

**THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989**

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I. The 1989-90 Hit Parade of Supreme Court Cases

- A. Cruzan v. Director, Missouri Department of Health, 58 L.W. 4916. Petitioner Nancy Cruzan is incompetent and remains in a vegetative state in a Missouri state hospital since sustaining severe injuries in a motor vehicle accident. When Cruzan's parents, co-petitioners, requested that the hospital terminate their daughter's nutrition and hydration, the hospital refused, absent court approval. The state trial court authorized the termination, holding that Cruzan had a constitutional right to refuse life-sustaining measures and that Cruzan's prior comments to a friend, that she would not want to continue her life if sick or injured unless she could live halfway normally, suggested that Cruzan would want to terminate her treatment. The state supreme court reversed, holding that, although the Due Process clause granted a competent person the right to refuse life-sustaining treatment, it did not prohibit the state from requiring clear and convincing evidence of an incompetent patient's wishes, and that Cruzan's statement to her friend was unreliable for the purposes of establishing intent. The court also refused to recognize a "substantial judgment" right, which would allow Cruzan's parents the right to order the termination of her medical treatment.

Held: The state court did not commit constitutional error by requiring clear and convincing evidence of an incompetent patient's wishes as to the withdrawal of life-sustaining treatment, nor by finding Cruzan's comments insufficient evidence in this regard. Moreover, the Due Process clause did not require a state to accept the substitute judgment of a family member in the absence of substantial proof that their wishes reflect those of the patient.

- B. Jimmy Swaggart Ministries v. Board of Equalization of California, 58 L.W. 4135. California imposes a sales tax on tangible personal property and a parallel use tax. Swaggart's ministries sold articles at "religious crusades" in California and through the mail.

Held: Taxing these sales does not violate the Religion Clauses of the First Amendment. It imposes no constitutionally significant burden on religious practices or beliefs under the Free Exercise Clause; there is no danger that religious activity is singled out for special and burdensome treatment.

There is no Establishment problem, since there is no excessive entanglement between church and state.

- C. Hodgson v. Minnesota, 58 L.W. 4957. Minnesota Statute § 144.343 provides that a woman may not obtain an

abortion until at least 48 hours after notifying both of her parents. The mandatory two parent notice requirement is waived only if the woman is the victim of parental abuse or neglect, in which case notice of her declaration must be given to the proper authorities. In the event the two-parent notice requirement is judicially enjoined, a minor may obtain an abortion via a bypass procedure wherein she must prove that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would be in her best interest.

Held: The two-parent notice requirement of the statute does not further any legitimate state interest that cannot be served by notice to one parent and is, therefore, unconstitutional. The statute's provision for a bypass procedure, however, renders the statute as a whole constitutional.

Cf. Ohio v. Akron Center for Reproductive Health, 58 L.W. 4979. An Ohio statute requires that, before a physician or other person may perform an abortion on an unmarried, unemancipated, minor woman, timely notice must be given to one of the minor's parents, unless a juvenile court issues an order authorizing the minor to consent. A minor may obtain a judicial bypass of the notice requirement if she presents clear and convincing proof that she has sufficient maturity and information to make the abortion decision herself, that she has suffered physical, emotional, or sexual abuse by one of her parents, or that notice is not in her best interests. The statute also provides that a physician may give constructive notice if actual notice to the parent is impossible; requires the minor to file a bypass complaint in juvenile court on prescribed forms; requires that the court appoint a guardian ad litem and an attorney for the minor if she has not retained counsel; mandates expedited bypass hearings and decisions and expedited review by a court of appeals; and specifies that both the juvenile court and court of appeals maintain the minor's anonymity and the confidentiality of all papers.

Held: The judicial bypass provisions and other requirements of the statute render it constitutionally adequate on its face.

- D. United States v. Verdugo-Urquidez, 58 L.W. 4263. A Mexican citizen was arrested in the U.S. pursuant to a warrant. His Mexican residences were searched and document seized. The Appeals Court affirmed suppression of the evidence, noting that since illegal aliens in the United States have Fourth Amendment rights, it would be odd to acknowledge that respondent was entitled to trial-related rights but not to Fourth

Amendment rights.

Held: The Fourth Amendment does not apply to search and seizure by United States agents of property owned by nonresident aliens located in a foreign country. The Amendment's reference to the term "people" refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. The amendment's history shows that its purpose was to protect Americans against arbitrary action of their own government and not to restrain government action against aliens outside of America.

Brennan and Marshall dissent. "The majority today brushes aside the principles of mutuality and fundamental fairness that are central to our Nation's constitutional conscience."

- E. Michigan Department of State Police v. Sitz, 58 L.W. 4781. This action challenged the constitutionality of a highway sobriety checkpoint programs. The Court held that the program is consistent with the Fourth Amendment. Case authority permits the use of a balancing test in this case. While a Fourth Amendment seizure occurs when a vehicle is stopped at a checkpoint, the issue is whether the seizure is reasonable. The intrusion is minimal and the problem of drunk drivers grave. This case involves neither random stops nor a complete absence of empirical data indicating that the stops would be an effective means of promoting highway safety. Per Rehnquist, C.J.

Brennan and Marshall dissent; Stevens dissents. Stevens states: "...[T]he findings of the trial court, based on an extensive record and affirmed by the Michigan Court of Appeals, indicate that the net effect of sobriety checkpoints on traffic safety is infinitesimal and possibly negative."

- F. Spallone v. United States, 58 L.W. 4103. This is the Yonkers, N.Y., housing desegregation case. The United States claimed the city had violated Title VIII of the Civil Rights Act of 1968 and the Equal Protection Clause. The District Court had required the city council to enact a remedial ordinance and issued an order that failure to do so would result in contempt citations, carrying daily fines of nearly one million dollars.

Held: That portion of the order imposing contempt citations was an abuse of discretion. There are significant differences between fining the city and fining individual legislators, since the latter may result in a greater perversion of the legislative process. The District Court should have begun with

sanctions against the city alone and only if that approach failed, should sanctions against legislators be considered.

- G. Pavelic & LeFlore v. Marvel Entertainment Group, 58 L.W. 4038. In connection with a forgery case, the District Court imposed a Rule 11 monetary sanction against the law firm of the attorney who had signed the court papers in the case. The other attorney in the firm moved to relieve the firm of the sanction, claiming that the "person who signed" language of the Rule applied only to the attorney who signed the paper, not the attorney's firm. The Court of Appeals affirmed.

Held: A Rule 11 sanction could be imposed only against the individual signer, even when the individual signs on behalf of a firm. Thus, the Rule may attach consequences only to a signature in the attorney's individual name.

