), is proper in any district where the crime of violence was committed, even if the firearm was used or carried only in a single district." United States v. Rodriguez-Moreno, 526 U.S. 275, 276 (1999).

"In * * * [determining the *locus delicti* of the charged offense], a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999) (footnote omitted).

"Where venue is appropriate for the underlying crime of violence, so

too it is for the [18 U.S.C.] § 924(c)(1) [firearm] offense." United States v. Rodriguez-Moreno, 526 U.S. 275, 282 (1999).

**Void for Vagueness**

"'It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .'" City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (Opinion of Stevens, J.) (quoting Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966)).

"The broad sweep of [Chicago's anti-loitering] ordinance * * * violates 'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" City of Chicago v. Morales, 527 U.S. 41, 60 (1999) (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

V. SUBSTANTIVE LAW DOCTRINES

**Americans with Disabilities Act**

"[P]ursuit, and receipt, of SSDI [Social Security Disability Insurance] benefits does not automatically estop the recipient from pursuing an ADA [American with Disabilities Act] claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. To survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.'" Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 797-798 (1999) (quoting 42 U.S.C. 12111(8)).

"The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity. See, *e.g.*, 42 U.S.C. §§ 12101(a)(8), (9)." Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 801 (1999).

"[T]he determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses." Sutton v. United Airlines, Inc., 527 U.S. 471, 475 (1999).

"[T]o fall within this definition [of "disability" in the ADA, 42 U. S.C. 12102(2),] one must have an actual disability (subsection (A)), have a record of a disability (subsection (B)), or be regarded as having one (subsection (C))." Sutton v. United Airlines, Inc., 527 U.S. 471, 478 (1999).

"No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101-12102, which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term 'disability.'" Sutton v. United Airlines, Inc., 527 U.S. 471, 479 (1999).

"[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures - both positive and negative - must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999).

"Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently - not potentially or hypothetically - substantially limited in order to demonstrate a disability." Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999).

"[O]ne has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity." Sutton v. United Airlines, Inc., 527 U.S. 471, 488 (1999).

"By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment - such as one's height, build, or singing voice - are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job." Sutton v. United Airlines, Inc., 527 U.S. 471, 490-491 (1999) (emphasis in original).

"The ADA does not define 'substantially limits,' but 'substantially' suggests 'considerable' or 'specified to a large degree.'" Sutton v. United Airlines, Inc., 527 U.S. 471, 491 (1999) (citing Webster's Third New

International Dictionary 2280 (1976)).

"When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. Reflecting this requirement, the EEOC uses a specialized definition of the term 'substantially limits' when referring to the major life activity of working:

'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.' [29 C.F.R.] § 1630.2(j)(3)(i)."

Sutton v. United Airlines, Inc., 527 U.S. 471, 491 (1999).

"As we held in Sutton [v. United Air Lines, Inc.], 527 U.S. [471, 489 (1999)], a person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." Murphy v. United Parcel Service, Inc., 527 U.S. 516, 521-522 (1999).

"[T]o be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job. See [29 C.F.R.] § 1630.2(j)(3)(i) ('The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working')." Murphy v. United Parcel Service, Inc., 527 U.S. 516, 523 (1999).

"[U]nder the Americans with Disabilities Act of 1990, * * * 104 Stat. 327, as amended, 42 U.S.C. § 12101 *et seq.* (1994 ed. and Supp. III), an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation [need not] justify enforcing the regulation solely because its standard may be waived in an individual case." Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 558 (1999).

"While the Act 'addresses substantial limitations on major life activities, not utter inabilities,'" Bragdon v. Abbott, 524 U.S. 624, 641 (1998), it concerns itself only with limitations that are in fact substantial." A "mere difference" is insufficient. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999).

"[M]itigating measures must be taken into account in judging whether an individual possesses a disability." Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999) (citing Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999)).

The ADA imposes a "statutory obligation to determine the existence of disabilities on a case-by-case basis." Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999).

"[T]he Act requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial." Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999).

"Unjustified isolation, we hold, is properly regarded as discrimination based on disability." Olmstead v. L.C., 527 U.S. 581, 597 (1999).

"In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably." Olmstead v. L.C., 527 U.S. 581, 597 (1999).

"[U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." Olmstead v. L.C., 527 U.S. 581, 607 (1999).

The Court rejects "as a matter of precedent and logic" the view that "a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group." Olmstead v. L.C., 527 U.S. 581, 599 n.10 (1999).

**Antitrust Law**

"As this Court has made clear, the Sherman Act's prohibition of '[e]very' agreement 'in restraint of trade,' 26 Stat. 209, as amended, 15 U.S.C. § 1, prohibits only agreements that *unreasonably* restrain trade." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) (emphasis in original).

"[T]he specific legal question before us is whether an antitrust court considering an agreement by a buyer to purchase goods or services from one supplier rather than another should (after examining the buyer's reasons or justifications) apply the *per se* rule if it finds no legitimate business reason for that purchasing decision. We conclude no boycott-related *per se* rule applies and that the plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself." NYNEX Corp. v. Discon, Inc., 525 U. S. 128, 135 (1998).

"To apply the *per se* rule here - where the buyer's decision, though not made for competitive reasons, composes part of a regulatory fraud - * * * would discourage firms from changing suppliers - even where the competitive process itself does not suffer harm." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136-137 (1998).

"The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137 (1998).

"[A]ntitrust law does not permit the application of the *per se* rule in the boycott context in the absence of a horizontal agreement * * *." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 138 (1998).

"'An agreement on output also equates to a price-fixing agreement.'" California Dental Assn. v. FTC, 526 U.S. 756, 777 (1999) (quoting General Leaseways, Inc. v. National Truck Leasing Assn., 744 F.2d 588, 594 (7th Cir. 1984)).

**Armed Services**

The Court of Appeals for the Armed Forces lacked jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), "to enjoin the President and various military officials from dropping [an Air Force officer] from the rolls of the Air Force. * * * [T]hat court's process was neither 'in aid of' its strictly circumscribed jurisdiction to review court-martial findings and sentences under 10 U.S.C. § 867 nor 'necessary or appropriate' in light of a servicemember's alternative opportunities to seek relief." Clinton v. Goldsmith, 526 U.S. 529, 531 (1999).

"[T]he CAAF's independent statutory jurisdiction is narrowly circumscribed. * * * [T]he CAAF is accorded jurisdiction by statute * * * to 'review the record in [specified] cases reviewed by' the service courts

of criminal appeals, 10 U.S.C. §§ 867(a)(2), (3), which in turn have jurisdiction to 'revie[w] court-martial cases,' § 866(a). Since the Air Force's action to drop respondent from the rolls was an executive action, not a 'findin[g]' or 'sentence,' § 867(c), that was (or could have been) imposed in a court-martial proceeding, the elimination of [respondent] from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the 'aid' of the All Writs Act in reviewing it." Clinton v. Goldsmith, 526 U.S. 529, 535 (1999) (footnote omitted).

"[T]he CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguable related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." Clinton v. Goldsmith, 526 U.S. 529, 536 (1999).

**Arbitration**

"[A] general arbitration clause in a collective-bargaining agreement" does not "require[] an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990." Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 72 (1998).

"In collective bargaining agreements * * * there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 78 (1998) (internal quotation marks and brackets omitted).

"[T]he ultimate question for the arbitrator [in collective bargaining agreements] would be not what the parties have agreed to, but what federal law requires; and that is not a question which should be *presumed* to be included within the arbitration requirement." Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 79 (1998) (emphasis in original).

**Bankruptcy**

"[A] debtor's prebankruptcy equity holders may [not], over the objection of a senior class of impaired creditors, contribute new capital and receive ownership interests in the reorganized entity, when that opportunity is given exclusively to the old equity holders under a plan adopted without consideration of alternatives. We hold that old equity holders are disqualified from participating in such a 'new value'

transaction by the terms of 11 U.S.C. § 1129(b)(2)(B)(ii), which in such circumstances bars a junior interest holder's receipt of any property on account of his prior interest." Bank of Nat'l Trust & Sav. Assn. v. 203 N. LaSalle St. Partnership, 526 U.S. 434, 437 (1999).

"[T]he two recognized policies underlying Chapter 11 * * * [are] preserving going concerns and maximizing property available to satisfy creditors." Bank of Nat'l Trust & Sav. Assn. v. 203 N. LaSalle St. Partnership, 526 U.S. 434, 453 (1999).

"A nonrecourse loan requires the Bank to look only to the Debtor's collateral for payment." Bank of Nat'l Trust & Sav. Assn. v. 203 N. LaSalle St. Partnership, 526 U.S. 434, 438 n.3 (1999).

"[O]ne of the [Bankruptcy] Code's innovations [was] to narrow the occasions for courts to make valuation judgments, as shown by its preference for the supramajoritarian class creditor voting scheme in § 1126 (c)." Bank of Nat'l Trust & Sav. Assn. v. 203 N. LaSalle St. Partnership, 526 U.S. 434, (1999).

**Blackstone**

The works of Blackstone "constituted the preeminent authority on English law for the founding generation." Alden v. Maine, 527 U.S. 706, 715 (1999).

**Carjacking**

"The intent requirement of [18 U.S.C.] § 2119[, the federal carjacking statute,] is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car (or, alternatively, if unnecessary to steal the car)." Holloway v. United States, 526 U.S. 1, 12 (1999).

**Census Act**

"[T]he Census Act prohibits the proposed uses of statistical sampling in calculating the population for purposes of apportionment." Department of Commerce v. United States House of Representatives, 525 U.S. 316, 343 (1999).

**Coal Lands Acts**

"We are persuaded that the common conception of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource [and not coalbed methane gas]." Amoco Production Co. v. Southern Ute Tribe, 526 U.S. 865, 874 (1999).

**Commercial Speech**

The statute barring radio and television broadcasters from carrying advertising about privately operated commercial casino gambling, 18 U.S.C. 1304 "may not be applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal." Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 176 (1999).

The Supreme Court employs a four-part test to resolve First Amendment commercial speech challenges:

"'At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.'"

Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U. S. 173, 183 (1999)(quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)).

"The third part of the Central Hudson test asks whether the speech restriction directly and materially advances the asserted governmental interest. 'This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 188 (1999) (quoting Edenfield v. Fane, 507 U.S. 761, 770-771 (1993)).

"The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest - 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best

disposition but one whose scope is in proportion to the interest served.'" Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 188 (1999)(quoting Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

**Continuing Criminal Enterprise, 21 U.S.C. 848**

"[A] jury in a federal criminal case brought under [21 U.S.C.] § 848 must unanimously agree not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" Richardson v. United States, 526 U.S. 813, 815 (1999).

**Contract Construction**

"[A]ny [collective bargaining agreement] requirement to arbitrate [a statutory claim] must be particularly clear." Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 79 (1998).

It is a "canon of construction * * * that an agreement should be interpreted in such fashion as to preserve, rather than destroy, its validity (*ut res magis valeat quam pereat*)." Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 81 (1998).

"[B]y tracking the statutory language, the [union security] clause incorporates all of the refinements that have become associated with that language." Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 46 (1998).

**Criminal Intent: Conditional Intent**

"The core principle that emerges from these sources is that a defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose; '[a]n intent to kill, in the alternative, is nevertheless an intent to kill.'" Holloway v. United States, 526 U.S. 1, 11 (1999) (quoting R. Perkins & R. Boyce, Criminal Law 647 (3d ed. 1982)).

**Customs Regulations**

"[T]he statutes authorizing customs classification regulations are consistent with the usual rule that regulations of an administering agency warrant judicial deference." United States v. Haggar Apparel Co., 526 U.S. 380, 390 (1999).

**Definition: "Administer"**

"'[A]dminister' is consistently defined in purely nondiscretionary terms." Lopez v. Monterey County, 525 U.S. 266, 278 (1999).

**Definition: "Any"**

"[A]lthough the word 'any' is broad, it stretches the imagination to suggest that Congress intended, through the use of this one word, to make the fee limitations applicable to all fee awards." Martin v. Hadix, 527 U. S. 343, 354 (1999).

**Definition: "Arbitrary"**

"A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 46 (1998).

**Definition: "Invalidate"**

"The term 'invalidate' ordinarily means 'to render ineffective, generally without providing a replacement rule or law.'" Humana Inc. v. Forsyth, 525 U.S. 299, 307 (1999).

**Definition: "Supersede"**

"[T]he term 'supersede' ordinarily means 'to displace (and thus render ineffective) while providing a substitute rule.'" Humana Inc. v. Forsyth, 525 U.S. 299, 307 (1999).

**Discriminatory State Taxation**

"[A] discriminatory tax cannot be upheld as compensatory unless the State proves that the special burden that the franchise tax imposes upon foreign corporations is roughly approximate to the special burden on domestic corporations, and that the taxes are similar enough in substance to serve as mutually exclusive proxies for one another." South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 170 (1999) (ellipsis and internal quotation marks omitted).

**Due Process: Procedural**

"[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other

than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

"A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful." West Covina v. Perkins, 525 U.S. 234, 240 (1999).

"'[I]n procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.'" Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 642-643 (1999) (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990) (emphasis deleted)).

"Thus, under the plain terms of the [Due Process] Clause and the clear import of our precedent, a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result." Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 643 (1999).

**Due Process: Property Right**

"Thus, for an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary. Only then does the employee's interest parallel that of the beneficiary of welfare assistance in Goldberg and the recipient of disability benefits in Mathews." American Mfrs. Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 60-61 (1999).

"Patents, however, have long been considered a species of property. * * * As such, they are surely included within the 'property' of which no person may be deprived by a State without due process of law. And if the Due Process Clause protects patents, we know of no reason why Congress might not legislate against their deprivation without due process under § 5 of the Fourteenth Amendment." Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 642 (1999).

Neither "a right to be free from a business competitor's false advertising about its own product," nor "a more generalized right to be

secure in one's business interests" "qualifies as a property right protected by the Due Process Clause." College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 672 (1999).

"The hallmark of a protected property interest is the right to exclude others. That is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 673 (1999) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

**Due Process: Substantive**

"[A] prosecutor [does not] violate[] an attorney's Fourteenth Amendment right to practice his profession when the prosecutor causes the attorney to be searched at the same time his client is testifying before a grand jury." Conn v. Gabbert, 526 U.S. 286, 287 (1999).

"We hold that the Fourteenth Amendment right to practice one's calling is not violated by the execution of a search warrant, whether calculated to annoy or even to prevent consultation with a grand jury witness." Conn v. Gabbert, 526 U.S. 286, 293 (1999).

"[T]he liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation." Conn v. Gabbert, 526 U.S. 286, 291-292 (1999).

"[W]here another provision of the Constitution 'provides an explicit textual source of constitutional protection,' a court must assess a plaintiff's claims under that explicit provision and 'not the more generalized notion of "substantive due process."'" Conn v. Gabbert, 526 U. S. 286, 293 (1999) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

"[T]he Due Process Clause is not merely a 'font of tort law.'" College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 674 (1999) (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

**Due Process: Seizures**

"[T]he Constitution [does not] require[] a State or its local entities to give detailed and specific instructions or advice to owners who seek return of property lawfully seized but no longer needed for police investigation or criminal prosecution." West Covina v. Perkins, 525 U.S. 234, 236 (1999).

"When the police seize property for a criminal investigation, * * * due process does not require them to provide the owner with notice of state law remedies." West Covina v. Perkins, 525 U.S. 234, 240 (1999).

"[W]hen law enforcement agents seize property pursuant to warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return." West Covina v. Perkins, 525 U.S. 234, 240 (1999).

"Once the property owner is informed that his property has been seized, he can turn to these public sources [statutes and case law] to learn about the remedial procedures available to him. The City need not take other steps to inform him of his options." West Covina v. Perkins, 525 U.S. 234, 241 (1999).

"While Memphis Light[, Gas & Water Div. v. Craft, 436 U.S. 1 (1978),] demonstrates that notice of the procedures for protecting one's property interests may be required when those procedures are arcane and are not set forth in documents accessible to the public, it does not support a general rule that notice of remedies and procedures is required." West Covina v. Perkins, 525 U.S. 234, 242 (1999).

**Elections**

"States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." Buckley v. American Const. Law Found., Inc., 525 U.S. 182, 191 (1999).

"[B]allot initiatives do not involve the risk of '*quid pro quo*' corruption present when money is paid to, or for, candidates." Buckley v. American Const. Law Found., Inc., 525 U.S. 182, 203 (1999).

"[N]ecessary or proper ballot access controls" must be separated "from restrictions that unjustifiably inhibit the circulation of ballot-initiative petitions." Buckley v. American Const. Law Found., Inc., 525 U. S. 182, 205 (1999).

**Eleventh Amendment**

"'[T]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts.'" South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 166 (1999) (quoting McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,

Fla. Dept. of Business Regulation, 496 U.S. 18, 31 (1990)).

"Seminole Tribe [of Fla. v. Florida, 517 U.S. 44 (1996),] makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause." Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 636 (1999).

"The Trademark Remedy Clarification Act (TRCA), 106 Stat. 3567, * * * [is not] effective to permit suit against a State for its alleged misrepresentation of its own product * * * because the TRCA [does not] effect[] a constitutionally permissible abrogation of state sovereign immunity, or because the TRCA [does not] operate[] as an invitation to waiver of such immunity which is automatically accepted by a State's engaging in the activities regulated by the Lanham Act." College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 668-669 (1999).

"Concluding, for the foregoing reasons, that the sovereign immunity of the State of Florida was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce, we hold that the federal courts are without jurisdiction to entertain this suit against an arm of the State of Florida." College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 691 (1999).

"Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more: It repudiated the central premise of Chisholm [v. Georgia, 2 Dall. 419 (1793),] that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union." College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 669 (1999).

"While this immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment - an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Second, a State may waive its sovereign immunity by consenting to suit. Clark v. Barnard, 108 U.S. 436, 447-448 (1883)." College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 670 (1999).

"[O]ur 'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.' Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985). Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273, 284 (1906), or else if the State makes a 'clear declaration' that it intends to submit itself to our jurisdiction, Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944). See also Pennhurst State School and Hospital v. Halderman, 465 U.S. [89, 99 (1984)] (State's consent to suit must be 'unequivocally expressed'). Thus, a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. Smith v. Reeves, 178 U.S. 436, 441-445 (1900). Nor does it consent to suit in federal court merely by stating its intention to 'sue and be sued,' Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn., 450 U.S. 147, 149-150 (1981) (*per curiam*), or even by authorizing suits against it '"in any court of competent jurisdiction,"' Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 577-579 (1946). We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit. Beers v. Arkansas, [20 How. 527 (1858)]." College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 675-676 (1999).

"[A] State's express waiver of sovereign immunity [must] be unequivocal." College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 680 (1999).

**EMTALA**

To recover in a suit under the Emergency Medical Treatment and Active Labor Act, as amended, 42 U.S.C. 1395dd, the plaintiff patient does not have to "prove that the hospital acted with an improper motive in failing to stabilize her." Roberts v. Galen of Va., Inc., 525 U.S. 249, 250 (1999) (*per curiam*).

**Environmental Law**

"Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999).

**Equal Protection**

"We have repeatedly held that 'a classification neither involving

fundamental rights nor proceedings along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose.'" Central State Univ. v. American Assn. of Univ. Professors, Central State Univ. Chapter, 526 U.S. 124, 127-128 (1999) (*per curiam*) (quoting Heller v. Doe, 509 U.S. 312, 319-321 (1993)).

"'A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification.'" Central State Univ. v. American Assn. of Univ. Professors, Central State Univ. Chapter, 526 U.S. 124, 128 (1999) (*per curiam*) (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)).

"[A] state law requiring public universities to develop standards for professors' instructional workloads and exempting those standards from collective bargaining" does not violate equal protection. Central State Univ. v. American Assn. of Univ. Professors, Central State Univ. Chapter, 526 U.S. 124, 125 (1999) (*per curiam*).

**ERISA**

An employer did not violate ERISA "by amending the Plan to provide for an early retirement program and a noncontributory benefit structure." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 435 (1999).

"ERISA's vesting requirement is met if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable, assuming that such are not limited to a certain percentage of benefits depending on the employee's years of service. * * * The vesting provision sets the minimum level of benefits an employee must receive after accruing specified years of service." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 441 (1999) (citation and internal quotation marks omitted).

"[W]e reject [the] assertion that a state regulation must satisfy all three McCarran-Ferguson factors in order to 'regulate insurance' under ERISA's saving clause [29 U.S.C. 1144(b)(2)(A)]." UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358, (1999) (referring to the factors set forth in the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. 1011 *et seq.*).

**Federal Labor Law**

The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*, "delegates to the Federal Labor Relations Authority the legal power to determine whether the parties must engage in midterm bargaining (or

bargaining about that matter)." National Federation of Federal Employees, Local 1309 v. Department of Interior, 526 U.S. 86, 88 (1999).

"The [Federal Labor Relations] Authority would seem better suited than a court to make the workplace-related empirical judgments that would help properly balance these, and other, policy-related considerations." National Federation of Federal Employees, Local 1309 v. Department of Interior, 526 U.S. 86, 95 (1999).

**Federal Trade Commission**

"We hold that the [Federal Trade] Commission's jurisdiction under the Federal Trade Commission Act (FTC Act) extends to a[] [nonprofit] association that, like the [California Dental Association], provides substantial economic benefit to its for-profit members." California Dental Assn. v. FTC, 526 U.S. 756, 759 (1999).

**Federalism**

"[T]he Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States." Lopez v. Monterey County, 525 U.S. 266, 282 (1999).

**Fifteenth Amendment**

"In City of Rome [v. United States, 446 U.S. 156, 175 (1980)], we * * * expressly reaffirmed that, 'under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect.'" Lopez v. Monterey County, 525 U.S. 266, 283 (1999).

**Fifth Amendment: Privilege Against Self-Incrimination**

"[I]n the federal criminal system, a guilty plea [does not] waive[] the privilege [against self-incrimination] in the sentencing phase of the case, either as a result of the colloquy preceding the plea or by operation of law when the plea is entered." Mitchell v. United States, 526 U.S. 314, 316 (1999).

"It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." Mitchell v. United States, 526 U.S. 314, 321 (1999) (citing Rogers v. United States, 340 U.S. 367, 373 (1951)).

"The justifications for the rule of waiver [of the Fifth Amendment] in the testimonial context are evident: A witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry." Mitchell v. United States, 526 U.S. 314, 322 (1999).

"It is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege. We conclude that principle applies to cases in which the sentence has been fixed and the judgment of conviction has become final." Mitchell v. United States, 526 U.S. 314, 326 (1999).

"The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted." Mitchell v. United States, 526 U.S. 314, 327-328 (1999) (citing Griffin v. California, 380 U.S. 609, 614 (1965)).

"The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." Mitchell v. United States, 526 U.S. 314, 330 (1999).

**Fifth Amendment: Takings**

"'The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

"The rule applied in Dolan [v. City of Tigard, 512 U.S. 374 (1994),] considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts." Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703 (1999).

**First Amendment: Freedom of Speech**

"Petition circulation * * * is core political speech, because it involves interactive communication concerning political change. * * * First Amendment protection for such interaction * * * is at its zenith." Buckley v. American Const. Law Found., Inc., 525 U.S. 182, 186-187 (1999) (citations and internal quotation marks omitted).

"For the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that

conduct. * * * It is well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone." Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 193 (1999).

"Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 193-194 (1999).

There is a "presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct." Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 195 (1999).

**Fourteenth Amendment - Section 5**

"Though the lack of support in the legislative record is not determinative, * * * identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because '[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.'" Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 646 (1999) (quoting City of Boerne v. Flores, 521 U.S. 507, 530 (1997)).

"The historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment." Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 647 (1999).

**Fourth Amendment: General**

"[T]o claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable * * *." Minnesota v. Carter, 525 U.S. 83, 88 (1998).

"[T]he Fourth Amendment is a personal right that must be invoked by an individual." Minnesota v. Carter, 525 U.S. 83, 88 (1998).

"'[T]he Fourth Amendment protects people, not places.'" Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

"'[C]apacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" Minnesota v. Carter, 525 U.S. 83, 88 (1998) (omission in original) (quoting Rakas v. Illinois, 439 U.S. 128, 143 (1978)).

"[A]n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." Minnesota v. Carter, 525 U.S. 83, 90 (1998).

"Property used for commercial purposes is treated differently for Fourth Amendment purposes than residential property." Minnesota v. Carter, 525 U. S. 83, 90 (1998).

"[T]he Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion." Wilson v. Layne, 526 U.S. 603, 611 (1999).

"We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." Wilson v. Layne, 526 U.S. 603, 614 (1999) (footnote omitted).

**Fourth Amendment: Search and Seizure**

Merely stopping the defendant for speeding and "issu[ing] him a citation rather than arresting him" is not sufficient to "authorize[] the officer, consistently with the Fourth Amendment, to conduct a full search of the car." Knowles v. Iowa, 525 U.S. 113, 114 (1998).

"[W]hile the concern for officer safety in this context may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search." Knowles v. Iowa, 525 U.S. 113, 117 (1998).

"[T]he two historical rationales for the 'search incident to arrest' exception [are]: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." Knowles v. Iowa, 525 U.S. 113, 116 (1998).

"The threat to officer safety from issuing a traffic citation * * * is a good deal less than in the case of a custodial arrest." Knowles v. Iowa, 525 U.S. 113, 117 (1998).

"A routine traffic stop * * * is a relatively brief encounter and is more analogous to a so-called 'Terry stop' than to a formal arrest." Knowles v. Iowa, 525 U.S. 113, 117 (1998) (internal quotation marks and ellipsis omitted).

The Fourth Amendment was not violated when defendants "and the lessee of an apartment were sitting in one of its rooms, bagging cocaine," and "[w]hile so engaged they were observed by a police officer, who looked through a drawn window blind." Minnesota v. Carter, 525 U.S. 83, 85 (1998).

"[T]he purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between [defendants] and the householder, all lead us to conclude that * * * any search which may have occurred did not violate their Fourth Amendment rights." Minnesota v. Carter, 525 U.S. 83, 91 (1998).

"In determining whether a particular governmental action violates [the Fourth Amendment] * * *, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. * * * Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (citations omitted).

"Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which 'trave[l] public thoroughfares' * * *." Wyoming v. Houghton, 526 U.S. 295, 303 (1999) (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)).

"We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search." Wyoming v. Houghton, 526 U.S. 295, 307 (1999).

"[T]he Fourth Amendment [does not] requir[e] the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband." Florida v. White, 526 U.S. 559, 561 (1999).

"In deciding whether a challenged governmental action violates the [Fourth] Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed." Florida v.

White, 526 U.S. 559, 563 (1999).

"In addition to the special considerations recognized in the context of movable items, our Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places." Florida v. White, 526 U.S. 559, 565 (1999).

"[B]ecause the police seized [defendant's] vehicle from a public area -- [defendant's] employer's parking lot -- the warrantless seizure also did not involve any invasion of [defendant's] privacy." Florida v. White, 526 U. S. 559, 566 (1999).

"[U]nder our established precedent, the 'automobile exception' has no separate exigency requirement. We made this clear in United States v. Ross, 456 U.S. 798, 809 (1982), when we said that in cases where there was probable cause to search a vehicle 'a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*' (Emphasis added.)" Maryland v. Dyson, 527 U.S. 465, 466-467 (1999) (*per curiam*).

**Habeas Corpus**

"Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court." O'Sullivan v. Boerckel, 526 U.S. 838, 839 (1999) (citing 28 U.S.C. 2254(b)(1), (c) (1994 ed. and Supp. III)).

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

"[W]e have not interpreted the exhaustion doctrine to require prisoners to file repetitive petitions." O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999).

"[A] state prisoner must present his claims to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement." O'Sullivan v. Boerckel, 526 U.S. 838, 839-840 (1999).

"[W]e conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

**Immigration Law**

Section 1252(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. 1252(g), "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.' (Emphasis added.) There are of course many other decisions or actions that may be part of the deportation process - such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999).

"Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 485 (1999) (footnote omitted).

"As a general matter * * * an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999) (footnote omitted).

"While the consequences of deportation may assuredly be grave, they are not imposed as a punishment * * *." Reno v. American-Arab Anti-Discrimination Comm.,525 U.S. 471, 491 (1999).

"Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to permit and prolong a continuing violation of United States law." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 490 (1999).

"When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491-492 (1999).

"As a general rule, withholding [of deportation] is mandatory if an alien 'establish[es] that it is more likely than not that [he] would be subject

to persecution on one of the specified grounds,' [INS v. Stevic, 467 U.S. 407,] 429-430 [(1984)], but the statute has some specific exceptions. * * * [W]ithholding does not apply, and deportation to the place of risk is authorized, 'if the Attorney General determines that'

'there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.' 8 U.S.C. § 1253(h)(2)(C)."

INS v. Aguirre-Aguirre, 526 U.S. 415, 419 (1999).

"Under the immigration laws, withholding [of deportation] is distinct from asylum, although the two forms of relief serve similar purposes. Whereas withholding only bars deporting an alien to a particular country or countries, a grant of asylum permits an alien to remain in the United States and to apply for permanent residency after one year. * * * In addition, whereas withholding is mandatory unless the Attorney General determines one of the exceptions applies, the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion." INS v. Aguirre-Aguirre, 526 U.S. 415, 419-420 (1999) (internal citations omitted).

"We agree the U.N. Handbook provides some guidance in construing the provisions added to the INA by the Refugee Act. * * * The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts." INS v. Aguirre-Aguirre, 526 U. S. 415, 427 (1999).

"[W]e think the BIA's determination that [8 U.S.C.] § 1253(h)(2)(C) [of the INA] requires no additional balancing of the risk of persecution rests on a fair and permissible reading of the statute." INS v. Aguirre-Aguirre, 526 U. S. 415, 428 (1999).

"[T]he BIA need not give express consideration to the atrociousness of the alien's acts in every case before determining that an alien has committed a serious nonpolitical crime."INS v. Aguirre-Aguirre, 526 U.S. 415, 430 (1999).

**Impermissible Gifts to Public Officials**

"Bribery [under 18 U.S.C. 201(b)] requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity [under 18 U.S.C. 201(c)] requires only that the gratuity be given or accepted 'for or because of' an official act. In other words, for bribery there must be a *quid pro quo* -- a specific intent to give or

receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-405 (1999) (emphasis in original).

"[I]n order to establish a violation of 18 U.S.C. § 201(c)(1)(A) [the illegal gratuity statute], the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 414 (1999).

**Indian Law**

"We conclude that President Taylor's 1850 Executive Order was ineffective to terminate Chippewa usufructuary rights under the 1837 Treaty." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 193 (1999).

"Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).

"[S]tate[s have] authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999).

"Treaty rights are not impliedly terminated upon statehood." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999).

**Individuals with Disabilities Education Act**

"[T]he [Individuals with Disabilities Education Act] authorizes federal financial assistance to States that agree to provide disabled children with special education and 'related services.' * * * [T]he definition of 'related services' in § 1401(a)(17) [of the IDEA] requires a public school district in a participating State to provide a ventilator-dependent student with certain nursing services during school hours." Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S. 66, 68-69 (1999) (footnote omitted).

"The text of the 'related services' definition * * * broadly encompasses those supportive services that 'may be required to assist a child with a disability to benefit from special education.' [20 U.S.C. 1401(a)(17).] * * * As a general matter, services that enable a disabled child to remain in

school during the day provide the student with the meaningful access to education that Congress envisioned." Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S. 66, 73 (1999) (internal quotation marks omitted).

"[T]he phrase 'medical services' in § 1401(a)(17) [of the IDEA] does not embrace all forms of care that might loosely be described as 'medical' in other contexts, such as a claim for an income tax deduction. * * * [T]he medical services exemption [is limited to] physician services * * *." Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S. 66, 74-75, 76 (1999).

**Insurance Law**

"We reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise." Humana Inc. v. Forsyth, 525 U.S. 299, 308 (1999).

**Intergovernmental Tax Immunity**

The county's "tax operates as a nondiscriminatory tax on the judges' compensation, to which the Public Salary Tax Act of 1939, 4 U.S.C. § 111, consents." Jefferson County, Ala. v. Acker, 527 U.S. 423, 427 (1999).

"In contracting the once expansive intergovernmental tax immunity doctrine, we have recognized that the area is one over which Congress is the principal superintendent." Jefferson County, Ala. v. Acker, 527 U.S. 423, 437 (1999).

"[W]hether Jefferson County's license tax fits within the Public Salary Tax Act's allowance is a question of federal law. The practical impact, not the State's name tag, determines the answer to that question." Jefferson County, Ala. v. Acker, 527 U.S. 423, 439 (1999).

**Interstate Commerce**

"[A]n insurance company doing business across state lines engages in interstate commerce." Humana Inc. v. Forsyth, 525 U.S. 299, 306 (1999).

**Kidnaping**

"[K]idnaping, as defined by 18 U.S.C. § 1201 (1994 ed. and Supp. III), is a unitary crime * * * [that] once begun, does not end until the victim is free. It does not make sense, then, to speak of it in discrete geographic fragments." United States v. Rodriguez-Moreno, 526 U.S. 275, 281 (1999)

(citations omitted).

**Labor Law**

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), which authorizes union security clauses,

"permits unions and employers to require only that employees pay the fees and dues necessary to support the union's activities as the employees' exclusive bargaining representative." Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 38 (1998).

"If a union negotiates a union security clause, it must notify workers that they may satisfy the membership requirement by paying fees to support the union's representational activities, and it must enforce the clause in conformity with this notification." Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 43 (1998).

"[A] union [does not] breach[] its duty of fair representation merely by negotiating a union security clause that tracks the language of § 8(a)(3) [29 U.S.C. 158(a)(3)]." Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 42 (1998).

"When a labor organization has been selected as the exclusive representative of the employees in a bargaining unit, it has a duty, implied from its status under § 9(a) of the [National Labor Relations Act] as the exclusive representative of the employees in the unit, to represent all members fairly." Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998).

"[T]he duty of fair representation requires a union 'to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998) (quoting Vaca v. Sipes, 386 U.S. 171, 177 (1967)).

"To invoke federal jurisdiction when the claim is based in part on a violation of the NLRA, there must be something *more* than just a claim that the union violated the statute. The plaintiff must adduce facts suggesting that the union's violation of the statute was arbitrary, discriminatory, or in bad faith." Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 50 (1998) (emphasis in original).

"[A]n investigator employed in NASA's Office of Inspector General (NASA-OIG) can be considered a 'representative' of NASA when examining a NASA

employee, such that the right to union representation in the [Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq*.,] may be invoked." National Aeronautics and Space Admin. v. Federal Labor Relations Authority, 527 U.S. 229, 231 (1999).

**Liens**

"Liens, whether equitable or legal, are merely a means to the end of satisfying a claim for the recovery of money." Department of Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999).

"An equitable lien does not give the plaintiff the very thing to which he was entitled * * *; instead, it merely grants a plaintiff a security interest in the property, which the plaintiff can then use to satisfy a money claim, usually a claim for unjust enrichment." Department of Army v. Blue Fox, Inc., 525 U.S. 255, 262-263 (1999) (citations, brackets, and internal quotation marks omitted).

**Logic**

"Because there is no stopping point to the logic of petitioner's argument, we find it unpersuasive." Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 47-48 (1998).

**McCarran-Ferguson Act**

"When federal law is applied in aid or enhancement of state regulation, and does not frustrate any declared state policy or disturb the State's administrative regime, the McCarran-Ferguson Act does not bar the federal action." Humana Inc. v. Forsyth, 525 U.S. 299, 303 (1999).

"When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." Humana Inc. v. Forsyth, 525 U.S. 299, 310 (1999).

**Medicare**

Under the Medicare Act, the Provider Reimbursement Review Board does not have "jurisdiction to review a fiscal intermediary's refusal to reopen a reimbursement determination." Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449, 452 (1999).

"[J]udicial review under the federal-question statute, 28 U.S.C. § 1331, is precluded by 42 U.S.C. § 405(h), applicable to the Medicare Act by operation of § 1395ii, which provides that '[n]o action against . . . the [Secretary] or any officer or employee thereof shall be brought under section 1331 . . . of title 28 to recover on any claim arising under this subchapter.'" Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449, 456 (1999).

"Even if mandamus were available for claims arising under the Social Security and Medicare Acts, petitioner would still not be entitled to mandamus relief because it has not shown the existence of a 'clear nondiscretionary duty,' * * * to reopen the reimbursement determination at issue." Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449, 456-457 (1999) (quoting Heckler v. Ringer, 466 U.S. 602, 616 (1984)).

**Miller Act**

"[T]he Miller Act by its terms only gives subcontractors the right to sue on the surety bond posted by the prime contractor, not the right to recover their losses directly from the Government." Department of Army v. Blue Fox, Inc., 525 U.S. 255, 264 (1999).

**Monetary Interest**

"[T]he State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens." Saenz v. Roe, 526 U.S. 473, 507 (1999).

**Patentability**

"The primary meaning of the word 'invention' in the Patent Act unquestionably refers to the inventor's conception rather than to a physical embodiment of that idea." Pfaff v. Wells Electronics, Inc., 525 U. S. 55, 60 (1998).

"[A]ssuming diligence on the part of the applicant, it is normally the first inventor to conceive, rather than the first to reduce to practice, who establishes the right to the patent." Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 61 (1998).

"It is well settled that an invention may be patented before it is reduced to practice." Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 61 (1998).

"'The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation.'" Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 62 (1998) (quoting The Telephone Cases, 126 U.S. 1, 536 (1888)).

"As we have often explained, * * * the patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time. The balance between the interest in motivating innovation and enlightenment by rewarding invention with patent protection on the one hand, and the interest in avoiding monopolies that unnecessarily stifle competition on the other, has been a feature of the federal patent laws since their inception." Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 63 (1998).

"[A]n inventor who seeks to perfect his discovery may conduct extensive testing without losing his right to obtain a patent for his invention - even if such testing occurs in the public eye. The law has long recognized the distinction between inventions put to experimental use and products sold commercially." Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 64 (1998).

"A rule that makes the timeliness of an application depend on the date when an invention is 'substantially complete' seriously undermines the interest in certainty." Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 65-66 (1998).

"The word 'invention' must refer to a concept that is complete, rather than merely one that is 'substantially complete.' It is true that reduction to practice ordinarily provides the best evidence that an invention is complete." Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 66 (1998).

"[T]he on-sale bar [in the Patent Act] applies when two conditions are satisfied before the critical date. First, the product must be the subject of a commercial offer for sale. * * * Second, the invention must be ready for patenting. That condition may be satisfied in at least two ways: by proof of reduction to practice before the critical date; or by proof that prior to the critical date the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention." Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 67-68 (1998).

**Plea Bargaining**

"The purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea." Mitchell v. United States, 526 U.S. 314, 322 (1999).

**Punitive Damages**

"Most often, however, eligibility for punitive awards is characterized in terms of a defendant's motive or intent. * * * Indeed, '[t]he justification of exemplary damages lies in the evil intent of the defendant.' 1 [T. Sedgwick, Measure of Damages 526 (8th ed. 1891)] * * *. Accordingly, 'a positive element of conscious wrongdoing is always required.' [C. McCormick, Law of Damages 280 (1935)." Kolstad v. American Dental Assn., 527 U.S. 526, 538 (1999).

"The common law has long recognized that agency principles limit vicarious liability for punitive awards." Kolstad v. American Dental Assn., 527 U.S. 526, 541 (1999).

**Qualified Immunity**

"A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" Wilson v. Layne, 526 U.S. 603, 609 (1999) (quoting Conn v. Gabbert, 526 U. S. 286, 290 (1999)).

"[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Wilson v. Layne, 526 U.S. 603, 609 (1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

"'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" Wilson v. Layne, 526 U.S. 603, 614-615 (1999) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

**Race-Conscious Voting Districts**

"[A]ppellees were [not] entitled to summary judgment on their claim that North Carolina's Twelfth Congressional District, as established by the State's 1997 congressional redistricting plan, constituted an unconstitutional racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment." Hunt v. Cromartie, 526 U.S. 541, 543 (1999).

"Our decisions have established that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized." Hunt v. Cromartie, 526 U.S. 541, 546 (1999).

"Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." Hunt v. Cromartie, 526 U.S. 541, 551 (1999) (emphasis in original).

"Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference." Hunt v. Cromartie, 526 U.S. 541, 551-552 (1999).

"This Court has recognized * * * that political gerrymandering claims are justiciable under the Equal Protection Clause although we were not in agreement as to the standards that would govern such a claim." Hunt v. Cromartie, 526 U.S. 541, 551 n.7 (1999).

**Right to Counsel**

"A grand jury witness has no constitutional right to have counsel present during the grand jury proceeding, * * * and no decision of this Court has held that a grand jury witness has a right to have her attorney present outside the jury room." Conn v. Gabbert, 526 U.S. 286, 292 (1999) (citation omitted).

**Right to Travel**

"The 'right to travel' * * * protects the right of a citizen of one

State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." Saenz v. Roe, 526 U.S. 473, 500 (1999).

"[I]t has always been common ground that [the Privileges or Immunities] Clause protects the third component of the right to travel," *i. e.*, "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." Saenz v. Roe, 526 U.S. 473, 503, 502 (1999).

**Scope of Employment**

"The Restatement of Agency provides that even intentional torts are within the scope of an agent's employment if the conduct is 'the kind [the employee] is employed to perform,' 'occurs substantially within the authorized time and space limits,' and 'is actuated, at least in part, by a purpose to serve the' employer. Restatement (Second) of Agency, § 228(1), at 504 [(1957)]. According to the Restatement, so long as these rules are satisfied, an employee may be said to act within the scope of employment even if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results.' *Id*., § 230, at 511, Comment *b*." Kolstad v. American Dental Assn., 527 U.S. 526, 543-544 (1999).

**Severability**

"[W]e shall assume, *arguendo*, that the severability standard for statutes also applies to Executive Orders." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999).

**Sovereign Immunity**

Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702, does "not nullify the long settled rule that sovereign immunity bars creditors from enforcing liens on Government property." Department of Army v. Blue Fox, Inc., 525 U.S. 255, 257 (1999).

