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"On Certiorari to the Ninth Circuit Court of Appeals": The Supreme Court's Review of Ninth Circuit Cases During the October 2006 Term

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COMMENT

"ON CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS":

THE SUPREME COURT'S REVIEW OF NINTH CIRCUIT CASES DURING THE OCTOBER 2006 TERM

INTRODUCTION

The Ninth Circuit has long been viewed as being in conflict with the Supreme Court.[1] Critics have pointed to controversial rulings and a high rate of reversal.[2] In the October 2006 Supreme Court term, which ran from October 2006 to July 2007, cases on certiorari to the Ninth Circuit Court of Appeals were a substantial part of the Supreme Court's docket. During this term, the Supreme Court issued seventy-one opinions, with twenty-two — or 30% — coming from the Ninth Circuit.[3]

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[1] *Cf.*, Akhil R. Amar & Vikram D. Amar, *Does the Supreme Court Hate the Ninth Circuit? A Dialogue On Why That Appeals Court Fares So Poorly*, Apr. 19, 2002, *available at* http://writ.news.findlaw.com/amar/20020419.html.

[2] *See e.g.*, Rush Limbaugh, *The Rush Limbaugh Show* (radio broadcast Nov. 3, 2005) (stating "The 9th *Circus*, the most reversed circuit court of appeals in the country.") (emphasis added); *but see e.g.*, Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, (2003) (arguing that the Ninth Circuit is neither far to the left nor disproportionately reversed); *accord.* Stephen J. Wermiel, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355 (2006).

[3] *See* Rupal Doshi, *Supreme Court of the United States October Term 2006 Overview*, GEORGETOWN UNIVERSITY LAW CENTER SUPREME COURT INSTITUTE, 10, Table 1 (June 29, 2007); Brian T. Fitzpatrick, *Disorder in the court*, LA TIMES, July 11, 2007, at A15. The Ninth Circuit Court of Appeals is the largest of the thirteen circuit courts, id., and its jurisdiction includes nine states, forty percent of the nation's land mass, and nearly sixty million people. Hon. John M. Roll,

With thirteen circuit courts of appeal, this was a disproportionately large percentage, even when the large geographic size and substantial population of the Ninth Circuit is taken into account.[4]

Whether reversed, affirmed, vacated, or remanded, a review of the interaction between the two courts over twenty-two cases reveals several fundamental differences between the two courts on key issues. This Comment examines these differences by exploring twenty of those decisions and how they illustrate the relationship between the Ninth Circuit and Supreme Court.[5] Part I examines the decisions that arose from the Supreme Court's review of Ninth Circuit decisions. Part II ties these decisions and conclusions into a larger motif emerging between the Ninth Circuit and Supreme Court, and Part III ultimately concludes that the future is likely to continue to see disagreements between the two courts.

I. INTERACTION BETWEEN THE COURTS

The twenty Ninth Circuit cases reviewed by the U.S. Supreme Court involved varying subject matters and an assortment of issues. The Supreme Court showed special interest in cases involving habeas corpus and Constitutional issues. The Court reviewed seven habeas petition cases and four Constitutional law cases.[6] The Supreme Court reversed the Ninth Circuit on five of the seven habeas petition cases and all of the

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The 115-Year-Old Ninth Circuit—Why a Split Is Necessary and Inevitable, 7 WYO. L. REV. 109, 110 (2007). This is nearly one-fifth of the American population. The next busiest court of appeals, the Fifth Circuit which includes Texas, Louisiana, and Mississippi, saw the Supreme Court review only five cases in the October 2006 term. *See* Fitzpatrick, *Disorder in the court*, LA TIMES, July 11, 2007, at A15.

[4] Crystal Marchesoni, *"United We Stand, Divided We Fall"?: The Controversy Surrounding A Possible Division of the United States Courts of Appeals for the Ninth Circuit*, 37 TEX. TECH. L. REV. 1263, 1269 (2005); Brian T. Fitzpatrick, *Disorder in the court*, L.A. TIMES, July 11, 2007, at A15; *see also* Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 718 (2000); *but see* Jerome Farris, *The Ninth Circuit—Most Maligned Circuit in the Country–Fact or Fiction?*, 58 OHIO ST. L.J. 1465 (1997).

[5] This article will only look at twenty of the cases on certiorari from the Ninth Circuit Court of Appeals during the Supreme Court's October 2006 term because two cases were procedural anomalies, which fail to add substance to the discussion of the relationship between the two courts. The cases which will therefore not be discussed in this article are Purcell v. Gonzalez,—U.S. —, 127 S. Ct. 5 (2007) (on appeal to the Supreme Court from two judge motions panel of Ninth Circuit) and Limtiaco v. Camacho,—U.S. —, 127 S. Ct. 1413 (2007) (on appeal from Guam Supreme Court to Ninth Circuit and the Supreme Court; Supreme Court reversed holding that limitations period for filing appeal did not start running until Ninth Circuit dismissed).

[6] *See* sections I (A) and I (B), *infra*.

Constitutional law cases.[7] The Supreme Court also reviewed two key immigration cases, and cases involving employment law, the Fair Credit Reporting Act, communications, environmental law, bankruptcy, anti-trust, and price fixing.[8] These decisions reveal certain common threads emerging between the Ninth Circuit and the Supreme Court in the course of the latter's October 2006 term.

A. SUPREME COURT REVIEW OF HABEAS PETITIONS FROM THE NINTH CIRCUIT

On its journey from a prerogative writ in medieval England,[9] through its recognition in the United States Constitution,[10] the writ of habeas corpus had ingrained itself into modern American jurisprudence. It is quite simply a legal procedure, in which the lawfulness of a prisoner's detention is collaterally challenged in front of a new judicial body by way of a civil action.

1. Summary of Cases

a. *Ayers v. Belmontes*

In 1982 Fernando Belmontes was tried and convicted of first-degree murder, and was subsequently sentenced to death.[11] During sentencing, Belmontes presented evidence purporting to show that he would contribute positively to society while serving a life sentence, and that he had previously done so while under the supervision of the California Youth Authority.[12] After closing arguments, the trial judge instructed the jury to consider certain factors either as aggravating or mitigating, including "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[13]

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[7] *Id.*

[8] U.S. v. Resendiz-Ponce, 549 U.S. __, 127 S.Ct. 782 (2007); Gonzales v. Duenas-Alvarez, 549 U.S. __, 127 S.Ct. 815 (2007); *see* section II, *infra*.