- H. Maryland v. Buie, 58 L.W. 4281. Police obtained arrest warrants for two armed robbers and arrested one of them emerging from his basement. One officer entered the basement "in case there was someone else" and retrieved a red running suit lying in plain view. Chimel v. California, 395 U.S. 752 (1969) had held that in the absence of a search warrant, the justifiable search incident to a lawful arrest could not extend beyond the arrestee's person and the area from within which he might have obtained a weapon.

Held: The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-house arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is yet the latest in the "exceptions" to the warrant requirement.

- I. Alabama v. White, 58 L.W. 4747. Police received an anonymous tip that the respondent would be leaving a particular apartment at a particular time in a particular vehicle and would be going to a particular motel. The tip said she would be in possession of cocaine. They went to the apartment, saw her leave in a vehicle matching the description and followed her on the most direct route to the motel, stopping her short of it. A search revealed marijuana and cocaine.

Held: The anonymous tip, corroborated by the independent police work, exhibited sufficient indicia

of reliability to provide reasonable suspicion to make the investigatory stop. While the tip here was, alone, completely lacking in the necessary indicia of reliability, the totality of the circumstances demonstrates that significant aspects of the informant's story were sufficiently corroborated for reasonable suspicion.

Stevens, Brennan and Marshall dissent: Under the ruling, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed.

- J. Perpich v. Department of Defense, 58 L.W. 4750. The Minnesota governor claimed that a Congressional enactment violated the Militia Clauses of Article I, § 8 of the Constitution in that it prevented a governor from withholding consent to a training mission in Central America.

Held: The Constitution's plain language enables Congress to authorize National Guard members to be sent on federal active duty for extra-territorial training without the consent of a governor or the declaration of an emergency.

- K. United States v. Eichman, 58 L.W. 4744. Congress enacted a statute in 1989 criminalizing the conduct of anyone who knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon a United States flag. Appellees were prosecuted for flag burning.

Held: The court declines to reconsider its rejection in Texas v. Johnson, 491 U.S. ____ (1989) of the claim that flag-burning as a mode of expression does not enjoy the First Amendment's full protection. The new law's restriction on expression cannot be justified without reference to the content of the regulated speech.

Stevens, Rehnquist, White and O'Connor dissent.

- L. Maryland v. Craig, 58 L.W. 5044. This is another case involving the procedure to be used in a child sexual abuse case. The Court held here that the Confrontation Clause does not guarantee an absolute right to face-to-face meeting with the witnesses against them. The Clause's central purpose is to insure reliability, and this can be ensured by physical presence, oath, cross examination, and observation of demeanor by the trier. Cf. Coy v. Iowa, 487 U.S. 1012 (1988).

Cf. Idaho v. Wright, 58 L.W. 5036. In this prosecution for lewd conduct with a minor, the

trial court admitted certain statements that a two-and-a-half-year old made to her pediatrician. The issue is whether the admission of the statements violated the defendant's Confrontation Clause rights.

Held: Incriminating statements admissible under an exception to the hearsay rule are not admissible under the Confrontation Clause unless the prosecution produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use and unless the statement bears adequate indicia of reliability.

- M. Employment Division, Oregon Department of Human Resources v. Smith, 58 L.W. 4433. Respondents ingested peyote at a ceremony of the Native American Church and were denied unemployment compensation when they were fired for the misconduct of using a controlled substance.

Held: The Free Exercise Clause of the First Amendment permits the state to prohibit sacramental peyote use and thus to deny unemployment benefits to those fired for such use. An individual must comply with a law which incidentally forbids or requires the performance of an act that his religious belief requires or forbids if the law is not specifically directed at religious practices and is otherwise constitutional.

Blackmun (with Brennan and Marshall) dissents: The Court "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."

- N. Board of Education of Westside Community Schools v. Mergens, 58 L.W. 4720. When Mergens requested permission to form a Christian club, the school denied the request citing First Amendment grounds. Mergens sued alleging, among other things, that the refusal violated the Equal Access Act, which prohibits high schools receiving federal assistance from denying equal access to students who wish to meet for religious, political, or philosophical discussions.

Held: The school violated the Act by denying recognition to the club. The school allowed other noncurriculum-related groups to meet and thus, must allow a religious group to meet. Cf. Widmar v. Vincent, 454 U.S. 263 (1981).

This case is not a free exercise decision.

A. Religion

1. Davis v. United States, 58 L.W. 4587. A member of the Mormon Church gave funds directly to his sons doing missionary work and attempted to deduct the donations either under Section 170 of the Internal Revenue Code, or a regulation which permits deductions for unreimbursed expenses incurred in connection with giving service to a charitable group. Held: the money was not donated "for use of" the church within the statute's meaning nor was it a contribution under the regulation.

B. Speech and Press

1. Butterworth v. Smith, 58 L.W. 4363. A reporter testified before a grand jury and was warned not to reveal his testimony or he would be subject to penalties. After the grand jury terminated its activities, he sued to obtain a declaration that state law barring his disclosure was a violation of his constitutional rights.

Held: The statute violates the First Amendment as it prohibits a grand jury witness from disclosing his own testimony after the term has ended. This information was within the witness' possession before he testified. State officials may not punish publication of lawfully-obtained information about a matter of public importance absent a need to further a state interest of the highest order.

2. Milkovich v. Lorain Journal Co., 58 L.W. 4846. A newspaper published a column which implied that a high school coach had lied under oath and the coach sued for defamation. Held: Where a media defendant is involved, a statement on matters of public concern must be provable as false before liability can be assessed. The reference to "opinion" in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) was not intended to create a wholesale defamation exemption for "opinion".

3. Rutan v. Republican Party of Illinois, 58 L.W. 4872. The petitioners claimed discrimination in public employment because they had not been Republican Party supporters. Held: Promotions, transfers, and recalls based on political affiliation or support are an impermissible infringement on public employees' First Amendment rights. See Elrod v. Burns, 427 U.S. 507 (1976) and Branti v. Finkel, 445 U.S. 507 (1980), deciding that the First Amendment forbids government officials from discharging or threatening to discharge public employees solely for not being supporters of the

II. First Amendment

political party in power, unless party affiliation is an appropriate requirement for the position involved.

4. United States v. Kokinda, 58 L.W. 5013. A political advocacy group set up a table on a sidewalk on postal property which is the sole means by which customers may travel from a parking lot to a post office. Members of the group were convicted of soliciting on postal premises.

Held: Speech activity of government property may be regulated and where the property is not a traditional public forum such regulation is examined only for reasonableness.

Brennan (with Marshall, Stevens and Blackmun) dissents: The sidewalk is a public forum and the regulation does not qualify as content-neutral time, place, and manner regulation. "It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur, whether that speech is critical of government generally, aimed at the particular governmental agency housed in the building, or focused upon issues unrelated to the government."

5. Austin v. Michigan Chamber of Commerce, 58 L.W. 4371. The Chamber claimed that a state campaign finance law barred it from spending money in support of a specific candidate for state office. It argued that the spending restrictions are unconstitutional under the First Amendment.

