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Peter B. Rutledge

University of Georgia Law School, borut@uga.edu

Nicole L. Angarella

Catholic University of America School of Law



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AN END OF TERM EXAM: OCTOBER TERM 2003 AT THE SUPREME COURT OF THE UNITED STATES

Peter Bowman Rutledge^{} and Nicole L. Angarella^{**}*

Law reviews enjoy a rich tradition of publishing scholarship that analyzes the activities at the Supreme Court of the United States.¹ Some journals publish scholarship or host symposia on the Court's jurisprudence in a particular area.² Others adopt the "Dagnet" approach and provide "just the facts" about a particular year's docket. Some employ a "macro-economic" approach and identify various trends in the docket and the justices' voting and opinion-writing patterns.³ Yet others seek to blend the various approaches.

The *Catholic University Law Review* is ideally positioned to contribute to this rich tradition. From its vantage point in the Nation's capital, the Law School is privy to the developments at the Court. The Law School has regularly hosted a variety of guests active at the Court, ranging from

^{*} Assistant Professor of Law, Catholic University of America, Columbus School of Law. This Article is an adaptation of speeches that I previously delivered to the Board of Visitors of the Catholic University of America, Columbus School of Law and the D.C. Chapter of the Law School's alumni association. I would like to thank Dean William F. Fox of the Columbus School of Law for supporting this research through the Dean's Research Grant program. Holly Kuebler and Katherine Plemmons provided excellent research assistance. Steve Young, one of the Law School's reference librarians, provided invaluable support tracking down sources. In the interest of full disclosure, I worked closely with counsel for the respondent in *Missouri v. Seibert* and participated in moot courts for counsel for respondent in *Rumsfeld v. Padilla* and *United States v. Banks*.

^{**} J.D. Candidate, May 2006, The Catholic University of America, Columbus School of Law.

1. Some examples of this scholarship include *Harvard Law Review's* November issues, e.g., *The Supreme Court, 2002 Term*, 117 HARV. L. REV. 1 (2003), *Touro Law Review's* fall issues, e.g., Symposium, *The Fourteenth Annual Supreme Court Review*, 19 TOURO L. REV. 1 (2002), *Tulsa Law Review's* fall issues, e.g., Symposium, *2000-2001 Supreme Court Review*, 37 TULSA L. REV. 1 (2001), the Cato Institute's Supreme Court Review, e.g., Symposium, *The Constitution at War, 2003-2004* CATO SUP. CT. REV. 23, and other Supreme Court updates, e.g., Erwin Chemerinsky, *Supreme Court Update*, 31 N.M. L. REV. 31 (2001).

2. See Joel Gora, *First Amendment Decisions-2002 Term*, 20 TOURO L. REV. 251, 251-52 (2003) (focusing on First amendment decisions from the prior Term); Marla E. Mansfield, *By the Dawn's Early Light: The Administrative State Still Stands After the 2000 Term (Commerce Clause, Delegation, and Takings)*, 37 TULSA L. REV. 205, 205-07 (2001) (focusing on environmental law).

3. E.g., *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 543 tbl. I(C)-(D) (2001) [hereinafter *2000 Leading Cases*] (illustrating patterns of voting between the different justices).

Supreme Court justices, to employees in the Clerk's office, to seasoned Supreme Court advocates. Finally, the *Law Review* has a strong tradition of publishing scholarship about the Supreme Court.⁴

In light of this special role played by The Catholic University of America, Columbus School of Law and its *Law Review*, it is a great honor to be able to contribute to this tradition of scholarship. The goal of this Essay is to provide a resource of digestible proportions that any Court watcher (judge, lawyer, professor, student) can use to inform himself or herself about current developments at the Court. While the Essay discusses how the current Term compares to past ones, it does not do so simply as an exercise in dry social science. Instead, it highlights those trends of interest to both the scholar and the practitioner. Likewise, while the Essay discusses particular cases, it does not simply summarize facts and holdings. Instead, it places those doctrinal developments in a larger context, analyzes them, and critiques them.

This Essay proceeds in two parts. The first part provides the broad overview of October Term 2003. It analyzes current statistics in the size and composition of the Court's caseload and compares those figures to past terms. It also considers the justices' voting patterns and which justices proved to be the "swing" votes, both generally and in particular fields. The second part focuses on the key cases of the Term. It addresses both what the Court decided and what it failed to decide. It critiques those decisions and considers their implications for future doctrinal developments. The Court Consensus offers some closing lessons to be drawn from the Term.

I. MACRO-ECONOMIC TRENDS

This Section proceeds in two parts. First, it considers the Court's docket and compares it to prior years. Second, it analyzes the current and historical voting patterns among the justices.

A. Docket

The first noteworthy trend in this year's docket is the Court's lean diet of cases. This Term, the Court decided seventy-three cases after argument.⁵ This figure tracks the steady reduction in the Court's

4. See David P. Currie, *The Constitution in the Supreme Court: The Second World War, 1941-1946*, 37 CATH. L. REV. 1 (1987), Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. L. REV. 529 (1984), and Mark Villaneuva, Note, *Hill v. Colorado: The Supreme Court's Deviation from Traditional First Amendment Jurisprudence to Silence the Message of Abortion Protestors*, 51 CATH. L. REV. 317 (2001), for examples of *Catholic University Law Review* articles evaluating the Supreme Court.

5. See *infra* app. 1.

caseload that Court-watchers have witnessed over the past decade.⁶ As a point of comparison, in October Term 1992, the Court decided 107 cases after argument⁷—a nearly thirty percent decline in cases decided after argument. This Term, however, equals the nadir in the Court's docket in October Term 2002, when the Court decided a mere seventy-three cases after argument.⁸ Data on the number of cases decided after argument appears in Appendix 1.

A second noteworthy trend in this year's docket is the source of cases for the Court's docket, summarized at Appendix 2.⁹ Cases from the Ninth Circuit made up nearly one-third of the Court's argument docket this Term.¹⁰ This was the largest by several multiples; the Sixth Circuit came in a distant second, contributing a mere nine cases to the Court's docket.¹¹ The number of cases from the Ninth Circuit exceeded, also by several multiples, the Court's entire certiorari docket from the fifty state supreme courts.¹² This figure is consistent with the data for the prior six terms, which are summarized at Appendix 3.¹³ In each of those terms, the Ninth Circuit supplied, by far, the largest percentage of cases on the Court's docket.¹⁴

Noteworthy about this year's figure, however, is the sheer number of cases. The twenty-five cases decided on certiorari from the Ninth Circuit this year represents the largest number in the last several terms.¹⁵ While the Ninth Circuit contributed a comparably large number of cases last term (and a higher percentage relative to the size of the docket), one sees a growing trend in the size of the Court's docket consisting of Ninth Circuit cases.¹⁶ By contrast, prior to October Term 2002, the Ninth Circuit was contributing anywhere from ten cases on the low end to eighteen cases on the high end.¹⁷

6. See *infra* app. 1. For the history of the Court's calendar, see Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 185-203 (2004), WL 36 AZSLJ 183.

7. See *infra* app. 1.

8. See *infra* app. 1.

9. See *infra* app. 2.

10. See *infra* app. 2.

11. See *infra* app. 2.

12. See *infra* app. 2.

13. See *infra* app. 3.

14. See *infra* app. 3.

15. Compare *infra* app. 2 (illustrating Ninth Circuit statistics for the current Term), with *infra* app. 3 (illustrating Ninth Circuit statistics for previous terms).

16. Compare *infra* app. 2, with *infra* app. 3.

17. See *infra* app. 3.

If the Ninth Circuit was the frequent filer, then several other circuits were nary to be seen in the Court this year. Remarkably, the Court of Appeals for the First Circuit contributed no cases to the Court's docket this year (typically, one or two federal appellate courts contribute no cases to the Court's docket).¹⁸ With the exception of the Fifth and Sixth Circuits, most other courts contributed on average approximately three to four cases to the Court's docket, a low average relative to prior years with the exception of October Term 2002.¹⁹

Not only was the Ninth Circuit king of the docket generally, it also led the way in reversals.²⁰ Of the twenty-five cases coming from the Ninth Circuit, the Court reversed a whopping nineteen.²¹ This too is more than double the absolute number of reversals for the next highest court (the Sixth Circuit with seven reversals).²² While the Ninth Circuit reigned supreme in absolute numbers, it also had the highest number of affirmances (six)—again several multiples higher than any other court (no doubt, however, due to the number of its cases headed to the Supreme Court).²³ As a consequence, the Ninth Circuit had a relatively low reversal rate of seventy-six percent.²⁴ This actually represents a slight improvement for the Ninth Circuit which, in prior terms, has had reversal rates as high as ninety percent.²⁵ Several other courts had higher reversal rates this term, including the Second, Fifth, Tenth, Eleventh, and D.C. Circuits with 100% reversal rates.²⁶ By contrast, the Fourth and the Seventh Circuits fared best, with only a single reversal earlier this Term.²⁷ This is consistent with their performance in prior terms, as summarized in Appendix 3.²⁸

A third noteworthy trend in this year's docket is the type of case that the Court took. By several multiples, the Court took more criminal cases than any other category.²⁹ Of the seventy-five cases decided after argument, twenty-five qualify as criminal.³⁰ The next largest categories were international (eight), environmental (six), and First Amendment

18. *See infra* app. 2.

19. *See infra* app. 2 (current Term); *infra* app. 3 (prior terms).

20. *See infra* app. 2.

21. *See infra* app. 2.

22. *See infra* app. 2.

23. *See infra* app. 2.

24. *See infra* app. 2.

25. *See infra* app. 3.

26. *See infra* app. 2.

27. *See infra* app. 2.

28. *See infra* app. 3.

29. *See infra* app. 4 (categorizing the Court's cases for the 2003 Term and illustrating the number of criminal cases).

30. *See infra* app. 4.

(five).³¹ Admittedly, the categorization is a subjective one. Lumping all “criminal” cases together arguably overstates their size on the docket. One might equally argue that the appropriate reference point should be the number of “civil” cases, in which case they surely would outstrip the sheer number of criminal cases. Appendix 4 breaks down the docket by category.³²

But even if the criminal cases were broken down further, the Court clearly demonstrates a penchant for them. For example, the Court took six Fourth Amendment cases this year.³³ It also took, again depending on the methodology, three or four cases that required it to develop significant law in the *Miranda* doctrine.³⁴ Thus, however one slices them, criminal cases clearly constituted a significant share of the Court’s caseload this Term.

B. Voting

When one moves from the docket to voting patterns, several results are striking. For one thing, despite the high publicity given to the Court’s closely divided rulings on contested matters, the Court continues to display a remarkable harmony and unanimity. The Court decided eighteen cases unanimously on topics ranging from Fourth Amendment law to sovereign immunity law.³⁵ It also decided an additional sixteen cases by a 9-0 vote (distinct from unanimous cases by one or more justices writing a separate concurrence).³⁶ In both absolute and relative terms, this marks a slight decline over cases decided without a split vote.³⁷ By contrast, last term (when the docket was smaller), the Court decided thirty cases unanimously and five more by a 9-0 vote on the disposition.³⁸

As unanimity on the Court fell over last year, the number of closely divided cases grew in absolute terms.³⁹ This Term, the Court decided

31. See *infra* app. 4.

32. See *infra* app. 4.

33. See *infra* app. 4 (showing the number of Fourth Amendment cases in the criminal category).

34. See *Missouri v. Seibert*, 124 S. Ct. 2601, 2603 (2004); *United States v. Patane*, 124 S. Ct. 2620, 2622 (2004); *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2144 (2004); *Fellers v. United States*, 124 S. Ct. 1019, 1020-21 (2004).

35. See *infra* app. 4 (referencing the breakdown of votes for each decision in the 2003 Term).

36. See *infra* app. 4 (listing the cases decided by a 9-0 vote).

37. *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 484 tbl. I(C) (2003) [hereinafter *2002 Leading Cases*].

38. *Id.*

39. Compare *infra* app. 4 (showing 5-4 decisions for the current Term), with Charles Lane, *Courting O’Connor; Why the Chief Justice Isn’t the Chief Justice*, WASH. POST, July 4, 2004, at W10 (stating the number of 5-4 decisions in the previous Term).

seventeen cases by a 5-4 vote.⁴⁰ By contrast, the Court decided a mere fourteen cases by a 5-4 vote last year.⁴¹ In absolute terms, the data reflect a short-term increase in the number of close cases over last year, but this year's figure simply brings the Court into line with the pattern during the October Terms 1999-2001 when the number of 5-4 decisions hovered in the high-teens to mid-twenties.⁴² In relative terms, this year's figure actually represents a slight decline in the number of 5-4 cases as a percentage of the docket, seventy-three percent.⁴³ One need go back to October Term 1997 and preceding terms to find a time when the number of 5-4 cases comprised such a low percentage of the Court's docket.⁴⁴

Of particular note in the 5-4 decisions are the voting alliances. The media regularly reports on the "conservative bloc" consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas.⁴⁵ As in prior years, the bloc was by far the dominant one in 5-4 decisions.⁴⁶ It was the controlling majority in eight cases, a slight uptick from last term but lower than the several preceding terms.⁴⁷ The next most powerful coalition in 5-4 cases consisted of the so-called liberal bloc (Stevens, Souter, Ginsburg, and Breyer) joined by Justice O'Connor, which held sway six times.⁴⁸ In total there were five different alliances this term in 5-4 cases. This marks a decline over prior terms when the number of different alliances in 5-4 cases varied from a low of six to a high of nine.⁴⁹

As the foregoing data suggest, certain justices are most and least likely to be in the majority in close cases. Justice O'Connor continued to be the swing vote in close cases.⁵⁰ In fact, in the 5-4 cases before the Court, she joined the majority in all but four.⁵¹ This is consistent with past

40. See *infra* app. 4.

41. See *2002 Leading Cases*, *supra* note 37, at 485 tbl. (I)(E).

42. *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 390, 395 tbl. I(E) (2000) (showing comparable statistics for the 1999 Term) [hereinafter *1999 Leading Cases*]; *2000 Leading Cases*, *supra* note 3, at 544 tbl. I(E) (illustrating the breakdown of 5-4 decisions for the 2000 Term).

43. See *infra* app. 4.

44. *The Supreme Court, 1997 Term—Statistics*, 112 HARV. L. REV. 122, 371 tbl. I(E) [hereinafter *1997 Leading Cases*] (1998).

45. E.g., Lane, *supra* note 39.

46. See *2002 Leading Cases*, *supra* note 37, at 485 tbl. I(E).

47. *2000 Leading Cases*, *supra* note 3, at 544 tbl. I(E); *2002 Leading Cases*, *supra* note 37, at 485 tbl. I(E).

48. See Lane, *supra* note 39; *cf. infra* app. 5.

49. *The Supreme Court, 1994 Term—Leading Cases*, 109 HARV. L. REV. 135, 343 tbl. I(D) (1995) [hereinafter *1994 Leading Cases*]; *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 200, 405 tbl. I(E) (1999) [hereinafter *1998 Leading Cases*].

50. See Lane, *supra* note 39.

51. Marcia Coyle, *Flexing Muscle and Wisdom*, NAT'L L.J., Aug. 2, 2004, at 51.

terms.⁵² In fact, for every term since October Term 1998, Justice O'Connor was most frequently in the majority in 5-4 decisions⁵³ (interestingly, for the five terms preceding October Term 1998, Justice Kennedy held this honor every term).⁵⁴ While Justice O'Connor was most frequently in the majority in 5-4 cases, Justice Breyer was least frequently in the majority in such cases this Term, an honor he has held three terms previously since he joined the Court.⁵⁵

Voting patterns across the range of cases, not limited to 5-4 decisions, reflect a similar trend. Justice O'Connor led her brethren in being in the majority most frequently in cases this Term—joining the Court sixty-six times.⁵⁶ Unlike her dominance in 5-4 cases, Justice O'Connor has not consistently held this honor across the entire docket historically.⁵⁷ In prior terms, both Justice Kennedy and, surprisingly, the Chief Justice have held (or shared) the honor of most frequently joining the majority or agreeing in the disposition.⁵⁸ On the other end of the spectrum, Justice Scalia was least frequently in the majority—joining the Court only fifty-six times.⁵⁹ In the past several terms, Justice Stevens generally has held this title, though Justices Scalia and Thomas occasionally have held it as well.⁶⁰

Another interesting cut at the data is to consider voting affinities between the justices (the rate at which they agree on the disposition in the case), summarized in Appendix 5. Some affinities track popular reporting—the most common alliances are Scalia-Thomas and Souter-Ginsburg.⁶¹ In each case, the bloc voted together 90.3% of the time—a slight upswing for the Scalia-Thomas bloc but consistent with prior years

52. *Id.*

53. *Id.*

54. See *The Supreme Court, 1993 Term—Leading Cases*, 112 HARV. L. REV. 139, 371 tbl. I(E); *1994 Leading Cases*, *supra* note 49, at 405 tbls. I(C)-(D); *The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 135, 370 tbl. I(D); *The Supreme Court, 1996 Term—Leading Cases*, 197, 434 tbl. I(D); *1997 Leading Cases*, *supra* note 44.

55. See *1998 Leading Cases*, *supra* note 49, at 434 tbl. I(E); *1999 Leading Cases*, *supra* note 42; *2000 Leading Cases*, *supra* note 3, at 544 tbl. I(E). In the 2000 Term, Justice Stevens shared this honor with Justice Breyer. *Id.*

56. See generally *infra* app. 4.

57. See *2000 Leading Cases*, *supra* note 3, at 394 tbls. I(C)-(D); *2002 Leading Cases*, *supra* note 37, at 484 tbls. I(C)-(D).

58. See *2000 Leading Cases*, *supra* note 3, at 394 tbls. I(C)-(D) (Justice Kennedy); *2002 Leading Cases*, *supra* note 37, at 484 tbls. I(C)-(D) (Justice Rehnquist).

59. See generally *infra* app. 4.

60. See *1997 Leading Cases*, *supra* note 44, at 370 tbls. I(C)-(D) (Justice Scalia); *2000 Leading Cases*, *supra* note 3, at 394 tbls. I(C)-(D) (Justice Stevens); *2002 Leading Cases*, *supra* note 37, at 484 tbls. I(C)-(D) (Justice Thomas).

61. See *infra* app. 5.

for the Souter-Ginsburg bloc.⁶² Other data, however, reveal some surprising and less well-known affinities. For example, this Term, Justices O'Connor and Breyer represented the next highest affinity (89.9%)⁶³ followed by Chief Justice Rehnquist and Justice Kennedy (89.0%).⁶⁴ The O'Connor-Breyer bloc represents an important break from past terms (where they tended to vote together 70-75% of the time).⁶⁵ The Rehnquist-Kennedy bloc has been a more consistent one, though their affinity this Term is one of the highest in the past decades (only in October Term 2000 and October Term 1997 did they vote together more frequently).⁶⁶

On the other side of the scale, certain blocs of justices voted together least frequently. This Term, the most unlikely alliance was a Stevens-Scalia bloc.⁶⁷ These two justices only agreed in the disposition 55.6% of the time.⁶⁸ Other low-affinity rates include Thomas-Breyer (59.2%),⁶⁹ Scalia-Breyer (60.0%),⁷⁰ and Stevens-Thomas (60.3%).⁷¹ This is consistent with past terms where Justice Thomas has had low affinities with Justices Stevens, Souter, and Breyer and where Justice Breyer has had a low affinity with Justice Scalia as well.⁷²

Finally, as an original contribution to the scholarship, we also considered voting affinities across various topic matters of cases to see whether the general alliances revealed any more subtle trends. Appendix 6 summarizes the results. For example, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas agreed in the disposition of every criminal case this term except one (*Blakely*).⁷³ The justices displayed a great deal of harmony in several areas of criminal law (Fourth Amendment and Sixth Amendment), but deep divides showed in others (Fifth Amendment and death penalty).⁷⁴

Similar interesting alliances emerged in the civil area. For example, two blocs of justices formed around the disposition of First Amendment

62. See *infra* app. 5.

63. See *infra* app. 5.

64. See *infra* app. 5.

65. See, e.g., 2002 *Leading Cases*, *supra* note 37, at 481 tbl. I(B1).

66. See 1998 *Leading Cases*, *supra* note 49, at 367 tbl. I(B1); 2000 *Leading Cases*, *supra* note 3, at 540 tbl. I(B1).

67. See *infra* app. 5.

68. See *infra* app. 5.

69. See *infra* app. 5.

70. See *infra* app. 5.

71. See *infra* app. 5.

72. See 1998 *Leading Cases*, *supra* note 49, at 367 tbl. I(B1); 2002 *Leading Cases*, *supra* note 37, at 484 tbl. I(B1).

73. See *infra* app. 6.

74. See *infra* app. 6.

cases, Rehnquist-O'Connor-Breyer and Stevens-Souter-Ginsburg, allowing Justices Scalia, Kennedy, and Thomas to be the swing votes.⁷⁵ Each of these blocs voted together 100% of the time in the disposition of First Amendment cases.⁷⁶ Sovereign immunity cases departed interestingly from prior terms—with Justice O'Connor voting with the *Seminole Tribe v. Florida*⁷⁷ dissenters in all of the sovereign immunity cases this Term.⁷⁸ In the environmental area, two interesting blocs emerged as well, Rehnquist-Scalia-Kennedy-Thomas and Stevens-Ginsburg-Breyer, each of which agreed in the disposition in 100% of the cases—allowing Justices Ginsburg and Souter to be the swing votes.⁷⁹ The Court appeared to divide into three blocs in civil procedure cases, a Rehnquist-Kennedy bloc, a Scalia-Thomas bloc and a Stevens-Souter-Ginsburg-Breyer bloc—setting the stage for Justice O'Connor to be the swing vote.⁸⁰

One of the most interesting cuts at the topical alliances came in the international area. This area covered a wide swath of cases, ranging from the enemy combatant cases to the Alien Tort Statute cases.⁸¹ Here, the two strongest blocs were Rehnquist-Kennedy-Thomas and Stevens-Souter-Ginsburg.⁸² This meant that, for a party to prevail, they had to pick up two votes from among the O'Connor-Scalia-Breyer cluster. The results in the international cases, as described below, generally bear out this trend.

This Section has reviewed both the docket and the voting alliances along various axes. The next Section focuses the microscope on the particular cases before the Court.

II. MICRO-ECONOMIC TRENDS

This Section summarizes and critiques the major decisions from the Term. It begins with the criminal cases then works to the civil ones.

75. See *infra* app. 6.

76. See *infra* app. 6.

77. 517 U.S. 44, 76 (1996).

78. See *infra* app. 6.

79. See *infra* app. 6.

80. See *infra* app. 6.

81. See *infra* app. 4.

82. See *infra* app. 6.

*Criminal Law and Criminal Procedure**Fourth Amendment*

Thornton v. United States

*Thornton v. United States*⁸³ finally provided the Supreme Court a vehicle by which to address a lingering question about the search incident to arrest doctrine—namely, does the *Belton* rule (allowing warrantless suspicionless searches of the passenger compartment of an automobile in connection with a valid arrest)⁸⁴—apply in cases where the first contact between a defendant and law enforcement officials occurs after the defendant has left the vehicle.⁸⁵

In Thornton's case, a Norfolk police officer observed him driving erratically and, after running the tags on Thornton's car, ascertained that they had been issued to a car other than the one that Thornton was driving.⁸⁶ Before the officer could pull him over, a perhaps crafty Thornton pulled into a parking lot and exited the automobile.⁸⁷ After obtaining Thornton's consent, the officer patted him down and discovered what later proved to be illegal narcotics.⁸⁸ The officer then handcuffed petitioner, informed him that he was under arrest, placed him in his cruiser, searched Thornton's car, and discovered a handgun under the driver's seat.⁸⁹ At his trial on drug and firearms charges, the district court denied Thornton's motion to suppress the firearm, and the Fourth Circuit affirmed.⁹⁰

In an opinion by Chief Justice Rehnquist, the Supreme Court affirmed but divided badly on the reasoning.⁹¹ In order to appreciate the Supreme Court's opinion, it is important to understand the parties' arguments. Thornton's counsel, the able Frank Dunham, Federal Public Defender for the Eastern District of Virginia (and a CUA alum), argued for the "contact initiation rule"—which would limit *Belton* to cases where the

83. 124 S. Ct. 2127 (2004).

84. *New York v. Belton*, 453 U.S. 454, 460 (1981).

85. *Thornton*, 124 S. Ct. at 2129. In two prior cases, the Court had granted certiorari to resolve this question but disposed of the case before reaching the merits. *Arizona v. Gant*, 124 S. Ct. 461 (2003) (mem.) (remanding for reconsideration in light of intervening decision of the Arizona Supreme Court in *State v. Dean*, 76 P.3d 429 (Ariz. 2003)); *Florida v. Thomas*, 532 U.S. 774, 776 (2001) (dismissing for lack of jurisdiction).

86. *Thornton*, 124 S. Ct. at 2129.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 2129-30.

91. *Compare id.* at 2132 n.4, *with id.* at 2133 (Scalia, J., concurring in the judgment).

officer had initiated contact with the suspect while he was still in the car.⁹² In contrast, the United States argued that *Belton* extended to “occupants” and “recent occupants” of automobiles, the latter category being defined by the recent occupant’s “temporal” and “spatial” relationship to the automobile.⁹³

The five justices in the majority (Rehnquist, O’Connor, Kennedy, Thomas, and Breyer) rejected Thornton’s argument but did not quite embrace the Government’s position.⁹⁴ The majority held that Thornton’s “contact initiation” rule was untenable because it forced police officers to “gamble” that the suspect might destroy evidence or threaten their safety and because it severely undermined the bright line value of *Belton*.⁹⁵ But the majority did not embrace the Government’s attempt to abstract criteria for how close a “recent occupant” must be to an automobile for the *Belton* rule to apply.⁹⁶ Instead, the majority concluded, somewhat unhelpfully, that “[s]o long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.”⁹⁷ In other words, the *Belton* rule extends to “recent occupants” in the same shoes as Thornton but not necessarily to anyone else. Therefore, the *Belton* rule extends beyond occupants at the time of contact, but the majority opinion leaves unclear how far this extends.

While *Thornton*’s precise holding might be narrowly construed, the reader should not be deceived about what was (and remains) at stake in these cases. The three separate opinions make this far clearer. In her concurrence, Justice O’Connor agreed with the Chief Justice but expressed misgivings about the “state of the law” under *Belton*.⁹⁸ While disinclined to show her hand, Justice O’Connor clearly signaled her willingness to reconsider *Belton* in the proper case. She declined to do so here, only because, according to her, the parties had not briefed the issue.⁹⁹

92. Brief for Petitioner at 29-30, 35, *Thornton* (No. 03-5165). Dunham argued in the alternative that the Court should limit the *Belton* rule to those defendants who are within “reaching distance” of the automobile. *Id.* at 35. The majority declined to address this alternative rule, finding it beyond the scope of the question presented in the petition for a writ of certiorari. *Thornton*, 124 S. Ct. at 2132 n.2.

93. Brief for the United States at 5-6, 9, 14, *Thornton* (No. 03-5165).

94. *Thornton*, 124 S. Ct. at 2132-33.

95. *Id.* at 2131.

96. *Id.* at 2132.

97. *Id.*

98. *Id.* at 2133 (O’Connor, J., concurring in part).

99. *Id.* (O’Connor, J., concurring in part).

Justice Scalia, joined by Justice Ginsburg, concurred in the judgment and took a far bolder approach.¹⁰⁰ Unphased by technical arguments about what was within the scope of the certiorari petition, the erstwhile D.C. Circuit judges and occasional opera singers were prepared to jettison the *Belton* rule in its entirety.¹⁰¹ In their view, the underlying safety rationale for *Belton* was indefensible, and the cases had strayed far from the history that underpinned searches of this sort.¹⁰² In place of *Belton*'s bright line rule, these Justices proposed limiting the doctrine "to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."¹⁰³ Despite articulating a new standard, Justices Scalia and Ginsburg concurred in the judgment because in their view, under this new standard, it was reasonable for the Norfolk officer to believe that evidence relevant to Thornton's crime of arrest (narcotics possession) might be found in the vehicle.¹⁰⁴

Finally, Justice Stevens, joined by Justice Souter, dissented.¹⁰⁵ The dissent hewed to the view previously expressed by Justice Stevens that the *Belton* rule should be narrowly construed to apply to searching the passenger compartment of an automobile where the suspects are arrested while in the automobile.¹⁰⁶ Justice Stevens previously expressed his disagreement to extend *Belton* to searches of closed containers in the automobile.¹⁰⁷ He found the majority's rule in this case yet a further expansion of *Belton*, unmoored from its narrow origins and sure to trigger a "massive broadening" of rules permitting warrantless searches of automobiles.¹⁰⁸

Thornton warrants two observations. First, the Court went out of its way to construe the question presented narrowly in order to avoid a host of legal issues that, as Justice Scalia accurately observed, were fairly subsumed within that question.¹⁰⁹ Second, though the judgment nominally represented a victory for the Government, close readers will

100. *Id.* at 2133-34, 2137-38 (Scalia, J., concurring in the judgment).

101. *Id.* at 2137-38 (Scalia, J., concurring in the judgment).

102. *Id.* at 2135 (Scalia, J., concurring in the judgment).

103. *Id.* at 2137 (Scalia, J., concurring in the judgment).

104. *Id.* at 2137-38 (Scalia, J., concurring in the judgment).

105. *Id.* at 2138 (Stevens, J., dissenting).

106. *Id.* at 2138-39 (Stevens, J., dissenting).

107. *Id.* (Stevens, J., dissenting).

108. *Id.* at 2140 (Stevens, J., dissenting).

109. The Court rephrased the question presented, although their definition more closely resembled the petitioner's. The petitioner asked whether *Belton* authorizes a warrantless search of a car when the arrestee was not in the car when the police initiated contact. Brief for Petitioner at 1, *Thornton* (No. 03-5165). The Court instead considered whether *Belton* applies when the officer makes first contact with the arrestee after the arrestee has stepped out of the vehicle. *Thornton*, 124 S. Ct. at 2129.

realize that the opinions send a shot across the Government's bow about its use (and possible abuse) of the *Belton* rule. While four justices (Rehnquist, Kennedy, Thomas, and Breyer) appear willing to maintain the *Belton* rule,¹¹⁰ two justices (Scalia and Ginsburg) have declared their willingness to overrule it,¹¹¹ a third (O'Connor) has expressed doubts about it,¹¹² and two others (Stevens and Souter) have been more circumspect on the issue but have clearly shown concern about untoward expansions of it.¹¹³ That lineup demonstrates that five votes are potentially there to overrule or at least trim *Belton* in the proper case.

Illinois v. Lidster

*Illinois v. Lidster*¹¹⁴ represents the Supreme Court's latest foray into the constitutionality of police roadblocks and, more generally, the constitutionality of warrantless, suspicionless searches.¹¹⁵ *Lidster* involved a roadblock set up to investigate the vehicular homicide of a bicyclist on an Illinois highway.¹¹⁶ One week after the accident, at approximately the same time of day when it occurred, police set up the highway checkpoint specifically to obtain additional information about the accident.¹¹⁷ As cars approached the roadblock, officers would ask the occupants if they had seen anything happen the preceding weekend and handed them a flyer seeking information about the accident.¹¹⁸ Each encounter took only ten to fifteen seconds.¹¹⁹ As Lidster approached the roadblock, he swerved and almost hit one of the officers.¹²⁰ An officer sensed alcohol on Lidster's breath, directed Lidster to a side street, and later arrested him after he failed a field sobriety test.¹²¹ At his trial for charges of driving under the influence of alcohol, Lidster challenged the constitutionality of his arrest, claiming that the roadblock violated his Fourth Amendment rights.¹²² The trial court rejected his challenge, but the Illinois Court of Appeals and Illinois Supreme Court disagreed and held that the roadblock violated the Fourth Amendment.¹²³ In support of

110. *Id.* at 2128-29.

111. *Id.* at 2135, 2137-38.

112. *Id.* at 2133.

113. *Id.* at 2138, 2140.

114. 124 S. Ct. 885 (2004).