[9] *See generally*, WILLIAM F. DUNKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (Greenwood Press 1980) (1980).

[10] U.S. CONST. art. 1, § 9, cl. 2.

[11] Ayers v. Belmontes, 549 U.S. __, 127 S.Ct. 469, 472 (2006).

[12] *Id.* at 473.

[13] *Id.* at 472-73.

This factor was, at the time codified at California Penal Code section 190.3(k), and was referred to as "factor (k)."[14]

After exhausting his state remedies, Belmontes filed for a writ of habeas corpus.[15] Belmontes argued that factor (k) prevented the jury from considering his forward-looking evidence.[16] The district court denied the petition, and a divided panel of the Ninth Circuit reversed the district court's decision.[17] An equally divided panel denied rehearing en banc.[18] The Supreme Court granted certiorari and vacated the Ninth Circuit's decision for further consideration in light of *Brown v. Payton*.[19] Returning to the Ninth Circuit, another divided panel again invalidated Belmontes' sentence by distinguishing *Payton*.[20] The Ninth Circuit held that *Payton* was distinguishable because the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") [21] applied in that case,[22] while it was inapplicable to Belmontes' petition.[23] Again, a divided panel of the Ninth Circuit denied rehearing en banc.[24] The Supreme Court granted certiorari for a second time.[25]

The Court held that the Ninth Circuit's interpretation of factor (k) was "too confined" because the Ninth Circuit read this factor to "allow[] the jury to consider evidence that bears upon the commission of the crime . . . ."[26] However, the Supreme Court explained that the factor directed the jury to consider any other circumstance that might excuse the crime, not just any other circumstance of the crime that might mitigate his culpability.[27] So although the Ninth Circuit was correct that AEDPA was inapplicable to Belmontes' claims, the Ninth Circuit dismissed *Payton* without reviewing its factor (k) precedent, which held that "reading factor (k) to preclude consideration of post-crime evidence would require the surprising conclusion that remorse could never serve to lessen or excuse a crime."[28] The Court noted that this interpretation was

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[14] *Id.* at 472.
[15] *Id.* at 472.
[16] *Id.* at 472.
[17] Ayers v. Belmontes, 549 U.S. __, 127 S.Ct. 469, 472 (2006).
[18] *Id.* at 472 (denying rehearing *en banc*).
[19] *Id.* at 472; Brown v. Payton, 544 U.S. 133 (2005).
[20] *Ayers*, 127 S.Ct. at 472 (2006).
[21] 28 U.S.C.A. § 2254 (Westlaw 2008).
[22] 28 U.S.C.A. § 2254 (Westlaw 2008).
[23] *Ayers*, 127 S.Ct. at 472.
[24] *Id.* at 472.
[25] *Id.* at 472-73.
[26] *Id.* at 475.
[27] *Id.* at 475.
[28] *Id.* at 475 (internal quotations omitted).

consistent with the evidence presented at the hearings, the parties' closing arguments, and the other instructions from the trial court.[29] As such, the Court held that "[i]t is implausible that the jury supposed that past deeds pointing to a constructive future could not extenuate the gravity of the crime, as required by factor (k), much less that such evidence could not be considered at all."[30]

b. *Carey v. Musladin*

During Mathew Musladin's trial, which resulted in a conviction for first–degree murder,[31] members of the victim's family sat in the front row and wore buttons with a photo of the victim on the buttons.[32] Musladin appealed his conviction, arguing that the buttons deprived him of his Constitutional rights.[33] A state appellate court affirmed Musladin's conviction, stating that although the practice of "wearing of photographs of victims in a courtroom . . . should be discouraged," the buttons had not "branded [Musladin] with an unmistakable mark of guilt in the eyes of the jurors."[34] The court reasoned that, under *Holbrook v. Flynn*,[35] the photographs of the victim were "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member."[36]

Musladin applied for a writ of habeas corpus in federal district court arguing that the buttons were inherently prejudicial and deprived him of a fair trial.[37] The district court denied Musladin's application, and Musladin appealed to the Ninth Circuit.[38] The Ninth Circuit, applying the Antiterrorism and Effective Death Penalty Act (AEDPA) provision requiring that a writ of habeas corpus only be issued when the trial unreasonably applied or resulted in a decision contrary to "clearly established federal law", concluded that *Estelle v. Williams*[39] and *Holbrook v. Flynn*[40] established the test for inherent prejudice applicable

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[29] Ayers v. Belmontes, 549 U.S. __, 127 S.Ct. 469, 475-76 (2006).

[30] *Id.* at 478.

[31] Carey v. Musladin, 549 U.S. __, 127 S.Ct. 649, 651 (2006).

[32] *Id.* at 651-52.

[33] *Id.* at 652.

[34] *Id.* at 652.

[35] Holbrook v. Flynn, 475 U.S. 560, 570 (1986).

[36] *Id.* at 652; Carey v. Musladin, 549 U.S. __, 127 S.Ct. 649, 651 (2006).

[37] *Carey*, 127 S.Ct. at 652.

[38] *Id.* at 652.

[39] Estelle v. Williams, 425 U.S. 501, 503-06 (1976).

[40] *Holbrook*, 475 U.S. at 56 (1986).

to Musladin's claim.[41] As a result, the Ninth Circuit held that the state court's application of *Flynn*, but not *Williams*, "was contrary to clearly established federal law and constituted an unreasonable application of that law."[42]

On review, the Supreme Court first noted that section 2254(d)(1) of AEDPA, where it refers to "clearly established Federal law," refers to Supreme Court holdings, as opposed to dicta.[43] Next, the Court pointed out that *Williams* and *Flynn* dealt with inherent prejudice produced by government-sponsored practices, not spectator conduct: "[i]ndeed, part of the legal test of *Williams* and *Flynn*–asking whether the practices furthered an essential state interest–suggests that those cases apply only to state-sponsored practices."[44] The court reversed the decision of the Ninth Circuit, holding that the lack of applicable precedent regarding unreasonable spectator conduct made it impossible to say that the state court unreasonably applied clearly established Federal law.[45]

c. *Whorton v. Bockting*

In *Whorton v. Bockting*, the Supreme Court again reviewed the Ninth Circuit's decision to grant a writ of habeas corpus, this time requested by Marvin Bockting.[46] Bockting was convicted of three counts of sexual assault on a minor under the age of fourteen.[47] Although Bockting's alleged six-year-old victim was unable to recount the assault allegations at trial, the trial court allowed the prosecution to call a detective and the victim's mother to recount the victim's previous allegations.[48] After exhausting his state remedies, Bockting filed a petition for writ of habeas corpus in district court challenging the Nevada Supreme Court's affirmation of Bockting's conviction.[49]

The district court denied the petition, and Bockting appealed to the Ninth Circuit.[50] While the petition was pending in the Ninth Circuit, the Supreme Court held in *Crawford v. Washington* that "[t]estimonial

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[41] *Carey*, 127 S.Ct. at 652, 649, 651; Musladin v. Lamarque, 427 F.3d 653, 657-58 (9th Cir. 2005) (citing Norris v. Risley, 918 F.2d 828 (9th Cir. 1990)) *See also* 28 U.S.C.A. 2254(d)(1).