Held: The state law is not unconstitutional. Although it does burden the Chamber's exercise of political expression, it is justified by the compelling interest of preventing corruption or the appearance of corruption by reducing the threat that huge corporate treasuries will be used to influence unfairly election outcomes. Corporations are allowed to make contributions through special, segregated funds, given by people who understand that this money will be used for political purposes. Moreover, the law is not a denial of equal protection for, while it regulates corporations and not unincorporated associations, it is precisely tailored to serve its compelling interest.

6. Michigan Citizens for an Independent Press v. Thornburgh, The U.S. Court of Appeals (D.C. Cir.) interpreted the NPA phrase, "probable danger of financial failure" to mean that a newspaper seeking permission to enter into a joint operating agreement with another paper must be suffering losses that are, most likely, irreversible by unilateral

action.

III. Criminal Law and Procedure

A. Indictment

1. John Doe Agency v. John Doe Corp., 58 L.W. 4067. During a periodic audit, a defense contractor and the auditing entity corresponded about accounting treatment of certain items. Eight years later, a federal grand jury sought, via subpoena, the correspondence. The corporation sought the information from the auditing entity, which denied the request under the Freedom of Information Act, citing an exemption for records compiled for law enforcement purposes. These records were transferred to the FBI two days later, however, which, in turn, denied a renewed FOIA request.

During the course of a suit by the corporation, the Court of Appeals held that the government may not invoke the exemption for records which were not investigatory when first collected.

Held: The exemption can apply to these records and they do not have to be turned over to the corporation.

2. Osborne v. Ohio, 58 L.W. 4467. Defendant was convicted of possessing sexually explicit pictures of adolescents over his contention that the states may not prohibit the private possession of child pornography.

Held: The possession and viewing of child pornography may be proscribed by a state because of its compelling interest in protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children by penalizing those who possess and view the offending materials. Furthermore, the statute is not overly broad.

3. Duro v. Reina, 58 L.W. 4643. Petitioner Duro, an American Indian, shot and killed an Indian youth of another tribe while within that tribe's reservation boundaries. After Duro was prosecuted under the tribal criminal code, he moved to dismiss the prosecution for lack of jurisdiction and filed a habeas corpus petition in the federal district court. The court granted the writ, holding that assertion of jurisdiction by one tribe over a member of another tribe constituted racial discrimination in violation of the Indian Civil Rights Act. The court of appeals reversed.

Held: An Indian tribe may not assert criminal jurisdiction over a nonmember Indian. Indian tribes are limited sovereigns, possessing the sovereignty

needed to control their own internal relations and preserve their unique customs and social order, yet they are subject to the overriding authority of the United States. The power to prosecute an outsider would be inconsistent with this status and could only come from a delegation by Congress.

4. Grady v. Corbin, 58 L.W. 4599. When Corbin's automobile struck vehicles causing the death of one person and injury to another, he got two traffic tickets. One charged him with driving while intoxicated and the other with failing to keep to the right of the median. At the time he pleaded guilty, the judge was unaware of the fatality or pending homicide investigation. Subsequently, a grand jury charged him with reckless manslaughter, criminally negligent homicide, and third-degree reckless assault. When he learned that the prosecution would rely on the prior traffic offenses to prove the homicide and assault charges, Corbin moved to dismiss on constitutional double jeopardy grounds.

Held: The Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

B. Arrest, Search, and Seizure

1. Florida v. Wells, 58 L.W. 4454. After his drunk driving arrest, respondent allowed police to open the trunk of his impounded automobile. An inventory found a locked suitcase in the trunk, which was opened. Marijuana was discovered in it.

Held: The marijuana must be suppressed since, under Colorado v. Bertine, 479 U.S. 367 (1987), police must mandate that either all containers must be opened during searches or no containers be opened, leaving no discretion to the individual officers. Requiring standardized criteria prevents individual officers from having so much latitude that inventories are turned into a ruse for a general rummaging to find incriminating evidence.

2. New York v. Harris, 58 L.W. 4457. Officers had probable cause but no warrant to enter Harris' house in a murder investigation. They read him Miranda rights and got an inculpatory statement. After his arrest, he made another station-house confession. He moved to suppress based on Payton v. New York, 445 U.S. 573 (1980).

Held: Where there is probable cause to arrest, the exclusionary rule does not prohibit the use of a statement made by the defendant outside his house, even though the statement is taken after an arrest made in violation of Payton. The Payton rule was designed to protect the physical integrity of the home not to grant suspects protection for statements made outside the home.

3. U.S. v. Ojeda Rios, 58 L.W. 4525. The government secured a series of court orders authorizing electronic surveillance. In accordance with 18 U.S.C. 2518 (8)(a), recordings made pursuant to a wiretap order must be sealed "immediately upon the expiration of the period of the order, or extensions thereof," and made available to the judge who issued the order and sealed under his directions. The statute also requires that a "satisfactory explanation" be given for failure to do so. Respondents moved to suppress the evidence obtained from the wiretaps, on the ground that there had been a delay in the tape's sealing.

Held: Section 2518(8)(a) applied to a delay in sealing, as well as to a complete failure to seal tapes. In interpreting § 2518(8)(a), its intent must be considered. In order to prevent recordings from being altered, § 2518(8)(a) requires that a seal be obtained immediately on expiration of the surveillance order. Thus, the government's claim that the "satisfactory explanation" requirement does not apply where tapes bear a seal, regardless of when or why the seal was applied, was not plausible.

4. Horton v. California, 58 L.W. 4694. A California police officer sought a search warrant for both weapons and proceeds of a robbery, but the warrant was limited to the proceeds. The officer did not find the proceeds but did find the weapons in plain view. The discovery was not inadvertent.

Held: The Fourth Amendment allows the warrantless seizure of plain view evidence even where the discovery is not inadvertent. Inadvertence is a characteristic of most plain view seizures but it is not a necessary condition. Here, no search for weapons could have taken place if the named items had been found or surrendered at the outset.

5. Illinois v. Rodriguez, 58 L.W. 4892. Respondent was arrested in his apartment after police were let in by a third party who represented that the place was "ours", who unlocked the door with her key and gave the officers permission to enter. The core question is whether the woman has joint access or control over the

apartment, but the Court holds that a warrantless entry is valid when based on the consent of a third party whom the police, when they enter, reasonably believe to possess common authority over the premises, even though the person does not, in fact.

6. Minnesota v. Olson, 58 L.W. 4464. Police raided a home where they believed a robbery-murder suspect was "holed-up." Shortly thereafter, he made an inculpatory statement which the trial court refused to suppress and he was convicted. The home entered was not his but a female friend with whom he had been living.