"'Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.'" Department of Army v. Blue Fox, Inc., 525 U. S. 255, 260 (1999) (quoting FDIC v. Meyer, 510 U.S. 471, 475 (1994)).

"We have frequently held * * * that a waiver of sovereign immunity

is to be strictly construed, in terms of its scope, in favor of the sovereign." Department of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999).

"[A] waiver [of sovereign immunity] must * * * be unequivocally expressed in the statutory text." Department of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (internal quotation marks omitted).

"[S]overeign immunity bars creditors from attaching or garnishing funds in the Treasury * * * or enforcing liens against property owned by the United States." Department of Army v. Blue Fox, Inc., 525 U.S. 255, 264 (1999) (citations omitted).

**State Action**

"[S]tate action requires *both* an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' *and* that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" American Mfrs. Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999) (emphasis in original) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

"In cases involving extensive state regulation of private activity, we have consistently held that '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.'" American Mfrs. Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974)).

"Thus, the private insurers in this case will not be held to constitutional standards unless 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the latter may be fairly treated as that of the State itself.' * * * Whether such a 'close nexus' exists, our cases state, depends on whether the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" American Mfrs. Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

"Action taken by private entities with the mere approval or acquiescence of the State is not state action." American Mfrs. Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999).

"We have never held that the mere availability of a remedy for

wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it." American Mfrs. Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 53 (1999).

"[A] private party's mere use of the State's dispute resolution machinery, without the 'overt, significant assistance of state officials,'" cannot be considered state action. American Mfrs. Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 54 (1999) (quoting Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 486 (1988)).

"We conclude that an insurer's decision to withhold payment and seek utilization review of the reasonableness and necessity of particular medical treatment is not fairly attributable to the State." American Mfrs. Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 58 (1999).

**State Sovereign Immunity**

"[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. * * * [T]he State of Maine has not consented to suits for overtime pay and liquidated damages under the [Fair Labor Standards Act]." Alden v. Maine, 527 U.S. 706, 712 (1999).

"[T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments." Alden v. Maine, 527 U.S. 706, 713 (1999).

State "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. * * * [I]t follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." Alden v. Maine, 527 U.S. 706, 728, 729 (1999).

"In exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is 'compelling evidence'

that the States were required to surrender this power to Congress pursuant to the constitutional design." Alden v. Maine, 527 U.S. 706, 730-731 (1999) (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 781 (1991)).

**State Sovereign Immunity: Limitations**

"The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." Alden v. Maine, 527 U.S. 706, 754-755 (1999).

"The States have consented, moreover, to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments. In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." Alden v. Maine, 527 U.S. 706, 755 (1999).

State sovereign "immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State. * * * Nor does sovereign immunity bar all suits against state officers. Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State. * * * The rule, however, does not bar certain actions against state officers for injunctive or declaratory relief. * * * Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." Alden v. Maine, 527 U.S. 706, 756-757 (1999) (citations omitted).

**State Taxation: Federal Contracts**

"[A] State generally may impose a nondiscriminatory tax upon a private company's proceeds from contracts with the Federal Government [including those] * * * when the federal contractor renders its services on an Indian reservation." Arizona Dept. of Revenue v. Blaze Const. Co., 526 U. S. 32, 34 (1999).

"The need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations." Arizona Dept. of Revenue v. Blaze Const.

Co., 526 U.S. 32, 37 (1999).

***Stare Decisis***

"[T]his Court is not bound by its prior assumptions * * *." Lopez v. Monterey County, 525 U.S. 266, 281 (1999).

**Supremacy Clause**

"As is evident from its text, however, the Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design. * * * Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power." Alden v. Maine, 527 U.S. 706, 731 (1999).

**Tax Injunction Act**

"But a suit to collect a tax is surely not brought to restrain state action, and therefore does not fit the [Tax Injunction] Act's description of suits barred from federal district court adjudication." Jefferson County, Ala. v. Acker, 527 U.S. 423, 433-434 (1999).

"[T]he Tax Injunction Act, as indicated by its terms and purpose, does not bar collection suits, nor does it prevent taxpayers from urging defenses in such suits that the tax for which collection is sought is invalid." Jefferson County, Ala. v. Acker, 527 U.S. 423, 435 (1999) (footnote omitted).

**Title VII**

"[T]he Equal Employment Opportunity Commission (EEOC) possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII of the Civil Rights Act of 1964, 84 Stat. 121, 42 U.S.C. § 2000e *et seq."* West v. Gibson, 527 U.S. 212, 214 (1999).

"'[I]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles.'" Kolstad v. American Dental Assn., 527 U.S. 526, 541 (1999) (quoting Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754 (1998)).

"[O]ur interpretation of Title VII is informed by 'the general common law of agency, rather than . . . the law of any particular State.' Burlington Industries, Inc. [v. Ellerth, 524 U.S. 742, 754 (1998)]

(internal quotation marks omitted). The common law as codified in the Restatement (Second) of Agency (1957), provides a useful starting point for defining this general common law." Kolstad v. American Dental Assn., 527 U. S. 526, 542 (1999).

**Title VII - Punitive Damages**

"The 1991 [amendment to Title VII] limits compensatory and punitive damages awards, however, to cases of 'intentional discrimination' - that is, cases that do not rely on the 'disparate impact' theory of discrimination. 42 U.S.C. § 1981a(a)(1)." Kolstad v. American Dental Assn., 527 U.S. 526, 534 (1999).

"Congress plainly sought to impose two standards of liability - one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award. * * * [Section 1981a, however,] does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind." Kolstad v. American Dental Assn., 527 U.S. 526, 534, 535 (1999).

"Moreover, § 1981a's focus on the employer's state of mind gives some effect to Congress' apparent intent to narrow the class of cases for which punitive awards are available to a subset of those involving intentional discrimination. The employer must act with 'malice or with reckless indifference *to [the plaintiff's] federally protected rights*.' § 1981a(b)(1) (emphasis added). The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." Kolstad v. American Dental Assn., 527 U.S. 526, 535 (1999).

"Applying this standard in the context of § 1981a, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." Kolstad v. American Dental Assn., 527 U.S. 526, 536 (1999).

"There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful." Kolstad v. American Dental Assn., 527 U.S. 526, 536-537 (1999).

"Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that,

in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." Kolstad v. American Dental Assn., 527 U.S. 526, 545 (1999) (citation and internal quotation marks omitted).

**Title IX**

"Dues payments from recipients of federal funds * * * do not suffice to render the dues recipient subject to Title IX." National Collegiate Athletic Assn. v. Smith, 525 U.S. 459, 462 (1999).

"Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not." National Collegiate Athletic Assn. v. Smith, 525 U.S. 459, 468 (1999).

The Supreme Court "reject[s] the position" that "the private right of action available under 20 U.S.C. § 1681(a) is potentially broader than the Government's enforcement authority provided by § 1682." National Collegiate Athletic Assn. v. Smith, 525 U.S. 459, 467 n.5 (1999).

"This Court has indeed recognized an implied private right of action under Title IX, * * * and we have held that money damages are available in such suits. * * * Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause, however, * * * private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 639-640 (1999) (internal citations omitted).

"[A] recipient of federal funds may be liable in damages under Title IX only for its own misconduct." Davis v. Monroe County Bd. of Educ., 526 U. S. 629, 640 (1999).

"[C]ourts should refrain from second guessing the disciplinary decisions made by school administrators." Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999).

"We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999).

"Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 652 (1999).

**Trusts**

"Under common law, a wasting trust is a trust whose purposes have been accomplished, such that the continuation of the trust would frustrate the settlor's intent." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999).

**42 U.S.C. 1983**

"To state a claim for relief in an action brought under § 1983, [plaintiffs] must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." American Mfrs. Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999).

"We decline, accordingly, to find a statutory jury right under [42 U.S.C.] § 1983 based solely on the authorization of 'an action at law.'" Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999).

"We hold that a [42 U.S.C.] § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment." Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999).

"[T]here can be no doubt that claims brought pursuant to [42 U.S.C.] § 1983 sound in tort." Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999).

**42 U.S.C. 1985**

"The gist of the wrong at which [42 U.S.C.] § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings." Haddle v. Garrison, 525 U.S. 121, 125 (1998).

"[T]he fact that employment at will is not 'property' for purposes

of the Due Process Clause, * * * does not mean that loss of at-will employment may not 'injur[e] [petitioner] in his person or property' for purposes of [42 U.S.C.] § 1985(2)." Haddle v. Garrison, 525 U.S. 121, 125-126 (1998) (citation omitted).

"We hold that the sort of harm alleged by [plaintiff] here - essentially third-party interference with at-will employment relationships - states a claim for relief under [42 U.S.C.] § 1985(2)." Haddle v. Garrison, 525 U.S. 121, 126 (1998).

**Voting Rights Act**

"[T]he [Voting Rights] Act's preclearance requirements apply to measures mandated by a noncovered State to the extent that these measures will effect a voting change in a covered county." Lopez v. Monterey County, 525 U.S. 266, 269 (1999).

"Subject to certain limitations not implicated here, * * * we traditionally afford substantial deference to the Attorney General's interpretation of § 5 [of the Voting Rights Act] in light of her 'central role . . . in formulating and implementing' that section." Lopez v. Monterey County, 525 U.S. 266, 281 (1999) (quoting Dougherty County Bd. of Ed. v. White, 439 U.S. 32, 39 (1978)). (Attorney General's position was set forth in Supreme Court *amicus* brief.)

"We have recognized that the [Voting Rights] Act, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs." Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (internal quotation marks omitted).

"In short, the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion * * *." Lopez v. Monterey County, 525 U.S. 266, 284-285 (1999).

**Waiver**

"[A] union waiver of employee rights to a federal judicial forum for employment-discrimination claims must be clear and unmistakable * * *." Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 82 n.2 (1998).

An inmate "waived his claim that execution by lethal gas is unconstitutional [in violation of the Eighth Amendment] * * * [b]y declaring his method of execution, picking lethal gas over the State's default form of execution -- lethal injection." Stewart v. LaGrand, 526 U. S. 115, 119 (1999).

"The classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). '[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights. Aetna Ins. Co. v. Kennedy *ex rel.* Bogash, 301 U.S. 389, 393 (1937)." College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 682 (1999).

**Warsaw Convention**

"We * * * hold that recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' Art. 17, 49 Stat. 3018, if not allowed under the [Warsaw] Convention, is not available at all." El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 161 (1999).

"The cardinal purpose of the Warsaw Convention * * * is to achieve uniformity of rules governing claims arising from international air transportation." El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 169 (1999) (internal quotation marks and brackets omitted).

# MAXIMS FROM THE SUPREME COURT 1997 TERM

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## I. DOCTRINES OF STATUTORY CONSTRUCTION

**Literal Construction**

"[W]e ordinarily resist reading words or elements into a statute that do not appear on its face." Bates v. United States, 522 U.S. 23, 29 (1997).

A literal reading of the statute "is not a sensible interpretation of this language, since a literal reading of the words * * * would dramatically separate the statute from its intended purpose." Lewis v. United States, 523 U.S. 155, 160 (1998).

**Plain Meaning**

"Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." Salinas v. United States, 522 U.S. 52, 57 (1997) (internal quotation marks, citations, and brackets omitted).

"No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope." Salinas v. United States, 522 U.S. 52, 59 (1997) (quotation omitted).

"If we do our job of reading the statute whole, we have to give effect to this plain command, * * * even if doing that will reverse the longstanding practice under the statute and the rule * * *." Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (citations omitted).

"The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical." Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach, 523 U. S. 26, 37 (1998).

Where statutory meaning is clear, court need not "resort to the canons of construction that we use to resolve doubtful cases, such as the rule that the creation of a right in the same statute that provides a limitation is some evidence that the right was meant to be limited, not just the remedy." Beach v. Ocwen Federal Bank, 523 U.S. 410, 417 (1998).

**Plain Meaning: Determination of**

[In interpreting the scope of the statutory word "carry," as in "carries a firearm," the Court first determines its ordinary English meaning by consulting: three regular dictionaries (Oxford English Dictionary, Webster's Third New International Dictionary, and Random House Dictionary of the English Language Unabridged); two etymological dictionaries (Oxford Dictionary of English Etymology and Barnhart Dictionary of Etymology); Black's Law Dictionary; great English works (King James Bible, Robinson Crusoe, Moby Dick); Lexis/Nexis and Westlaw newspaper databases (including New York Times and its style manual, Boston Globe, Arkansas Gazette, and San Diego Union-Tribune; previous Supreme Court opinions; and court of appeals' decisions.] Muscarello v. United States, 524 U.S. 125, 127-132 (1998). [Only then does the Court address statutory purpose and legislative history.] Id. at 132-134.

[The dissent countered with: Black's Law Dictionary; the King James Bible and four other translations of the Bible; Oliver Goldsmith; Rudyard Kipling; Theodore Roosevelt; newspaper surveys; website quotations from "The Magnificent Seven" and "M*A*S*H."] Id. at 140-144 and nn. 2-6.

**Plain Meaning Makes "Actual" Congressional Purpose Irrelevant**

[Even if Congress did not envision a particular statutory application,] "in the context of an unambiguous statutory text that is irrelevant. As we have said before, the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (citation and internal quotation marks omitted)).

**Ordinary Meaning**

"When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition." Salinas v. United States, 522 U.S. 52, 63 (1997).

**Unambiguous Statute**

"A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be plain to anyone reading the Act that the statute encompasses the conduct at issue." Salinas v. United States, 522 U.S. 52, 60 (1997) (internal quotation marks omitted).

**Definitions: "Any"**

The other language of the statute "more clearly sets limits upon the

scope of the word 'any.'" Lewis v. United States, 523 U.S. 155, 161 (1998).

**Definitions: "Carries"**

"[T]he phrase 'carries a firearm' [in 18 U.S.C. 924(c)(1), which "imposes a 5-year mandatory prison term upon a person who 'uses or carries a firearm' 'during and in relation to' a 'drug trafficking crime'" is not] limited to the carrying of firearms on the person. * * * Rather, it also applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." Muscarello v. United States, 524 U.S. 125, 126-127 (1998).

**Definitions: "Choate Lien"**

"'[A] choate lien [exists] when the identity of the lienor, the property subject to the lien, and the amount of the lien are established.'" United States v. Estate of Romani, 523 U.S. 517, 523 (1998) (quoting United States v. City of New Britain, 347 U.S. 81, 84 (1954)).

**Definitions: "Court"**

"The word 'court' in [the context of the damages provision of the Copyright Act] appears to mean judge, not jury." Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 346 (1998).

**Definitions: "Doubt"**

"'Doubt'" is precisely that sort 'disbelief' (failure to believe) which consists of an uncertainty rather than a belief in the opposite." Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 367 (1998).

**Definition: "Fine"**

"[A]t the time the Constitution was adopted, 'the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.'" United States v. Bajakajian, 524 U.S. 321, 327 (1998) (quoting Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

"Forfeitures -- payments in kind -- are thus 'fines' if they constitute punishment for an offense." United States v. Bajakajian, 524 U. S. 321, 328 (1998).

**Definitions: "Individual" and "Person"**

"[I]n the context of the entire section [*i.e.*, the Line Item Veto Act expedited review provision,] Congress undoubtedly intended the word 'individual' to be construed as synonymous with the word 'person.'" Clinton v. City of New York, 524 U.S. 417, 428 (1998).

"Although in ordinary usage both 'individual' and 'person' often refer to an individual human being, * * * 'person' often has a broader meaning in the law, see, *e.g.*, 1 U.S.C. § 1 ('person' includes 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals')." Clinton v. City of New York, 524 U.S. 417, 428 n.13 (1998) (citation omitted).

**Definitions: "Jurisdiction"**

"'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings * * *.'" Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 90 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663, n.2 (D. C. Cir. 1996)).

**Definitions: "Knowingly"**

"[T]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, 'the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.' Bryan v. United States, 524 U.S. 184, 192 (1998) (quoting Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 345 (1952) (dissenting opinion)).

"[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." Bryan v. United States, 524 U.S. 184, 193 (1998) (footnote omitted).

**Definitions: "Shall"**

The statutory instruction "comes in terms of the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion." Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998).

**Definition: "Such as"**

"As the use of the term 'such as' confirms, the [regulatory] list [of major life activities] is illustrative, not exhaustive." Bragdon v. Abbott, 524 U.S. 624, 639 (1998).

**Definitions: "Willfully"**

"[S]pecific intent to injure or defraud someone, whether the United States or another, is not an element of the misapplication of funds proscribed by" 20 U.S.C. 1097(a) (1988 ed.), "which declared it a felony 'knowingly and willfully' to misapply student loan funds insured under Title IV of the Higher Education Act of 1965." Bates v. United States, 522 U.S. 23, 25 (1997).

"The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. * * * Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. * * * As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.' Ratzlaf v. United States, 510 U.S. 135, 137 (1994)." Bryan v. United States, 524 U.S. 184, 191-192 (1998) (other citations and footnotes omitted).

"[T]he willfulness requirement of [the Crime Control Act] does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required." Bryan v. United States, 524 U.S. 184, 196 (1998).

***Ejusdem Generis***

"'Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.'" Brogan v. United States, 522 U.S. 398, 403 n.2 (1998) (quoting Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129 (1991)).

***Noscitur a Sociis* (Know a Word by the Company It Keeps)**

"[T]he argument [that the Self-Incrimination Clause's applicability to "any" criminal case includes foreign criminal prosecutions] overlooks the cardinal rule to construe provisions in context. * * * In the Fifth Amendment context, the Clause in question occurs in the company of guarantees of grand jury proceedings, defense against double jeopardy, due

process, and compensation for property taking. Because none of these provisions is implicated except by action of the government that it binds, it would have been strange to choose such associates for a Clause meant to take a broader view, and it would be strange to find such a sweep in the Clause now." United States v. Balsys, 524 U.S. 666, 673 (1998) (citations omitted).

**Specific Governs General Language**

"[I]t is a commonplace of statutory construction that the specific * * * language in [the text] governs the general terms of the saving clause." South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 348 (1998).

**Similar Language in Same Section of Statute**

It is an "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning." National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 501 (1998).

"Because each use of 'debt for' in [11 U.S.C.] § 523(a) serves the identical function of introducing a category of nondischargeable debt, the presumption that equivalent words have equivalent meaning when repeated in the same statute * * * has particular resonance here." Cohen v. de la Cruz, 523 U.S. 213, 220 (1998) (citing Ratzlaf v. United States, 510 U.S. 135, 143 (1994)).

**Language In One Section But Not Another**

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Bates v. United States, 522 U.S. 23, 29-30 (1997) (quoting Russello v. United States, 464 U.S. 16, 23 (1983), and United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

"'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Hohn v. United States, 524 U.S. 236, 250 (1998) (quoting Bates v. United States, 522 U.S. 23, 29-30 (1997), and Russello v. United States, 464 U.S. 16, 23 (1983) (other internal quotation marks omitted)).

"'[W]here Congress includes particular language in one section of a

statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Beach v. Ocwen Federal Bank, 523 U.S. 410, 418 (1998) (quoting Bates v. United States, 522 U.S. 23, 29-30 (1997), and two other cases).

**Use of Established Term**

"Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." Bragdon v. Abbott, 524 U.S. 624, 645 (1998).

**Title of Statute**

"'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (quoting Trainmen v. Baltiore & Ohio R. Co., 331 U.S. 519, 528-529 (1947)).

[Because the statutory meaning is plain,] "we disregard petitioners' invocation of the statute's title * * *. '[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase.'" Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-529 (1947)).

**Construed to Avoid Constitutional Issues**

"'Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.'" Salinas v. United States, 522 U.S. 52, 59-60 (1997) (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)).

"As Justice Holmes said long ago: 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" Almendarez-Torres

v. United States, 523 U.S. 224, 237 (1998) (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)).

"The doctrine [of constitutional doubt] seeks in part to minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made. For similar reasons, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a 'fair' one." Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998).

"[T]he 'constitutional doubt' doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious. And precedent makes clear that the Court need not apply (for it has not always applied) the doctrine in circumstances similar to those here -- where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional." Almendarez-Torres v. United States, 523 U.S. 224, 239 (1998).

"Before inquiring into the applicability of the Seventh Amendment, we must '"first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided."'" Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 345 (1998) (quoting Tull v. United States, 481 U.S. 412, 417 n.3 (1987), and Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974)).

"Our conclusion that the text of the ADA is not ambiguous causes us also to reject petitioners' appeal to the doctrine of constitutional doubt, which requires that we interpret statutes to avoid 'grave and doubtful constitutional questions,' * * *. That doctrine enters in only 'where a statute is susceptible of two constructions[.]'" Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

"'The operation was a success, but the patient died.' What such a procedure is to medicine, the Court's opinion in this case is to law. It sustains the constitutionality of [the "decency and respect" standard for

NEA funding] by gutting it." National Endowment for the Arts v. Finley, 524 U.S. 569, 590 (1998) (Scalia, J., concurring).

**Construed as a Whole**

"'"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."'" Regions Hospital v. Shalala, 522 U.S. 448, 460 n.5 (1998) (quoting United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 455 (1993), and United States v. Heirs of Boisdore, 8 How. 113, 122 (1849)).

It is a "central tenet of interpretation" that "a statute is to be considered in all its parts when construing any one of them." Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach, 523 U.S. 26, 36 (1998).

**Construed in Context**

"[I]t is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" Textron Lycoming Reciprocating Engine Div., v. Automobile Workers, 523 U.S. 653, 657 (1998) (quoting Deal v. United States, 508 U.S. 129, 132 (1993)).

**Construed to Avoid Surplusage**

"[T]he Court avoids interpreting statutes in a way that 'renders some words altogether redundant.'" South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 347 (1998) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995).

"'[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'" Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (quoting Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988)).

"We are reluctant to adopt a construction making another statutory provision superfluous." Hohn v. United States, 524 U.S. 236, 249 (1998).

**Construed to Avoid Absurd or Bizarre Results**

"Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a sensible construction that avoids this absurd conclusion." South Dakota v. Yankton Sioux Tribe, 522 U.

S. 329, 346 (1998) (internal quotation marks omitted).

[Where either of two alternate readings of statute creates incongruities, the Court declines to adopt reading that yields "bizarre" result contrary to a likely and rational congressional policy.] Caron v. United States, 524 U.S. 308, 315 (1998).

"Acceptance of the Government's new-found reading of [the statutory provision] 'would produce an absurd and unjust result which Congress could not have intended.'" Clinton v. City of New York, 524 U.S. 417, 429 (1998) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 (1982)).

**Statutes in Derogation of Common Law**

"'[I]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" United States v. Bestfoods, 524 U.S. 51, 63 (1998) (quoting United States v. Texas, 507 U. S. 529, 534 (1993) (internal quotation marks omitted)).

**Uniform Interpretation of Federal Statutes**

"[W]e conclude a uniform and predictable standard must be established as a matter of federal law. We rely 'on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.' Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989). The resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction. This is not federal common law in 'the strictest sense, *i.e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute . . . , but, rather, to the judicial "creation" of a special federal rule of decision.' Atherton v. FDIC, 519 U.S. 213, 218 (1997). State-court decisions, applying state employment discrimination law, may be instructive in applying general agency principles, but, it is interesting to note, in many cases their determinations of employer liability under state law rely in large part on federal court decisions under Title VII." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754-755 (1998).

**Statute Not Limited to Particular Evil**

"But it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy -- even assuming that it is possible to identify that evil from something other than the text of the statute itself." Brogan v. United States, 522 U.S. 398, 403 (1998).

"[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998).

**Policy Arguments**

"Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so * * *." Brogan v. United States, 522 U.S. 398, 408 (1998).

"[W]hether or not we think it would be wise policy to provide statutory protection for * * * price discrimination is not a matter that is relevant to our duty to interpret the text of the Copyright Act." Quality King Distributors, Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 153 (1998).

**Amendments Can Clarify Without Changing**

"Congress' 1992 amendment hardly means that [the original statute] did not previously cover the conduct in question. Cf. Commissioner v. Estate of Sternberger, 348 U.S. 187, 194 (1955) ('Subsequent amendments have clarified and not changed th[e earlier] principle.')." Bates v. United States, 522 U.S. 23, 32 (1997).

**Conflict Between Statute and Treaty**

"We have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.' Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion); see also Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, 'the one last in date will control the other')." Breard v. Greene, 523 U.S. 371, 376 (1998).

"[W]hile we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, 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." Breard v. Greene, 523 U.S. 371, 375 (1998).

**Judges as Historians**

"Some appellate judges are better historians than others." Eastern Enterprises v. Apfel, 524 U.S. 498, 550 (1998) (Stevens, J., dissenting) (comparing Supreme Court majority unfavorably with court of appeals judges below).

**Legislative History: Floor Statements**

"Whatever weight some members of this Court might accord to floor statements about proposals actually under consideration, remarks that purport to clarify 'related' areas of the law can have little persuasive force, and in this case none at all." Fidelity Financial Services, Inc. v. Fink, 522 U.S. 211, 220 (1998).

**Legislative History: Opponents of Legislation**

"'[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.' Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951). 'In their zeal to defeat a bill, they understandably tend to overstate its reach.' NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964)." Bryan v. United States, 524 U.S. 184, 196 (1998).

**Later-Enacted Statutes**

"These later-enacted laws, however, are beside the point. They do not declare the meaning of earlier law. * * * They do not seek to clarify an earlier enacted general term. * * * They do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute. * * * They do not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions. * * * Consequently, we do not find in them any forward looking legislative mandate, guidance, or direct suggestion about how courts should interpret the earlier provisions." Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998) (citations omitted).

The Supreme Court has "concluded that a specific policy embodied in a later federal statute should control [its] construction of the [federal] priority statute [31 U.S.C. 3713(a)], even though it had not been expressly amended." United States v. Estate of Romani, 523 U.S. 517, 530-531 (1998).

"[E]ven if Congress *could* express its will by not legislating, the will of a later Congress that a law enacted by an earlier Congress should

bear a particular meaning is of no effect whatever. The Constitution puts Congress in the business of writing new laws, not interpreting old ones. '[L]ater-enacted laws . . . do not declare the meaning of earlier law.'" United States v. Estate of Romani, 517 U.S. 517, 536 (Scalia, J. concurring in part and concurring in the judgment) (emphasis in original) (quoting Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998)).

**Subsequent Legislative History**

"'[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 355 (1998) (quoting United States v. Philadelphia Nat. Bank, 374 U.S. 321, 348-349 (1963)).

**Congressional Inaction**

"I join the opinion of the Court except that portion which takes seriously, and thus encourages in the future, an argument that should be laughed out of court" [*i.e.*, that Congress's failure to enact a proposal has meaning]. United States v. Estate of Romani, 523 U.S. 517, 535 (1998) (Scalia, J. concurring in part and concurring in the judgment).

"Congress can not express its will by a *failure* to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law." United States v. Estate of Romani, 523 U.S. 517, 535 (1998) (Scalia, J. concurring in part and concurring in the judgment) (emphasis in original).

"Today, however, the Court's fascination with the files of Congress (we must consult them, because they are there) is carried to a new silly extreme. Today's opinion ever-so-carefully analyzes, not legislative history, but the history of legislation-that-never-was." United States v. Estate of Romani, 523 U.S. 517, 536 (1998) (Scalia, J. concurring in part and concurring in the judgment).

**Deference to Agency's Construction of Statute**

"Courts must defer to the requirements imposed by the [National Labor Relations] Board if they are 'rational and consistent with the Act,' Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987), and if the Board's 'explication is not inadequate, irrational or arbitrary,' NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)." Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 364 (1998).

"[W]hen we examine the Secretary's rule interpreting a statute, we ask first whether 'the intent of Congress is clear' as to 'the precise question at issue.' Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). If, by 'employing traditional tools of statutory construction,' *id.*, at 843, n. 9, we determine that Congress' intent is clear, 'that is the end of the matter,' *id.*, at 842. But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' *Id.*, at 843. If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.' *Id.*, at 843, n. 11." Regions Hospital v. Shalala, 522 U.S. 448, 457 (1998).

"Since the term [in the statute] is ambiguous, the task that confronts us is to decide, not whether the Treasury Regulation represents the best interpretation of the statute, but whether it represents a reasonable one." Atlantic Mutual Ins. Co. v. Commissioner of Internal Revenue, 523 U.S. 382, 389 (1998).

Where the statutory provision at issue "is a limitation upon an extraordinary [tax] deduction[,] * * * [t]here was certainly no need for that deduction to be microscopically fair, and the interpretation adopted by the Treasure Regulation seems to us a reasonable accommodation -- and one that the statute very likely intended -- of the competing interests of fairness, administrability, and avoidance of abuse." Atlantic Mutual Ins. Co. v. Commissioner of Internal Revenue, 523 U.S. 382, 390-391 (1998).

**Skidmore Deference to Agency Expertise**

"Responsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). It is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' Skidmore v. Swift & Co., 323 U.S. 134, 139-140 (1944)." Bragdon v. Abbott, 524 U.S. 624, 642 (1998).

**No Deference to Later Executive Treaties**

"Equally irrelevant is the fact that the Executive Branch of the

Government has entered into at least five international trade agreements [on the same subject matter] * * *. The earliest of those agreements was made in 1991; none has been ratified by the Senate. Even though they are of course consistent with the position taken by the Solicitor General in this litigation, they shed no light on the proper interpretation of a statute that was enacted in 1976." Quality King Distributors, Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 153-154 (1998) (footnote omitted).

**Rule of Lenity**

"The rule [of lenity] does not apply when a statute is unambiguous or when invoked to engraft an illogical requirement to its text." Salinas v. United States, 522 U.S. 52, 66 (1997).

"The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of [the rule of lenity], for most statutes are ambiguous to some degree." Muscarello v. United States, 524 U. S. 125, 138 (1998).

"The rule of lenity is not invoked by a grammatical possibility. It does not apply if the ambiguous reading relied on is an implausible reading of the congressional purpose." Caron v. United States, 524 U.S. 308, 316 (1998).

II. SUPREME COURT PRACTICE

**Argument Made by Amicus**

"[W]e must pass over the arguments of the named *amici* for the reason that New York, the party to the case, has in effect renounced them, or at least any benefit they might provide." New Jersey v. New York, 523 U.S. 767, 781 n.3 (1998).

**Argument Not Raised Below**

"Because this argument was not presented below * * * or to this Court when [respondent] opposed petitioners' petition for certiorari, * * * it is unnecessary for us to consider it here." Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach, 523 U.S. 26, 42 n.5 (1998).

"'With "very rare exceptions," . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" Campbell v. Louisiana, 523 U.S. 392, 403 (1998) (quoting Adams

v. Robertson, 520 U.S. 83, 86 (1997) (*per curiam*)).

An "argument suffers from the legally fatal problem that it makes its first appearance here in this Court in the briefs on the merits." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 738 (1998).

"'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212-213 (1998) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

**Argument First Raised in Cert. Petition**

[Where an issue was first raised in a cert. petition and the Court granted certiorari on that issue, the Court declined to address that argument because it had not been raised in the lower courts.] Hopkins v. Reeves, 524 U.S. 88, 94 n.3 (1998).

**Argument Not a Question in Petition**

"We do not address [an issue that] falls outside the question on which we granted certiorari." Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach, 523 U.S. 26, 42 n.5 (1998) (citing Supreme Court Rule 14.1(a)).

**Jurisdictional Argument Not Waived**

"Because the [statutory construction] argument poses a jurisdictional question (although not one of constitutional magnitude), it is not waived by the failure to raise it in the District Court." Clinton v. City of New York, 524 U.S. 417, 428 (1998).

**Argument Preserved**

"It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari." Bragdon v. Abbott, 524 U.S. 624, 638 (1998).

**Argument Not Preserved**

"[W]e have no obligation to search the record for the existence of a nonjurisdictional point not presented, and to consider a disposition (remand instead of reversal) not suggested by either side." American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 227 n.2 (1998).

**Certiorari: Cases Reviewable**

[An] "application for a certificate of appealability [under the Antiterrorism and Effective Death Penalty Act] constitutes a 'case' [reviewable] under [28 U.S.C.] § 1254(1). As we have noted, '[t]he words "case" and "cause" are constantly used as synonyms in statutes . . . , each meaning a proceeding in court, a suit, or action.'" Hohn v. United States, 524 U.S. 236, 241 (1998) (quoting Blyew v. United States, 13 Wall. 581, 595 (1872)).

"When judges perform administrative functions, their decisions are not subject to [Supreme Court] review." Hohn v. United States, 524 U.S. 236, 245 (1998).

[Supreme Court] "decisions foreclose the proposition that the failure to satisfy a threshold prerequisite for court of appeals jurisdiction, such as the issuance of a certificate of appealability, prevents a case from being in the court of appeals for purposes of [28 U.S. C.] § 1254(1)." Hohn v. United States, 524 U.S. 236, 248 (1998).

**Failure to Cross-Petition**

"However, the Government did not challenge by cross- petition any part of the Seventh Circuit's decision, so the question whether the defendant must know his conduct was a violation of the law is not before us." Bates v. United States, 522 U.S. 23, 32 n.7 (1997).

**Review of State-Court Decisions**

"Congress has limited our review of state-court decisions to '[f] inal judgments or decrees rendered by the highest court of a State in which a decision could be had.' 28 U.S.C. § 1257(a)." Jefferson v. City of Tarrant, Ala., 522 U.S. 75, 77 (1997).

"This provision [28 U.S.C. 1257(a)] establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" Jefferson v. City of Tarrant, Ala., 522 U.S. 75, 81 (1997) (quoting Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 551 (1945)).

"'If a state court judgment is not final for purposes of Supreme Court review, the federal questions it determines will (if not mooted) be open in the Supreme Court on later review of the final judgment, whether or not under state law the initial adjudication is the law of the case on the second state review.'" Jefferson v. City of Tarrant, Ala., 522 U.S. 75, 83 (1997) (quoting R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 642 (4th ed. 1996)).

**Deference to Lower Federal Courts on State Law**

[Examples of inconsistency in state law are] "insufficient to dispel the presumption of deference given the views of a federal court as to the law of a State within its jurisdiction." Phillips v. Washington Legal Foundation, 524 U.S. 156, 167 (1998) (citing Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 204 (1956)).

**Remand**

"'When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court.'" Bragdon v. Abbott, 524 U.S. 624, 654 (1998) (quoting Dandridge v. Williams, 397 U.S. 471, 476 n.6 (1970)).

**Summary Dispositions**

"Although we have noted that '[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from,' we have also explained that they do not 'have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits.'" Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 307 (1998) (quoting Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 477, n.20 (1979) (citations and internal quotation marks omitted)).

"'A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.'" Montana v. Crow Tribe, 523 U.S. 696, 714 n.14 (1998) (quoting Anderson v. Celebrezze, 460 U.S. 780, 785 n.5 (1983)).

III. PROCEDURAL DOCTRINES

**Abuse of Discretion**

"[A]buse of discretion is the proper standard of review of a district court's evidentiary rulings." General Elec. Co. v. Joiner, 522 U. S. 136, 141 (1997).

"[D]eference [to the trial court] * * * is the hallmark of abuse of discretion review." General Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997).

**Administrative Procedure Act**

"The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of 'reasoned decisionmaking.' Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 52 (1983). Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 374 (1998).

"It is hard to imagine a more violent breach of that requirement ["of reasoned decisionmaking"] than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced." Allentown Mack Sales and Service, Inc. v. NLRB, 522 U. S. 359, 374 (1998).

"An agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding." Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 376 (1998).

**Appealability of Partial Victory**

"[T]his Court has held that a 'party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.' * * * But this Court also has clearly stated that a party is 'aggrieved' and ordinarily can appeal a decision 'granting in part and denying in part the remedy requested.'" Forney v. Apfel, 524 U.S. 266, 271 (1998) (citations omitted) (quoting Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980), and United States v. Jose, 519 U.S. 54, 56 (1996)).

**Appealability of Social Security Remand Order**

"[A] Social Security disability claimant seeking court reversal of an agency decision denying benefits may appeal a district court order remanding the case to the agency for further proceedings." Forney v. Apfel,

524 U.S. 266, 267 (1998).

**Case or Controversy**

No case or controversy presented where death-row inmate sought "a declaratory judgment as to the validity of a defense the State may, or may not, raise in a habeas proceeding. Such a suit * * * attempts to gain a litigation advantage by obtaining an advance ruling on an affirmative defense * * *. * * * Any judgment in this action thus would not resolve the entire case or controversy as to any one of [the plaintiff class members], but would merely determine a collateral legal issue governing certain aspects of their pending or future suits." Calderon v. Ashmus, 523 U.S. 740, 747 (1998).

**Collateral Estoppel**

"Absent actual and adversarial litigation about base-year GME costs, principles of issue preclusion do not hold fast. See Cromwell v. County of Sac, 94 U.S. 351, 353 (1877) ('[T]he judgment in the prior action operates as an estoppel only as to those matters in issue or points *controverted* . . . . [T]he inquiry must always be as to the point or question *actually litigated*.')." Regions Hospital v. Shalala, 522 U.S. 448, 463-464 (1998) (emphasis added by Regions Court).

**Criminal Sentencing Procedures**

"Where noncapital sentencing proceedings contain trial-like protections, that is a matter of legislative grace, not constitutional command." Monge v. California, 524 U.S. 721, 734 (1998).

**Criminal Standard of Review of Evidence Following Conviction**

"The jury having found petitioner guilty, we accept the Government's version of the evidence." Bryan v. United States, 524 U.S. 184, 189 (1998).

**Double Jeopardy**

"The Government administratively imposed monetary penalties and occupational debarment on petitioners for violation of federal banking statutes, and later criminally indicted them for essentially the same conduct. We hold that the Double Jeopardy Clause of the Fifth Amendment is not a bar to the later criminal prosecution because the administrative proceedings were civil, not criminal." Hudson v. United States, 522 U.S. 93, 95-96 (1997).

"[T]he Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, '"in common parlance,"' be described as punishment. United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 (1943) (quoting Moore v. Illinois, 14 How. 13, 19 (1852)). The Clause protects only against the imposition of multiple *criminal* punishments for the same offense, Helvering v. Mitchell, 303 U.S. 391, 399 (1938); see also Hess, *supra*, at 548-549." Hudson v. United States, 522 U.S. 93, 98-99 (1997).

"Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. * * * A court must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. * * * Even in those cases where the legislature has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect * * * as to transform what was clearly intended as a civil remedy into a criminal penalty. * * *

"In making this latter determination, the factors listed in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963), provide useful guideposts, including: (1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as a punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment -- retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.' It is important to note, however, that 'these factors must be considered in relation to the statute on its face,' id. at 169, and 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty, [United States v. Ward, 448 U.S. 242, 249 (1980)](internal quotation marks omitted)." Hudson v. United States, 522 U.S. 93, 99-100 (1997) (some citations, internal quotation marks, and brackets omitted).

"[A]ll civil penalties have some deterrent effect. * * * If a sanction must be "solely" remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause." Hudson v. United States, 522 U.S. 93, 102 (1997) (citations omitted).

"[N]either money penalties nor debarment has historically been

viewed as punishment. We have long recognized that 'revocation of a privilege voluntarily granted,' such as a debarment, 'is characteristically free of the punitive criminal element.' Helvering [v. Mitchell, 303 U.S. 391, 399, and n.2 (1938)]. Similarly, 'the payment of fixed or variable sums of money [is a] sanction which ha[s] been recognized as enforcible by civil proceedings since the original revenue law of 1789.' *Id.*, at 400." Hudson v. United States, 522 U.S. 93, 104 (1997).

"[T]he conduct for which [administrative] sanctions are imposed may also be criminal (and in this case formed the basis for petitioners' indictments). This fact is insufficient to render the money penalties and debarment sanctions criminally punitive, * * * particularly in the double jeopardy context." Hudson v. United States, 522 U.S. 93, 105 (1997).

"We have previously held that [the Double Jeopardy Clause] protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense. * * * Historically, we have found double jeopardy protections inapplicable to sentencing proceedings * * * because the determinations at issue do not place a defendant in jeopardy for an 'offense' * * *." Monge v. California, 524 U.S. 721, 727-728 (1998) (citations omitted).

"An enhanced sentence imposed on a persistent offender thus 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes' but as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" Monge v. California, 524 U.S. 721, 728 (1998) (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948)).

"The Double Jeopardy Clause 'does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.' * * * Consequently, it is a 'well-established part of our constitutional jurisprudence' that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal." Monge v. California, 524 U. S. 721, 730 (1998) (citations omitted).

"[T]he Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." Monge v. California, 524 U.S. 721, 734 (1998).

**Equitable Estoppel**

"As a rule, equitable estoppel bars a party from shirking the

burdens of a voidable transaction for as long as she retains the benefits received under it." Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426 (1998). [But Court adds, "These general rules may not be as unified as the employer asserts." *Ibid.*]

**Evidence**

"[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)).

**Evidence: Polygraphs**

"Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings, [does not] unconstitutionally abridge[] the right of accused members of the military to present a defense." United States v. Scheffer, 523 U.S. 303, 305 (1998).

"[T]here is simply no consensus that polygraph evidence is reliable." United States v. Scheffer, 523 U.S. 303, 309 (1998).

**Evidence: Scientific**

"Thus, while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under Frye [v. United States, 293 F. 1013 (D.C. 1923)], they leave in place the 'gatekeeper' role of the trial judge in screening such evidence." General Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997).

"[Plaintiff] claims that because the District Court's disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error and was properly reversed by the Court of Appeals. But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either Daubert [v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993),] or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

"[A]buse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence." General

Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

"Scientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment." Bragdon v. Abbott, 524 U.S. 624, 653 (1998).

**Exclusionary Rule**

"We have emphasized repeatedly that the State's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 362 (1998).

"Recognizing [its social] costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials." Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 363 (1998).

"We therefore hold that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights." Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 364 (1998).

"Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions. * * * Although we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 364-365 (1998) (citations and footnote omitted).

**Extradition**

[Where one state demands extradition of a criminal defendant from another state,] "[i]n case after case we have held that claims relating to what actually happened in the demanding State, the law of the demanding State, and what may be expected to happen in the demanding State when the fugitive returns are issues that must be tried in the courts of that State, and not in those of the asylum State." New Mexico ex rel. Ortiz v. Reed, 524 U.S. 151, 153 (1998).