[42] *Carey*, 127 S.Ct. at 652; Musladin v. Lamarque, 427 F.3d 653, 657-58 (9th Cir. 2005) (citing 28 U.S.C. § 2254(d)(1)).

[43] *Carey*, 127 S.Ct. at 652 (2006) (citing 28 U.S.C. § 2254(d)(1)).

[44] *Id.* at 653-54.

[45] *Id.* at 654.

[46] Whorton v. Bockting, 549 U.S. __, 127 S.Ct. 1173, 1180 (2007).

[47] *Id.* at 1178.

[48] *Id.* at 1178.

[49] *Id.* at 1178-79.

[50] *Id.* at 1179.

statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]."[51] In granting the petition, the Ninth Circuit held that *Crawford* applied retroactively to cases on collateral review because it announced a watershed rule that "rework[ed] our understanding of bedrock criminal procedure."[52] In reviewing this decision, the Supreme Court held that *Crawford* applied a new rule, which did not qualify for watershed status, and therefore the *Crawford* holding did not apply retroactively, reversing the decision of the Ninth Circuit.[53]

d. *Schriro v. Landrigan*

In *Schriro v. Landrigan*, Jeffrey Timothy Landrigan was previously convicted of multiple crimes.[54] After escaping his Oklahoma prison, Landrigan murdered Chester Dean Dyer in Arizona during the course of a burglary.[55] A jury found Landrigan guilty of theft, second-degree burglary, and felony murder.[56] At his sentencing hearing, the trial judge found two statutory aggravating circumstances and two non-statutory mitigating circumstances, but nevertheless sentenced him to death.[57] Consistent with his defiant statements at his sentencing hearing, Landrigan filed a petition to set aside his conviction and sentencing.[58] Among his arguments, Landrigan claimed that he was denied effective assistance of counsel.[59]

After exhausting his attempts to set aside his conviction and sentence at the state level, Landrigan filed a petition of writ of habeas corpus under AEDPA.[60] The federal district court dismissed Landrigan's

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[51] *Id.* at 1179 (citing Crawford v. Washington, 541 U.S. 36 (2004)).

[52] *Whorton*, 127 S.Ct. at 1180 (2007) (citing *Crawford*, 541 U.S. 36 (2004)).

[53] *Whorton.*, 127 S.Ct. at 1181-84 (2007).

[54] State v. Landrigan, 859 P.2d 111, 114 (Ariz. 1993); Landrigan v. Stewart, 272 F.3d 1221, 1223 (9th Cir. 2001), *aff'd en banc*, 441 F.3d 638 (9th Cir. 2006) (Bea, C., and Callahan, C., dissenting), *rev'd* 550 U.S. ___, 127 S.Ct. 1933 (2007).

[55] *Landrigan*, 859 P.2d at 114 (Ariz. 1993).

[56] *Id.* at 4.

[57] *Landrigan*, 127 S.Ct. at 1938 (2007) (aggravating circumstances included Landrigan's expectation of a pecuniary gain when murdering Dyer and his previous felony convictions, while mitigating circumstances included his family's love and lack of premeditation).

[58] *See Landrigan*, 859 P.2d at 117 (Ariz. 1993) (citing various excerpts from Landrigan's sentencing hearing).

[59] *Id.* at 8 (Landrigan's other arguments in his post-conviction petition include a failure to grant a motion for acquittal and new trial, failure to instruct the jury on a lesser degree of homicide, and violations of his Sixth and Eighth Amendment rights).

[60] 28 U.S.C.A. § 2254(d)(1) (Westlaw 2008); *Landrigan*, 441 F.3d at 641-42 (9th Cir. 2006)

petition without holding an evidentiary hearing because he had failed to demonstrate any prejudice as a result of his attorney's actions.[61] After a three-judge panel affirmed that denial,[62] the Ninth Circuit granted a rehearing en banc and reversed.[63] Turning to the issue of Landrigan's evidentiary hearing, the Ninth Circuit concluded that the district court abused its discretion in denying such a hearing in part because Landrigan's instructions to his attorney were taken out of context.[64] The court stated that "Landrigan tried and failed, through no fault of his own, to develop the facts supporting his ineffective assistance claim at the state-court level. He is therefore not precluded by AEDPA from seeking an evidentiary hearing in federal court."[65]

Because an evidentiary hearing on Landrigan's claims was not barred under AEDPA, the Court of Appeals turned to the merits of his ineffective assistance of counsel claim, reviewing under the framework of *Strickland v. Washington*.[66] First, the Court of Appeals concluded that his attorney's initial investigation revealed evidence that may have mitigated Landrigan's sentence, if it had been developed further.[67] Since the Ninth Circuit concluded that Landrigan had established some basis to find his attorney was ineffective for failing to investigate and discover mitigating evidence, it next turned to the prejudicial impact it had on Landrigan.[68] The Court of Appeals determined that Landrigan might have been prejudiced when considering evidence discussed at trial *and* the evidence presented in Landrigan's habeas proceedings under *Wiggins v. Smith*.[69] Ultimately, the Ninth Circuit concluded that Landrigan had a "colorable claim" for ineffective assistance of counsel if he could prove

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(*en banc* rehearing).

[61] *Id.* at 641-42.

[62] *Landrigan*, 272 F.3d at 1221 (9th Cir. 2001).

[63] *Id.* at 1235 (deferring submission of decision pending the *en banc* decision in Summerlin v. Schriro, 427 F.3d 623 (9th Cir. 2005)).

[64] *Landrigan*, 441 F.3d at 642-43, 647 (9th Cir. 2006) (*en banc* rehearing).