Held: The arrest violated Olson's Fourth Amendment rights. His status as an overnight guest is alone sufficient to show that he had an expectation of privacy in the home. All citizens share the expectation that hosts will more likely than not respect their guests' privacy even if the guests have no legal interest in the premises and do not have the legal authority to determine who shall enter the house.

7. U.S. v. Montalvo-Murillo, 58 L.W. 4652. Guadalupe Montalvo-Murillo, who was arrested on federal drug charges, was released after the district court found that his detention hearing had been held in violation of the Bail Reform Act of 1984. Under the Act, a suspect held in pretrial custody on federal criminal charges must be detained if he poses a risk of danger to the community. Before detention can occur, however, a hearing must be conducted "immediately upon the person's first appearance before the . . . officer." Montalvo-Murillo's hearing had been held after his "first appearance."

Held: Violation of the statutory requirement does not require release of a suspect who is otherwise subject to continued detention on the ground that he presents a risk of flight or danger to other persons or the community.

C. Confessions

1. Illinois v. Perkins, 58 L.W. 4737. An undercover agent was placed in a cellblock with Perkins, jailed for charges unrelated to the murder the agent was investigating. The agent asked Perkins if he had ever killed anyone and Perkins implicated himself in the murder. Perkins moved to suppress under Miranda, which prohibits undercover contacts with jailed suspects when those contacts are reasonably likely to elicit incriminating statements.

Held: An undercover agent in these circumstances need not give Mirandas before questioning. While Miranda must be enforced strictly, this is so only where its underlying concerns are present. There is neither a police dominated atmosphere nor compulsion. Here, Miranda does not forbid strategic deception by taking advantage of a suspect's misplaced trust. Cf. Hoffa v. United States, 385 U.S. 293 (1966), which is distinguishable only because Perkins was incarcerated. Mathis v. United States, 391 U.S. 1 (1968) is distinguishable, for there the inmate knew he was speaking to a government agent. Massiah v. United States, 377 U.S. 201 (1964) is inapplicable, for there the suspect had already been charged with the crime.

Marshall dissents, claiming the conditions that require the police to apprise a defendant of his constitutional rights--custodial interrogation conducted by a police agent--were present. He claims the exception fashioned in this case "allows police officers intentionally to take advantage of suspects unaware of their constitutional rights."

2. Butler v. McKellar, 58 L.W. 4294. Following a murder, Butler was arrested on an unrelated assault charge, for which he retained counsel. Petitioner was informed that he was a suspect in the murder and, after signing waiver of rights forms, made incriminating statements about the murder during interrogation. At trial, his motion to suppress was denied. After direct appeal, the district court dismissed Butler's petition for federal habeas relief. The court of appeals affirmed and rejected his argument that a defendant, during continuous custody, may not be subjected by the police to uncounselled interrogation about a crime once he has invoked his right to counsel on another offense.

Held: The "new rule" announced in Edwards v. Roberson was not in existence at the time of the defendant's conviction and was not retroactively applicable to cases on collateral review. Butler's interrogation, while contrary to present guidelines established in Roberson, had been conducted in strict accordance with established law at the time.

3. Michigan v. Harvey, 58 L.W. 4288. After respondent was arraigned on rape charges and appointed counsel, he told a police officer that he wished to make a statement. Following the officer's advice that respondent did not need to speak to his lawyer, Harvey signed a constitutional rights waiver form and talked. At trial, the statement was used to impeach his testimony and he was convicted.

Held: Harvey's statement, though inadmissible as

direct evidence under Michigan v. Jackson, may nevertheless be used to impeach defendant, as long as defendant has made a knowing, voluntary, and intelligent waiver of his right to counsel. The Sixth Amendment does not prevent a suspect charged with a crime and represented by counsel from voluntarily choosing to speak with police without an attorney present.

D. Trial and Juries

Holland v. Illinois, 58 L.W. 4162. A white defendant objected to two black persons' being struck from his jury on Sixth Amendment grounds. Held: he has Sixth Amendment standing to object when he believes that his jury does not have a fair cross-section of the community. But he cannot prevail on his Sixth Amendment claim, for it only ensures an impartial jury, not a representative jury.

E. Testimony and Impeachment

1. James v. Illinois, 58 L.W. 4115. James was arrested as a suspect in a shooting; he admitted that he had changed the appearance of his hair following the shooting. The trial court suppressed his admission, however. But James' statement was allowed in to impeach another witness for the defense.

Held: The impeachment exception does not encompass all defense witnesses. The threat of a criminal prosecution for perjury is more likely to deter a witness from intentionally lying than to deter a defendant who is already facing conviction. (Kennedy, Rehnquist, O'Connor, and Scalia dissent).

2. Dowling v. United States, 58 L.W. 4124. Dowling was charged with a bank robbery in which it was alleged that he wore a ski mask and carried a small pistol. The government--relying on Federal Rule of Evidence 404(b)--introduced testimony that a similarly masked and armed Dowling had been a perpetrator of a crime at her home two weeks after the bank robbery. Section 404(b) allows evidence of other crimes, wrongs, or acts for purposes of showing character. Dowling had been acquitted in the home entry case.

Held: The admission of the testimony does not violate the collateral estoppel component of the Double Jeopardy Clause. This provision prohibits the government from relitigating an issue of ultimate fact that has been determined by a valid and final judgment. But it does not bar the later use of evidence simply because it relates to alleged criminal

conduct for which a defendant has been acquitted. Dowling failed to satisfy his burden of showing that the first jury determined that he was not one of the men who entered the house.

Moreover, this evidence does not violate the due process fundamental fairness test.

F. Sentencing

1. United States v. Munoz-Flores, 58 L.W. 4563. After pleading guilty to federal charges, respondent was ordered to pay a special assessment to the Crime Victims Fund established by 18 USC 3013. He claimed the assessments violate the Origination Clause which mandates that all "Bills for raising Revenue shall originate in the House of Representatives" and this law, raising revenue, originated in the Senate.

Held: 1. This case does not present a nonjusticiable political question under the standards of Baker v. Carr, 369 U.S. 186 (1962), for invalidating the law would not evince a lack of respect for the House, among other reasons.

The statute is not a bill for raising revenue, for it creates and raises revenue for supporting a particular government program, as opposed to raising revenue to support government generally. See, e.g., Twin City Bank v. Nebecker, 167 U.S. 196 (1897).

2. Pennsylvania Department of Public Welfare v. Davenport, 58 L.W. 4610. Respondents pleaded guilty to welfare fraud and were ordered to make restitution. They then filed for Chapter 13 Bankruptcy, listing the restitution obligation as unsecured debt. After the state filed a probation revocation proceeding, the respondents sought relief from Bankruptcy court. Held: The Bankruptcy Code's language and structure demonstrate that restitution obligations are debts and are dischargeable. Cf. Kelly v. Robinson, 479 U.S. 36 (1986), holding that restitution obligations imposed as conditions of probation are not dischargeable in Chapter 7 proceedings.