**Guilty Plea**

"A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" Bousley v. United States, 523 U.S. 614, 618 (1998) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

**Habeas Corpus**

"We have strictly limited the circumstances under which a guilty plea may be attacked on collateral review. It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked. * * * And even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal. * * * Indeed, the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." Bousley v. United States, 523 U.S. 614, 621 (1998) (citations and internal quotations omitted).

"In light of 'the profound societal costs that attend the exercise of habeas jurisdiction,' * * * we have found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief." Calderon v. Thompson, 523 U.S. 538, 554-555 (1998) (quoting Smith v. Murray, 477 U.S. 527, 539 (1986)).

"These limits [on habeas relief] reflect our enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" Calderon v. Thompson, 523 U. S. 538, 555 (1998) (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

**Habeas Corpus: Miscarriage of Justice Exception**

"Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' * * * or that he is 'actually innocent.'" Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted).

"'[A]ctual innocence' means factual innocence, not mere legal insufficiency. * * * In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make." Bousley v. United States, 523 U.S. 614, 623-624 (1998) (citation omitted).

"If the petitioner asserts his actual innocence of the underlying crime, he must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his

habeas petition. * * * If, on the other hand, a capital petitioner challenges his death sentence in particular, he must show 'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty in light of the new evidence." Calderon v. Thompson, 523 U.S. 538, 559-560 (1998) (quoting first Schlup v. Delo, 513 U.S. 298, 327 (1995), and then Sawyer v. Whitley, 505 U.S. 333, 348 (1992)).

**Implied Right of Action**

"Because the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute. * * * That endeavor inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken. * * * To guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the parameters of an implied right in a manner at odds with the statutory structure and purpose." Gebser v. Lago Vista Independent School District, 524 U.S. 274, 284 (1998) (citations omitted).

"When Congress attaches conditions to the award of federal funds under its spending power, U.S. Const., Art. I, § 8, cl. 1, as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. * * * Our central concern in that regard is with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award." Gebser v. Lago Vista Independent School District, 524 U. S. 274, 287 (1998) (citations, internal quotation marks, and brackets omitted).

"Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions." Gebser v. Lago Vista Independent School District, 524 U.S. 274, 290 (1998).

**Indictments**

"An indictment must set forth each element of the crime that it charges. * * * But it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) (citation omitted).

**Injunctive Relief**

"'Past exposure to illegal conduct does not in itself show a present

case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 109 (1998) (quoting O'Shea v. Littleton, 414 U.S. 488, 495-496 (1974)).

**Issue Raised *Sua Sponte***

"A court of appeals is not 'required' to raise the issue of procedural default *sua sponte*. It is not as if the presence of a procedural default deprived the federal court of jurisdiction, for this Court has made clear that in the habeas context, a procedural default, that is, a critical failure to comply with state procedural law, is not a jurisdictional matter." Trest v. Cain, 522 U.S. 87, 89 (1997).

**Case Decided on Ground Not Raised**

"We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home." Trest v. Cain, 522 U.S. 87, 92 (1997).

**Confession of Codefendant**

[The rule of Burton v. United States, 391 U.S. 123 (1968), which bars the admission of a confession of a codefendant that incriminates the defendant in a joint trial, applies to bar the admission of] "the codefendant's confession [that has been redacted] by substituting for the defendant's name in the confession a blank space or the word 'deleted.'" Gray v. Maryland, 523 U.S. 185, 188 (1998).

**Exhaustion of Remedies**

"'[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.'" Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 877 (1998) (quoting McCarthy v. Madigan, 503 U.S. 140, 146 (1992) (internal quotation marks omitted)).

**Jurisdiction: Contrast to Cause of Action**

"It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to

adjudicate the case." Steel Co. v. Citizens for a Better Environment, 523 U. S. 83, 89 (1998) (emphasize in original) (citing 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, p. 196, n.8 (2d ed. 1990)).

**Jurisdiction: Federal Question**

"'[T]he presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.'" Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998) (quoting Caterpillar Inc. v. Williams, 482 U. S. 386, 392 (1987)).

"Allied as an 'independent corollary' to the well-pleaded complaint rule is the further principle that 'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998) (quoting Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 22 (1983)).

**Jurisdiction: Hypothetical**

The "doctrine of hypothetical jurisdiction" is "embraced by several Courts of Appeals, which find it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. * * * We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93-94 (1998).

"Hypothetical jurisdiction produces nothing more than a hypothetical judgment -- which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101 (1998).

**Jurisdiction: Removal**

"[C]laim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under [28 U.S.C.] § 1441 (b). Such a defense is properly made in the state proceedings, and the state courts' disposition of it is subject to this Court's ultimate review." Rivet v. Regions Bank of La., 522 U.S. 470, 478 (1998) (footnote omitted).

**Jurisdiction: Supplemental**

"[A] case containing claims that local administrative action violates federal law, but also containing state law claims for on-the-record review of the administrative findings, is within the jurisdiction of federal district courts." City of Chicago v. International College of Surgeons, 522 U.S. 156, 163 (1997).

"[T]his Court has long adhered to principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact,' such that 'the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case."' Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) * * *. Congress has codified those principles in the supplemental jurisdiction statute, which combines the doctrines of pendent and ancillary jurisdiction under a common heading. 28 U.S.C. § 1367." City of Chicago v. International College of Surgeons, 522 U.S. 156, 164-165 (1997).

"Of course, to say that the terms of § 1367(a) authorize the district courts to exercise supplemental jurisdiction over state law claims for on-the-record review of administrative decisions does not mean that the jurisdiction *must* be exercised in all cases. Our decisions have established that pendent jurisdiction 'is a doctrine of discretion, not of plaintiff's right,' Gibbs, 383 U.S., at 726, and that district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons, *id.*, at 726-727. * * * Accordingly, we have indicated that 'district courts [should] deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine.' [Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988)].

"The supplemental jurisdiction statute codifies these principles." City of Chicago v. International College of Surgeons, 522 U.S. 156, 172-173 (1997) (emphasis in original).

"In addition to their discretion under § 1367(c), district courts may be obligated not to decide state law claims (or to stay their adjudication) where one of the abstention doctrines articulated by this Court applies. Those doctrines embody the general notion that 'federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest, for example where abstention is

warranted by considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration.'" City of Chicago v. International College of Surgeons, 522 U.S. 156, 174 (1997) (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (citations and internal quotation marks omitted)).

**Jury Trial**

"The District Court correctly afforded [plaintiff] the option of a new trial when it entered judgment for the reduced damages. The Court of Appeals' writ of mandamus, requiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing [plaintiff] the option of a new trial, cannot be squared with the Seventh Amendment." Hetzel v. Prince William County, 523 U.S. 208, 211 (1998).

"Since Justice Story's time, the Court has understood 'Suits at common law' to refer 'not merely [to] suits, which the *common* law recognized among its old and settled proceedings, but [to] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.' Parsons v. Bedford, 3 Pet. 433, 447 (1830) (emphasis in original). The Seventh Amendment thus applies not only to common-law causes of action, but also to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.' Granfinanciera, S.A. v. Nordberg, 492 U. S. 33, 42 (1989) (citing Curtis v. Loether, 415 U.S. [189,] 193 [1974]). To determine whether a statutory action is more analogous to cases tried in courts of law than to suits tried in courts of equity or admiralty, we examine both the nature of the statutory action and the remedy sought. See 492 U.S., at 42." Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347-348 (1998).

"It has long been recognized that 'by the law the jury are judges of the damages.'" Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) (quoting Lord Townshend v. Hughes, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C.P. 1677)).

"[T]he Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, [17 U.S.C. 504(c),] including the amount itself." Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998).

**Laches**

"When New York thus asserts prescription as an affirmative defense, it is in the same position it would have occupied if it had itself brought an original action against New Jersey claiming sovereignty by prescription. On each of the essential elements of prescription and acquiescence New York has the burden of persuasion, and therefore, though raising a 'defense,' it is in effect a plaintiff. * * * [In these circumstances, New York] cannot benefit from the defense of laches. This is so because New York is effectively a plaintiff on the issue of prescription and cannot invoke laches to escape the necessity of proving its affirmative case." New Jersey v. New York, 523 U.S. 767, 807 (1998).

**Legislative Motives**

"[I]t simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998) (quoting Tenney v. Brandhove, 341 U.S. 367, 377 (1951)).

**Mootness**

Petition for habeas corpus challenging parole revocation is moot where convict "has completed the entire term of imprisonment underlying the parole revocation" and faces no continuing collateral consequences. Spencer v. Kemna, 523 U.S. 1, 3 (1998).

"'This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit." Spencer v. Kemna, 523 U.S. 1, 7 (1998) (quoting Lewis v. Continental Bank Corp., 494 U.S. 472, 477-478 (1990)).

"[M]ootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. We are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." Spencer v. Kemna, 523 U.S. 1, 18 (1998).

**Mootness: Capable of Repetition Yet Evading Review**

"The capable-of-repetition doctrine applies only in exceptional situations, * * * where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Spencer v. Kemna, 523 U.S. 1, 17 (1998) (internal quotation

marks, citations, ellipses, and brackets omitted).

**Presumptions**

"The [National Labor Relations] Board can, of course, forthrightly and explicitly adopt counterfactual evidentiary presumptions (which are in effect substantive rules of law) as a way of furthering particular legal or policy goals -- for example, the Board's irrebuttable presumption of majority support for the union during the year following certification * * *." Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 378 (1998).

**Recall of Appellate Court Mandate**

"[T]the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." Calderon v. Thompson, 523 U.S. 538, 549 (1998).

"In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances." Calderon v. Thompson, 523 U.S. 538, 550 (1998) (citing 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3938, p. 712 (2d ed. 1996)).

"The sparing use of the power [to recall the mandate] demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." Calderon v. Thompson, 523 U.S. 538, 550 (1998).

"Finality is essential to both the retributive and the deterrent functions of criminal law." Calderon v. Thompson, 523 U.S. 538, 555 (1998).

"[W]e hold the general rule to be that, where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." Calderon v. Thompson, 523 U.S. 538, 558 (1998).

**Relief From Judgment**

"The sense of [the caselaw] is that, under [Federal Rule of Civil Procedure 60(b)] an independent action [to obtain relief from a judgment] should be available only to prevent a grave miscarriage of justice." United States v. Beggerly, 524 U.S. 38, 47 (1998).

**Res Judicata**

"'Res judicata' is the term traditionally used to describe two discrete effects: (1) what we now call claim preclusion (a valid final adjudication of a claim precludes a second action on that claim or any part of it), see Restatement (Second) of Judgments §§ 17-19 (1982); and (2) issue preclusion, long called 'collateral estoppel' (an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim), see *id.*, § 27." Baker v. General Motors Corp., 522 U.S. 222, 233 n.5 (1998).

"'Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.'" Baker v. General Motors Corp., 522 U. S. 222, 238 (1998) (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979)).

"Under the doctrine of claim preclusion, '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" Rivet v. Regions Bank of La., 522 U.S. 470, 476 (1998) (quoting Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981)).

"Claim preclusion (res judicata), as Rule 8(c) of the Federal Rules of Civil Procedure makes clear, is an affirmative defense." Rivet v. Regions Bank of La., 522 U.S. 470, 476 (1998).

**Retroactivity**

"[A] prescription is not made retroactive merely because it draws upon antecedent facts for its operation." Regions Hospital v. Shalala, 522 U.S. 448, 456 (1998) (citations and internal quotation marks omitted).

**Ripeness**

"A claim is not ripe for adjudication if it rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all."'" Texas v. United States, 523 U.S. 296, 300 (1998) (quoting Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 580-581 (1985) (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)).

"Ripeness 'requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court

consideration.' Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). As to fitness of the issues: Texas asks us to hold that under no circumstances can the imposition of these sanctions constitute a change affecting voting. We do not have sufficient confidence in our powers of imagination to affirm such a negative." Texas v. United States, 523 U.S. 296, 300-301 (1998).

"[A]n abstraction no graver than the 'threat to personal freedom' that exists whenever an agency regulation is promulgated [is] * * * inadequate to support suit unless the person's primary conduct is affected." Texas v. United States, 523 U.S. 296, 302 (1998).

"In sum, we find it too speculative whether the problem Texas presents will ever need solving; we find the legal issues Texas raises not yet fit for our consideration, and the hardship to Texas of biding its time insubstantial." Texas v. United States, 523 U.S. 296, 302 (1998).

"In deciding whether an agency's decision is, or is not, ripe for judicial review, the Court has examined both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.' [Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)] at 149. To do so in this case, we must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).

Withholding of court consideration will not cause significant hardship, in part, because the challenged agency actions "do not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm. * * * [T]hey do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998) (paraphrasing United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 309-310 (1927) (opinion of Brandeis, J)).

"The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of -- even repetitive -- postimplementation litigation." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 735 (1998).

**Standing: In General**

"[A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 320 n.4 (1998) (Ginsburg, J., dissenting) (quoting New York v. Ferber, 458 U.S. 747, 767 (1982)).

"[I]t was [once] thought that the only function of the constitutional requirement of standing was 'to assure that concrete adverseness which sharpens the presentation of issues,' Baker v. Carr, 369 U.S. 186, 204 (1962). * * * That parsimonious view of the function of Article III standing has since yielded to the acknowledgment that the constitutional requirement is a 'means of "defin[ing] the role assigned to the judiciary in a tripartite allocation of power,"' Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U. S. 464, 474 (1982), and 'a part of the basic charter . . . provid[ing] for the interaction between [the federal] government and the governments of the several States,' *id.*, at 476." Spencer v. Kemna, 523 U.S. 1, 11-12 (1998) (footnote omitted).

"The 'irreducible constitutional minimum of standing' contains three requirements. * * * First and foremost, there must be alleged (and ultimately proved) an 'injury in fact' -- a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not "conjectural" or "hypothetical."' * * * Second, there must be causation -- a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. * * * And third, there must be redressability -- a likelihood that the requested relief will redress the alleged injury. * * * This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-104 (1998) (citations and footnote omitted).

"[A] white criminal defendant has standing to object to discrimination against black persons in the selection of grand jurors." Campbell v. Louisiana, 523 U.S. 392, 394 (1998).

"Standing to litigate often turns on imprecise distinctions and requires difficult line-drawing." Campbell v. Louisiana, 523 U.S. 392, 397 (1998) (*dictum*).

"It is axiomatic that one has standing to litigate his or her own due process rights." Campbell v. Louisiana, 523 U.S. 392, 400 (1998).

**Constitutional Standing: Causation**

[An agency's discretion to withhold a remedy does not] "destroy Article III 'causation,' for we cannot know that the FEC would have exercised its prosecutorial discretion in this way. Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground." Federal Election Comm'n v. Akins, 524 U.S. 11, 25 (1998).

**Constitutional Standing: Injury in Fact**

"Regardless of his or her skin color, the accused suffers a significant injury in fact when the composition of the grand jury is tainted by racial discrimination." Campbell v. Louisiana, 523 U.S. 392, 398 (1998).

"[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 107 (1998).

"An 'interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.'" Steel Co. v. Citizens for a Better Environment, 523 U. S. 83, 107 (1998) (quoting Lewis v. Continental Bank Corp., 494 U.S. 472, 480 (1990)).

The Supreme Court "decline[d] to presume that collateral consequences adequate to meet Article III's injury-in-fact requirement resulted from petitioner's parole revocation." Spencer v. Kemna, 523 U.S. 1, 14 (1998).

"[A] plaintiff suffers an 'injury-in-fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." Federal Election Comm'n v. Akins, 524 U.S. 11, 21 (1998) (citing Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989)).

"By depriving [plaintiffs] of their statutory bargaining chip, the cancellation inflicted a sufficient likelihood of economic injury to establish standing under our precedents." Clinton v. City of New York, 524 U.S. 417, 432 (1998).

"[A] denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result." Clinton v. City of New York, 524 U.S. 417, 433-434 n.22 (1998).

"Once it is determined that a particular plaintiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing -- regardless of whether there are others who would also have standing to sue." Clinton v. City of New York, 524 U.S. 417, 434-436 (1998).

**Constitutional Standing: Redressability**

"[I]t is [not] enough that respondent will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm. * * * Obviously, such a principle would make the redressability requirement vanish. By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. * * * Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 106-107 (1998) (citations omitted).

**Standing: Generalized Grievance**

"[V]indication of the rule of law" is an "undifferentiated public interest" that "does not suffice" to establish standing. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 106 (1998) (quotation marks omitted).

"Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance. * * * [This kind of judicial language], however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature -- for example, harm to the 'common concern for obedience to law.'" Federal Election Comm'n v. Akins, 524 U.S. 11, 23 (1998) (citations omitted).

"Often the fact that an interest is abstract and the fact that it is

widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" Federal Election Comm'n v. Akins, 524 U.S. 11, 24 (1998).

"[T]he informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts." Federal Election Comm'n v. Akins, 524 U.S. 11, 24-25 (1998).

**Prudential Standing: "Aggrieved"**

"History associates the [statutory] word 'aggrieved' with a congressional intent to cast the standing net broadly -- beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." Federal Election Comm'n v. Akins, 524 U.S. 11, 19 (1998).

**Prudential Standing: Zone of Interests**

"For a plaintiff to have prudential standing under the APA, 'the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question.'" National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 488 (1998) (quoting Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970)).

"[F]or a plaintiff's interests to be arguably within the 'zone of interests' to be protected by a statute, there does not have to be an 'indication of congressional purpose to benefit the would-be plaintiff.'" National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 492 (1998) (quoting Clarke v. Securities Industry Assn., 479 U.S. 388, 399-400 (1987)).

"[I]n applying the 'zone of interests' test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests 'arguably . . . to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them." National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 492 (1998).

"[I]n order to have standing under the APA, a plaintiff must * * * have [more than] an interest in enforcing the statute in question."

National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 494 n.7 (1998).

"As competitors of federal credit unions, respondents certainly have an interest in limiting the markets that federal credit unions can serve, and the NCUA's interpretation has affected that interest by allowing federal credit unions to increase their customer base." National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 493-494 (1998).

A commercial bank's "interest in limiting the markets that federal credit unions can serve is arguably within the zone of interests to be protected by" 12 U.S.C. 1759, which imposes a "common bond" requirement for membership in a credit union. National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 488 (1998).

"Because of the unmistakable link between § 109's express restriction on credit union membership and the limitation on the markets that federal credit unions can serve, there is objectively some indication in the statute, * * * that respondents' interest is 'arguably within the zone of interests to be protected' by § 109. Hence respondents are more than merely incidental beneficiaries of § 109's effects on competition." National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 494 n.7 (1998) (some internal quotation marks omitted).

"The injury of which [plaintiffs] complain -- their failure to obtain relevant information -- is injury of a kind that FECA [Federal Election Campaign Act] seeks to address." Federal Election Comm'n v. Akins, 524 U.S. 11, 20 (1998).

**Stare Decisis**

"The Court of Appeals was correct in applying [*stare decisis*] despite disagreement with [a Supreme Court precedent], for it is this Court's prerogative alone to overrule one of its precedents." State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

"*Stare decisis* reflects 'a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."'" Agostini v. Felton, 521 U.S. 203, 235 (1997) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). It 'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' Payne v. Tennessee, 501 U.S. 808, 827 (1991)." State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

"Today's opinion gives the lie to those cynics who claim that changes in this Court's jurisprudence are attributable to changes in the Court's membership. It proves that the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim, 'That was then, this is now.'" County of Sacramento v. Lewis, 523 U.S. 833, 860 (1998) (Scalia, J., concurring in the judgment).

"*Stare decisis* is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" Hohn v. United States, 524 U. S. 236, 251 (1998) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

"Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality. * * * Once we have decided to reconsider a particular rule, however, we would be remiss if we did not consider the consistency with which it has been applied in practice." Hohn v. United States, 524 U.S. 236, 252-253 (1998) (citations omitted).

"'Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.'" Hohn v. United States, 524 U.S. 236, 251 (1998) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-173 (1989)).

"*[S]tare decisis* is a 'principle of policy' rather than 'an inexorable command.' * * * For example, we have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument. * * * The role of *stare decisis*, furthermore, is 'somewhat reduced . . . in the case of a procedural rule . . . which does not serve as a guide to lawful behavior.'" Hohn v. United States, 524 U.S. 236, 251 (1998) (citations omitted).

**Stare Decisis: Enhanced Force Where Congress Has Declined to Modify Court Decision**

"'W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.'" Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)).

"Neither party before us has urged us to depart from our customary adherence to *stare decisis* in statutory interpretation, Patterson v. McLean Credit Union, 491 U.S. 164, 172-173 (1989) (*stare decisis* has 'special force' in statutory interpretation). And the force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the Meritor decision, without providing any modification of our holding. * * * [S]ee Keene Corp. v. United States, 508 U.S. 200, 212 (1993) (applying the 'presumption that Congress was aware of [prior] judicial interpretations and, in effect, adopted them')." Faragher v. City of Boca Raton, 524 U.S. 775, 792 (1998) (citation omitted). See *id.* at 804 n.4.

**Stare Decisis: *Sub Silentio* Holdings**

"'While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, neither should we disregard the implications of an exercise of judicial authority assumed to be proper' in previous cases." Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998) (Opinion of O'Connor, J.) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 307 (1962) (citations omitted)).

**State Court Injunctions**

"This Court has held it impermissible for a state court to enjoin a party from proceeding in a federal court, see Donovan v. Dallas, 377 U.S. 408 (1964), but has not yet ruled on the credit due to a state-court injunction barring a party from maintaining litigation in another State, see Ginsburg, Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments, 82 Harv. L. Rev. 798, 823 (1969)." Baker v. General Motors Corp., 522 U.S. 222, 236 n.9 (1998).

**Statute of Limitations**

"A limitations period ordinarily does not begin to run until the plaintiff has a 'complete and present cause of action.'" Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc., 522 U.S. 192, 195 (1997) (quoting Rawlings v. Ray, 312 U.S. 96, 98 (1941)).

"Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc., 522 U.S. 192, 201 (1997).

"Consistent with general principles governing installment obligations, each missed payment creates a separate cause of action with its own six-year limitations period." Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc., 522 U.S. 192, 195 (1997).

"We cannot agree that the rule that each missed payment carries its own limitations period turns on the origin -- contractual or otherwise -- of an installment obligation. Courts have repeatedly applied the rule in actions to collect on installment judgments, even though such obligations obviously are not contractual." Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc., 522 U.S. 192, 209-210 (1997).

Where a statute governs the "life of the underlying right," "it limits more than the time for bringing a suit." Beach v. Ocwen Federal Bank, 523 U.S. 410, 417 (1998).

"[T]he object of a statute of limitation [is] keeping stale litigation out of the courts, * * * [and] limitation statutes are aimed at lawsuits, not at the consideration of particular issues in lawsuits." Beach v. Ocwen Federal Bank, 523 U.S. 410, 415-416 (1998) (citations and internal quotation marks omitted).

**Statutes of Limitation: Equitable Tolling**

"Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute. * * * Here, the QTA [Quiet Title Act, 28 U.S.C. 2409a], by providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,' has already effectively allowed for equitable tolling. * * * Given this fact, and the unusually generous nature of the QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted. This is particularly true given that the QTA deals with ownership of land. It is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge. Equitable tolling of the already generous statute of limitations incorporated in the QTA would throw a cloud of uncertainty over these rights, and we hold that it is incompatible with the Act." United States v. Beggerly, 524 U.S. 38, 48-49 (1998) (citations omitted).

**Statutory Deadlines**

"The Secretary's failure to meet the [statutory] deadline, a not

uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it. See, *e.g.*, Brock v. Pierce County, 476 U.S. 253, 260 (1986) (even though the Secretary of Labor did not meet a 'shall' statutory deadline, the Court 'would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action')." Regions Hospital v. Shalala, 522 U.S. 448, 459 n.3 (1998).

**Substantial Evidence Test**

"The 'substantial evidence' test *itself* already gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree that *could* satisfy a reasonable factfinder. See [NLRB v.] Columbian Enameling & Stamping Co., 306 U.S. * * * [292, 300 (1939)]. This is an objective test, and there is no room within it for deference to an agency's eccentric view of what a reasonable factfinder *ought* to demand." Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 377 (1998) (emphasis in original).

**Summary Judgment**

"[S]ummary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." Crawford-el v. Britton, 523 U.S. 574, 600 (1998).

"The petitioner was required to establish that there existed a genuine issue of material fact [to avoid summary judgment]. Evidence which was merely colorable or not significantly probative would not have been sufficient." Bragdon v. Abbott, 524 U.S. 624, 652-653 (1998).

**Transfers in Multidistrict Litigation**

A district court conducting pretrial proceedings pursuant to a transfer by the Judicial Panel on Multidistrict Litigation is not authorized by 28 U.S.C. 1407(a) "to assign a transferred case to itself for trial." Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

**Venue**

Where money "laundering alleged in the indictment [under 18 U.S.C. 1956(a)(1)(B)(ii) and 1957] occurred entirely in" one state, and "[t]he currency purportedly laundered derived from the unlawful distribution of

cocaine in" a second state, venue is proper only in the first state. United States v. Cabrales, 524 U.S. 1, 3-4 (1998).

**Vienna Convention**

"[N]either the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions." Breard v. Greene, 523 U.S. 371, 377 (1998).

IV. SUBSTANTIVE LAW DOCTRINES

**Admiralty**

"The federal courts have had a unique role in admiralty cases since the birth of this Nation, because '[m]aritime commerce was . . . the jugular vein of the Thirteen States.'"

California v. Deep Sea Research, Inc., 523 U.S. 491, 501 (1998) (quoting F. Frankfurter & J. Landis, The Business of the Supreme Court 7 (1927)).

**Age Discrimination in Employment Act**

A release signed by "[a]n employee, as part of a termination agreement" and the employee's receipt of severance pay do not bar her action under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S.C. 621 *et seq.*, when the release "did not comply with specific federal statutory requirements for a release of claims under the" ADEA. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 423-424 (1998).

**Americans With Disabilities Act**

"Title II of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U.S.C. § 12131 *et seq.*, which prohibits a 'public entity' from discriminating against a 'qualified individual with a disability' on account of that individual's disability * * * covers inmates in state prisons." Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 208 (1998).

"HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease." Bragdon v. Abbott, 524 U.S. 624, 637 (1998).

"[R]eproduction is a major life activity." Bragdon v. Abbott, 524 U. S. 624, 638 (1998).

"HIV infection, even in the so-called asymptomatic phase, is an impairment which substantially limits the major life activity of reproduction." Bragdon v. Abbott, 524 U.S. 624, 647 (1998).

**Antitrust Law**

"Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints." State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

"[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

"*Per se* treatment is appropriate [under the antitrust laws] '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (quoting Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 344 (1982)).

"[T]he primary purpose of the antitrust laws is to protect interbrand competition." State Oil Co. v. Khan, 522 U.S. 3, 15 (1997).

"[V]ertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason." State Oil Co. v. Khan, 522 U.S. 3, 22 (1997).

**Assimilative Crimes Act**

"The [Assimilative Crimes Act's] basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves." Lewis v. United States, 523 U.S. 155, 160 (1998).

"[T]he ACA's [Assimilative Crimes Act's] language and its gap-filing purpose taken together indicate that a court must first ask the question that the ACA's language requires: Is the defendant's 'act or omission . . .

made punishable by *any* enactment of Congress.' 18 U.S.C. § 13(a) (emphasis added). If the answer to this question is 'no,' that will normally end the matter. The ACA presumably would assimilate the statute. If the answer to the question is 'yes,' however, the court must ask the further question whether the federal statutes that apply to the 'act or omission' preclude application of the state law in question, say, because its application would interfere with the achievement of a federal policy, see Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 389-390 (1944), because the state law would effectively rewrite an offense definition that Congress carefully considered, see Williams [v. United States, 327 U.S. 711, 718 (1946)], or because federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue, see *id.*, at 724 (no assimilation where Congress has 'covered the field with uniform federal legislation')." Lewis v. United States, 523 U.S. 155, 164-165 (1998).

**Attorney-Client Privilege**

"[N]otes of an initial interview with a client shortly before the client's death * * * are protected by the attorney-client privilege" even after the client's death." Swidler and Berlin v. United States, 524 U.S. 399, 401 (1998).

"The [attorney-client] privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" Swidler and Berlin v. United States, 524 U.S. 399, 403 (1998) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

**Bankruptcy Act**

"[A] debt arising from a medical malpractice judgment, attributable to negligent or reckless conduct," does not fall within the Bankruptcy Code exception from dischargeability of a debt "for willful and malicious injury by the debtor to another," (11 U.S.C. 523(a)(6)) and thus is dischargeable. Kawaauhau v. Geiger, 523 U.S. 57, 59 (1998).

**Bankruptcy Act: Fraud Exception**

The Bankruptcy Code exception from discharge in bankruptcy applicable to "'any debt . . . for money, property, services, or . . . credit, to the extent obtained by' fraud [11 U.S.C. 523(a)(2)(A)] encompasses any liability arising from money, property, etc., that is fraudulently obtained, including treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor." Cohen v. de la Cruz, 523 U.S. 213, 223 (1998).

Statutory context indicates that phrase "debt for" is not limited to restitutionary sense of "liability on a claim to obtain," but instead "is used throughout to mean 'debt as a result of,' 'debt with respect to,' 'debt by reason of,' and the like * * *." Cohen v. de la Cruz, 523 U.S. 213, 220 (1998).

"We, however, 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure' * * *." Cohen v. de la Cruz, 523 U.S. 213, 221 (1998) (quoting Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 563 (1990)).

**Bribery: Elements of**

"[T]he federal bribery statute codified at 18 U.S.C. § 666 [is not] limited to cases in which the bribe has a demonstrated effect upon federal funds." Salinas v. United States, 522 U.S. 52, 54 (1997).

"The phrase ["anything of value" in the federal bribery statute, 18 U.S.C. 666(a)(1)(B),] encompasses all transfers of personal property or other valuable consideration in exchange for the influence or reward." Salinas v. United States, 522 U.S. 52, 57 (1997).

**Capital Punishment**

"[T]he Eighth Amendment [does not] require[] that a capital jury be instructed on the concept of mitigating evidence generally, or on particular statutory mitigating factors." Buchanan v. Angelone, 522 U.S. 269, 270 (1998).

"[O]ur cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. Tuilaepa v. California, 512 U.S. 967, 971 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Ibid.* In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.*, at 972." Buchanan v. Angelone, 522 U.S. 269, 275 (1998).

"It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have

emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." Buchanan v. Angelone, 522 U.S. 269, 275-276 (1998).

**CERCLA**

"[U]nder the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 94 Stat. 2767, as amended, 42 U.S.C. § 9601 *et seq.*, * * * a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may [not], without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary * * * unless the corporate veil may be pierced. But a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility." United States v. Bestfoods, 524 U.S. 51, 55 (1998).

"CERCLA liability may turn on operation as well as ownership, and nothing in the statute's terms bars a parent corporation from direct liability for its own actions in operating a facility owned by its subsidiary." United States v. Bestfoods, 524 U.S. 51, 64 (1998).

"[U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." United States v. Bestfoods, 524 U.S. 51, 66-67 (1998).

**Conspiracy**

"A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." Salinas v. United States, 522 U.S. 52, 63 (1997).

It is "the common-law principle that, so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators." Salinas v. United States, 522 U.S. 52, 64 (1997).

"A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." Salinas v. United States, 522 U.S. 52,

65 (1997).

**Constitutional Tort Alleging Improper Motive**

The D.C. Circuit's creation of a heightened burden of proof for constitutional tort claims alleging improper motive "is that court's latest effort to address a potentially serious problem: Because an official's state of mind is 'easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." Crawford-el v. Britton, 523 U.S. 574, 584-585 (1998) (quoting Crawford-el v. Britton, 93 F.3d 813, 816, 821 (D.C. Cir. 1996) (*en banc*)).

"The immunity standard in Harlow [v. Fitzgerald, 457 U.S. 800 (1982),] itself eliminates all motive-based claims in which the official's conduct did not violate clearly established law." Crawford-el v. Britton, 523 U.S. 574, 592 (1998).

"[T]here is a strong public interest in protecting public officials from the costs associated with the defense of damages actions. That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated." Crawford-el v. Britton, 523 U.S. 574, 590 (1998) (footnote omitted).

"[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process." Crawford-el v. Britton, 523 U.S. 574, 595 (1998) (rejecting D.C. Circuit's court-fashioned burden of proof).

"When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." Crawford-el v. Britton, 523 U.S. 574, 597-598 (1998).

To guard against unnecessary and burdensome discovery in qualified immunity cases, "[t]he court may [first] insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. * * * This option exists even if the official chooses not to plead the affirmative defense of qualified immunity. Second, if the defendant does plead the immunity defense, the district court should resolve that threshold question before

permitting discovery. * * * To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law. Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question, which sometimes requires complicated analysis of legal issues." Crawford-el v. Britton, 523 U.S. 574, 598 (1998) (footnote and citations omitted).

**Contract Law**

"[C]ontracts tainted by mistake, duress, or even fraud are voidable at the option of the innocent party." Oubre v. Entergy Operations, Inc., 522 U.S. 422, 425 (1998).

"[I]in equity, a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation." Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426 (1998).

**Corporate Veil**

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." United States v. Bestfoods, 524 U.S. 51, 61 (1998) (quoting Douglas & Shanks, Insulation from Liability Through Subsidiary Corporations, 39 Yale L.J. 193 (1929)).

"But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." United States v. Bestfoods, 524 U.S. 51, 62 (1998).

**Criminal Law: Lesser Included Offenses**

"[S]tate trial courts [are not constitutionally required] to instruct juries on offenses that are not lesser included offenses of the charged [capital] crime under state law." Hopkins v. Reeves, 524 U.S. 88, 90 (1998).

**Death On the High Seas Act ("DOHSA")**

"DOHSA expresses Congress' judgment that there should be no [survival action for non-pecuniary injuries such as pre-death pain and suffering] in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas." Dooley v. Korean Air Lines Co., 524 U.S. 116, 123 (1998).

**Due Process**

"The core of due process is the right to notice and a meaningful opportunity to be heard." Lachance v. Erickson, 522 U.S. 262, 266 (1998).

**Due Process: Life or Liberty Interest**

"[R]espondent * * * must have a protected life or liberty interest in the [process he is challenging]. Otherwise * * * he is asserting merely a protected interest in process itself, which is not a cognizable claim." Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 279-280 n.2 (1998) (opinion of four Justices) (citing Olim v. Wakinekona, 461 U.S. 238, 249-250 (1983)).

**Due Process: Substantive**

"[A] police officer [does not] violate[] the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. * * * [I]n such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998).

"[W]e have 'always been reluctant to expand the concept of substantive due process * * *.'" County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

"'[W]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) (quoting Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.) (quoting

Graham v. Connor, 490 U.S. 386, 395 (1989) (internal quotation marks omitted)).

"'[T]he touchstone of due process is protection of the individual against arbitrary action of government * * *.'" County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

"Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense * * *." County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (internal quotation marks omitted).

"[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

"While the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'poin[t] the way.'" County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir.), cert. denied, 414 U.S. 1033 (1973).

"Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." County of Sacramento v. Lewis, 523 U.S. 833, 854 (1998) (footnote omitted).

"[E]xecutive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them. Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways." County of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998).

**Elections**

"[I]t is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." Foster v. Love, 522 U.S. 67, 69 (1977) (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832-833 (1995)).

**Eleventh Amendment**

"[In a diversity case,] [t]he presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect or consent to jurisdiction. * * * No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own. * * *

"The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. * * * Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it." Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 389 (1998) (citations omitted).

"A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim. But that circumstance does not destroy removal jurisdiction over the remaining claims in the case before us. A federal court can proceed to hear those other claims, and the District Court did not err in doing so." Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 392-393 (1998).

**Equal Protection: State Taxation**

"[I]n the equal protection context, 'inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a [tax] system that is not arbitrary in its classification, are not sufficient to defeat the law.' Maxwell [v. Bugbee, 250 U.S. 525, 543 (1919)].

"We have described this balance as 'a rule of substantial equality of treatment' for resident and nonresident taxpayers. Austin v. New Hampshire, 420 U.S. 656, 665 (1975)." Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 297-298 (1998).

**ERISA**

"The Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), * * * [does not allow] an employer to deny COBRA continuation coverage [under a group health plan] to a qualified beneficiary who is covered under another group health plan at the time he makes his COBRA election." Geissal v. Moore Medical Corp., 524 U.S. 74, 76 (1998).

**Export Clause**

"[T]he Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit." United States v. United States Shoe Corp., 523 U.S. 360, 367 (1998).

"'[W]e must regard things rather than names,' * * * in determining whether an imposition on exports ranks as a tax. The crucial question is whether the ["tax" at issue] is a tax on exports in operation as well as nomenclature or whether, despite the label Congress has put on it, the exaction is instead a bona fide user fee." United States v. United States Shoe Corp., 523 U.S. 360, 367 (1998) (quoting Pace v. Burgess, 92 U.S. 372, 376 (1876)).

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**Facial Challenges**

"Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.' * * * To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech." National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

**False Statements**

"[N]either the Due Process Clause [n]or the Civil Service Reform Act

(CSRA), 5 U.S.C. § 1101 *et seq.*, precludes a federal agency from sanctioning an employee for making false statements to the agency regarding alleged employment-related misconduct on the part of the employee." Lachance v. Erickson, 522 U.S. 262, 264 (1998).

"'Our legal system provides methods for challenging the Government's right to ask questions -- lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." Lachance v. Erickson, 522 U.S. 262, 265 (1998) (quoting Bryson v. United States, 396 U.S. 64, 72 (1969) (footnote omitted)).

"[T]here is [no] exception to criminal liability under 18 U.S.C. § 1001 for a false statement that consists of the mere denial of wrongdoing, the so-called 'exculpatory no.'" Brogan v. United States, 522 U.S. 398, 399 (1998).

**Federal Credit Unions**

"Because we conclude that Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of Chevron." National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 500 (1998) (emphasis in original).

**Federal Election Campaign Act**

[Under the Federal Election Campaign Act, the term "political committee" has] "a much broader scope" [than the term "political action committee."] Federal Election Comm'n v. Akins, 524 U.S. 11, 15 (1998).

**Fifth Amendment: Privilege Against Self-Incrimination**

"It is well established that a criminal defendant's right to testify does not include the right to commit perjury." Lachance v. Erickson, 522 U. S. 262, 266 (1998).

"[T]he 'prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify.'" Lachance v. Erickson, 522 U.S. 262, 267-268 (1998) (quoting Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)).

"[C]oncern with foreign prosecution is beyond the scope of the Self-

Incrimination Clause." United States v. Balsys, 524 U.S. 666, 669 (1998).

"Resident aliens * * * are considered 'persons' for purposes of the Fifth Amendment and are entitled to the same protections under the Clause as citizens." United States v. Balsys, 524 U.S. 666, 671 (1998).

"[T]he risk that [the testimony of a resident alien] might subject him to deportation is not a sufficient ground for asserting the privilege, given the civil character of a deportation proceeding." United States v. Balsys, 524 U.S. 666, 671 (1998).

**Filed-Rate Doctrine**

[Under the filed-rate doctrine common to the Communications Act and the Interstate Commerce Act,] "even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff." American Telephone and Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 222 (1998).

[The filed-rate doctrine applies to service variations as well as to pricing.] "Rates * * * do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." American Telephone and Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 223 (1998).

**First Amendment: Freedom of Speech**

"When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity. * * * Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998).

"Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 675 (1998).

"Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 681 (1998).

**First Amendment: Government as Patron**

"[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities." National Endowment for the Arts v. Finley, 524 U.S. 569, 587-588 (1998).

"[W]hen the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.

"In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity." National Endowment for the Arts v. Finley, 524 U.S. 569, 589 (1998).

"[I]t is well established that 'decency' is a permissible factor where 'educational suitability' motivates its consideration." National Endowment for the Arts v. Finley, 524 U.S. 569, 584 (1998) (quoting Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982)).

"As the dissent below noted, it would be 'impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression.' 100 F.3d, at 685 (opinion of Kleinfeld, J.). The 'very assumption' of NEA is that grants will be awarded according to the 'artistic worth of competing applicants,' and absolute neutrality is simply 'inconceivable.' Advocates for the Arts v. Thomson, 532 F.2d 792, 795-796 (CA 1), cert. denied, 429 U.S. 894 (1976)." National Endowment for the Arts v. Finley, 524 U.S. 569, 585-586 (1998).

**First Amendment: Traditional Public Fora**

"Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.' Perry Ed. Ass'n [v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)] at 45. The government can exclude a speaker from a traditional public forum 'only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.' Cornelius [v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788 (1985)] at 800." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

**First Amendment: Designated Public Fora**

"Designated public fora, in contrast, are created by purposeful governmental action. 'The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.' * * * Hence 'the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.' * * * If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 802 (1985)).

"To create a forum of this type, the government must intend to make the property 'generally available,' * * * to a class of speakers." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998) (quoting Widmar v. Vincent, 454 U.S. 263, 264 (1981)).

"A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." Arkansas Educational Television Comm'n v. Forbes, 523 U. S. 666, 679 (1998).

**First Amendment: Nonpublic Fora and Non-Fora**

"Other government properties are either nonpublic fora or not fora at all. * * * The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 677-678 (1998) (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985)).

"To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998).

**Forfeitures**

"[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." United States v. Bajakajian, 524 U.S. 321, 334 (1998).

"[T]he question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." United States v. Bajakajian, 524 U.S. 321, 337 n.10 (1998).

"The 'guilty property' theory behind *in rem* forfeiture can be traced to the Bible, which describes property being sacrificed to God as a means of atoning for an offense. See Exodus 21:28. In medieval Europe and at common law, this concept evolved into the law of deodand, in which offending property was condemned and confiscated by the church or the Crown in remediation for the harm it had caused. See 1 M. Hale, Pleas of the Crown 420-424 (1st Am. ed. 1847); 1 W. Blackstone, Commentaries on the Law of England 290-292 (1765); O. Holmes, The Common Law 10-13, 23-27 (M. Howe ed. 1963)." United States v. Bajakajian, 524 U.S. 321, 330 n.5 (1998).