[65] *Id.* at 643.

[66] *Id.* at 643 (citing from Supreme Court precedent and requiring Landrigan to "demonstrate that his counsel's representation 'fell below an objective standard of reasonableness' and that there is a reasonable probability that counsel's unprofessional errors 'undermine confidence in the outcome of the proceeding.'" (Strickland v. Washington, 466 U.S. 668, 688, 694 (1984))).

[67] *Landrigan*, 441 F.3d at 644 (*en banc* rehearing) Evidence initially discovered but not developed further included a psychological recommendation, findings of a private investigator, specific facts about Landrigan's birth-mother's substance abuse, and a letter from Landrigan's birth mother.

[68] *Id.* at 648.

[69] *Id.* (interpreting Wiggins v. Smith, 539 U.S. 510, 534 (2003)).

the facts alleged in his habeas petition were true; thus, the case was remanded for an evidentiary hearing.[70]

The Supreme Court reversed the Ninth Circuit and decided that the district court did not abuse its discretion.[71] Under AEDPA, a federal court is called upon to determine if the state court was *unreasonable* in its application of Supreme Court precedent or analysis of evidence presented at trial.[72] Only if the federal court concludes that a prisoner could "prove [his or her] factual allegations, which, if true, would entitle [him or her] to federal habeas relief" should an evidentiary hearing be granted;[73] however, the state court's decision must be presumed correct and rebutted with clear and convincing evidence.[74] The Court rejected the Ninth Circuit's reading of Landrigan's sentencing hearing transcript and found that no abuse of discretion existed because Landrigan "'instructed his attorney not to bring any mitigation to the attention of the [sentencing] court,'" much of which overlapped with the evidence he presented in his defense.[75]

The Court next attacked the Ninth Circuit's interpretation of *Strickland*. First, the Court found that it was objectively reasonable for the sentencing court to conclude that Landrigan's rejection of mitigating evidence could not establish any prejudice pursuant to *Strickland*.[76] Second, the Court found that Landrigan's decision to not present mitigating evidence might have been made knowingly and intelligently, but nevertheless avoided the issue in part because Landrigan failed to argue the issue in state court.[77] Lastly, the Court rejected the Ninth Circuit's conclusion that Landrigan had a "colorable claim" for ineffective assistance of counsel and assigned greater deference to the district court's determination.[78] The Court opined that the district court had reason to conclude that the exclusion of additional evidence would not have directly resulted in a different sentence for Landrigan.[79] As a

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[70] *Landrigan*, 441 F.3d at 650 (*en banc* rehearing) (applying Earp v. Ornoski, 431 F.3d 1158, 1170-73 (9th Cir. 2005)).

[71] *Landrigan*, 127 S.Ct. at 1937 (2007) (Stevens, J., Souter, D., Ginsburg, R., and Breyer, J., dissenting).

[72] *Id.* at 1939 (citing 28 U.S.C. § 2254(d) and referencing Williams v. Taylor, 529 U.S. 362, 410 (2000)) (emphasis added).

[73] *Landrigan*, 127 S.Ct. at 1940 (2007).

[74] *Id.* at 1939-40 (citing 28 U.S.C. § 2254(e)(1)).

[75] *Landrigan*, 127 S.Ct. at 1941-42 (2007).

[76] *Id.* at 1942.

[77] *Id.* at 1942-43 (rejecting an "informed and knowing" requirement for defendants who decide not to introduce evidence).

[78] *Id.* at 1943-44.

[79] *Id.* at 1943-44.

result, the district court's denial of Landrigan's habeas corpus petition was affirmed[80] and Landrigan is currently on death row at the Arizona Department of Corrections.[81]

e. *Uttecht v. Brown*

The fifth habeas corpus case stemmed from four days in May 1991 during which Cal Coburn Brown robbed, raped, and tortured two women in Washington and California.[82] Brown slit both of his victims' throats, killing one.[83] Brown was sentenced to life in prison by a California state court after he pled guilty to charges of attempted murder in the first degree, aggravated mayhem, torture, robbery in the first degree, and false imprisonment.[84] Brown was also tried in Washington for the first-degree murder of Holly Washa, resulting in Brown's death sentence.[85] After exhausting his state appeals, Brown petitioned for a writ of habeas corpus in federal court. Brown raised several issues in his petition, including the assertions that Washington's death penalty statutes is facially unconstitutional, the dismissal of three jurors was improper, and Brown's attorney was ineffective as counsel.[86] The district court denied Brown's petition;[87] however, the Ninth Circuit reversed in part.[88]

The Ninth Circuit's reversal focused on the second issue raised: the allegedly improper dismissal of three jurors,[89] with special attention paid to the .dismissal of a particular juror—juror *Z*.[90] The Ninth Circuit

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[80] *Landrigan*, 501 F.3d at 1147 (9th Cir. 2007).

[81] Arizona Department of Corrections Death Row Inmate Profiles, *available at* http://www.azcorrections.gov/DeathRow/ProfilesBase.asp?inmate=LandriganJ (last visited Mar. 3, 2008).

[82] State v. Brown, 132 Wash. 2d 529, 555-59 (Wash., 1997)..

[83] *Id.*

[84] *Id.* at 548.

[85] *Id.* at 549-50.

[86] Brown v. Lambert, 431 F.3d 661, 663 (9th Cir. 2005) (opinion superseded at 451 F.3d 946 after denial of rehearing *en banc*) (Tallman, J.; O'Scannlain, J.; Kleinfeld, J.; Callahan, J.; and Bea, J. dissenting from the denial of rehearing *en banc*).

[87] Brown v. Lambert, W.D. Wash. (Sept. 15, 2004) (slip copy).

[88] *Brown*, 431 F.3d 661 (9th Cir. 2005) (opinion superseded at 451 F.3d 946 after denial of rehearing *en banc*) (Tallman, ., O'Scannlain, ., Kleinfeld, ., Callahan ., Bea, ., dissenting from the denial of rehearing *en banc*).

[89] Brown v. Lambert, 451 F.3d 946, 947-48 and 954-55 (9th Cir. 2005) (citing Campbell v. Kincheloe, 829 F.2d 1453, 1464 (9th Cir. 1987) to find the death penalty statue was previously upheld, and determining Brown will have an "opportunity to receive effective assistance of counsel" upon a sentencing rehearing following the standard in Davis v. Georgia, 429 U.S. 122, 123-24 (1976)).