115. *Id.* at 888-89.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

its conclusion, the Illinois Supreme Court relied heavily on the U.S. Supreme Court's 2000 decision, *Indianapolis v. Edmond*,¹²⁴ which invalidated a police roadblock designed to control crime.¹²⁵

In an opinion by Justice Breyer, the Supreme Court reversed and held that the Fourth Amendment did not prohibit carefully designed roadblocks created to obtain evidence of a specific crime.¹²⁶ Speaking for a unanimous Court, Justice Breyer distinguished *Edmond* on the ground that the primary purpose of the checkpoint here, unlike in *Edmond*, was not law enforcement but, instead, to obtain information about a crime committed by others.¹²⁷ Having distinguished *Edmond*, the Court then relied on several factors to explain why the investigative roadblock was not unconstitutional—it involved automobiles, it did not direct suspicion at the individuals stopped, the stops were brief, they were akin to voluntary encounters which the Supreme Court regularly has approved, citizens can (and often want to) assist criminal investigations, and community pressure will inhibit undue proliferation of such checkpoints.¹²⁸ Six justices (Rehnquist, O'Connor, Scalia, Kennedy, Thomas, and Breyer) went on to hold that, applying these factors, the roadblock in this case was reasonable.¹²⁹

Justice Stevens, joined by Justices Souter and Ginsburg, concurred in part and dissented in part.¹³⁰ These three fully shared the majority's view on *Edmond* and on the factors governing the reasonableness of the roadblock here.¹³¹ Yet rather than apply that test to the facts, they preferred to remand the case to the Illinois appellate courts.¹³² In the dissenters' view, there might be situations where the intrusiveness of the roadblock was great or its efficaciousness questionable.¹³³ The dissent also felt there were lingering questions in the record about whether the timing of the roadblock was truly calibrated to garner information about the accident (implying that the accident might simply be a ruse to conduct the more general crime control stop barred by *Edmond*).¹³⁴

Lidster provides an important bookend to *Edmond* in the Fourth Amendment doctrine governing police roadblocks. Law enforcement

124. 531 U.S. 32 (2000).

125. *Id.* at 44.

126. *Lidster*, 124 S. Ct. at 890-91.

127. *Id.* at 888-89.

128. *Id.* at 889-90.

129. *Id.* at 887, 890-91.

130. *Id.* at 891 (Stevens, J., concurring in part and dissenting in part).

131. *Id.* (Stevens, J., concurring in part and dissenting in part).

132. *Id.* (Stevens, J., concurring in part and dissenting in part).

133. *Id.* at 891-92 (Stevens, J., concurring in part and dissenting in part).

134. *Id.* (Stevens, J., concurring in part and dissenting in part).

can justify an investigatory roadblock, when it is tailored to the investigation of a specific crime and involves a minimal intrusion. Yet, in two respects, *Lidster* seems to beg more questions than it resolves. First, as the dissent implies, *Lidster* seems to open the door for police, particularly in urban or high-crime areas, to use the investigative roadblock as a ruse for more general crime control.¹³⁵ Provided that the location and timing of the roadblock can be plausibly tied to the investigation of an unsolved crime, law enforcement may be able to accomplish by another means the crime control ends that *Edmond* proscribes. Second, and more generally, *Lidster* is noteworthy as yet another example where the Court has been willing to bless warrantless, suspicionless searches and seizures by *law enforcement* under the administrative search and special needs doctrines.¹³⁶ Even if the roadblock serves a non-law enforcement purpose, it ultimately is being conducted *by law enforcement personnel*, who obviously have a crime control function in addition to their investigative one. As the facts of *Lidster* demonstrate, it is unrealistic to expect law enforcement personnel to shed that crime control function when they are performing the investigative one. Thus, it is with a bit of “a wink and a nod” when the Court (and law enforcement) claim that the roadblock simply serves non-law-enforcement purposes. If that really were true, it would be conducted by personnel who lack a law enforcement and crime control function or the fruits of any roadblock should be inadmissible. To sanction investigative roadblocks and similar seizures by law enforcement personnel, the Court (and law enforcement) must continue to navigate the uncomfortable waters between prohibited and permitted roadblocks.

United States v. Banks

Poor Lashawn Lowell Banks probably wishes that he had taken that shower a little earlier than two in the afternoon. While Banks was showering, federal and local law enforcement officers were outside his apartment, executing a warrant to search for cocaine.¹³⁷ They called out “police search warrant” and knocked hard on the front door, but Banks did not hear them.¹³⁸ After approximately fifteen to twenty seconds, police officers broke the door open, entered Banks’s apartment and

135. *Id.* (Stevens, J., concurring in part and dissenting in part).

136. *Id.* at 889-91; *see also* Mich. Dep’t of State Police v. Sitz, 496 U.S. 444 (1990); New York v. Burger, 482 U.S. 691 (1987); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

137. United States v. Banks, 124 S. Ct. 521, 523 (2003).

138. *Id.*

subsequently found drugs and weapons.¹³⁹ During his trial on federal firearms and drug charges, Banks sought to suppress the evidence on the ground that the officers' manner of executing the search violated the Fourth Amendment and 18 U.S.C. § 3109.¹⁴⁰ The district court rejected Banks's motion, but a divided Ninth Circuit reversed.¹⁴¹ The majority articulated a non-exhaustive list of factors governing how long police must wait after knocking and announcing their presence.¹⁴² The majority also developed a four-part framework under which the reasonableness of the entry depended on whether exigent circumstances existed and whether the entry involved the destruction of property.¹⁴³

In an opinion by Justice Souter, a unanimous Court reversed the Ninth Circuit.¹⁴⁴ The Court began by reviewing the general rules governing the execution of search warrants, its tradition of case-by-case development of the law in this area, the ordinary need to knock and announce presence, and the exigent circumstances justifying exceptions to the knock and announce rule.¹⁴⁵ Building on this review, the Court then concluded that, while the case was "close," the fifteen to twenty second wait was reasonable in this case, particularly in light of the risk that Banks might be destroying cocaine.¹⁴⁶ Finally, the Court charted a middle road with

139. *Id.*

140. *Id.* The statute provides:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant.

18 U.S.C. § 3109 (2000).

141. *Banks*, 124 S. Ct. at 523-24.

142. *United States v. Banks*, 282 F.3d 699, 704 (9th Cir. 2002), *rev'd*, 124 S. Ct. 521 (2003). Factors include:

(a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead on to believe that immediate entry was necessary.

Id.

143. *Id.* The four categories are used to aid in the determination of reasonableness. The court categorizes entries as either forced or non-forced, and then determines reasonableness in light of the totality of the circumstances surrounding the execution of the warrant. *Id.*

144. *Banks*, 124 S. Ct. at 522-23.

145. *Id.* at 524-25. In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the Supreme Court held that the knock-and-announce rule forms part of the reasonableness inquiry under the Fourth Amendment. *Id.* at 929.

146. *Banks*, 124 S. Ct. at 526. The Court, however, signaled no retreat from its holding in *Richards v. Wisconsin*, 520 U.S. 385 (1997), that the Fourth Amendment does not create

respect to the destruction of property—it rejected the Government’s argument that such a fact is irrelevant to the reasonableness inquiry but also rejected the Ninth Circuit’s four-part framework.¹⁴⁷

Banks is surely both a victory and a loss for the Government. On the one hand, the Government had an easy time persuading the Court to dismantle the Ninth Circuit’s cumbersome framework and multi-factored test for evaluating the reasonableness of an entry. On the other hand, the case dealt the Government a setback in two respects. First, the decision undoubtedly will invite litigation over whether the police waited a sufficient period of time to justify their destruction of property in the course of entering a residence. One can expect the decision to support some attempts to suppress evidence lawfully seized pursuant to a warrant simply because the police did not choose the least “intrusive” means of executing the search. Second, and perhaps more importantly, the Court accepted, without any dissent or much reflection, that the time police wait before entering a residence, after knocking and announcing, forms part of the Fourth Amendment’s reasonableness inquiry.¹⁴⁸ To be sure, the Supreme Court did not go so far as to impose a requirement that a resident actively or constructively “refuse” entry before law enforcement may forcibly enter a residence in executing a warrant.¹⁴⁹ But the Court clearly left open the possibility that, under other circumstances, an insufficient wait might render the execution of a search “unreasonable” and thereby, potentially, require suppression of evidence otherwise lawfully obtained.¹⁵⁰ In other words, had police acted the same way in the course of executing a warrant to recover a stolen piano, or had they waited less than fifteen seconds in this case, their conduct might have violated the Fourth Amendment. As with its views on the destruction of property, the Court’s decision, while attempting to balance the parties’ respective interests, creates a fertile field for future litigation.

Groh v. Ramirez

*Groh v. Ramirez*¹⁵¹ is a complex case involving the intersection of Fourth Amendment law, the good faith exception of *United States v.*

a blanket exception to the knock-and-announce rule in the case of searches for narcotics. *Id.* at 387-88.

147. *Banks*, 124 S. Ct. at 528-29. The Court collapsed its analysis of 18 U.S.C. § 3109 with its analysis of the Fourth Amendment issues. *Id.*; *United States v. Ramirez*, 523 U.S. 65, 73 (1998).

148. *Banks*, 124 S. Ct. at 524-26.

149. *Id.* at 527-29. For an article forcefully defending this position, see Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U.L. REV. 895 (2002).

150. *Banks*, 124 S. Ct. at 526, 528.

151. 124 S. Ct. 1284 (2004).

Leon,¹⁵² and principles of qualified immunity.¹⁵³ In *Groh*, federal officials applied for a warrant to search Ramirez's ranch for firearms, explosives, and records.¹⁵⁴ While the warrant application specified these items, the warrant itself did not.¹⁵⁵ Instead, it simply described Ramirez's house in the section describing the "person or property" to be seized.¹⁵⁶ When federal and local officials executed the warrant, they brought the warrant but only orally described the items sought (the details of the conversation are disputed).¹⁵⁷ Officers found none of the items specified in the accompanying affidavit.¹⁵⁸ Based on the lack of particularity in the warrant itself, Ramirez then filed a civil rights action under *Bivens v. Six Unknown Federal Narcotics Agents*¹⁵⁹ and 42 U.S.C. § 1983 against the officers and alleged that their conduct violated, inter alia, the Fourth Amendment.¹⁶⁰ The district court granted summary judgment to the defendants, but the Ninth Circuit reversed on the Fourth Amendment claim.¹⁶¹ The Court of Appeals held that the officer was not entitled to qualified immunity on that claim.¹⁶² In its view, a reasonable officer would know that the warrant was facially invalid because it failed to specify the items to be seized with sufficient particularity.¹⁶³

In an opinion by Justice Stevens, a closely divided Supreme Court affirmed and held that the officers violated the Fourth Amendment and were not entitled to qualified immunity.¹⁶⁴ On the Fourth Amendment violation, the majority held that the warrant was "plainly invalid" due to the insufficiently particular description of the items to be seized.¹⁶⁵ The Court intimated that a search warrant could cross-reference other documents but found that rule unhelpful to the officers' case; it also held that the alleged oral description of the items to be seized was not a constitutionally adequate substitute for specificity in the warrant or a cross-referenced document.¹⁶⁶ As a consequence, the warrant was "so

152. 468 U.S. 897 (1984).

153. *Groh*, 124 S. Ct. at 1287.

154. *Id.* at 1287-88.

155. *Id.* at 1288.

156. *Id.*

157. *Id.*

158. *Id.*

159. 403 U.S. 388 (1971).

160. *Groh*, 124 S. Ct. at 1288-89.

161. *Id.* at 1289.

162. *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1028 (9th Cir. 2002), *aff'd sub nom.* *Groh v. Ramirez*, 124 S. Ct. 1284 (2004).

163. *Id.*

164. *Groh*, 124 S. Ct. at 1287, 1293.

165. *Id.* at 1289.

166. *Id.* at 1289-90.

obviously deficient” that the search amounted to a warrantless one.¹⁶⁷ The Court rejected petitioner’s argument that the officers heeded the purposes of the particularity requirement because they limited their search to those items specified in the application.¹⁶⁸ On the qualified immunity point, the Court held that, because the Fourth Amendment specifies the particularity requirement, and the Court has held that a warrantless search of a home violates the Fourth Amendment,¹⁶⁹ petitioners violated clearly established law and no reasonable officer would have relied on the facially invalid warrant.¹⁷⁰

Justice Kennedy, joined by Chief Justice Rehnquist, dissented.¹⁷¹ Justice Kennedy agreed with the majority that the officers had violated the Fourth Amendment.¹⁷² However, he parted company on the qualified immunity question.¹⁷³ In Justice Kennedy’s view, the majority’s rejection of the officers’ qualified immunity defense had not allowed sufficient latitude for reasonable mistakes by law enforcement who must make difficult decisions in the heat of an investigation.¹⁷⁴ Here, the officers had committed a simple clerical error—they had failed to reproduce the description of the property, accurately described in the affidavit, in the warrant itself.¹⁷⁵

Justice Thomas, joined in full by Justice Scalia and in part by Chief Justice Rehnquist, also dissented.¹⁷⁶ Justice Thomas began by highlighting the Court’s unsatisfactory attempts to harmonize the Fourth Amendment’s “unreasonable search” clause and its Warrant Clause and noted that the Court had lurches between reading the Fourth Amendment to require warrants and reading it to require reasonable searches simpliciter.¹⁷⁷ After articulating that principle, Justice Thomas chided the majority for collapsing the inquiry about the warrant’s validity into the inquiry about the search’s reasonableness.¹⁷⁸ To support his

167. *Id.* at 1290.

168. *Id.* at 1291-92.

169. *Payton v. New York*, 445 U.S. 573, 576 (1980).

170. *Groh*, 124 S. Ct. at 1293; *see also* *Wilson v. Layne*, 526 U.S. 603 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that whether petitioner is entitled to qualified immunity depends on whether the right transgressed was clearly established in that it would be clear to a reasonable officer that his conduct was unlawful given the circumstances).

171. *Groh*, 124 S. Ct. at 1295 (Kennedy, J., dissenting).

172. *Id.* (Kennedy, J., dissenting).

173. *Id.* (Kennedy, J., dissenting).

174. *Id.* at 1295-97 (Kennedy, J., dissenting).

175. *Id.* at 1295 (Kennedy, J., dissenting).

176. *Id.* at 1298 (Thomas, J., dissenting).

177. *Id.* (Thomas, J., dissenting).

178. *Id.* at 1298-99 (Thomas, J., dissenting).

conclusion that the search was reasonable, Justice Thomas reviewed the careful steps taken by the petitioner—briefing the search team and providing them a copy of the warrant and affidavit, reviewing the warrant’s terms, conducting their search within the scope of what the magistrate had authorized, leaving a copy of the warrant and responding to the later request for a copy of the application.¹⁷⁹ Finally, Justice Thomas believed that the officer was entitled to qualified immunity—both because no decision clearly established that their conduct was unconstitutional and because petitioner reasonably could believe that the search warrant was objectively reasonable.¹⁸⁰

Groh might seem like a narrow decision. Rare will be the search warrant containing such an administrative error and rarer still the lawsuit following a fruitless search pursuant to such a warrant. However, *Groh* has potentially broad implications for search warrant practice, the good faith exception, and the exclusionary rule. Two points bear emphasis. First, the majority makes the bold assertion that the warrant was so deficient that the search must be treated as “warrantless.”¹⁸¹ This holding opens the door for future defendants to claim that certain police conduct—whether searches or arrests—must be treated as warrantless despite the fact that the officers have in fact obtained a warrant and confined the scope of their conduct to that sought in the warrant application. Second, the majority narrows the scope of *Leon*’s good faith exception.¹⁸² At one point, the majority, citing a footnote from *Leon*, asserts that it would not have been reasonable “for petitioner to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency.”¹⁸³ The majority’s citation, however, is quite curious. The cited footnote discusses the illegality of the search and expressly refers to the warrant application as part of the good faith inquiry.¹⁸⁴ While *Leon* did hold that it might be unreasonable for officers to rely on a warrant that, on its face, was not sufficiently particular,¹⁸⁵ the footnote cited by the majority suggests that *Leon* did not contemplate a case such as *Groh*.¹⁸⁶ Instead, *Leon* more likely contemplated a case where, throughout the application process, the officers had sought permission to conduct a general search of some place. By holding that the officers’ conduct here fell under one of the *Leon* exceptions, the majority narrows

179. *Id.* at 1303 (Thomas, J., dissenting).

180. *Id.* at 1301-03 (Thomas, J., dissenting).

181. *Id.* at 1290.

182. *See id.* at 1297-98 (Kennedy, J., dissenting).

183. *Id.* at 1292 n.4.

184. *Id.*

185. *United States v. Leon*, 468 U.S. 897, 923 (1984).

186. *Groh*, 124 S. Ct. at 1292 n.4.

the scope of the good faith exception to focus on the facial validity of the warrant rather than on the objective reasonableness of the police in light of all the circumstances, including the application.

Hiibel v. Sixth Judicial District Court

*Hiibel v. Sixth Judicial District Court*¹⁸⁷ presented constitutional challenges to Nevada's "stop and identify statute."¹⁸⁸ Under that statute, a law enforcement officer who has grounds to effect a *Terry* stop may require the stopped individual to identify himself.¹⁸⁹ In Hiibel's case, a Nevada Deputy Sheriff indisputably had "reasonable suspicion" to stop Hiibel.¹⁹⁰ Despite the sheriff's repeated requests, however, Hiibel refused to identify himself.¹⁹¹ Hiibel was prosecuted for violating the statute and challenged its constitutionality.¹⁹² Following his conviction, the Nevada appellate courts rejected the constitutional challenge.¹⁹³ When it reached the Supreme Court, the case presented the question whether Nevada's law violated either the Fourth or the Fifth Amendment.¹⁹⁴

Upholding Hiibel's conviction in an opinion by Justice Kennedy, a closely divided Supreme Court held that Nevada's statute violated neither Amendment.¹⁹⁵ On the Fourth Amendment question, the majority noted that "stop and identify" statutes had a rich tradition in the Nation's history of vagrancy laws.¹⁹⁶ After canvassing its prior case law, the Court quickly concluded that the Fourth Amendment did not bar a police officer, pursuant to a valid *Terry* stop, from demanding that a suspect identify himself.¹⁹⁷ The Court reasoned that requiring a suspect to answer the request and punishing him for failing to do so, represented only a mild intrusion on the suspect's Fourth Amendment interests and was closely related to the strong governmental interests justifying the stop.¹⁹⁸ In reaching this conclusion, the Court disavowed Justice White's

187. 124 S. Ct. 2451 (2004).

188. NEV. REV. STAT. 171.123 (2003).

189. *Id.* Nevada's "stop and identify law" provides that the "officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer." *Id.*

190. *Hiibel*, 124 S. Ct. at 2457.

191. *Id.* at 2455.

192. *Id.* at 2455-56.

193. *Id.* at 2456.

194. *Id.*

195. *Id.* at 2457, 2460.

196. *Id.* at 2457.

197. *Id.* at 2458.

198. *Id.* at 2459.

opinion in *Terry* and dicta in another case which had suggested that the Fourth Amendment did not require the suspect to answer a police officer's request during a *Terry* stop.¹⁹⁹ On the Fifth Amendment question, the Court concluded that disclosing one's identity *ordinarily* did not violate the Fifth Amendment because it was not incriminating.²⁰⁰ In the Court's view, a mere name rarely furnished a link in the chain of evidence needed to prosecute; this was certainly true in *Hiibel's* case—*Hiibel* could not show how his identity could be used to incriminate him.²⁰¹ However, the Court left open the possibility that, in some rare case, a name could furnish a link in the chain and, therefore, might require a different rule.²⁰² This case, however, did not require the Court to reach that question.²⁰³

Justice Stevens dissented on the Fifth Amendment issue.²⁰⁴ In his view, the majority overlooked the fact that the statute was tailored to apply only to suspects in *Terry* stops, and therefore it followed virtually as a matter of logic that their names might provide a link in an incrimination chain.²⁰⁵ In Justice Stevens's view, identification fell within the core Fifth Amendment protection, for not only was it incriminating, but it also was compelled (in light of the stop) and testimonial (in light of its responsiveness to police questioning).²⁰⁶ Finally, Justice Stevens criticized the majority for overlooking the vast array of investigative tools (such as databases) available to officers once they know a suspect's identity.²⁰⁷

Justice Breyer, joined by Justices Souter and Ginsburg, dissented on the Fourth Amendment issue.²⁰⁸ They urged the Court to adopt the understanding expressed by Justice White in his *Terry* concurrence—that the Fourth Amendment allows a police officer to request that a suspect identify himself, but does not require the suspect to respond.²⁰⁹ According to the dissent, this view, even if never formally adopted by the Court in a holding, had assumed a fixed place in the Court's jurisprudence and thus should be accepted as an authoritative statement

199. *Id.* at 2459-60; *see also* *Berkemer v. McCarthy*, 468 U.S. 420, 439 (1984); *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring).

200. *Hiibel*, 124 S. Ct. at 2460-61.

201. *Id.* at 2461.

202. *Id.*

203. *Id.*

204. *Id.* at 2461-62 (Stevens, J., dissenting).

205. *Id.* at 2464 (Stevens, J., dissenting).

206. *Id.* at 2462-64 (Stevens, J., dissenting).

207. *Id.* at 2464 (Stevens, J., dissenting).

208. *Id.* at 2465 (Breyer, J., dissenting).

209. *Id.* (Breyer, J., dissenting).

of law.²¹⁰ In the dissent's view, good reasons supported this legal rule because it established a bright line on the permissible scope of the police-citizen encounter.²¹¹ Opening the door to require identification permitted too many imponderables and sent the Court down the dreaded slippery slope where it would have to decide whether further requests (such as a license number or place of residence) was permissible.²¹²

This case represented a significant victory for law enforcement. Reversal might seriously have hampered officers' ability to effect any investigation during the course of a *Terry* stop. Moreover, some have suggested that this decision opens the door for possible future laws mandating national identity cards.²¹³ But this suggestion quickly stumbles over the majority's reasoning that the statute in *Hübel* required reasonable suspicion before law enforcement could request suspects to identify themselves. However, the close margin suggests that efforts to expand the scope of stop-and-identify statutes must proceed with caution in order not to run afoul of the Constitution. Requiring information beyond identification runs the risk of losing a swing vote. The decision cries out for a future case to bookend the decision in a situation where the identification itself might be incriminating, such as when the suspect is being stopped on suspicion of impersonating an officer or being a fugitive. One wonders why the majority did not join issue more forcefully with the dissent over how identification fits into police databases and other information that may be learned once the suspect's identity is known. One suspects that the majority did not have a great answer and, therefore, its reliance on history (plus the threshold requirement of reasonable suspicion) allowed it to sidestep those concerns.

Fifth Amendment

Yarborough v. Alvarado

Given its procedural posture, *Yarborough v. Alvarado*²¹⁴ should have been a very easy case. It arose after the Ninth Circuit granted a writ of habeas corpus following a state court conviction despite the deferential standards of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).²¹⁵ The facts were these: Alvarado was seventeen and a half

210. *See id.* (Breyer, J., dissenting).

211. *Id.* at 2465-66 (Breyer, J., dissenting).

212. *Id.* (Breyer, J., dissenting); *see* Anne M. Coughlin, *Simple Question, Big Implications*, WASH. POST, March 28, 2004, at B5.

213. *See* Coughlin, *supra* note 212.

214. 124 S. Ct. 2140 (2004).

215. The Antiterrorism and Effective Death Penalty Act provides that

years old.²¹⁶ A Los Angeles police officer contacted Alvarado's mother and asked her if she wouldn't mind bringing him to the station so they could ask him some questions in connection with a homicide investigation.²¹⁷ The mother agreed and, accompanied by her husband, took Alvarado to the station.²¹⁸ The officer asked Alvarado to accompany him to another room and, over the course of the next two hours, interrogated him about the homicide.²¹⁹ Central to the case, the officer never read Alvarado his *Miranda* rights.²²⁰ At first, Alvarado denied any knowledge of or involvement in the homicide.²²¹ Pressed by the officer, Alvarado eventually changed his story and implicated himself as a coconspirator to the shooter.²²² Twice during the interview, the officer asked Alvarado if he needed a break.²²³ Following its completion, Alvarado returned home with his parents.²²⁴

A few months later, Alvarado was charged in California state court with murder and attempted robbery.²²⁵ Alvarado sought to suppress his confession on the ground that the officer interrogated him in violation of *Miranda*.²²⁶ The trial court denied the motion and, following his conviction, the California Court of Appeals affirmed on the ground that Alvarado was not in custody.²²⁷ On federal post conviction review, Alvarado reraised his *Miranda* claim.²²⁸ The federal district court denied it, but a divided panel of the Ninth Circuit reversed.²²⁹ Applying AEDPA, the Ninth Circuit concluded that the California appellate court's conclusion that Alvarado was not in custody was an unreasonable

(d) [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1) (2000).

216. *Alvarado*, 124 S. Ct. at 2144-45.

217. *Id.* at 2145.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 2145-46.

223. *Id.* at 2146.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 2146-47.

application of federal law clearly established by the Supreme Court.²³⁰ Critical to the Ninth Circuit's analysis was the fact that the California appellate court had failed to consider Alvarado's age in its determination about whether Alvarado was in custody during the police interview.²³¹

In an opinion by Justice Kennedy, a closely divided Supreme Court reversed and held that the California appellate court's conclusion regarding custody was not objectively unreasonable.²³² After reviewing the deferential standard set out by AEDPA and its prior case law governing the "in custody" determination for *Miranda*,²³³ the Court weighed several factors to consider whether Alvarado was in custody.²³⁴ Several factors supported a conclusion that Alvarado was *not* in custody. Officers did not take Alvarado to the station, they did not threaten him, his parents waited in the lobby, the interrogating officer encouraged Alvarado to tell the truth, Alvarado twice was offered a break, and Alvarado went home at the end of the interview.²³⁵

Other factors supported the contrary conclusion.²³⁶ The interview lasted two hours, the officer did not tell Alvarado he was free to leave, Alvarado's parents brought him to the interview, and Alvarado's parents allegedly were barred from attending the interview.²³⁷ In light of these conflicting factors, the California appellate court's custody determination was not unreasonable.²³⁸ The majority went further, however, and also concluded that the California appellate court's failure to consider Alvarado's age was not unreasonable.²³⁹ In the majority's view, the custody determination focuses on objective factors known to the police, unlike other tests which might focus on the suspect's condition (like the voluntariness test).²⁴⁰ A suspect's age or personal experience, in the Court's view, did not qualify as the type of objective factor that police could know (or could be expected to know) and would run contrary to

230. *Id.* at 2147.

231. *Id.*

232. *Id.* at 2149.

233. Framing the determination of custody for *Miranda* purposes in *Thompson v. Keohane*, 516 U.S. 99 (1995), the Court asks whether a reasonable person in the circumstances surrounding the interrogation "would have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 112.

234. *Alvarado*, 124 S. Ct. at 2149-50.

235. *Id.*

236. *Id.* at 2150.

237. *Id.*

238. *Id.*

239. *Id.* at 2151.

240. *Id.* at 2151-52.

one of *Miranda*'s purposes—namely, providing clear rules guiding police interrogations and their *Miranda* obligations.²⁴¹

Justice O'Connor filed a brief concurring opinion.²⁴² She fully joined Justice Kennedy's majority opinion and held that, given how close Alvarado was to the age of majority, his age was irrelevant to the custody determination.²⁴³ But she left the door open for a different result in cases of younger defendants.²⁴⁴ In such cases, a younger defendant might be more likely to feel not free to leave and, therefore, her age might be relevant to the custody determination.²⁴⁵

In a blistering dissent, Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg) castigated the majority both for its implausible custody analysis and its "objective reasonableness" test for custody determinations.²⁴⁶ The dissent reminded the majority that "reasonableness" tests (civil negligence, criminal mens rea, etc.) involve a blended subjective/objective inquiry.²⁴⁷ Certainly a person below the age of majority, who lacks total liberty, feels less free to leave a situation than an adult.²⁴⁸ Many of the factors cited by the majority to support the conclusion that Alvarado was not in custody broke down on closer examination. For example, the fact that he went home at the end of the interview had no probative value as to whether he felt free to leave the interview in the first place.²⁴⁹ Finally, even accepting the majority's test, Justice Breyer asserted how it easily led to the conclusion that Alvarado was in fact in custody.²⁵⁰

Alvarado represents a very important development in *Miranda* doctrine. Two points bear emphasis. First, prior to *Alvarado*, the Court had struggled to generate more concrete guidance about the meaning of "custody" for purposes of *Miranda*.²⁵¹ Apart from obvious cases like arrests (custody) and routine traffic stops (no custody), the Court had generally offered loose standards, such as whether a reasonable person would feel free to terminate the interview and leave, without glossing what "reasonable" meant and how one determined whether, in fact, a

241. *Id.* at 2151 (O'Connor, J., concurring).

242. *Id.* at 2152 (O'Connor, J., concurring).

243. *Id.* (O'Connor, J., concurring).

244. *Id.* (O'Connor, J., concurring).

245. *Id.* (O'Connor, J., concurring).

246. *Id.* at 2152-56 (Breyer, J., dissenting).

247. *Id.* at 2155 (Breyer, J., dissenting).

248. *Id.* at 2154 (Breyer, J., dissenting).

249. *Id.* (Breyer, J., dissenting).

250. *Id.* at 2155-56 (Breyer, J., dissenting).

251. See *Thompson v. Keohane*, 516 U.S. 99 (1995); *Stansbury v. California*, 511 U.S. 318 (1994); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977).

reasonable person would feel free to leave.²⁵² *Alvarado* clarifies that reasonable *generally* means “objectively reasonable” and that one considers freedom to leave by looking at the various factors that the majority itself utilized in applying its test to the facts of the case.²⁵³ Second, Justice O’Connor’s opinion leaves the door open for defense counsel to argue that subjective considerations should sometimes factor into the custody inquiry.²⁵⁴ The most obvious example suggested by Justice O’Connor’s opinion would be a ten-year-old suspect, perhaps because the suspect’s immaturity is so obvious to the police that certain inferences about whether the suspect feels free to leave naturally flow from that fact.²⁵⁵ But Justice O’Connor’s concurrence is not so confined. What about a suspect who does not speak English particularly well or who clearly comes from a culture that is more deferential to authority? Such facts may be equally obvious to the police as a suspect’s extreme immaturity, and Justice O’Connor’s separate opinion, by providing, once again, the crucial fifth vote, leaves many of these questions hanging. Had she simply joined the majority, the law regarding custody would have been much clearer. But her separate writing here, as in other areas,²⁵⁶ ensures constant litigation in the future over the precise state of the law.

Missouri v. Seibert

*Miranda v. Arizona*²⁵⁷ requires police officers to provide certain familiar warnings prior to any custodial interrogation.²⁵⁸ *Missouri v. Seibert*²⁵⁹ presented the question about the proper remedy when police officers deliberately withhold *Miranda* warnings at the outset of the interrogation, only give them when they have extracted a confession from the suspect, and then, during this second stage, refer back to statements made during the pre-*Miranda* interrogation.²⁶⁰ The Missouri Supreme Court held that, under these circumstances, this deliberate end-run around *Miranda* required exclusion of the confession.²⁶¹ It distinguished this case from mere “technical” and unintentional

252. See cases cited *supra* note 251.

253. *Alvarado*, 124 S. Ct. 2149-50.

254. *Id.* at 2152.

255. See *id.*

256. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 276-80 (2003) (O’Connor, J., concurring); *Branch v. Smith*, 538 U.S. 254, 292-97 (2003) (O’Connor, J., concurring in part and dissenting in part); *Peguero v. United States*, 526 U.S. 23, 30-31 (1999) (O’Connor, J., concurring).

257. 384 U.S. 436 (1966).

258. *Id.*

259. 124 S. Ct. 2601 (2004).

260. *Id.* at 2605.