3. Taylor v. U.S., 58 L.W. 4616. Arthur Taylor had four prior convictions, including two for second-degree burglary, when he was arrested for possession of a firearm by a convicted felon. In light of this fact, the government sought to apply 18 U.S.C. § 924(e) which provides for a sentence enhancement for persons having three previous convictions for a violent felony. Violent felony was defined as including a burglary which presented "a serious potential risk of physical injury to another." The district court imposed an

enhanced sentence upon Taylor, who contended that because his burglaries had not presented a risk of physical injury, they should not count. The court of appeals affirmed.

Held: An offense constitutes burglary as long as it involves an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime. Section 924(e) is not limited to those burglaries involving dangerous conduct.

4. Hughey v. U.S., 58 L.W. 4570. The petitioner had stolen and used one unauthorized MBank credit card. The district court found him guilty and, under the restitution provisions of the Victim and Witness Protection Act of 1982 (VWPA), ordered petitioner to pay the bank \$90,431 in restitution, the total of MBank's losses from the theft and use of 21 cards from other MBank cardholders. The petitioner moved that the court reduce and correct his sentence, claiming that the amount of restitution should only be for the offense of conviction and that the amount ordered was excessive.

Held: A VWPA award is authorized only for the loss caused by the specific conduct that is the basis of the offense of conviction. The statutory language of the Act is unambiguous, since the ordinary meaning of restitution is to restore a victim to the position occupied before an event.

G. Capital Punishment

1. Blystone v. Pennsylvania, 58 L.W. 4274. A robber-murderer was sentenced to death after a jury found as an aggravating circumstance that he committed a killing while in the perpetration of a felony. The jury found no mitigating circumstances. The petitioner complained that the state local requiring death if a jury finds at least one aggravating and no mitigating ones, or one or more aggravating circumstances which outweigh mitigating ones is unconstitutional because it mandates death as the outcome of a weighing process.

Held: the statute is constitutional for the Eighth Amendment only requires that a capital sentencing jury be allowed to consider and give effect to all relevant mitigating circumstances. Nor is death mandatory, for the law permits consideration of all factors. See Lockett v. Ohio, 438 U.S. 586 (1978) and Penry v. Lynaugh, ___ U.S. ___ (1989).

Cf. Clemons v. Mississippi, 58 L.W. 4395. The case was remanded to determine whether the state supreme court correctly employed weighing particularly

regarding the "especially heinous" factor.

Cf. Whitmore v. Arkansas, 58 L.W. 4495. A death-row inmate lacks standing to seek review of death sentence imposed on a fellow inmate who has waived the right to pursue appeal.

2. Walton v. Arizona, 58 L.W. 4992. This is another "aggravating-mitigating" circumstances case, in which there was a consideration of language indicating that the murder was committed "in an especially heinous, cruel or depraved manner." Held: There is sufficient guidance to the sentencer to satisfy the Eighth and Fourteenth Amendments.

Cf. Maynard v. Cartwright, 486 U.S. 356 (1986).

Cf. Lewis v. Jeffers, 58 L.W. 5025. A federal habeas court is limited to determining whether the state court's finding was so arbitrary and capricious as to constitute independent due process or Eighth Amendment violation. The appropriate standard of review is whether, after reviewing the evidence in the light most favorable to the state, any rational trier could have found the existence of aggravating circumstances.

3. Boyde v. California, 58 L.W. 4301. Richard Boyde was tried in state court and convicted of murder. During the penalty phase of the trial, in accordance with California Jury Instructions, Criminal (CALJIC) 8.84.1, the jury was instructed to consider, in addition to 10 specifically enumerated factors, "any circumstance extenuating the gravity of the crime, even though it is not a legal excuse for the crime." The court also instructed the jury, pursuant to CALJIC 8.84.2, to weigh all applicable aggravating and mitigating circumstances in deciding for a death sentence or life imprisonment. The jury imposed the death sentence, and the state supreme court affirmed, rejecting Boyde's contention that CALJIC 8.84.1 violated the Eighth and Fourteenth Amendments.

Held: CALJIC 8.84.1 and 8.84.2 did not violate the Eighth Amendment. Boyde's claim that the mandatory nature of the instructions "shall impose" language prevented the jury from making an individualized assessment of the death penalty was foreclosed, as was Boyde's claim that the jury had been precluded from considering non-crime-related factors, such as background and character, as mitigating evidence.

4. Saffle v. Parks, 58 L.W. 4322. The state court capital murder conviction and death sentence of respondent Parks became final in 1983. The federal district court denied respondent's habeas corpus

petition, which was based on the argument that the instruction delivered in the penalty phase of his trial telling the jury to "avoid any influence of sympathy" violated the Eighth Amendment. The court of appeals reversed on the ground that the instruction was unconstitutional because it barred the jury from considering the mitigating evidence that Parks had presented.

Held: Parks is not entitled to federal habeas relief. The principle he urges, that the Eighth Amendment allows the jury to base its capital sentencing decision upon sympathy the jurors feel for the accused after considering his mitigating evidence, would be a "new rule" of federal constitutional law. Such a rule can neither be announced nor applied in a case on collateral review.

5. McKoy v. North Carolina, 58 L.W. 4311. McKoy was convicted of first degree murder. During sentencing, the jury acted under a North Carolina unanimity requirement in recommending death. A jury may recommend death if it has unanimously found: 1) the existence of two statutory aggravating circumstances, 2) the existence of two of eight possible mitigating circumstances, 3) that the mitigating circumstances insufficiently outweighed the aggravating circumstances, and 4) that the aggravating circumstances, when weighed against the mitigating circumstances, were sufficiently substantial to call for a recommendation of the death penalty. Additionally, it must unanimously find "legally relevant" any evidence introduced to support a mitigating factor.

Held: The unanimity requirement is an impermissible limitation of a juror's consideration of mitigating evidence. Under such a system, one holdout juror can prevent the others from giving effect to evidence they feel may call for a lesser sentence. Moreover, the state court's holding distorts the concept of relevance by allowing a mere declaration that evidence is "legally irrelevant" to preclude consideration of that evidence.

IV. Civil Procedure and Service of Process

- A. Tafflin v. Levitt, 58 L.W. 4157. This case holds that state courts have concurrent jurisdiction over civil RICO claims.
- B. Burnham v. Superior Court of California, 58 L.W. 4629. A New Jersey resident on a trip to California was

served with a California summons. His motion to quash was denied. Held: It is a valid predicate for in personam jurisdiction that the man was personally served while in the forum state. Cf. International Shoe Co. v. Washington, 326 U.S. 310 (1945), holding that a state court's assertion of personal jurisdiction must not violate "traditional notions of fair play and substantial justice."