**Forfeitures: Civil *In Rem* v. Criminal**

"The theory behind [civil *in rem*] forfeitures was the fiction that the action was directed against 'guilty property,' rather than against the offender himself." See, *e.g.*, Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) ('[I]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient'); see also R. Waples, Proceedings In Rem 13, 205-209 (1882). Historically, the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime. See, *e.g.*, Origet v. United States, 125 U.S. 240, 246 (1888) ("[T]he merchandise is to be forfeited irrespective of any criminal prosecution. . . . The person punished for the offence may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent"). As Justice Story explained:

'The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*. . . . [T]he practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.' The Palmyra, 12 Wheat.[1,] 14-15 [(1827)].

Traditional *in rem* forfeitures were thus not considered punishment against the individual for an offense." United States v. Bajakajian, 524 U. S. 321, 330-331 (1998) (footnote omitted).

**Fourth Amendment: Search and Seizure**

"[T]he Fourth Amendment [does not hold] officers to a higher standard than [reasonable suspicion] when a 'no-knock' entry results in the destruction of property." United States v. Ramirez, 523 U.S. 65, 68 (1998).

"Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." United States v. Ramirez, 523 U.S. 65, 71 (1998).

"Attempted seizures of a person are beyond the scope of the Fourth Amendment." County of Sacramento v. Lewis, 523 U.S. 833, 845 n.7 (1998).

**Full Faith and Credit**

"The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939) * * *. Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force." Baker v. General Motors Corp., 522 U.S. 222, 232-233 (1998) (footnote omitted).

"[O]ur decisions support no roving 'public policy exception' to the full faith and credit due *judgments*." Baker v. General Motors Corp., 522 U. S. 222, 233 (1998) (emphasis in original).

"The Court has never placed equity decrees outside the full faith and credit domain. Equity decrees for the payment of money have long been considered equivalent to judgments at law entitled to nationwide recognition." Baker v. General Motors Corp., 522 U.S. 222, 234 (1998).

"Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law." Baker v. General Motors Corp., 522 U.S. 222, 235 (1998).

"Michigan has no authority to shield a witness from another jurisdiction's subpoena power in a case involving persons and causes outside Michigan's governance. Recognition, under full faith and credit, is owed to dispositions Michigan has authority to order. But a Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve." Baker v. General Motors Corp., 522 U.S. 222, 240-241 (1998).

**Immunity: Absolute**

"Thus, in determining immunity, we examine 'the nature of the function performed, not the identity of the actor who performed it.'" Kalina v. Fletcher, 522 U.S. 118, 127 (1997) (quoting Forrester v. White, 484 U.S. 219, 229 (1988)).

A prosecutor's "activities in connection with the preparation and filing of two of the three charging documents -- the information and the motion for an arrest warrant -- are protected by absolute immunity." Kalina v. Fletcher, 522 U.S. 118, 129 (1997).

**Immunity: Indian Tribes**

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998).

"Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 760 (1998).

"In [tribal immunity as in foreign sovereign immunity], Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U. S. 751, 759 (1998).

**Immunity: Legislative Actions**

"It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for

their legislative activities. * * * [L]ocal officials performing legislative functions, [including "their acts of introducing, voting for, and signing an ordinance eliminating the government office held by" the plaintiff,] are entitled to the same protection." Bogan v. Scott-Harris, 523 U.S. 44, 46 (1998).

"'The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct.'" Bogan v. Scott-Harris, 523 U.S. 44, 51-52 (1998) (quoting Amy v. Supervisors, 11 Wall. 136, 138 (1871)).

"Thus, we now make explicit what was implicit in our precedents: Local legislators are entitled to absolute immunity from § 1983 liability for their legislative activities." Bogan v. Scott-Harris, 523 U.S. 44, 53-54 (1998).

"Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" Bogan v. Scott-Harris, 523 U. S. 44, 54 (1998) (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).

"Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).

**Immunity: Qualified**

"[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question." County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

**Indian Country**

"Although this definition [of "Indian country" in 18 U.S.C. 1151] by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction such as the one at issue here." Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

"[T]he term 'dependent Indian communities' [in the definition of "Indian country"] * * * refers to a limited category of Indian lands that

are neither reservations nor allotments, and that satisfy two requirements -- first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." Alaska v. Native Village of Venetie Tribal Gov't, 522 U. S. 520, 527 (1998).

"Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1 (1998).

"[B]ecause Congress has plenary power over Indian affairs, see U.S. Const., Art. I, § 8, cl. 3, some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 531 n.6 (1998).

**Indian Law**

"[I]n an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress diminished the boundaries of the Yankton Sioux Reservation in South Dakota." South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333 (1998).

"Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. * * * Accordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation, * * * and its intent to do so must be clear and plain." South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (citations and internal quotation marks omitted).

**Indian Reservation Land: Taxation**

"When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation. The repurchase of such land by an Indian tribe does not cause the land to reassume tax-exempt status." Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 (1998).

**Interest Follows Principal**

"The rule that 'interest follows principal' has been established under English common law since at least the mid-1700's. Beckford v. Tobin, 1 Ves. Sen. 308, 310, 27 Eng. Rep. 1049, 1051 (Ch. 1749) ('[I]nterest shall follow the principal, as the shadow the body'). Not surprisingly, this rule

has become firmly embedded in the common law of the various States." Phillips v. Washington Legal Foundation, 524 U.S. 156, 165 (1998) (footnote omitted).

**Labor Law**

"[A]n employer who believes that an incumbent union no longer enjoys the support of a majority of its employees * * * [can] conduct an internal poll of employee support for the union * * * [but the NLRB has held that conducting this poll is an unfair labor practice] unless the employer can show that it had a 'good-faith reasonable doubt' about the union's majority support. * * * [The Court holds] that the Board's standard for employer polling is rational and consistent with the National Labor Relations Act, * * * [but] the Board's factual determinations in this case are [not] supported by substantial evidence in the record." Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 361 (1998).

**Labor Management Relations Act**

"'Suits for violation of contracts' under § 301(a) [of the LMRA, 29 U.S.C. § 185(a)] are not suits that claim a contract is invalid, but suits that claim a contract has been violated." Textron Lycoming Reciprocating Engine Div., v. Automobile Workers, 523 U.S. 653, 657 (1998).

**Line Item Veto**

"[T]he cancellation procedures set forth in the [Line Item Veto] Act violate the Presentment Clause, Art. I, § 7, cl. 2, of the Constitution." Clinton v. City of New York, 524 U.S. 417, 421 (1998).

**Medicare**

"[T]he Secretary's 'reaudit' rule[, which] * * * permit[s] a second audit of the 1984 GME [*i.e.*, graduate medical education] costs to ensure accurate future reimbursements, even though the GME costs had been audited previously * * * is a reasonable interpretation of the GME Amendment." Regions Hospital v. Shalala, 522 U.S. 448, 452 (1998).

**Pardon and Clemency Decisions**

"We reaffirm our holding in [Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981),] that 'pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.'" Ohio Adult Parole

Authority v. Woodard, 523 U.S. 272, 276 (1998).

"[T]he heart of executive clemency * * * is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280-281 (1998) (opinion of four Justices).

**PCBs**

"PCB's ["polychlorinated biphenyls"] are widely considered to be hazardous to human health. Congress, with limited exceptions, banned the production and sale of PCB's in 1978. See 90 Stat. 2020, 15 U.S.C. § 2605(e)(2)(A)." General Elec. Co. v. Joiner, 522 U.S. 136, 139 (1997).

**Privileges and Immunities Clause**

"[B]ecause New York has not adequately justified the discriminatory treatment of nonresidents effected by N.Y. Tax Law § 631(b)(6), [which "effectively denies only nonresident taxpayers an income tax deduction for alimony paid,"] the challenged provision violates the Privileges and Immunities Clause." Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 290-291 (1998).

"The object of the Privileges and Immunities Clause is to 'strongly . . . constitute the citizens of the United States one people,' by 'plac[ing] the citizens of each State upon the same footing with the citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 296 (1998) (quoting Paul v. Virginia, 8 Wall. 168, 180 (1869)).

"[A]s a practical matter, the Privileges and Immunities Clause affords no assurance of precise equality in taxation between residents and nonresidents of a particular State. Some differences may be inherent in any taxing scheme, given that, '[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute,' Toomer [v. Witsell, 334 U.S. 385, 396 (1948)], and that '[a]bsolute equality is impracticable in taxation,' Maxwell v. Bugbee, 250 U.S. 525, 543 (1919)." Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 297 (1998).

"Thus, when confronted with a challenge under the Privileges and Immunities Clause to a law distinguishing between residents and nonresidents, a State may defend its position by demonstrating that '(i) there is a substantial reason for the difference in treatment; and (ii) the

discrimination practiced against nonresidents bears a substantial relationship to the State's objective.'" Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 298 (1998) (quoting Supreme Court of N.H. v. Piper, 470 U.S. 274, 284 (1985)).

**Property Rights**

"[It is] the fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit. United States v. General Motors Corp., 323 U.S. 373, 377-378 (1945) (property 'denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to . . . dispose of it')." Phillips v. Washington Legal Foundation, 524 U.S. 156, 167-168 (1998).

"We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value." Phillips v. Washington Legal Foundation, 524 U.S. 156, 169 (1998).

**Railway Labor Act**

[Non-union pilots objecting to an "agency fee" paid to a union under an "agency shop" arrangement may not, absent their agreement, be required to exhaust an arbitration remedy before bringing their claims in federal court.] Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 879-880 (1998).

**Recoupment**

"[A]s a general matter a defendant's right to plead recoupment, a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded, * * * survives the expiration of the period provided by a statute of limitation that would otherwise bar the recoupment claim as an independent cause of action. So long as the plaintiff's action is timely, * * * a defendant may raise a claim in recoupment even if he could no longer bring it independently, absent the clearest congressional language to the contrary." Beach v. Ocwen Federal Bank, 523 U.S. 410, 415 (1998) (citations and internal quotation marks omitted).

**Regulatory Takings**

"Government regulation often curtails some potential for the use or economic exploitation of private property, * * * and not every destruction or injury to property by governmental action has been held to be a taking in the constitutional sense * * *. In light of that understanding, the process for evaluating a regulation's constitutionality involves an examination of the justice and fairness of the governmental action. * * *

That inquiry, by its nature, does not lend itself to any set formula, * * * and the determination whether justice and fairness require that economic injuries caused by public action must be compensated by the government, rather than remain disproportionately concentrated on a few persons, is essentially ad hoc and fact intensive * * *." Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998) (Opinion of O'Connor, J.) (citations, internal quotation marks, and brackets omitted).

"We have identified several factors * * * that have particular significance [for determining whether a taking has occurred]: '[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.'" Eastern Enterprises v. Apfel, 524 U.S. 498, 523-524 (1998) (Opinion of O'Connor, J.) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

**Retroactivity Disfavored**

"Retroactivity is generally disfavored in the law, * * * in accordance with 'fundamental notions of justice' that have been recognized throughout history * * *." Eastern Enterprises v. Apfel, 524 U.S. 498, 532 (1998) (Opinion of O'Connor, J.) (citations omitted).

"Even in areas in which retroactivity is generally tolerated, such as tax legislation, some limits have been suggested." Eastern Enterprises v. Apfel, 524 U.S. 498, 534 (1998) (Opinion of O'Connor, J.) (citation omitted).

**RICO**

"There is no requirement of some overt act or specific act in the * * * [RICO conspiracy statute, 18 U.S.C. 1962(d)], unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy.'" Salinas v. United States, 522 U.S. 52, 63 (1997) (quoting 18 U.S.C. 371).

**Scope of Employment**

"The concept of scope of employment has not always been construed to require a motive to serve the employer." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 757 (1998).

"The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." Burlington Industries, Inc. v.

Ellerth, 524 U.S. 742, 757 (1998).

**Security Interests**

"[A] transfer of a security interest is 'perfected' under [11 U.S. C.] § 547(c)(3)(B) on the date that the secured party has completed the steps necessary to perfect its interest, so that a creditor may invoke the enabling loan exception only by satisfying state-law perfection requirements within the 20-day period provided by the federal statute." Fidelity Financial Services, Inc. v. Fink, 522 U.S. 211, 213 (1998).

**Sentencing Guidelines**

"[T]he sentencing factor at issue here -- recidivism -- is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998).

"The Sentencing Guidelines instruct *the judge* in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable -- and then to impose a sentence that varies depending upon amount and kind." Edwards v. United States, 523 U.S. 511, 513-514 (1998) (emphasis in original).

**Takings Clause**

"Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" Phillips v. Washington Legal Foundation, 524 U.S. 156, 164 (1998) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).

"[A] claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." Eastern Enterprises v. Apfel, 524 U.S. 498, 520 (1998) (Opinion of O'Connor, J.).

"Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief." Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998) (Opinion of O'Connor, J.).

"The aim of the [Takings] Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998) (Opinion of O'Connor, J.) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

"Our analysis of legislation under the Takings and Due Process Clauses is correlated to some extent * * *." Eastern Enterprises v. Apfel, 524 U.S. 498, 537 (1998) (Opinion of O'Connor, J.) (citation omitted).

**Tax Refund Actions**

"As a rule, a nontaxpayer may not sue for a refund of taxes paid by another." Montana v. Crow Tribe, 523 U.S. 696, 713 (1998).

**Title VII: Sexual Harrassment**

"[W]e hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998).

"Respondents and their *amici* contend that recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace. But that risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute. Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat [ion] . . .* because of . . . sex.' We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. 'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

"[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the

presence of women in the workplace." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998).

"[T]here is another requirement that prevents Title VII from expanding into a general civility code: * * * [T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment. 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview.' * * * We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace -- such as male-on-male horseplay or intersexual flirtation -- for discriminatory 'conditions of employment.'" Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)).

"Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998).

"[I]n order to be actionable under [Title VII], a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. * * * We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' * * * Most recently, we explained that Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.' * * * A recurring point in these opinions is that 'simple teasing,' * * * offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'

"These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' * * * Properly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive

language, gender-related jokes, and occasional teasing.'" Faragher v. City of Boca Raton, 524 U.S. 775, 787-788 (1998) (citations omitted) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22, 23 (1993); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80, 81, 82 (1998); and B. Lindemann & D. Kadue, Sexual Harassment in Employment Law 175 (1992)).

"Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 751 (1998).

"We distinguished between *quid pro quo* claims and hostile environment claims [in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986),] and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive. *Ibid.* The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 752 (1998).

**Title VII: Sexual Harassment: Employer Liability**

"An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment. Sexual harassment under Title VII presupposes intentional conduct. While early decisions absolved employers of liability for the intentional torts of their employees, the law now imposes liability where the employee's 'purpose, however misguided, is wholly or in part to further the master's business.'" Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 756 (1998) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 70, p. 505 (5th ed. 1984)).

"[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 762 (1998).

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a

preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807-808 (1998).

**Title IX: Sexual Harassment: School District Liability**

"[A] school district may be held liable in damages in an implied right of action under Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. § 1681 *et seq.* (Title IX), for the sexual harassment of a student by one of the district's teachers," but "damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." Gebser v. Lago Vista Independent School District, 524 U.S. 274, 277 (1998).

**Title IX: Sexual Harassment: Standard for Vicarious Liability**

"[I]n cases * * * that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." Gebser v. Lago Vista Independent School District, 524 U.S. 274, 290 (1998).

**Title VII and Title IX: Comparison of Goals**

"[W]hereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." Gebser v. Lago Vista Independent School District, 524 U.S. 274, 287 (1998).

**Torts: Intentional**

"Intentional torts generally require that the actor intend 'the *consequences* of an act,' not simply 'the act itself.'" Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998) (quoting Restatement (Second) of Torts § 8A, Comment *a*, p. 15 (1964)) (emphasis added by Court).

**42 U.S.C. 1983**

"42 U.S.C. § 1983 creates a damages remedy against a prosecutor for making false statements of fact in an affidavit supporting an application for an arrest warrant, * * * [and] such conduct is [not] protected by 'the doctrine of absolute prosecutorial immunity.'" Kalina v. Fletcher, 522 U.S. 118, 120 (1997).

"Congress intended [18 U.S.C. 1983] to be construed in the light of common-law principles that were well settled at the time of its enactment. * * * Thus, we have examined common-law doctrine when identifying both the elements of the cause of action and the defenses available to state actors." Kalina v. Fletcher, 522 U.S. 118, 123 (1997) (citations omitted).

"Prisoner suits under 42 U.S.C. § 1983 can illustrate our legal order at its best and its worst. The best is that even as to prisoners the Government must obey always the Constitution. The worst is that many of these suits invoke our basic charter in support of claims which fall somewhere between the frivolous and the farcical and so foster disrespect for our laws." Crawford-el v. Britton, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring).

"Insofar as the Consul General seeks to base his claims on § 1983, his suit is not cognizable. Section 1983 provides a cause of action to any 'person within the jurisdiction' of the United States for the deprivation 'of any rights, privileges, or immunities secured by the Constitution and laws.' As an initial matter, it is clear that Paraguay is not authorized to bring suit under § 1983. Paraguay is not a 'person' as that term is used in § 1983. * * * Nor is Paraguay 'within the jurisdiction' of the United States." Breard v. Greene, 523 U.S. 371, 378 (1998) (citations omitted).

**Unlawful Possession**

"Under our decision in Staples v. United States, 511 U.S. 600 (1994), the *mens rea* element of a violation of [26 U.S.C.] § 5861(d)[, which makes it unlawful to possess an unregistered firearm,] requires the Government to prove that the defendant knew that the item he possessed had the characteristics that brought it within the statutory definition of a firearm. It is not, however, necessary to prove that the defendant knew that his possession was unlawful, or that the firearm was unregistered. United States v. Freed, 401 U.S. 601 (1971); see Staples, 511 U.S., at 609. Thus, in this case, petitioner's admission that he knew the item was a silencer constituted evidence sufficient to satisfy the *mens rea* element of the charged offenses." Rogers v. United States, 522 U.S. 252, 254-255 (1998).

# MAXIMS FROM THE SUPREME COURT 1996 TERM

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## I. DOCTRINES OF STATUTORY CONSTRUCTION

### Plain Meaning

"Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" Robinson v. Shell Oil Co., 117 S. Ct. 843, 846 (1997) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989)).

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 117 S. Ct. 843, 846 (1997).

"[A]bsent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the

statute as Congress wrote it." Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 916 (1997) (internal quotation marks omitted).

The Supreme Court held that "the purposes underlying the [statute in issue] are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it." Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 918 (1997).

"'Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.'" United States v. Gonzales, 117 S. Ct. 1032, 1036 (1997) (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)).

"Given this clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy." United States v. Gonzales, 117 S. Ct. 1032, 1037 (1997).

The Supreme Court holds that only an "absurd or glaringly unjust result" "would warrant departure from the plain language of" the statute. Inter-Modal Rail Employees Ass'n v. Atchison, T&SF Ry. Co., 117 S. Ct. 1513, 1516 (1997) (citation and internal quotation marks omitted).

**Ordinary Meaning**

"In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" Walters v. Metropolitan Educational Enterprises, Inc., 117 S. Ct. 660, 664 (1997) (quoting Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 388 (1993)).

Supreme Court rejected a construction that "violates the ordinary meaning of the key word." Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 916 (1997) (internal quotation marks omitted).

**Construed to Avoid Constitutional Issue**

"Federal courts, when confronting a challenge to the constitutionality of a federal statute, follow a 'cardinal principle': They 'will first ascertain whether a construction . . . is fairly possible' that will contain the statute within constitutional bounds." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1074 (1997) (quoting Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

"In considering a facial challenge, this Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2350 (1997) (quoting Virginia v. American Bookseller's Assn., Inc., 484 U. S. 383, 397 (1988)).

"This Court 'will not rewrite a . . . law to conform it to constitutional requirements.'" Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2351 (1997) (quoting Virginia v. American Bookseller's Assn., Inc., 484 U.S. 383, 397 (1988)).

**Construed to Avoid Surplusage**

Supreme Court applied "the doctrine that legislative enactments should not be construed to render their provisions mere surplusage." Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 917 (1997).

The Supreme Court presumes "that each term in a criminal statute carries meaning." United States v. Wells, 117 S. Ct. 921, 928 n.14 (1997).

"It is the cardinal principle of statutory construction that it is our duty to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." Bennett v. Spear, 117 S. Ct. 1154, 1167 (1997) (internal quotation marks, ellipses, and brackets omitted).

**Construed in Accord with Evolution of Statute**

The Supreme Court held that the construction it adopted "is also consonant with the history of evolving congressional regulation in this area." Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 918 (1997).

**Construed in Accord with Contemporary Legal Context**

The Supreme Court held that the construction it adopted is "faithful to the contemporary legal context in which the [statute] was drafted." Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 920 (1997) (internal quotation marks omitted).

**Construed in Accord with Supreme Court Precedents**

"[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents * * *." United States v. Wells, 117

S. Ct. 921, 929 (1997).

**Construed in Accord with Common Law**

"We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if those terms have accumulated settled meaning under the common law and the statute does not otherwise dictate." United States v. Wells, 117 S. Ct. 921, 927 (1997) (internal quotation marks, ellipses, and brackets omitted).

**Construction of State Statutes**

"Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state. * * * This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules." Johnson v. Fankell, 520 U.S. 911, 916 (1997).

**Specific Statute Controls General One**

"Ordinarily, where a specific provision conflicts with a general one, the specific governs." Edmond v. United States, 117 S. Ct. 1573, 1578 (1997).

**Failure to Amend Statute**

The Supreme Court rejected the argument that "Congress' unwillingness to amend [the statute in issue] in response to these [lower court] decisions is evidence that Congress believed that those opinions accurately interpreted [the statute's] scope." California Division of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 117 S. Ct. 832, 841 n.8 (1997).

**Statutory Change to Clarify Not Change Existing Law**

The Supreme Court was "decidedly of the view that the 'mere' elimination of evident ambiguity is ample -- indeed, admirable -- justification for the inclusion of a statutory phrase; and that purpose alone is enough to 'merit' enactment of the phrase at issue here." Walters v. Metropolitan Educational Enterprises, Inc., 117 S. Ct. 660, 665 (1997).

The Supreme Court accepted the argument "that Congress might simply have thought that the then-current law * * * was unclear, [and] that it wanted to clarify the matter * * *."

O'Gilvie v. United States, 117 S. Ct. 452, 457 (1996).

**Congressional Ratification**

"But the significance of subsequent congressional action or inaction necessarily varies with the circumstances * * *." United States v. Wells, 117 S. Ct. 921, 929 (1997).

**Congressional Silence**

"[W]e have 'frequently cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."'" United States v. Wells, 117 S. Ct. 921, 929 (1997) (quoting NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116, 129-130 (1971), and Girouard v. United States, 328 U.S. 61, 69 (1946)).

**Statutory Recodification**

"But surely this indication [*i.e.*, the 1948 Reviser's Note stating that the consolidation "was without change of substance"] that the 'staff of experts' who prepared the legislation, Muniz v. Hoffman, 422 U.S. 454, 470, n.10 (1975), either overlooked or chose to say nothing about changing the language of three of the former statutes does nothing to muddy the ostensibly unambiguous provision of the statute as enacted by Congress." United States v. Wells, 117 S. Ct. 921, 930 (1997).

"Those who write revisers' notes have proven fallible before." United States v. Wells, 117 S. Ct. 921, 930 (1997).

**No Resort to Legislative History Where Statute Is Clear**

"Given the straightforward statutory command, there is no reason to resort to legislative history." United States v. Gonzales, 117 S. Ct. 1032, 1035 (1997).

**Subsequent Legislative History**

"[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute." O'Gilvie v. United States, 117 S. Ct. 452, 458 (1996).

The Supreme Court dismissed as "legislative dicta" a statement about the scope of the statute in issue made during a debate on a later amendment

to that statute on the ground that the statement did not concern the change made by the later amendment. Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 920 (1997).

"[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Reno v. Bossier Parish School Board, 117 S. Ct. 1491, 1500 (1997) (quoting United States v. Price, 361 U. S. 304, 313 (1960)).

**Legislative Intent**

The Supreme Court does "not assume unconstitutional legislative intent even when statutes produce harmful results * * *; much less do we assume it when the results are harmless." Mazurek v. Armstrong, 117 S. Ct. 1865, 1867 (1997).

**Statutes Drafted by Lobbyists**

"[T]he fact that [a special-interest] group drafted the [state] law * * * says nothing significant about the legislature's purpose in passing it." Mazurek v. Armstrong, 117 S. Ct. 1865, 1867 (1997).

**Deference to Agency's Construction of Statute**

"Because Congress has not 'directly spoken to the precise question at issue,' we must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'" Auer v. Robbins, 117 S. Ct. 905, 909 (1997) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984)).

"[W]e do not defer to the Director's interpretation here of the APA's provision for allocating the burden of persuasion under the preponderance of the evidence standard, for three reasons. (1) The APA is not a statute that the Director is charged with administering. * * * (2) This interpretation does not appear to be embodied in any regulation or similar binding policy pronouncement to which such deference would apply. * * * (3) The interpretation is couched in a logical non-sequitur, as just explained." Metropolitan Stevedore Co. v. Rambo, 117 S. Ct. 1953, 1963 n.9 (1997).

**Deference to Agency's Construction of Its Own Regulation**

"Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence,

controlling unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 117 S. Ct. 905, 911 (1997) (internal quotation marks omitted).

**Deference to Agency's Construction First Set Forth in Litigation**

"[T]hat the Secretary's interpretation comes to us in the form of a legal brief * * * does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack, Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." Auer v. Robbins, 117 S. Ct. 905, 912 (1997).

**Deference to Agency's Construction: Which Agency**

The Supreme Court avoided the issue of which of two agencies with opposing constructions, CFTC or Treasury, was entitled to Chevron deference by holding that the statute was clear, so no deference was owed. Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 920 n.14 (1997) (citing cases).

**Policy Arguments for Congress**

The Supreme Court noted that "there is an important public policy dispute -- with substantial arguments favoring each side," but held that "these are arguments best addressed to the Congress, not the courts." Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 920-921 (1997).

"Lacking the expertise or authority to assess these important competing claims, we note only that a literal construction of the statute does not yield results so manifestly unreasonable that they could not fairly be attributed to congressional design." Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 921 (1997) (internal quotation marks and brackets omitted).

"We need not put our imprimatur on Congress' economic theory in order to validate the reasonableness of its judgment." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1195 (1997).

"These disagreements [among psychiatric professionals], however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that

legislatures have been afforded the widest latitude in drafting such statutes. * * * As we have explained regarding congressional enactments, when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" Kansas v. Hendricks, 117 S. Ct. 2072, 2081 n.3 (1997) (quoting Jones v. United States, 463 U.S. 354, 370 (1983)).

II. SUPREME COURT PRACTICE

**Certiorari - Questions Presented**

"Because the question we granted certiorari to address does not encompass this argument, we decline to address it." Regents of the University of California v. Doe, 117 S. Ct. 900, 905 (1997).

Although the "petition for certiorari raised the question" at issue, the Supreme Court "express[ed] no opinion on it," because its "order granting review did not encompass that question." Caterpillar Inc. v. Lewis, 117 S. Ct. 467, 473 n.7 (1996).

"Under this Court's Rule 15.2, a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari 'may be deemed waived.' Under the facts of this case, however, addressing [the issue] is predicate to an intelligent resolution of the question presented. * * * We therefore regard the issue as one 'fairly included' within the question presented * * * and we exercise our discretion to decide it." Caterpillar Inc. v. Lewis, 117 S. Ct. 467, 476 n.13 (1996) (citations and some internal quotation marks deleted).

**Certiorari: Time for Petitioning**

"A timely filed petition for rehearing will toll the running of the 90-day period for filing a petition for certiorari until disposition of the rehearing petition." Moreover, "although the petition for rehearing was filed two days late," it was timely where the court of appeals "granted petitioners 'leave to file a late petition * * *'" and "treated it as timely and no mandate issued until after the petition was denied." Young v. Harper, 117 S. Ct. 1148, 1151 n.1 (1997).

**Decision Applicable to Parties**

"Our general practice is to apply the rule of law we announce in a case to the parties before us." Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997).

**Deference to Lower Courts on State Procedural Issues**

The Supreme Court has "repeatedly recognized" that "the courts of appeals and district courts are more familiar than [it is] with the procedural practices of the States in which they regularly sit." Lambrix v. Singletary, 117 S. Ct. 1517, 1523 (1997) (citations omitted).

**Dismissal of Appeal: Precedential Effect**

The Supreme Court's dismissal of an "appeal for want of a substantial federal question, * * * although not entitled to full precedential weight, see Edelman v. Jordan, 415 U.S. 651, 670-671 (1974), * * * constitutes a decision on the merits, see Hicks v. Miranda, 422 U.S. 332, 344 (1975)." Boggs v. Boggs, 117 S. Ct. 1754, 1764 (1997).

**Dismissal for Failure to Raise Federal Claim**

"With 'very rare exceptions,' Yee v. Escondido, 503 U.S. 519, 533 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." Adams v. Robertson, 117 S. Ct. 1028, 1029 (1997).

"Nor are petitioners helped by the fact that respondents addressed the federal due process issue raised here in *their* briefs as appellees in the Alabama State Court." Adams v. Robertson, 117 S. Ct. 1028, 1030 (1997) (footnote omitted).

**GVR Practice**

"In this diversity case, [where] the holding of the federal appellate court below has been called into question by a recent decision of the highest state court, * * * it is appropriate * * * for this Court to grant the petition for certiorari, vacate the judgment of the lower court, and remand the case (GVR) for further consideration." Lords Landing Village v. Continental Ins. Co., 117 S. Ct. 1731, 1731 (1997).

**Lower Courts Bound by Supreme Court Holdings**

"We reaffirm that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which

directly controls, leaving to this Court the prerogative of overruling its own decisions.'" Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

**Questions Not Properly Raised**

"Even if the issue is 'fairly included' in the broadly worded question presented [in appellant's merits brief], it is tangential to the main issue, and prudence dictates that we not decide this question based on such scant argumentation." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1203 (1997).

The Supreme Court declined to decide an issue that "was not squarely addressed by the decision below or in the parties' briefs on appeal." Reno v. Bossier Parish School Board, 117 S. Ct. 1491, 1501 (1997).

**Respondent May Defend Judgment on Different Ground**

"A respondent is entitled, however, to defend the judgment on any ground supported by the record." Bennett v. Spear, 117 S. Ct. 1154, 1163 (1997) (citations omitted).

**Review of Interlocutory Orders**

The Supreme Court is "ordinarily reluctant to exercise [its] certiorari jurisdiction" when "the case comes to [it] prior to the entry of a final judgment in the lower courts. * * * But [its] cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts * * *." Mazurek v. Armstrong, 117 S. Ct. 1865, 1868 (1997).

III. PROCEDURAL DOCTRINES

**Abuse of Discretion: Error of Law**

"It is true that the trial court has discretion, but the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained." Agostini v. Felton, 117 S. Ct. 1997, 2018 (1997).

**Agency Discretion**

"Though the agency's discretion is unfettered at the outset, if it announces and follows -- by rule or by settled course of adjudication -- a

general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the Administrative Procedure Act, 5 U.S.C. §706(2)(A)." INS v. Yueh-Shaio Yang, 117 S. Ct. 350, 353 (1996).

**Appellate Correction of Errors Not Raised Below**

Under Rule 52(b) of the Federal Rules of Criminal Procedure, "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' * * * If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" Johnson v. United States, 117 S. Ct. 1544, 1549 (1997) (citations and some internal quotations omitted).

**Appellate Review: Avoiding Hindsight**

"It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight." Old Chief v. United States, 117 S. Ct. 644, 651 n.6 (1997).

**Class Actions**

"[T]he class certification [which "sought to achieve global settlement of current and future asbestos-related claims"] failed to satisfy Rule 23's requirements in several critical respects." Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2237 (1997).

Because "the class certification issues are dispositive, * * *, their resolution here is logically antecedent to the existence of any Article III issues, [and] it is appropriate to reach them first." Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2244 (1997) (citations, internal quotation marks, and brackets omitted).

"[S]ettlement is relevant to a class certification. * * * Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the rule -- those designed to protect absentees by blocking unwarranted or overbroad class definitions -- demand undiluted, even heightened, attention in the settlement context." Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231,

2248 (1997).

"[P]roposed settlement classes sometimes warrant more, not less caution on the question of certification." Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2248 n.16 (1997).

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. * * * A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2250-2251 (1997) (citations, internal quotation marks, and brackets deleted).

**Constitutional Adjudication**

"'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944). It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied. . . .' Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945)." Clinton v. Jones, 117 S. Ct. 1636, 1642 n.11 (1997).

**Counsel's Duty to Advise Court**

"It is the duty of counsel to bring to the federal tribunal's attention, *without delay*, facts that may raise a question of mootness. * * * Nor is a change in circumstances bearing on the vitality of a case a matter opposing counsel may withhold from a federal court based on counsels' agreement that the case should proceed to judgment and not be treated as moot." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1069 n.23 (1997) (citations and internal quotation marks omitted) (emphasis in original).

**Deference to Congress**

"In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. * * * Our sole obligation is to assure that, in formulating its judgments, Congress

has drawn reasonable inferences based on substantial evidence." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1189 (1997) (citations and internal quotation marks omitted).

"We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1189 (1997) (internal quotation marks omitted).

"Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1189 (1997).

"The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process. Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference, in examining the evidence, to Congress' findings and conclusions, including its findings and conclusions with respect to conflicting economic predictions." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1191 (1997).

"[T]he question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress. * * * In making that determination, we are not to re-weigh the evidence *de novo*, or to replace Congress' factual predictions with our own. * * * Rather, we are simply to determine if the standard is satisfied. If it is, summary judgment for defendants-appellees is appropriate regardless of whether the evidence is in conflict." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1196 (1997) (citations and internal quotation marks omitted).

"We are not at liberty to substitute our judgment for the reasonable conclusion of a legislative body." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1197 (1997).

"Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1197 (1997).

"Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of

the body constitutionally appointed to decide.' * * * As a general matter, it is for Congress to determine the method by which it will reach a decision." City of Boerne v. Flores, 117 S. Ct. 2157, 2170 (1997) (quoting Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (opinion of Harlan, J.)).

**Duty of Congress to Determine Constitutionality**

"When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution." City of Boerne v. Flores, 117 S. Ct. 2157, 2171 (1997).

**Final Agency Action**

"As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process * * * -- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Bennett v. Spear, 117 S. Ct. 1154, 1168 (1997) (citations omitted).

**Final Appealable Order**

"[A] decision dispositively granting in part and denying in part the remedy requested" is a final order appealable under 28 U.S.C. 1291. United States v. Jose, 117 S. Ct. 463, 465 (1996).

"Finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court." United States v. Jose, 117 S. Ct. 463, 465 (1996).

**Harmless Error**

"'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" Johnson v. United States, 117 S. Ct. 1544, 1550 (1997) (quoting R. Traynor, The Riddle of Harmless Error 50 (1970)).

**Harmless Error: Habeas Test**

In a habeas case, an error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." California v. Roy, 117 S. Ct. 337, 338 (1996) (quotation omitted).

**Injunction: Modification for Changed Circumstances**

"In Rufo v. Inmates of Suffolk County Jail, [502 U.S. 367, 384 (1992),] we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.' A court may recognize subsequent changes in either statutory or decisional law." Agostini v. Felton, 117 S. Ct. 1997, 2006 (1997).

"Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6) * * *." Agostini v. Felton, 117 S. Ct. 1997, 2018 (1997).

**Interlocutory Appeals**

"Nor is a plaintiff required to seek permission to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) in order to avoid waiving whatever ultimate appeal right he may have." Caterpillar Inc. v. Lewis, 117 S. Ct. 467, 475 (1996) (footnotes omitted).

**Jurisdiction: Complete Diversity**

"The current general-diversity statute, permitting federal district court jurisdiction over suits for more than $50,000 'between . . . citizens of different States,' 28 U.S.C. § 1332(a), thus applies only to cases in which the citizenship of each plaintiff is diverse from the citizenship of each defendant." Caterpillar Inc. v. Lewis, 117 S. Ct. 467, 472 (1996) (footnote omitted).

"This 'complete diversity' interpretation of the general-diversity provision is a matter of statutory construction." Caterpillar Inc. v. Lewis, 117 S. Ct. 467, 472 n.3 (1996).

**Jurisdiction: Removal**

"[A] district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." Caterpillar Inc. v. Lewis, 117 S. Ct. 467, 471 (1996).

**Law of the Case**

"Nor does the 'law of the case' doctrine place any additional

constraints on our ability to overturn [a Supreme Court constitutional precedent]. Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. Messenger v. Anderson, 225 U.S. 436, 444 (1912). The doctrine does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.' Arizona v. California, 460 U.S. 605, 618, n.8 (1983)." Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997).

**Mixed Question of Fact and Law**

"The seaman inquiry [under the Jones Act] is a mixed question of law and fact, and it often will be inappropriate to take the question from the jury. Nevertheless, summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." Harbor Tug & Barge Co. v. Papai, 117 S. Ct. 1535, 1540 (1997) (citations and internal quotation marks omitted).

**Mootness**

"Mootness has been described as '"the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973))." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1069 n.22 (1997).

"[B]ecause some of the respondents are seeking a refund of 1991 assessments * * *, the validity of that portion of the program is not moot." Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2135 n.5 (1997).

**Mootness - Duty to Vacate**

"When a civil case becomes moot pending appellate adjudication, '[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.' United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950). Vacatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review. Id., at 40. Vacatur is in order when mootness occurs through happenstance -- circumstances not attributable to the parties -- or, relevant here, the 'unilateral action of the party who prevailed in the lower court.' U.S. Bancorp Mortgage Co. [v. Bonner Mall Partnership, 513 U.S. 18, 23 (1994)]; cf. id., at 29 ('mootness by reason of settlement [ordinarily] does not justify vacatur of a judgment

under review')." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1071 (1997).

**Preliminary Injunctions**

"'[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" Mazurek v. Armstrong, 117 S. Ct. 1865, 1867 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed. 1995) (emphasis added by Supreme Court; footnotes omitted)).

**Res Judicata: Acquittal Not a Bar**

"'[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.'" United States v. Watts, 117 S. Ct. 633, 637 (1997) (quoting Dowling v. United States, 493 U.S. 342, 349 (1990)).

**Retroactive Statutes**

The Supreme Court applies the "time-honored presumption [against the retroactivity of statutes] unless Congress has clearly manifested its intent to the contrary." Hughes Aircraft Co. v. United States *ex rel.* Schumer, 117 S. Ct. 1871, 1876 (1997).

"In determining whether a statute's terms would produce a retroactive effect, however, and in determining a statute's temporal reach generally, our normal rules of construction apply. Although Landgraf's default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as Lindh argues the recognition of a negative implication would do here." Lindh v. Murphy, 117 S. Ct. 2059, 2063 (1997).

"[T]he natural expectation would be that [a procedural provision] would apply to pending cases." Lindh v. Murphy, 117 S. Ct. 2059, 2063 (1997).

**Ripeness**

The "'ripeness doctrine is drawn both from Article III limitations

on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" Suitum v. Tahoe Regional Planning Agency, 117 S. Ct. 1659, 1664 n.7 (1997) (quoting Reno v. Catholic Social Services, Inc., 509 U.S. 43, 57 n.18 (1993)).

"'[The] basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Suitum v. Tahoe Regional Planning Agency, 117 S. Ct. 1659, 1669 (1997) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967)).

**Settlements**

"[A] settlement agreement subject to court approval in a nonclass action may not impose duties or obligations on an unconsenting party or 'dispose' of his claims." Lawyer v. Department of Justice, 117 S. Ct. 2186, 2194 (1997).

**Standard of Appellate Review**

The District Court's finding that a redistricting plan "did not subordinate traditional districting principles to race * * * is subject to review for clear error." Lawyer v. Department of Justice, 117 S. Ct. 2186, 2194 (1997).

**Standing**

"Article III, § 2, of the Constitution confines federal courts to the decision of 'Cases' or 'Controversies.' Standing to sue or defend is an aspect of the case or controversy requirement. * * * To qualify as a party with standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest that is concrete and particularized and actual or imminent. * * * An interest shared generally with the public at large in the proper application of the Constitution and laws will not do." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1067 (1997) (citations and internal quotation marks omitted).

"Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1067 (1997) (citations and internal quotation marks omitted).

"The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1067 (1997).

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1068 (1997) (citations and internal quotation marks omitted).

**Standing: Injury in Fact**

"To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." Bennett v. Spear, 117 S. Ct. 1154, 1161 (1997) (citations omitted).

It is wrong to "equate[] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation. * * * [The 'fairly traceable' requirement] does not exclude injury produced by determinative or coercive effect upon the action of someone else." Bennett v. Spear, 117 S. Ct. 1154, 1164 (1997).

At the pleading stage, plaintiffs' burden "of alleging that their injury is 'fairly traceable'" to the defendant's conduct is "relatively modest." Bennett v. Spear, 117 S. Ct. 1154, 1165 (1997).

"We have also stressed that the alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered an invasion of a legally protected interest which is . . . concrete and particularized * * *, and that the dispute is traditionally thought to be capable of resolution through the judicial process." Raines v. Byrd, 117 S. Ct. 2312, 2317 (1997) (citations and internal quotation marks omitted).

**Standing: Legislators**

"It is obvious, then, that our holding in Coleman [v. Miller, 307 U. S. 433 (1939),] stands (at most * * *) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have

been completely nullified." Raines v. Byrd, 117 S. Ct. 2312, 2319 (1997).

"[T]he abstract dilution of institutional legislative power that is alleged here" is insufficient to confer standing." Raines v. Byrd, 117 S. Ct. 2312, 2320-2321 (1997).

**Standing: Prudential Limitations**

"Congress' decision to grant a particular plaintiff the right to challenge an act's constitutionality * * * eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit." Raines v. Byrd, 117 S. Ct. 2312, 2318 n.3 (1997).

**Standing: Zone-of-Interests Test**

"Numbered among these prudential [standing] requirements is the doctrine of particular concern in this case: that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." Bennett v. Spear, 117 S. Ct. 1154, 1161 (1997).