261. *Id.* at 2606.

violations of *Miranda* which, under *Oregon v. Elstad*,²⁶² do not require exclusion of post-*Miranda* statements provided that both the statements and the *Miranda* waiver are voluntary.²⁶³

A badly divided Supreme Court affirmed. Writing for the Court's plurality, Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer) first noted that this practice of interrogating "outside *Miranda*" had become increasingly common since *Elstad*.²⁶⁴ Next, the plurality explained that this practice had the effect of depriving the *Miranda* warnings of much value if the warnings were given only after the suspect had confessed.²⁶⁵ The plurality crafted an "objective" test under which the admissibility of the confession turned on whether the objective circumstances revealed that the timing or manner of administering the warnings deprived them of their functional value.²⁶⁶ Applying that test, the Court concluded that in this case, a variety of circumstances warranted the confession's exclusion. These circumstances included the same officer conducting both stages of the interrogation, allowing no break in the interrogation before the warnings were given, the second stage of the interrogation referring back to statements made by the suspect in the first stage, and the interrogation taking place at a police stationhouse.²⁶⁷ Each of these facts, moreover, distinguished this case from *Elstad*.²⁶⁸

Justice Breyer filed a brief concurrence.²⁶⁹ In it, he argued that the Court should simply employ the fruit-of-the-poisonous-tree analysis that it had developed for some other violations of constitutional rights but, heretofore, had declined to adopt in the *Miranda* context.²⁷⁰

Justice Kennedy concurred only in the judgment.²⁷¹ While he agreed that the confession had to be excluded in this case, he adopted a different test from the plurality's.²⁷² Unlike the plurality, Justice Kennedy placed greater weight on the deliberateness of the misconduct.²⁷³ In Justice Kennedy's view, the confession should be excluded when it is the product of a deliberate withholding of *Miranda* rights, when the post-*Miranda*

262. 470 U.S. 298 (1985).

263. *Seibert*, 124 S. Ct. at 2606-07.

264. *Id.* at 2608-09 (plurality opinion).

265. *Id.* at 2609-10 (plurality opinion).

266. *Id.* at 2610-11 (plurality opinion).

267. *Id.* at 2612-13 (plurality opinion).

268. *Id.* at 2612 (plurality opinion).

269. *Id.* at 2613-14 (Breyer, J., concurring).

270. *Id.* (Breyer, J., concurring); see *Oregon v. Elstad*, 470 U.S. 298 (1985); *Wong Sun v. United States*, 371 U.S. 471 (1963).

271. *Seibert*, 124 S. Ct. at 2614-16 (Kennedy, J., concurring in the judgment).

272. *Id.* at 2614 (Kennedy, J., concurring in the judgment).

273. *Id.* at 2615 (Kennedy, J., concurring in the judgment).

interrogation referred to statements made in the pre-*Miranda* phase, and when officers have not taken corrective action, such as notifying suspects that their pre-*Miranda* statements are inadmissible as proof of guilt.²⁷⁴

Justice O'Connor (joined by the Chief Justice and Justices Scalia and Thomas) dissented.²⁷⁵ She accused the majority of "devour[ing]" *Elstad* through its new exclusionary rule.²⁷⁶ In her view, *Elstad* rejected the fruit-of-the-poisonous-tree doctrine, and the majority was, in effect, adopting a variation on it through excluding the confession here.²⁷⁷ She would have analyzed the confession's admissibility under *Elstad*'s voluntariness framework.²⁷⁸ She also noted that some facts cut in favor of a finding of involuntariness in this case.²⁷⁹

Seibert demonstrates that *Miranda* issues will continue to divide the Court despite the so-called "détente" announced several terms ago in *Dickerson v. United States*.²⁸⁰ While some believed that *Dickerson* finally settled *Miranda*'s constitutional status, others foresaw that *Dickerson* merely set the stage for more battles over *Miranda*'s meaning.²⁸¹ Much like the Court's splintered decision two terms ago in *Chavez v. Martinez*,²⁸² the divisions in *Seibert* demonstrate that this latter group was more prescient.²⁸³ More so than *Dickerson*, *Seibert* contained a dramatic reassertion of *Miranda*'s constitutional pedigree, at least from the plurality. One can expect future cases probing the divisions among the

274. *Id.* at 2615-16 (Kennedy, J., concurring in the judgment).

275. *Id.* at 2616-20 (O'Connor, J., dissenting).

276. *Id.* at 2616 (O'Connor, J., dissenting).

277. *Id.* at 2619 (O'Connor, J., dissenting).

278. *Id.*

279. *Id.* at 2619-20. (O'Connor, J., dissenting).

280. 530 U.S. 428 (2000).

281. Compare Conor Bateman, *Dickerson v. United States: Miranda is Deemed a Constitutional Rule, but Does It Really Matter?*, 55 ARK. L. REV. 177, 177-207 (2002), with Bryan Doyle, *Securing Liberty with Chains: Locking Up the Fifth Amendment Within the Confines of Miranda*, 21 MISS. C. L. REV. 55, 55-81 (2001), and Timothy Brennan, *Silencing Miranda: Exploring Potential Reform to the Law of Confessions in the Wake of Dickerson v. United States*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 253, 253-78 (2001).

282. 538 U.S. 760 (2003).

283. Justice Thomas, writing for the plurality which included Chief Justice Rehnquist and Justice O'Connor, held that a suspect's interrogation is not a violation of the constitutionally protected right against self-incrimination absent the commencement of criminal proceedings. *Id.* at 766 (plurality opinion). Justices Souter and Breyer concurred in judgment, but concluded that a suspect's claim that questioning alone was a violation of the Fifth and Fourteenth Amendments subject to redress could be recognized if a core guarantee or the judicial capacity to protect it would be placed at risk absent complimentary protection. *Id.* at 777-78 (Souter, J., concurring in the judgment).

justices over *Miranda* such as whether statements taken in deliberate violation of *Miranda* may be used for impeachment purposes.²⁸⁴

United States v. Patane

*United States v. Patane*²⁸⁵ concerned a lingering question in *Miranda* doctrine—the admissibility of physical evidence derived from a *Miranda* violation.²⁸⁶ In *Patane*, law enforcement officers arrested Patane for violating a restraining order.²⁸⁷ While Patane was in custody outside his home and without reading Patane a complete set of *Miranda* rights, the officers asked him about a pistol allegedly in his possession.²⁸⁸ Patane informed the officers about the pistol's location, and he was later charged with violating federal felon-in-possession laws.²⁸⁹ The district court granted Patane's motion to suppress the gun (due to lack of probable cause to arrest), and the Tenth Circuit affirmed its order on a different theory—that, as a result of *Dickerson v. United States*,²⁹⁰ the Constitution required suppression of physical evidence (here, the gun) derived from a *Miranda* violation.²⁹¹

A badly divided Supreme Court reversed.²⁹² Justice Thomas, writing for a three-justice plurality, which included Chief Justice Rehnquist and Justice Scalia, supported a per se rule that the failure to give *Miranda* warnings does not require the suppression of physical evidence derived therefrom.²⁹³ The plurality anchored this theory in the notion that the Fifth Amendment does not proscribe unwarned statements, only involuntary ones, and that *Miranda* merely was designed as a prophylactic rule to support that constitutional right.²⁹⁴ Consequently, the bare failure to read *Miranda* rights did not constitute a completed constitutional violation and, therefore, did not require application of the traditional fruit-of-the-poisonous-tree rule.²⁹⁵ Protection of the core right of self-incrimination did not require such an expansive interpretation of the exclusionary rule: the exclusion of the unwarned statement already provided an adequate deterrent to law enforcement, and notions of

284. *E.g.*, *People v. Neal*, 72 P.3d 280, 294 (Cal. 2003).

285. 124 S. Ct. 2620 (2004).

286. *Id.* at 2624.

287. *Id.* at 2625.

288. *Id.*

289. *Id.*

290. 530 U.S. 428 (2000).

291. *Patane*, 124 S. Ct. at 2625-26.

292. *Id.* at 2630-32.

293. *Id.* at 2629 (plurality opinion).

294. *Id.* at 2626-27 (plurality opinion).

295. *Id.* at 2628-29 (plurality opinion).

trustworthiness underpinning the Fifth Amendment were not at play in the case of physical evidence.²⁹⁶ Finally, the plurality rejected the Tenth Circuit's reliance on *Dickerson*. While *Dickerson* characterized *Miranda* as a constitutional rule, it did not override the requirement of a "close fit" between the core constitutional right and the exclusionary remedy.²⁹⁷

Justice Kennedy (joined by Justice O'Connor) concurred in the judgment.²⁹⁸ Unlike the plurality, they found it unnecessary to decide whether, categorically, a failure to give *Miranda* warnings itself constitutes a violation of *Miranda*'s constitutional rule.²⁹⁹ Instead, Justice Kennedy extracted the principle from the Court's prior cases that the underlying purposes of *Miranda* must be balanced against the other objectives of the criminal justice system.³⁰⁰ In this case, the reliability and probative value of the physical evidence justified its admission; a rule that admitted such evidence while excluding the unwarned statement adequately balanced the interests of law enforcement and the suspect.³⁰¹

Justice Souter (joined by Justices Stevens and Ginsburg) dissented.³⁰² They accused the majority of sidestepping the issue in the case; the case was not about the scope of the Fifth Amendment.³⁰³ Rather, the case concerned whether exclusion of derivative physical evidence was necessary in order to deter questioning outside *Miranda*.³⁰⁴ Permitting the admission of the evidence undercuts *Miranda*'s protective function and, thereby, harms the Fifth Amendment itself.³⁰⁵ They predicted that the rule announced today would encourage officers to flout *Miranda*, just like *Elstad* did two decades ago, leading to the tactics at issue in *Seibert*.³⁰⁶

Justice Breyer also dissented.³⁰⁷ He saw this case as functionally equivalent to *Seibert* and, for that reason, would apply the fruit-of-the-poisonous-tree doctrine to this case.³⁰⁸

What *Seibert* giveth, *Patane* taketh away (or the other way around, depending on your perspective). The two cases were handed down the same day, which is unsurprising because, at a certain level of generality,

296. *Id.* at 2630 (plurality opinion).

297. *Id.* at 2629-30 (plurality opinion).

298. *Id.* at 2630 (Kennedy, J., concurring in the judgment).

299. *Id.* at 2631 (Kennedy, J., concurring in the judgment).

300. *Id.* at 2630-31 (Kennedy, J., concurring in the judgment).

301. *Id.* at 2631 (Kennedy, J., concurring in the judgment).

302. *Id.* (Souter, J., dissenting).

303. *Id.* (Souter, J., dissenting).

304. *Id.* (Souter, J., dissenting).

305. *Id.* (Souter, J., dissenting).

306. *Id.* (Souter, J., dissenting).

307. *Id.* at 2632 (Breyer, J., dissenting).

308. *Id.* (Breyer, J., dissenting).

both cases involved the common issue of the admissibility of evidence derived from a *Miranda* violation. For Justice Breyer, that was the correct level of generality at which to assess the cases.³⁰⁹ Yet the reasoning in the two plurality opinions could not be more different—with the *Seibert* plurality focusing on preserving the core purpose of *Miranda*³¹⁰ and the *Patane* plurality taking a cramped view of the core purpose of the Amendment.³¹¹ The outcomes and opinions suggest that Justice Kennedy has positioned himself as the “swing vote” on many post-*Dickerson* *Miranda* issues, which suggests that, in future cases, practitioners would be well advised to pitch toward his views in order to obtain a favorable outcome.

Sixth Amendment

Schriro v. Summerlin

Two years ago, in *Ring v. Arizona*,³¹² the Supreme Court invalidated Arizona’s capital sentencing scheme under which a judge could impose a sentence of death absent a prior jury finding that at least one aggravating circumstance could be proven beyond a reasonable doubt.³¹³ This Term, *Schriro v. Summerlin*³¹⁴ presented the question whether that holding applied retroactively under *Teague v. Lane*.³¹⁵ The Ninth Circuit held that it did on two alternative grounds: (1) that *Ring* was substantive and therefore fell outside *Teague*’s framework, and (2) that *Ring* announced a watershed rule of criminal procedure and therefore fell under one of *Teague*’s exceptions.³¹⁶

In an opinion by Justice Scalia, a closely divided Supreme Court reversed and held that *Ring* did not apply retroactively.³¹⁷ The Court first laid out the common ground—that *Ring* announced a new rule and that one of *Teague*’s two exceptions (removing conduct beyond the state’s power to punish)³¹⁸ did not apply. It then held that *Ring* was procedural

309. *Id.* (Breyer, J., dissenting).

310. *Missouri v. Seibert*, 124 S. Ct. 2601, 2613 (2004) (plurality opinion).

311. *Patane*, 124 S. Ct. at 2626 (plurality opinion).

312. 536 U.S. 584 (2002).

313. *Id.* at 609.

314. 124 S. Ct. 2519 (2004).

315. *Schriro*, 124 S. Ct. at 2521; *Teague v. Lane*, 489 U.S. 288 (1989). Summerlin filed his federal habeas petition prior to the Antiterrorism and Effective Death Penalty Act of 1996’s effective date, so its harsher restrictions did not apply. *See Schriro*, 124 S. Ct. at 2522-23.

316. *Schriro*, 124 S. Ct. at 2523.

317. *Id.* at 2526.

318. *Id.* at 2523-24.

rather than substantive.³¹⁹ Rejecting the Ninth Circuit's view, the majority explained that *Ring* did not alter the range of conduct that Arizona subjected to the death penalty; rather, it merely required that this conduct be proven in accordance with *Ring*'s procedural dictates.³²⁰ Finally, the Court concluded that *Ring* did not comprise a watershed rule of criminal procedure.³²¹ In the Court's view, judicial fact-finding was not seriously inaccurate—this followed both from general accuracy in sentencing and from the Court's decision in *DeStefano v. Woods*.³²² *DeStefano* declined to apply retroactively *Duncan v. Louisiana*³²³ (which incorporated the Sixth Amendment jury guarantee against the states) on the ground that a trial held without a jury was not necessarily inaccurate.³²⁴

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented on the ground that *Ring* was a watershed rule of criminal procedure (they did not seem to quarrel with the holding on the substantive/procedural point).³²⁵ In the dissent's view, the applicability of *Teague*'s watershed exception turned on two findings: (1) that the decision implicated fundamental fairness (something with which the majority did not quarrel), and (2) that it enhanced accurate punishment.³²⁶ *Ring*, according to the dissent, fulfilled this second function because death sentences ultimately rest on a community judgment about the proper level of retribution, which is something that a jury is better able to render than a judge.³²⁷ The dissent rejected the majority's twin rationales for holding otherwise relying on three points: (1) the unique community-based judgments inherent in capital sentencing; (2) the interests in accuracy, uniformity, and fundamental fairness underpinning *Teague*; and (3) the weak support of *DeStefano* for the majority's rule.³²⁸ In the dissent's view, *DeStefano* offered the majority little comfort because it predated *Teague* and involved far different social consequences.³²⁹ Applying *Duncan* retroactively would have thrown the prison doors open to thousands of prisoners; by

319. *Id.* at 2523.

320. *Id.* at 2523-24.

321. *Id.* at 2524-25.

322. *Id.* at 2525; *DeStefano v. Woods*, 392 U.S. 631 (1968).

323. 391 U.S. 145 (1968).

324. *DeStefano*, 392 U.S. at 633.

325. *Schriro*, 124 S. Ct. at 2526-27 (Breyer, J., dissenting).

326. *Id.* at 2527 (Breyer, J., dissenting).

327. *Id.* (Breyer, J., dissenting).

328. *Id.* at 2528-30 (Breyer, J., dissenting).

329. *Id.* at 2530 (Breyer, J., dissenting).

contrast, applying *Ring* retroactively would have upset, at most, approximately one hundred death sentences.³³⁰

Schriro is noteworthy in two respects. First, the majority opinion refines *Teague*'s basic framework. Traditional hornbook law suggested that the general bar against retroactive application of new procedural rules was subject to the two above-described exceptions.³³¹ *Schriro* folds one of these exceptions (placing conduct beyond the power of the state to punish) into the corollary that *Teague* does not apply to new substantive (as opposed to procedural) rules.³³² Since *Schriro* did not even implicate this exception, this development is arguably dicta, but habeas practitioners should follow how lower courts treat it in their future retroactivity analyses. Second, *Schriro* marks yet another battle in the ongoing fight over the scope of the *Apprendi* rule.³³³ Here, the typical *Apprendi* lineup (Stevens, Scalia, Souter, Thomas, and Ginsburg) gave way to the typical lineup in close habeas/federalism cases (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas), suggesting the Court's commitment to federalism principles underlying its habeas jurisprudence trumps the anti-federalism tendencies of the *Apprendi* rule.

Blakely v. Washington

*Blakely v. Washington*³³⁴ involved a constitutional challenge to Washington's sentencing scheme.³³⁵ Under the scheme, the facts of the crime and the defendant's criminal history determine a recommended sentencing range within the statutory maximum.³³⁶ In *Blakely*'s case, he pled guilty to various violent crimes, and the recommended sentence under the guidelines was forty-nine to fifty-three months.³³⁷ Just prior to sentencing, however, the trial judge tagged thirty-seven more months to the sentence because of the presence of certain "aggravating factors" of cruelty and violence.³³⁸ The resulting sentence exceeded that recommended under the guidelines but still was below the statutory maximum.³³⁹ *Blakely* argued that this determination violated his Sixth

330. *Id.* at 2530-31 (Breyer, J., dissenting).

331. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 28.6(a) (2d ed. 1992).

332. *Schriro*, 124 S. Ct. at 2522-23.

333. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

334. 124 S. Ct. 2531 (2004).

335. *Id.* at 2534.

336. *Id.* at 2535.

337. *Id.*

338. *Id.*

339. *Id.* at 2537.

Amendment rights. The Washington Court of Appeals rejected Blakely's constitutional argument, a decision that the Washington Supreme Court declined to review.³⁴⁰

In an opinion by Justice Scalia, a closely divided Supreme Court reversed.³⁴¹ The majority began by summarizing its holding in *Apprendi*—that any fact other than recidivism which increases the statutory maximum offense must be found by a jury beyond a reasonable doubt.³⁴² It then explained that this holding reflected two principles of historical criminal jurisprudence: (1) that the truth of any accusation be confirmed by a jury; and (2) that an accusation, to result in punishment, requires proof of facts.³⁴³ While acknowledging that the statutory maximum for Blakely's crime was ten years, the majority held that the relevant maximum for *Apprendi* purposes was the range prescribed by the guidelines—namely, the range dictated by the jury's findings or the defendant's admissions.³⁴⁴ The facts contained in Blakely's guilty plea, the majority explained, did not authorize the judge to grant an exceptional upward departure.³⁴⁵ That departure depended, instead, on facts outside the plea and, therefore, violated the *Apprendi* principle.³⁴⁶ This view of the "statutory maximum," the majority explained, was necessary to give "intelligible content to the right of the jury trial," something that the dissenters failed to do, for their position led to one of two alternatives: (1) legislative labeling, or (2) subjective limits on whether a sentence was too extreme—neither of which was defensible.³⁴⁷ The dissenters' concerns about reallocation of punishment power and the unfairness of the rule or its impact on determining sentencing were either inaccurate or overstated.³⁴⁸ At bottom, the decision rested simply on preserving the jury's right to determine the facts necessary to punishment.³⁴⁹

Justice O'Connor (joined by Justice Breyer and, in part, by Chief Justice Rehnquist and Justice Kennedy) dissented.³⁵⁰ In the dissent's view, the majority decision consolidated sentencing power in the

340. *Id.* at 2536.

341. *Id.* at 2533-34, 2543.

342. *Id.* at 2536-37.

343. *Id.* at 2536.

344. *Id.* at 2537.

345. *Id.*

346. *Id.* at 2537-38.

347. *Id.*

348. *Id.* at 2541-42.

349. *Id.* at 2543.

350. *Id.* (O' Connor, J., dissenting).

judiciary, at the expense of the legislature.³⁵¹ That result, in Justice O'Connor's view, hampered uniformity in sentencing and thereby undercut the underlying purpose of sentencing reform for the past two decades.³⁵² Accusing the majority of "doctrinaire formalism," the dissent claimed that the majority's decision called into doubt the constitutionality of numerous sentencing schemes, including the federal sentencing guidelines, which like Washington's scheme, guided the sentencer's discretion depending on the presence or absence of certain facts.³⁵³

Justice Kennedy filed a separate dissent which Justice Breyer joined.³⁵⁴ On top of the criticisms leveled by the principal dissent, Justice Kennedy explained that the majority's decision upset the careful interchange among constitutional actors (specifically courts and legislatures) over the crafting of good policy.³⁵⁵ The offense here was especially grave because it offended not simply horizontal intergovernmental concerns but vertical ones as well, and thereby deprived states of the opportunity to serve as laboratories for reform.³⁵⁶

Justice Breyer filed a dissent which Justice O'Connor joined.³⁵⁷ While agreeing with the majority that the distinction between sentencing factor and statutory element ultimately was a matter of legislative labeling, he refused to conclude that the Sixth Amendment proscribed how legislatures treated the two categories.³⁵⁸ In his view, the majority's decision threatened to undermine the fairness of criminal justice systems, rested on a faulty history, and upset the law around which legislatures have built their punishment systems.³⁵⁹

Blakely is an important decision. Until *Blakely*, the Court had a relatively clear line at which it could limit *Apprendi*'s reach—the jury had to find any facts that would increase the maximum punishment for a crime allowed under a statute.³⁶⁰ Any fact-finding that might guide a sentencer's discretion within that range did not offend the *Apprendi* principle. Such a limit would have enabled *Apprendi* to coexist comfortably with guidelines sentencing. *Blakely*, however, blew away that *détente* and called into doubt a far greater variety of punishment

351. *Id.* (O' Connor, J., dissenting).

352. *Id.* (O' Connor, J., dissenting).

353. *Id.* at 2548-49 (O' Connor, J., dissenting).

354. *Id.* at 2550 (Kennedy, J., dissenting).

355. *Id.* (Kennedy, J., dissenting).

356. *Id.* at 2551 (Kennedy, J., dissenting).

357. *Id.* (Breyer, J., dissenting).

358. *Id.* at 2552 (Breyer, J., dissenting).

359. *Id.* (Breyer, J., dissenting).

360. *See id.* at 2536.

regimes. While the majority expressly disavowed that it was calling into question the constitutionality of the federal guidelines,³⁶¹ even the Government acknowledged in its amicus briefs that the federal scheme bore some similarities to Washington's scheme and, therefore, might be called into doubt by reversal in this case.³⁶² As a result of *Blakely*, the Court now is considering the guidelines' constitutionality and likely will require a jury finding or waiver for any upward departures.³⁶³ When that time comes, it is worth recalling that Justice Scalia was the sole dissenter in *Mistretta v. United States*,³⁶⁴ the 1989 decision that upheld the guidelines against separation-of-powers attack.³⁶⁵ Three of the four justices forming the *Apprendi* majority (Souter, Thomas, and Ginsburg) joined the Court after *Mistretta* was decided.³⁶⁶ Thus, Justice Scalia may yet prevail in his fight against the guidelines, albeit on a Sixth Amendment (rather than separation of powers) battleground.

Federal Criminal Law

Sabri v. United States

*Sabri v. United States*³⁶⁷ presented the constitutional question whether the federal bribery statute constituted a valid exercise of Congress's Article I power.³⁶⁸ Sabri was indicted after he offered three bribes to a local governmental official as a kickback for various favors, including steering him grant money supported in part by federal funds.³⁶⁹ Sabri sought to dismiss his indictment on the ground that the federal bribery statute was facially unconstitutional because it failed to require proof of a federal nexus to the bribe among the crime's offense elements.³⁷⁰ The district court granted Sabri's motion, but a divided panel of the Eighth Circuit reversed and held that the statute was a valid exercise of Congress's power under the Necessary and Proper Clause as an incident to the Spending Power.³⁷¹

361. *Id.* at 2540.

362. Brief for the United States as Amicus Curiae Supporting Respondent at 25-26, *Blakely* (No. 02-1632).

363. See *United States v. Willis*, 322 F. Supp.2d 76, 81-82 (D. Mass. 2004).

364. 488 U.S. 361 (1989).

365. *Id.* at 412-13.

366. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); see *Mistretta*, 488 U.S. at 362.

367. 124 S. Ct. 1941 (2004).

368. *Id.* at 1944 (citing to 18 U.S.C.A. § 666, which proscribes "bribery of state, local, and tribal officials of entities that receive at least \$10,000 in federal funds").

369. *Id.* at 1944-45.

370. *Id.* at 1945.

371. *Id.*

The Supreme Court unanimously affirmed, though it divided on the reasoning.³⁷² In the opinion for the Court, Justice Souter dispensed with Sabri's (and the Eighth Circuit's) arguments in short order.³⁷³ The majority held that nothing in the Constitution required a jurisdictional element as a prerequisite to a federal criminal statute.³⁷⁴ Rather, the Court found it abundantly clear that Congress had the power under the Spending Clause to appropriate federal monies and, as incident to that power, the authority under the Necessary and Proper Clause to enact laws ensuring that those monies were not squandered.³⁷⁵ The Court showed little patience with Sabri's argument that the Constitution required proof that federal money actually was involved in the bribe.³⁷⁶ In its view, the fungibility of money showed that it made little difference whether federal funds were involved (or other funds, which thereby freed up federal funds for other uses).³⁷⁷ Regardless of the funds, the Necessary and Proper Clause surely encompassed a federal interest in weeding out greedy local politicians who might squander federal resources if given the opportunity.³⁷⁸ In the final portion of the opening section of its analysis, the Court quickly rejected Sabri's reliance on the Court's Commerce Clause and federalism jurisprudence, finding neither particularly relevant in his case.³⁷⁹

Had the majority ended its opinion here, it might have been unremarkable. But the Court went further. It proceeded to chide Sabri for launching a facial challenge, rather than an as-applied one, which would have been disposed of far more easily since his case in fact involved a federal nexus.³⁸⁰ The Court reiterated its old adage that facial challenges are disfavored and generally must clear a high hurdle.³⁸¹ But then it arguably broke new territory in two ways. First, it explicitly linked up the Court's facial challenge jurisprudence with its overbreadth jurisprudence, typically associated with the First Amendment.³⁸² Second, it suggested that facial challenges (like overbreadth ones) ordinarily should be reserved only for certain categories of rights such as free

372. *Id.* at 1944.

373. *Id.* at 1945-47.

374. *Id.* at 1945-46.

375. *Id.* at 1946-47.

376. *Id.* at 1945.

377. *Id.* at 1946.

378. *Id.*

379. *Id.* at 1947-48; *see also* *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *South Dakota v. Dole*, 483 U.S. 203 (1987).

380. *Sabri*, 124 S. Ct. at 1948.

381. *Id.*

382. *Id.* at 1948-49; *see* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 10-14.

speech, abortion, the right to travel, and the scope of Congress's Section 5 power under the Fourteenth Amendment, where weighty reasons overcome the Court's reticence to entertain facial attacks on statutes.³⁸³

Justice Kennedy, joined by Justice Scalia, filed a brief opinion concurring in part.³⁸⁴ Justice Kennedy fully concurred in the majority's constitutional analysis.³⁸⁵ But he declined to join its exposition on facial challenges and sought to dispel any doubt over whether the Court was right to entertain facial challenges in *United States v. Lopez*³⁸⁶ and *United States v. Morrison*.³⁸⁷

Justice Thomas concurred in the judgment.³⁸⁸ In his view, the case could be resolved more simply under the Commerce Clause.³⁸⁹ In light of the Court's Commerce Clause jurisprudence (with which Justice Thomas admittedly has disagreed), the federal bribery statute was a perfectly valid exercise of Congress's Commerce Clause power.³⁹⁰ Unlike his eight brethren, Justice Thomas expressed skepticism over whether the Necessary and Proper Clause supplied a sufficient power in this case—in his view, the federal bribery statute, read literally, swept up an array of conduct where the federal interest was remote at best and nonexistent at worst.³⁹¹ Thus, Justice Thomas was hard pressed to find how the statute was a proper exercise of power under the Necessary and Proper Clause.³⁹²

Sabri could have been a fairly narrow opinion, simply rejecting the view that the Constitution required a federal nexus and holding that, in any event, *Sabri* could not benefit from the rule he sought. But the Court used the case as a vehicle to break open a broader debate in two areas. First, as the divisions between the Souter and Kennedy camps illustrate, there is an underlying tension in the Court's jurisprudence over when facial challenges will be appropriate. The majority opinion in *Sabri* potentially cabins such challenges substantially to a few categories of rights (or others where the litigant's interests are sufficiently weighty). Second, as the divisions between the majority and Justice Thomas's opinion illustrate, the case offers a potentially expansive reading of the

383. *Sabri*, 124 S. Ct. at 1948-49.

384. *Id.* at 1949 (Kennedy, J., concurring).

385. *Id.* (Kennedy, J., concurring).

386. 514 U.S. 549 (1995).

387. *Sabri*, 124 S. Ct. 1949 (Kennedy, J., concurring); 529 U.S. 598 (2000).

388. *Sabri*, 124 S. Ct. 1949 (Thomas, J., concurring).

389. *Id.* (Thomas, J., concurring).

390. *Id.* (Thomas, J., concurring) (citing *Lopez*, 514 U.S. at 584 (Thomas, J., concurring), and *Morrison*, 529 U.S. 598 at 627 (Thomas, J., concurring)).

391. *Id.* at 1949-51 (Thomas, J., concurring).

392. *Id.* (Thomas, J., concurring).

Necessary and Proper Clause. This may provide a vehicle for those opponents of the Court's restrictive Commerce Clause jurisprudence, in *Lopez* and *Morrison*, to rely on a different textual hook to justify the exercise of federal power.

First Amendment

City of Littleton v. Z.J. Gifts D-4, L.L.C.

*City of Littleton v. Z.J. Gifts D-4, L.L.C.*³⁹³ required the Court to examine Littleton's "adult business" licensing ordinance to determine whether it met a First Amendment requirement to assure prompt judicial review of licensing denials.³⁹⁴ The city's ordinance requires all "adult businesses" to apply for an adult business license with the city.³⁹⁵ Z.J. opened his adult bookstore in an area not zoned for an adult business and instead of applying for a license, initiated this suit challenging the ordinance as facially unconstitutional.³⁹⁶ The federal district court rejected Z.J.'s claims, but the Tenth Circuit held that the ordinance did not assure the prompt final judicial decision required.³⁹⁷

The Supreme Court unanimously reversed but divided on the reasoning.³⁹⁸ In the opinion for the Court, Justice Breyer (joined by Chief Justice Rehnquist and Justices O'Connor, Thomas, and Ginsburg) held that the city was required to assure a prompt judicial decision to challenges of denied licenses.³⁹⁹ The majority, however, agreed with the city's claim that the state's ordinary judicial review procedures met the First Amendment requirements.⁴⁰⁰ So long as Colorado courts remain sensitive to the importance of First Amendment cases and the need to sometimes expedite these cases, the state's ordinary procedures suffice.⁴⁰¹ The Court concluded that challenges to the promptness of a decision should be reserved for a case-by-case determination not a facial challenge.⁴⁰²

Several justices filed opinions concurring in part and concurring in the judgment.⁴⁰³ Justice Stevens disagreed with the majority's interpretation

393. 124 S. Ct. 2219 (2004).

394. *Id.* at 2221.

395. *Id.* at 2222.

396. *Id.*

397. *Id.*

398. *Id.* at 2221.

399. *Id.* at 2224.

400. *Id.*

401. *Id.*

402. *Id.* at 2226.