- C. U.S. v. Sperry Corp., 58 L.W. 4018. Sperry filed suit for claims against Iran in Federal District Court in connection with contracts entered into in 1979. After implementation of the Algiers Accords, the prejudgment attachment of Iranian assets, awarded Sperry in federal district court, was invalidated. Prohibited from further pursuing its claim in American courts, Sperry filed a claim with the Iran-United States Claim Tribunal (Tribunal) and was awarded \$2.8 million. When the FRB, acting under § 502 of the Foreign Relations Authorization Act, deducted a percentage of Sperry's award, Sperry brought suit in Claims Court on the ground that the deduction was unconstitutional, violating the Just Compensation and Due Process Clauses of the Fifth Amendment, and the Origination Clause of Article I, § 7.

Held: Section 502 was not unconstitutional. The deduction was not a taking, but was a reasonable "user fee" assessed against claimants before the Tribunal to reimburse the government for its costs in connection with the Tribunal.

- D. Northbrook National Insurance Co. v. Bremer, 58 L.W. 4003. Under local law, a Texan employed by a Texas company filed a workers' compensation claim against the insurer, an Illinois corporation. The Board awarded compensation and the insurer sued in federal court, invoking diversity jurisdiction. The case was dismissed for lack of subject matter jurisdiction when the court attributed the employer's Texas citizenship to the insurer.

Held: The direct action provision in the diversity law is limited to actions against, not by insurers. Thus, a federal court may assert diversity jurisdiction over a case by an Illinois insurer against a Texan awarded compensation by the Texas Board.

- E. Carden v. Arkona Associates, 58 L.W. 4243. A limited partnership, organized under Arizona law, sued two Louisiana citizens on a contract dispute in District Court, relying on diversity of citizenship for federal jurisdiction. The petitioners moved to dismiss, claiming that one of respondent's limited

partners was also a Louisiana citizen. The court denied the motion, holding that complete diversity existed.

Held: Complete diversity was lacking with respect to petitioners. A limited partnership is not a "citizen" of the state that created it within the meaning of the federal diversity statute. Moreover, a federal court must determine whether complete diversity exists by looking to the citizenship of a partnership's limited, as well as, its general partners.

F. Hallstrom v. Tillacook County, 58 L.W. 4007.

Owners of a farm situated next to a sanitary landfill claimed that the landfill violated RCRA standards. Under the RCRA's citizen suit provision, landowners sent violators written notice of their intent to sue and, one year later, brought suit in district court. Claiming that landowners had failed to notify the State of Oregon and the EPA, the violators moved for summary judgment, claiming lack of jurisdiction. Landowners thereafter notified the State and the EPA of the suit. The district court denied motion for summary judgment, holding that landowners had satisfied the RCRA's notice requirement.

Held: Suits brought under the RCRA's citizen suit provision will be dismissed upon failure to comply with the 60-day notice requirement of the provision. The notice requirement is a mandatory precondition to suit and may not be disregarded by a district court at its discretion.

G. Ferens v. John Deere Co., 58 L.W. 4333.

Petitioner, a Pennsylvania resident, lost a hand in an accident involving a harvester manufactured by Deere, a Delaware corporation. Three years later, after the Pennsylvania 2-year tort limitations period had expired, petitioners filed diversity actions in federal district court in Pennsylvania for contract and warranty claims. Petitioners also filed tort claims in Mississippi, where respondent did business, knowing that the federal court must apply the state court's choice of law rules. Under these rules, Mississippi's 6-year tort statute of limitations would apply. Petitioners then moved, under the change of venue provisions of U.S.C. § 1404(a), to transfer the tort action to the Pennsylvania court, which refused to honor the Mississippi tort statute of limitations, claiming that the petitioners, as plaintiffs, could not initiate the move.

Held: A transferee forum must apply the law of the transferrer court with respect to § 1404(a) transfers, regardless of whether plaintiff or defendant

initiated the transfer.

V. Civil Rights Actions

A. Yellow Freight System, Inc. v. Donnelly, 58 L.W. 4420. This case holds that federal courts do not have exclusive jurisdiction over Title VII actions; as the Court said in Tafflin v. Levitt, 493 U.S. _____, state courts have the inherent authority and are competent to adjudicate federal claims.

B. Venegas v. Mitchell, 58 L.W. 4462. In connection with a 1983 action, an attorney and client agreed on a contingent fee arrangement. In the case, an attorney fee was awarded under 42 U.S.C. § 1988.

Held: Section 1988 does not invalidate contingent-fee contracts that would require a prevailing plaintiff to pay her lawyer more than the statutory award against the defendant.

C. Missouri v. Jenkins, 58 L.W. 4480. A federal district court in a 42 U.S.C. § 1983 action relating to school desegregation issued an order detailing a remedy and the financing necessary to implement it. It subsequently ordered the property tax levy increased for the purposes of the plan.

Held: The court abused its discretion in imposing the increase, which contravened the principles of comity. Local officials should at least have the opportunity to devise solutions to their problems. But the Appeals Court's modifications of the district court's remedy are neither invalid under the Tenth Amendment nor exceed the judicial power under the Third Article.

D. Nqiraingas v. Sanchez, 58 L.W. 4504. Petitioners sued respondents, the Guam government, its police department and its director, in her official capacity, and various officers, alleging the petitioners were arrested and beaten by officers who coerced confessions from them. The lower court dismissed suits against the government, the department and individual defendants in their official capacities, ruling that they are no more than federal instrumentalities and not persons for purposes of the 42 U.S.C. § 1983 action.

Held: Neither Guam nor its officers acting in their official capacities are "persons" for 1983 purposes. It could not have been Congress' intent to include territories under the original design of 1983, which was intended to combat abuse by Ku Klux Klan activities. Likewise, later enactments excluded

territories.

Brennan dissents: "Our decision in District of Columbia v. Carter, 409 U.S. 418 (1973), set forth ample evidence that Congress had the Territories in mind when it enacted the predecessor of § 1983."

E. Howlett v. Rose, 58 L.W. 4755. A former high school student sued, inter alia, the school board alleging that his federal constitutional rights were violated when his car was searched on school grounds and he was suspended from school without due process. The action was brought in a Florida circuit court which held it lacked jurisdiction over the board and ruled that there was a blanket immunity from federal civil rights actions in state courts.

Held: A state law sovereign immunity defense is not available to a school board in a 1983 suit filed in state court when such a defense would not be available if the case were brought in federal court. Under the Supremacy Clause, state courts have a duty to enforce federal law according to their regular modes of procedure.

F. Wilder v. Virginia Hospital Association, 58 L.W. 4795. The Boren Amendment to the Medicaid scheme mandates that states reimburse health care providers according to reasonable and adequate rates. Here, suit was brought under 42 U.S.C. § 1983 against state officials alleging that Virginia's plan for reimbursement violates the federal law because the state's reimbursement rates are not reasonable and adequate.