"The classic formulation of the zone-of-interests test is set forth in [Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970)]: 'whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" Bennett v. Spear, 117 S. Ct. 1154, 1167 (1997).

"Whether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question * * *, but by reference to the particular provision of law upon which the plaintiff relies." Bennett v. Spear, 117 S. Ct. 1154, 1167 (1997).

***Stare Decisis***

"*[S]tare decisis* is not an inexorable command, * * * but instead reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right * * *. That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997) (citations and internal quotation marks omitted).

**Stays: Discretion**

"The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket. * * * As we have explained, "[e]specially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." Clinton v. Jones, 117 S. Ct. 1636, 1650 (1997) (quoting Landis v. North American Co., 299 U.S. 248, 256 (1936)).

**Strict Scrutiny**

"Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." City of Boerne v. Flores, 117 S. Ct. 2157, 2171 (1997).

**Undue Prejudice**

In a prosecution for possessing a firearm after having been convicted of a felony, "a district court abuses its discretion if it spurns [a defendant's offer to stipulate that he has a past felony conviction] and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." Old Chief v. United States, 117 S. Ct. 644, 647 (1997) (footnote omitted).

"The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 117 S. Ct. 644, 650 (1997).

IV. SUBSTANTIVE LAW DOCTRINES

**Administrative Procedure Act**

"The APA, by its terms, provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. § 704, and applies universally 'except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law,' § 701(a)." Bennett v. Spear, 117 S. Ct. 1154, 1167 (1997).

**Admiralty Torts**

"[T]he physical destruction of *extra equipment* (a skiff, a fishing net, spare parts) *added* [to a fishing vessel] by the initial user after the first sale and then resold as part of the ship when the ship itself is later resold to a subsequent user" is "other property." "Hence (assuming other tort law requirements are satisfied) admiralty's tort rules permit recovery." Saratoga Fishing Co. v. J.M. Martinac & Co., 117 S. Ct. 1783, 1785 (1997).

**Agency's Failure to Reconsider Regulation**

"But where, as here, the claim is not that the regulation is substantively unlawful, or even that it violates a clear procedural prerequisite, but rather that it was 'arbitrary' and 'capricious' not to conduct amendatory rulemaking (which might well have resulted in no change), there is no basis for the court to set aside the agency's action prior to any application for relief addressed to the agency itself" under the APA, 5 U.S.C. 553(e)." Auer v. Robbins, 117 S. Ct. 905, 910 (1997).

**Agency Inaction**

"It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." Bennett v. Spear, 117 S. Ct. 1154, 1166 (1997).

"[T]he Secretary's failure to perform his duties as administrator of the" statute in issue or his "conduct in implementing or enforcing the [statute] is not a 'violation' of the [statute] within the meaning of" the judicial-review provision authorizing actions to enjoin persons in violation of the statute." Bennett v. Spear, 117 S. Ct. 1154, 1166 (1997).

**Appointments Clause**

"Congress has authorized the Secretary of Transportation to appoint civilian members of the Coast Guard Court of Criminal Appeals, and * * * this authorization is constitutional under the Appointments Clause of Article II." Edmond v. United States, 117 S. Ct. 1573, 1576 (1997).

**Bankruptcy Law**

"[W]hen a debtor, over a secured creditor's objection, seeks to retain and use the creditor's collateral in a Chapter 13 plan, * * * the

value of the collateral [is] determined by * * * what the debtor would have to pay for comparable property (the 'replacement-value' standard) * * *." Associates Commercial Corp. v. Rash, 117 S. Ct. 1879, 1892 (1997).

**Bias**

A criminal defendant who showed that the state trial judge had taken bribes during and around the time of the defendant's trial "has made a sufficient factual showing to establish 'good cause,' as required by Habeas Corpus Rule 6(a), for discovery on his claim of actual judicial bias in his case." Bracy v. Gramley, 117 S. Ct. 1793, 1795 (1997).

**Civil and Criminal Distinguished**

"The categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.'" Kansas v. Hendricks, 117 S. Ct. 2072, 2081 (1997) (quoting Allen v. Illinois, 478 U. S. 364, 368 (1986)).

"Although we recognize that a civil label is not always dispositive * * *, we will reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997) (internal quotation marks, brackets, and citations omitted).

"The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes." Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997).

**Civil Commitment**

"[T]he involuntary civil confinement of a limited subclass of dangerous persons is [not] contrary to our understanding of ordered liberty." Kansas v. Hendricks, 117 S. Ct. 2072, 2080 (1997).

**Commerce Clause**

"The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1597 (1997) (quoting Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979)).

"We see no reason why the nonprofit character of an enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the Commerce Clause." Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1602 (1997).

**Commerce Clause: Negative**

"The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." General Motors Corp. v. Tracy, Tax Comm'r of Ohio, 117 S. Ct. 811, 825 (1997).

**Common Law**

Sir William Blackstone's "Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th and 19th century American lawyers." Washington v. Glucksberg, 117 S. Ct. 2258, 2264 (1997).

**Community Property**

Community property law "is a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship." Boggs v. Boggs, 117 S. Ct. 1754, 1760 (1997).

**Constitutional Law and Social Norms**

"It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment." Richards v. Wisconsin, 117 S. Ct. 1416, 1421 n.6 (1997).

**Definition of "Employees"**

"[T]he term 'employees,' as used in § 704(a) [of Title VII, 42 U.S. C. § 2000e-3(a)], includes former employees, such that petitioner may bring suit against his former employer for postemployment actions allegedly taken in retaliation for petitioner's having filed a charge with the Equal Employment Opportunity Commission (EEOC)." Robinson v. Shell Oil Co., 117 S. Ct. 843, 845 (1997).

**Definition of "On Account Of"**

The Supreme Court holds that "on account of" in 26 U.S.C. 104(a)(2) requires "more than a 'but-for' connection"; "those words impose a stronger causal connection, making the provision applicable only to those personal

injury lawsuit damages that were awarded by reason of, or because of, the personal injuries." O'Gilvie v. United States, 117 S. Ct. 452, 454 (1996).

**Definition of "Replacement Value"**

"[B]y replacement value, we mean the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition." Associates Commercial Corp. v. Rash, 117 S. Ct. 1879, 1884 n.2 (1997).

**Discrimination**

"'[W]e have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands.'" General Motors Corp. v. Tracy, Tax Comm'r of Ohio, 117 S. Ct. 811, 830 (1997) (quoting Associated Industries of Mo. v. Lohman, 511 U.S. 641, 654 (1994).

**Double Jeopardy**

"Although generally understood to preclude a second prosecution for the same offense, the Court has also interpreted this prohibition to prevent the State from 'punishing twice, or attempting a second time to punish criminally, for the same offense.'" Kansas v. Hendricks, 117 S. Ct. 2072, 2085 (1997) (quoting Witte v. United States, 515 U.S. 389, 396 (1995)).

"[A]s commitment under the Act is not tantamount to 'punishment,' [plaintiff's] involuntary detention does not

violate the Double Jeopardy Clause, even though that confinement may follow a prison term." Kansas v. Hendricks, 117 S. Ct. 2072, 2086 (1997).

**Dread of Litigation**

"There is, no doubt, some truth to Learned Hand's comment that a lawsuit should be 'dread[ed] . . . beyond almost anything else short of sickness and death.' 3 Association of the Bar of the City of New York, Lectures on Legal Topics 105 (1926)." Clinton v. Jones, 117 S. Ct. 1636, 1650 n.40 (1997).

**Due Process: Procedural**

"[W]here a State must act quickly, or where it would be impractical

to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." Gilbert v. Homar, 117 S. Ct. 1807, 1812 (1997).

"[T]he purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay." Gilbert v. Homar, 117 S. Ct. 1807, 1813 (1997) (emphasis omitted).

"[T]he Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." Bracy v. Gramley, 117 S. Ct. 1793, 1797 (1997).

"'The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" United States v. Lanier, 117 S. Ct. 1219, 1225 (1997) (quoting Bouie v. City of Columbia, 378 U.S. 347, 351 (1964), and United States v. Harriss, 347 U.S. 612, 617 (1954)).

"[G]eneral statements of the law are not inherently incapable of giving fair and clear warning * * *." United States v. Lanier, 117 S. Ct. 1219, 1227 (1997).

"[A]s with civil liability under § 1983 or Bivens, all that can usefully be said about criminal liability under [18 U.S.C.] § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, 'in the light of preexisting law the unlawfulness [under the Constitution is] apparent.'" United States v. Lanier, 117 S. Ct. 1219, 1228 (1997) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

**Due Process: Substantive**

"[A] State [may not], consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees." M.L.B. v. S.L.J., 117 S. Ct. 555, 559 (1996).

"[D]ue process does not independently require that the State provide a right to appeal." M.L.B. v. S.L.J., 117 S. Ct. 555, 566 (1996).

"[W]e 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' Collins [v. Harker Heights, 503 U.S. 115, 125 (1992)]. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter

outside the arena of public debate and legislative action." Washington v. Glucksberg, 117 S. Ct. 2258, 2267-2268 (1997).

"Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition * * * and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed * * *. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. * * * Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking * * * that direct and restrain our exposition of the Due Process Clause." Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997) (citations and internal quotation marks omitted).

**Economic Predictions**

"[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them." General Motors Corp. v. Tracy, Tax Comm'r of Ohio, 117 S. Ct. 811, 829 (1997).

**Election Laws**

"When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1370 (1997) (internal quotation marks omitted).

"The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system." Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1374 (1997).

**Eleventh Amendment**

"[T]he fact that the Federal Government has agreed to indemnify a state instrumentality against the costs of litigation, including adverse judgments, [does not] divest[] the state agency of Eleventh Amendment immunity." Regents of the University of California v. Doe, 117 S. Ct. 900, 902 (1997).

"It has long been settled that the reference to actions 'against one of the

United States' [in the Eleventh Amendment] encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." Regents of the University of California v. Doe, 117 S. Ct. 900, 903 (1997).

"Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character." Regents of the University of California v. Doe, 117 S. Ct. 900, 906 n.5 (1997).

"[W]ith respect to the underlying Eleventh Amendment question, it is the [state] entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." Regents of the University of California v. Doe, 117 S. Ct. 900, 904 (1997).

"The [Eleventh] Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2033 (1997).

"The Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment. To respect the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying, we have extended a State's protection from suit to suits brought by the State's own citizens. * * * Furthermore, the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction. As a consequence, suits invoking the federal-question jurisdiction of Article III courts may also be barred by the Amendment." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2033 (1997) (citations omitted).

"An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2040 (1997).

**Emotional Distress**

"[T]he common law of torts does not permit recovery for negligently inflicted emotional distress *unless* the distress falls within certain

specific categories that amount to recovery-permitting exceptions. The law, for example, does permit recovery for emotional distress where that distress accompanies a physical injury * * *, and it often permits recovery for distress suffered by a close relative who witnesses the physical injury of a negligence victim * * *." Metro-North Commuter R. Co. v. Buckley, 117 S. Ct. 2113, 2117 (1997) (citations omitted).

"[T]he 'physical impact' [necessary to recover for emotional distress] * * * does not include a simple physical contact with a substance that might cause a disease at a substantially later time -- where that substance, or related circumstance, threatens no harm other than that disease-related risk." Metro-North Commuter R. Co. v. Buckley, 117 S. Ct. 2113, 2117 (1997).

"[T]he words 'physical impact' do not encompass every form of 'physical contact.' And, in particular, they do not include a contact that amounts to no more than an exposure -- an exposure, such as that before us, to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time." Metro-North Commuter R. Co. v. Buckley, 117 S. Ct. 2113, 2118 (1997).

"Common law courts do permit a plaintiff who suffers from a disease to recover for related negligently caused emotional distress * * *, and some courts permit a plaintiff who exhibits a physical symptom of exposure to recover * * *. But with only a few exceptions, common law courts have denied recovery to those who, like [plaintiff], are disease and symptom free." Metro-North Commuter R. Co. v. Buckley, 117 S. Ct. 2113, 2118 (1997) (citations omitted).

"[T]he common law in this area does not examine the genuineness of emotional harm case by case. Rather, it has developed recovery-permitting categories the contours of which more distantly reflect this, and other, abstract general policy concerns." Metro-North Commuter R. Co. v. Buckley, 117 S. Ct. 2113, 2120 (1997).

**Equal Protection**

"New York's prohibition on assisting suicide * * * [does not] violate[] the Equal Protection Clause of the Fourteenth Amendment." Vacco v. Quill, 117 S. Ct. 2293, 2296 (1997).

"The Equal Protection Clause * * * creates no substantive rights. * * * Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997).

"Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause. New York City Transit Authority v. Beazer, 440 U.S. 568, 587 * * * (1979); see Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 271-273 * * *(1979) ('[M]any [laws] affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law')." Vacco v. Quill, 117 S. Ct. 2293, 2298 (1997).

"'When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.'" Vacco v. Quill, 117 S. Ct. 2293, 2298 (1997) (quoting Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

**Equitable Tolling**

The "detail [of 26 U.S.C. 6511, which sets forth the statute of limitations for filing tax refund claims with the IRS,] its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together indicate to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." United States v. Brockamp, 117 S. Ct. 849, 852 (1997).

**Equity Courts Bound By Law**

"'[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" Reno v. Bossier Parish School Board, 117 S. Ct. 1491, 1501 (1997) (quoting INS v. Pangilinan, 486 U.S. 875, 883 (1988)).

**ERISA: Pre-emption**

"[T]he pre-emption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 et seq., [does not] supersede[] California's prevailing wage law to the extent that the law prohibits payment of an apprentice wage to an apprentice trained in an unapproved program." California Division of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 117 S. Ct. 832, 835 (1997).

"[T]he Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. § 1001 *et seq.*, pre-empts a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits." Boggs v. Boggs, 117 S. Ct. 1754, 1758 (1997).

ERISA does not pre-empt "New York from imposing a gross receipts tax on the income of medical centers operated by ERISA funds." De Buono v. NYSA-ILA Medical and Clinical Services Fund, 117 S. Ct. 1747, 1749 (1997).

**Evidence: Preponderance**

"The burden of showing something by a preponderance of evidence simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the fact's existence." Metropolitan Stevedore Co. v. Rambo, 117 S. Ct. 1953, 1963 n.9 (1997) (ellipsis, brackets, and citation omitted).

**Evidence: Quality**

"[W]e need not ignore the data which do exist simply because further refinement would be even more helpful." Maryland v. Wilson, 117 S. Ct. 882, 885-886 n.2 (1997).

**Evidence: Relevance**

"Evidence is 'relevant' if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Reno v. Bossier Parish School Board, 117 S. Ct. 1491, 1502 (1997) (quoting Fed. Rule Evid. 401)).

"[T]he impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions." Reno v. Bossier Parish School Board, 117 S. Ct. 1491, 1502 (1997).

***Ex Post Facto* Laws**

"To fall within the *ex post facto* prohibition, a law must be retrospective -- that is it must apply to events occurring before its enactment -- and it must disadvantage the offender affected by it * * * by altering the definition of criminal conduct or increasing the punishment for the crime." Lynce v. Mathis, 117 S. Ct. 891, 896 (1997) (citations and internal quotation marks omitted).

"The *Ex Post Facto* Clause, which forbids the application of any new punitive measure to a crime already consummated, has been interpreted to

pertain exclusively to penal statutes." Kansas v. Hendricks, 117 S. Ct. 2072, 2086 (1997) (citations and internal quotation marks omitted).

**False Claims Act**

"[A] 1986 amendment to the [False Claims Act does not] * * * appl[y] retroactively to *qui tam* suits regarding allegedly false claims submitted prior to its enactment." Hughes Aircraft Co. v. United States *ex rel.* Schumer, 117 S. Ct. 1871, 1874 (1997).

**Federal Common Law**

"'[T]here is no federal general common law.'" Atherton v. FDIC, 117 S. Ct. 666, 670 (1997) (quoting Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

"[N]ormally, when courts decide to fashion rules of federal common law, 'the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.'" Atherton v. FDIC, 117 S. Ct. 666, 670 (1997) (quoting O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)).

**Federal Crimes**

"Federal crimes are defined by Congress, not the courts * * *." United States v. Lanier, 117 S. Ct. 1219, 1226 n.6 (1997).

**FELA**

"[A] railroad worker negligently exposed to a carcinogen (here, asbestos) but without symptoms of any disease can[not] recover under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U.S.C. § 51 *et seq.*, for negligently inflicted emotional distress." Metro-North Commuter R. Co. v. Buckley, 117 S. Ct. 2113, 2115-2116 (1997).

"[T]he FELA [does not] permit[] a plaintiff without symptoms or disease to recover this economic loss" for "medical monitoring costs," *i.e.*, "the economic cost of the extra medical check-ups that he expects to incur as a result of his exposure to asbestos-laden insulation dust." Metro-North Commuter R. Co. v. Buckley, 117 S. Ct. 2113, 2121 (1997).

**Federalism**

"'[A]bsent explicit congressional consent no state may command federal

officials . . . to take action in derogation of their . . . federal responsibilities.'" Clinton v. Jones, 117 S. Ct. 1636, 1643 n.13 (1997) (quoting L. Tribe, American Constitutional Law 513 (2d ed. 1988)).

"[C]ertain interim provisions of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution." Printz v. United States, 117 S. Ct. 2365, 2368 (1997).

"[T]he Tenth Amendment is [not] the exclusive textual source of protection for principles of federalism." Printz v. United States, 117 S. Ct. 2365, 2379 n.13 (1997).

"The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." Printz v. United States, 117 S. Ct. 2365, 2384 (1997).

**Fiduciary Duty**

"A fiduciary who pretends loyalty to the principal while secretly converting the principal's information for personal gain * * * dupes or defrauds the principal." United States v. O'Hagan, 117 S. Ct. 2199, 2208 (1997) (citation, internal quotation marks, and brackets omitted).

**First Amendment: Commercial Speech**

"[T]he requirement that [growers, handlers, and processors of tree fruit] finance * * * generic advertising is [not] a law 'abridging the freedom of speech' within the meaning of the First Amendment." Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2134 (1997).

"Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views." Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2138 (1997) (footnotes omitted).

**First Amendment: Establishment Clause**

"Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, * * * and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." Agostini v. Felton, 117 S. Ct. 1997, 2015 (1997) (citations omitted).

"New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997).

"We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here." Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997).

**First Amendment: Freedom of Speech**

"A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1186 (1997).

The "less-restrictive-alternative analysis has never been a part of the inquiry into the validity of content-neutral regulations on speech." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1199 (1997) (citations, internal quotation marks, and ellipses omitted).

"[T]he governmental interest in protecting children from harmful materials * * * does not justify an unnecessarily broad suppression of speech addressed to adults." Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2346 (1997).

**Forecasts that Prove Inaccurate with Hindsight**

"'The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. . . . [Value] depends largely on more or less certain prophecies

of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. . . . Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done.'" Commissioner of Int. Rev. v. Estate of Hubert, 117 S. Ct. 1124, 1130 (1997) (plurality opinion) (quoting Ithaca Trust Co. v. United States, 279 U.S. 151, 155 (1929) (Holmes, J.)).

**Fourteenth Amendment**

"Congress' power under § 5 [of the Fourteenth Amendment], however, extends only to enforcing the provisions of the Fourteenth Amendment. The Court has described this power as remedial * * *. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." City of Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997) (citation, some internal quotation marks, and brackets omitted).

**Fourth Amendment: Drug Testing**

"Georgia's requirement that candidates for state office pass a drug test * * * does not fit within the closely guarded category of constitutionally permissible suspicionless searches." Chandler v. Miller, 117 S. Ct. 1295, 1298 (1997).

"To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. * * * But particularized exceptions to the main rule are sometimes warranted based on special needs, beyond the normal need for law enforcement." Chandler v. Miller, 117 S. Ct. 1295, 1301 (1997) (citations and internal quotation marks omitted).

**Fourth Amendment: Searches**

"[T]he Fourth Amendment [does not] require[] that a lawfully seized defendant must be advised that he is 'free to go' before his consent to search will be recognized as voluntary." Ohio v. Robinette, 117 S. Ct. 417, 419 (1996).

"In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the

destruction of evidence." Richards v. Wisconsin, 117 S. Ct. 1416, 1421 (1997).

**Fourth Amendment: Stops**

"[A] police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle" without violating the Fourth Amendment." Maryland v. Wilson, 117 S. Ct. 882, 884 (1997).

**Freedom of Information Act**

"'[T]he *only* relevant public interest in the FOIA balancing analysis' is 'the extent to which disclosure of the information sought would "she[d] light on an agency's performance of its statutory duties" or otherwise let citizens know "what their government is up to."'" Bibles v. Oregon Natural Desert Ass'n, 117 S. Ct. 795, 795 (1997) (quoting Department of Defense v. FLRA, 510 U.S. 487, 497 (1994), and Department of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989)) (emphasis added by Bibles Court).

**Guilty Pleas**

"After the defendant in this case pleaded guilty, pursuant to a plea agreement, the District Court accepted his plea but deferred decision on whether to accept the plea agreement. The defendant then sought to withdraw his plea. We hold that in such circumstances a defendant may not withdraw his plea unless he shows a 'fair and just reason' under [Federal Rule of Criminal Procedure] 32(e)." United States v. Hyde, 117 S. Ct. 1630, 1631 (1997).

**Habeas Corpus**

"[T]he rule * * * which requires that a capital defendant be permitted to inform his sentencing jury that he is parole-ineligible if the prosecution argues that he presents a future danger * * * was 'new' * * * and thereby inapplicable to an already final death sentence." O'Dell v. Netherland, 117 S. Ct. 1969, 1971 (1997).

The "new section of the statute dealing with petitions for habeas corpus [*i. e.*, the Antiterrorism and Effective Death Penalty Act of 1996, does not] govern[] applications in noncapital cases that were already pending when the Act was passed." Lindh v. Murphy, 117 S. Ct. 2059, 2061 (1997).

**Indian Tribal Courts**

"[T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question." Strate v. A-1 Contractors, 117 S. Ct. 1404, 1408 (1997).

**Intimate Association**

"Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' Boddie [v. Connecticut, 401 U.S. 371, 376 (1971)], rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." M.L.B. v. S.L.J., 117 S. Ct. 555, 564 (1996).

"[P]arental termination decrees are among the most severe forms of state action * * *." M.L.B. v. S.L.J., 117 S. Ct. 555, 570 (1996).

**Legislation Based Upon Threatened Harm**

"A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it." Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1197 (1997).

**Legislation That Is Only a Partial Solution**

"[T]he fact that § 10(b) is only a partial antidote to the problems it was designed to alleviate does not call into question its prohibition of conduct that falls within its textual proscription." United States v. O'Hagan, 117 S. Ct. 2199, 2211 n.9 (1997).

**Legislative Districts**

"If race is the predominant motive in creating districts, strict scrutiny applies, * * * and the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive." Abrams v. Johnson, 117 S. Ct. 1925, 1936 (1997) (citation omitted).

"[T]he constitutional guarantee of one person, one vote under Article I, § 2 * * * requires congressional districts to achieve population equality 'as nearly as is practicable.'" Abrams v. Johnson, 117 S. Ct. 1925, 1939 (1997) (quoting Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964)).

"Appellant claims that the District Court acted without giving the State an

adequate opportunity to make its own redistricting choice by approving the remedial plan without first adjudicating the legality of the original plan, that the court had no authority to approve any settlement over his objection, and that the remedial plan violates the Constitution. We hold that the State exercised the choice to which it was entitled under our cases, that appellant has no right to block the settlement, and that he has failed to point up any unconstitutionality in the plan proposed." Lawyer v. Department of Justice, 117 S. Ct. 2186, 2189 (1997).

**LHWCA**

"The LHWCA authorizes compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages." Metropolitan Stevedore Co. v. Rambo, 117 S. Ct. 1953, 1957 (1997).

"[A] worker is entitled to nominal compensation [under the Longshore and Harbor Workers' Compensation Act] when his work- related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions." Metropolitan Stevedore Co. v. Rambo, 117 S. Ct. 1953, 1963 (1997).

**Materiality**

"[M]ateriality of falsehood is [not] an element of the crime of knowingly making a false statement to a federally insured bank, 18 U.S.C. § 1014." United States v. Wells, 117 S. Ct. 921, 924 (1997).

"Materiality" means "'ha[ving] a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" United States v. Wells, 117 S. Ct. 921, 926 (1997) (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)).

**Necessary and Proper Clause**

The Necessary and Proper Clause is "the last, best hope of those who defend *ultra vires* congressional action." Printz v. United States, 117 S. Ct. 2365, 2378 (1997).

**Official Immunity**

"In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear

that a particular decision may give rise to personal liability." Clinton v. Jones, 117 S. Ct. 1636, 1643 (1997) (footnote omitted).

"[W]hen defining the scope of an immunity for acts clearly taken *within* an official capacity, we have applied a functional approach. * * * As our opinions have made clear, immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.'" Clinton v. Jones, 117 S. Ct. 1636, 1644 (1997) (quoting Forrester v. White, 484 U.S. 219, 229 (1988)).

**Qualified Immunity**

"This 'qualified immunity' defense is valuable to officials asserting it for two reasons. First, if it is found applicable at any stage of the proceedings, it determines the outcome of the litigation by shielding the official from damages liability. Second, when the complaint fails to allege a violation of clearly established law or when discovery fails to uncover evidence sufficient to create a genuine issue whether the defendant committed such a violation, it provides the defendant with an immunity from the burdens of trial as well as a defense to liability." Johnson v. Fankell, 117 S. Ct. 1800, 1803 (1997) (footnote omitted).

"[P]rison guards who are employees of a private prison management firm are [not] entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983." Richardson v. McKnight, 117 S. Ct. 2100, 2102 (1997).

"The Court has sometimes applied a functional approach in immunity cases, but only to decide which type of immunity -- absolute or qualified -- a public officer should receive. * * * And it never has held that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity * * * especially for a private person who performs a job without government supervision or direction. Indeed a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities * * *." Richardson v. McKnight, 117 S. Ct. 2100, 2106 (1997) (citations omitted).

**Patent Law**

"Under [the doctrine of equivalents] a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention." Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 117

S. Ct. 1040, 1045 (1997).

**Pre-emption**

"[W]here 'federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."'" California Division of Labor Standards Enforcement v. Dillingham Const., N. A., Inc., 117 S. Ct. 832, 838 (1997) (quoting New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1676 (1995), and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

**The President**

"Only three sitting Presidents have been defendants in civil litigation involving their actions prior to taking office." Clinton v. Jones, 117 S. Ct. 1636, 1643 (1997).

"Although Presidents have responded to written interrogatories, given depositions, and provided videotaped trial testimony, * * * no sitting President has ever testified, or been ordered to testify, in open court." Clinton v. Jones, 117 S. Ct. 1636, 1643 n.14 (1997).

**Prophylactic Measures**

"A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited." United States v. O'Hagan, 117 S. Ct. 2199, 2217 (1997).

**Punitive Damages: Taxation**

"[P]unitive damages received by a plaintiff in a tort suit for personal injuries * * * were not received '*on account of*' personal injuries; hence [26 U.S.C. 104(a)(2) (1988 ed.)] does not apply and the damages are taxable." O'Gilvie v. United States, 117 S. Ct. 452, 454 (1996) (emphasis in original).

**RICO Actions**

"[W]e hold that a plaintiff may not rely upon 'fraudulent

concealment' [to extend the statute of limitations in a civil RICO action] unless he has been reasonably diligent in trying to discover his

cause of action." Klehr v. A.O. Smith Corp., 117 S. Ct. 1984, 1987 (1997).

**Rule of Lenity**

"The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." United States v. Wells, 117 S. Ct. 921, 931 (1997) (quotation marks and ellipses omitted).

**Securities Fraud**

"[A] person who trades in securities for personal profit, using confidential information misappropriated in breach of a fiduciary duty to the source of the information, [is] guilty of violating § 10(b) and Rule 10b-5 [and] * * * the [Securities and Exchange] Commission [did not] exceed its rulemaking authority by adopting Rule 14e-3(a), which proscribes trading on undisclosed information in the tender offer setting, even in the absence of a duty to disclose." United States v. O'Hagan, 117 S. Ct. 2199, 2205 (1997).

"The 'misappropriation theory' holds that a person commits fraud 'in connection with' a securities transaction, and thereby violates § 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information. * * * Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information. In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information." United States v. O'Hagan, 117 S. Ct. 2199, 2207 (1997).

**Sentencing**

"[A] federal court may [not] direct that a prison sentence under 18 U.S.C. § 924(c) run concurrently with a state-imposed sentence * * *." United States v. Gonzales, 117 S. Ct. 1032, 1034 (1997). [Section 924(c) provides that whoever uses or carries a firearm in relation to any drug offense shall be sentenced to five years' imprisonment that shall not "run concurrently with any other term of imprisonment."]

"[T]he phrase 'at or near the maximum term authorized' [in 28 U.S.C. 994(h)] is unambiguous and requires a court to sentence a career offender

'at or near' the 'maximum' prison term available once all relevant statutory sentencing enhancements are taken into account." United States v. LaBonte, 117 S. Ct. 1673, 1679 (1997).

**Sentencing Guidelines**

"[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." United States v. Watts, 117 S. Ct. 633, 638 (1997).

**Separation of Powers**

"We have recognized that '[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'" Clinton v. Jones, 117 S. Ct. 1636, 1648 (1997) (quoting Loving v. United States, 517 U.S. ___, ___, 116 S. Ct. 1737, 1743 (1996)).

"We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office." Clinton v. Jones, 117 S. Ct. 1636, 1650 (1997).

**Sovereign Immunity**

"Although we have adopted the related doctrine of sovereign immunity, the common-law fiction that '[t]he king . . . is not only incapable of *doing* wrong, but even of *thinking* wrong," * * * was rejected at the birth of the Republic." Clinton v. Jones, 117 S. Ct. 1636, 1646 n.24 (1997) (quoting 1 W. Blackstone, Commentaries *246)).

**State Authority**

"[A] crucial axiom of our government" is that "the States have wide authority to set up their state and local governments as they wish." McMillian v. Monroe County, Ala., 117 S. Ct. 1734, 1741 (1997).

**Statutes of Limitations**

"[T]he law ordinarily provides that an action to recover mistaken payments of money accrues upon the receipt of payment," not when payment is mailed to the payee. O'Gilvie v. United States, 117 S. Ct. 452, 458 (1996) (internal quotation marks omitted).

**Suits Against Officers in Official Capacity**

"[A] suit against a governmental officer in his official capacity is the same as a suit against the entity of which the officer is an agent,* * * and * * * victory in such an official-capacity suit imposes liability on the entity that the officer represents." McMillian v. Monroe County, Ala., 117 S. Ct. 1734, 1737 n.2 (1997) (citations, internal quotation marks, and brackets omitted).

**Suits Under 42 U.S.C. 1983**

"State officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983. * * * State officers are subject to § 1983 liability for damages in their personal capacities, however, even when the conduct in question relates to their official duties." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1070 n.24 (1997) (citations omitted).

"[T]he requirement that a State operate its child support program in 'substantial compliance' with Title IV-D [of the Social Security Act] was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right. Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV-D program." Blessing v. Freestone, 117 S. Ct. 1353, 1361 (1997) (emphasis in original).

"[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Commissioners of Bryan County v. Brown, 117 S. Ct. 1382, 1388 (1997) (emphasis in original).

"[A] claim for damages and declaratory relief brought by a state prisoner challenging the validity of the procedures used to deprive him of good-time credits is [not] cognizable under [42 U.S.C.] § 1983." Edwards v. Balisok, 117 S. Ct. 1584, 1586 (1997).

"Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties," so the counties are not liable for the sheriffs' actions in suits under 42 U.S.C. 1983.

McMillian v. Monroe County, Ala., 117 S. Ct. 1734, 1740 (1997).

"[D]efendants in an action brought under Rev. Stat. 1979, 42 U.S.C. § 1983, in state court [do not] have a federal right to an interlocutory appeal from a denial of qualified immunity." Johnson v. Fankell, 117 S. Ct. 1800, 1802 (1997).

**Sympathetic Plaintiff**

"We do not deny that the dissent paints a sympathetic picture of [plaintiff] and his co-workers; this picture has force because [he] *is* sympathetic and he *has* suffered wrong at the hands of a negligent employer. But we are more troubled than is the dissent by the potential systemic effects of creating a new, full-blown, tort law cause of action -- for example, the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." Metro-North Commuter R. Co. v. Buckley, 117 S. Ct. 2113, 2124 (1997).

**Tax Injunction Act**

"Production Credit Associations, corporations chartered under federal law, are [not] included within the exception [to the Tax Injunction Act, 28 U.S.C. 1341] when they sue by themselves * * * and so may not sue in federal court for an injunction against state taxation without the United States as co-plaintiff." Arkansas v. Farm Credit Services of Cent. Arkansas, 117 S. Ct. 1776, 1778-1779 (1997).

"Instrumentalities of the United States, by virtue of that designation alone, do not have the same right as does the United States to avoid the prohibitions of the Tax Injunction Act." Arkansas v. Farm Credit Services of Cent. Arkansas, 117 S. Ct. 1776, 1779 (1997).

**Tax Law**

"Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities." United States v. Brockamp, 117 S. Ct. 849, 852 (1997).

**Takings**

"There are two independent prudential hurdles to a regulatory taking claim brought against a state entity in federal court. * * * [A] plaintiff

must demonstrate that she has both received a final decision regarding the application of the challenged regulations to the property at issue from the government entity charged with implementing the regulations * * * and sought compensation through the procedures the State has provided for doing so. * * * The second hurdle stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment; if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Suitum v. Tahoe Regional Planning Agency, 117 S. Ct. 1659, 1664-1665 (1997) (citations, brackets, and some internal quotation marks omitted).

**Tort Remedies: Creation of**

"[W]here state and federal regulations already provide the relief that a plaintiff seeks, creating a full-blown tort remedy could entail systemic costs without corresponding benefits." Metro-North Commuter R. Co. v. Buckley, 117 S. Ct. 2113, 2123 (1997).

**Valuation of Property**

"[E]ven if . . . the income generated by such parcels may be properly thought of as *de minimis*, the value of the land may not fit that description." Babbitt v. Youpee, 117 S. Ct. 727, 733 (1997) (internal quotation marks omitted).

**Voting Rights Act**

"[T]he Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S. C. § 1973c (§ 5), requires preclearance of certain changes that Mississippi made in its voter registration procedures -- changes that Mississippi made in order to comply with the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*" Young v. Fordice, 117 S. Ct. 1228, 1231 (1997).

"[A] violation of § 2 [of the Voting Rights Act] is not grounds in and of itself for denying preclearance under § 5." Reno v. Bossier Parish School Board, 117 S. Ct. 1491, 1500 (1997).

**Waiver of Deportation: Discretion**

"While [8 U.S.C. 1251(a)(1)(H)] establishes certain prerequisites to eligibility for a waiver of deportation, it imposes no limitations on the factors that the Attorney General (or her delegate, the INS, see 8 CFR § 2.1 (1996)) may consider in determining who, among the class of eligible

aliens, should be granted relief." INS v. Yueh-Shaio Yang, 117 S. Ct. 350, 352 (1996).

# MAXIMS FROM THE SUPREME COURT 1995 TERM

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## I. DOCTRINES OF STATUTORY CONSTRUCTION

### Plain Language

"We start, as we must, with the language of the statute." Bailey v. United States, 116 S. Ct. 501, 506 (1995).

"[W]e begin with the text and design of the statute." Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co., 116 S. Ct. 595, 597 (1996).

While "the English word 'damage' or 'harm' * * * can be applied to an extremely wide range of phenomena, * * * that term's 'plain meaning'" is not its meaning in the Warsaw Convention. Zicherman v. Korean Air Lines Co., 116 S. Ct. 629, 632 (1996).

### Ordinary Meaning

A word in a statute "must be given its 'ordinary or natural' meaning * * *." Bailey v. United States, 116 S. Ct. 501, 506 (1995).

### Statutory Text Controlling

"We are bound by the language of the statute as it is written, and even if the rule Lundy advocates might 'accor[d] with good policy,' we are not at liberty 'to rewrite [the] statute because [we] might deem its effects susceptible of improvement.'" Commissioner v. Lundy, 116 S. Ct. 647, 656-657 (1996) (quoting Badaracco v. Commissioner, 464 U.S. 386, 398

(1984).

**Complex Statutes**

"The analysis dictated by [26 U.S.C.] § 6512(b)(3)(B) is not elegant, but it is straightforward." Commissioner v. Lundy, 116 S. Ct. 647, 651 (1996).

**Construction of Treaty**

"Because a treaty ratified by the United States is not only the law of this land, see Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (travaux préparatoires) and the post-ratification understanding of the contracting parties." Zicherman v. Korean Air Lines Co., 116 S. Ct. 629, 634 (1996).

**Construction of State Statutes**

"[O]nly state courts may authoritatively construe state statutes." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1600 (1996).

**Context**

"A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." Bailey v. United States, 116 S. Ct. 501, 507 (1995) (quoting United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

**History of Amendments**

"The amendment history of [a statutory provision] casts further light on Congress' intended meaning." Bailey v. United States, 116 S. Ct. 501, 507 (1995).

**Subsequent Legislation**

"[S]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Loving v. United States, 116 S. Ct. 1737, 1749 (1996) (quotation marks and citations omitted).

"[S]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight." United States v. Winstar Corp., 116 S.

Ct. 2432, 2463 (1996) (plurality opinion) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974)).

**Statutory Purpose**

In interpreting ERISA, "courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." Varity Corp. v. Howe, 116 S. Ct. 1065, 1070 (1996).

"We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." Bailey v. United States, 116 S. Ct. 501, 506 (1995).

"The purpose of the HSA [Hours of Service Act] is to promote the safe operation of trains, and the statutory classification must be understood in accord with that objective." Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co., 116 S. Ct. 595, 598 (1996).

**Construed to Avoid Constitutional Problems**

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." United States v. Winstar Corp., 116 S. Ct. 2432, 2455 (1996) (plurality opinion) (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988), and citing Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

**Construed to Avoid Surplusage or Meaninglessness**

"[T]he more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight." United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529, 1533 (1996).

"It is an elementary rule of construction that 'the act cannot be held to destroy itself.'" Citizens Bank of Maryland v. Strumpf, 116 S. Ct. 286, 290 (1995) (quoting Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,

204 U.S. 426, 446 (1907).

This canon was applied to avoid rendering one section "redundant" and "nonsensical" in Field v. Mans, 116 S. Ct. 437, 442-443 n.7 (1995).

The Supreme Court reads statutes "with the assumption that Congress intended each of its terms to have meaning. 'Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.'" Bailey v. United States, 116 S. Ct. 501, 506-507 (1995) (quoting Ratzlaf v. United States, 114 S. Ct. 655, 659 (1994)).

The Supreme Court recognizes "the canon of construction that instructs that 'a legislature is presumed to have used no superfluous words' * * *." Bailey v. United States, 116 S. Ct. 501, 507 (1995) (quoting Platt v. Union Pacific R.R. Co., 99 U.S. 48, 58 (1879).

**Construed to Achieve Practical Result**

"When presented with an equally plausible reading of Article 24" of the Warsaw Convention, the Supreme Court chooses the one "that leads to a more comprehensible result * * *." Zicherman v. Korean Air Lines Co., 116 S. Ct. 629, 634 (1996).

"Even if the text of [the statute in issue] could plausibly be read to create this decidedly inefficient jurisdictional scheme, we would hesitate to attribute such a design to Congress." Bank One Chicago, N.A. v. Midwest Bank & Tr. Co., 116 S. Ct. 637, 643 (1996) (footnote omitted).

**Policy Arguments**

"[Respondent] may or may not have a valid policy argument, but it is up to Congress, not this Court, to revise the [statutory] determination if it so chooses." United States v. Noland, Trustee, 116 S. Ct. 1524, 1528 n.3 (1996).

**Construed in Accord with Common Law**

"Though dictionaries sometimes help in such matters, we believe it more important here to look to the common law, which, over the years, has given to terms such as 'fiduciary' and trust 'administration' a legal meaning to which, we normally presume, Congress meant to refer." Varity Corp. v. Howe, 116 S. Ct. 1065, 1073 (1996).

"'[F]alse pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art. They are common-law terms, and * * * they imply elements that the common law has defined them to include." Field v. Mans, 116 S. Ct. 437, 443 (1995).

"'It is . . . well established that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."'" Field v. Mans, 116 S. Ct. 437, 443 (1995) (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) (quoting NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981))).

"We construe the terms in [the statutory provision in issue] to incorporate the general common law of torts, the dominant consensus of common-law jurisdictions, rather than the law of any particular State." Field v. Mans, 116 S. Ct. 437, 443 n.9 (1995).

**Construed in Accord with Prior Caselaw**

"The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." United States v. Noland, Trustee, 116 S. Ct. 1524, 1527 (1996) (quoting Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 501 (1986)).

**Construed in Accord with Other Statutes**

"But absent clearer indication than what we have in [29 U.S.C.] § 406 (a)(1)(D), we would be reluctant to infer that ERISA bars conduct affirmatively sanctioned by other federal statutes." Lockheed v. Spink, 116 S. Ct. 1783, 1791 n.6 (1996).

**Ejusdem Generis**

The canon that "the specific governs the general" is "a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." Varity Corp. v. Howe, 116 S. Ct. 1065, 1077 (1996) (declining to follow that canon).

**Identical Words in Different Sections**

"[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same

meaning." Commissioner v. Lundy, 116 S. Ct. 647, 655 (1996) (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990), and Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986) (internal quotation marks omitted)).

**Implied Remedies**

"[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1256 (1996) (quotation omitted).

**Implied Repeals**

For there to be an implied repeal, there must be an "irreconcilable conflict between the two federal statutes at issue." Matsushita Electric Industrial Co. v. Epstein, 116 S. Ct. 873, 881 (1996) (internal quotation marks omitted).