403. *Id.* at 2221.

of *FW/PBS, Inc. v. Dallas*⁴⁰⁴ and *Freedman v. Maryland*.⁴⁰⁵ He argued, there is a difference between “prompt judicial review” and “prompt judicial decision.”⁴⁰⁶ The latter, according to Justice Stevens, means little more than the assurance of the *possibility* of a prompt decision, which is insufficient to guard against the dangers of unjustified suppression of speech.⁴⁰⁷ Justice Souter agreed with the majority’s interpretation that the language of *FW/PBS* and *Freedman* required a prompt judicial decision; however, he disagreed that the state’s ordinary judicial review process was adequate to meet the First Amendment requirements.⁴⁰⁸ Justice Scalia concurred in the judgment, but argued the activity of the adult bookstore, pandering sex, is not protected by the First Amendment.⁴⁰⁹

There is no clear ruling from the Court in this case that makes it easy to predict the disposition of future cases. We know that a majority of the justices agree the First Amendment requires a “prompt” judicial decision, but we do not know the definition of “prompt.” Five justices feel that the ordinary procedures of a state’s judicial review process are “prompt,” while other justices express concern over the possibility of delays in unjustified suppression of speech cases.⁴¹⁰ In addition, the majority agreed that the promptness of a decision is best left to a case-by-case determination rather than a facial challenge.⁴¹¹ Finally, it is clear Justice Scalia has a much narrower interpretation of First Amendment protections than the rest of the Court.

Locke v. Davey

In *Locke v. Davey*,⁴¹² the Court addressed the constitutionality of Washington’s Promise Scholarship Program. Under this program, students may not receive a scholarship if they choose to pursue a degree in theology.⁴¹³ Washington’s State Constitution states: “Religious Freedom. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of

404. 493 U.S. 215 (1990).

405. *Z.J. Gifts*, 124 S. Ct. at 2226-27 (Stevens, J., concurring in part and concurring in the judgment); *Freedman v. Maryland*, 380 U.S. 51 (1965).

406. *Z.J. Gifts*, 124 S. Ct. at 2227.

407. *Id.*

408. *Id.* at 2227-28 (Souter, J., concurring in part and concurring in the judgment).

409. *Id.* at 2228 (Scalia, J., concurring in the judgment).

410. *Compare id.* at 2226, *with id.* at 2227-28 (Souter, J., concurring in part and concurring in the judgment).

411. *Id.* at 2226.

412. 124 S. Ct. 1307 (2004).

413. *Id.* at 1309; WASH. ADMIN. CODE § 250-80-020(12)(f)-(g) (2001).

any religious establishment.”⁴¹⁴ Davey was awarded a Promise Scholarship and decided to attend Northwest College, a private, Christian college affiliated with the Assemblies of God denomination, an accredited institution and eligible under the Promise Scholarship Program.⁴¹⁵ When Davey chose to pursue a double major in pastoral ministries and business management/administration, he learned he was no longer eligible for the scholarship.⁴¹⁶ He then commenced litigation and argued that the denial of his scholarship based on his course of studies was a violation of the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment.⁴¹⁷ The district court rejected Davey’s claims.⁴¹⁸ A divided panel of the Court of Appeals for the Ninth Circuit reversed and concluded that the State had singled out religion for unfavorable treatment, thus violating the Court’s ruling in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*.⁴¹⁹ The question before the Supreme Court in this case became whether the State of Washington could continue to deny funding without violating the Free Exercise Clause.⁴²⁰

The Court rejected Davey’s claim that *Lukumi* applied because “[the Program] does not require students to choose between their religious beliefs and receiving a government benefit. . . . [The] Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology.”⁴²¹ The Court also found that the Program goes a long way in protecting religious beliefs in that students are allowed to use their scholarships at extremely religious colleges, so long as they are accredited.⁴²² The Court then used a historical analysis to show that the state’s interest in a stringent Exercise and Establishment Clause is not novel and that, in fact, it is entirely consistent with the Founders’ “formal prohibitions against using tax funds to support the ministry.”⁴²³ Since early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars, the Court argued this reinforces its conclusion that religious instruction is in a different class.⁴²⁴ In upholding the Program’s degree requirement, the Court found the state’s interest in not funding

414. WASH. CONST. art. I, § 11.

415. *Locke*, 124 S. Ct. at 1310.

416. *Id.* at 1310-11.

417. *Id.* at 1311.

418. *Id.*

419. *Id.*; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

420. *Locke*, 124 S. Ct. at 1312.

421. *Id.* at 1312-13 & n.4 (footnote omitted).

422. *Id.* at 1310.

423. *Id.* at 1313-14.

424. *Id.* at 1314.

devotional degrees substantial and the burden it placed on recipients relatively minor.⁴²⁵

Justice Scalia and Thomas dissented in this case.⁴²⁶ Justice Scalia argued that *Lukumi* clearly applied.⁴²⁷ He believed the scholarship was a public benefit and, therefore, the Government cannot withhold that benefit from some individuals solely on the basis of religion.⁴²⁸ Likening the benefits of the scholarship program to general, public benefits, Justice Scalia addressed the majority's historical argument by stating, "No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church."⁴²⁹ Justice Thomas joined Justice Scalia's dissent, but also added in a short dissent of his own, that the study of theology is not always for a devotional purpose.⁴³⁰ A theology degree can be from a secular perspective and for a secular purpose as well as a religious one.⁴³¹

Interestingly, this case had Justice Scalia and Thomas arguing for broader rights under the First Amendment and other justices arguing in favor of allowing a particular form of discrimination that fit within the "joints" of the Establishment and Free Exercise Clauses.⁴³² Justice Scalia even wrote in his dissent, "In an era when the Court is so quick to come to the aid of other disfavored groups, its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional."⁴³³ So what does this case say about the First Amendment, especially since the trend, as Justice Scalia noted, has been to increase protections? It appears that a majority of the justices are willing to apply a state's religion clause, even if the state's clause is more stringent than the Federal Constitution. Beyond that it is difficult to make any predictions.

The Court did not specify a standard of review in this case. The Court mentioned a compelling state interest and minimum burden on the scholarship recipients.⁴³⁴ However, unlike in *Lukumi*, and other First Amendment cases, the Court did not specifically identify and apply a test. In addition, the Court relied largely on historical analysis and did

425. *Id.* at 1315.

426. *Id.* at 1315-20 (Scalia, J., dissenting); *id.* at 1320-21 (Thomas, J., dissenting).

427. *Id.* at 1315-16 (Scalia, J., dissenting).

428. *Id.* at 1316 (Scalia, J., dissenting).

429. *Id.* at 1316-17 (Scalia, J., dissenting).

430. *Id.* at 1320 (Thomas, J., dissenting).

431. *Id.* at 1321 (Thomas, J., dissenting).

432. *Id.* at 1311.

433. *Id.* at 1320 (Scalia, J., dissenting) (citing *Romer v. Evans*, 517 U.S. 620, 635 (1998)).

434. *Id.* at 1315.

not address Justice Thomas's view that there are times when a theological degree is for a secular course of study and not necessarily for devotional purposes.⁴³⁵ In the end, the best prediction is that a majority of the justices are willing to review cases that fall within the "joints" of the two religion clauses and that going forward the Court most likely will have to determine a standard of review for this category of cases.

Ashcroft v. ACLU

*Ashcroft v. ACLU (Ashcroft II)*⁴³⁶ addressed the Child Online Protection Act (COPA) enacted by Congress in 1998.⁴³⁷ This was the statute's second trip to the Court.⁴³⁸ In its first journey, the Court held that the statute's "community standards" provision was not overbroad.⁴³⁹ In this latest journey, the Court had to consider the propriety of an injunction based on the lower courts' finding that the Government had failed to meet its burden of proving that alternative speech regulations were less effective.⁴⁴⁰

Justice Kennedy, writing for the majority, agreed with the decision of the lower courts.⁴⁴¹ He explained that the Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bears the responsibility of proving their constitutionality.⁴⁴² Part of this burden requires the Government to rebut the plaintiff's argument that there are feasible, less restrictive alternatives to the act.⁴⁴³ In this case, the majority believed filters would be more effective than the statute because filters (1) are less restrictive and do not have a "chilling effect on speech"; (2) prevent minors from seeing all pornography, not just that posted in the United States; and (3) can be applied to all Internet communication, including e-mail.⁴⁴⁴ The majority explained further, "The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective."⁴⁴⁵ Finally, the Court expressed the importance of remanding the case for trial because new technologies

435. *Id.* at 1320 (Thomas, J., dissenting).

436. 124 S. Ct. 2783 (2004).

437. Pub. L. No. 105-277, 112 Stat. 2681-736 (1988) (current version at 47 U.S.C. § 231 (2000)).

438. *See Ashcroft v. ACLU (Ashcroft I)*, 535 U.S. 564 (2002).

439. *Id.* at 566, 585.

440. *Ashcroft II*, 124 S. Ct. at 2788.

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.* at 2792.

445. *Id.* at 2793.

have been developed and new congressional acts have been passed since the initiation of the suit five years ago.⁴⁴⁶

Justice Stevens, joined by Justice Ginsburg, filed a concurring opinion.⁴⁴⁷ They reiterated their position from *Ashcroft I* that the language in the statute with respect to “community standards” is unconstitutional.⁴⁴⁸ In addition, Justice Stevens wrote, “Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as ‘obscene,’ since ‘the line between communications which offend and those which do not is too blurred to identify criminal conduct.’”⁴⁴⁹

Two dissenting opinions were filed.⁴⁵⁰ In the principal dissent, Justice Breyer (joined by Rehnquist, O’Connor, and Scalia), agreed that in order to meet constitutional requirements the Government must have a compelling interest, narrowly tailored means, and the means must be the least restrictive available.⁴⁵¹ However, the dissenting justices believed the Act met these requirements, especially since it was drafted after the Court’s ruling in *Reno v. ACLU*.⁴⁵² In a separate dissent, Justice Scalia expressed the same views from his concurrence in *Z.J. Gifts*: businesses that profit from the pandering of sex are not protected by the First Amendment.⁴⁵³ Therefore, the speech in this case should not be subject to a strict scrutiny review.⁴⁵⁴ However, since the other eight justices disagreed, Justice Scalia sided with the dissent and held the Government met its burden and the Act was constitutional.⁴⁵⁵

Ashcroft has significant lessons for future speech cases and is a good story for Court watchers. For the First Amendment lesson, eight justices applied the most heightened level of review to this restriction on speech—strict scrutiny—and a majority required the Government to prove that all of the plaintiff’s alternatives were less effective than the Government’s statute.⁴⁵⁶ This case exemplifies the Court’s concern with any restrictions on speech, even speech deemed offensive to some individuals and harmful to children. It also signals some potentially new

446. *Id.* at 2794-95.

447. *Id.* at 2795-97 (Stevens, J., concurring).

448. *Id.* at 2795-96 (Stevens, J., concurring).

449. *Id.* at 2796 (Stevens, J., concurring) (quoting *Smith v. United States*, 431 U.S. 291, 316 (1977)).

450. *Id.* at 2797 (Scalia, J., dissenting); *id.* at 2797-806 (Breyer, J., dissenting).

451. *Id.* at 2797-98 (Breyer, J., dissenting).

452. *Id.* at 2805 (Breyer, J., dissenting); *Reno v. ACLU*, 521 U.S. 844 (1997).

453. *Ashcroft II*, 124 S. Ct. at 2797 (Scalia, J., dissenting); see *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 124 S. Ct. 2219, 2228 (2004) (Scalia, J., concurring in the judgment).

454. *Ashcroft II*, 124 S. Ct. at 2797 (Scalia, J., dissenting).

455. *Id.* (Scalia, J., dissenting).

456. *Id.* at 2794; *id.* at 2796 (Stevens, J., concurring).

branches among the Court's jurisprudence, such as Justice Scalia's refusal to apply strict scrutiny and Justices Stevens and Ginsburg's skepticism over criminal penalties.⁴⁵⁷ For Court watchers, the decision has all the hallmarks of a "lost majority." Justice Breyer did not pen a majority opinion in the April sitting, and his dissent reads strongly like an opinion originally drafted as a majority. Though such "flips" of the Court happen at most two or three times per term, the decision should remind students of the Court that, even after the justices have voted at their Friday conference, those votes are not set in stone and can be turned through a particularly persuasive opinion from one of the brethren (such as Justice Kennedy's in this case).

Elk Grove Unified School District v. Newdow

*Elk Grove Unified School District v. Newdow*⁴⁵⁸ involved issues of standing and the First Amendment's religion clauses.⁴⁵⁹ Under California law, every public elementary school must start the day with an appropriate patriotic exercise.⁴⁶⁰ The Pledge of Allegiance (set forth as amended in a 1954 congressional act),⁴⁶¹ satisfies this requirement, though students with religious objections may refrain from reciting it.⁴⁶² However, Newdow, an ordained atheist, filed suit on behalf of his daughter, challenged the 1954 act that amended the Pledge and added the words "under God," and sought an injunction against use of the Pledge to satisfy the school's patriotic exercise requirement.⁴⁶³ The district court concluded that the Pledge did not violate the Establishment Clause, but the Ninth Circuit reversed.⁴⁶⁴ In a series of opinions, the Ninth Circuit unanimously held that Newdow had standing "as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter"⁴⁶⁵ and, in a split decision, held that the 1954 congressional Act and the mandatory, daily recitation of the Pledge in school violated the Establishment Clause.⁴⁶⁶

457. *Id.* at 2796-97 (Stevens, J., concurring).

458. 124 S. Ct. 2301 (2004).

459. *Id.* at 2305.

460. CAL. EDUC. CODE § 52720 (Deering 2000).

461. Act of June 14, 1954, ch. 297, 68 Stat. 249 (codified as amended at 4 U.S.C. § 4 (2000)).

462. *Elk Grove*, 124 S. Ct. at 2306.

463. *Id.* at 2306-07.

464. *Id.* at 2307.

465. *Newdow v. U.S. Congress*, 328 F.3d 466, 485 (9th Cir. 2003), *rev'd sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

466. *Newdow*, 328 F.3d at 490.

Before the case reached the Supreme Court, it took two unusual procedural turns. First, Sandra Banning, the mother, filed a motion to dismiss the case, claiming that she had exclusive legal custody of her daughter and that, consequently, Newdow had no right to sue on her behalf.⁴⁶⁷ The Ninth Circuit rejected this argument.⁴⁶⁸ Second, Justice Scalia made public remarks criticizing the Ninth Circuit's decision.⁴⁶⁹ As a result, he took the unusual step *sua sponte* of recusing himself from the case,⁴⁷⁰ an action that stood in stark contrast to his refusal to recuse in the *Cheney v. United States District Court*⁴⁷¹ case, despite a request from one of the litigants.⁴⁷²

When it reached the Court, the case presented two issues: (1) whether Newdow had standing to sue on behalf of his daughter, and (2) whether the school district's policy violated the First Amendment.⁴⁷³ Justice Stevens, writing for the majority, concluded that Newdow did not have standing, so it did not reach the First Amendment issue.⁴⁷⁴ Showing extreme deference to state law, Stevens argued, because California law does not give Newdow the right to sue as next friend, he lacks prudential standing to challenge the policy of the school district.⁴⁷⁵ The Court added, "A next friend surely could exercise such right, but the Superior Court's order has deprived Newdow of that status."⁴⁷⁶ Justice Stevens's opinion did not address Newdow's First Amendment claim.⁴⁷⁷

Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas each filed opinions concurring in the judgment of the case.⁴⁷⁸ These three justices voted to reverse the case based on its merits, rather than the standing issue raised by the majority.⁴⁷⁹ According to Chief Justice Rehnquist, the importance of the constitutional question at issue supersedes the standing issue.⁴⁸⁰ Chief Justice Rehnquist then engaged in

467. *Elk Grove*, 124 S. Ct. at 2307.

468. *Newdow v. U.S. Congress*, 313 F.3d 500, 505 (9th Cir. 2002).

469. See Charles Lane, *Scalia Will Sit Out Review of Pledge of Allegiance Case*, WASH. POST, Oct. 19, 2003, at A3.

470. *Id.*

471. 124 S. Ct. 2576 (2004).

472. See Charles Lane, *Scalia Won't Sit Out Case on Cheney: Justice's Memo Details Hunting Trip with VP*, WASH. POST, Mar. 19, 2004, at A1.

473. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2308 (2004).

474. *Id.* at 2312.

475. *Id.*

476. *Id.*

477. *Id.* at 2305-12.

478. *Id.* at 2304.

479. *Id.* at 2312 (Rehnquist, C.J., concurring in the judgment); *id.* at 2321 (O'Connor, J., concurring in the judgment); *id.* at 2328, 2333 (Thomas, J., concurring in the judgment).

480. *Id.* at 2312 (Rehnquist, C.J., concurring in the judgment).

a lengthy historical discussion of references to God in our country's patriotic exercises, stated that the Pledge was just such a patriotic exercise, and concluded that the words "under God" do not convert it to an explicit or formal religious exercise.⁴⁸¹ Justice O'Connor applied the endorsement test and concluded that under the test, a reasonable person with knowledge of our Nation's history would not perceive the words of the Pledge to be government endorsement of a particular religion.⁴⁸² Finally, Justice Thomas argued the Establishment Clause is a federal provision, "which . . . resists incorporation," and regardless of that consideration, the Pledge is not unconstitutional because it does not violate any free-exercise rights.⁴⁸³

At the beginning of the Term, legal experts and First Amendment scholars anticipated *Newdow* would be one of the Court's landmark decisions.⁴⁸⁴ Since a majority of the Court did not even address the First Amendment issue and dismissed the case on a standing technicality, what is the importance of this case? The answer to this question may depend on how one reads the opinions. Some people argue that this case is significant because Justice O'Connor, the swing vote in many controversial cases, affirmatively (and somewhat exceptionally) stated her belief in the constitutionality of the Pledge despite not needing to do so.⁴⁸⁵ Others might argue that the five justices who resolved the case on standing grounds would find the Pledge unconstitutional if the right case came along for them to address the issue on the merits. In light of Justice Scalia's public critique of the Ninth Circuit's decision,⁴⁸⁶ it appears that Justice Kennedy may be the swing vote in the next case presenting this issue.

Though the case did not chart new First Amendment territory, it *did* make important case law regarding a parent's right to sue on behalf of his child. Despite the Court's recent jurisprudence suggesting that the Due Process Clause embraced a parent's right to control the upbringing of his child,⁴⁸⁷ the five justices in this case took a far dimmer view of parental rights.⁴⁸⁸ Admittedly, the parental relationship in this case was a strained one—with a state court order trimming Newdow's right to sue on his

481. *Id.* at 2317-20 (Rehnquist, C.J., concurring in the judgment).

482. *Id.* at 2321-26 (O'Connor, J., concurring in the judgment).

483. *Id.* at 2328, 2330 (Thomas, J., concurring in the judgment).

484. *See, e.g.*, Marcia Coyle, *High Expectations*, NAT'L L.J., Sept. 29, 2003, at 1.

485. *See, e.g.*, *Supreme Deliverance*, DAILY NEWS L.A., June 14, 2004, at N16, LEXIS, News Library, LAD File.

486. *See Lane, supra* note 469.

487. *See Troxel v. Granville*, 530 U.S. 57 (2000).

488. *See Elk Grove*, 124 S. Ct. at 2311-12.

daughter's behalf.⁴⁸⁹ Nonetheless, the majority's holding, that certain parents do not have a right to sue on behalf of their children, dents both the Court's parental rights jurisprudence and its third party standing jurisprudence.⁴⁹⁰ By linking prudential standing considerations explicitly with state law, the Court invites future challenges on prudential standing grounds based on the eccentricities of the state from which the case arises. Thus, while Court watchers must wait another day to hear how the Court will decide the constitutionality of the Pledge, the standing determinations in this case are sure to have substantial repercussions in future cases.

McConnell v. Federal Election Commission

*McConnell v. Federal Election Commission*⁴⁹¹ addressed the Bipartisan Campaign Reform Act of 2002 (BCRA),⁴⁹² more popularly known as the McCain-Feingold Act or the Shays-Meehan Act.⁴⁹³ The purpose of the Act was to address three developments in federal election campaign finance since the Court's ruling in *Buckley v. Valeo*:⁴⁹⁴ (1) the increased importance and influence of "soft money," (2) the proliferation of "issue ads" aired during the 1996 federal elections, and (3) the findings of a Senate investigation into the general campaign practices of federal officials during the 1996 election cycle.⁴⁹⁵

The BCRA has five parts, called Title I through Title V.⁴⁹⁶ Justices Stevens and O'Connor wrote for the majority (including Justices Souter, Ginsburg, and Breyer) upholding the major provisions of Titles I and II, which control soft-money, expenditure restrictions for national party committees, and disclosure requirements for broadcast companies regarding electioneering communications.⁴⁹⁷ Rejecting strict scrutiny, the majority applied a less demanding "close scrutiny" that it derived from *Buckley*.⁴⁹⁸ It justified this more lenient standard on the ground that contribution limits "entail[] only a marginal restriction upon the

489. *Id.* at 2307.

490. *Cf. Whitmore v. Arkansas*, 495 U.S. 149 (1990).

491. 124 S. Ct. 619 (2003).

492. Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.A.)

493. *McConnell v. Fed. Election Comm'n*, 124 S. Ct. 619, 643 (2003); see Mark Fineman, *Top 'Soft-Money' Donor Does It 'Under the Radar'*, L.A. TIMES, June 26, 2002, at A1, available at 2002 WL 2485906.

494. 424 U.S. 1 (1976).

495. *McConnell*, 124 S. Ct. at 648.

496. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

497. *McConnell*, 124 S. Ct. at 643, 706.

498. *Id.* at 656-57, 659.

contributor's ability to engage in free communication" and display the appropriate deference to Congress in light of its expertise in this area.⁴⁹⁹

Next, the majority held that limitations on a national party, its committees, or agents, to solicit or spend money do not violate the First Amendment.⁵⁰⁰ Here again, the Court found that the Government's interest in preventing corruption is "sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits."⁵⁰¹ Finally, the Court concluded the Government had met its burden of proof with substantial evidence showing how large soft money contributions contribute to the appearance and actual corruption of federal officials.⁵⁰²

The Court then rejected McConnell's argument that Title II's regulation of "electioneering communication[s]" contradicts *Buckley*.⁵⁰³ *Buckley* requires political committees to file financial reports with the Federal Election Commission (FEC) regarding communications that expressly advocate the election or defeat of a specific candidate.⁵⁰⁴ BCRA applies the rule in *Buckley* to "electioneering communication," which includes any broadcast that identifies a specific candidate and is aired within sixty days of a general election and within thirty days of a primary.⁵⁰⁵ The Court explained that *Buckley* in no way set out a constitutional distinction between express and issue advocacy.⁵⁰⁶ Instead, *Buckley* was a statutory interpretation, not a principle of constitutional law.⁵⁰⁷ However, the Court noted that this ruling against the facial challenge of electioneering communication requirements does not foreclose the possibility of future challenges to this requirement as applied.⁵⁰⁸

Chief Justice Rehnquist wrote the opinion for the Court on the constitutionality of Titles III and IV.⁵⁰⁹ In one section of his opinion (joined by Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer), Chief Justice Rehnquist struck down section 318 which forbade minors from contributing to political parties or

499. *Id.* at 655-57 (alteration in original) (quoting *Buckley*, 424 U.S. at 20-21).

500. *Id.* at 659-61.

501. *Id.* at 661 (citing *Fed. Election Comm'n v. Colo. Republican Campaign Comm.*, 533 U.S. 431, 456 (2001)).

502. *Id.* at 666.

503. *Id.* at 687.

504. *Id.* at 686.

505. *Id.* at 686-87.

506. *Id.* at 687.

507. *Id.* at 688.

508. *Id.* at 692.

509. *Id.* at 707.

candidates.⁵¹⁰ Applying strict scrutiny, the Court concluded that the Government had not met its burden of proof showing that this provision was necessary for combating corruption and that there were no other less restrictive alternatives available.⁵¹¹ In another section, Chief Justice Rehnquist (joined by Justices O'Connor, Scalia, Kennedy, Souter, and Thomas) held that McConnell's challenges to BCRA's millionaire provisions were nonjusticiable.⁵¹² The millionaire provisions weakened campaign finance restrictions for candidates whose opponents used large sums of their own funds to finance their campaigns.⁵¹³ In the majority's view, however, McConnell and other plaintiffs lacked Article III standing because they could not demonstrate an "actual or imminent" "injury in fact" that was "fairly traceable" to BCRA.⁵¹⁴

Justice Breyer (joined by Justices Stevens, O'Connor, Souter, and Ginsburg) delivered the opinion of the Court upholding Title V, section 504, which requires broadcasters to keep public records of political requests for broadcasting time made by or on behalf of federal candidates.⁵¹⁵ The district court held this was a violation of the First Amendment; however, the Court reversed on the grounds that these "requirements [for records] are virtually identical to those contained in a regulation that the Federal Communications Commission promulgated as early as 1938."⁵¹⁶ Also rejecting McConnell's argument that the regulations place an undue burden on broadcast companies, party committees, and individuals that pay for the ads, the majority stated that the Government's interest in enforcing the provisions and goals of BCRA outweigh the small administrative burden placed on the broadcast companies.⁵¹⁷

Justice Scalia argues in his opinion that "[t]his is a sad day for the freedom of speech."⁵¹⁸ He expresses his confusion with a Court that endorses the First Amendment privileges of online pornography, pornographic cable television, and tobacco advertising, but will not protect what he believes to be the heart of the First Amendment—the right to criticize government.⁵¹⁹ He adds, there are three arguments

510. *Id.* at 711.

511. *Id.*

512. *Id.* at 710.

513. *Id.*

514. *Id.* at 707, 710.

515. *Id.* at 712.

516. *Id.* at 712, 715.

517. *Id.* at 713-14.

518. *Id.* at 720 (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part).

519. *Id.* (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part).

supporters of the Act use that are fallacious: (1) money is not speech, (2) pooling money is not speech, and (3) speech by corporations can be abridged.⁵²⁰

Justice Thomas also added a long opinion to this decision.⁵²¹ Like Justice Scalia, Justice Thomas believes *Buckley* was decided incorrectly.⁵²² He argues, with this decision, the Court continues to err by applying the low level of scrutiny adopted in *Buckley*.⁵²³ In addition, he expresses concern that the Court has created a slippery slope with this decision.⁵²⁴ He asks what's next for the Court to apply this ruling to, and answers that it is entirely possible for the freedom of the press to be next.⁵²⁵ He concludes this is possible because "[t]he press now operates at the whim of Congress."⁵²⁶

Justice Kennedy writes in his opinion that "significant portions of Titles I and II of the Bipartisan Campaign Reform Act . . . constrain" the freedom of speech.⁵²⁷ He argues that the Court's decision in this case surpasses *Buckley* because "*Buckley* did not authorize Congress to decide what shapes and forms the national political dialogue is to take."⁵²⁸ Like Justices Scalia and Thomas, Justice Kennedy dissents from most of the majority's ruling in this case because he believes it stifles speech, violates the First Amendment, and creates a society that is less free.⁵²⁹

McConnell marks a significant victory for proponents of campaign finance reform in the United States. Beginning with *Federal Election Commission v. Akins*,⁵³⁰ a number of members of the Court have signaled

520. *Id.* at 721, 724-25 (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part).

521. *Id.* at 729 (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part).

522. *Id.* at 737 (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part).

523. *Id.* at 730 (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part).

524. *Id.* at 732 (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part).

525. *Id.* at 740 (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part).

526. *Id.* at 742 (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part).

527. *Id.* (Kennedy, J., concurring in the judgment in part and dissenting in part).

528. *Id.* (Kennedy, J., concurring in the judgment in part and dissenting in part).

529. *Id.* at 742-43, 772 (Kennedy, J., concurring in the judgment in part and dissenting in part).

530. 524 U.S. 11 (1998).

their sympathy for campaign finance reform laws.⁵³¹ However, as demonstrated by the proliferation of section 527 organizations (also known as “Soft PACS”) after *McConnell*,⁵³² BCRA is not the last chapter in this struggle. Apart from the fanfare over Titles I and II, however, the story with perhaps the most lasting doctrinal impact may be Chief Justice Rehnquist’s opinion striking down BCRA’s restrictions on minors’ campaign contributions.⁵³³ For some time, the Court has struggled with defining the scope of minors’ constitutional rights and the appropriate level of constitutional scrutiny in reviewing restrictions on those rights. Somewhat unexpectedly, the Court in *McConnell* took a very harsh line on such restrictions, subjecting them to heightened scrutiny and invalidating them.⁵³⁴ Subsequent cases, whether on matters of abortion or the constitutionality of juvenile curfew ordinances, are sure to make use of this doctrinal development.

Voting Rights

Vieth v. Jubelirer

*Vieth v. Jubelirer*⁵³⁵ had the potential to end with a bang but instead ended with a whimper. This case involved a challenge under Article I and the Equal Protection Clause to an alleged political gerrymander in Pennsylvania.⁵³⁶ According to the plaintiffs’ claim, Pennsylvania’s Republican-dominated government (which at the time controlled both houses of the legislature and the governor’s office) carved up the state’s congressional district in a blatantly pro-Republican fashion, partly in retaliation for prior pro-Democrat plans.⁵³⁷ After a three-judge district court ruled in the plaintiffs’ favor, the general assembly revised the plan, which the district court accepted on review.⁵³⁸ As the case went to the Supreme Court, it presented the question not simply whether the revised plan comported with the Constitution, but whether a voting rights challenge based on a political gerrymander theory presented a non-

531. See Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377 (2000).

532. See Thomas B. Edsall, *Pro-GOP Groups Outpaced in Funds: Pro-Democratic ‘527s’ Far Ahead*, WASH. POST, July 16, 2004, at A9; ALLIANCE FOR JUSTICE, SECTION 527 ORGANIZATIONS (“SOFT PACS”), at http://www.allianceforjustice.org/nonprofit/public_policy/527_organizations.html (last visited Aug. 11, 2004).

533. *McConnell*, 124 S. Ct. at 711.

534. *Id.*

535. 124 S. Ct. 1769 (2004).

536. *Id.* at 1773.

537. *Id.*

538. *Id.* at 1774.

justiciable political question.⁵³⁹ Eighteen years earlier, in *Davis v. Bandemer*,⁵⁴⁰ the Supreme Court had held that a political gerrymander claim was justiciable, but could not agree on the proper standard to assess the claim.⁵⁴¹

A divided Court affirmed the district court's decision but could not agree on the reasoning.⁵⁴² A plurality, led by Justice Scalia, took the position that political gerrymander claims were nonjusticiable and argued that *Davis* should be overruled.⁵⁴³ The plurality began by canvassing the history of political gerrymanders, noting that they were a common feature of colonial government.⁵⁴⁴ It then noted that although the text of the Constitution did not impose a legal limit on how congressional districts are drawn, it did supply a textually explicit remedy for poorly drawn districts—namely that Congress could “make or alter” those districts.⁵⁴⁵ The plurality then explained that political gerrymander claims entailed a “lack of judicially discoverable and manageable standards”—one of the grounds for political questions identified in *Baker v. Carr*.⁵⁴⁶

In the plurality's view, the Court's complete failure over the past eighteen years to craft a set of standards for evaluating political gerrymander claims evidenced the utter lack of discoverable and manageable standards, leaving lower courts (and state governments) adrift.⁵⁴⁷ Finally, the plurality rejected both the appellants' proposed standard (a type of “purpose” test drawn from the racial gerrymander context) and the various standards proposed by the dissenters.⁵⁴⁸ The fact that the dissenters proposed no fewer than three different standards merely confirmed the lack of judicially discoverable standards in this context.⁵⁴⁹

Justice Kennedy concurred in the judgment.⁵⁵⁰ Unlike the plurality, he would not overrule *Davis* at the present time because he believed that it remains possible to discover some judicially manageable standard for

539. *Id.* at 1776-78.

540. 478 U.S. 109 (1986).

541. *Vieth*, 124 S. Ct. at 1777.

542. *Id.* at 1792-93.

543. *Id.* at 1778, 1792 (plurality opinion).

544. *Id.* at 1774-76 (plurality opinion).

545. *Id.* at 1775 (plurality opinion) (quoting U.S. CONST. art. I, § 4).

546. *Id.* at 1776, 1778 (plurality opinion) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

547. *Id.* at 1778-80 (plurality opinion).

548. *Id.* at 1780-81, 1786-89 (plurality opinion).

549. *Id.* at 1784 (plurality opinion).