[90] *Brown*, 451 F.3d at 948-49 (9th Cir. 2005) (holding the dismissal of juror *X* was proper because she could not vote for a death sentence, and juror *Y* was properly dismissed for obvious

held that the exclusion of juror Z was improper because juror Z could have followed the rule of law and imposed the death penalty.[91] The majority compared juror Z to the juror held to have been improperly dismissed in *Gray v. Mississippi* and found that juror Z gave a stronger affirmative answer when asked if he could apply the rule of law.[92] The majority also rejected any deference to the trial judge because, in the majority's view, juror Z had clearly stated his ability to impose the death penalty and no ambiguity was present.[93]

In reviewing its precedent, the Supreme Court articulated four principles to be applied on appeal: (1) "criminal defendant[s have] the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause," (2) states have "a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes," (3) jurors can be excused for cause if his or her ability to impose the death penalty under state law is "substantially impaired," and (4) the trial court's decision to remove a juror based in part on his or her demeanor should be given deference by subsequent courts.[94]

The Supreme Court concluded that the Ninth Circuit erroneously reviewed the Washington Supreme Court's decision. Nevertheless, the Court found that the Washington Supreme Court's opinion was not contrary to the principals noted above.[95] Most importantly, the Court attacked the Ninth Circuit's lack of deference to the trial court and stated that reviewing courts "owe deference to the trial court" because it is in a fitter position to identify an impaired juror.[96]

f. *Burton v. Stewart*

In *Burton v. Stewart*, Burton was originally sentenced to 562 months in prison for rape, robbery, and burglary.[97] Burton requested

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impairments).

[91] *Id.* at 948-52 (drawing from Witherspoon v. Illinois, 391 U.S. 510, 521 (1968); *see* Adams v. Texas, 448 U.S. 38, 45 (1980); Wainwright v. Witt, 469 U.S. 412, 424 (1985); Gray v. Mississippi, 481 U.S. 648, 658 (1987)).

[92] *Brown*, 451 F.3d at 950-51 (9th Cir. 2005) (referring to Gray v. Mississippi, 481 U.S. 648 (1987).

[93] *Brown*, 451 F.3d at 952 (9th Cir. 2005) (suggesting that trial court deference to juror demeanor "can only shed light [when] ambiguous language" exists).

[94] Uttecht v. Brown, 551 U.S. ___ , 127 S.Ct. 2218, 2224 (2007) (drawing from Witherspoon v. Illinois, 391 U.S. 510, 521 (1968) and Wainwright v. Witt, 469 U.S. 412, 416, 442, 424-434 (1985)).

[95] *Brown*, 127 S.Ct. at 2228 (2007).

[96] *Id.* at 2229-31.

[97] Burton v. Stewart, 549 U.S. __, 127 S.Ct. 793, 794 (2007).

resentencing after an unrelated prior conviction was overturned.[98] While state review of Burton's resentencing was pending, Burton filed a petition for writ of habeas corpus relief in district court disputing the constitutionality of his three convictions, but not his sentence.[99] The district court denied relief, and the Ninth Circuit affirmed.[100]

Three years after filing the initial habeas petition, Burton filed a second habeas petition, this time contesting his sentence.[101] Again, the district court denied relief, and the Ninth Circuit affirmed.[102] Both courts also found that the district court exercised proper jurisdiction, although Burton did not seek or obtain authorization to file the second habeas petition—a requirement for subsequent habeas petitions under AEDPA.[103]

The Supreme Court granted review to determine whether *Blakely v. Washington* applied retroactively on collateral review, but instead vacated the decision of the Ninth Circuit on procedural grounds, holding that Burton's second petition was barred by AEDPA.[104] The Court held that the second petition was barred because Burton was being held in custody pursuant to the 1998 judgment at the time he filed both habeas petitions.[105] Because Burton failed to obtain authorization to file a second or successive habeas petition pursuant to AEDPA, the district court lacked jurisdiction to entertain the second petition, and therefore the Supreme Court vacated the decision of the Ninth Circuit.[106]

g. *Fry v. Pliler*

Finally, *Fry v. Pliler* stemmed from the murder of James and Cynthia Bell in central California on October 27, 1992.[107] John Francis Fry was charged with their murders, and after his third jury trial, Fry was convicted of two counts of first-degree murder.[108] While incarcerated, Fry filed an application for writ of habeas corpus.[109] Fry challenged his

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[98] *Id.* at 795.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 796.

[103] Burton v. Stewart, 549 U.S. __, 127 S.Ct. 793, 796 (2007).

[104] *Id.* at 794-96.

[105] *Id.* at 796.

[106] *Id.* at 799.

[107] Fry v. Pliler, No. Civ. S011580FCDGGHP, at 5 (E.D. Cal. Aug. 27, 2004) (slip copy).

[108] *Id.* at 4 (Fry's conviction was also affirmed by the California Court of Appeals and the California Supreme Court).

[109] 28 U.S.C.A. § 2254 (Westlaw 2008); *Fry*, No. Civ. S011580FCDGGHP, at 1 (E.D. Cal.

custody in part because the testimony of Pamela Marie Maples was excluded during his third jury trial.[110] Maples was the cousin of Anthony Hurtz, who Fry asserted had confessed to the killing of James and Cynthia Bell.[111] Nevertheless, the United States District Court for the Eastern District of California denied Fry's petition in full.[112]

The Ninth Circuit concluded that Maple's testimony was "'material and would have substantially bolstered [Fry's] claims of innocence'" because she was sufficiently reliable and overheard Hurtz's confession of a double homicide.[113] Even so, the Ninth Circuit applied *Brecht v. Abrahamson* and found the exclusion of Maple's testimony was "harmless."[114] Under the *Brecht* test, an error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict."[115] Despite Fry's argument that the *Brecht* test should not be applied because the California Court of Appeals never conducted a prejudice review, the Ninth Circuit affirmed the denial of his habeas corpus application.[116]

The Supreme Court struggled with the application of the *Chapman v. California* and *Brecht* tests for harmless error.[117] Under the *Chapman* test, federal constitutional error is harmless if a court is "able to declare a belief that it was harmless beyond a reasonable doubt."[118] Left unanswered by *Chapman* was what test should be used by a federal court on collateral review of a habeas corpus application if no finding of error is made at the state appellate court level. This is precisely the issue the Court took under review.[119] In affirming the Ninth Circuit's dismissal of Fry's petition, the Supreme Court stated that Federal courts reviewing § 2254 habeas corpus applications must apply the *Brecht* test:

Aug. 27, 2004) (slip copy).