**Silence in One Provision Contrasted with Specific Provision**

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Field v. Mans, 116 S. Ct. 437, 442 (1995) (quoting Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991), and Russello v. United States, 464 U.S. 16, 23 (1983)). Note this rule of construction was held inapplicable in Field: "But there is more here, showing why the negative pregnant argument should not be elevated to the level of interpretive trump card." 116 S. Ct. at 442. See id. at 446.

**Catchall Provisions**

"This structure suggests that these 'catchall' provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Varity Corp. v. Howe, 116 S. Ct. 1065, 1078 (1996).

**Construction of Rule of General Intent**

Federal Rule of Criminal Procedure 2, which provides that the "rules are intended to provide for the just determination of every criminal proceeding," "sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives." Carlisle v. United States, 116

S. Ct. 1460, 1465 (1996).

**Clear Statement Rule**

"Congress' intent to abrogate the States' immunity from suit [under the Eleventh Amendment] must be obvious from a clear legislative statement." Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1123 (1996) (internal quotation marks omitted).

**Significance of Title**

"[U]nless the intent that the text exceed its caption is clear," the Supreme Court is "not inclined to adopt an interpretation [of Federal Rule of Criminal Procedure 29(c)] that creates such a surprise." Carlisle v. United States, 116 S. Ct. 1460, 1464 (1996).

**Deference to Agency Construction**

Chevron deference is based on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1733 (1996).

Where deference is otherwise owed to an agency's interpretation, it does not "matter that the regulation was prompted by litigation, including this very suit" and was issued after the decision of the lower court. Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1733 (1996).

No deference is given to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1733 (1996) (quoting Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212 (1988)).

"[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal" to giving it deference. Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1734 (1996).

An agency letter was held "too informal" and an opinion letter of the agency's deputy chief counsel was held only to purport to represent his own position, and thus they were not "binding agency policy." Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1734 (1996).

The question under Chevron "is not whether [the agency's regulation] represents the best interpretation of the statute, but whether it represents a reasonable one." Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1735 (1996).

"When the legislative prescription is not free from ambiguity, the administrator must choose between conflicting reasonable interpretations. Courts, in turn, must respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' Bayside [Enterprises, Inc. v. NLRB, 429 U.S. 298, 304 (1977)], even if the issue 'with nearly equal reason [might] be resolved one way rather than another,' id., at 302 (citing Farmers Reservoir [& Irrigation Co. v. McComb, 337 U.S. 755, 770 (1949)] (Frankfurter, J., concurring))." Holly Farms Corp. v. NLRB, 116 S. Ct. 1396, 1401 (1996).

"For the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one." Holly Farms Corp. v. NLRB, 116 S. Ct. 1396, 1406 (1996).

"Our deference arises not from the highly technical nature of his decision, but rather from the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary." Wisconsin v. City of New York, 116 S. Ct. 1091, 1102-1103 (1996).

The NLRB "often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application." NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450, 453 (1995).

The Supreme Court has "not settled whether and to what extent deference is due to an administrative interpretation * * * in a case that has already reached the appeal or certiorari stage when that interpretation is adopted." Lawrence v. Chater, 116 S. Ct. 604, 610 (1996).

**Deference to Agency - Retroactivity**

"Where, however, a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means" even though the regulation was adopted after the events at issue. Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1735 n.3 (1996).

**Decisionmaker Overruled Subordinates**

"[T]he mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision." Wisconsin v. City of New York, 116 S. Ct. 1091, 1103 (1996).

**Sentencing Guidelines**

The commentary in the United States Sentencing Commission's Guidelines Manual "is the authoritative construction of the Guideline absent plain inconsistency or statutory or constitutional infirmity * * *." Neal v. United States, 116 S. Ct. 763, 768 (1996) (citing Stinson v. United States, 508 U.S. 36, ___ (1993)). [Note Neal held that the Guideline in question could not change the construction of the statute previously adopted by the Supreme Court.]

**Effect of Canons**

"Canons of construction, however, are simply 'rules of thumb' which will sometimes 'help courts determine the meaning of legislation.' Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253 (1992). To apply a canon properly one must understand its rationale." Varity Corp. v. Howe, 116 S. Ct. 1065, 1077 (1996).

II. SUPREME COURT PRACTICE

**Affirmance by Equally Divided Court**

"[A]n unexplained affirmance by an equally divided court" is "a judgment not entitled to precedential weight no matter what reasoning may have supported it." Rutledge v. United States, 116 S. Ct. 1241, 1249 (1996).

**Argument Abandoned**

The Court holds that the government has abandoned an argument that it raised in its petition for certiorari but "failed to address * * * in its brief on the merits." United States v. International Business Machines Corp., 116 S. Ct. 1793, 1801 n.3 (1996).

**Argument Properly Raised in Rehearing Petition**

The Supreme Court held that "[b]ecause petitioners raised their due process challenge to the application of res judicata in their application for rehearing to the Alabama Supreme Court, that federal issue has been

preserved for our review." Richards v. Jefferson Co., 116 S. Ct. 1761, 1765 n.3 (1996).

**Issue Not Raised Below**

Supreme Court declines to consider an argument where petitioner "failed to advance this argument before the Court of Appeals, and it did not home in on this contention in its petition for certiorari." Holly Farms Corp. v. NLRB, 116 S. Ct. 1396, 1402 n.7 (1996).

The Supreme Court "declines to address" a contention that was not raised below in the lower courts. Citizens Bank of Maryland v. Strumpf, 116 S. Ct. 286, 290 n.** (1995).

"Since this issue was never raised previously and is not fairly subsumed within the question on which we granted certiorari, we do not reach it." Field v. Mans, 116 S. Ct. 437, 440 n.2 (1995).

**Standards for Summarily Granting Cert., Vacating, and Remanding**

"Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. Whether a GVR order is ultimately appropriate depends further on the equities of the case: if it appears that the intervening development, such as a confession of error in some but not all aspects of the decision below, is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." Lawrence v. Chater, 116 S. Ct. 604, 607 (1996).

**Summary Court of Appeals Disposition**

"[W]hile not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review. We are therefore more ready than the dissent to issue a GVR order in cases in which recent events have cast substantial doubt on the correctness of the lower court's summary disposition." Lawrence v. Chater, 116 S. Ct. 604, 608 (1996).

III. PROCEDURAL DOCTRINES

**Abstention Doctrine**

"[T]he abstention doctrine first recognized in Burford v. Sun Oil Co., 319 U.S. 315 (1943), can be applied in a common-law suit for damages" to stay, but not dismiss, the federal action while the state-court action proceeds. Quackenbush v. Allstate Insurance, 116 S. Ct. 1712, 1717 (1996).

**Abuse of Discretion**

"A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100 (1996).

**All Writs Act, 28 U.S.C. 1651**

"[T]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Carlisle v. United States, 116 S. Ct. 1460, 1467 (1996) (quoting Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 43 (1985).

**Appellate Jurisdiction**

"[A] defendant's immediate appeal of an unfavorable qualified-immunity ruling on his motion to dismiss [does not] deprive[] the court of appeals of jurisdiction over a second appeal, also based on qualified immunity, immediately following denial of summary judgment." Behrens v. Pelletier, 116 S. Ct. 834, 836 (1996).

"Appeal rights cannot depend on the facts of a particular case." Behrens v. Pelletier, 116 S. Ct. 834, 841 (1996) (quoting Carroll v. United States, 354 U.S. 394, 405 (1957)).

"[A]ppealability determinations are made for classes of decisions, not individual orders in specific cases." Behrens v. Pelletier, 116 S. Ct. 834, 834, 841-842 (1996).

**Burden of Proof**

"The 'more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.'" Cooper v. Oklahoma, 116 S. Ct. 1373, 1381 (1996) (quoting Cruzan v. Director, Mo. Dept. of

Health, 497 U.S. 261, 283 (1990).

"A heightened standard [of proof] does not decrease the risk of error, but simply reallocates that risk between the parties." Cooper v. Oklahoma, 116 S. Ct. 1373, 1383 (1996).

**De Novo Appellate Review**

"Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify the legal principles." Ornelas v. United States, 116 S. Ct. 1657, 1662 (1996).

"[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." Ornelas v. United States, 116 S. Ct. 1657, 1663 (1996).

**Dicta Not Binding**

"[I]t is to the holdings of our cases, rather than their dicta, that we must attend." Bennis v. Michigan, 116 S. Ct. 994, 999 (1996) (quoting Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. ___, ___ (1994)).

**Discovery - Criminal Cases**

"Defense" within the meaning of Fed. R. Crim. P. 16(a)(1)(C), which requires the government to permit the defendant to inspect and copy certain documents in its possession "which are material to the preparation of the defendant's defense," "encompass[es] only the narrower class of 'shield' claims, which refute the Government's arguments that the defendant committed the crime charged," not "any claim that is a 'sword,' challenging the prosecution's conduct of the case." United States v. Armstrong, 116 S. Ct. 1480, 1485 (1996).

**Discovery - Due Process**

"'[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.'" Gray v. Netherland, 116 S. Ct. 2074, 2083 (1996) (quoting Wardius v. Oregon, 412 U.S. 470, 474 (1973)).

**Distinguishing Issues of Fact and Law**

"[T]he proper characterization of a question as one of fact or law is sometimes slippery." Thompson v. Keohane, 116 S. Ct. 457, 464 (1995).

"While [issues of fact] encompass more than 'basic, primary, or historical facts,' their resolution depends heavily on the trial court's appraisal of witness credibility and demeanor." Thompson v. Keohane, 116 S. Ct. 457, 465 (1995).

**Equitable Remedies**

"A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].' See Milliken v. Bradley, 433 U.S. 267, 280 (1977) (internal quotation marks omitted)." United States v. Virginia, 116 S. Ct. 2264, 2282 (1996).

**Erie v. Thompkins**

"Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law." Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2219 (1996).

"Classification of a law as 'substantive' or 'procedural' for Erie purposes is sometimes a challenging endeavor." Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2219 (1996).

**Factual Findings**

"In reviewing this legal conclusion, we give deference to the factual findings of the District Court, recognizing its comparative advantage in understanding the specific context in which the events of this case occurred." Varity Corp. v. Howe, 116 S. Ct. 1065, 1071 (1996).

**Federal Courts - Inherent Power**

"Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities. [Citations omitted.] The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." Degen v. United States, 116 S. Ct. 1777, 1780 (1996).

"A court's inherent power is limited by the necessity giving rise to its exercise." Degen v. United States, 116 S. Ct. 1777, 1783 (1996).

"Whatever the scope of this 'inherent power' [of district courts], however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." Carlisle v. United States, 116 S. Ct. 1460, 1466 (1996).

**Interlocutory Appeals**

The Supreme Court holds that on interlocutory appeals under 28 U.S. C. 1292(b), the court of appeals can exercise jurisdiction over "any issue fairly included within the certified order" and is not limited to the particular issues certified by the district court as controlling issues of law. Yamaha Motor Corp, U.S.A. v. Calhoun, 116 S. Ct. 619, 623 (1996).

**Issues for Court**

"[T]he construction of a patent, including terms of art within its claim, is exclusively within the province of the court." Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1387 (1996).

"[J]udges, not juries, ordinarily construe[] written documents." Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1392 (1996).

"The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis." Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1395 (1996).

**Issues for Jury**

"[C]redibility determinations * * * are the jury's forte." Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1395 (1996).

**Jurisdiction - General**

"[F]ederal courts [do not] possess ancillary jurisdiction over new actions in which a federal judgment creditor seeks to impose liability for a money judgment on a person not otherwise liable for the judgment." Peacock v. Thomas, 116 S. Ct. 862, 865 (1996).

"[A] federal court may exercise ancillary jurisdiction '(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.'" Peacock v. Thomas, 116 S. Ct. 862,

867 (1996) (quoting Kokkonen v. Guardian Life Ins. Co., 511 U.S. ___, ___ (1994)).

"The court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims. * * * Consequently, claims alleged to be factually interdependent with and, hence, ancillary to claims brought in an earlier federal lawsuit will not support federal jurisdiction over a subsequent lawsuit." Peacock v. Thomas, 116 S. Ct. 862, 867 (1996).

**Jurisdiction - Limited**

"[W]e are constrained by our limited jurisdiction and may not entertain claims 'based merely on equitable considerations.'" Hercules Inc. v. United States, 116 S. Ct. 981, 989 (1996) (quoting United States v. Minnesota Mutual Investment Co., 271 U.S. 212, 217-218 (1926)).

**Jurisdiction - Tucker Act**

Tucker Act jurisdiction "extends only to contracts either express or implied in fact, and not to claims on contracts implied in law." Hercules Inc. v. United States, 116 S. Ct. 981, 985 (1996).

**Jury Trial**

"We hold that New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to the Seventh Amendment, if the review standard set out in CPLR § 5501(c) is applied by the federal trial court judge, with appellate control of the trial court's ruling limited to review for 'abuse of discretion.'" Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2215 (1996).

**Mootness**

"It is true, of course, that mootness can arise at any stage of litigation, Steffel v. Thompson, 415 U.S. 452, 459, n.10 (1974); that federal courts may not 'give opinions upon moot questions or abstract propositions,' Mills v. Green, 159 U.S. 651, 653 (1895); and that an appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant. Ibid. The available remedy, however, does not need to be 'fully satisfactory' to avoid mootness. Church of Scientology of Cal. v. United States, 506 U.S. 9, 13 (1992). To the contrary, even the availability of a 'partial remedy,' is 'sufficient to prevent [a] case from being moot.' Ibid." Calderon v. Moore, 116 S. Ct. 2066, 2067 (1996).

**"Motion"**

"But the term 'motion' generally means '[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant.' Black's Law Dictionary 1013 (6th ed. 1990). Papers simply 'acknowledging' substantial assistance [by a criminal defendant] are not sufficient if they do not indicate desire for, or consent to, a sentence below the statutory minimum." Melendez v. United States, 116 S. Ct. 2057, 2061 (1996) (footnotes omitted).

**Precedential Effect**

The Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." Lewis v. Casey, 116 S. Ct. 2174, 2180 n.2 (1996).

**Relief - Scope of**

"We agree that the success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic Bounds [v. Smith, 430 U.S. 817 (1977),] violation invalid." Lewis v. Casey, 116 S. Ct. 2174, 2179 (1996).

"The actual-injury requirement would hardly serve the purpose we have described above -- of preventing courts from undertaking tasks assigned to the political branches -- if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration. The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established." Lewis v. Casey, 116 S. Ct. 2174, 2183 (1996) (emphasis in original).

**Remand**

"When a reviewing court concludes that a district court based a departure [from the Sentencing Guidelines] on both valid and invalid factors, a remand is required unless it determines the district court would have imposed the same sentence absent reliance on the invalid factors." Koon v. United States, 116 S. Ct. 2035, 2053-2054 (1996).

**Remand Orders - Appealability**

"[A]n abstention-based remand order is appealable as a final order under 28 U.S.C. § 1291." Quackenbush v. Allstate Insurance, 116 S. Ct. 1712, 1717 (1996).

**Remand Orders - Unreviewability**

"If an order remands a bankruptcy case to state court because of a timely raised defect in removal procedure or lack of subject-matter jurisdiction, then a court of appeals lacks jurisdiction to review that order under [28 U.S.C.] § 1447(d), regardless of whether the case was removed under § 1441(a) or § 1452(a)." Things Remembered, Inc. v. Petrarca, 116 S. Ct. 494, 497 (1995).

**Role of Courts and Agencies**

The "familiar pattern" is that "agency regulates, court adjudicates." Bank One Chicago, N.A. v. Midwest Bank & Tr. Co., 116 S. Ct. 637, 642 (1996).

Supreme Court precedents "have not been quick to infer agency authority to adjudicate private claims." Bank One Chicago, N.A. v. Midwest Bank & Tr. Co., 116 S. Ct. 637, 642 (1996).

**Service of Process**

The provision of Rule 4, Fed.R.Civ.P., allowing 120 days for service of process, "operates not as an outer limit subject to reduction, but as an irreducible allowance." Henderson v. United States, 116 S. Ct. 1638, 1643 (1996).

**Standard of Review**

The Supreme Court "hold[s] that the issue whether a suspect is 'in custody,' and therefore entitled to Miranda warnings, presents a mixed question of law and fact qualifying for independent review." Thompson v. Keohane, 116 S. Ct. 437, 460 (1995).

"'[N]orm elaboration occurs best when the Court has power to consider fully a series of closely related situations'; case-by-case elaboration when a constitutional right is implicated may more accurately be described as law declaration than as law application." Thompson v. Keohane, 116 S. Ct. 457, 467 (1995) (quoting Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 273-276 (1985)).

**Stay Orders**

"[T]he Court of Appeals order vacating the stay [of execution of a death sentence] is lawful only if dismissal of the [habeas corpus] petition would have been lawful." Lonchar v. Thomas, Warden, 116 S. Ct. 1293, 1296 (1996) (emphasis in original).

"[I]f the district court cannot dismiss the [habeas corpus] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." Lonchar v. Thomas, Warden, 116 S. Ct. 1293, 1297 (1996).

IV. SUBSTANTIVE LAW DOCTRINES

**Age Discrimination**

Under the Age Discrimination in Employment Act, "[t]he fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996) (emphasis in original).

**Antitrust Law**

The nonstatutory labor exemption from the antitrust laws "appl[ies] to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer." Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2121 (1996).

**Civil Forfeitures**

"[I]n rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause." United States v. Ursery, 116 S. Ct. 2135, 2142 (1996).

"Civil forfeitures, in contrast to civil penalties, are designed to do more than simply compensate the Government. Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." United States v. Ursery, 116 S. Ct. 2135, 2145 (1996).

A district court cannot "strike the filings of a claimant in a forfeiture suit and grant summary judgment against him for failing to

appear in a related criminal prosecution." Degen v. United States, 116 S. Ct. 1777, 1779 (1996).

**Civil Penalties**

"Civil penalties are designed as a rough form of 'liquidated damages' for the harms suffered by the Government as a result of a defendant's conduct." United States v. Ursery, 116 S. Ct. 2135, 2145 (1996).

**Commerce Clause**

"The constitutional provision of power '[t]o regulate Commerce . . . among the several States,' U.S. Const., Art. I, § 8, cl. 3, has long been seen as a limitation on state regulatory powers, as well as an affirmative grant of congressional authority." Fulton Corp. v. Faulkner, 116 S. Ct. 848, 853 (1996).

"[T]he dormant Commerce Clause [requires] justifications for discriminatory restrictions on commerce [to] pass the strictest scrutiny." Fulton Corp. v. Faulkner, 116 S. Ct. 848, 861 (1996) (internal quotation marks omitted).

**Constitutional Provision Not Limited To Its Original Purpose**

"While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language." United States v. International Business Machines Corp., 116 S. Ct. 1793, 1803 (1996).

**Contracts - Construction**

"Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." United States v. Winstar Corp., 116 S. Ct. 2432, 2449 (1996) (plurality opinion) (quoting Restatement (Second) of Contracts § 202(1) (1981)).

"[T]he law of contracts has always treated promises to provide something beyond the promisor's absolute control * * * as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence." United States v. Winstar Corp., 116 S. Ct. 2432, 2452 (1996) (footnote omitted) (plurality opinion).

"[T]he failure to specify remedies in the contract is no reason to find that the parties intended no remedy at all." United States v. Winstar Corp., 116 S. Ct. 2432, 2452 n.15 (1996) (plurality opinion).

**Contracts - Breach**

"Although Congress subsequently changed the relevant law, and thereby barred the Government from specifically honoring its agreements, * * * the terms assigning the risk of regulatory change to the Government are enforceable, and * * * the Government is therefore liable in damages for breach." United States v. Winstar Corp., 116 S. Ct. 2432, 2440 (1996) (plurality opinion).

**Delegation Doctrine**

"Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties. * * * The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." Loving v. United States, 116 S. Ct. 1737, 1743-1744 (1996).

The "general rule is that '[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.'" Loving v. United States, 116 S. Ct. 1737, 1748 (1996) (quoting Lichter v. United States, 334 U.S. 742, 778 (1948).

"It does not suffice to say that Congress announced its will to delegate certain authority. Congress as a general rule must also 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" Loving v. United States, 116 S. Ct. 1737, 1750 (1996) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

"Though in 1935 we struck down two delegations for lack of an intelligible principle, A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), we have since upheld, without exception, delegations under standards phrased in sweeping terms." Loving v. United States, 116 S. Ct. 1737, 1750 (1996).

**Discriminatory State Taxation**

"State laws discriminating against interstate commerce on their face are 'virtually per se invalid.'" Fulton Corp. v. Faulkner, 116 S. Ct. 848,

854 (1996) (quoting Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. ___, ___ (1994)).

The Supreme Court has "never recognized a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause." Fulton Corp. v. Faulkner, 116 S. Ct. 848, 855 n.3 (1996).

**Double Jeopardy**

"'In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept . . . a long course of adjudication in this Court carries impressive authority.'" United States v. Ursery, 116 S. Ct. 2135, 2142 (1996) (quoting Gore v. United States, 357 U. S. 386, 392 (1958)).

**Due Process**

The Due Process Clause is not violated by a state statute which provides that "voluntary intoxication 'may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense.'" Montana v. Egelhoff, 116 S. Ct. 2013, 2016 (1996) (plurality opinion).

A state criminal procedure violates due process only if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Montana v. Egelhoff, 116 S. Ct. 2013, 2017 (1996) (plurality opinion) (citation omitted).

"Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice." Montana v. Egelhoff, 116 S. Ct. 2013, 2017 (1996) (plurality opinion).

"[One state], does not have the power, however, to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the state] or its residents." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1597 (1996).

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1598 (1996).

"Petitioner has failed to proffer any historical, textual, or

controlling precedential support for his argument that the inability of a district court to grant an untimely postverdict motion for judgment of acquittal violates the Fifth Amendment, and we decline to fashion a new due process right out of thin air." Carlisle v. United States, 116 S. Ct. 1460, 1468 (1996).

A state statute providing that "the defendant in a criminal prosecution is presumed to be competent to stand trial unless he proves his incompetence by clear and convincing evidence" violates due process. Cooper v. Oklahoma, 116 S. Ct. 1373, 1374-1375 (1996).

"[T]he criminal trial of an incompetent defendant violates due process." Cooper v. Oklahoma, 116 S. Ct. 1373, 1376 (1996) (citations and quotation marks omitted).

"Historical practice is probative of whether a procedural rule can be characterized as fundamental." Cooper v. Oklahoma, 116 S. Ct. 1373, 1377 (1996) (citation and quotation marks omitted).

"[D]ue process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money." Cooper v. Oklahoma, 116 S. Ct. 1373, 1381 (1996) (citations and internal quotation marks omitted).

**Due Process - Longstanding Legislative Practice**

"Evidence of a longstanding legislative practice 'goes a long way in the direction of proving the presence of unassailable grounds for the constitutionality of the practice.'" United States v. Ursery, 116 S. Ct. 2135, 2141 (1996) (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 327-328 (1936)).

**"Employee"**

The Supreme Court answers "yes" to the question: "Can a worker be a company's 'employee,' within the terms of the National Labor Relations Act, 29 U.S.C. § 151 et seq., if, at the same time, a union pays that worker to help the union organize the company?" NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450, 452 (1995).

**Equal Protection**

"[T]he Constitution 'neither knows nor tolerates classes among

citizens.'" Romer v. Evans, 116 S. Ct. 1620, 1623 (1996) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. * * * We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." Romer v. Evans, 116 S. Ct. 1620, 1627 (1996).

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." Romer v. Evans, 116 S. Ct. 1620, 1628 (1996).

**Equal Protection - Racial Classifications**

"[A] racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect." Shaw v. Hunt, 116 S. Ct. 1894, 1900 (1996).

**Equal Protection - Sex Discrimination**

"[A] party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification." United States v. Virginia, 116 S. Ct. 2264, 2271 (1996) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (internal quotation marks omitted)).

"Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State. See Mississippi Univ. for Women [v. Hogan, 458 U.S. 718, 724 (1982)]. The State must show 'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."' Ibid. (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)). The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 223-224 (1977) (Stevens, J., concurring

in judgment). United States v. Virginia, 116 S. Ct. 2264, 2275-2276 (1996).

**Equal Protection - Strict Scrutiny**

"[A] racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification * * * and the legislature must have had a strong basis in evidence to support that justification before it implements the classification." Shaw v. Hunt, 116 S. Ct. 1894, 1902 n.4 (1996).

"Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government." Wisconsin v. City of New York, 116 S. Ct. 1091, 1100 n.8 (1996).

**Equity**

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." United States v. Noland, Trustee, 116 S. Ct. 1524, 1527 (1996) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)).

"[C]ourts of equity must be governed by rules and precedents no less than the courts of law." Lonchar v. Thomas, Warden, 116 S. Ct. 1293, 1297 (1996) (quoting Missouri v. Jenkins, 115 S. Ct. 2038, 2068 (1995) (Thomas, J., concurring)).

**ERISA**

"[T]he payment of benefits pursuant to an early retirement program conditioned on the participants' release of employment-related claims [does not] constitute[] a prohibited transaction under [ERISA]." Lockheed v. Spink, 116 S. Ct. 1783, 1786 (1996).

"[T]he law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." Varity Corp. v. Howe, 116 S. Ct. 1065, 1070 (1996).

**Export Clause**

"[T]he Export Clause of the Constitution [does not] permit[] the imposition of a generally applicable, nondiscriminatory federal tax on

goods in export transit. * * * [N]ondiscriminatory pre-exportation assessments[, however,] do not violate the Export Clause, even if the goods are eventually exported." United States v. International Business Machines Corp., 116 S. Ct. 1793, 1795, 1797 (1996).

The Supreme Court "has strictly enforced the Export Clause's prohibition against federal taxation of goods in export transit, and [it has] extended that protection to certain services and activities closely related to the export process. [It has] not, however, exempted pre-export goods and services from ordinary tax burdens; nor [has it] exempted from federal taxation various services and activities only tangentially related to the export process." United States v. International Business Machines Corp., 116 S. Ct. 1793, 1798 (1996).

**Federal Arbitration Act**

The Federal Arbitration Act pre-empts "state laws applicable only to arbitration provisions," but not "generally applicable contract defenses, such as fraud, duress or unconscionability." Doctor's Associates, Inc. v. Casarotto, 116 S. Ct. 1652, 1656 (1966).

**First Amendment**

"[T]he First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech -- and this is so ordinarily even where those decisions take place within the framework of a regulatory regime such as broadcasting." Denver Area Educ. Telecom. Consortium v. FCC, 116 S. Ct. 2374, 2383 (1996) (plurality opinion).

"The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitutions's general command * * * has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required." Denver Area Educ. Telecom. Consortium v. FCC, 116 S. Ct. 2374, 2384 (1996) (plurality opinion).

"[T]he First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems. This Court, in different contexts, has consistently held that the Government may directly regulate

speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech." Denver Area Educ. Telecom. Consortium v. FCC, 116 S. Ct. 2374, 2385 (1996) (plurality opinion).

"In other cases, where, as here, the record before Congress or before an agency provides no convincing explanation, this Court has not been willing to stretch the limits of the plausible, to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech." Denver Area Educ. Telecom. Consortium v. FCC, 116 S. Ct. 2374, 2394 (1996).

"To prevail, [the independent contractor] must show that the termination of his contract was motivated by his speech on a matter of public concern, an initial showing that requires him to prove more than the mere fact that he criticized the Board members before they terminated him. If he can make that showing, the Board will have a valid defense if it can show, by a preponderance of the evidence, that, in light of their knowledge, perceptions and policies at the time of the termination, the Board members would have terminated the contract regardless of his speech. * * * The Board will also prevail if it can persuade the District Court that the County's legitimate interests as contractor, deferentially viewed, outweigh the free speech interests at stake." Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 116 S. Ct. 2342, 2352 (1996).

"[T]he protections of Elrod [v. Burns, 427 U.S. 347 (1976),] and Branti [v. Finkel, 445 U.S. 507 (1980), which hold that "[g]overnment officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question,"] extend to an instance * * * where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance." O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353, 2355 (1996).

**Forfeiture of Property**

"[A]n owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." Bennis v. Michigan, 116 S. Ct. 994, 998 (1996).

**"Forthwith"**

"Forthwith" is "indicative of a time far shorter than 120 days." Henderson v. United States, 116 S. Ct. 1638, 1643 (1996).

**Fourth Amendment**

"[T]he temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is [] consistent with the Fourth Amendment's prohibition against unreasonable seizures [even though] a reasonable officer would [not] have been motivated to stop the car by a desire to enforce the traffic laws." Whren v. United States, 116 S. Ct. 1769, 1771-1772 (1996).

"Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 116 S. Ct. 1769, 1774 (1966).

**Fourth Amendment - Automobile Search**

"If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." Pennsylvania v. Labron, 116 S. Ct. 2485, 2487 (1996).

**Full Faith and Credit**

"[A] federal court may [not] withhold full faith and credit from a state-court judgment approving a class-action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts." Matsushita Electric Industrial Co. v. Epstein, 116 S. Ct. 873, 875-876 (1996).

**Government Contracts - General**

"[A]s a general matter, * * * the 'rights and duties' contained in a government contract 'are governed generally by the law applicable to contracts between private individuals.'" United States v. Winstar Corp., 116 S. Ct. 2432, 2473 (1996) (Breyer, J., concurring) (quoting Lynch v. United States, 292 U.S. 571, 579 (1934)).

"The Government contractor defense * * * shields contractors from tort liability for products manufactured for the Government in accordance with Government specifications, if the contractor warned the United States about any hazards known to the contractor but not to the Government." Hercules Inc. v. United States, 116 S. Ct. 981, 985 (1996) (citing Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988).

"When the Government provides specifications directing how a

contract is to be performed, the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications. * * * But this circumstance alone does not support a further inference that would extend the warranty beyond performance to third-party claims against the contractor." Hercules Inc. v. United States, 116 S. Ct. 981, 986 (1996).

**Government Contracts - Implied in Fact and Implied in Law**

"An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" Hercules Inc. v. United States, 116 S. Ct. 981, 986 (1996) (quoting Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597 (1923).

"By contrast, an agreement implied in law is a 'fiction of law' where 'a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress.'" Hercules Inc. v. United States, 116 S. Ct. 981, 986 (1996) (quoting Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597 (1923).

**Government Contracts - Unmistakability Doctrine**

"[A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power." United States v. Winstar Corp., 116 S. Ct. 2432, 2456 (1996) (plurality opinion).

"So long as such a contract ["under which performance will require exercise (or not) of a power peculiar to the Government"] is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it." United States v. Winstar Corp., 116 S. Ct. 2432, 2457-2458 (1996) (plurality opinion).

**Habeas Corpus**

Although the Antiterrorism and Effective Death Penalty Act of 1996 "does impose new conditions on [the Supreme Court's] authority to grant relief, it does not deprive this Court of jurisdiction to entertain original habeas petitions." Felker v. Turpin, 116 S. Ct. 2333, 2337 (1996).

"The added restrictions which the Act places on second habeas petitions * * * do not amount to a 'suspension' of the writ contrary to Article I, § 9." Felker v. Turpin, 116 S. Ct. 2333, 2340 (1996).

"[A] federal court may [not] dismiss a first federal habeas petition for general 'equitable' reasons beyond those embodied in the relevant statutes, Federal Habeas Corpus Rules, and prior precedents." Lonchar v. Thomas, Warden, 116 S. Ct. 1293, 1295 (1996).

**"Interest"**

The Supreme Court held that the Comptroller's definition of "interest" to include late fees charged credit-cardholders was reasonable even though the definition did not limit interest to "charges expressed as a function of time or of amount owing" and even though the late fees were also "penalties." Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1735 (1996).

**Jury Trial**

"The Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses, and its scope does not change where a defendant faces a potential aggregate prison term in excess of six months for petty offenses charged." Lewis v. United States, 116 S. Ct. 2163, 2165 (1996).

"[T]he right of trial by jury thus preserved [by the Seventh Amendment] is the right which existed under the English common law when the Amendment was adopted." Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1389 (1996) (quoting Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654, 657 (1935).

"In keeping with our long-standing adherence to this 'historical test,' Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 640-643 (1973), we ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the Founding or is at least analogous to one that was, see, e.g., Tull v. United States, 481 U.S. 412, 417 (1987). If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1389 (1996).

**Labor Relations**

The NLRB reasonably concluded that an employer committed an unfair labor practice when it "disavow[ed] a collective-bargaining agreement because of a good-faith doubt about a union's majority status at the time the contract was made." Auciello Iron Works, Inc. v. NLRB, 116 S. Ct. 1754, 1756 (1996).

"The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees." Auciello Iron Works, Inc. v. NLRB, 116 S. Ct. 1754, 1758 (1996).

**Pre-emption**

"'[T]he purpose of Congress is the ultimate touchstone' in every pre-emption case." Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

A state law is pre-empted "only 'to the extent that it actually conflicts with federal law.'" Dalton v. Little Rock Family Planning Services, 116 S. Ct. 1063, 1064 (1996) (quoting Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983)). An injunction barring enforcement of a state statute should be tailored accordingly in scope and duration.

The question of whether a federal statute pre-empts a state statute "is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? * * * Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. * * * More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's structure and purpose, or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103, 1107-1108 (1996) (internal quotation marks omitted).

**Pre-emption - Requirement for a Clear Statement**

"In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the

clear and manifest purpose of Congress.' Id., at 230." Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996) (other citations omitted).

**Presumptions**

"Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue [of race-based selective prosecution]." United States v. Armstrong, 116 S. Ct. 1480, 1489 (1996).

**Prima Facie Case**

"As the very name 'prima facie case' suggests, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).

**Prisoners' Right of Access to Courts**

The Supreme Court rejects the position that a State's duty to provide its prisoners with a right of access to the courts means "that the State must enable the prisoner to discover grievances, and to litigate effectively once in court." Lewis v. Casey, 116 S. Ct. 2174, 2181 (1996) (emphasis in original).

**Privileges**

"[C]onfidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." Jaffee v. Redmond, 116 S. Ct. 1923, 1931 (1996) (footnote omitted).

**Probable Cause and Reasonable Suspicion**

"Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Ornelas v. United States, 116 S. Ct. 1657, 1661 (1996) (citations and internal quotation marks omitted).

**Proximate Cause**

"The issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review." Exxon Co., U.S.A. v. SOFEC, Inc., 116 S. Ct. 1813, 1819 (1996).

**Public Burdens**

"The Government may not 'forc[e] some people alone to bear public burdens which . . . should be borne by the public as a whole.'" United States v. Winstar Corp., 116 S. Ct. 2432, 2465 (1996) (opinion of Souter, J.) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

**Punishment**

The Court presumes that "where two statutory provisions proscribe the same offense, a legislature does not intend to impose two punishments for that offense." Rutledge v. United States, 116 S. Ct. 1241, 1245 (1996) (internal quotation marks omitted).

**Punitive Damages**

"The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1592 (1996).

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1595 (1996).

"Three guideposts" for reviewing the validity of a punitive damages award are: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1598-1599 (1996).

**Reliance: Justifiable and Reasonable Reliance Distinguished**

"Here a contrast between a justifiable and reasonable reliance is clear: 'Although the plaintiff's reliance on the misrepresentation must be justifiable . . . this does not mean that his conduct must conform to the standard of the reasonable man. Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of

the particular case, rather than of the application of a community standard of conduct to all cases.'" Field v. Mans, 116 S. Ct. 437, 444 (1995) (quoting Restatement (Second) of Torts § 545A, Comment b (1976)).

**Restatement of Law - Weight**

"Then [in 1978], as now, the most widely accepted distillation of the common law of torts was the Restatement (Second) of Torts (1976) * * *." Field v. Mans, 116 S. Ct. 437, 443-444 (1995) (footnote omitted).

**Selective Prosecution**

To establish selective prosecution in a race case, "the claimant must show that similarly situated individuals of a different race were not prosecuted." United States v. Armstrong, 116 S. Ct. 1480, 1487 (1996).

To obtain discovery on the issue of race-based selective prosecution, the defendant must make "a credible showing of different treatment of similarly situated persons" by producing "some evidence that similarly situated defendants of other races could have been prosecuted, but were not." United States v. Armstrong, 116 S. Ct. 1480, 1488, 1489 (1996).

**Sentencing Guidelines**

"[A] Government motion attesting to the defendant's substantial assistance in a criminal investigation and requesting that the district court depart below the minimum of the applicable sentencing range under the Sentencing Guidelines [does not] also permit[] the district court to depart below any statutory minimum sentence." Melendez v. United States, 116 S. Ct. 2057, 2059 (1996).

"The appellate court should not review the departure decision de novo, but instead should ask whether the sentencing court abused its discretion" in departing from the sentencing ranges in the Sentencing Guidelines. Koon v. United States, 116 S. Ct. 2035, 2043 (1996).

"The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." Koon v. United States, 116 S. Ct. 2035, 2053 (1996).

**Separation of Powers**

"[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." Loving v. United States, 116 S. Ct. 1737, 1743 (1996).

The separation of powers doctrine serves (1) to deter "arbitrary or tyrannical rule," and (2) to "allocat[e] specific powers and responsibilities to a branch fitted to the task, [thereby fostering] a National Government that is both effective and accountable." Loving v. United States, 116 S. Ct. 1737, 1743 (1996).

**Setoff or Offset**

"The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" Citizens Bank of Maryland v. Strumpf, 116 S. Ct. 286, 289 (1995) (quoting Studley v. Boylston Nat'l Bank, 229 U.S. 523, 528 (1913)).

**Severability**

"The question is one of legislative intent: Would Congress still 'have passed' [the provision] 'had it known' that the remaining 'provision [s were] invalid'?" Denver Area Educ. Telecom. Consortium v. FCC, 116 S. Ct. 2374, 2397 (1996) (plurality opinion) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985)).

**Sovereign Acts Doctrine**

"The sovereign acts doctrine thus balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law." United States v. Winstar Corp., 116 S. Ct. 2432, 2465 (1996) (plurality opinion).

**Sovereign Immunity**

"Congress has [not] waived the Federal Government's sovereign immunity against awards of monetary damages for violations of" section 504 (a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a). Lane v. Pena, 116 S. Ct. 2092, 2095 (1996).

"A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text * * * and will not be implied * * *. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Pena, 116 S. Ct. 2092, 2096 (1996) (citations omitted).

"To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." Lane v. Pena, 116 S. Ct. 2092, 2096-2097 (1996).

"[T]he United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." Hercules Inc. v. United States, 116 S. Ct. 981, 985 (1996) (internal quotation marks omitted).

**Standing**

The "actual injury" "point relates to standing, which is jurisdictional and not subject to waiver." Lewis v. Casey, 116 S. Ct. 2174, 2179 n.1 (1996).

"Article III of the Constitution limits the federal judicial power to 'Cases' or 'Controversies,' thereby entailing as an 'irreducible minimum' that there be (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529, 1533 (1996) (citations omitted).

"[T]he third prong of the associational standing test [i.e., "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977),] is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529, 1536 (1996).

**Stare Decisis**

"Stare decisis is a principle of policy and not an inexorable command." United States v. International Business Machines Corp., 116 S. Ct. 1793, 1801 (1996) (internal quotation marks and citations omitted).

"[S]tare decisis promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. [E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." United States v. International Business Machines Corp., 116 S. Ct. 1793, 1801 (1996) (internal quotation marks and citations omitted).

Stare decisis serves the interests of "the evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process * * *." Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1127 (1996) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

Stare decisis is a "principle of policy," not an "inexorable command." Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1127 (1996) (citations omitted).

"When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1129 (1996).

"Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute [allegedly adopting a conflicting meaning] against that settled law." Neal v. United States, 116 S. Ct. 763, 768-769 (1996).

"One reason that we give great weight to stare decisis in the area of statutory construction is that 'Congress is free to change this Court's interpretation of its legislation.' Illinois Brick Co. v. Illinois, 431 U. S. 720, 736 (1977). We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (citations omitted). Absent those changes or compelling evidence bearing on Congress' original intent, NLRB v. Longshoremen, 473 U.S. 61, 84 (1985), our system demands that we adhere to our prior interpretations of statutes [even where] * * * there may be little in logic to defend the statute's treatment * * *." Neal v. United States, 116 S. Ct. 763, 769 (1996).

**State Police Powers**

"States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2245 (1996) (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (internal quotation marks omitted)).

**Takings**

"The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." Bennis v. Michigan, 116 S. Ct. 994, 1001 (1996). [This statement seems overly broad.]

**"Tax" and "Penalty"**

"'[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.'" United States v. Reorganized CF&I Fabricators of Utah, Inc., 116 S. Ct. 2106, 2113 (1996) (quoting New Jersey v. Anderson, 203 U.S. 483, 492 (1906)).

"'[A] tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.'" United States v. Reorganized CF&I Fabricators of Utah, Inc., 116 S. Ct. 2106, 2113 (1996) (quoting United States v. La Franca, 282 U.S. 568, 572 (1931)).

**Twenty-first Amendment**

"[T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996).

**Unconstitutional Conditions**

The Supreme Court has "long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 116 S. Ct. 2342, 2347 (1996) (quoting McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892)).

"'[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. That would allow

the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.'" O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353, 2356-2357 (1996) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972), and Speiser v. Randall, 357 U.S. 513, 526 (1958)).

"Government officials may indeed terminate at-will relationships, unmodified by any legal constraints, without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views." O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353, 2361 (1996).

**Untimeliness**

"We conclude that the District Court had no authority to grant petitioner's motion for judgment of acquittal filed one day outside the time limit prescribed by Rule 29(c) [of the Fed. R. Crim. P.]." Carlisle v. United States, 116 S. Ct. 1460, 1470 (1996).

**Warsaw Convention**

"We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules." Zicherman v. Korean Air Lines Co., 116 S. Ct. 629, 637 (1996).

## MAXIMS FROM THE SUPREME COURT 1994 TERM

I. PRONOUNCEMENTS ON STATUTORY CONSTRUCTION

**Plain Meaning**

"'[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.'" Metropolitan Stevedore Co. v. Rambo, 115 S. Ct. 2144, 2166 (1995) (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992)).

"In the ordinary case, absent any 'indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statue as Congress wrote it.'" Hubbard v. United States, 115 S. Ct. 1754, 1759 (1995) (quoting BFP v. Resolution Trust

Corp., 114 S. Ct. 1757, 1778 (1994) (Souter, J., dissenting)).

"Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress, particularly when the Legislature has specifically defined the controverted term." Hubbard v. United States, 115 S. Ct. 1754, 1761 (1995).

**Avoiding Judicial Legislation**

Supreme Court notes "[o]ur obligation to avoid judicial legislation." United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1019 (1995).

**Ambiguity**

"Ambiguity is a creature not of definitional possibilities but of statutory context * * *." Brown v. Gardner, 115 S. Ct. 552, 555 (1994).

**Congressional Intent**

"'The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.'" United States v. Mezzanatto, 115 S. Ct. 797, 808 (1995) (Souter, J., dissenting) (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).

**Construed as a Whole**

No Act of Congress should "be read as a series of unrelated and isolated provisions." Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1067 (1995).

"But it is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" Reno v. Koray, 115 S. Ct. 2021, 2025 (1995) (quoting Deal v. United States, 113 S. Ct. 1993, 1996 (1993)).

**Construed in Context**

"As our decisions underscore, a characterization fitting in certain contexts may be unsuitable in others." Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810, 816 (1995) (citations omitted).

"The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810, 816 (1995) (quoting Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333, 337 (1933)).

**Presumption Against Superfluous Language**

"[T]he Court will avoid a reading which renders some words altogether redundant." Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1069 (1995).

"A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation."

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2413 (1995).

**Effect of Amendment**

"When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." Stone v. INS, 115 S. Ct. 1537, 1545 (1995).

**Identical Word in Same Statute**

"[T]here is a presumption that a given term is used to mean the same thing throughout a statute, * * * a presumption surely at its most vigorous when a term is repeated within a given sentence * * *." Brown v. Gardner, 115 S. Ct. 552, 555 (1994).

A "term should be construed, if possible, to give it a consistent meaning throughout the Act." Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1066 (1995).

"[T]he 'normal rule of statutory construction' [is] that 'identical words used in different parts of the same act are intended to have the same meaning.'" Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1067 (1995) (quoting Department of Revenue of Oregon v. ACF Industries, Inc., 114 S. Ct. 843, 845 (1994)).

"'[T]he basic canon of statutory construction [is] that identical

terms within an Act bear the same meaning'" Reno v. Koray, 115 S. Ct. 2021, 2026 (1995) (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992)).

**Different Language in Different Sections**

"'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Brown v. Gardner, 115 S. Ct. 552, 556 (1994) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

When statutory term is absent in one statute, but is explicit in analogous statutes, "Congress' silence * * * speaks volumes." United States v. Shabani, 115 S. Ct. 382, 385 (1994).

**Construed to Carry Out Statutory Purpose**

"Finally, the Director retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes. [citation omitted]

* * * The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two." Director, Office of Workers' Compensation Programs, Dept. of Labor v. Newport News Shipbuilding & Dry Dock Co., 115 S. Ct. 1278, 1288 (1995).

**Wisdom**

"'Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute.'" United States v. Mezzanatto, 115 S. Ct. 797, 809 n.1 (1995) (Souter, J., dissenting) (quoting TVA v. Hill, 437 U.S. 153, 194 (1978)).

**Avoiding Constitutional Issues**

The Court presumes "that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." United States v. X-Citement Video, Inc., 115 S. Ct. 464, 467 (1994).

" * * * [W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court." United States v. X-Citement Video, Inc., 115 S. Ct. 464, 470 (1994)

(citation omitted).

"It is therefore incumbent upon us to read the statute to eliminate those [serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress." United States v. X-Citement Video, Inc., 115 S. Ct. 464, 472 (1994) (citation omitted).

The Supreme Court reiterates "[o]ur policy of avoiding unnecessary adjudication of constitutional issues." United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1019 (1995).

"'"Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ." or judicially rewriting it.' Commodity Futures Trading Comm'n v. Schor, 478 U. S. 833, 841 (1986) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964))." United States v. X-Citement Video, Inc., 115 S. Ct. 464, 476 (1994) (Scalia, J., dissenting).

"To avoid a constitutional question by holding that Congress enacted and the President approved a blank sheet of paper would indeed constitute 'disingenuous evasion.'" Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1452 (1995)(citation omitted).

**Use of Plural**

"'Ordinarily the legislature by use of a plural term intends a reference to more than one matter or thing.'" Metropolitan Stevedore Co. v. Rambo, 115 S. Ct. 2144, 2147 (1995) (quoting 2A N. Singer, Sutherland on Statutory Construction § 47.34, p. 274 (5th rev. ed. 1992)).

**Use of "Shall" and "May"**

"Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'" Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227, 2236 n.9 (1995) (citations omitted).

**Common-law Meaning**

It is "the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." United States v. Shabani, 115 S. Ct. 382, 384 (1994).

Where statute is enacted against a "background [common law]

presumption, * * * we will not interpret Congress' silence as an implicit rejection of [that common law rule]." United States v. Mezzanatto, 115 S. Ct. 797, 803 (1995).

**Construed in Accord with Other Statutes**

"'It is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms,' since Congress is presumed to have 'legislated with reference to' those terms." Reno v. Koray, 115 S. Ct. 2021, 2025 (1995) (quoting Gozlon-Peretz v. United States, 498 U.S. 395, 407-408 (1991)).

"'[W]hen two statutes are capable of co-existence, * * * it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" Vimar Seguros Y Reaseguros, S. A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2326 (1995) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974) and Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Ass'n, 491 U.S. 490, 510 (1989)).

**Construing Exceptions to Policy Narrowly**

"[A]n exception to 'a general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy].'" City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776, 1780 (1995) (quoting Commissioner v. Clark, 489 U.S. 726, 739 (1989)).

**Construed in Accord with Supreme Court Precedents**

"[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactments[s] to be interpreted in conformity with them." North Star Steel Co. v. Thomas, 115 S. Ct. 1927, 1930 (1995) (quoting Cannon v. University of Chicago, 441 U.S. 677, 699 (1979).

**Construed in Accord with International Agreements**

"If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2329 (1995).

**Construed to Avoid Restraints on Alienation**

Statute should be read to be "consistent with our time-honored practice of viewing restraints on the alienation of property with disfavor." Asgrow Seed Co. v. Winterboer, 115 S. Ct. 788, 796 (1995) (Stevens, J., dissenting); see also id. at 797 ("A statutory restraint on this basic freedom should be expressed clearly and unambiguously").

**Presumption of Judicial Review**

"* * * [W]hen a government official's determination of a fact or circumstance -- for example, 'scope of employment' -- is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable. Instead, federal judges traditionally proceed from the 'strong presumption that Congress intends judicial review.'" Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227, 2231 (1995) (quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986) (other citations omitted)).

"Accordingly, we have stated time and again that judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227, 2231 (1995) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967)).

"Because the statute is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up to render." Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227, 2236 (1995).

**Judicial Review Provisions**

"Judicial review provisions, however, are jurisdictional in nature and must be construed with strict fidelity to their terms." Stone v. INS, 115 S. Ct. 1537, 1549 (1995).

**Deference to Agency Interpretation**

"If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'" Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810, 813-814 (1995) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

"When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his." Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2418 (1995).

Deference that trial and appellate courts give administrative agencies does not mean "that court of appeals should give *extra* leeway to district court decision that upholds an agency." First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1926 (1995) (emphasis in original) (dictum).

**Deference: Change in Agency Interpretation**

"[A]ny change in the Comptroller's position might reduce, but would not eliminate, the deference we owe his reasoned determinations." Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810, 817 (1995) (citations omitted).

"In view of the Commissioner's differing interpretations of her own regulation, we do not accord her present litigating position any special deference." Commissioner v. Schleier, 115 S. Ct. 2159, 2166 n.7 (1995).

**Longstanding Administrative Construction**

"A regulation's age is no antidote to clear inconsistency with a statute * * *." Brown v. Gardner, 115 S. Ct. 552, 557 (1994).

"'[M]any VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations' unscrutinized and unscrutinizable existence' could not alone, therefore, enhance any claim to deference." Brown v. Gardner, 115 S. Ct. 552, 557 (1994) (quoting Gardner v. Brown, 5 F.3d 1456, 1463-1464 (Fed. Cir. 1993)).

**Deference to Internal Agency Guidelines**

"But BOP's internal agency guideline, which is akin to an interpretive rule that does not require notice-and-comment, is still entitled to some deference, since it is a permissible construction of the statute." Reno v. Koray, 115 S. Ct. 2021, 2027 (1995) (internal citations and quotation marks omitted).

**Subsequent Reenactment**

"[W]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." Brown v. Gardner, 115 S. Ct. 552, 556 (1994) (quoting Demarest v. Manspeaker, 498 U. S. 184, 190 (1991)).

"'[W]e consider the . . . re-enactment to be without significance'" where "the record of congressional discussion preceding reenactment makes no reference to the [agency's] regulation, and there is no other evidence to suggest that Congress was even aware of the [agency's] interpretive position." Brown v. Gardner, 115 S. Ct. 552, 556-557 (1994) (quoting United States v. Calamaro, 354 U.S. 351, 359 (1957)).

**Legislative History - What Constitutes**

"Material not available to the lawmakers is not considered, in the normal course, to be legislative history. After-the-fact statements by proponents of a broad interpretation are not a reliable indicator of what Congress intended when it passed the law, assuming extratextual sources are to any extent reliable for this purpose." Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1071 (1995).

"[The Congressman] made his statement not during the legislative process, but after the statute became law. It therefore is not a statement upon which other legislators might have relied in voting for or against the Act, but it simply represents the views of one informed person on an issue about which others may (or may not) have thought differently." Heintz v. Jenkins, 115 S. Ct. 1489, 1492 (1995).

**Statutory History**

"[A] historical analysis normally provides less guidance to a statute's meaning than its final text." Hubbard v. United States, 115 S. Ct. 1754, 1759 (1995).

**Congressional Silence**

"[C]ongressional silence lacks persuasive significance * * *, particularly where administrative regulations are inconsistent with the controlling statute * * *." Brown v. Gardner, 115 S. Ct. 552, 557 (1994) (citations and internal quotation marks omitted).

**Narrow Construction of Criminal Statutes**

The Supreme Court has "traditionally exercised restraint in

assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, Dowling v. United States, 473 U.S. 207 (1985), and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed, McBoyle v. United States, 283 U. S. 25, 27 (1931)." United States v. Aguilar, 115 S. Ct. 2357, 2362 (1995).

**Criminal Intent**

The Supreme Court presumes "that some form of scienter is to be implied in a criminal statute even if not expressed * * *." United States v. X-Citement Video, Inc., 115 S. Ct. 464, 467 (1994).

"Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful." United States v. X-Citement Video, Inc., 115 S. Ct. 464, 469 n.3 (1994) (citations omitted).

**Rule of Lenity**

"The rule of lenity, however, applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." United States v. Shabani, 115 S. Ct. 382, 386 (1994).

"A statute is not ambiguous for purposes of lenity merely because there is a division of judicial authority over its proper construction. The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." Reno v. Koray, 115 S. Ct. 2021, 2029 (1995) (citations and quotation marks omitted).

"We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2417 n.18 (1995).

**Noscitur a Sociis**

"'[A] word is known by the company it keeps.'" Brown v. Gardner, 115 S. Ct. 552, 555 (1994) (quoting Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961)).

"This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.' Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961)." Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1069 (1995).

The canon of *noscitur a sociis* "counsels that a word 'gathers meaning from the words around it.'" Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2415 (1995) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).

II. OTHER PRONOUNCEMENTS OF INTEREST

**Abuse of Discretion**

"It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." Schlup v. Delo, 115 S. Ct. 851, 870 (1995) (O'Connor, J., concurring).

**Agency Discretion re Remedy**

"[T]he relation of remedy to policy is peculiarly a matter for administrative competence." ICC v. Transcon Lines, 115 S. Ct. 689, 694 (1995) (quotation omitted).

An agency's "judgment that a particular remedy is an appropriate exercise of its enforcement authority under [its statute] is entitled to some deference." ICC v. Transcon Lines, 115 S. Ct. 689, 694 (1995).

**Appeal: Timeliness**

"A litigant faced with an unfavorable district court judgment must appeal that judgment within the time allotted by Fed. Rule App. Proc. 4, whether or not the litigant first files a Rule 60(b) motion (where the Rule 60 motion is filed more than 10 days following judgment)." Stone v. INS, 115 S. Ct. 1537, 1547 (1995).

**Blanket Prohibition**

"This argument is unpersuasive, however, largely because it relies on an occasional problem to justify a blanket prohibition." Qualitex Co. v. Jacobson Prods. Co., 115 S. Ct. 1300, 1306 (1995).

**Case or Controversy**

"Of course no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy. For that purpose, a case must exist at all the stages of appellate review." U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 389 (1994).

**Cert. Denied: Effect**

"Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" Missouri v. Jenkins, 115 S. Ct. 2038, 2047 (1995) (quoting United States v. Carver, 260 U.S. 482, 490 (1923)).

**Certiorari Practice**

"[O]rdinarily a court of appeals decision interpreting one of our precedents -- even one deemed to be arguably inconsistent with it -- will not be reviewed [on certiorari] unless it conflicts with a decision of another court of appeals. This fact is a necessary concomitant of the limited capacity in this Court." Hubbard v. United States, 115 S. Ct. 1754, 1767 (1995) (Rehnquist, CJ., dissenting).

**Certiorari Practice: Issues Not Raised in Cert. Petition**

"As this Court's Rule 14.1(a) and simple prudence dictate, we will not reach questions not fairly included in the petition." Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 965 (1995).

"When a question is, like this one, both prior to the clearly presented question and dependent upon many of the same factual inquiries, refusing to regard it as embraced within the petition may force us to assume what the facts will show to be ridiculous, a risk which ought to be avoided." Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 966 (1995).

"As a court of review, not one of first view, we will entertain issues withheld until merits briefing 'only in the most exceptional cases.'" Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214, 2219 (1995) (quoting Yee v. Escondido, 503 U.S. 519, 535 (1992)).

**Commerce Clause**

"Finally, the Commerce Clause demands a fair relation between a tax

and the benefits conferred upon the taxpayer by the State." Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1345 (1995).

**Commerce Clause: Dormant**

"Despite the express grant to Congress of the power to 'regulate Commerce * * * among the several States,' U.S. Const., Art. I, § 8, cl. 3, we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1335 (1995).

**Construing Contract Against Drafter**

"Moreover, respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1219 (1995) (citations omitted).

**Construing Contract -- Give Effect to All Provisions**

"Finally the respondents' reading of the two clauses violates another cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1219 (1995) (citations omitted).

**Constitutional Analysis**

"'[W]hatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution.'" United States v. Lopez, 115 S. Ct. 1624, 1636 (1995) (Kennedy, J., concurring) (quoting Wickard v. Filburn, 317 U.S. 111, 123 n.24 (1942)).

**Constitutional Rights May Not Be Indirectly Denied**

"As we have often noted, constitutional rights would be of little value if they could be * * * indirectly denied. The Constitution nullifies sophisticated as well as simple-minded modes of infringing on Constitutional protections." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1867 (1995) (citations and internal quotation marks omitted).

**Declaratory Judgment Act**

"We have repeatedly characterized the Declaratory Judgment Act as 'an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.'" Wilton v. Seven Falls Co., 115 S. Ct. 2137, 2143 (1995) (quoting Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 241 (1952)).

"By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." Wilton v. Seven Falls Co., 115 S. Ct. 2137, 2143 (1995).

**De Facto Officer Doctrine**

"[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." Ryder v. United States, 115 S. Ct. 2031, 2035 (1995).

**Dictum Not Binding**

"The quoted characterization * * * was merely set forth at the beginning of the opinion, in describing the factual background of the case. It is hard to imagine weaker dictum." Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 971 (1995).

The Supreme Court invokes its "customary refusal to be bound by dicta" and its "customary skepticism towards *per curiam* dispositions that lack the reasoned consideration of a full opinion * * *." U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 391 (1994).

"Breath spent repeating dicta does not infuse it with life." Metropolitan Stevedore Co. v. Rambo, 115 S. Ct. 2144, 2149 (1995).

**Eleventh Amendment**

"The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals. Adoption of the Amendment responded most immediately to the States' fears that 'federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin.' * * * [citations and footnote omitted]

More pervasively, current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system * * *." Hess v. Port Auth. Trans-Hudson Corp., 115 S. Ct. 394, 400 (1994).

**Equal Protection**

"'[T]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.'" Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2108 (1995) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975)).

It is a "basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2212 (1995) (emphasis in original).

"[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995).

"[F]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995).

**Equity**

"We have rejected the unclean hands defense 'where a private suit serves important public purposes.'" McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879, 885 (1995) (quoting Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968)).

"'[A] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 392 (1994) (quoting Sanders v. United States, 373 U.S. 1, 17 (1963)).

"As always when federal courts contemplate equitable relief, our holding must take account of the public interest." U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 392 (1994).

**Facial Challenge**

"Although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, * * * we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1018 (1995) (internal citations omitted).

"A facial challenge is 'the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the rule would be valid.'" Anderson v. Edwards, 115 S. Ct. 1291, 1299 n.6 (1995) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

**Federal Employees**

"We recognize our obligation to defer to considered congressional judgments about matters such as appearances of impropriety, but on the record of this case we must attach greater weight to the powerful and realistic presumption that the federal work force consists of dedicated and honorable civil servants." United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1018 (1995).

**First Amendment -- General**

"The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States." McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1514 n.1 (1995).

"[U]rgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed." McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1519 (1995) (citation omitted).

"When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1519 (1995) (citation omitted).

"Consistently with our holding today, we noted that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source whether corporation, association, union, or individual." McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1522 (1995) (quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)).

"It [anonymous pamphleteering] thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society." McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1524 (1995).

"But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1524 (1995) (citing Abrams v. United States, 250 U.S. 616, 630-631 (1919) (Holmes, J., dissenting)).

"[T]he fundamental rule of protection under the First Amendment * * * [is] that a speaker has the autonomy to choose the content of his own message." Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338, 2347 (1995).

"Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338, 2348 (1995).

**First Amendment -- Independent Appellate Review**

The Supreme Court's "review of petitioners' claim that their activity is * * * in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. * * * Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that '[f]indings of fact . . . shall not be set aside unless clearly erroneous,' we are obliged to make a fresh examination of crucial facts." Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338, 2344 (1995).

**Formalism**

The Supreme Court has a "preference for common sense inquiries over formalism * * *." United States v. Williams, 115 S. Ct. 1611, 1618 (1995).

**Fourth Amendment**

"The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.'" Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2391 (1995) (quoting New

Jersey v. T.L.O., 469 U.S. 325, 338 (1985)).

"Fourth Amendment rights, no less than First or Fourteenth Amendment Rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2392 (1995).

In Fourth Amendment context, compelling state interest means "an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive on a genuine expectation of privacy." Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2394-2395 (1995).

**Inferences**

Argument would require Supreme Court to "pile inference upon inference." United States v. Lopez, 115 S. Ct. 1624, 1634 (1995).

**Injunctions: Duty to Obey**

The Supreme Court "reaffirmed the well established rule that 'persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.'" Celotex Corp. v. Edwards, 115 S. Ct. 1493, 1498 (1995) (quoting GTE Sylvania, Inc. v. Consumer's Union of United States, Inc., 445 U.S. 375, 386 (1980)).

**Interpretive Rules**

"[A]n interpretive rule [is] '"issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."' Chrysler Corp. v. Brown, 441 U.S. 281, 302, n.31 (1979) (quoting the Attorney General's Manual on the Administrative Procedure Act 30, n.3 (1947)). Interpretative rules do not require notice-and-comment, * * * [but] they also do not have the force and effect of law and are not accorded that weight in the adjudicatory process * * *." Shalala v. Guernsey Memorial Hosp., 115 S. Ct. 1232, 1239 (1995).

**Issues Not Raised Below**

The Court refused to consider "alternative grounds for affirmance which the Government did not raise below" even though the Government was the respondent. Ryder v. United States, 115 S. Ct. 2031, 2037 n.4 (1995).

"Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 965 (1995) (quoting Yee v. Escondido, 503 U.S. 519, 534 (1992).

The Supreme Court would "ordinarily feel free to address" "a claim not raised by petitioner below" if "it was addressed by the court below." Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 965 (1995).

**Jurisdiction**

"Normal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements, * * * and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection." Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043, 1050 (1995) (citations omitted).

**Legislative Findings**

"[A]s part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." United States v. Lopez, 115 S. Ct. 1624, 1631 (1995).

"'Congress need [not] make particularized findings in order to legislate.'" United States v. Lopez, 115 S. Ct. 1624, 1631 (1995) (quoting Perez v. United States, 402 U.S. 146, 156 (1971)).

**Overbreadth**

"[O]verbreadth analysis [i]s 'strong medicine,' to be 'employed by the Court sparingly and only as a last resort.' Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Accordingly, we have observed that '[i]t is not the usual judicial practice,

. . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily.'" Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 484-85 (1989); see also New York v. Ferber, 458 U.S. 747, 768 (1982) ('By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face

"flesh-and-blood" legal problems with data "relevant and adequate to an informed judgment."') (footnotes omitted)." United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1022 (1995) (O'Connor, J., concurring in part and dissenting in part).

"Congress was not obliged to draw an infinitely filigreed statute to deal with every subtle distinction between various groups of [covered persons]." United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1029 (1995) (Rehnquist, CJ., dissenting).

**Precedents Binding**

"We would have thought it self-evident that the lower courts must adhere to our precedents." Hubbard v. United States, 115 S. Ct. 1754, 1764 n.13 (1995) (opinion of Stevens, J.).

**Preemption**

"* * * [W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1676 (1995) (citation omitted).

"Since pre-emption claims turn on Congress's intent, * * * we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1677 (1995) (citations omitted).

"Our past cases have recognized that the Supremacy Clause, U.S. Const., Art VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1676 (1995) (citations omitted).

**Prejudgment Interest: Admiralty**

"The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss. Full compensation has long been recognized as a basis principle of admiralty law, where 'restitution in integrum is the leading maxim applied by admiralty courts to ascertain damages resulting from a collision." City of Milwaukee v. Cement Div., Nat. Gypsum Co., 115 S. Ct. 2091, 2095-2096

(1995) (quoting Standard Oil Co. v. Southern Pac. Co., 268 U.S. 146, 158 (1925).

**Racial Imbalance**

"The mere fact that a school is black does not mean that it is the product of a constitutional violation. A 'racial imbalance does not itself establish a violation of the Constitution.'" Missouri v. Jenkins, 115 S. Ct. 2038, 2062 (1995) (Thomas, J., concurring) (quoting United States v. Fordice, 112 S. Ct. 2727, 2744 (1992) (Thomas, J., concurring)).

**Remedial Authority of District Courts**

The Supreme Court reversed where "[i]n effect, the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students." Missouri v. Jenkins, 115 S. Ct. 2038, 2051 (1995).

**RICO**

Corporation is "engaged in commerce" under RICO "when it is itself 'directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce.'" United States v. Robertson, 115 S. Ct. 1732 (1995) (per curiam) (quoting United States v. American Build. Maintenance Indus., 422 U.S. 271, 283 (1975)).

**Ripeness**

"'[R]ipeness is peculiarly a question of timing,' and 'it is the situation now rather than the situation at the time of the [decision under review] that must govern.'" Anderson v. Green, 115 S. Ct. 1059, 1060 (1995) (per curiam) (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974)).

**Rulemaking v. Adjudication**

"The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication. [Citations omitted.] The Secretary's mode of determining benefits by both rulemaking and adjudication is, in our view, a proper exercise of her statutory mandate." Shalala v. Guernsey Memorial Hosp., 115 S. Ct. 1232, 1237 (1995).

**Severability**

"Although our jurisprudence in this area is hardly a model of clarity, this Court has on several occasions declared a statute invalid as to a particular application without striking the entire provision that appears to encompass it." United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1023 (1995) (O'Connor, J., concurring in part and dissenting in part).

"We have held that 'Congress' silence is just that -- silence -- and does not raise a presumption against severability.'" United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1023 (1995) (O'Connor, J., concurring in part and dissenting in part) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987)).

**Sovereign Immunity**

"[W]e may not enlarge the waiver beyond the purview of the statutory language. Department of Energy v. Ohio, 503 U.S. 607, 614-616 (1992). Our task is to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity. United States v. Nordic Village, Inc., 503 U.S. 30, 33 (1992) (internal quotation marks omitted)." United States v. Williams, 115 S. Ct. 1611, 1615-1616 (1995).

**Standing: APA**

"We have thus interpreted § 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question." Director, Office of Workers' Compensation Programs, Dept. of Labor v. Newport News Shipbuilding & Dry Dock Co., 115 S. Ct. 1278, 1283 (1995) (quoting Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

**State Practice Poor Evidence of Constitutionality**

"As we have noted, the practice of States is a poor indicator of the effect of [constitutional] restraints on the States * * *." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1866 n.41 (1995).

**State Court Interpretation of Constitution**

"State courts, in appropriate cases, are not merely free to -- they are bound to -- interpret the United States Constitution. In doing so, they are not free from the final authority of this Court." Arizona v. Evans, 115

S. Ct. 1185, 1190 (1995).

**Stare Decisis**

"'Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.'" Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2114 (1995) (opinion of O'Connor, J.) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

"'[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him'" Hubbard v. United States, 115 S. Ct. 1754, 1763 (1995) (opinion of Stevens, J.) (quoting B. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

"Respect for precedent is strongest 'in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.'" Hubbard v. United States, 115 S. Ct. 1754, 1763 (1995) (opinion of Stevens, J.) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)).

"'*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" Hubbard v. United States, 115 S. Ct. 1754, 1763 n.11 (1995) (opinion of Stevens, J.) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

"Who ignores [stare decisis] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)." Hubbard v. United States, 115 S. Ct. 1754, 1765 (1995) (Scalia, J., concurring in part & concurring in the judgment).

**Stare Decisis - Issues Not Decided**

"[Q]uestions which merely lurk in the record are not resolved, and no resolution of them may be inferred." United States v. Shabani, 115 S. Ct. 382, 386 (1994) (citations and internal quotations omitted).

**Stare Decisis -- The Need for More Than One or Two Cases to Flesh Out a Principle**

"* * * [W]e do not overlook that in our system of adjudication, principles seldom can be settled "on the basis of one or two cases, but require a closer working out." American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 827 (1995) (quoting Pound, Survey of the Conference Problems, 14 U. Cin.L.Rev. 324, 339 (1940) (Conference on the Status of the Rule of Judicial Precedent)).

**Statute of Limitations**

"But the reference to federal law is the exception, and we decline to follow a state limitations period only when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." North Star Steel Co. v. Thomas, 115 S. Ct. 1927, 1931 (1995) (internal quotation marks omitted).

**Strict Scrutiny**

The Supreme Court has "dispel[led] the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (quoting Fullilove v. Klutznick, 448 U. S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

**Vacatur**

Where party seeking review did not voluntarily cause case to become non-justiciable, "[v]acatur is appropriate * * * to 'clea[r] the path for future relitigation of the issues between parties and [to] eliminat[e] a judgment, review of which was prevented through a happenstance.'" Anderson v. Green, 115 S. Ct. 1059, 1060 (1995) (per curiam) (quoting United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950)).

**Waiver**

"[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." United States v. Mezzanatto, 115 S. Ct. 797, 801 (1995).

**MAXIMS FOR DAILY USE**
**SUPREME COURT 1993 TERM**

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## I. PRONOUNCEMENTS ON STATUTORY CONSTRUCTION

### Plain Meaning

"The language of the statute [is] the starting place in our inquiry * * *." Staples v. United States, 114 S. Ct. 1793, 1797 (1994).

"'We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" Department of Defense v. FLRA, 114 S. Ct. 1006, 1014 (1994), quoting Connecticut Nat'l Bank v. Germain, 503 U.S. ___, 112 S. Ct. 1146, 1149 (1992).

Plain meaning interpretation of statute eschewed where it "leads to an absurd result." United States v. Granderson, 114 S. Ct. 1259, 1264 n.5 (1994); see also id. at 1268-69 (adopting "'a sensible construction' that avoids attributing to the legislature either 'an unjust or an absurd conclusion'" (quoting In re Chapman, 166 U.S. 661, 667 (1897)).

"Of course, by denying the existence of an ambiguity, we do not claim to be perfectly certain that we have divined Congress' intentions as to this particular situation. * * * But our task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider petitioners' particular case. Rather, it is to determine whether the language the legislators actually enacted has a plain, unambiguous meaning." Beecham v. United States, 114 S. Ct. 1669, 1672 (1994).

"It should go without saying * * * that ambiguity in one portion of a statute does not give the Board license to distort other provisions of the statute." NLRB v. Health Care and Retirement Corp. of America, 114 S. Ct. 1778, 1783 (1994).

**Construe Not Rewrite**

"We decline to accept respondents' ambitious invitation to rewrite the statutes before us * * *." Department of Defense v. FLRA, 114 S. Ct. 1006, 1014 (1994).

"It is best, as usual, to apply the statute as written, and to let Congress make the needed repairs. That repairs are needed is perhaps the only thing about this wretchedly drafted statute that we can all agree upon." United States v. Granderson, 114 S. Ct. 1259, 1270 (1994) (Scalia, J., concurring). Accord, John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 531 (1993).

"Our task is to apply the text, not to improve upon it." Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1033 (1994) (Thomas, J. dissenting), quoting Pavelic & Le Flore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989).

**Avoiding Anomalies**

Statute interpreted to "avoid[] linguistic anomalies." United States v. Granderson, 114 S. Ct. 1259, 1264 (1994).

**Common Sense Construction**

The Court stated that it was "[a]ccording the statute a sensible construction." United States v. Granderson, 114 S. Ct. 1259, 1262 (1994).

**Usefulness of Dictionary**

"Dictionaries can be useful aids in statutory interpretation, but they are no substitute for close analysis of what words mean as used in a particular statutory context." MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 114 S. Ct. 2223, 2236 (1994) (Stevens, J. dissenting), citing Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.).

**Meaning Can Change Over Time**

"[T]he meaning of words may change over time, and many words have several meanings even at a fixed point in time." Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries, 114 S. Ct. 2251, 2255 (1994).

"Words and phrases can change meaning over time: a passage generally understood in 1850 may be incomprehensible or confusing to a modern juror." Victor v. Nebraska, 114 S. Ct. 1239, 1247 (1994).

"[T]he meaning of words may change over time, and many words have several meanings even at a fixed point in time." Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251, 2255 (1994).

**Ordinary Meaning**

"In the absence of * * * a definition, we construe a statutory term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 114 S. Ct. 996, 1000 (1994).

Where statutory term is undefined, "our task is to construe it in accord with its ordinary or natural meaning." Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251, 2255 (1994).

**Meaning in Legal Community**

"[We] presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment." Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251, 2257 (1994).

**Practical Construction**

"This interpretation is the only one that gives meaning to the statute as a practical matter." McFarland v. Scott, 114 S. Ct. 2568, 2572 (1994).

**Policy Considerations**

"Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it." Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1453-1454 (1994), quoting Demarest v. Manspeaker, 498 U.S. 184, 191 (1991).

"It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some members of Congress is the preferred result." United States v. Granderson, 114 S. Ct. 1259, 1275 (1994) (Kennedy, J., concurring) (citing additional cases).

**Construed as a Whole**

"[W]e examine first the language of the governing statute, guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy." John Hancock Mut. Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 523 (1993) (internal quotations, brackets, and citations omitted).

"The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences." Beecham v. United States, 114 S. Ct. 1669, 1671 (1994).

It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." Department of Revenue of Oregon v. ACF Industries, 114 S. Ct. 843, 848 (1994), quoting Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985).

"A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme * * * because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the lawsuit." Department of Revenue of Oregon v. ACF Industries, 114 S. Ct. 843, 850 (1994), quoting United States Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988).

"[I]nterpreting a statute or regulation 'is a holistic endeavor.'" Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2394 (1994) (Thomas, J. dissenting) (quoting United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988)).

**Presumption Against Superfluous Language**

"Judges should hesitate * * * to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense." Ratzlaf v. United States, 114 S. Ct. 655, 659 (1994).

**Same Word in Single Sentence**

"'[I]t seems reasonable to give * * * a similar construction' to a word used as both a noun and a verb in a single statutory sentence." United States v. Granderson, 114 S. Ct. 1259, 1264 (1994), quoting Reves v. Ernst & Young, 507 U.S. ___ (1993) (slip op. at 7); see also id. (adopting

statutory interpretation that "keeps constant the meaning" of a statutory term).

**Identical Words in Same Statute**

"[T]he normal rule of statutory construction [is] that 'identical words used in different parts of the same act are intended to have the same meaning.'" Department of Revenue of Oregon v. ACF Industries, 114 S. Ct. 843, 849 (1994), quoting Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986) (other citations omitted).

"A term appearing in several places in a statutory text is generally read the same way each time it appears." Ratzlaf v. United States, 114 S. Ct. 655, 660 (1994).

**Different Language in Different Sections**

"'[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another,' Chicago v. Environmental Defense Fund, 511 U.S. ___, ___, 114 S. Ct. 1588, 1593 * * * (1994) (internal quotation marks omitted), and that presumption is even stronger when the omission entails the replacement of standard legal terminology with a neologism." BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1761 (1994).

**Statute Deleting Language**

"[W]hen Congress deletes limiting language, "it may be presumed that the limitation was not intended." John Hancock Mut. Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 527 (1993), quoting Russello v. United States, 464 U.S. 16, 23-24 (1983).

**Construed in Accord with the Common Law**

"[W]e must construe the statute in light of the background rules of the common law, * * * in which the requirement of some mens rea for a crime is firmly embedded." Staples v. United States, 114 S. Ct. 1793, 1797 (1994).

"Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1033 (1994), quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952).

**Statutes Altering Results of Judicial Decisions**

"And we of course have rejected the argument that a statute altering the result reached by a judicial decision necessarily changes the meaning of the language interpreted in that decision." NLRB v. Health Care & Retirement Corp. of America, 114 S. Ct. 1778, 1783 (1994).

**Presumption Against Departures From Prior Policies or Underlying Theory**

"But we will not lightly assume that the ambiguous language means anything so inconsistent with the Rule's [Fed. R. Evid. 804(b)(3)'s] underlying theory." Williamson v. United States, 114 S. Ct. 2431, 2435 (1994).

**Construed in Accord with State Laws**

"'The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation.' Davies Warehouse Co. v. Bowles, 321 U.S. 144, 154 * * * (1944)." BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1762 (1994).

**Construing Statutes to Avoid Constitutional Issues**

The "principle of statutory construction" that a statute must be construed so as to avoid doubts as to its validity "applies only when the meaning of a statute is in doubt * * *." National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 789, 806-807 (1994) (Souter, J., concurring), citing Eastern RR. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

**Deference to Agency**

"When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" ABF Freight System, Inc. v. NLRB, 114 S. Ct. 835, 839 (1994), quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

"[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear * * *." MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 114 S.

Ct. 2223, 2231 (1994), citing Pittston Coal Group v. Sebben, 488 U.S. 105, 113 (1988).

"We must give substantial deference to an agency's interpretation of its own regulations." Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2386 (1994), citing, inter alia, Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150-151 (1991).

"Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2386 (1994), citing Udall v. Tallman, 380 U.S. 1, 16 (1965).

"This broad deference is all the more warranted when * * * the regulation concerns 'a complex and highly technical regulatory program' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2387 (1994), quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991).

"[A]n agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view. Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2388 (1994), citing INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987).

"The Secretary [of HHS] is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation." Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2389 (1994), citing Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151, 2161 (1993).

"A settled interpretation that persists over time is presumptively to be preferred * * * and therefore judges are properly suspect of sharp departures from past practice that are unexplained * * *." Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2392 n.3 (1994) (Thomas, J. dissenting) (citing Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 41-42 (1983)).

**Deference to Agency View First Adopted in Litigation**

Court states that "the deference due an agency view first precisely stated in a brief supporting a petitioner" is a "difficult question." John

Hancock Mut. Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 531 (1993).

**Legislative History**

"We agree with the D.C. Circuit that 'courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point." Shannon v. United States, 114 S. Ct. 2419, 2426 (1994).

Majority's use of legislative history to confirm statutory text "serves to maintain the illusion that legislative history is an important factor in this Court's deciding of cases, as opposed to an omnipresent make-weight for decisions arrived at on other grounds." Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771, 782 (1994) (Scalia, J., concurring in part).

"But we cannot divine from the legislators' many 'get tough on drug offenders' statements any reliable guidance to particular provisions. None of the legislators' expressions * * * focuses on 'the precise meaning of the provision at issue in this case.'" United States v. Granderson, 114 S. Ct. 1259, 1265 (1994) (quoting Government's brief).

"Congress fired a blank." United States v. Granderson, 114 S. Ct. 1259, 1275 (1994) (Kennedy, J., concurring) (referring to asserted congressional purpose that finds no basis in statutory language).

Majority's consideration of legal backdrop against which Congress might have legislated characterized as a "venture in interpretive archaeology." United States v. Granderson, 114 S. Ct. 1259, 1274 (1994) (Kennedy, J., concurring).

"There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear." Ratzlaf v. United States, 114 S. Ct. 655, 662 (1994).

**Legislative History - Past Congress**

"But '[w]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.'" Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1452 (1994), quoting Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989).

**Rule of Lenity**

"[T]he rule of lenity, under which an ambiguous criminal statute is to be construed in favor of the accused * * * [is a] [m]axim of construction [that] is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." Staples v. United States, 114 S. Ct. 1793, 1804 n.17 (1994) (internal quotation marks deleted).

"But the rule of lenity applies only when an ambiguity is present * * *." National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 789, 806 (1994).

**In Pari Materia**

"We thus conclude that the two statutes must be read in pari materia * * *." McFarland v. Scott, 114 S. Ct. 2568, 2573 (1994).

Use of in pari materia argument rejected where animating concerns might differ. United States v. Granderson, 114 S. Ct. 1259, 1265-1266 (1994).

**Ejusdem Generis**

"'Under the ejusdem generis rule of construction the general words are confined to the class and may not be used to enlarge it.'" Holder v. Hall, 114 S. Ct. 2581, 2604 (1994) (Thomas, J. concurring), quoting Cleveland v. United States, 329 U.S. 14, 18 (1946).

"That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." Beecham v. United States, 114 S. Ct. 1669, 1671 (1994). But see also id. (""this canon of construction is by no means a hard and fast rule").

**Reenactment**

"[W]e generally will assume that reenactment of specific statutory language is intended to include a 'settled judicial interpretation' of that language." Holder v. Hall, 114 S. Ct. 2581, 2606 (1994) (Thomas, J. concurring), quoting Pierce v. Underwood, 487 U.S. 552, 567 (1988).

"'When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby.'"

Holder v. Hall, 114 S. Ct. 2581, 2627 (1994) (separate opinion of Stevens, J.), quoting United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 134 (1978).

The Court held that the amendment of the Securities Exchange Act of 1934 after lower courts had construed the act to cover aiding and abetting did not indicate "acquiesce[nce] in the judicial interpretation of § 10(b)" because the Supreme Court "has reserved the issue of 10b-5 aiding and abetting liability on two previous occasions." Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1452 (1994).

"When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language." Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1452 (1994).

**Congress's Failure to Act**

"It does not follow * * * that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation * * * *." Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1453 (1994), quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989), and Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 671-672 (1987) (Scalia, J., dissenting).

"[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.' * * * 'Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'" Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1453 (1994), quoting Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (additional internal quotation omitted). See also id. ("these arguments deserve little weight in the interpretive process").

"[W]e are mindful that Congress had before it, but failed to pass, just such a scheme. * * * We are directed by [the statute's] words, and not by the discarded draft." John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 526 (1993).

**Meaning of "Directly or Indirectly"**

The Court held that Section 10(b) of the Securities Exchange Act of 1934, which imposes civil liability upon those who "directly or indirectly" engage in prohibited conduct does not reach those who aid or abet that conduct. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A., 114 S. Ct. 1439 (1994).

**Meaning of Two Terms Joined by "Or"**

The Court cites cases where the "second phrase in disjunctive [is] added simply to make the meaning of the first phrase 'unmistakable'" and "reading 'error or defect' to create one category of 'error.'" Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239, 2244 (1994).

**Requirement for Clear Statement**

"'[W]hen the Federal government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.' F. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 539-540 (1947) * * *." BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1764 (1994).

"To displace traditional State regulation * * *, the federal statutory purpose must be clear and manifest." BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1764 (1994) (internal quotation marks and citations omitted).

"When determining the breadth of a federal statute that impinges upon or pre-empts the State's traditional powers, we are hesitant to extend the statute beyond its obvious scope.

* * * We will interpret a statute to pre-empt the traditional state power only if that result is 'the clear and manifest purpose of Congress.'" Department of Revenue of Oregon v. ACF Industries, 114 S. Ct. 843, 850-851 (1994), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

**Meta-canons**

"It is not uncommon to find 'apparent tension' between different cannons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites." Landgraf v. USI Film Products, 114 S. Ct. 1483, 1496 (1994), citing Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed, 3 Vand. L. Rev. 395 (1950).

II. OTHER PRONOUNCEMENTS OF INTEREST

**Administrative Procedure Act**

"We do not lightly presume exemptions to the APA * * *." Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251, 2254 (1994).

**Attorney's Fees**

"Our cases establish that attorney's fees generally are not a recoverable cost of litigation 'absent explicit congressional authorization.' * * * Recognition of the availability of attorney's fees therefore requires a determination that 'Congress intended to set aside this longstanding American rule of law.' * * * Mere 'generalized commands' * * * will not suffice to authorize such fees." Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1965 (1994) (citations omitted).

**Collateral Order Doctrine**

"The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." Digital Equip. Corp. v. Desktop Direct, Inc., 114 S. Ct. 1992, 1995 (1994), quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949).

**Dicta Not Binding**

"It is to the holdings of our cases, rather than their dicta, that we must attend * * *." Kokkonen v. Guardian Life Ins. of Am., 114 S. Ct. 1673, 1676 (1994).

"[T]he repetition of a dictum does not turn it into a holding * * *." Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1956 (1994) (Scalia, J., dissenting).