550. *Id.* at 1792 (Kennedy, J., concurring in the judgment).

political gerrymander claims.⁵⁵¹ In his view, the damage to democracy wrought by political gerrymanders requires that the Court seek to develop some legal standard for policing them.⁵⁵² Justice Kennedy suggested that First Amendment principles might provide a helpful analogy in this context but declined to commit to them conclusively.⁵⁵³ Instead, he seemed to conclude that, absent a clear standard in this case, the judgment of the district court should be affirmed.⁵⁵⁴

In three separate opinions, four justices dissented and offered various standards for evaluating political gerrymander claims.⁵⁵⁵ Justice Stevens, relying on the racial gerrymander cases, proposed that the proper standard be whether partisanship was the legislature's "predominant" motive.⁵⁵⁶ Justice Souter, joined by Justice Ginsburg, borrowed from the Court's racial harassment jurisprudence and proposed a burden-shifting analysis akin to the *McDonnell Douglas v. Green*⁵⁵⁷ framework.⁵⁵⁸ Justice Breyer argued that the proper standard should be whether the gerrymander resulted in unjustified entrenchment of the dominant party.⁵⁵⁹

Unfortunately, this case raises more questions than it answers. Eight votes are clear—four for nonjusticiability, four against. One vote, Justice Kennedy's, is the most difficult to explain. He clearly wants to leave two doors open—one for nonjusticiability and one for the development of a manageable standard.⁵⁶⁰ The problem is how to explain his vote on the judgment in this case.

As Justice Scalia properly demonstrates, Justice Kennedy's decision to affirm the judgment below can be explained on only one of two rationales—either no standard is available, in which case the nonjusticiability doctrine should apply, or a standard is available, in

551. *Id.* at 1792-99 (Kennedy, J., concurring in the judgment).

552. *See id.* at 1794-95 (Kennedy, J., concurring in the judgment).

553. *Id.* at 1797-98 (Kennedy, J., concurring in the judgment).

554. *Id.* at 1798-99 (Kennedy, J., concurring in the judgment).

555. *Id.* at 1799 (Stevens, J., dissenting); *id.* at 1815-22 (Souter, J., dissenting); *id.* at 1822 (Breyer, J., dissenting).

556. *Id.* at 1810 (Stevens, J., dissenting).

557. 411 U.S. 792 (1973).

558. *Vieth*, 124 S. Ct. at 1817 (Souter, J., dissenting). Under that framework, the plaintiff must advance a prima facie case of discrimination. *Green*, 411 U.S. at 802. At that point, the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for its action. *Id.* If it does so, the burden shifts back to the plaintiff to show that the defendant discriminated against him. *Id.* at 804; *see also* *Raytheon Co. v. Hernandez*, 124 S. Ct. 513 (2003); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

559. *Vieth*, 124 S. Ct. at 1825 (Breyer, J., dissenting).

560. *See id.* at 1798-99 (Kennedy, J., concurring in the judgment).

which case affirmance only can occur by reasoning that the plaintiffs have failed to satisfy that standard.⁵⁶¹ Since Justice Kennedy explicitly acknowledges that the Court has no agreed-upon standard, his opinion is probably most reasonably read as a cautious fifth vote in favor of nonjusticiability in this case. The risk in not joining the majority in toto is that future litigants may attempt to stitch together a standard from the opinion of Justice Kennedy and the four dissenters, forcing courts to grapple with the same uncertainty that confronted them after *Davis*. It would have provided far greater guidance to litigants for the Court either to shut the door entirely on such claims or to hash out a standard on which they all could agree.

International

Republic of Austria v. Altmann

*Republic of Austria v. Altmann*⁵⁶² involved the retroactive application of the Federal Sovereign Immunities Act (FSIA).⁵⁶³ Enacted in 1976,⁵⁶⁴ the FSIA sets forth a general rule immunizing foreign states and their instrumentalities from suits, but it contains a series of exceptions, including, of relevance here, “rights in property taken in violation of international law.”⁵⁶⁵ Prior to its enactment, there were two basic phases in the sovereign immunity law.⁵⁶⁶ Until 1952, sovereigns generally were absolutely immune from suit.⁵⁶⁷ Beginning in 1952, until the adoption of the FSIA, the United States employed a “restrictive theory” of sovereign immunity under which foreign sovereigns could lose their immunity if their conduct fell under certain exceptions detailed in a 1952 letter by the then Acting Legal Advisor at the State Department.⁵⁶⁸ Following decades of jurisprudential confusion and inconsistent application of the “restrictive theory,” the FSIA sought to codify the principles under which sovereigns would be immune.⁵⁶⁹ This legal progression is important because Altmann’s case involved conduct occurring in the late

561. *Id.* at 1790 (plurality opinion).

562. 124 S. Ct. 2240 (2004).

563. *Id.* at 2243; 28 U.S.C. §§ 1602-1611 (2000).

564. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602-1611).

565. 28 U.S.C. § 1605(a)(3) (2003); *see Altmann*, 124 S. Ct. at 2243.

566. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), DEP’T. ST. BULL., June 23, 1952, at 984-85 (1952).

567. *See id.*

568. *Altmann*, 124 S. Ct. at 2249; *see* Tate, *supra* note 566.

569. *Altmann*, 124 S. Ct. at 2249; *see also* Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 487-88 (1983).

1930s and early 1940s, when the principle of absolute immunity still reigned supreme in the United States.

Altmann's case involved the unlawful seizure (by either the Nazi Party or the Austrian Government) of six paintings done by the famous Austrian artist Gustav Klimt.⁵⁷⁰ Following a decades-long struggle with the Austrian government for the return of the paintings, Altmann finally sued it (and its national museum) in federal court.⁵⁷¹ The Austrian defendants moved to dismiss, arguing, among other things, that at the time of the events in question, they enjoyed absolute immunity and that nothing in the FSIA retroactively abrogated that immunity.⁵⁷² The district court and the Ninth Circuit rejected this argument, albeit on different grounds.⁵⁷³

In a broad and very important opinion by Justice Stevens, the Supreme Court affirmed and held that the FSIA applied retroactively to conduct like Austria's that occurred both prior to its enactment and prior to the United States' adoption of the restrictive theory of sovereign immunity.⁵⁷⁴ The Court began by reviewing its leading retroactivity decision in *Landgraf v. USI Film Products*,⁵⁷⁵ and concluded that it did not control the instant case.⁵⁷⁶ Under that framework, the FSIA, under *Verlinden B.V. v. Central Bank of Nigeria*,⁵⁷⁷ was not purely jurisdictional (and therefore automatically retroactive), and Congress had failed to include an "express command" requiring retroactive application of the statute.⁵⁷⁸ Normally, the Court would then ask whether the statute had an impermissible retroactive effect (if so, it should not be applied retroactively).⁵⁷⁹ Here, however, the opinion took a curious turn. The Court held that the *Landgraf* framework did "not definitively resolve" the case because the FSIA was *sui generis*—it did not attempt to define substantive liability principles but, instead, to give sovereigns present

570. *Altmann*, 124 S. Ct. at 2243.

571. *Id.* at 2244-46 & n.4.

572. *Id.* at 2246.

573. The district court concluded that the Federal Sovereign Immunities Act was a jurisdictional statute which applied retroactively. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1201 (C.D. Cal. 2001), *aff'd*, 317 F.3d 964 (9th Cir. 2002), *aff'd*, 124 S. Ct. 2240 (2004). The Court of Appeals for the Ninth Circuit argued that Austria could not have reasonably expected to be immune from suit at the time of its alleged misconduct. *Altmann v. Republic of Austria*, 317 F.3d 954, 965 (9th Cir. 2002), *aff'd*, 124 S. Ct. 2240 (2004).

574. *Altman*, 124 S. Ct. at 2254.

575. 511 U.S. 244 (1994).

576. *Altmann*, 124 S. Ct. at 2249-50.

577. 461 U.S. 480 (1983).

578. *Altmann*, 124 S. Ct. at 2251-52.

579. *See id.* at 2252.

protection from suits based on past conduct.⁵⁸⁰ For this reason, in the Court's view, the FSIA defied description under the types of statutes described in *Landgraf*.⁵⁸¹ Leaving behind *Landgraf*, the Court then proceeded to use traditional tools of statutory interpretation (text, structure, and policy) to conclude that Congress intended the FSIA to apply to all pending cases regardless of when the conduct at issue occurred.⁵⁸² Finally, the Court concluded with a somewhat dubitable caution that its holding was extremely narrow—it was not opining on whether Austria's conduct fell under the expropriation exception or whether other doctrines might protect Austria; nor was it prejudging any "statement of interest" by the United States (an unlikely event according to the record) suggesting that the Court should decline to exercise jurisdiction, which might be entitled to deference by the Court.⁵⁸³

Several justices concurred. Justice Scalia argued that the FSIA was a jurisdictional, not a substantive, statute that simply expanded the available forums for suit.⁵⁸⁴ Under the plain logic of *Landgraf*, the statute had no impermissible retroactive effect and, therefore, applied to pending cases such as *Altmann's*, regardless of the timing of the underlying conduct.⁵⁸⁵ Justice Breyer, joined by Justice Souter, found that close reading of the text, the Court's past practice, and practical considerations supported retroactive application of the FSIA and mitigated against any damage to sovereigns' "reliance" interests on the pre-1952 rule of absolute immunity.⁵⁸⁶ Unlike the majority, Justice Breyer also explicitly relied on foreign precedent from France and England that stood for the proposition that a sovereign's status at the time of suit (rather than at the time of the underlying conduct) controlled the immunity inquiry.⁵⁸⁷

Justice Kennedy (joined by Chief Justice Rehnquist and Justice Thomas) dissented.⁵⁸⁸ In Justice Kennedy's view, the majority opinion suffered from two flaws.⁵⁸⁹ First, the majority potentially upset the

580. *Id.*

581. *Id.* at 2251-52.

582. *Id.* at 2252-54.

583. *Id.* at 2254-56. The State Department, as authorized by the Attorney General, may issue a statement advocating the international interests of the United States implicated by the litigation. 28 U.S.C. §§ 516-517 (2000).

584. *Altmann*, 124 S. Ct. at 2256 (Scalia, J., concurring).

585. *Id.* (Scalia, J., concurring).

586. *Id.* at 2258-63 (Breyer, J., concurring).

587. *Id.* at 2259 (Breyer, J., concurring) (citing *Regina v. Bow St. Metro. Stipendiary Magistrate (Ex parte Pinochet Ugarte (No. 3))*, [2000] 1 A.C. 147, and *Ex-King Farouk of Egypt v. Christian Dior, CA Paris*, 84 *Clunet* 717, (1957), *reprinted in* 24 *I.L.R.* 228).

588. *Id.* at 2263 (Kennedy, J., dissenting).

589. *Id.* at 2263, 2273 (Kennedy, J., dissenting).

settled expectations of foreign sovereigns for conduct that, as in the present case, occurred decades ago.⁵⁹⁰ For this reason, Justice Kennedy would have followed the principle enunciated in *Landgraf* (and a long line of cases preceding it) that the Court should not apply statutes that have an impermissible retroactive effect.⁵⁹¹ The dissent chided the majority for contorting *Landgraf*—if the statute lacks clear congressional language mandating retroactive application and has an impermissible retroactive effect, that should be the end of the case.⁵⁹² In order for the majority to move beyond this framework and consider the statutory text (despite how it fares under *Landgraf*), it must twist that decision beyond recognition. Doing so calls into doubt the validity of the Supreme Court's decision in *Hughes Aircraft v. United States ex rel. Schumer*,⁵⁹³ where the Court declined to give retroactive effect to a statute that created a new cause of action and, thus, like the FSIA, arguably expanded the Court's jurisdiction.⁵⁹⁴ Second, Justice Kennedy closed with a caution that the majority's opinion potentially treads dangerously on separation of powers principles.⁵⁹⁵ In the dissent's view, the FSIA represented a carefully crafted compromise between the executive and legislative branches over the scope of a foreign sovereign's immunity in U.S. courts, typically a very sensitive political matter.⁵⁹⁶ By suggesting that a statement of interest by the executive branch might be entitled to deference, the majority arguably elevated the Executive power over the legislative power exemplified by Congress's carefully crafted scheme. Moreover, to allow the Court to pass on the deference due to the executive statement would be a raw exercise of judicial power in matters of foreign affairs.

This case, as Justice Kennedy explained, was a hard one, involving a murky retroactivity test and foreign affairs powers. At bottom, the case was tricky, not because of the issues but because the Court was the victim of its own jurisprudence. The clearest solution was Justice Scalia's—that the FSIA was a jurisdiction-creating statute normally entitled to retroactive effect.⁵⁹⁷ However, as the majority acknowledged, that view was hard to reconcile as a principled matter with *Verlinden*, which suggested that the FSIA was also substantive.⁵⁹⁸ Once that premise—

590. *Id.* at 2263 (Kennedy, J., dissenting).

591. *Id.* at 2264 (Kennedy, J., dissenting).

592. *Id.* at 2266 (Kennedy, J., dissenting).

593. 520 U.S. 939 (1997).

594. *Altmann*, 124 S. Ct. at 2270-72 (Kennedy, J., dissenting).

595. *Id.* at 2273 (Kennedy, J., dissenting).

596. *See id.* at 2274-75 (Kennedy, J., dissenting).

597. *Id.* at 2256 (Scalia, J., concurring).

598. *Id.* at 2251.

FSIA qua substantive law—is accepted, then, as the dissent points out, the case is hard to distinguish from *Hughes*, which denied retroactive application to a statute creating a cause of action.⁵⁹⁹ Thus, fidelity to *stare decisis* would seem to have required the conclusion reached by Justice Kennedy—that the FSIA should not apply retroactively. The majority dodged this conclusion only by rewriting the *Landgraf* test and making it non-dispositive for this *sui generis* statute.⁶⁰⁰ That holding is bound to generate future litigation over whether other statutes share the salient qualities with the “*sui generis*” FSIA.

This murky doctrinal broth would have been digestible in a garden-variety statutory case. However, peppered as the case was with flavors of foreign policy, the stakes are far higher; for the case removes a major hurdle to suits against foreign nations for a wide variety of past conduct (such as the Japanese comfort women litigation).⁶⁰¹ To be sure, the decision does not remove all hurdles, and doctrines such as Act of State and forum nonconveniens ultimately may provide additional barriers to the liability of state defendants, as Justice Breyer rightly observes.⁶⁰² But there are at least two crucial differences between those doctrines and sovereign immunity. One is ease of proof, a point that Justice Breyer elides. Act of State and forum nonconveniens tend to be highly fact-sensitive determinations, often amenable to conclusion only after some amount of discovery (or, at least, fact pleading).⁶⁰³ By contrast, immunity (at least of the pre-1952 brand) was an easy argument—we’re a sovereign, so we win. Thus, the most important upshot of the decision may be increased litigation (and therefore settlement pressure) against foreign sovereigns, even if the cases never reach trial. The second is the diplomatic effects of the decision. As the majority and Justice Breyer recognize, the State Department may sometimes come to the foreign nation’s rescue by filing a statement of interest.⁶⁰⁴ That solution is not

599. *Id.* at 2267 (Kennedy, J., dissenting).

600. *See id.* at 2251-52.

601. *See generally* Hwang Geum Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003).

602. *Altmann*, 124 S. Ct. at 2262.

603. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249-50 (1981) (holding that each case invoking the doctrine of forum non conveniens turns on its own particular facts); *Koster v. Lumbermans Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) (holding that there must be a clear showing of facts that make the chosen forum inappropriate).

604. *Altmann*, 124 S. Ct. at 2255-56, 2262. Foreign nations often placed diplomatic pressures on the State Department in seeking immunity. According to the Court in *Verlinden*, “on occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.” *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 487 (1983); *see Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the House Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary*, 94th Cong. 34-35 (1976)

unproblematic. Apart from the separation of powers concerns identified by Justice Kennedy, the decision also forces the State Department to make sensitive diplomatic decisions about intervening in litigation—decisions that it previously could avoid more easily, at least with respect to pre-1952 conduct, where the theory of absolute immunity made the case easy.⁶⁰⁵ Although the majority assures its readers that its holding is a narrow one, practitioners can be sure that its implications, both legal and political, are not.⁶⁰⁶

Intel Corp. v. Advanced Micro Devices, Inc.

*Intel Corp. v. Advanced Micro Devices, Inc.*⁶⁰⁷ provided the Supreme Court its first opportunity to interpret 28 U.S.C. § 1782.⁶⁰⁸ That statute permits a federal district court to order the production of a person or documents found within its jurisdiction “for use in a proceeding in a foreign or international tribunal.”⁶⁰⁹ In this case, Advanced Micro Devices (AMD) brought an antitrust complaint against Intel, its rival in the microprocessor industry, before the European Commission’s Antitrust Directorate (EC).⁶¹⁰ For use in the EC’s investigation, AMD sought an order in the U.S. District Court for the Northern District of California for Intel to produce certain documents.⁶¹¹ The district court declined to order their production, but the U.S. Court of Appeals for the Ninth Circuit reversed and held that the documents were potentially discoverable for use in the EC proceeding even if they would not be discoverable had the documents been located within the European Union.⁶¹²

The Supreme Court affirmed and announced five key holdings. First, the Court held that the class of “interested persons” who may invoke § 1782 is not limited to sovereigns but includes private litigants.⁶¹³ To support this holding, the Court relied on the plain text of § 1782 and scholarly commentary glossing its meaning; it rejected Intel’s reliance on the statute’s caption which suggested that the scope of “interested

[hereinafter *Jurisdiction Hearing*] (testimony of Monroe Leigh, Legal Advisor, Department of State).

605. *Jurisdiction Hearing*, *supra* note 604.

606. *See id.*

607. 124 S. Ct. 2466 (2004).

608. *Id.*

609. 28 U.S.C. § 1782 (2000).

610. *Intel*, 124 S. Ct. at 2474.

611. *Id.* at 2475.

612. *Id.* at 2475-76.

613. *Id.* at 2478.

parties” might be limited to litigants.⁶¹⁴ Second, the Court held that the EC in this case qualifies as a “foreign or international tribunal,” a holding supported both by the EC’s role as the exclusive fact-finding body in the antitrust investigation and the drafting history of § 1782, suggesting its purpose was to include quasi-judicial agencies.⁶¹⁵ Third, the Court rejected Intel’s argument that the proceeding before a foreign tribunal be “imminent” or “pending” for § 1782 to be available.⁶¹⁶ Since 1964, § 1782 no longer requires that a proceeding be “pending” or “judicial,” and no subsequent legislative action by Congress suggests intent to depart from that understanding.⁶¹⁷ Fourth, the Court held that § 1782 does not impose a foreign discoverability requirement.⁶¹⁸ Neither the text nor the legislative history of § 1782 supported such a reading of the statute, and Intel’s policy concerns (respect for foreign governments and parity between litigants) did not support a categorical prohibition on discovery.⁶¹⁹ Finally, while § 1782 permitted discovery in this instance, the statute did not require it, and the Court announced several criteria that should guide the district court’s exercise of its discretion on remand: (1) whether the party seeking discovery is a party to the foreign proceeding; (2) the nature of the tribunal, the character of the proceedings, and the receptivity of the foreign court or agency to assistance; (3) whether the discovery request seeks to circumvent an applicable discovery limit of the foreign country; and (4) the intrusiveness or burdensomeness of the request.⁶²⁰

Two justices filed separate opinions.⁶²¹ Justice Scalia concurred in the judgment to disavow any reliance on legislative history to support his reading of the statutory text.⁶²² Justice Breyer dissented alone.⁶²³ In his view, the majority’s interpretation paved the way for private litigants to exploit § 1782 to obtain information about a competitor or to upset a foreign proceeding.⁶²⁴ The discovery permitted by § 1782 imposed a costly burden on the target and potentially could be exploited as a means

614. *Id.*; see Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1027 (1965).

615. *Intel*, 124 S. Ct. at 2479; see Smit, *supra* note 614, at 1026-27, 1026 n.71, 1027 n.73.

616. *Intel*, 124 S. Ct. at 2479-80; see Smit, *supra* note 614, at 1026 & n.72.

617. *Intel*, 124 S. Ct. at 2479-80.

618. *Id.* at 2480.

619. *Id.* at 2481.

620. *Id.* at 2483.

621. *Id.* at 2484 (Scalia, J., concurring in the judgment); *id.* at 2485 (Breyer, J., dissenting).

622. *Id.* at 2484-85 (Scalia, J., concurring in the judgment).

623. *Id.* at 2485 (Breyer, J., dissenting).

624. *Id.* (Breyer, J., dissenting).

for the target to settle the underlying foreign dispute.⁶²⁵ Instead, Justice Breyer proposed two limiting principles on his interpretation of the statute: (1) where doubts exist over whether the foreign entity qualifies as a tribunal, a court should defer to the entity's own view of its mission (here the EC disavowed any desire for AMD's discovery); and (2) a court should deny discovery where it would be unavailable under both foreign law and domestic law (here EC law did not permit AMD to obtain discovery and AMD, as a third party, would not be entitled to it under the Federal Rules of Civil Procedure).⁶²⁶

This case resolves some important interpretive puzzles about an oft-overlooked, obscure statute in international civil litigation. As increased globalization fuels more transboundary private disputes, tools such as § 1782 will become increasingly important. The greatest impact of *Intel's* holding probably will not be felt in EC antitrust investigations. Instead, the decision may have the greatest impact in international arbitration proceedings involving U.S. companies.⁶²⁷ The decision clears many of the hurdles necessary for a party to a foreign arbitration to obtain documents or testimony from its adversary that are located in the United States. This possibility raises the specter that Intel feared, namely, non-reciprocal discovery rights that may enable the foreign party to obtain more information about the U.S. adversary than could be obtained from it. The Court's opinion contains enough qualifying language that it might still reach a different result in an international arbitration case (or at least apply the discretion-guiding factors differently). But practitioners of international arbitration should watch for the growing use of this statute in future proceedings.

Rumsfeld v. Padilla

Rumsfeld v. Padilla,⁶²⁸ one of the two "enemy combatant" cases, involved facts with which most readers already will be quite familiar.⁶²⁹

625. *Id.* (Breyer, J., dissenting).

626. *Id.* at 2486 (Breyer, J., dissenting).

627. Prior to *Intel*, U.S. judicial assistance to a foreign court was not always forthcoming. See, e.g., *In re Sarrio*, No. 9-372, 1995 WL 598988 (S.D.N.Y. Oct. 11, 1995) (holding that § 1782 cannot be invoked to require production of evidence originally located in Spain even though the evidence is currently in the United States). But see *In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992) (permitting, in the interests of comity, discovery of evidence in the United States for purposes of an English insolvency proceeding). For an overview on the rise of U.S. courts' producing evidence for a foreign proceeding, see GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (3d ed. 2001).

628. 124 S. Ct. 2711 (2004).

629. Dan Eggen & Susan Schmidt, *U.S. Says It Has Thwarted Dirty-Bomb Terrorist Plot*, WASH. POST, June 16, 2002, at A3.

Padilla, a U.S. citizen, was seized at a Chicago airport and taken to New York on a “material witness” warrant issued by a grand jury.⁶³⁰ Suspected of being part of an al Qaeda plot to detonate a “dirty bomb” in the United States, Padilla later was transferred to a military detention facility in South Carolina.⁶³¹ His lawyer filed a petition for a writ of habeas corpus in New York challenging the constitutionality of his detention.⁶³² The district court held that the President had the authority to detain Padilla (subject to, *inter alia*, a right to challenge the President’s determination and a right to counsel).⁶³³ The Second Circuit reversed and ordered his release.⁶³⁴

In an opinion by Chief Justice Rehnquist, a closely divided Supreme Court reversed and held that the New York court lacked jurisdiction over Padilla’s petition.⁶³⁵ In the majority’s view, two rules controlled this case. The first was the “immediate custodian” rule, under which a habeas petition generally must sue the leader of the facility where he is being held, not his ultimate superior located elsewhere.⁶³⁶ In this case, that rule required Padilla to sue the commandant of the South Carolina brig, not Defense Secretary Rumsfeld.⁶³⁷ The second was that federal courts’ habeas power was limited to granting relief “within their respective jurisdictions.”⁶³⁸ That rule limited a federal court’s habeas power to the territory of the district where it was located and, consequently, required a habeas petition to seek relief in the district of his confinement.⁶³⁹ Padilla failed to do this by suing in New York (instead of South Carolina), and none of the cases creating exceptions to that general rule applied here.⁶⁴⁰

Justice Kennedy (joined by Justice O’Connor) filed a concurring opinion.⁶⁴¹ While agreeing with the majority, Justice Kennedy expanded on what he believed was meant by the “jurisdictional” limitation of the “immediate custodian” rule.⁶⁴² In his view, this rule did not function as a “subject matter jurisdiction limitation,” but was more akin to a personal

630. *Padilla*, 124 S. Ct. at 2715.

631. *Id.* at 2715-16.

632. *Id.* at 2716.

633. *Id.* at 2716 & n.5.

634. *Id.* at 2717.

635. *Id.* at 2729.

636. *See id.* at 2718.

637. *Id.* at 2721-22.

638. *Id.* at 2724 (quoting 28 U.S.C. § 2241(a) (2000)).

639. *Id.* at 2722 (citing *Carbo v. United States*, 364 U.S. 611 (1961)).

640. *Padilla*, 124 S. Ct. at 2725-27.

641. *Id.* at 2727 (Kennedy, J., concurring).

642. *Id.* at 2727-29 (Kennedy, J., concurring).

jurisdiction or venue limitation.⁶⁴³ As such, it was waivable and was subject to equitable exceptions that the Court might craft (such as when the habeas petitioner is moved to another jurisdiction *after* the petition has been filed).⁶⁴⁴ Here, the Government did not waive the defense, none of the well established exceptions applied, and Padilla had not made a sufficient showing to justify an expansion of those equitable exceptions.⁶⁴⁵

Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) dissented.⁶⁴⁶ The dissent accused the majority of dodging the merits of a case of profound national importance.⁶⁴⁷ While agreeing with the majority about the general applicability of the “immediate custodian” rule and the jurisdictional limitation on federal courts’ habeas power, the dissent believed that this case appropriately fell within the equitable exceptions justifying the exercise of jurisdiction.⁶⁴⁸ The dissent suggested the majority returned to an interpretation of habeas corpus “that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements.”⁶⁴⁹ Having determined that the exercise of jurisdiction was proper, the dissent concluded by opining that Padilla surely was entitled to a hearing on his status, for nothing less than the essence of a free society was at stake.⁶⁵⁰

Padilla arose in an admittedly awkward procedural posture. To reach the merits of the case would have forced the Court to make new habeas law that could not be easily confined to the unique setting presented by this case and thus risked havoc for the ordinary course of habeas corpus. To that extent, the majority’s decision is faithful to the doctrine. Yet the dissent is not without cause for complaint. For the upshot of the majority’s rule is twofold. First, it encourages defense counsel to file preemptive habeas petitions in order to “lock in” the jurisdiction of the court in the district where a defendant is detained, even if the defendant is subsequently moved. And perhaps more insidiously, it encourages the Government to engage in forum shopping by moving detainees to jurisdictions with inhospitable habeas jurisprudence (note that South Carolina is in the traditionally conservative Fourth Circuit). The

643. *Id.* at 2727 (Kennedy, J., concurring).

644. *Id.* at 2728-29 (Kennedy, J., concurring).

645. *Id.* at 2729 (Kennedy, J., concurring).

646. *Id.* (Stevens, J., dissenting).

647. *Id.* at 2729-30 (Stevens, J., dissenting).

648. *Id.* at 2731 (Stevens, J., dissenting).

649. *Id.* at 2733 (Stevens, J., dissenting) (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973)).

650. *Id.* at 2735 (Stevens, J., dissenting).

presence of the *Hamdi v. Rumsfeld*⁶⁵¹ case on the docket at the same time as *Padilla* enabled the Court to reach the merits of “an enemy combatant” case (albeit one involving a U.S. citizen seized on the battlefield) without having to clear the procedural hurdles necessary to reach the merits in *Padilla*’s case. One wonders whether the Court would have charted the same path without the availability of *Hamdi* to address the constitutional issues.

Hamdi v. Rumsfeld

Hamdi was the other major enemy combatant case on the Court’s docket.⁶⁵² Like *Padilla*, *Hamdi* was a U.S. citizen.⁶⁵³ Unlike *Padilla*, *Hamdi* was seized on the battlefield in Afghanistan, not in the United States.⁶⁵⁴ The Government classified him as an enemy combatant and moved him to a military brig in South Carolina.⁶⁵⁵ Challenging that classification, *Hamdi*’s father (who claimed that his son was performing relief work in Afghanistan) filed a petition for a writ of habeas corpus.⁶⁵⁶ The district court found that the Government had submitted insufficient evidence to justify *Hamdi*’s detention, but the Fourth Circuit reversed, placing great weight on the fact that *Hamdi* was captured in an active combat zone and, consequently, was not entitled to a full-fledged factual hearing on the necessity of his detention.⁶⁵⁷

A badly divided Supreme Court reversed and held that (1) the President, acting pursuant to a congressional authorization, had the authority to detain *Hamdi*; and (2) *Hamdi* was entitled to challenge the factual basis for his detention before a neutral decision maker.⁶⁵⁸ Justice O’Connor (joined by the Chief Justice, Justice Kennedy, and Justice Breyer) penned the plurality opinion.⁶⁵⁹ On the first point, the plurality believed that the congressional authorization to use military force⁶⁶⁰ encompassed individuals who fought as part of the Taliban against the United States in Afghanistan, and *Ex parte Quirin*⁶⁶¹ made clear that such authorizations could include the detention of U.S. citizens before a

651. 124 S. Ct. 2633 (2004).

652. *Id.*

653. *Id.* at 2635.

654. *Id.* at 2635-36.

655. *Id.* at 2636.

656. *Id.*

657. *Id.* at 2638.

658. *Id.* at 2640-41, 2648.

659. *Id.* at 2634 (plurality opinion).

660. Authorization for Use of Military Force, 50 U.S.C. § 1541 (Supp. 2001).

661. 317 U.S. 1 (1942) (holding that American citizens associated with the military of an enemy government are enemy belligerents and detainable).

military tribunal.⁶⁶² On the second point, the plurality borrowed the balancing test from *Mathews v. Eldridge*⁶⁶³ to determine the scope of Hamdi's right to challenge his classification.⁶⁶⁴ Finding weighty interests on both sides of the balance, the plurality held that Hamdi was entitled to receive "notice of the factual basis for his classification" and a "fair opportunity" to rebut that classification "before a neutral decision maker."⁶⁶⁵ While the plurality did not provide a detailed sketch of the procedures governing such a proceeding, it did offer some limited guidance: (1) the system might work on burden-shifting principles (with the Government bearing the initial burden to produce facts supporting its classification and, at such point, shifting the burden to Hamdi); (2) while the decision maker had to be neutral, it could under the appropriate circumstances be a military official; and (3) Hamdi had a right to counsel in connection with these proceedings.⁶⁶⁶

Justice Souter, joined by Justice Ginsburg, filed an opinion concurring in part, dissenting in part, and concurring in the judgment.⁶⁶⁷ Parting ways with the plurality, these justices believed that Hamdi's detention was unlawful because Congress had not authorized it (and Article II did not allow the President to act absent congressional authorization).⁶⁶⁸ Having lost that point (with Justice Thomas, *infra*, providing the fifth vote for the plurality on it), these justices agreed that Hamdi was, at least, entitled to the procedural protections sketched out in Justice O'Connor's plurality opinion.⁶⁶⁹

Justice Scalia, joined by Justice Stevens, filed a dissenting opinion.⁶⁷⁰ In their view, the Government should lose this case for a simple reason: when someone takes up arms against the United States (as Hamdi is alleged to have done), the Government may prosecute that individual for treason.⁶⁷¹ If wartime necessity or other exigencies make prosecution impracticable, the Constitution provides a very simple mechanism—

662. *Hamdi*, 124 S. Ct. at 2640-41 (plurality opinion).

663. 424 U.S. 319 (1976) (announcing a balancing test for weighing an individual's right to due process against the Government's asserted interest).

664. *Hamdi*, 124 S. Ct. at 2646-48 (plurality opinion).

665. *Id.* at 2648 (plurality opinion).

666. *Id.* at 2649, 2651-52 (plurality opinion).