[110] *Id.* at 24 (Fry contended other violations of his Sixth Amendment and Due Process rights, including improper admission of character evidence, admission of coerced testimony, undue restriction of cross examination of witnesses, prohibition of presenting prior criminal convictions of Anthony Hurtz, improper jury instructions, and improperly edited testimony submitted to the jury during deliberations).

[111] *Id.* at 24.

[112] *Id.* at 1.

[113] Fry v. Pliler, 209 Fed. Appx. 622, 624 (9th Cir., 2006) (citing Chia v. Cambra, 360 F.3d 997, 1003 (9th Cir. 2004)).

[114] *Fry*, 209 Fed. Appx. at 624 (9th Cir. 2006).

[115] Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

[116] *Fry*, 209 Fed. Appx. at 624 (9th Cir. 2006).

[117] Fry v. Pliler, 551 U.S. ___, 127 S.Ct. 2321 (2007), petition for rehearing denied 128 S.Ct. 19 (2007).

[118] Chapman v. California, 386 U.S. 18, 87 (1967).

[119] *Fry*, 127 S.Ct. at 2325.

"whether or not the state appellate court" performed an analysis under the *Chapman* test.[120]

Two broad themes arise from these seven cases – one procedural and the other substantive. First, the Supreme Court and the Ninth Circuit have differing opinions when it comes to federalism. The former viewed state power more expansively while the latter was more willing to restrict it by granting habeas relief. Second, the two courts are also at odds regarding individual liberties. Converse to the federalism impacts, here the Supreme Court appears to be the restrictor, while the Ninth Circuit is the liberator.

2. *The Courts' Decisions and the Impact on Federalism*

One of the bedrock concepts of American government is the delineation of powers between the federal government and the states, i.e., the legal relationship called federalism.[121] Habeas corpus relief can be viewed as an anomaly within this framework because it invites a federal court to second-guess a state's exercise of its power to punish criminals.[122] It has thus been a matter of dispute whether federal habeas corpus is[123] or is not a direct attack on federalism.[124] The seven Ninth Circuit habeas corpus cases reviewed by the Supreme Court in 2006, illustrate that the two courts have differing views regarding federalism, as their decisions had contrary impacts on a state's ability to punish its criminals.

In all seven cases, the respective state judicial systems sentenced the prisoners and upheld their imprisonments.[125] Likewise, in all seven

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[120] *Fry*, 127 S.Ct. at 2328.

[121] *See e.g.*, Pacific Co. v. Johnson, 285 U.S. 480, 493 (1932) ("Thus, in our dual system of government, action of the one government in the proper exercise of its sovereign powers, regarded as innocuous and permissible notwithstanding its incidental effects on the other, may become offensive and be deemed forbidden if it discriminates against the other.").

[122] It is recognized that the invitation is to allow the federal judiciary to enforce certain rights that are within its power to do so; however, the issue of individual liberties is addressed in the following subsection. For purposes of this subsection, second-guessing a state's police power refers purely to the mechanical process.

[123] *Cf.*, Coleman v. Thompson, 501 U.S. 722, 726 (1991) (reviewing a writ of habeas corpus form the State of Virginia, Justice S. O'Connor begins the Court's opinion with: "This is a case about federalism.").

[124] *See e.g.*, ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY, 147 *et seq.* (New York University Press 2001) (2001).

[125] People v. Belmontes, 45 Cal. 3d 744 (Cal. 1988); *see* Musladin v. LaMarque, 403 F.3d 1072 (9th Cir. 2005); Bockting v. State, 105 Nev. 1023 (Nev. 1989); State v. Landrigan, 176 Ariz. 1 (Ariz. 1993); State v. Brown, 132 Wash. 2d 529 (Wash., 1997); State v. Burton, 133 Wash. 2d 1025 (Wash. 1997); Fry v. Pliler, No. Civ. S011580FCDGGHP, slip op. at 4 (E.D. Cal. Aug. 27, 2004).

cases the District Courts denied the prisoner's habeas corpus petition.[126] The Ninth Circuit reversed in all but two cases, holding that a writ of habeas corpus should be granted or the case remanded for further proceedings.[127] In each of these decisions the state's power was effectively supplanted and assumed by the federal judiciary.

The Supreme Court, by contrast, reversed the Ninth Circuit's decisions in five of the seven cases.[128] But in *every* decision the court favored the rejection of federal habeas corpus relief. In all seven cases, only Justices Breyer, Souter, Ginsberg, and Steven proffered any dissenting opinions.[129] Even so, only three cases were not unanimous.[130] Many of the majority decisions are littered with language that expresses a preference for state power.[131] By declining to involve the federal judiciary in a state's punishment oif its criminals, the Court expressed a more restrained understanding of federalism with respect to federal power than the Ninth Circuit.

At first glance, two of the cases—*Burton* and *Fry*— do not neatly fit into this framework because none of the federal courts — the district courts, the Ninth Circuit, nor the Supreme Court —favored granting a writ. However, these two cases, like the others, comport with the Supreme Court's view on federalism with respect to habeas corpus.. Habeas relief was denied by all courts in *Burton* on jurisdictional grounds. Similarly, in *Fry* the Ninth Circuit wrote only a four-page opinion summarily applying the *Brecht* harmless error test.[132] Justice Scalia later wrote a majority opinion in which he avoided the Ninth Circuit's application of the *Brecht* test.[133] Instead he narrowly framed the opinion as to whether the Ninth Circuit was correct in applying the

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[126] Belmontes v. Calderon, No. CIVS890736DFLJFM, slip op. (E.D. Cal. May 14, 2001); *see* Musladin v. LaMarque, 403 F.3d 1072 (9th Cir. 2005); Bockting v. Bayer, No. CV-N-98-0764-ECR (VPC), slip op. (D. Nev. Mar. 19, 2002); Landrigan v. Schriro, 441 F.3d 638, 641-42 (9th Cir. 2006); Brown v. Lambert, No. C01-715C, slip op. (W.D. Wash. Sept. 15, 2004); Burton v. Waddington, No. C02-140L, slip op. (W.D. Wash. Dec. 17, 2002); Fry v. Pliler, No. Civ. S011580FCDGGHP, slip op. (E.D. Cal. Aug. 27, 2004).

[127] *See* section I(A)(1), *supra*.