**Due Process**

A state's "abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause" because "traditional practice provides a touchstone for constitutional analysis." Honda Motor Co., Ltd. v. Oberg, 114 S. Ct. 2331, 2339 (1994).

**Federal Common Law**

"[T]he judicial creation of a federal rule of decision is warranted" only in "extraordinary cases." O'Melveny & Myers v. FDIC, 114 S. Ct. 2048, 2056 (1994).

**Issues Not Raised in Cert. Petition**

"We have consistently declined to consider issues not raised in the petition for a writ of certiorari. 'Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.'" Caspari v. Bohlen, 114 S. Ct. 948, 951 (1994) (citation omitted).

**Issues That Can Be Raised By An Amicus**

The Court "declined to address the First Amendment question argued by respondents and the amici" on the ground that none of the respondents made that constitutional argument in the court of appeals and the respondents' only constitutional argument in the Supreme Court was a different one. National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 789, 806 n.6 (1994).

"Although we will consider arguments raised only in an amicus brief, we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position." Davis v. United States, 114 S. Ct. 2350, 2354 n.1 (1994).

**Jurisdictional and Non-jurisdictional Arguments**

"The question whether a federal statute creates a claim for relief is not jurisdictional." Northwest Airlines, Inc. v. County of Kent, Mich., 114 S. Ct. 855, 862 (1994) (citations omitted).

"Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 789, 802 (1994).

**Limited Jurisdiction**

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute

* * *, which is not to be expanded by judicial decree. * * * It is

to be presumed that a cause lies outside this limited jurisdiction, * * * and the burden of establishing the contrary rests upon the party asserting jurisdiction." Kokkonen v. Guardian Life Ins. of Am., 114 S. Ct. 1673, 1675 (1994) (citations omitted).

**Mens Rea and Ignorance of the Law**

"The mens rea presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.' Cheek v. United States, 498 U.S. 192, 199 * * * (1990)." Staples v. United States, 114 S. Ct. 1793, 1805-1806 n.3 (1994) (Ginsburg, J., concurring).

**Necessity for Cross-Petition**

"A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment.

* * * A cross-petition is required, however, when the respondent seeks to alter the judgment below." Northwest Airlines, Inc. v. County of Kent, Mich., 114. S. Ct. 855, 862 (1994) (citations omitted).

**Negative Commerce Clause**

"Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' aspect that denies the State the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Oregon Waste Systems, Inc. v. Department of Envir. Quality, 114 S. Ct. 1345, 1349 (1994) (citation omitted).

"[T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce. * * * As we use the term here, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually per se invalid." Oregon Waste Systems, Inc. v. Department of Envir. Quality, 114 S. Ct. 1345, 1350 (1994) (citations omitted).

**No Unified Theory**

"It is always appealing to look for a single test, a Grand Unified Theory that would resolve all cases that may arise under a particular clause * * *. But the same constitutional principle may operate very differently in different contexts." Board of Education of Kiryas Joel Village School District v. Grument, 114 S. Ct. 2481, 2498-2499 (1994) (O'Connor, J. dissenting).

**Pre-emption**

"Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent. Pre-emption of employment standards 'within the traditional police power of the State' 'should not be lightly inferred.'" Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239, 2243 (1994).

**Presumption of Validity -- Rules**

"If the Federal Rules, which generally are not affirmatively enacted into law by Congress * * * are not entitled to that great deference as to constitutionality which we accord federal statutes, * * * they at least come with the imprimatur if the rulemaking authority of this Court." Title Ins. Co. v. Brown, 114 S. Ct. 1359, 1362 (1994) (per curiam).

**Primary Jurisdiction**

"Although the Commission has no particular expertise in construing statutes other than the Mine Act, we conclude that exclusive review before the Commission is appropriate since 'agency expertise [could] be brought to bear' on the statutory questions presented here." Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771, 780 (1994), quoting Whitney Bank v. New Orleans Bank, 379 U.S. 411, 420 (1965).

Rule that adjudication of the constitutionality of federal laws is beyond the ken of most administrative agencies, "is not mandatory, however, and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes." Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771, 780 (1994).

**Private Right of Action**

"We have been quite reluctant to infer a private right of action from a criminal prohibition alone * * *." Central Bank of Denver, N.A. v.

First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1455 (1994).

"[T]he creation of new rights ought to be left to legislatures, not courts." Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. ___, ___, 113 S. Ct. 2085, 2088 (1993).

**Punitive Damages**

"Punitive damages pose an acute danger of arbitrary deprivation of property." Honda Motor Co., Ltd. v. Oberg, 114 S. Ct. 2331, 2340 (1994).

A state's "denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment. Honda Motor Co., Ltd. v. Oberg, 114 S. Ct. 2331, 2341 (1994) (footnote omitted). The Court made this holding even though Honda did not argue that the amount of the punitive damages awarded ($5,000) violated the substantive constitutional limit on punitive damages (being "grossly excessive"). See id. at 2344 (Ginsburg, J., dissenting).

**Remedies**

"We are not free to fashion remedies that Congress has specifically chosen not to extend." Landgraf v. USI Film Products, 114 S. Ct. 1483, 1507 n.38 (1994).

**Retroactivity**

"'Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. * * * To be sure, * * * retroactive legislation does have to meet a burden not faced by legislation that has only future effects. * * * The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. * * * But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.'" United States v. Carlton, 114 S. Ct. 2018, 2022 (1994), quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984) (other internal quotations omitted).

"When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When,

however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." Landgraf v. USI Film Products, 114 S. Ct. 1483, 1505 (1994).

"Congress' decision to alter the rule of law established in one of our cases -- as petitioners put it, to 'legislatively overrul[e],' * * * does not, by itself, reveal whether Congress intends the 'overruling' statute to apply retroactively to events that would otherwise be governed by the judicial decision." Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1515 (1994).

"Altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes, and simply does not answer the retroactivity question." Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1517 (1994).

"'The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student,' * * * and this case illustrates the second half of that principle as well as the first." Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1519 (1994), quoting United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982).

**Sovereign Immunity**

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." FDIC v. Meyer, 114 S. Ct. 996, 1000 (1994).

"Sovereign immunity is jurisdictional in nature." FDIC v. Meyer, 114 S. Ct. 996, 1000 (1994).

**Stare Decisis**

"Stare decisis is a powerful concern, especially in the field of statutory construction. See Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989). * * * But 'we have never applied stare decisis mechanically to prohibit overruling our earlier decisions determining the meaning of statutes.' Monell v. New York City Dept. of Social Services, 436 U.S. 658, 695 (1978)." Holder v. Hall, 114 S. Ct. 2581, 2618 (1994) (Thomas, J. concurring).

"[T]he pull of precedent is strongest in statutory cases." Department of Defense v. FLRA, 114 S. Ct. 1006, 1019 (1994) (Ginsburg, J., concurring) (citing additional cases).

"[Prior case's] cursory answer to an ancillary and largely unbriefed question does not warrant the same level of deference we typically give our precedents." Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251, 2257 (1994) (statutory interpretation case).

"As Justice O'Connor supplied the fifth vote in Caldwell, and concurred on grounds narrower than those put forth by the plurality, her position is controlling." Romano v. Oklahoma, 114 S. Ct. 2004, 2010 (1994).

**Sue-and-Be-Sued Clauses**

"[N]otwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign," sue-and-be-sued clause waivers are to be "liberally construed." FDIC v. Meyer, 114 S. Ct. 996, 1003 (1994).

**Unconstitutional Foreign Taxes**

"A tax affecting foreign commerce therefore raises two concerns in addition to the four delineated in Complete Auto. The first is prompted by 'the enhanced risk of multiple taxation.' * * * The second relates to the Federal Government's capacity to '"speak with one voice when regulating commercial relations with foreign governments."'" Barclays Bank PLC v. Franchise Tax Board of Calif., 114 S. Ct. 2268, 2276 (1994) (citations omitted).

**Unconstitutional State Taxes**

"Absent congressional approval, * * * a state tax on * * * commerce will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax either (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State. * * * In 'the unique context of foreign commerce,' a State's power is further constrained because of 'the special need for federal uniformity.'" Barclays Bank PLC v. Franchise Tax Board of Calif., 114 S. Ct. 2268, 2276 (1994), citing Complete Auto Transit, Inc. v. Brady, 430 U. S. 274, 279 (1977).

**Add-On 9-27-93**
**Update - -**

# MAXIMS FOR DAILY USE

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**I. APPELLATE REVIEW**

**A. Trial Court.**

"we review trial court determinations of negligence with considerable deference." Doggett v. United States, 112 S. Ct. 2686 (1992).

**B. Agency.**

"A court reviewing an agency's adjudicative action should accept the agency's findings if those findings are supported by substantial evidence on the record as a whole. * * * The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence." Arkansas v. Oklahoma, 112 S. Ct. 1046, 1059 (1992) (emphasis in original).

**C. Jurisdictional Defenses.**

**1. Lack Of Jurisdiction Can Be Raised At Any Stage Of The Proceedings.**

Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

Edelman v. Jordan, 415 U.S. 651, 677-78 (1974).

Matson Navigation Co. v. United States, 284 U.S. 352, 359 (1932).

**2. Untimely Notice of Appeal.**

"The requirement of a timely notice of appeal is mandatory and jurisdictional." Munden v. Ultra-Alaska Assocs., 849 f.2d 383, 386 (9th

Cir. 1988), citing Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978).

"[T]his proposition 'means what it says: if an appellant does not file his notice of appeal on time, [the Court of Appeals] cannot hear his appeal.'" Pinion v. Dow Chemical, U.S.A., 928 F.2d 1522, 1525 (11th Cir. 1991), quoting Varhol v. National R.R. Passenger Corp., 909 F.2d 1557, 1561 (7th Cir. 1990) (per curiam) (en banc).

**a. What Constitutes Filing?**

Filing occurs on the date that a notice of appeal is received by the court, not the date that it is mailed. Sanchez v. Board of Regents, 624 F.2d 521, 522 (5th Cir. 1980).

**b. Excusable Neglect or Good Cause.**

"It is well settled that leave to file an untimely notice of appeal is to be granted only in unique or extraordinary circumstances," and that "the excusable neglect standard has consistently been held to be 'strict,' and can be met only in extraordinary cases." Marsh v. Richardson, 873 F.2d 129, 130 (6th Cir. 1989).

District court abuses its discretion when it grants an extension of time to an attorney who explained that he was unaware of the district court's decision, even though his office had received notice of it. Ibid.

"Calculating deadlines in the context of the demands of trial practice is routine and ordinary. * * * Mistakes arising from such calculations are not of the 'unique' or 'extraordinary variety envisioned by our interpretation of Rule 4(a) [of the Federal Rules of Appellate Procedure]. Indeed, miscalculating the time for filing is among the most ordinary types of neglect." Barnes v. Cavazos, 966 F.2d 1056, 1061 (6th Cir. 1992) (per curiam).

**c. Use of Rule 60(b) to Avoid Untimeliness.**

The district court may not extend the time for appeal by entering a new judgment under Rule 60(b). Useden v. Acker, 947 F.2d 1563, ____ (11th Cir. 1991) ("Rule 60 * * * does not sanction the use of this tactic for the naked purpose of enabling the filing of a timely appeal.")

**3. Sovereign Immunity Is Jurisdictional.**

United States v. Testan, 424 U.S. 392, 399 (1976).

"[T]he United States, as sovereign, is immune from suit save as it consents to be sued, * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. United States v. Sherwood, 312 U.S. 584, 586 (1941).

**4. Exhaustion.**

"Where Congress specifically mandates, exhaustion is required." McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992).

"Only if there is no statutory exhaustion requirement may [the court] exercise [its] discretion to apply judicially-developed exhaustion rules." Reid v. Engen, 765 F.2d 1457, 1462 (9th Cir. 1985).

**5. Jurisdictional Questions Passed On Sub Silentio in Prior Decisions.**

"[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974).

**6. No Appellate Jurisdiction Where Only One Of Several Consolidated Cases Is Appealed.**

"[W]hen independently filed actions have been consolidated for trial, an order of summary judgment disposing of one, but not all, of the claims or suits is not appealable unless and until the district court has certified the order as final pursuant to Fed.R.Civ.P. 54(b)." Trinity Broadcasting Corp. v. Eller, 827 F.2d 673 (10th Cir. 1987) (per curiam), on reh., 835 F.2d 245, 246 (10th Cir. 1987).

**D. Grounds for Affirmance.**

**1. Court May Affirm On Any Ground That The Law Or Record Permits.**

A court "may affirm on any ground that the law and the record permit." Thigpen v. Roberts, 468 U.S. 27, 30 (1984).

"'[A]n appellee may rely on any matter appearing in the record in support of the judgment below.'" Schweiker v. Hogan, 457 U.S. 569, 584 n.24 (1982).

"Respondent may, of course, defend the judgment below on any ground which the law and record permit, provided the asserted ground would not expand the relief which has been granted." Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982) (citing additional cases).

"The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." Dandridge v. Williams, 397 U.S. 471, 476 n.6 (1970).

"Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action." Riley Co. v. Commissioner, 311 U.S. 55, 59 (1940).

[For additional Supreme Court authority on this point, see R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice sec. 6.35, at 382 (6th ed. 1986) (quoting Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979), Dayton Bd. of Educ. v. Brinkham, 433 U.S. 406, 419 (1977), and Blum v. Bacon, 457 U.S. 132, 137 n.5 (1982)).]

Summary judgment may be affirmed on grounds other than those relied upon by the district court. Dennison v. County of Frederick, Va., 921 F.2d 50, 53 (4th Cir. 1990), cert. denied, 111 S. Ct. 2828 (1991); Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir.), cert. denied, 111 S. Ct. 257 (1990).

"An appellate court may affirm a correct decision by a lower court on grounds different than those used by the lower court in reaching its decision." Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084, 1089 n.10 (3d Cir. 1988) (citing Helvering v. Gowran, 302 U.S. 238, 245 (1937), Securities & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943), and PAAC v. Rizzo, 502 F.2d 306, 308 n.1 (3d Cir. 1974), cert. denied, 419 U.S. 1108 (1975)).

"When a party seeks neither to modify nor alter a lower court decision 'but only to sustain it on grounds other than those relied on by the court below,' no obligation to cross-appeal exists. * * * It is now well established that this court has the 'power to affirm the judgment below on any ground supported by the record, whether or not raised or relied on in the District Court.'" Wycoff v. Menke, 773 F.2d 983, 985-56 (8th Cir. 1985) (quoting, respectively, Clark v. Mann, 562 F.2d 1104, 1111 n.3 (8th Cir. 1977), and Reeder v. Kansas City Bd. of Police Comm'rs, 733 F.2d 543, 548 (8th Cir. 1984)).

"We may affirm the district court 'on any basis fairly supported by

the record.'" City of Las Vegas v. Clark County, Nevada, 755 F.2d 697, 701 (9th Cir. 1985), quoting Hoohuli v. Ariyoshi, 741 F.2d 1169, 1177 (9th Cir. 1984).

**F. Questions of Law.**

A district court's determination of state law is subject to de novo review in the court of appeals. Salve Regina College v. Russel, 111 S. Ct. 1217, 1221 (1991).

**G. Questions of Fact.**

**H. Injunctions.**

**1. Review of Preliminary Injunctions.**

**a. Mootness.**

A preliminary injunction merges into the final injunction, thereby mooting a pending appeal from the preliminary injunction. Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles, 979 F.2d 1338, 1340, n.1 (9th Cir. 1992); Planned Parenthood of Central and Northern Arizona v. State of Arizona, 718 F.2d 938, 949-950 (9th Cir. 1983). See Fundicao Tupy S.A. v. United States, 841 F.2d 1101 (Fed. Cir. 1988); 9 J. Moore & B. Ward, Moore's Federal Practice | 110.20[1] at p. 217 (1992-1993 Cum. Supp.).

**b. As compared to permanent injunction.**

"Because of the limited scope of our review of the law applied by the district court and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits." Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982).

**c. Delay in seeking relief.**

"Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985).

**2. Review of Permanent Injunctions.**

**3. Interlocutory Appeal from Grant or Denial.**

"Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1)." Switzerland Cheese Ass'n, Inc. v. Horne's Market Inc., 385 U.S. 23, 25 (1966) (holding that the denial of a motion for summary judgment seeking grant of a permanent injunction because of unresolved issues of fact is not immediately appealable under 28 U.S.C. § 1292(a)(1)).

**I. Waiver of Arguments.**

**1. An issue raised for the first time in a reply brief is waived.**

Gaste v. Kaiserman, 863 F.2d 1061, 1069 n.6 (2d Cir. 1988) (issue not raised in opening brief is waived).

Stephens v. C.I.T. Group / Equip. Fin., Inc., 955 F.2d 1023, 1026 (5th Cir. 1992).

United States v. Jerkins, 871 F.2d 598, 602 n.3 (6th Cir. 1989); Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 820 F.2d 186, 189 (6th Cir. 1987).

Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692, 697 (7th Cir. 1991).

Nevada v. Watkins, 914 F.2d 1545, 1560 (9th Cir. 1990), cert. denied, 111 S. Ct. 1105 (1991); Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1990) ("It is well established in this circuit that the general rule is that appellants cannot raise a new issue for the first time in their reply briefs.") (citations and quotations omitted).

**2. Issues not raised below cannot be raised for the first time on appeal.**

Supreme Court will not consider a claim not raised or addressed below or a claim not included in the question on which it granted certiorari. Yee v. City of Escondido, (S. Ct. No. 90-1947, decided 4/1/92), 60 USLW 4301

"As a general rule, we will not consider an issue raised for the

first time on appeal. Bolker v. Commissioner, 760 F.2d 1039, 1042 (9th Cir. 1985).

"[B]ecause Shaw did not raise it in the district court, he cannot raise it now." Boston Celtics Ltd. v. Shaw, 908 F.2d 1041, 1045 (1st Cir. 1990). "This rule is relaxed only in horrendous cases where a gross miscarriage of justice would occur,' and where the new theory is so compelling as virtually to insure appellant's success." Sanchez-Arroyo v. Eastern Airlines, Inc., 835 F.2d 407, 408-09 (1st Cir. 1987) (internal quotation and citations omitted).

**3. Arguments raised only in a footnote.**

"A skeletal 'argument', really nothing more than an assertion, does not preserve a claim. * * * Judges are not like pigs, hunting for truffles buried in briefs." United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

**4. Argument not included in question on which certiorari was granted.**

Supreme Court will not consider a claim not raised or addressed below or a claim not included in the question on which it granted certiorari. Yee v. City of Escondido, (S. Ct. No. 90-1947, decided 4/1/92), 60 USLW 4301.

**5. Argument raised for the first time in petition for rehearing.**

"'[A]n argument not raised on appeal is deemed abandoned,' and we will not ordinarily consider such an argument unless 'manifest injustice otherwise would result.'" United States v. Quiroz, ____ F.3d ____, slip. op. 3567, 3571 (2d Cir. Apr. 20, 1994), 1994 WL 144522, at *2 (citations omitted) (argument raised for the first time on petition for rehearing will be deemed waived); see also United States v. Babwah, 972 F.2d 30, 34 (2d Cir. 1992); Herrmann v. Moore, 576 F.2d 453, 455 (2d Cir.), cert. denied, 439 U.S. 1003 (1978).

**J. Failure to Cross Appeal.**

"A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment. * * * A cross-petition is required, however, when the respondent seeks to alter the judgment below." Northwest Airlines, Inc. v. County of Kent, Mich., 114. S. Ct. 855, 862 (1994)

(citations omitted).

"When a party seeks neither to modify nor alter a lower court decision 'but only to sustain it on grounds other than those relied on by the court below,' no obligation to cross-appeal exists. * * * It is now well established that this court has the 'power to affirm the judgment below on any ground supported by the record, whether or not raised or relied on in the District Court.'" Wycoff v. Menke, 773 F.2d 983, 985-56 (8th Cir. 1985) (quoting, respectively, Clark v. Mann, 562 F.2d 1104, 1111 n.3 (8th Cir. 1977), and Reeder v. Kansas City Bd. of Police Comm'rs, 733 F.2d 543, 548 (8th Cir. 1984)).

**K. Use of Precedents.**

**1. Statements "lurking" in the record.**

The Supreme Court has stated, "[q]uestions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Webster v. Fall, 266 U.S. 507, 511 (1925). Accord, Allen v. Wright, 468 U.S. 737, 764 (1984); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 119 n.29 (1984); Edelman v. Jordan, 415 U.S. 651, 670-71 (1974).

"[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974).

**2. Assumption that precedent overruled by implication disfavored.**

The strong presumption, inherent in the doctrine of stare decisis, of stability in the judicial interpretation of statutes and rules disfavors any assumption that the court has overruled prior precedent by implication. Square D. Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 421-24 (1986).

**K. Limited Court Role When Reviewing Agency Action Under APA.**

"The guiding principle [of APA review], violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952).

"It is a guiding principle of administrative law, long recognized by this Court, that 'an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." FCC v. Pottsville Broadcasting Co., 309 U.S. 146, 148 (1940) [additional citations omitted]. Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course." N.L.R.B. v. Food Store Employees Union, 417 U.S. 1, 10 (1974).

"At least in the absence of substantial justification for doing otherwise, a reviewing court may not after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency." Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976) (footnote omitted).

"If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

"Once we reject the agency's interpretation of the statute as unreasonable it does not follow that appellant's competing construction must be adopted. Even if we thought appellant's interpretation were reasonable we could not accept it if we perceived still other possible reasonable constructions. It is, after all, for the agency to make the choice between such alternatives." Abbott Laboratories v. Young, 920 F.2d 984, 988 (D.C. Cir. 1990).

See also L. Jaffe, Judicial Control of Administrative Action 713-20 (1965).

**L. Abuse of Discretion.**

"A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990).

**M. Parties.**

**1. Notice of Appeal.**

**2. Intervenors.**

"Appeal can be taken by an intervenor." United States v. AT&T, 642 F.2d 1285, 1290 (D.C. Cir. 1980).

**a. Jurisdiction to review denial of motion to intervene.**

"We have jurisdiction to review an order denying intervention as a matter of right because such a determination is a 'final decision' under 28 U.S.C. § 1291 that 'ends the litigation on the merits' * * * for the intervenor * * *. Standing alone, an order denying permissive intervention is neither a final decision nor an appealable interlocutory order because such an order does not substantially affect the movant's rights." Meek v. Metropolitan Dade County, 985 F.2d 1471, 1476 (11th Cir. 1993).

"We have said that denial of intervention as a matter of right under rule 24(a) is reviewed 'for error.' * * * Orders denying permissive intervention under rule 24(b) are reviewed for abuse of discretion. * * * Although we generally review denial of intervention under rule 24(a) for error, with subsidiary factual findings subject to review for clear error, our review of the district court's determination of timeliness under both rule 24(a) and 24(b) is conducted under the abuse of discretion standard." Meek v. Metropolitan Dade County, 985 F.2d at 1477.

"This Court has provisional jurisdiction under the 'anamolous rule [that] has evolved in the federal appellate courts concerning the appealability . . . of an order denying intervention.' Weiser v. White, 505 F.2d 912, 916 (5th Cir. 1975). Under this rule, '[i]f the district court was correct in denying the motion to intervene, this court's jurisdiction evaporates and we must dismiss the appeal for want of jurisdiction. If the district court erred, we retain jurisdiction and must reverse.' Federal Trade Comm'n v. American Legal Distributors, 890 F.2d 363, 364 (11th cir. 1989). The rule is 'anamolous' because of the 'seemingly inconsistent approach of reaching the merits to determine jurisdiction.' Weiser, 505

F.2d at 917." United States v. south Florida Water Mgmt. Dist., 922 F.2d 704, 706 (11th Cir. 1991).

## II. PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION

### A. Article III "Case" or "Controversy" Requirements.

#### 1. Standing Limitations.

##### a. Burden of Proof.

Since essential elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

##### b. Injury to Third Parties.

"[w]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137 (1992) (internal quotations omitted).

#### 2. "Ripeness" Limitations.

#### 3. "Mootness" Limitations.

##### a.

##### b. "Capable of Repetition Yet Evading Review" Doctrine.

The basic test for application of the doctrine "capable of repetition yet evading review" was outlined by the Supreme Court in Weinstein v. Bradford, 423 U.S. 147, 149 (1975), where the Court explained that the doctrine applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." See also Murphy v. Hunt, 455 U.S. 478 (1982).

#### 4. "Political Question" Limitations.

"A controversy is nonjusticiable -- i.e., involves a political question -- where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .'" Nixon v. United States, No. 91-740, slip op. at 3 (U.S. Jan. 13, 1993), quoting Baker v. Carr, 369 U.S. 186, 217 (1962).

**a. Immigration Matters.**

"[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952). See also Fiallo v. Bell, 430 U.S. 787, 792 (1977); Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 n.21 (1976) ("the power over aliens is of a political character and therefore subject only to narrow judicial review").

**B. Sovereign Immunity.**

**1. Strict Construction.**

"We start with a common rule, with which we presume congressional familiarity, see McNary v. Haitian Refugee Center, 498 U.S. ---, ---, 111 S. Ct. 888, --- (1991), that any waiver of the National Government's sovereign immunity must be unequivocal, see United States v. Mitchell, 445 U.S. 535, 538-539 (1980). 'Waivers of immunity must be "construed strictly in favor of the sovereign," McMahon v. United States, 342 U.S. 25, 27 (1951), and not "enlarge[d] ... beyond what the language requires." Eastern Transportation Co. v. United States, 272 U.S. 675, 686 (1927).' Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-686 (1983)." United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1633 (1992).

"Any such waiver must be strictly construed in favor of the United States." Ardestani v. INS, 112 S. Ct. 515, 520 (1991).

"Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed," in light of "the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign." U.S. v. Nordic Village, Inc., 112 S. Ct. 1011, 1014-15 (1992) (internal quotations omitted).

Even an unambiguous waiver of sovereign immunity will authorize a

monetary award only if the statutory provision "establish[es] unambiguously that the waiver extends to monetary claims." U.S. v. Nordic Village, Inc., 112 S. Ct. 1011, 1015 (1992).

**a. The term "person" in a statute ordinarily does not include the sovereign.**

"In common usage, [the term person] does not include the sovereign, and statutes employing it will ordinarily not be construed to do so." United States v. United Mine Workers of America, 330 U.S. 258, 275 (1947).

**2. Legislative History.**

"[T]he unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." U.S. v. Nordic Village, Inc., 112 S. Ct. 1011, 1016 (1992) (internal quotations omitted).

**3. Availability of Remedies Where Sovereign Immunity Is Not An Issue.**

Court reaffirmed "the long line of cases in which the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028, 1034 (1992).

**C. Stare Decisis.**

"In deciding whether to depart from a prior decision, one relevant consideration is whether the decision is 'unsound in principle.' * * * Another is whether is 'unworkable in practice.' * * * And, of course, reliance interests are of particular relevance because '[a]dherence to precedent promotes stability, predictability, and respect for judicial authority.'" Allied-Signal, Inc. v. Director, Div. of Taxation, 112 S. Ct. 2251, 2261 (1992)(citations omitted).

**III. PRINCIPLES OF STATUTORY CONSTRUCTION**

**A. The Priority of the Statutory Text and its Plain Meaning.**

"The starting point in statutory interpretation is 'the language [of the statute] itself.'" Ardestani v. INS, 112 S. Ct. 515, 519 (1991) (quoting United States v. James, 478 U.S. 597, 604 (1986).

"The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstance' * * * when a contrary legislative intent is clearly expressed." Ardestani v. INS, 112 S. Ct. 515, 519 (1991) (citations omitted).

"When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 (1991) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).

"In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2594 (1992).

"It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature." Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2598 (1992).

"We have stated time and again that courts must presume that a legislature says in a sttute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (citations omitted).

**B. The Determination of Statutory Meaning.**

**1. Ordinary Meaning of Words.**

"In construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." INS v. Elias-Zacarias, 112 S. Ct. 816 (1992) (quoting Richards v. United States, 369 U.S. 1 (1962)). Accord Ardestani v. United States, 112 S. Ct. 515, 520 (1991).

It is a "basic principle of statutory construction that words are ordinarily to be given their 'plain meaning.'" Palestine Information Office v. Shultz, 853 F.2d 932, 938 (D.C. Cir. 1988).

Although neither the statute nor the governing regulation defines

"reimbursement", it is well-established that "'words should be given their common and approved usage.'" United Scenic Artists v. NLRB, 762 F.2d 1027, 1032 n. 15 (D.C. Cir. 1985).

**2. Common Law Meaning; Previously-Established Meaning.**

"[A] statutory term is generally presumed to have its common-law meaning." Evans v. United States, 112 S. Ct. 1881, 1885 (1992).

"[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." Id. (quoting Morissette v. United States, 342 U.S. 246 (1952)); Molzof v. United States, 112 S. Ct. 711, 716 (1992) (quoting same).

**3. Statutory Context.**

"[T]he cardinal rule [is] that a statute is to be read as a whole, * * * since the meaning of statutory language, plain or not, depends on context." King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 (1991).

**4. Same Language Used In Different Provisions Of A Single Statute.**

"[I]dentical terms within an Act bear the same meaning." Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2596 (1992).

But see Dewsnup v. Timm, 112 S. Ct. 773, 778 (1992) (Court rejected the contention that "the words 'allowed secured claim' must take the same meaning in § 506(d) [of the Bankruptcy Code] as in § 506(a)").

"It is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission." Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 13 F.3d 398, 401 (Fed. Cir. 1994), citing Russello v. United States, 464 U.S. 16, 23 (1983).

**5. Significance of Title.**

"In other contexts, we have stated that the title of a statute or section can aid in resolving an ambiguity in the legislation's text." INS v. National Center for Immigrants' Rights, 112 S. Ct. 551, 556 (1991) (citations omitted).

**6. Significance of Verb Tense.**

"Congress' use of a verb tense is significant in construing statutes." United States v. Wilson, 112 S. Ct. 1351, 1354 (1992) (holding use of past tense in describing computation of credit for time served must occur after the defendant begins his sentence)

**7. Significance of "Shall" v. "May".**

Hecht Co. v. Bowles, 321 U.S. 321, 328-29 (1944).

United States v. Monsanto, 852 F.2d 1400, 1406 (2d Cir. 1988) (Winter, J., concurring).

**8. Significance of Punctuation.**

"Punctuation is a most fallible standard by which to interpret a writing." Ewing v. Burnet, 36 U.S. (11 Pet.) 41, 54 (1837).

"The presence or absence of a comma, according to the whim of the printer or proof reader, is so nearly fortuitous that it is a wholly unsafe aid to statutory interpretation." Erie R.R. v. United States, 240 F. 28, 32 (6th Cir. 1917).

**C. Presumptions and Rules of Clear Statement.**

**1. Presumption Favoring Changed Meaning After Amendment.**

Referring to the "canon of statutory construction requiring a change in language to be read, if possible, to have some effect." American National Red Cross v. S.G., 112 S. Ct. 2465, 2475 (1992).

Referring to, but distinguishing, the "familiar maxim that, when Congress alters the words of a statute, it must intend to change the statute's meaning." United States v. Wilson, 112 S. Ct. 1351, 1355 (1992).

**2. Presumption Against Departures From Prior Policies.**

"It is not lightly to be assumed that Congress intended to depart from a long established policy." United States v. Wilson, 112 S. Ct. 1351, 1355 (1992) (quoting Robertson v. Railroad Labor Board, 268 U.S. 619 (1925)).

"This Court has been reluctant to accept arguments that would interpret the [Bankruptcy] Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." Dewsnup v. Timm, 112 S. Ct. 773, 779 (1992).

**3. Presumption Against Implied Repeal Of Statutes.**

"'[R]epeals by implication are not favored.'" Randall v. Loftsgaarden, 478 U.S. 647, 661 (1986).

"Judges 'are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683, 692 (1992) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

**4. Presumption Against Preemption.**

"Consideration of issues arising under the Supremacy Clause 'start [s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Cippolone v. Liggett Group, Inc., 112 S. Ct. 2608, 2617 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (ellipses in original).

**5. Presumption Against Superfluous Language.**

"[C]ourts should disfavor interpretations of statutes that render language superfluous." Connecticut National Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (but note: presumption held not to apply to case). See also Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985).

McCuin v. Secretary of HHS, 817 F.2d 161, 168 (1st Cir. 1987); United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-52 (1st Cir. 1985).

**6. Clear Statements Required.**

"We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." Franklin v. Massachusetts, 112 S. Ct. 2767, 2775 (1992).

"Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed." United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1014 (1992) (internal quotation omitted).

For the difference between a presumption and a rule of clear statement, see Astoria Federal Savings and Loan Ass'n v. Solimino, 111 S. Ct. 2166, 2169-70 (1991).

**7. Presumption in favor of review of agency action.**

Presumption favoring judicial review of administrative action may be overcome by a consideration of the language, structure and legislative history of the statute and the nature of the administrative action involved. United States v. Fausto, 484 U.S. 439, 452 (1988); Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984).

**8. Exclusio Unius.**

"'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

**D. Use of Legislative History.**

"A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true, where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment -- that to which it gave rise as well as that which gave rise to it -- can yield its true meaning." United States v. Thompson/ Center Arms Co., 112 S. Ct. 2102, 2109 n.8 (1992) (plurality opinion of Souter, joined by Rehnquist & O'Connor) (quoting United States v. Monia, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting)).

Legislative history is "that last hope of lost interpretive causes,

that St. Jude of the hagiology of statutory construction." United States v. Thompson/Center Arms Co., 112 S. Ct. 2102, 2111 (1992) (opinion of Scalia, J. concurring, joined by Thomas).

"[A] court appropriately may refer to a statute's legislative history to resolve statutory ambiguity". Toibb v. Radloff, 111 S. Ct. 2197, 2200 (1991).

Patterson v. Shumate, 112 S. Ct. 2242, 2248 (1992) (same as Toibb).

The use of legislative history is akin to "looking over a crowd and picking out your friends." Judge Patricia M. Wald, Some Observations of the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983) (quoting Judge Harold B. Leventhal).

**E. Avoidance of Absurd Results.**

"[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

"[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

But see Public Citizen v. Department of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) ("The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.").

**F. Deference to Agency Interpretation.**

**1. Of statute.**

"Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law." National R.R. Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394, 1401 (1992).

"If the agency interpretation is not in conflict with the plain language of the statute, deference is due." Ibid.

Agency's interpretation of its duties under its own enabling legislation, as expressed in regulations, decisions, and practices, must be accorded great deference. Connecticut Dep't of Income Maint. v. Heckler, 471 U.S. 524, 532 (1985); Miller v. Youakin, 440 U.S. 125 (1979).

Even when an agency's pronouncements conflict with earlier interpretation, deference is appropriate where agency presents well-considered basis for new position. Robertson v. Mathew Valley Citizens Council, 109 S. Ct. 1835, 1848-49 (1989).

Agencies generally have discretion to interpret their governing statute either by adjudication or by rule-making. NLRB v. Bell Aerospace, 416 U.S. 267, 294 (19 ).

It is "hornbook law that the regulatory interpretation of a statute by the agency charged with administering it must be given great deference." Monongahela Valley Hosp. v. Sullivan, 945 F.2d 576, 591 (3d Cir. 1991) (collecting Supreme Court authority).

Unless Congress "'has directly spoken to the precise question at issue'" in the statute, "'the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" Sacred Heart Medical Ctr. v. Sullivan, 958 F.2d 537, 544 (3d Cir. 1992) (quoting Chevron U.S.A. v. NRDC, 467 U.S. 837, 842-43 (1984)).

**2. Of agency regulations.**

Unless the agency's interpretation of its own regulations violates the Constitution or a controlling statute, "it must be given' controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Stinson v. United States, 113 S. Ct. 1913, 1919 (1993) (collecting numerous authorities) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 1945)).

"It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.'" Martin v. Occupational Safety & Health Review Comm'n, 111 S. Ct. 1171, 1175 (1991) (quoting Lyng v. Payne, 476 U.S. 926, 939 (1986)).

See also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989); First Nat'l Bank of Lexington v. Sanders, 946 F.2d 1185, 1190 (6th Cir. 1991); United States v. City of Painesville, Ohio, 644 F.2d 1186, 1190 (6th Cir.), cert. denied, 454 U.S. 894 (1981); Compton v. Tennessee Dep't of Pub. Welfare, 532 F.2d 561, 565 (6th Cir. 1976); Monongahela Valley Hosp. v. Sullivan, 945 F.2d 576, 591 (3d Cir. 1991); Director, OWCP

v. Mangifest, 826 F.2d 1318, 1323 (3d Cir. 1987).

**G. Congressional Acquiescence.**

"It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974) (footnotes omitted)).

"[A]n agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation * * * ." Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 45 (1983) (citing Bob Jones Univ. v. United States, 461 U. S. 574, 599-602 (1983)). See also Haig v. Agee, 453 U.S. 280, 291-300 (1981); Red Lion broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (noting traditional deference to agency construction of a statute "especially when Congress has refused to alter the administrative construction") (citing additional cases in n.10).

**H. Judicial Notice.**

"The contents of the Federal Register shall be judicially noticed * * *." 44 U.S.C. 1507.

**I. Statutory Invalidation.**

Invalidation of a federal statute is "the gravest and most delicate task" faced by a federal court. Blodgett v. Holden, 275 U.S. 142, 148 (1927).

**J. Statutory Scope.**

"Knowing that Congress meant to be generous with mine operators' money does not tell us how generous. Legislative history frequently points in a direction, but to carry out the statute we must identify not only the direction but also the distance. '[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.' Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original)." Freeman United Coal Mining Co.

v. OWCP, No. 92-1992 (7th Cir. Aug. 4, 1993) (statement of Easterbrook, J., on denial of rehearing).

**1. Whether statute creates a cause of action not jurisdictional.**

"The question whether a federal statute creates a claim for relief is not jurisdictional." Northwest Airlines, Inc., 114 S. Ct. 855, 862 (1994) (citations omitted).

**K. Meta-canons.**

"We will presume congressional understanding of * * * interpretive principles." King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 n.9 (1991).

"Canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. * * * [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it ways there." Connecticut National Bank v. Germain, 112 S. Ct. 1146, 1149 (1992).

"Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context." National R.R. Passenger Corp., 112 S. Ct. at 1402.

"The existence of alternative dictionary definitions of the [statutory language], each making some sense under the statute, itself indicates that the statute is open to interpretation." National R.R. Passenger Corp., 112 S. Ct. at 1402.

"[W]e cannot conclude that because there might be a better way to write the statute, the statute as it exists is irrational." Anetekhai v. INS, 876 F.2d 1218, 1224 (5th Cir. 1989).

**IV. PRINCIPLES OF SUPREME COURT PRACTICE**

**A. Reasons for Granting Certiorari**

**B. Reasons for Denying Certiorari**

**1. Decision Would In Effect Be Advisory Opinion**

"While [the] Court decides questions of public importance, it

decides them in the context of meaningful litigation." The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). It does not exercise jurisdiction to resolve questions in situations where its decision "would in effect be merely an advisory opinion on a delicate subject". Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 620 (1950).

**C. Argument not Included in Question on Which Certiorari Was Granted.**

Supreme Court will not consider a claim not raised or addressed below or a claim not included in the question on which it granted certiorari. Yee v. City of Escondido, (S. Ct. No. 90-1947, decided 4/1/92), 60 USLW 4301.

**D. Deference to Lower Courts**

**1. Matters of State Law**

Generally, the Supreme Court accepts the determination of local law by the courts of appeals, and this deference "generally render[s] unnecessary review of their decisions in this respect." Cort v. Ash, 422 U. S. 66, 73 n.6 (1975). See also Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499-500 & n.9 (1985); Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 462 (1967).

**IV. MISCELLANEOUS**

**A. Proof of Damages.**

"Although uncertainty created by wrongful acts does not insulate the wrongdoer from liability, 'people who want damages have to prove them, using methodologies that need not be intellectually sophisticated but must not insult the intelligence.'" Zazu Designs v. L'Oreal, No. 91-2842, slip op. (7th Cir. Nov. 2, 1992) (quoting Schiller & Schmidt Inc. v. Nordisco Corp., 969 F.2d 410, 415 (7th Cir. 1992).

**B. Res Judicata/Collateral Estoppel.**

"[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980).

"[R]es judicata bars all claims that could have been advanced in support of a previously adjudicated cause of action, and that 'one who has

a choice of more than one remedy for a given wrong * * * may not assert them serially, in successive actions, but must advance all at once on pain of bar.'" Mills v. Des Arc Convalescent Home, 872 F.2d 823, 826 (8th Cir. 1989), quoting Nilsen v. City of Moss Point, 701 F.2d 556, 560 (5th Cir. 1983) (en banc).

**1. Mutuality of Parties No Longer Required.**

"[T]his Court in recent years has broadened the scope of the doctrine of collateral estoppel beyond its common-law limits. * * * It has done so by abandoning the requirement of mutuality of parties, * * * and by conditionally approving the 'offensive' use of collateral estoppel by a nonparty to a prior lawsuit." United States v. Mendoza, 464 U.S. 154, 158-59 (1984) (citations omitted).

**2. Exception for Litigation Against the Government.**

"We have long recognized that 'the Government is not in a position identical to that of a private litigant,' INS v. Hibi, 414 U.S. 5, 8 (1973) (per curiam), both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates. * * * A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." United States v. Mendoza, 464 U.S. 154, 159-60 (1984) (citation omitted).

**C. Timeliness.**

**1. Excusable Neglect**

The Supreme Court rejected a narrow construction of the term "excusable neglect" and adopted a flexible balancing test:

Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include * * * the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Ptrsp., 61 U.S.L.W. 4263, 4267-4268 (U.S. Mar. 24, 1993) (footnote omitted). The Court added, however, that clients must "be held accountable for the acts and omissions of their chosen counsel." Id. at 4268.

**D. "Magic Words."**

"Opinions are not bond indentures. * * * Judges become weary of the endless repetition of the same formulas, and they have the liberty to omit a word or two in a sentence without causing avulsive changes in the law." Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1428 (7th Cir. 1985), cert. denied, 475 U.S. 1147 (1986) (citations omitted).