667. *Id.* at 2652 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

668. *Id.* at 2653-56 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

669. *Id.* at 2660 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

670. *Id.* (Scalia, J., dissenting).

671. *Id.* at 2663-64 (Scalia, J., dissenting).

Congress can suspend the Habeas Corpus Clause.⁶⁷² Because Congress has not suspended the Clause and because the Government has not prosecuted Hamdi for treason, the Government cannot lawfully detain a U.S. citizen within the Nation's territory (the result might be different for non-citizens or for citizens detained outside the territory).⁶⁷³ To hold otherwise (as the plurality and Justice Thomas did) flies in the face of centuries of constitutional jurisprudence and pre-constitutional English practice.⁶⁷⁴

Justice Thomas also dissented but on substantially different grounds.⁶⁷⁵ In Justice Thomas's view, the Executive had the authority to detain enemy combatants such as Hamdi.⁶⁷⁶ Courts were ill-equipped to second-guess that executive determination and, by doing so, were unduly interfering in the Executive's ability to make sensitive national security determinations.⁶⁷⁷ The procedural protections put forth by the plurality might be sensible policy, but the prerogative to develop them belongs to Congress, not to the Court.⁶⁷⁸ The only question properly before the Court is whether the President has the authority to determine Hamdi's status as an enemy combatant (*not* the correctness of that determination).⁶⁷⁹ Having concluded that the President has this authority (in this case, supported by a congressional authorization), the Court should have gone no further.⁶⁸⁰ Even assuming that the *Mathews* framework applies (a view that Justice Thomas does not share), the majority misapplies it by discounting how a hearing would impede the Government's ability to gather intelligence and to prosecute war.⁶⁸¹

Somewhat unexpectedly, *Hamdi*, instead of *Padilla*, proved to be the pathbreaking enemy combatant case. Prior to argument, some speculated that the Court would take a more deferential view of *Hamdi* (because it involved a citizen seized on the battlefield) but condemn the Government's practice in *Padilla* (because it involved a citizen seized on U.S. soil). Since *Padilla* ultimately was resolved on procedural grounds, *Hamdi* (ably argued by CUA alum, Frank Dunham) became the main event. The fanfare did not disappoint, though the reasoning left

672. *Id.* at 2664-65. The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art I, § 9, cl. 2.

673. *Hamdi*, 124 S. Ct. at 2671-73.

674. *Id.* at 2661-71.

675. *Id.* at 2674 (Thomas, J., dissenting).

676. *Id.* (Thomas, J., dissenting).

677. *Id.* at 2680, 2683-85 (Thomas, J., dissenting).

678. *Id.* at 2674 (Thomas, J., dissenting).

679. *Id.* at 2678 (Thomas, J., dissenting).

680. *Id.* at 2680 (Thomas, J., dissenting).

681. *Id.* at 2683 (Thomas, J., dissenting).

something to be desired. Unsurprisingly, a majority of the Court rejected the Government's extreme position (no judicial review), allegedly taken over the recommendation of the Solicitor General.⁶⁸² Slightly more surprisingly, the Court came within one vote (where was Justice Breyer?) of holding the detention unconstitutional. It avoided this outcome (and the thorny question of the scope of Executive power) through a sleight of hand—concluding that the Authorization for Use of Military Force authorized the President to detain Hamdi.⁶⁸³ This was curious for two reasons: (1) as Justice Scalia pointed out, the statute nowhere authorizes detention;⁶⁸⁴ and (2) it authorizes action only against those whom the President determines planned, authorized, committed, or aided in the September 11 attacks—a category in which the plurality lumps Padilla by declaring it “obvious” that this language extended to Taliban soldiers fighting the United States generally.⁶⁸⁵ Not only was its reasoning dubious, its guidance for future proceedings was especially vague. The Court intimated that a military tribunal might supply the required neutral decision maker but did not directly address that question; it also proclaimed that people like Hamdi were entitled to the assistance of counsel but did not bother to explain *why* that was the case, much less *why* the Court was addressing this arguably moot issue (Hamdi had received access to counsel).⁶⁸⁶ Thus, despite the *one* opportunity it had this Term to opine on some of the most important and pressing constitutional issues presently facing the country, the Court balked. Some credit should go to Justices Souter and Ginsburg who provided the necessary votes on the “hearing” issues so that the Court could at least issue a judgment.⁶⁸⁷ One wishes, however, that the plurality had been a bit more carefully crafted and thoroughly developed so that courts and litigants had more guidance for future matters.

Rasul v. Bush

*Rasul v. Bush*⁶⁸⁸ concerned the ability of foreign captives, detained at the U.S. military base in Guantanamo Bay, Cuba, to challenge the legality of their detention.⁶⁸⁹ The facts are well known. Following the commencement of military activities in Afghanistan, the United States

682. *The Hamdi Catch-22*, WASH. POST, June 28, 2002, at A28.

683. *Hamdi*, 124 S. Ct. at 2639-40.

684. *Id.* at 2671 (Scalia, J., dissenting).

685. *Id.* at 2640 (Scalia, J., dissenting).

686. *Id.* at 2652 (Scalia, J., dissenting).

687. *Id.* at 2660 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

688. 124 S. Ct. 2686 (2004).

689. *Id.* at 2690.

transported to Guantanamo Bay a number of foreign citizens seized on the battlefield.⁶⁹⁰ There, it held them in an effort both to remove them from the battlefield and to obtain intelligence related to terrorist activities directed at the United States.⁶⁹¹ Several of these detainees, all foreign citizens, challenged the legality of their detention through a variety of statutory mechanisms, including, among others, the habeas corpus statute, the Alien Tort Statute (ATS),⁶⁹² and the Administrative Procedure Act.⁶⁹³ Construing their claim as a request for habeas corpus relief, the district court dismissed their action.⁶⁹⁴ Relying on *Johnson v. Eisentrager*,⁶⁹⁵ the Court of Appeals for the District of Columbia affirmed, holding that it lacked jurisdiction over the claims of foreigners detained in U.S. military custody and held outside the sovereign territory of the United States.⁶⁹⁶

In an opinion by Justice Stevens, the Supreme Court reversed and held that federal courts had jurisdiction to consider the legality of the foreign captives' detention.⁶⁹⁷ After tracing the roots of the habeas corpus power, the Court confronted the Government's primary argument that *Eisentrager* barred the exercise of habeas jurisdiction.⁶⁹⁸ In the majority's view, *Eisentrager* rested critically on *Ahrens v. Clark*,⁶⁹⁹ which held that a court's habeas power was limited to its territorial jurisdiction.⁷⁰⁰ Decisions since *Ahrens* had effectively overruled that restrictive interpretation of the Court's jurisdiction and, consequently, the critical premise on which *Eisentrager* rested.⁷⁰¹ Thus, *Eisentrager* did not control.⁷⁰² The Court next rejected the Government's argument that extraterritorial application of the habeas statute required a clear statement from Congress; in the Court's view, that argument was inapposite where, as here, the detainees were held in an area that was the

690. *Id.*

691. Brief for the Respondents at 4, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343).

692. 28 U.S.C. § 1350 (2000) (providing that district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United Nations).

693. *Rasul*, 124 S. Ct. at 2691; Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

694. *Id.*

695. 339 U.S. 763 (1950).

696. *Rasul*, 124 S. Ct. at 2691-92.

697. *Id.* at 2698.

698. *Id.* at 2693.

699. 335 U.S. 188 (1948).

700. *Rasul*, 124 S. Ct. at 2694.

701. *Id.* at 2695 (citing *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973)).

702. *Id.*

functional equivalent of the territorial jurisdiction of the United States (particularly in light of the Government's concession that a federal court would have habeas jurisdiction over a U.S. citizen detained there).⁷⁰³ Finally, the Court held that *Eisentrager* did not bar the detainees' ATS claim and that aliens, no less than U.S. citizens, had a right of access to U.S. courts if they had a cognizable claim.⁷⁰⁴

Justice Kennedy concurred in the judgment.⁷⁰⁵ Skeptical of the majority's argument that *Braden* overruled the statutory premise on which *Eisentrager* rested, he nonetheless believed that the result reached by the majority flowed from *Eisentrager*.⁷⁰⁶ In his view, *Eisentrager* articulated a sliding scale of Executive power over military affairs (to the exclusion of judicial oversight) depending on certain facts.⁷⁰⁷ Two critical facts distinguished this case from *Eisentrager* and necessitated a different result.⁷⁰⁸ First, the detainees in this case were being held in a locale that, for all practical purposes, constituted U.S. territory (whereas the detainees in *Eisentrager* were being held in the territory of a foreign sovereign).⁷⁰⁹ Second, the detainees in this case were "being held indefinitely, and without benefit of any legal proceeding to determine their status" (unlike the detainees in *Eisentrager* who had been tried by military commissions and sentenced to prison terms).⁷¹⁰

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.⁷¹¹ In his view, the majority was turning its back on more than a half-century of jurisprudence, leading all the way back to *Eisentrager*.⁷¹² Its reasoning, grounded in the demise of *Ahrens*, amounted to an over-reading of the intervening Supreme Court precedent.⁷¹³ Coming at a time when U.S. forces were still fighting in the battlefield, the majority's decision ran the risk of jeopardizing military operations and throwing open federal courts to habeas claims from around the globe.⁷¹⁴ In the dissent's view, such a radical step, if it should be taken, should come from Congress, not the courts.⁷¹⁵

703. *Id.* at 2696.

704. *Id.* at 2698-99.

705. *Id.* at 2699 (Kennedy, J., concurring in the judgment).

706. *Id.* (Kennedy, J., concurring in the judgment).

707. *Id.* at 2699-700 (Kennedy, J., concurring in the judgment).

708. *Id.* at 2700 (Kennedy, J., concurring in the judgment).

709. *Id.* (Kennedy, J., concurring in the judgment).

710. *Id.* (Kennedy, J., concurring in the judgment).

711. *Id.* at 2701 (Scalia, J., dissenting).

712. *Id.* (Scalia, J., dissenting).

713. *Id.* at 2704-05 (Scalia, J., dissenting).

714. *Id.* at 2706-07 (Scalia, J., dissenting).

715. *Id.* at 2711 (Scalia, J., dissenting).

For all the fanfare that it created, *Rasul* is likely not to have much impact in the war on terror though it may in the war over the meaning of the habeas statute. While the decision certainly opens the jurisdictional door for challenges to the legality of detentions, it of course offers no view on the merits of the question. Moreover, cabined as it was by the unique nature of the military facility at Guantanamo Bay, the decision, contrary to Justice Scalia's worst-case scenarios, does not hold (or require) that federal courts now answer the door whenever any prisoner detained on the battlefield comes knocking. Instead, the case is limited to the perhaps unique situation of a federal enclave that is within the sovereign control of the United States even if the underlying title to the land belongs to a foreign sovereign. Perhaps the greater impact of the decision will be felt in the garden-variety habeas case. By rejecting the fairly straightforward and strict textualist interpretation of the habeas statute offered by Justice Scalia, the majority now raises the question whether federal courts might be able to reach across state (or district) lines to challenge the detention by a custodian elsewhere. *Padilla* suggests that this will not always be the case, but reconciling those two decisions and articulating a coherent theory for the super-jurisdictional habeas power for the federal courts will be a task that the lower courts will face for some time to come.

Sosa v. Alvarez-Machain

*Sosa v. Alvarez-Machain*⁷¹⁶ involved the availability of a federal forum for certain torts committed against aliens.⁷¹⁷ Alvarez-Machain was wanted in the United States for trial on charges of murdering a federal drug agent.⁷¹⁸ With the approval of federal narcotics enforcement authorities, Mexican officials abducted him and brought him to the United States.⁷¹⁹ Following his acquittal, Alvarez-Machain sued Sosa, a Mexican official, under the Alien Tort Statute (ATS) and federal officials under the Federal Tort Claims Act (FTCA).⁷²⁰ After a rather circuitous procedural history,⁷²¹ the district court eventually granted

716. 124 S. Ct. 2739 (2004).

717. *Id.* at 2746.

718. *Id.*

719. *Id.*

720. *Id.* at 2747; 28 U.S.C. § 2680 (2000) (removing sovereign immunity of the United States from suits in torts and, with certain specific exceptions, rendering government liable as a private individual would be under the same circumstances).

721. *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003), *rev'd sub nom.* *Sosa v. Alvarez-Machain* 124 S. Ct. 2739 (2004). "The District Court partially granted defendant's motion to dismiss, and the Court of Appeals . . . reversed in part and remanded. On remand, the . . . District Court . . . entered summary judgment against former policeman, substituted United States for DEA agents, and dismissed [Alvarez-

Alvarez-Machain summary judgment on his ATS claim but dismissed his FTCA claim.⁷²² The Ninth Circuit affirmed on the ATS claim but reversed as to the FTCA claim.⁷²³

In an opinion by Justice Souter, a divided Supreme Court reversed.⁷²⁴ The Court announced two main holdings. First, the Court held that Alvarez-Machain could not state a claim under the FTCA.⁷²⁵ The FTCA waives the Federal Government's sovereign immunity for certain torts but creates an exception to the waiver for torts "arising in a foreign country."⁷²⁶ In the Court's view, that exception barred any claim (including Alvarez-Machain's) where the injury occurred on foreign soil, even if the planning and directing of the tort took place on U.S. soil.⁷²⁷ In reaching this conclusion, the Court rejected the Ninth Circuit's "headquarters doctrine," which had allowed FTCA claims for alleged injuries suffered abroad as a result of planning in the United States.⁷²⁸ Second, the Court held that Sosa could not state a claim under the ATS. In reaching this conclusion, the Court rejected the extreme positions offered by both sides in the case—Sosa's (and the Government's) position that the ATS afforded *no* cause of action and Alvarez-Machain's position that the ATS afforded a broadly available cause of action.⁷²⁹ Instead, after canvassing the sparse history of the ATS, the majority concluded that the ATS did afford a cause of action for certain limited torts that the drafters of the ATS (part of the 1789 Judiciary Act) likely envisioned—offenses against ambassadors, violation of safe conduct, and piracy.⁷³⁰ To qualify for a cause of action under the ATS, a tort must have a content and acceptance as widespread as these torts did in the eighteenth century.⁷³¹ Since Alvarez-Machain's claim did not fall within this limited class, the ATS was unavailable.⁷³²

Justice Scalia, joined by the Chief Justice and Justice Thomas, concurred in part and concurred in the judgment.⁷³³ While agreeing with

Machain's] FTCA claims." *Id.* The Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, and remanded. *Id.*

722. *Sosa*, 124 S. Ct. at 2747.

723. *Id.*

724. *Id.*

725. *Id.* at 2754.

726. *Id.* at 2748 (citing 28 U.S.C. § 2680(k) (2000)).

727. *Id.* at 2749.

728. *Id.* at 2748-54 (discussing *Cominotto v. United States*, 802 F.2d 1127 (9th Cir. 1986)).

729. *Id.* at 2754-55.

730. *Id.* at 2759.

731. *Id.* at 2765.

732. *Id.* at 2769.

733. *Id.* (Scalia, J., concurring in judgment).

Justice Souter's analysis of the FTCA claim and with his canvas of the ATS's history, Justice Scalia parted company over the availability of the cause of action under the ATS.⁷³⁴ Justice Scalia accused Justice Souter of inventing judge-made law where none was appropriate.⁷³⁵ Instead of carving out a narrow class of cases where the ATS provided a cause of action, Justice Scalia would have held categorically that the ATS does not provide a cause of action under any circumstances.⁷³⁶ That decision must be made by Congress.⁷³⁷

Justice Ginsburg, joined by Justice Breyer, concurred in part and concurred in the judgment.⁷³⁸ While joining completely the majority's disposition of Alvarez-Machain's ATS claim and the result on the FTCA claim, Justice Ginsburg's disposition of the FTCA claim rested on different reasoning.⁷³⁹ Unlike the majority, Justice Ginsburg read the foreign tort exception to the sovereign immunity waiver to apply to "place[s] where the act or omission occurred," not places where the injury occurred.⁷⁴⁰ In her view, this interpretation harmonized the foreign tort exception with other sections of the FTCA and avoided federal courts' entanglement in the interpretation of foreign law.⁷⁴¹ Finally, Justice Ginsburg rejected the Ninth Circuit's "headquarters doctrine" because it "render[ed] the FTCA's foreign-country exception inapplicable" and entailed needlessly confusing choice-of-law determinations when the acts crossed state boundaries.⁷⁴²

Justice Breyer filed an opinion concurring in part and concurring in the judgment.⁷⁴³ Agreeing completely with Justice Ginsburg, Justice Breyer added that the availability of the ATS claim also should turn on notions of comity—whether the exercise of jurisdiction respects foreign nations' sovereign rights and whether a universal consensus exists both on the existence of a right and the procedures for vindicating it.⁷⁴⁴

Sosa is an important case in the development of federal law governing the availability of a federal forum for international human rights violations. Though the ATS statute had been enacted over two centuries

734. *Id.* at 2769-70.

735. *Id.* at 2772.

736. *Id.* at 2772-76.

737. *Id.* at 2776.

738. *Id.* (Ginsburg, J., concurring in part and concurring in the judgment).

739. *Id.* (Ginsburg, J., concurring in part and concurring in the judgment).

740. *Id.* at 2777 (Ginsburg, J., concurring in part and concurring in the judgment) (quoting 28 U.S.C. § 1346 (b)(1)).

741. *Id.* at 2778-79 (Ginsburg, J., concurring in part and concurring in the judgment).

742. *Id.* at 2780-81 (Ginsburg, J., concurring in part and concurring in the judgment).

743. *Id.* at 2782 (Breyer, J., concurring in part and concurring in the judgment).

744. *Id.* at 2782-83 (Breyer, J., concurring in part and concurring in the judgment).

earlier, this was the Court's first opportunity to offer any interpretation of the law's meaning or scope.⁷⁴⁵ As a result of several pathbreaking opinions in the Second Circuit,⁷⁴⁶ the statute has been an important vehicle for the pursuit of civil claims for human rights violations.⁷⁴⁷ Had the Court adopted Justice Scalia's position (as the Government urged), it would have cut off an important avenue of relief for such claims (albeit on a quite plausible theory). By leaving the door open (albeit only slightly), the Court ensures that the statute will continue to supply an important vehicle for such claims in the future but with the added wrinkle that the parties must squabble over whether the underlying tort at issue adequately resembles the types of cognizable claims described by the majority.

Environmental

Department of Transportation v. Public Citizen

*Department of Transportation v. Public Citizen*⁷⁴⁸ was an important case for the Bush administration.⁷⁴⁹ Prior to its entry into the North American Free Trade Agreement (NAFTA), the United States maintained a moratorium on the operation of Mexican trucks in the United States.⁷⁵⁰ In NAFTA, the United States agreed to lift the moratorium but, after some foot-dragging, Mexico commenced arbitration under NAFTA, which led to an award concluding that America's failure to lift the moratorium violated NAFTA.⁷⁵¹ Shortly thereafter, President Bush announced his intention to lift the moratorium.⁷⁵² Subsequently, the Federal Motor Carrier Safety Administration (FMCSA) issued safety regulations governing Mexican

745. See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 36-49 (3d ed. 1996); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 175-78 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) [hereinafter THE ALIEN TORT CLAIMS ACT].

746. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

747. See Ralph G. Steinhardt, *The Internalization of Domestic Law*, in THE ALIEN TORT CLAIMS ACT, *supra* note 745, at 3-6.

748. 124 S. Ct. 2204 (2004).

749. See Joseph Miller, *United States Department of Transportation v. Public Citizen*, 28 HARV. ENVTL. L. REV. 593, 593 (2004).

750. *Public Citizen*, 124 S. Ct. at 2210-11.

751. *Id.* at 2211; see also North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605.

752. *Public Citizen*, 124 S. Ct. at 2211.

motor carriers.⁷⁵³ Federal law required FMCSA to assess the environmental impact of the rules and, when doing so, FMCSA assumed that the rules would not change the truck volume between the United States and Mexico.⁷⁵⁴ It reasoned that any change in volume was due to President Bush's lifting of the moratorium, not the FMCSA's rules.⁷⁵⁵ Interest groups challenged this decision, and the Ninth Circuit granted their request for relief.⁷⁵⁶

In a unanimous opinion by Justice Thomas, the Supreme Court reversed and held that the federal law did not require the FMCSA to consider the effect of the truck volume.⁷⁵⁷ The Court first considered whether the FMCSA's action comported with the National Environmental Policy Act of 1969 (NEPA)⁷⁵⁸ and its related regulations.⁷⁵⁹ In brief, those rules required FMCSA to consider "effects" of its issuance of the rules.⁷⁶⁰ In the Court's view, any increase in Mexican trucking volume was not an "effect" of FMCSA's rules because FMCSA lacked any ability to countermand the President's decision to lift the moratorium on Mexican trucks.⁷⁶¹ Due to FMCSA's "limited statutory authority over the relevant actions," any rules issued by the agency did not "cause" the "effects" subject to the NEPA's environmental impact requirements.⁷⁶² The Court then considered whether FMCSA's action comported with the Clean Air Act (CAA),⁷⁶³ which prohibited an agency from any activity that would violate a state's air quality implementation plan.⁷⁶⁴ Looking to the regulations promulgated under the CAA, the Court concluded that, although FMCSA's action qualified as a "cause" (as that term is used) of any increased emissions due to the entry of Mexican trucks, the CAA only applied to "direct" or "indirect emissions," and the emissions from the Mexican trucks did not qualify under either category.⁷⁶⁵ At bottom, the Court tracked its analysis under the NEPA—that the FMCSA lacked any ability to countermand the President's decision to lift the moratorium.⁷⁶⁶

753. *Id.*

754. *Id.* at 2209, 2212.

755. *Id.* at 2212.

756. *Id.*

757. *Id.* at 2218-19.

758. 42 U.S.C. § 4332 (2000).

759. *Id.* at 2213-14; 40 C.F.R. §§ 1500.1-1518.4 (2003).

760. *Public Citizen*, 124 S. Ct. at 2213.

761. *Id.* at 2216.

762. *Id.* at 2217.

763. 42 U.S.C. §§ 7401-7431 (2000).

764. *Public Citizen*, 124 S. Ct. at 2217.

765. *Id.* at 2218.

766. *Id.*

This case averted a thorny political battle. Had the Ninth Circuit's decision been allowed to stand, it would have put the United States at odds with its international treaty obligations and chilled its relationship with one of its most important trading partners. Moreover, the issue of cross-border Mexican trucking operations had been the subject of close congressional scrutiny,⁷⁶⁷ and resolution of the issue depended critically on FMCSA's issuance of these rules.⁷⁶⁸ Thus, as a political matter, the Court handed the administration a major victory. The decision also has some significant legal consequences. It has the potential to reshape the parameters of NEPA's environmental impact requirement where agency action is decoupled from an exercise of Presidential authority. In such cases, the decision lightens the burden on agencies to limit their environmental impact assessment to a relatively narrow class of "effects" that flow directly from their rules, rather than from Presidential decisions related to but not directly flowing from the issuance of those rules. The decision surely complicates efforts of the public interest-environmental litigation community to use NEPA's environmental impact requirement as a tool to slow or thwart agency action.

Separation of Powers

Cheney v. United States District Court

*Cheney v. United States District Court*⁷⁶⁹ involved tricky issues of jurisdictional, statutory and constitutional law. Shortly after his election, President Bush formed the National Energy Policy Development Group (NEPDG).⁷⁷⁰ At a minimum, the NEPDG membership consisted of the Vice President (the chairman) and various senior staff from government agencies.⁷⁷¹ In addition to these members, representatives of private industry allegedly attended and voted at the NEPDG's meetings.⁷⁷² Such participation, if true, could trigger the Federal Advisory Committee Act (FACA), which imposes open-meeting and disclosure requirements.⁷⁷³ Various public interest organizations filed suit under the Mandamus Act⁷⁷⁴ and the Administrative Procedure Act, alleging violations of FACA.⁷⁷⁵ In relevant part, the district court declined to dismiss the

767. See, e.g., *id.* at 2210-11.

768. See *id.* at 2214-15.

769. 124 S. Ct. 2576 (2004).

770. *Id.* at 2582.

771. *Id.*

772. *Id.* at 2583.

773. See 5 U.S.C. app. § 2 (2000).

774. 28 U.S.C. § 1361 (2000).

775. *Cheney*, 124 S. Ct. at 2583.

complaint against certain government defendants, and the case proceeded to discovery.⁷⁷⁶ The plaintiffs propounded broad discovery requests against the remaining government defendants and the Vice President, which the district court refused to narrow.⁷⁷⁷ The government defendants petitioned for a writ of mandamus, which the D.C. Circuit refused to issue, principally on the ground that the government defendants had failed to invoke executive privilege.⁷⁷⁸

In an opinion by Justice Kennedy, the Supreme Court reversed and held that the government defendants' failure to invoke executive privilege did not render mandamus inappropriate.⁷⁷⁹ After dispensing with a preliminary jurisdictional objection, the Court considered whether, and under what circumstances, mandamus would be appropriate in this case.⁷⁸⁰ It reviewed the three prerequisites for mandamus to issue—that the party seeking mandamus has “no other adequate means to obtain the relief,” that this party has a “clear and indisputable” right to the relief, and that issuance of the writ “is appropriate under the circumstances.”⁷⁸¹ The majority then explained how this case, particularly because the Vice President was among the named defendants, implicated important separation of powers considerations that should have informed a court's mandamus analysis.⁷⁸² However, the majority did not ultimately decide whether mandamus was appropriate in this case.⁷⁸³ Instead, it simply held that the D.C. Circuit placed excessive weight on the fact that the government defendants, unlike the President in *United States v. Nixon*,⁷⁸⁴ did not invoke executive privilege.⁷⁸⁵ *Nixon* was not on point primarily because that case involved a criminal prosecution where the public's need for information was great and where several checks existed to limit overzealous prosecution.⁷⁸⁶ Moreover, in contrast to the strict constraints placed on the subpoenas in *Nixon*, the discovery requests in this case (the first round of presumably many) were far-reaching and swept up an array of documents and information that the government defendants would potentially have to review.⁷⁸⁷ In the Court's view, other choices were available to the lower

776. *Id.* at 2584.

777. *Id.*

778. *Id.* at 2584.

779. *Id.* at 2592-93.

780. *Id.* at 2586-87.

781. *Id.* at 2587.

782. *Id.* at 2587-88.

783. *Id.* at 2593.

784. 418 U.S. 683 (1974).

785. *Cheney*, 124 S. Ct. at 2593.

786. *Id.* at 2589-90.

787. *Id.* at 2590.

courts before concluding that all (or no) discovery was appropriate.⁷⁸⁸ Accordingly, the Court remanded the case to the D.C. Circuit to consider, anew, the government defendants' mandamus request.⁷⁸⁹

Justice Stevens concurred.⁷⁹⁰ In his view, remand was appropriate because the plaintiffs were seeking an extraordinary remedy (mandamus) and had propounded exceedingly broad discovery in connection with that request.⁷⁹¹ As a consequence, Justice Stevens reasoned, granting broad discovery would effectively "prejudge" the plaintiffs' case because, if they received the discovery, they would effectively be getting all the relief that they were seeking.⁷⁹² Remand was appropriate, perhaps to craft a narrower discovery order limited to a few interrogatories or depositions necessary to determine the extent of non-Government participation in the NEPDG.⁷⁹³

Justice Thomas, joined by Justice Scalia, concurred in part and dissented in part.⁷⁹⁴ These justices agreed that the D.C. Circuit's judgment had to be reversed.⁷⁹⁵ However, they parted company with the majority on how to dispose of the case.⁷⁹⁶ In their view, the case should have been remanded with instructions that the D.C. Circuit issue mandamus to the district court.⁷⁹⁷ Since the plaintiffs in this case themselves had proceeded on a writ of mandamus, they were only entitled to that writ if they had a clear and unmistakable right to relief.⁷⁹⁸ In Justice Thomas's view, even the district court acknowledged that plaintiffs' right to relief was debatable, and it should follow, *a priori*, that mandamus should not lie.⁷⁹⁹

Justice Ginsburg, joined by Justice Stevens, dissented.⁸⁰⁰ In her view, the D.C. Circuit was right to refuse mandamus because the Government had failed to avail itself of available avenues for relief—namely, asking the district court to narrow discovery or invoke executive privilege.⁸⁰¹

788. *Id.* at 2592.

789. *Id.* at 2593.

790. *Id.* (Stevens, J., concurring).

791. *Id.* at 2594 (Stevens, J., concurring).

792. *Id.* (Stevens, J., concurring).

793. *Id.* (Stevens, J., concurring).

794. *Id.* at 2594 (Thomas, J., concurring in part and dissenting in part).

795. *Id.* at 2595 (Thomas, J., concurring in part and dissenting in part).

796. *Id.* at 2594-95 (Thomas, J., concurring in part and dissenting in part).

797. *Id.* at 2595 (Thomas, J., concurring in part and dissenting in part).

798. *Id.* (Thomas, J., concurring in part and dissenting in part).

799. *Id.* (Thomas, J., concurring in part and dissenting in part).

800. *Id.* (Ginsburg, J., dissenting).

801. *Id.* at 2595-96 (Ginsburg, J., dissenting).

Many have commented that the Court's decision in *Cheney* is a victory for the White House.⁸⁰² I am not so sure. The decision certainly acknowledges the separation of powers concerns raised by the suit (trimming back some of its broad language in *Clinton v. Jones*⁸⁰³ that had been less solicitous of these concerns) and leaves open the door for the D.C. Circuit to issue mandamus. But the Court (with the exception of Justices Scalia and Thomas) clearly was unwilling to order the D.C. Circuit to issue the writ. As a result, the case leaves open the possibility that the D.C. Circuit will decline to issue the writ on other grounds or will issue the writ and order narrow discovery. Thus, the Court's decision keeps alive the suit and the possibility that the Vice President (barring a claim of executive privilege) still could be compelled to disclose documents in connection with the NEPDG. Moreover, some language in the opinion hints at the Court's skepticism over some of the positions taken by the Government. For example, the Court was unwilling to hold (and passed on whether) the collateral order doctrine entitled the Vice President to immediate appellate review of a discovery order.⁸⁰⁴ Additionally, the Court stated that, had the Vice President not been named, its analysis of the propriety of mandamus might be different.⁸⁰⁵ This is perhaps the decision's oddest feature, for it suggests that the plaintiffs simply made a poor tactical error. To the extent they simply are seeking to prove non-Government participation in the NEPDG, they could accomplish that result more easily by voluntarily dismissing the Vice President and propounding discovery against the remaining government defendants.

Civil Procedure

Hibbs v. Winn

*Hibbs v. Winn*⁸⁰⁶ is an Establishment Clause wolf in the clothing of a civil procedure sheep. The plaintiffs commenced a case in federal court challenging the constitutionality of Arizona's program authorizing an income tax credit for payments to school tuition organizations that award scholarships to students in private schools, including parochial schools.⁸⁰⁷

802. See, e.g., Charles Lane, *High Court Backs Vice President*, WASH. POST, June 25, 2004, at A1.

803. 520 U.S. 681 (1997).

804. *Cheney*, 124 S. Ct. at 2586. A collateral order is appealable because "[it] is not an ingredient of the cause of action and does not require consideration with it." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949).

805. *Cheney*, 124 S. Ct. at 2587.

806. 124 S. Ct. 2276 (2004).

807. *Id.* at 2282.