Held: The Boren Amendment is enforceable in a § 1983 action. There can be little doubt that the health care providers are the intended beneficiaries of the federal law which imposes a binding obligation on the states which gives rise to enforceable rights. Pennhurst State Hospital v. Haldermann, 451 U.S. 1 (1981).

Rehnquist, O'Connor, Scalia and Kennedy dissent, reasoning that the language used by Congress must confer identifiable enforceable rights, and not just an implied right.

G. Metro Broadcasting Inc. v. FCC, 58 L.W. 5053. The FCC had adopted minority preference policies, awarding an enhancement for minority ownership and participation in management and allowing a broadcaster to transfer a license in certain circumstances to a minority enterprise.

Held: Benign race-conscious measures mandated by Congress, even though they are not remedial in the sense of being designed to compensate for past

discrimination, are permissible under the equal protection provisions of the Due Process Clause, to the extent they serve important governmental objectives and are substantially related to the achievement of them.

H. Golden State Transit Corp. v. Los Angeles, 58 L.W. 4033. In a previous appearance of this litigation, the Court had held that the city had violated federal law by conditioning renewal of a taxi franchise on settlement of a pending labor dispute. On remand, the district court required reinstatement of the franchise but denied damages under 42 U.S.C. § 1983, holding that the supremacy clause does not create individual rights that may be vindicated in such an action.

Held: While the supremacy clause does not, of its own force, create rights enforceable under § 1983, the National Labor Relations Act does create such rights. The violation of a right implicit in the NLRA's language and structure is as much a "direct violation" of a right as is the violation clearly set out in the text of a law.

I. Zinermon v. Burch, 58 L.W. 4223. A Florida patient, while medicated and disoriented, signed admission forms for treatment at a state mental hospital in compliance with the State's statutory requirements for voluntary admission. After his release, the patient sued on the ground that he was deprived of liberty without due process. He said, because of his incompetence to give informed consent, petitioners' failure to initiate Florida's involuntary placement procedure denied him procedural safeguards.

Held: Patient's complaint was sufficient to give rise to a claim under 42 U.S.C. § 1983. The predeprivation of due process was foreseeable; persons requesting treatment might be incapable of informed consent and a deprivation was likely to occur, if at all, when patients were given admission forms to sign.

J. Washington v. Harper, 58 L.W. 4249. An inmate of a state prison sued in state court under 42 U.S.C. § 1983. The inmate, who was transferred to the Special Offender Center (SOC), claimed that the SOC's failure to provide a judicial hearing before he was involuntarily administered antipsychotic drugs violated his due process rights. Pursuant to the Center's involuntary treatment policy, an inmate may be administered such drugs if he suffers from a mental disorder and is in danger of harming himself or others. If the above conditions are met, a special committee of mental health professionals not presently involved in inmate's treatment, and a prison official, may order

involuntary medication. The inmate has the right to be present at the hearing, to present evidence and cross examine witnesses. Both of the involuntary treatment proceedings were conducted in accordance with SOC policy.

Held: The Due Process Clause allows a state involuntarily to administer antipsychotic medication if an inmate is dangerous to himself or others and such treatment is in his medical interest. The SOC's administrative procedures for involuntary treatment, which were followed, comported with procedural due process.

VI. Labor and Employment

- A. Breininger v. Sheet Metal Workers Local No. 6, 58 L.W. 4023. A laborer sued his union over the issue of non-referral in a hiring hall, claiming he had been discriminated against because of political opposition to union leadership and his right of fair representation was violated. The trial court dismissed the suit stating that claims such as this were unfair labor practices and the exclusive province of the NLRB.
- Held: The court did not lack jurisdiction, even though the matter may have been one over which the Board has jurisdiction.
- B. Hoffman-LaRoche Inc. v. Sperling, 58 L.W. 4072. Laid-off employees sued under the Age Discrimination in Employment Act and sought the names of similarly situated workers. This case holds that a district court conducting a suit of this type may authorize and facilitate notice of the pending suit.
- C. Pension Benefit Guaranty Corp v. LTV Corp., 58 L.W. 4831. The employee Retirement Income Security Act of 1974 protects private sector workers participating in covered pension plans against termination of their plans before sufficient money has been accumulated to pay benefits anticipated. LTV filed reorganization petitions under the Bankruptcy Code, but the PBGC failed to consider either bankruptcy or labor laws in deciding to restore a terminated
- D. Crandon v. U.S., 58 L.W. 4234. Several employees of Boeing Company, Inc., upon termination of their employment, had been given a lump sum payment before beginning new employment in the executive branch of the federal government. The U.S. subsequently filed a civil suit in district court against Boeing, claiming that the payments were in violation of 18 U.S.C. § 209(a). The court held that § 209(a) had not been

violated because the payments were made before the recipients had become government employees and were not intended to compensate them for government service.

Held: Employment status at the time of payment was an element of a § 209(a) violation. The language of § 209(a) clearly required a recipient of a payment to be a government employee at the time the payment was made. A contrary reading of the statute defeats the purpose for which it was enacted -- to allow corporations to encourage qualified employees to make their special skills available to the government.

- E. Chesapeake & Ohio Railroad Co. v. Schwalb, 58 L.W. 4015. Three railroad employees were injured while performing coal loading operations from railroad cars to a ship on navigable waters. The employees brought suit in state court under the Federal Employer's Longshoreman's and Harbor Worker's Compensation Act (LHWCA). The trial courts dismissed the suits, holding that the employees were covered by the LHWCA.
- Held: The employees were covered under the LHWCA. Employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act, regardless of whether the repairs might be considered traditional railroad work performed wherever railroad cars are unloaded.
- F. Port Authority Trans-Hudson Corp. v. Feeney, 58 L.W. 4536. Pursuant to Federal Employers' Liability Act, employees of the Port Authority Trans-Hudson Corp. (PATH), sued for injuries they incurred during their employment. The trial held that PATH had states' sovereign immunity and that, therefore, the court had no jurisdiction under the eleventh amendment. The court of appeals reversed, holding that any immunity claimed by PATH had been waived under provisions of the states' statutes which established that consent be extended to suit in federal court.
- Held: The states' statutory consent-to-suit provision established a waiver of eleventh amendment immunity.

VII. Business Regulation

- A. Texaco v. Hasbrouck, 58 L.W. 4807. Texaco sold gasoline directly to respondents at its retail wagon prices while granting substantial discounts to two other distributors. Stations supplied by these two distributors dramatically increased their sales whereas respondents' sales declined. Respondents sued Texaco

under the Robinson-Patman Amendments to the Clayton Act, 15 USC § 13 alleging that the discounts violated the law. Respondents recovered treble damages and this appeal concerns whether legitimate functional discounts violate the act.