[128] *Ayers*, 127 S.Ct. 469 (2006); *Carey*, 127 S.Ct. 649 (2006); *Whorton*, 127 S.Ct. 1173 (2007); *Landrigan*, 127 S.Ct. 1933 (2007); *Brown*, 127 S.Ct. 2218 (2007).

[129] *Ayers*, 127 S.Ct. 469 (2006); *Landrigan*, 127 S.Ct. 1933 (2007); *Brown*, 127 S.Ct. 2218 (2007).

[130] *Carey*, 127 S.Ct. 649 (2006); *Whorton*, 127 S.Ct. 1173 (2007); *Burton*, 127 S.Ct. 793 (2007); *Fry*, 127 S.Ct. 2321 (2007).

[131] *See e.g., Brown*, 127 S.Ct. at 2223 ("[R]eviewing courts are to accord deference to the trial court.").

[132] *Fry*, 209 Fed. Appx. 622 (9th Cir. 2006).

[133] *Fry*, 127 S.Ct. at 2328 (2007).

test in the first place, rather than whether it was applied correctly.[134] Collectively, these two cases do not weaken the different approaches to federalism simply because they enjoyed uniform denial of a habeas corpus petition.

The Supreme Court, to a greater extent than the Ninth Circuit, favors the state's power in so far as it relates to the punishment of criminals. Aside from the habeas corpus impacts on federalism, the Supreme Court and Ninth Circuit also took differing positions as it related to individual liberties.

3. *The Courts' Decisions and the Impacts on Individual Liberties*

One analyst has stated that "Habeas Corpus is the structural reform mechanism of the criminal justice system, functioning to provide an avenue to vindicate substantive rights."[135] If this statement is correct, then refusing to grant a petition may therefore function to censure individual liberties.[136] If no genuine impact on individual liberties actually occurred then the denial of habeas relief is moot. But to first conclude the existence of a violation is relative and not absolute. Reviewing the discrepancies between the Ninth Circuit and the Supreme Court, where the former found such violations while the latter did not, leads to the conclusion that there is a difference in the courts' perceptions of when individual liberties are violated.

In *Ayers*, *Landrigan*, *Carey*, *Whorton*, and *Uttecht*, the Ninth Circuit found enough of a violation of individual liberties to grant habeas relief or remand the case for further proceedings. Unlike the Ninth Circuit, the Supreme Court found no such violation in any of the seven

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[134] *Id.* at 2328.

[135] WILLIAM F. DUNKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS, 3 (Greenwood Press 1980) (1980); *see also* Margery I. Miller, *A Different View of Habeas: Interpreting AEDPA's "Adjudicated on the Merits" Clause When Habeas Corpus is Understood as an Appellate Function of the Federal Courts*, 72 FORDHAM L. REV. 2593, 2594 (2004) ("The ability of a state prisoner to petition a federal court for a writ of habeas corpus is an important way in which our criminal justice system protects the right of individuals to obtain relief when they have been unjustly imprisoned."); Ezra Spilke, *Adjudicated on the Merits?: Why the AEDPA Requires State Courts to Exhibit Their Reasoning*, 39 J. MARSHALL L. REV. 995, 1012 (2006) ("The requirement to examine the reasoning of a state court decision is the soundest way to guarantee the viability of habeas corpus as a meaningful protector of individual rights."); Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1197 *et seq.* (2007).

[136] For purposes of this subsection, individual liberties are synonymous with substantive and civil rights because all three are affected by a decision to deny or grant habeas relief. Furthermore, the umbrella of individual liberties comprises a broad range of rights.

cases.[137] Again, one could point to *Burton* and *Fry* because neither the Ninth Circuit nor the Supreme Court found a violation of individual liberties sufficient to grant habeas relief. However, these two cases are unique because *Burton* was decided on jurisdictional grounds and *Fry* was extremely limited in its holding, and thus do not impact this analysis.

The two courts' decisions thus reflect their contradictory findings on individual liberties. While it appears that the Ninth Circuit is more favorable to expanding individual liberties, the Supreme Court appears to be of a different view— raising the bar for finding violations of individual liberties. Future application of the Court's precedent stands to restrict individual liberties with respect to state prisoners. Notwithstanding this contrariety over prisoners' rights, the Ninth Circuit and the Supreme Court also appear to disagree over individual liberties in a greater range of Constitutional law cases.

B. THE SUPREME COURT'S REVIEW OF CONSTITUTIONAL CASES FROM THE NINTH CIRCUIT

While the Supreme Court's review of habeas cases from the Ninth Circuit evinces a recognition for greater state power and a resulting limitation on the established range of individual liberties, the Court's review of Constitutional law cases adds some light to these conclusions as well. The Court reviewed four Constitutional law cases from the Ninth Circuit: *Gonzales v. Carhart* (*Planned Parenthood*); *Parents Involved in Community Schools v. Seattle School Dist. No. 1; Morse v. Frederick;* and *California v. Rettele.*[138] In three of these four cases, the Ninth Circuit's holding favored an acknowledgement or enlargement of individual liberties, and in these three cases the Supreme Court reversed, finding in favor of the governmental authority. The one outlier—*Parents Involved*—did not result in a favorable holding for the governmental authority, but it did result in a holding that substantially limits a school district's ability to establish effective affirmative action plans in primary and secondary education.[139]

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[137] *See* section I (A)(1), *supra.*

[138] Gonzales v. Carhart, 549 U.S. __, 127 S.Ct. 1610 (2007); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. __, 127 S.Ct. 2738 (2007); Morse v. Frederick, 551 U.S. __, 127 S.Ct. 2618 (2007); Los Angeles County, California v. Rettele, 550 U.S. __, 127 S.Ct. 1989 (2007).

[139] *Parents Involved,* 127 S.Ct. 2738 (2007).