Arizona sought to dismiss the case on, among other grounds, the basis that the Tax Injunction Act (TIA)⁸⁰⁸ barred the suit.⁸⁰⁹ The TIA prohibits federal courts from restraining “the assessment, levy or collection of any tax under State law.”⁸¹⁰ The district court dismissed the suit, but the Ninth Circuit reversed.⁸¹¹

In an opinion by Justice Ginsburg, a closely divided Supreme Court affirmed and held that the TIA did not bar the plaintiffs’ suit.⁸¹² After dispensing with an argument that the petitioner’s certiorari petition was untimely, the majority turned to the merits.⁸¹³ The majority offered an extended exposition on the importance of a federal forum in racial desegregation cases when localities sought to revise their tax codes in an effort to block school desegregation.⁸¹⁴ Apart from the importance of the federal forum, the Court found that the lawsuit here did not offend the core purposes of the TIA—which were to bar federal interference in cases involving the assessment, levy, or collection of state taxes.⁸¹⁵ In the majority’s view, plaintiffs’ suit did not intrude on any of these functions because it merely challenged the availability of a state tax credit.⁸¹⁶ Thus, to apply the TIA here would depart from the “secure, state-revenue-protective moorings” of the Court’s prior case law.⁸¹⁷ The majority closed by noting that numerous other federal court decisions had explicitly or implicitly found no TIA bar to lawsuits involving similar challenges to tax credit schemes.⁸¹⁸

Justice Stevens penned a brief concurrence stating his view that considerations of stare decisis trumped any textual argument in support of TIA application.⁸¹⁹

Justice Kennedy, joined by the Chief Justice and Justices Scalia and Thomas, dissented.⁸²⁰ The dissent chided the majority for undervaluing

808. 28 U.S.C. § 1341 (2000).

809. *Hibbs*, 124 S. Ct. at 2281. Respondent’s argued that the certiorari petition was jurisdictionally untimely under 28 U.S.C. § 2101(c) since it was filed longer than ninety days after the Ninth Circuit first entered judgment. However, the Court held that it was timely because it was filed within ninety days of the date the Ninth Circuit denied rehearing en banc. *Id.* at 2283-84.

810. *Id.* at 2281 (quoting 28 U.S.C. § 1341 (2000)).

811. *Id.* at 2283.

812. *Id.* at 2292.

813. *Id.* at 2284.

814. *Id.* at 2281.

815. *Id.* at 2288.

816. *Id.* at 2288-89.

817. *Id.* at 2289.

818. *Id.* at 2290-91.

819. *Id.* at 2292 (Stevens, J., concurring).

820. *Id.* (Kennedy, J., dissenting).

the role of a state judicial forum, which remained open to resolve these suits.⁸²¹ Moreover, the dissent distinguished TIA cases in which federal courts had exercised jurisdiction on the ground that, in those cases (unlike this one), no federal forum was available.⁸²² In the dissent's view, the majority gave too crabbed an interpretation to the text of the TIA, which it argued should be read to encompass any interference with "the State's tax system administration and tax policy implementation."⁸²³

Hibbs contains two important substantive lessons and a piece of gossip for Court watchers. The first important substantive lesson is that this case clears a hurdle for those litigants who seek to challenge state efforts to promote private education in religious institutions. Following the Supreme Court's decision in *Zelman v. Simmons-Harris*,⁸²⁴ five justices were firmly on board in supporting such programs.⁸²⁵ Here, however, the dissenters in *Zelman* peeled away Justice O'Connor who chose not to opine on the merits of the suit but whose vote let the litigation proceed.⁸²⁶ The second important substantive lesson, relating to the first, is Justice O'Connor's continuing importance as the swing vote in federalism cases. To be sure, federalism issues, at the core of the TIA, abounded in this case, which involved at bottom the faith in the state courts' ability to fairly adjudicate challenges to state tax policy.⁸²⁷ It is no coincidence that the four dissenters in this case are four of the same justices who comprise eighty percent of the "federalism five" in other areas.⁸²⁸ However, here they could not hold onto Justice O'Connor, which leads me to my piece of gossip for Court watchers. Many speculate that Justice Ginsburg flipped the Court in this case. They base their well-founded hypothesis on the fact that Justice Ginsburg issued three decisions from the January sitting whereas Justice Kennedy issued none. Almost without exception, at least one majority opinion from each sitting is assigned to each chamber, so a lacuna like that normally suggests a flip in the Court. One can sense too, from how the opinions read, that Justice Kennedy's opinion might originally have been a majority, and Justice Ginsburg's a dissent.

821. *Id.* at 2293 (Kennedy, J., dissenting).

822. *Id.* at 2296-97 (Kennedy, J., dissenting).

823. *Id.* at 2298 (Kennedy, J., dissenting).

824. 536 U.S. 639 (2002).

825. *Id.* at 641.

826. *See Hibbs*, 124 S. Ct. at 2280.

827. *Id.* at 2281.

828. *See, e.g.*, Mark R. Killenbeck, *In(re)Dignity: The New Federalism in Perspective*, 57 ARK. L. REV. 1, 3 (2004) (defining the "Federalism Five" as consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas).

Sovereign Immunity

Tennessee v. Lane

*Tennessee v. Lane*⁸²⁹ involved whether Title II of the Americans with Disabilities Act (ADA)⁸³⁰ validly abrogated state sovereign immunity.⁸³¹ The facts of this case are awful. Lane, a paraplegic, arrived at a Tennessee courthouse to answer criminal charges.⁸³² The hearing took place on the second floor of the courthouse, which had neither an elevator nor any other means of carrying Lane's wheelchair up a flight of stairs.⁸³³ This forced Lane to crawl up two flights of stairs in order to attend the first hearing.⁸³⁴ When he appeared for the second hearing, Lane refused to climb the stairs or to be carried by officers.⁸³⁵ As a result, he was jailed for failure to appear at the hearing.⁸³⁶ Lane, along with another, filed suit against Tennessee arguing that it violated Title II of the ADA which, in relevant part, bars the exclusion of disabled individuals from "the benefits of the services, programs or activities of a public entity."⁸³⁷ Both the district court and the Sixth Circuit rejected Tennessee's sovereign immunity defense.⁸³⁸

In an opinion by Justice Stevens, a closely divided Supreme Court affirmed and held that Title II of the ADA, as applied to cases involving the fundamental right of access to courts, validly abrogated states' sovereign immunity.⁸³⁹ Applying its familiar two-step framework developed in prior cases, the majority first concluded that Congress unambiguously expressed its intent to abrogate the states' immunity; a provision of the ADA contains express language to that effect.⁸⁴⁰ The Court then considered whether Congress acted pursuant to a valid grant of statutory authority and concluded that it had done so.⁸⁴¹ In the Court's view, Title II, at least in the access-to-courts context, was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, which the Court previously had recognized constituted a valid basis for

829. 124 S. Ct. 1978 (2004).

830. 42 U.S.C. §§ 12101-12213 (2000).

831. *Lane*, 124 S. Ct. at 1982.

832. *Id.*

833. *Id.*

834. *Id.*

835. *Id.* at 1983.

836. *Id.*

837. *Id.* at 1982-83 (quoting 42 U.S.C. § 12132 (2000)).

838. *Id.* at 1983.

839. *Id.* at 1994.

840. *Id.* at 1985.

841. *Id.* at 1985-94.

abrogating state sovereign immunity.⁸⁴² To support that proposition, the Court applied the “congruence and proportionality” test first developed in *City of Boerne v. Flores*⁸⁴³ and later adapted to the sovereign immunity context.⁸⁴⁴ Under that test, the Court determined that Title II sought to protect various “basic constitutional guarantees” that under the Due Process Clause “are subject to more searching judicial review.”⁸⁴⁵ It then determined that Title II sought to redress a history of unequal treatment of the disabled in a wide variety of public service programs, as evidenced in the Court’s prior case law and various governmental reports.⁸⁴⁶ Finally, the Court concluded that Title II was a properly measured response to this history of maltreatment, at least in the context of access to courts.⁸⁴⁷

Several concurring opinions were filed. Justice Souter, joined by Justice Ginsburg, penned a brief concurrence highlighting the judiciary’s historical complicity in unfair treatment of disabled individuals.⁸⁴⁸ He dredged up, among other things, the infamous statement of Justice Holmes in a case upholding forced sterilization of the mentally disabled: “Three generations of imbeciles are enough.”⁸⁴⁹ Justice Ginsburg, joined by Justices Souter and Breyer, also filed a concurrence defending the ADA as a “measure expected to advance equal-citizenship stature for persons with disabilities.”⁸⁵⁰ She then argued that such legislation was “entirely compatible with . . . federalism” because there was nothing defensible in allowing states to disregard this principle of equal citizenship.⁸⁵¹

Chief Justice Rehnquist, joined by Justices Kennedy and Thomas, wrote the principal dissent.⁸⁵² He found that Title II was not a valid exercise of Congress’s Section 5 power.⁸⁵³ He first criticized the historical record cited by the majority to justify enactment of the ADA—in the Chief’s view, the record did not show that Congress was responding to widespread violations of disabled persons’ due process rights, and most

842. *Id.* at 1994; *see also* *Nev. Dep’t of Human Servs. v. Hibbs*, 538 U.S. 721, 726 (2003); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

843. 521 U.S. 507, 520 (1997).

844. *Lane*, 124 S. Ct. at 1986-87.

845. *Id.* at 1988.

846. *Id.* at 1989-90.

847. *Id.* at 1992-93.

848. *Id.* at 1995 (Souter, J., concurring).

849. *Id.* (Souter, J., concurring).

850. *Id.* at 1996 (Ginsburg, J., concurring).

851. *Id.* (Ginsburg, J., concurring).

852. *Id.* at 1997 (Rehnquist, C.J., dissenting).

853. *Id.* (Rehnquist, C.J., dissenting).

of the instances were acts of private, rather than public, mistreatment.⁸⁵⁴ This utter lack of record evidence put this case squarely within *Board of Trustees of the University of Alabama v. Garrett*⁸⁵⁵ which held that Title I of the ADA did not validly abrogate states' sovereign immunity due to the lack of a historical pattern of discrimination.⁸⁵⁶ The dissent also chided the majority for linking Title II to fundamental constitutional rights—Title II was not so limited but instead spoke more generally about any service or program (regardless of its fundamental status) provided by a state entity.⁸⁵⁷ Finally, the dissent found that the majority's "as-applied" analysis (limiting the case to access-to-court claims) was inconsistent with its past precedents, embraced an unrealistic view of Title II, and risked sparking substantial confusion over future questions of congressional abrogation.⁸⁵⁸

Justice Scalia filed a separate dissent.⁸⁵⁹ In it, he expressed misgivings over the "congruence and proportionality" test.⁸⁶⁰ In his view, such a test was far too malleable and carried the risk that courts might impose their own policy judgments on the legislature.⁸⁶¹ An alternative test, rooted in the meaning of "enforce" as that term is used in Section 5, provided a surer footing.⁸⁶² While stare decisis perhaps required a more "permissive" view of the Section 5 power in the context of racial discrimination, Justice Scalia declared his unwillingness to apply it in other contexts.⁸⁶³

Justice Thomas filed a brief dissent, reminding the reader that he dissented from the Court's sovereign immunity decision in *Nevada Department of Human Resources v. Hibbs*⁸⁶⁴ (which the Chief authored) and therefore making clear that his agreement with the Chief's dissent in this case did not rely in any way on *Hibbs*.⁸⁶⁵

854. *Id.* at 1999 (Rehnquist, C.J., dissenting).

855. 531 U.S. 356 (2001).

856. *Id.* at 374; see *Lane*, 124 S. Ct. at 2002 (Rehnquist, C.J., dissenting); see also 42 U.S.C. § 12112 (2000). Title I of the American with Disabilities Act (ADA) prohibits the states and other employers from "discriminat[ing] against a qualified individual with a disability because of that disability . . . in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." *Id.* § 12112(a).

857. *Lane*, 124 S. Ct. at 2004 (Rehnquist, C.J., dissenting).

858. *Id.* at 2005-06 (Rehnquist, C.J., dissenting).

859. *Id.* at 2007 (Scalia, J., dissenting).

860. *Id.* at 2007-08 (Scalia, J., dissenting).

861. *Id.* (Scalia, J., dissenting).

862. *Id.* at 2009 (Scalia, J., dissenting).

863. *Id.* at 2012-13 (Scalia, J., dissenting).

864. 538 U.S. 721 (2003).

865. *Lane*, 124 S. Ct. at 2013 (Thomas, J., dissenting).

Lane is an important decision. Like last Term's decision in *Hibbs*, it marks yet another fraying of the "federalism five" that has taken a hard-line stance on issues of sovereign immunity over the past decade. Since that alliance developed in *Seminole Tribe v. Florida*⁸⁶⁶ (over the fierce dissents of Justices Stevens, Souter, Ginsburg, and Breyer), Justice O'Connor consistently has proven to be the swing vote in sovereign immunity cases, as *Lane* makes clear once again.⁸⁶⁷ In two respects, *Lane* holds the potential for further fraying the *Seminole Tribe* majority. First, the decision paves the way for "as applied" challenges to statutes under the sovereign immunity doctrine. Consequently, it enables the *Seminole Tribe* dissenters to uphold a law within a narrow band of cases without requiring a massive contraction of the sovereign immunity doctrine. Second, its reliance on the fundamental rights doctrine, coupled with *Fitzpatrick v. Bitzer*,⁸⁶⁸ sets the conditions for future cases, which, on the logic of *Lane*, might uphold other legislation abrogating sovereign immunity as a valid exercise of the Section 5 power.

Bankruptcy

Tennessee Student Assistance Corporation v. Hood

*Tennessee Student Assistance Corporation v. Hood*⁸⁶⁹ presented the opportunity for further development of the *Seminole Tribe* line of cases, but instead, became a case simply about bankruptcy procedure.⁸⁷⁰ In *Hood*, the respondent received a general discharge from bankruptcy.⁸⁷¹ Because the discharge did not cover her student loans, she reopened her bankruptcy petition, arguing that paying her loans constituted an "undue hardship."⁸⁷² As part of this reopening procedure, she filed a complaint and served a summons on the guarantor of her loans, the Tennessee Student Assistance Corporation (TSAC), an undisputed state entity.⁸⁷³ Pleading sovereign immunity, TSAC moved to dismiss the complaint.⁸⁷⁴ The courts below rejected this contention, arguing that Congress had validly abrogated the state's immunity under the Bankruptcy Clause.⁸⁷⁵ Although *Seminole Tribe* appeared to hold that Congress could rely only

866. 517 U.S. 44 (1996).

867. *Lane*, 124 S. Ct. at 1982.

868. 427 U.S. 445 (1976).

869. 124 S. Ct. 1905 (2004).

870. *Id.* at 1908.

871. *Id.*

872. *Id.* at 1908-09; 11 U.S.C. § 523(a)(8) (2000).

873. *Id.* at 1908-09.

874. *Id.* at 1909.

875. *Id.*; see U.S. CONST. art. 1, § 8, cl. 4.

on constitutional powers developed subsequent to the Eleventh Amendment to waive state sovereign immunity, the Sixth Circuit distinguished that case on the ground that the Bankruptcy Clause is one of only two powers for which the Constitution grants Congress the power to make “uniform” laws.⁸⁷⁶ In the Sixth Circuit’s view, such uniform powers were not at issue in *Seminole Tribe*, and there were good reasons flowing from the need for uniform laws to allow Congress to abrogate the states’ immunity when acting pursuant to those powers.⁸⁷⁷

In an opinion by Chief Justice Rehnquist, the Supreme Court affirmed but on different grounds than those relied on by the Sixth Circuit.⁸⁷⁸ The Court declined to reach the question presented by the petition for certiorari (whether Congress may validly abrogate state sovereign immunity pursuant to the Bankruptcy Clause) because, on the facts of this case, the discharge of Hood’s debt did not implicate state sovereign immunity.⁸⁷⁹ In the majority’s view, bankruptcy jurisdiction was a form of in rem jurisdiction (over the res of the debtor’s estate).⁸⁸⁰ This finding was important because the Court previously had recognized that a court may exercise in rem jurisdiction over a res without offending sovereign immunity principles.⁸⁸¹ Here, although the bankruptcy rules required Hood to file a complaint and to issue a summons against TSAC, that procedure in the context of an in rem proceeding was the functional equivalent of a motion, which did not implicate sovereign immunity concerns.⁸⁸² Thus, a bankruptcy court could proceed to disposition of the res without having to exercise the in personam jurisdiction over the state, normally attendant to service of a complaint and summons.⁸⁸³ Accordingly, discharge of Hood’s student loan debt did not implicate state sovereign immunity and did not require the Court to answer the question presented.⁸⁸⁴

Justice Souter, joined by Justice Ginsburg, filed a brief concurring opinion reaffirming their disagreement with *Seminole Tribe*.⁸⁸⁵

876. *Hood v. Tenn. Student Assistance Corp. (In re Hood)*, 319 F.3d 755, 763 (6th Cir. 2003), *aff’d and remanded by* 124 S. Ct. 1904 (2004); *see also* U.S. CONST. art. I, § 8, cl. 4. (granting Congress the power to establish a uniform rule of naturalization).

877. *Hood*, 319 F.3d at 761-64.

878. *Hood*, 124 S. Ct. at 1909.

879. *Id.* at 1909, 1915.

880. *Id.* at 1911.

881. *Id.*

882. *Id.* at 1913-14.

883. *Id.* at 1914.

884. *Id.* at 1914-15.

885. *Id.* at 1915 (Souter, J., concurring).

Justice Thomas, joined by Justice Scalia, dissented.⁸⁸⁶ In their view, discharging the debt did constitute a proceeding against the state.⁸⁸⁷ Justice Thomas found this case indistinguishable from *Federal Maritime Commission v. South Carolina State Ports Authority*,⁸⁸⁸ where this Court held that *Seminole Tribe* prohibits dragging an unconsenting state before an independent federal agency.⁸⁸⁹ He also expressed doubt over the majority's treatment of the complaint as the functional equivalent of a motion—whatever the case, the proceeding clearly required the state to litigate in order to vindicate its interests.⁸⁹⁰ The dissent also took issue with the Court's reliance on prior in rem cases—noting that those arose under the Court's admiralty jurisdiction and thus involved different considerations from its bankruptcy jurisdiction.⁸⁹¹ Having concluded that nothing in the bankruptcy code required different treatment of the state's interests in this case, Justice Thomas concluded that it fell squarely within the *Seminole Tribe* principle—Congress clearly sought to abrogate the states' immunity but, by virtue of relying on an Article I power, lacked the constitutional authority to do so.⁸⁹²

This is an unexpected outcome. If the Court did not wish to answer the question presented, it might simply have dismissed the case as improvidently granted. But once it decided to delve into the merits of the case, the majority had to tow a very fine line to explain why the case did not implicate state sovereign immunity concerns (as every court below believed that it had). Its analogy to in rem jurisdiction is plausible, but its characterization of the complaint as a “functional equivalent” of a motion is less so. Even assuming that the two are comparable for these purposes, both vehicles, as Justice Thomas points out, require the state to defend its interests—which is precisely the burden of which the *Seminole Tribe* doctrine seeks to spare them.⁸⁹³ One wonders whether one of the votes among the federalism five might not have been shaky (O'Connor), prompting the Chief (a) to keep the opinion and (b) to write it in a way that just barely dodged the need to decide the question while still including extensive language that would allow courts to apply *Seminole Tribe* in future cases presenting different facts. The only risk with this result from the federalism perspective is that it expands the grounds upon which future Courts might hold that a particular proceeding does

886. *Id.* at 1915 (Thomas, J., dissenting).

887. *Id.* (Thomas, J., dissenting).

888. 535 U.S. 743 (2002).

889. *Id.* at 760-61; *see Hood*, 124 S. Ct. at 1916-18 (Thomas, J., dissenting).

890. *Hood*, 124 S. Ct. at 1917-18 (Thomas, J., dissenting).

891. *Id.* at 1918 (Thomas, J., dissenting).

892. *Id.* at 1920 (Thomas, J., dissenting).

893. *See id.* at 1917 (Thomas, J., dissenting).

not “implicate” state sovereign interests even if the state is being forced to litigate. Justice Thomas’s opinion at least has the virtue of squarely attacking the issue and offering a cleaner resolution of it.

III. CONCLUSION

October Term 2003 was an exceptional one for the Court. It confronted some of the most challenging and troublesome issues that it has faced for the last half century. The foregoing survey has provided the reader with both a “macroeconomic” and a “microeconomic” view on how the Court handled those issues. Some of the lessons from the Term—such as the smaller docket, the inflow from the Ninth Circuit, and the “swing vote” from Justice O’Connor—gel with the popular reports on the Court. Others such as the glut of criminal cases, the high unanimity rate, and the curious voting alliances (particularly broken out among topic areas) have not been as obvious.

Perhaps the most critical lesson from the Court’s Term has been the triumph of “judicial minimalism” and the Court’s reluctance to decide cases broadly or to provide significant guidance for future proceedings or future cases. In several instances, such as *Padilla* and *Newdow*, the Court dodged a critical issue on a technical point. In others, such as *Hamdi* or *Cheney*, the Court resolved a question but did so narrowly, leaving litigants and courts to wonder just precisely what the Court wanted it to do. And in yet others, such as *Till* and *Seibert*, the Court could not muster five votes for a position, leaving lawyers to sort out the messy opinions.

As the Court begins October Term 2004, Court watchers and practitioners alike can be sure that the rivalries, debates, and trends documented last term will surely revive. With a Presidential election and possible retirements on the horizon, a close understanding of the Court’s operations will only become more important.

APPENDIX: 1

Number of Cases Decided After Argument

| October Term | Number of Cases Decided After Argument |
|--------------|--|
| 2003 | 73 |
| 2002 | 73 |
| 2001 | 76 |
| 2000 | 79 |
| 1999 | 74 |
| 1998 | 78 |
| 1997 | 92 |
| 1996 | 81 |
| 1995 | 77 |
| 1994 | 84 |
| 1993 | 84 |
| 1992 | 107 |
| 1991 | 107 |
| 1990 | 102 |

APPENDIX: 2

*Source of Cases**Supreme Court of the United States, October Term 2003*

| Court | % Rev'd or Vacated in Whole or in Part | # Rev'd or Vacated in Whole or in Part | # Decided |
|----------------|--|--|-----------|
| First Circuit | | 0 | 0 |
| Second Circuit | 100% | 2 | 2 |
| Third Circuit | 75% | 3 | 4 |
| Fourth Circuit | 25% | 1 | 4 |

| | | | |
|-------------------------------------|------|----|-------------------|
| Fifth Circuit ⁸⁹⁴ | 100% | 6 | 6 |
| Sixth Circuit | 75% | 6 | 8 |
| Seventh Circuit | 50% | 2 | 4 |
| Eighth Circuit | 75% | 3 | 4 |
| Ninth Circuit | 76% | 19 | 25 |
| Tenth Circuit | 100% | 3 | 3 |
| Eleventh Circuit | 100% | 4 | 4 |
| D.C. Circuit | 100% | 3 | 3 |
| Federal Circuit | 100% | 1 | 1 |
| U.S. District Courts ⁸⁹⁵ | 100% | 1 | 2 |
| State Courts ⁸⁹⁶ | 67% | 6 | 9 ⁸⁹⁷ |
| <hr/> | | | |
| TOTAL | 76% | 60 | 79 ⁸⁹⁸ |

894. *Smith v. Dretke*, 124 S. Ct. 1652 (2004) (mem.), not included because case was dismissed.

895. *McConnell v. Federal Election Commission*, 540 U.S. 93 (2004), was reversed in part and affirmed in part, therefore, it is included in this calculation.

896. *Arizona v. Grant*, 124 S. Ct. 461 (2003), is not included because case was dismissed.

897. The Court decided nine cases from state courts this Term. Six were reversed or vacated in whole or in part, two were affirmed, and one (*Johnson v. California*, 124 S. Ct. 1833 (2004) (per curiam)) was dismissed for want of jurisdiction.

898. This total does not include the one original jurisdiction case decided by the Court this Term (*Virginia v. Maryland*, 540 U.S. 56 (2004)) or two cases where the Court dismissed the writ (*Grant* and *Dretke*).

APPENDIX: 3

*Source of Cases**Supreme Court of the United States, October Term 2002*

| Court | % Rev'd or Vacated in Whole or in Part | # Rev'd or Vacated in Whole or in Part | # Decided |
|----------------------|---|---|-----------|
| First Circuit | 0% | 0 | 1 |
| Second Circuit | 100% | 2 | 2 |
| Third Circuit | 0% | 0 | 0 |
| Fourth Circuit | 100% | 3 | 3 |
| Fifth Circuit | 100% | 3 | 3 |
| Sixth Circuit | 71% | 5 | 7 |
| Seventh Circuit | 67% | 2 | 3 |
| Eighth Circuit | 100% | 1 | 1 |
| Ninth Circuit | 78% | 18 | 23 |
| Tenth Circuit | 100% | 1 | 1 |
| Eleventh Circuit | 50% | 2 | 4 |
| D.C. Circuit | 33% | 1 | 3 |
| Federal Circuit | 50% | 1 | 2 |
| U.S. District Courts | 75% | 3 | 4 |

| | | | |
|--------------|-----|----|----|
| State Courts | 81% | 17 | 21 |
| <hr/> | | | |
| TOTAL | 76% | 59 | 78 |

APPENDIX: 3

*Source of Cases**Supreme Court of the United States, October Term 2001*

| <u>Court</u> | <u>% Rev'd or Vacated in Whole or in Part</u> | <u># Rev'd or Vacated in Whole or in Part</u> | <u># Decided</u> |
|------------------|---|---|------------------|
| First Circuit | 0% | 0 | 1 |
| Second Circuit | 100% | 4 | 4 |
| Third Circuit | 100% | 1 | 1 |
| Fourth Circuit | 64% | 7 | 11 |
| Fifth Circuit | 100% | 2 | 2 |
| Sixth Circuit | 90% | 9 | 10 |
| Seventh Circuit | 0% | 0 | 2 |
| Eighth Circuit | 80% | 4 | 5 |
| Ninth Circuit | 78% | 14 | 18 |
| Tenth Circuit | 75% | 3 | 4 |
| Eleventh Circuit | 100% | 4 | 4 |
| D.C. Circuit | 66% | 2 | 3 |
| Federal Circuit | 80% | 4 | 5 |

| | | | |
|----------------------|-----|----|----|
| U.S. District Courts | 0% | 0 | 1 |
| State Courts | 78% | 7 | 9 |
| <hr/> | | | |
| TOTAL | 76% | 61 | 80 |

APPENDIX: 3

*Source of Cases**Supreme Court of the United States, October Term 2000*

| Court | % Rev'd or Vacated in Whole or in Part | # Rev'd or Vacated in Whole or in Part | # Decided |
|------------------|---|---|-----------|
| First Circuit | 100% | 1 | 1 |
| Second Circuit | 38% | 3 | 8 |
| Third Circuit | 60% | 3 | 5 |
| Fourth Circuit | 40% | 2 | 5 |
| Fifth Circuit | 50% | 3 | 6 |
| Sixth Circuit | 71% | 5 | 7 |
| Seventh Circuit | 50% | 2 | 4 |
| Eighth Circuit | 33% | 1 | 3 |
| Ninth Circuit | 77% | 13 | 17 |
| Tenth Circuit | 75% | 3 | 4 |
| Eleventh Circuit | 100% | 3 | 3 |

| | | | |
|----------------------|------|----|----|
| D.C. Circuit | 100% | 1 | 1 |
| Federal Circuit | 100% | 2 | 2 |
| U.S. District Courts | 100% | 2 | 2 |
| State Courts | 86% | 12 | 14 |
| <hr/> | | | |
| Total | 68% | 56 | 82 |

APPENDIX: 3

*Source of Cases**Supreme Court of the United States, October Term 1999*

| Court | % Rev'd or Vacated in Whole or in Part | # Rev'd or Vacated in Whole or in Part | # Decided |
|-----------------|---|---|-----------|
| First Circuit | 0% | 0 | 1 |
| Second Circuit | 100% | 3 | 3 |
| Third Circuit | 0% | 0 | 1 |
| Fourth Circuit | 56% | 5 | 9 |
| Fifth Circuit | 67% | 6 | 9 |
| Sixth Circuit | 75% | 3 | 4 |
| Seventh Circuit | 75% | 6 | 8 |
| Eighth Circuit | 20% | 1 | 5 |
| Ninth Circuit | 90% | 9 | 10 |
| Tenth Circuit | 50% | 1 | 2 |

| | | | |
|----------------------|------|----|----|
| Eleventh Circuit | 40% | 2 | 5 |
| D.C. Circuit | 0% | 0 | 3 |
| Federal Circuit | 100% | 2 | 2 |
| U.S. District Courts | 0% | 0 | 2 |
| State Courts | 67% | 8 | 12 |
| <hr/> | | | |
| TOTAL | 61% | 46 | 76 |

APPENDIX: 3

*Source of Cases**Supreme Court of the United States, October Term 1998*

| Court | % Rev'd or Vacated in Whole or in Part | # Rev'd or Vacated in Whole or in Part | # Decided |
|-----------------|---|---|-----------|
| First Circuit | 0% | 0 | 0 |
| Second Circuit | 75% | 3 | 4 |
| Third Circuit | 67% | 4 | 6 |
| Fourth Circuit | 50% | 2 | 4 |
| Fifth Circuit | 80% | 4 | 5 |
| Sixth Circuit | 50% | 2 | 4 |
| Seventh Circuit | 100% | 4 | 4 |
| Eighth Circuit | 33% | 1 | 3 |

| | | | |
|----------------------|------|----|----|
| Ninth Circuit | 78% | 14 | 18 |
| Tenth Circuit | 25% | 1 | 4 |
| Eleventh Circuit | 88% | 7 | 8 |
| D.C. Circuit | 50% | 1 | 2 |
| Federal Circuit | 75% | 3 | 4 |
| U.S. District Courts | 67% | 2 | 3 |
| State Courts | 82% | 9 | 11 |
| Other ⁸⁹⁹ | 100% | 1 | 1 |
| <hr/> | | | |
| Total | 72% | 58 | 81 |

APPENDIX: 3

*Source of Cases**Supreme Court of the United States, October Term 1997*

| Court | % Rev'd or Vacated in Whole or in Part | # Rev'd or Vacated in Whole or in Part | # Decided |
|----------------|---|---|-----------|
| First Circuit | 60% | 3 | 5 |
| Second Circuit | 33% | 1 | 3 |
| Third Circuit | 25% | 1 | 4 |
| Fourth Circuit | 50% | 1 | 2 |

899. Court of Appeals for the Armed Forces

| | | | |
|----------------------|------|----|----|
| Fifth Circuit | 50% | 6 | 12 |
| Sixth Circuit | 100% | 3 | 3 |
| Seventh Circuit | 57% | 4 | 7 |
| Eighth Circuit | 62% | 8 | 13 |
| Ninth Circuit | 82% | 14 | 17 |
| Tenth Circuit | 0% | 0 | 1 |
| Eleventh Circuit | 100% | 2 | 2 |
| D.C. Circuit | 44% | 4 | 9 |
| Federal Circuit | 50% | 1 | 2 |
| U.S. District Courts | 50% | 1 | 2 |
| State Courts | 70% | 7 | 10 |
| Other ⁹⁰⁰ | 100% | 1 | 1 |
| <hr/> | | | |
| Total | 61% | 57 | 93 |

APPENDIX: 4⁹⁰¹*Breakdown of Docket by Category**CRIMINAL*Fourth Amendment*Illinois v. Lidster* (9-0)*Thornton v. United States* (7-2)*United States v. Banks* (9-0) (unanimous)

900. Court of Appeals for the Armed Forces

901. "Unanimous" indicates a 9-0 decision in which no separate concurrence was filed.