Held: The text of the act reveals a concern with competitive consequences at different levels of distribution. While a legitimate functional discount constitutes a reasonable reimbursement for the purchasers' actual marketing functions, the Act does not tolerate a discount which is completely untethered either to the supplier's savings or the wholesaler's costs.

- B. Lewis v. Continental Bank Corporation, 58 L.W. 4330. In 1981, an Illinois bank holding company applied to Florida to operate an "industrial savings bank" (ISB) in that state, averring that its deposit relationships would be FDIC-insured. Appellant Lewis, the state comptroller, refused to process the application on the ground that two state statutes prohibited out-of-state holding companies from operating ISBs in Florida. The appellee filed suit, claiming the statutes violated the Commerce Clause, and the district court granted judgment in its favor.

Held: The controversy was rendered moot by the 1987 amendments to the Bank Holding Company Act, which expanded the definition of "bank" excludable by state to include all banks whose deposits are FDIC-insured.

- C. North Dakota v. U.S., 58 L.W. 4574. The United States and North Dakota exercise concurrent jurisdiction over two military bases on which the Department of Defense (DoD) operates clubs and package liquor stores. In an effort to reduce the price of alcoholic beverages sold on these bases, Congress passed a statute requiring that liquor be procured from the most competitive source. There was nothing in the statute requiring submission to state control or making purchases from in-state suppliers mandatory. Prior to this time, North Dakota had instituted a liquor importation and distribution system requiring that out-of-state suppliers sell liquor only to state-licensed wholesalers or federal enclaves. The statute also required that persons bringing liquor into the state file monthly reports and that out-of-state distillers selling to federal enclaves affix labels to their goods indicating the liquor is for consumption only within the enclave. The federal government filed suit in district court after a number of out-of-state distillers threatened price increases to the military bases in response to the burden of complying with the

state's regulations. The court granted the state's motion for summary judgment, holding that the regulations did not prevent the government from obtaining beverages at the lowest cost.

Held: The state's regulations were not invalid under the Supremacy Clause since a state has almost complete control over the importation and sale of liquor and the structure of the liquor distribution system within the state's jurisdiction. Neither did the regulations violate the intergovernmental immunity doctrine since they operate only against suppliers and did not regulate the government directly. Moreover, the regulations favored the government it had the option of buying from in-state wholesalers or out-of-state wholesalers complying with the labeling and reporting requirements.

- D. California v. American Stores Co., 58 L.W. 4529. When a large supermarket chain acquired all the outstanding stock of the largest chain in the state, the state filed suit in the district court alleging that this was anticompetitive in violation of § 7 of the Clayton Act. The court granted the state a preliminary injunction which required that the supermarket operate its acquired stores separately pending resolution of the suit. The court of appeals set aside the injunction, holding that the "indirect divestiture" effected by the injunction exceeded the lower court's authority under § 16 of the Act.

Held: Divestiture is an appropriate form of injunctive relief for illegal mergers. The plain language of § 16 of the Act, which entitles "[a]ny person . . . to sue for and have injunctive relief . . . against threatened loss or damage . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity" should be broadly construed to encompass dissolution or divestiture as remedies for mergers violating the antitrust laws.

VIII. Practice of Law

- A. Peel v. Illinois Attorney Registration and Disciplinary Commission, 58 L.W. 4684. A licensed attorney with a "Certificate in Civil Trial Advocacy" from the National Board of Trial Advocacy advertised this "specialty" found himself the object of a complaint by the state bar. He was disciplined by the State Supreme Court which concluded that the First Amendment did not protect the lawyer's letterhead

containing the designation since the public could confuse the certificate and his license to practice and it could be read as a claim of superior quality.

Held: A lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his certification as a trial specialist. Truthful advertising related to lawful activities is entitled to First Amendment protection and the letterhead is not misleading.

O'Connor, rehnquist and Scalia dissent stating, first, that the commercial speech claim was raised for the first time in the Supreme Court and, thus, Cardinale v. Louisiana, 394 U.S. 437 (1969) should apply, and, second, that despite the veracity of the claim, it is "inherently likely to deceive the public."

- B. Keller v. California State Bar, 58 L.W. 4661. The state integrated bar uses mandatory dues for lobbying purposes. The use is regarded by some members as advancing political and ideological causes to which they do not subscribe and, thus, their First Amendment rights are violated.

Held: The use of compulsory dues to finance political and ideological activities violates First Amendment rights of members who do not share these ideas. Abood v. Detroit Board of Education, 431 U.S. 209 (1977), prohibiting the agency shop dues of dissenting nonunion employees from being used to support political and ideological causes unrelated to collective bargaining activities, applies. Furthermore, the guiding standard is whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." Lathrop v. Donohue, 367 U.S. 820 (1961).

- C. Federal Trade Commission v. Superior Court Trial Lawyers Association, 58 L.W. 4145. Private practitioners who were regularly appointed to represent indigents agreed to refuse cases until their compensation was increased. The boycott adversely affected the District of Columbia justice system and the government capitulated. The FTC charged members of the group with conspiracy to fix prices. The Court of Appeals concluded that the boycott was meant to convey a political message and had First Amendment protections.

Held: The social justifications do not make the restraint any less lawful and the boycott is not immunized from antitrust regulation under NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982) which

granted First Amendment protection to a civil rights boycott, for this boycott had the objective of gaining economic advantage.

IX. Taxation

- A. California Franchise Tax Board v. Alcan Aluminum Ltd., 58 L.W. 4121. The taxpayers brought Foreign Commerce Clause actions seeking relief from a California determination of what income is taxable in that state.

Held: Foreign corporations which are sole stockholders of American subsidiaries have Article III standing to challenge the accounting method by which California determines a subsidiary's income allocable to that state. But federal court actions brought by foreign corporations which can control their American subsidiaries' pursuit of state court relief from unitary taxes are barred by the Tax Injunction Act.

- B. U.S. v. Energy Resources Co., 58 L.W. 4609. Respondent, Energy Resources Co., Inc. filed for reorganization under Chapter 11 of the Bankruptcy Code. Under 26 U.S.C. § 6672, should an employer fail to pay personal income and social security taxes, commonly referred to as "trust fund" taxes, the government may collect such taxes from the employer's officers or employees, or "responsible individuals." However, in conjunction with reorganization plans, the bankruptcy court ordered the IRS to apply Energy Resource's payments on federal tax liabilities towards extinguishing their "trust fund" debts, thereby relieving "responsible" individuals of their separate liability for collection of such taxes. The IRS appealed, but the decision was affirmed by both the federal district court and court of appeals.

Held: A bankruptcy court has the authority to order the IRS to treat tax payments made by Chapter 11 debtor corporations as trust fund payments where the court determines such a designation is necessary to the success of the reorganization plan.