Groh v. Ramirez (5-4)
Maryland v. Pringle (9-0) (unanimous)
United States v. Flores-Montano (9-0)
Hübel v. Sixth Judicial District Court (5-4)

Fifth Amendment

Missouri v. Seibert (5-4)
United States v. Patane (5-4)
Yarborough v. Alvarado (5-4)

Sixth Amendment

Crawford v. Washington (9-0)
Fellers v. United States (9-0) (unanimous)
Iowa v. Tovar (9-0) (unanimous)
Blakely v. Washington (5-4)

Death Penalty

Schriro v. Summerlin (5-4)
Nelson v. Campbell (9-0) (unanimous)
Beard v. Banks (5-4)
Tennard v. Dretke (6-3)
Smith v. Dretke (dismissed)
Banks v. Dretke (9-0)⁹⁰²

Habeas

Baldwin v. Reese (8-1)
Pliler v. Ford (7-2)
Dretke v. Haley (6-3)

Nonconstitutional Criminal Law and Procedure

Castro v. United States (9-0)
United States v. Dominguez Benitez (9-0)
Sabri v. United States (9-0)

RIGHTS

First Amendment

McConnell v. Federal Election Commission (5-4)⁹⁰³

902. Justices Thomas and Scalia concurred in part and dissented in part.

Elk Grove Unified School District v. Newdow (8-0)⁹⁰⁴
Locke v. Davey (7-2)
Ashcroft v. ACLU (5-4)
City of Littleton v. Z.J. Gifts D-4, L.L.C. (9-0)

Civil Rights Act

Jones v. R.R. Donnelly & Sons (9-0) (unanimous)

Voting Rights

Vieth v. Jubelirer (5-4)

INTERNATIONAL

Rumsfeld v. Padilla (5-4)
Hamdi v. Rumsfeld (6-3)
Rasul v. Bush (6-3)
Sosa v. Alvarez-Machain (9-0)
Intel Corp v. Advanced Micro Devices, Inc. (7-1)⁹⁰⁵
Olympic Airways v. Husain (6-2)⁹⁰⁶
Republic of Austria v. Altmann (6-3)
F. Hoffman-La Roche Ltd. v. Empagran S.A. (8-0)⁹⁰⁷

FEDERAL

Environment

South Florida Water Management v. Miccosukee Tribe (9-0)
Alaska Department of Environmental Conservation v. EPA (5-4)
Engine Manufacturers v. South Coast Air Quality Management (8-1)
BedRoc Ltd. v. United States (6-3)
Norton v. Southern Utah Wilderness Alliance (9-0) (unanimous)
Department of Transportation v. Public Citizen (9-0) (unanimous)

Civil Procedure

Grupo Dataflux v. Atlas Global Group, L.P. (5-4)
Scarborough v. Principi (7-2)

903. This case is not included in the voting alliance calculations because the breakdown of votes for each part of this case is too complex for this chart.

904. Justice Scalia did not participate in this case.

905. Justice O'Connor did not participate in this case.

906. Justice Breyer did not participate in this case.

907. Justice O'Connor did not participate in this case.

Hibbs v. Winn (5-4)

Sovereign Immunity

Tennessee Student Assistance Corp. v. Hood (*In re Hood*) (7-2)

Tennessee v. Lane (5-4)

Frew ex rel. Frew v. Hawkins (9-0) (unanimous)

United States Postal Service v. Flamingo Industries (9-0) (unanimous)

Bankruptcy

Till v. SCS Credit Corp. (5-4)

Yates v. Hendon (9-0)

Lamie v. United States Trustee (9-0)

Kontrick v. Ryan (9-0) (unanimous)

ERISA

Central Laborers' Pension Fund v. Heinz (9-0)

Aetna Health Inc. v. Davila (9-0)

Tax

United States v. Galletti (9-0) (unanimous)

Antitrust/Telecom

Nixon v. Missouri Municipal League (8-1)

Verizon Communications v. Law Offices of Curtis (9-0)

Social Security

Barnhart v. Thomas (9-0) (unanimous)

Labor/Employment

Raytheon Co. v. Hernandez (7-0)⁹⁰⁸

General Dynamics Land System, Inc. v. Cline (6-3)

Pennsylvania State Police v. Suders (8-1)

Securities

SEC v. Edwards (9-0) (unanimous)

Native Americans

United States v. Lara (7-2)

908. Justices Souter and Breyer did not participate in this case.

Privacy*Doe v. Chao* (6-3)*National Archives & Records Administration v. Favish* (9-0)
(unanimous)Separation of Powers*Cheney v. United States District Court* (7-2)Banking*Household Credit Services, Inc. v. Pfennig* (9-0) (unanimous)ORIGINAL JURISDICTION*Virginia v. Maryland* (7-2)

APPENDIX: 5

General Voting Alliances for this Term

| <i>Voting Alliances: Percentage Each Justice Voted with Another for the Same Disposition</i> ⁹⁰⁹ | | | | | | | | | |
|---|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | ----- | 62.5 | 88.6 | 87.3 | 90.3 | 64.8 | 87.5 | 69.4 | 72.9 |
| Stev | 62.5 | ----- | 70 | 57.7 | 69.4 | 88.7 | 61.1 | 88.9 | 84.3 |
| OC | 88.6 | 70 | ----- | 81.2 | 84.3 | 72.5 | 75.7 | 75.7 | 82.4 |
| Scal | 87.3 | 57.7 | 81.2 | ----- | 80.3 | 60 | 91.5 | 60.6 | 62.3 |
| Ken | 90.3 | 69.4 | 84.3 | 80.3 | ----- | 69 | 83.3 | 69.4 | 70 |
| Sout | 64.8 | 88.7 | 72.5 | 60 | 69 | ----- | 60.6 | 91.5 | 84.3 |
| Thom | 87.5 | 61.1 | 75.7 | 91.5 | 83.3 | 60.6 | ----- | 63.9 | 61.4 |
| Gins | 69.4 | 88.9 | 75.7 | 60.6 | 69.4 | 91.5 | 63.9 | ----- | 93 |
| Brey | 72.9 | 84.3 | 82.4 | 62.3 | 70 | 84.3 | 61.4 | 93 | ----- |

909. These percentages were calculated by dividing the number of times two justices agreed in the disposition of a case by the number of cases in which they both voted, then multiplied by 100.

APPENDIX: 6

*Voting Alliances by Category*⁹¹⁰

| <i>Voting Alliances: Fourth Amendment</i> | | | | | | | | | |
|---|---------------|---------------|--------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 4/7 (57%) | 6/7 (86%) | 7/7 (100%) | 7/7 (100%) | 4/7 (57%) | 7/7 (100%) | 5/7 (71%) | 5/7 (71%) |
| Stev | 4/7 (57%) | -- | 5/7 (71%) | 4/7 (57%) | 4/7 (57%) | 7/7 (100%) | 4/7 (57%) | 6/7 (86%) | 6/7 (86%) |
| OC | 6/7 (86%) | 5/7 (71%) | -- | 6/7 (86%) | 6/7 (86%) | 5/7 (71%) | 6/7 (86%) | 6/7 (86%) | 6/7 (86%) |
| Scal | 7/7 (100%) | 4/7 (57%) | 6/7 (86%) | -- | 7/7 (100%) | 4/7 (57%) | 7/7 (100%) | 5/7 (71%) | 5/7 (71%) |
| Ken | 7/7 (100%) | 4/7 (57%) | 6/7 (86%) | 7/7 (100%) | -- | 4/7 (57%) | 7/7 (100%) | 5/7 (71%) | 5/7 (71%) |
| Sout | 4/7 (57%) | 7/7 (100%) | 5/7 (71%) | 4/7 (57%) | 4/7 (57%) | -- | 4/7 (57%) | 6/7 (86%) | 6/7 (86%) |
| Thom | 7/7 (100%) | 4/7 (57%) | 6/7 (86%) | 7/7 (100%) | 7/7 (100%) | 4/7 (57%) | -- | 5/7 (71%) | 5/7 (71%) |
| Gins | 5/7 (71%) | 6/7 (86%) | 6/7 (86%) | 5/7 (71%) | 5/7 (71%) | 6/7 (86%) | 5/7 (71%) | -- | 7/7 (100%) |
| Brey | 5/7 (71%) | 6/7 (86%) | 6/7 (86%) | 5/7 (71%) | 5/7 (71%) | 6/7 (86%) | 5/7 (71%) | 7/7 (100%) | -- |

| <i>Voting Alliances: Fifth Amendment</i> | | | | | | | | | |
|--|---------------|---------------|---------------|---------------|--------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 0/3 (0%) | 3/3 (100%) | 3/3 (100%) | 2/3 (67%) | 0/3 (0%) | 3/3 (100%) | 0/3 (0%) | 0/3 (0%) |
| Stev | 0/3 (0%) | -- | 0/3 (0%) | 0/3 (0%) | 1/3 (33%) | 3/3 (100%) | 0/3 (0%) | 3/3 (100%) | 3/3 (100%) |
| OC | 3/3 (100%) | 0/3 (0%) | -- | 3/3 (100%) | 2/3 (67%) | 0/3 (0%) | 3/3 (100%) | 0/3 (0%) | 0/3 (0%) |
| Scal | 3/3 (100%) | 0/3 (0%) | 3/3 (100%) | -- | 2/3 (67%) | 0/3 (0%) | 3/3 (100%) | 0/3 (0%) | 0/3 (0%) |
| Ken | 2/3 (67%) | 1/3 (33%) | 2/3 (67%) | 2/3 (67%) | -- | 1/3 (33%) | 2/3 (67%) | 1/3 (33%) | 1/3 (33%) |
| Sout | 0/3 (0%) | 3/3 (100%) | 0/3 (0%) | 0/3 (0%) | 1/3 (33%) | -- | 0/3 (0%) | 3/3 (100%) | 3/3 (100%) |
| Thom | 3/3 (100%) | 0/3 (0%) | 3/3 (100%) | 3/3 (100%) | 2/3 (67%) | 0/3 (0%) | -- | 0/3 (0%) | 0/3 (0%) |

910. See *supra* app. 4, for list of cases in each category and disposition.

| | | | | | | | | | |
|------|-------------|---------------|-------------|-------------|--------------|---------------|-------------|---------------|---------------|
| Gins | 0/3 (0%) | 3/3 (100%) | 0/3 (0%) | 0/3 (0%) | 1/3 (33%) | 3/3 (100%) | 0/3 (0%) | -- | 3/3 (100%) |
| Brey | 0/3 (0%) | 3/3 (100%) | 0/3 (0%) | 0/3 (0%) | 1/3 (33%) | 3/3 (100%) | 0/3 (0%) | 3/3 (100%) | -- |

| <i>Voting Alliances: Sixth Amendment</i> | | | | | | | | | |
|--|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 4/4 (100%) |
| Stev | 3/4 (75%) | -- | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | 4/4 (100%) | 3/4 (75%) |
| OC | 4/4 (100%) | 3/4 (75%) | -- | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 4/4 (100%) |
| Scal | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | -- | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | 4/4 (100%) | 3/4 (75%) |
| Ken | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | -- | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 4/4 (100%) |
| Sout | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | -- | 4/4 (100%) | 4/4 (100%) | 3/4 (75%) |
| Thom | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | -- | 4/4 (100%) | 3/4 (75%) |
| Gins | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | -- | 3/4 (75%) |
| Brey | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | -- |

| <i>Voting Alliances: Death Penalty</i> | | | | | | | | | |
|--|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 2/5 (40%) | 4/5 (80%) | 5/5 (100%) | 4/5 (80%) | 2/5 (40%) | 5/5 (100%) | 2/5 (40%) | 2/5 (40%) |
| Stev | 2/5 (40%) | -- | 3/5 (60%) | 2/5 (40%) | 3/5 (60%) | 5/5 (100%) | 2/5 (40%) | 5/5 (100%) | 5/5 (100%) |
| OC | 4/5 (80%) | 3/5 (60%) | -- | 4/5 (80%) | 5/5 (100%) | 3/5 (60%) | 4/5 (80%) | 3/5 (60%) | 3/5 (60%) |
| Scal | 5/5 (100%) | 2/5 (40%) | 4/5 (80%) | -- | 4/5 (80%) | 2/5 (40%) | 5/5 (100%) | 2/5 (40%) | 2/5 (40%) |
| Ken | 4/5 (80%) | 3/5 (60%) | 5/5 (100%) | 4/5 (80%) | -- | 3/5 (60%) | 4/5 (80%) | 3/5 (60%) | 3/5 (60%) |
| Sout | 2/5 (40%) | 5/5 (100%) | 3/5 (60%) | 2/5 (40%) | 3/5 (60%) | -- | 2/5 (40%) | 5/5 (100%) | 5/5 (100%) |
| Thom | 5/5 (100%) | 2/5 (40%) | 4/5 (80%) | 5/5 (100%) | 4/5 (80%) | 2/5 (40%) | -- | 2/5 (40%) | 2/5 (40%) |
| Gins | 2/5 (40%) | 5/5 (100%) | 3/5 (60%) | 2/5 (40%) | 3/5 (60%) | 5/5 (100%) | 2/5 (40%) | -- | 5/5 (100%) |

| | | | | | | | | | |
|------|--------------|---------------|--------------|--------------|--------------|---------------|--------------|---------------|----|
| Brey | 2/5 (40%) | 5/5 (100%) | 3/5 (60%) | 2/5 (40%) | 3/5 (60%) | 5/5 (100%) | 2/5 (40%) | 5/5 (100%) | -- |
|------|--------------|---------------|--------------|--------------|--------------|---------------|--------------|---------------|----|

| <i>Voting Alliances: Habeas</i> | | | | | | | | | |
|---------------------------------|---------------|--------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/3 (33%) | 3/3 (100%) | 3/3 (100%) | 2/3 (66%) | 2/3 (66%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) |
| Stev | 1/3 (33%) | -- | 1/3 (33%) | 1/3 (33%) | 2/3 (66%) | 2/3 (66%) | 1/3 (33%) | 0/3 (0%) | 0/3 (0%) |
| OC | 3/3 (100%) | 1/3 (33%) | -- | 3/3 (100%) | 2/3 (66%) | 2/3 (66%) | 3/3 (100%) | 2/3 (66%) | 2/3 (66%) |
| Scal | 3/3 (100%) | 1/3 (33%) | 3/3 (100%) | -- | 2/3 (66%) | 2/3 (66%) | 3/3 (100%) | 2/3 (66%) | 2/3 (66%) |
| Ken | 2/3 (66%) | 2/3 (66%) | 2/3 (66%) | 2/3 (66%) | -- | 3/3 (100%) | 2/3 (66%) | 1/3 (33%) | 1/3 (33%) |
| Sout | 2/3 (66%) | 2/3 (66%) | 2/3 (66%) | 2/3 (66%) | 3/3 (100%) | -- | 2/3 (66%) | 1/3 (33%) | 1/3 (33%) |
| Thom | 3/3 (100%) | 1/3 (33%) | 3/3 (100%) | 3/3 (100%) | 2/3 (66%) | 2/3 (66%) | -- | 2/3 (66%) | 2/3 (66%) |
| Gins | 3/3 (100%) | 0/3 (0%) | 2/3 (66%) | 2/3 (66%) | 1/3 (33%) | 1/3 (33%) | 2/3 (66%) | -- | 3/3 (100%) |
| Brey | 3/3 (100%) | 0/3 (0%) | 2/3 (66%) | 2/3 (66%) | 1/3 (33%) | 1/3 (33%) | 2/3 (66%) | 3/3 (100%) | -- |

| <i>Voting Alliances: Nonconstitutional Criminal Law and Procedure</i> | | | | | | | | | |
|---|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) |
| Stev | 3/3 (100%) | -- | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) |
| OC | 3/3 (100%) | 3/3 (100%) | -- | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) |
| Scal | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | -- | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) |
| Ken | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 2/3 (100%) | -- | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) |
| Sout | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | -- | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) |
| Thom | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | -- | 3/3 (100%) | 3/3 (100%) |
| Gins | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | -- | 3/3 (100%) |
| Brey | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | -- |

| <i>Voting Alliances: First Amendment</i> | | | | | | | | | |
|--|---------------|---------------|---------------|--------------|---------------|---------------|--------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 3/4 (75%) | 4/4 (100%) | 2/3 (66%) | 3/4 (75%) | 3/4 (75%) | 2/4 (50%) | 3/4 (75%) | 4/4 (100%) |
| Stev | 3/4 (75%) | -- | 3/4 (75%) | 1/3 (33%) | 4/4 (100%) | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) |
| OC | 4/4 (100%) | 3/4 (75%) | -- | 2/3 (66%) | 3/4 (75%) | 3/4 (75%) | 2/4 (50%) | 3/4 (75%) | 4/4 (100%) |
| Scal | 2/3 (66%) | 1/3 (33%) | 2/3 (66%) | -- | 1/3 (33%) | 1/3 (33%) | 2/3 (66%) | 1/3 (33%) | 2/3 (66%) |
| Ken | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 1/3 (33%) | -- | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) |
| Sout | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 1/3 (33%) | 4/4 (100%) | -- | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) |
| Thom | 2/4 (50%) | 3/4 (75%) | 2/4 (50%) | 2/3 (66%) | 3/4 (75%) | 3/4 (75%) | -- | 3/4 (75%) | 2/4 (50%) |
| Gins | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 1/3 (33%) | 4/4 (100%) | 4/4 (100%) | 3/4 (75%) | -- | 3/4 (75%) |
| Brey | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 2/3 (66%) | 3/4 (75%) | 3/4 (75%) | 2/4 (50%) | 3/4 (75%) | -- |

| <i>Voting Alliances: Civil Rights Act</i> | | | | | | | | | |
|---|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Stev | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| OC | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Scal | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Ken | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Sout | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Thom | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) |
| Gins | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) |
| Brey | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- |

| <i>Voting Alliances: Voting Rights</i> | | | | | | | | | |
|--|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) |
| Stev | 0/1 (0%) | -- | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) |
| OC | 1/1 (100%) | 0/1 (0%) | -- | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) |
| Scal | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | -- | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) |
| Ken | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | -- | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) |
| Sout | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | -- | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) |
| Thom | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | -- | 0/1 (0%) | 0/1 (0%) |
| Gins | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | -- | 1/1 (100%) |
| Brey | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | -- |

| <i>Voting Alliances: International</i> | | | | | | | | | |
|--|--------------|--------------|--------------|--------------|--------------|---------------|--------------|---------------|--------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 4/8 (50%) | 3/6 (50%) | 5/8 (63%) | 7/8 (88%) | 5/8 (63%) | 7/8 (88%) | 5/8 (63%) | 3/7 (43%) |
| Stev | 4/8 (50%) | -- | 3/6 (50%) | 5/8 (63%) | 5/8 (63%) | 7/8 (88%) | 5/8 (63%) | 7/8 (88%) | 5/7 (71%) |
| OC | 3/6 (50%) | 3/6 (50%) | -- | 4/6 (67%) | 4/6 (67%) | 4/6 (67%) | 2/6 (33%) | 4/6 (67%) | 4/5 (80%) |
| Scal | 5/8 (63%) | 5/8 (63%) | 4/6 (67%) | -- | 4/8 (50%) | 4/8 (50%) | 6/8 (75%) | 4/8 (50%) | 3/7 (43%) |
| Ken | 7/8 (88%) | 5/8 (63%) | 4/6 (67%) | 4/8 (50%) | -- | 6/8 (75%) | 6/8 (75%) | 6/8 (75%) | 4/7 (57%) |
| Sout | 5/8 (63%) | 7/8 (88%) | 4/6 (67%) | 4/8 (50%) | 6/8 (75%) | -- | 4/8 (50%) | 8/8 (100%) | 6/7 (86%) |
| Thom | 7/8 (88%) | 5/8 (63%) | 2/6 (33%) | 6/8 (75%) | 6/8 (75%) | 4/8 (50%) | -- | 4/8 (50%) | 2/7 (29%) |
| Gins | 5/8 (63%) | 7/8 (88%) | 4/6 (67%) | 4/8 (50%) | 6/8 (75%) | 8/8 (100%) | 4/8 (50%) | -- | 6/7 (86%) |
| Brey | 3/7 (43%) | 5/7 (71%) | 4/5 (80%) | 3/7 (43%) | 4/7 (57%) | 6/7 (86%) | 2/7 (29%) | 6/7 (86%) | -- |

| <i>Voting Alliances: Environment</i> | | | | | | | | | |
|--------------------------------------|---------------|---------------|---------------|---------------|---------------|--------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 4/6 (67%) | 5/6 (83%) | 6/6 (100%) | 6/6 (100%) | 3/6 (50%) | 6/6 (100%) | 4/6 (67%) | 5/6 (83%) |
| Stev | 4/6 (67%) | -- | 5/6 (83%) | 4/6 (67%) | 4/6 (67%) | 5/6 (83%) | 4/6 (67%) | 6/6 (100%) | 5/6 (83%) |
| OC | 5/6 (83%) | 5/6 (83%) | -- | 5/6 (83%) | 5/6 (83%) | 4/6 (67%) | 5/6 (83%) | 5/6 (83%) | 6/6 (100%) |
| Scal | 6/6 (100%) | 4/6 (67%) | 5/6 (83%) | -- | 6/6 (100%) | 3/6 (50%) | 6/6 (100%) | 4/6 (67%) | 5/6 (83%) |
| Ken | 6/6 (100%) | 4/6 (67%) | 5/6 (83%) | 6/6 (100%) | -- | 3/6 (50%) | 6/6 (100%) | 4/6 (67%) | 5/6 (83%) |
| Sout | 3/6 (50%) | 5/6 (83%) | 4/6 (67%) | 3/6 (50%) | 3/6 (50%) | -- | 3/6 (50%) | 5/6 (83%) | 4/6 (67%) |
| Thom | 6/6 (100%) | 4/6 (67%) | 5/6 (83%) | 6/6 (100%) | 6/6 (100%) | 3/6 (50%) | -- | 4/6 (67%) | 5/6 (83%) |
| Gins | 4/6 (67%) | 6/6 (100%) | 5/6 (83%) | 4/6 (67%) | 4/6 (67%) | 5/6 (83%) | 4/6 (67%) | -- | 5/6 (83%) |
| Brey | 5/6 (83%) | 5/6 (83%) | 6/6 (100%) | 5/6 (83%) | 5/6 (83%) | 4/6 (67%) | 5/6 (83%) | 5/6 (83%) | -- |

| <i>Voting Alliances: Civil Procedure</i> | | | | | | | | | |
|--|---------------|---------------|--------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/3 (33%) | 2/3 (67%) | 2/3 (67%) | 3/3 (100%) | 1/3 (33%) | 2/3 (67%) | 1/3 (33%) | 1/3 (33%) |
| Stev | 1/3 (33%) | -- | 2/3 (67%) | 0/3 (0%) | 1/3 (33%) | 3/3 (100%) | 0/3 (0%) | 3/3 (100%) | 3/3 (100%) |
| OC | 2/3 (67%) | 2/3 (67%) | -- | 1/3 (33%) | 2/3 (67%) | 2/3 (67%) | 1/3 (33%) | 2/3 (67%) | 2/3 (67%) |
| Scal | 2/3 (67%) | 0/3 (0%) | 1/3 (33%) | -- | 2/3 (67%) | 0/3 (0%) | 3/3 (100%) | 0/3 (0%) | 0/3 (0%) |
| Ken | 3/3 (100%) | 1/3 (33%) | 2/3 (67%) | 2/3 (67%) | -- | 1/3 (33%) | 2/3 (67%) | 1/3 (33%) | 1/3 (33%) |
| Sout | 1/3 (33%) | 3/3 (100%) | 2/3 (67%) | 0/3 (0%) | 1/3 (33%) | -- | 0/3 (0%) | 3/3 (100%) | 3/3 (100%) |
| Thom | 2/3 (67%) | 0/3 (0%) | 1/3 (33%) | 3/3 (100%) | 2/3 (67%) | 0/3 (0%) | -- | 0/3 (0%) | 0/3 (0%) |
| Gins | 1/3 (33%) | 3/3 (100%) | 2/3 (67%) | 0/3 (0%) | 1/3 (33%) | 3/3 (100%) | 0/3 (0%) | -- | 3/3 (100%) |
| Brey | 1/3 (33%) | 3/3 (100%) | 2/3 (67%) | 0/3 (0%) | 1/3 (33%) | 3/3 (100%) | 0/3 (0%) | 3/3 (100%) | -- |

| <i>Voting Alliances: Sovereign Immunity</i> | | | | | | | | | |
|---|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) |
| Stev | 3/4 (75%) | -- | 4/4 (100%) | 2/4 (50%) | 3/4 (75%) | 4/4 (100%) | 2/4 (50%) | 4/4 (100%) | 4/4 (100%) |
| OC | 3/4 (75%) | 4/4 (100%) | -- | 2/4 (50%) | 3/4 (75%) | 4/4 (100%) | 2/4 (50%) | 4/4 (100%) | 4/4 (100%) |
| Scal | 3/4 (75%) | 2/4 (50%) | 2/4 (50%) | -- | 3/4 (75%) | 2/4 (50%) | 4/4 (100%) | 2/4 (50%) | 2/4 (50%) |
| Ken | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | -- | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) |
| Sout | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | 2/4 (50%) | 3/4 (75%) | -- | 2/4 (50%) | 4/4 (100%) | 4/4 (100%) |
| Thom | 3/4 (75%) | 2/4 (50%) | 2/4 (50%) | 4/4 (100%) | 3/4 (75%) | 2/4 (50%) | -- | 2/4 (50%) | 2/4 (50%) |
| Gins | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | 2/4 (50%) | 3/4 (75%) | 4/4 (100%) | 2/4 (50%) | -- | 4/4 (100%) |
| Brey | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | 2/4 (50%) | 3/4 (75%) | 4/4 (100%) | 2/4 (50%) | 4/4 (100%) | -- |

| <i>Voting Alliances: Bankruptcy</i> | | | | | | | | | |
|-------------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) |
| Stev | 3/4 (75%) | -- | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | 4/4 (100%) | 4/4 (100%) |
| OC | 4/4 (100%) | 3/4 (75%) | -- | 4/4 (100%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) |
| Scal | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | -- | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) |
| Ken | 4/4 (100%) | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | -- | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) |
| Sout | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | -- | 4/4 (100%) | 4/4 (100%) | 4/4 (100%) |
| Thom | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 4/4 (100%) | -- | 4/4 (100%) | 4/4 (100%) |
| Gins | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | -- | 4/4 (100%) |
| Brey | 3/4 (75%) | 4/4 (100%) | 3/4 (75%) | 3/4 (75%) | 3/4 (75%) | 4/4 (100%) | 4/4 (100%) | 4/4 (100%) | -- |

| <i>Voting Alliances: ERISA</i> | | | | | | | | | |
|--------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | --- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Stev | 2/2 (100%) | --- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| OC | 2/2 (100%) | 2/2 (100%) | --- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Scal | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | --- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Ken | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | --- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Sout | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | --- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Thom | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | --- | 2/2 (100%) | 2/2 (100%) |
| Gins | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | --- | 2/2 (100%) |
| Brey | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | --- |

| <i>Voting Alliances: Tax</i> | | | | | | | | | |
|------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | --- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Stev | 1/1 (100%) | --- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| OC | 1/1 (100%) | 1/1 (100%) | --- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Scal | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | --- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Ken | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | --- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Sout | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | --- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Thom | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | --- | 1/1 (100%) | 1/1 (100%) |
| Gins | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | --- | 1/1 (100%) |
| Brey | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | --- |

| <i>Voting Alliances: Antitrust/Telecom</i> | | | | | | | | | |
|--|---------------|--------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Stev | 1/2 (50%) | -- | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) |
| OC | 2/2 (100%) | 1/2 (50%) | -- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Scal | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | -- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Ken | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | -- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Sout | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | -- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) |
| Thom | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | -- | 2/2 (100%) | 2/2 (100%) |
| Gins | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | -- | 2/2 (100%) |
| Brey | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | -- |

| <i>Voting Alliances: Social Security</i> | | | | | | | | | |
|--|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Stev | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| OC | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Scal | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Ken | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Sout | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Thom | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) |
| Gins | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) |
| Brey | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- |

| <i>Voting Alliances: Labor/Employment</i> | | | | | | | | | |
|---|---------------|---------------|---------------|---------------|---------------|---------------|--------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 3/3 (100%) | 3/3 (100%) | 2/3 (67%) | 2/3 (67%) | 2/2 (100%) | 1/3 (33%) | 3/3 (100%) | 2/2 (100%) |
| Stev | 3/3 (100%) | -- | 3/3 (100%) | 2/3 (67%) | 2/3 (67%) | 2/2 (100%) | 1/3 (33%) | 3/3 (100%) | 2/2 (100%) |
| OC | 3/3 (100%) | 3/3 (100%) | -- | 2/3 (67%) | 2/3 (67%) | 2/2 (100%) | 1/3 (33%) | 3/3 (100%) | 2/2 (100%) |
| Scal | 2/3 (67%) | 2/3 (67%) | 2/3 (67%) | -- | 3/3 (100%) | 1/2 (50%) | 2/3 (67%) | 2/3 (67%) | 1/2 (50%) |
| Ken | 2/3 (67%) | 2/3 (67%) | 2/3 (67%) | 3/3 (100%) | -- | 1/2 (50%) | 2/3 (67%) | 2/3 (67%) | 1/2 (50%) |
| Sout | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 1/2 (50%) | 1/2 (50%) | -- | 0/2 (0%) | 2/2 (100%) | 2/2 (100%) |
| Thom | 1/3 (33%) | 1/3 (33%) | 1/3 (33%) | 2/3 (67%) | 2/3 (67%) | 0/2 (0%) | -- | 1/3 (33%) | 0/2 (0%) |
| Gins | 3/3 (100%) | 3/3 (100%) | 3/3 (100%) | 2/3 (67%) | 2/3 (67%) | 2/2 (100%) | 1/3 (33%) | -- | 2/2 (100%) |
| Brey | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 1/2 (50%) | 1/2 (50%) | 2/2 (100%) | 0/2 (0%) | 2/2 (100%) | -- |

| <i>Voting Alliances: Securities</i> | | | | | | | | | |
|-------------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Stev | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| OC | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Scal | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Ken | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Sout | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Thom | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) |
| Gins | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) |
| Brey | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- |

| <i>Voting Alliances: Native Americans</i> | | | | | | | | | |
|---|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Stev | 1/1 (100%) | -- | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| OC | 1/1 (100%) | 1/1 (100%) | -- | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Scal | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | -- | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) |
| Ken | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | -- | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Sout | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | -- | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) |
| Thom | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | -- | 1/1 (100%) | 1/1 (100%) |
| Gins | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | -- | 1/1 (100%) |
| Brey | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | -- |

| <i>Voting Alliances: Privacy</i> | | | | | | | | | |
|----------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 1/2 (50%) | 1/2 (50%) |
| Stev | 1/2 (50%) | -- | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) |
| OC | 2/2 (100%) | 1/2 (50%) | -- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 1/2 (50%) | 1/2 (50%) |
| Scal | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | -- | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 1/2 (50%) | 1/2 (50%) |
| Ken | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | -- | 2/2 (100%) | 2/2 (100%) | 1/2 (50%) | 1/2 (50%) |
| Sout | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | -- | 2/2 (100%) | 1/2 (50%) | 1/2 (50%) |
| Thom | 2/2 (100%) | 1/2 (50%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | 2/2 (100%) | -- | 1/2 (50%) | 1/2 (50%) |
| Gins | 1/2 (50%) | 2/2 (100%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | -- | 2/2 (100%) |
| Brey | 1/2 (50%) | 2/2 (100%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 1/2 (50%) | 2/2 (50%) | -- |

| <i>Voting Alliances: Separation of Powers</i> | | | | | | | | | |
|---|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) |
| Stev | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) |
| OC | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) |
| Scal | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) |
| Ken | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) |
| Sout | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | -- | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) |
| Thom | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | -- | 0/1 (0%) | 1/1 (100%) |
| Gins | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | -- | 0/1 (0%) |
| Brey | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | -- |

| <i>Voting Alliances: Banking</i> | | | | | | | | | |
|----------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Stev | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| OC | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Scal | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Ken | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Sout | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Thom | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) |
| Gins | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) |
| Brey | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- |

| <i>Voting Alliances: Original Jurisdiction</i> | | | | | | | | | |
|--|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| | Rehn | Stev | OC | Scal | Ken | Sout | Thom | Gins | Brey |
| Rehn | -- | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Stev | 0/1 (0%) | -- | 0/1 (0%) | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) |
| OC | 1/1 (100%) | 0/1 (0%) | -- | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Scal | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | -- | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Ken | 0/1 (0%) | 1/1 (100%) | 0/1 (0%) | 0/1 (0%) | -- | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) | 0/1 (0%) |
| Sout | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | -- | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) |
| Thom | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | -- | 1/1 (100%) | 1/1 (100%) |
| Gins | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | -- | 1/1 (100%) |
| Brey | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 0/1 (0%) | 1/1 (100%) | 1/1 (100%) | 1/1 (100%) | -- |