1. Summary of Cases

a. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*

Parents Involved concerned a challenge to the Seattle school district's voluntary adoption of a student assignment plan that relied upon race to allocate students among the different public schools.[140] The Seattle school district classified students as either white or nonwhite for the purposes of allocating students among its public high schools.[141] Although Seattle has never historically operated racially segregated schools, the objective of this classification was to remedy segregated housing patterns.[142]

Parents Involved in Community Schools ("Parents Involved") is a non-profit corporation made up of the parents of students who had been or would be "denied assignment to their chosen high school because of their race."[143] Parents Involved sued, alleging that this use of race violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Washington Civil Rights Act.[144]

Because of the issues involved, both state and federal courts reviewed the case before it went to the Supreme Court. The Western District of Washington first held that the school district's use of race survived strict scrutiny under the Equal Protection Clause because the plan was narrowly tailored to serve a compelling government interest.[145] On appeal, the Ninth Circuit reversed this decision based on the Washington Civil Rights Act, but then vacated the decision and certified the state law question to the Washington Supreme Court.[146] The Washington Supreme Court held that the state civil rights act did not bar "[p]rograms which are racially neutral, such as the [district's] open choice plans."[147] Then, back in the Ninth Circuit, a second panel

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[140] *Id.* at 2738. The case was consolidated with Meredith v. Jefferson County Board of Education from the Sixth Circuit.

[141] *Id.* at 2746.

[142] *Id.* at 2747.

[143] *Id.* at 2748.

[144] *Id.*

[145] *Id.* at 2748; Parents Involved in Community Schools v. Seattle School District No. 1, 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001); *see generally* Katie York, *What Does Diversity Mean in Seattle?: Parents Involved In Community Schools v. Seattle School District Number 1 Strikes Down the Use of a Racial Tiebreaker*, 35 GOLDEN GATE U. L. REV. 51, 68-70 (2005).

[146] *Parents Involved*,127 S.Ct. at 2748; *Parents Involved*, 294 F.3d at 1087.

[147] *Parents Involved*, 127 S.Ct. at 2738 (citing Parents Involved in Community Schools v.

reversed the district court, this time holding that the schools district's plan was not narrowly tailored to achieve the district's interest in racial diversity under the Equal Protection Clause.[148] The Ninth Circuit reheard the case before an en banc panel and this time affirmed the district court's original decision.[149]

After granting certiorari and hearing oral argument, the Supreme Court issued a decision on the final day of its October 2006 term.[150] The Court first noted that it had previously recognized two compelling interests in racial classifications in education: 1) the interest in "remedying the effects of past intentional discrimination" and 2) "the interest in diversity in higher education."[151] The Court then went on to explain that the compelling diversity interest upheld in *Grutter v. Bollinger* focused not only on race or ethnicity, but on "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[152] Essentially, the admissions program in *Grutter* passed muster because the classification of applicants by race was merely a single part of a highly individualized consideration.[153] The Court also noted that racial classifications utilized in order to simply achieve racial balance would be "patently unconstitutional."[154]

The Court went on to explain that the Seattle school district's use of race was like the University of Michigan's undergraduate admissions plan in *Gratz v. Bollinger*—it was utilized in a non-individualized, mechanical manner that proves determinative.[155] Additionally, even just

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Seattle School District No. 1, 72 P.3d 151, 166 (2003) (en banc)).

[148] *Parents Involved*, 127 S.Ct. at 2749; *Parents Involved*, 377 F.3d 949 (2004); *see generally* Katie York, *What Does Diversity Mean in Seattle?: Parents Involved In Community Schools v. Seattle School District Number 1 Strikes Down the Use of a Racial Tiebreaker*, 35 GOLDEN GATE U. L. REV. 51, 70-72 (2005).

[149] Parents Involved in Community Schools v. Seattle School District No. 1,__U.S.__, 127 S.Ct. 2738, 2749 (2007).

[150] *See* Erwin Chemerinsky, *An Overview of the October 2006 Supreme Court Term*, 23 TOURO L. REV. 731, 732 (2008). Parents Involved was a 176-page long opinion, not counting appendices. Dean Chemerinsky has commented that he believes the Court is writing longer opinions than ever because they are taking fewer cases. As a result, Dean Chemerinsky has proposed that word and page limits should be imposed on the Court's opinions. *Id.*

[151] Parents Involved in Community Schools v. Seattle School District No. 1,—U.S. —, 127 S.Ct. 2738, 2752-53 (2007) (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992) and Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

[152] *Parents Involved,* 127 S.Ct. at 2753 (citing Grutter v. Bollinger, 539 U.S. 306, 325 (2003)).

[153] *Parents Involved*, 127 S.Ct. at 2753 (citing *Grutter*, 539 U.S. at 337).

[154] *Parents Involved*, 127 S.Ct. at 2753 (citing *Grutter*, 539 U.S. at 330).

[155] *Parents Involved*, 127 S.Ct. at 2753-54 (citing Gratz v. Bollinger, 539 U.S. 244, 275 (2003)).

from the race frame of reference, Seattle's plan merely categorized in biracial terms: white or non-white.[156] The Court took a color-blind approach to the Equal Protection Clause analysis, stating that this approach is faithful to *Brown v. Board of Education* because "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."[157] As a result, the Supreme Court held that the Ninth Circuit's reliance on *Grutter* in upholding Seattle's race-based plan was improper and therefore reversed and remanded the case.[158]

b. *Gonzales v. Carhart*

In *Gonzales v. Carhart* (*Gonzales v. Planned Parenthood Federation of America*), the Supreme Court considered the validity of the Partial-Birth Abortion Act of 2003, Congress' first attempt at regulating abortion.[159] The Act provides for civil and criminal penalties against "[a]ny physician who . . . knowingly performs a partial-birth abortion and thereby kills a human fetus,"[160] and the Act defines "partial-birth abortion" as:

> an abortion in which the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, (1) in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, (2) in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.[161]

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[156] *Parents Involved*,, 127 S.Ct. at 2754 (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) ("We are a Nation not of black and white alone, but one teeming with divergent communities knitted together with various traditions and carried forth, above all, by individuals") (O'Connor, J., dissenting)).

[157] *Parents Involved*, 127 S.Ct. at 2767-68 (citing Tr. of Oral Arg. in Brown v. Board of Education (Brown I), 347 U.S. 483 (1954), p. 7 (Robert L. Carter, Dec. 9, 1952)).

[158] *Parents Involved*, 127 S.Ct. at 2768 (citing *Grutter*, 539 U.S. at 330).

[159] Gonzales v. Carhart, – U.S. –, 127, S.Ct. 1610 (2007); 18 U.S.C.A § 1531 (Westlaw 2008). Although *Gonzales v. Carhart* was on certiorari to the United States Court of Appeals for the Eighth Circuit, *Carhart* was consolidated with *Gonzales v. Planned Parenthood Federation of America, Inc.*, which was on certiorari to the United States Court of Appeals for the Ninth Circuit.

[160] 18 U.S.C.A. § 1531(a) (2005) (Westlaw 2008).

[161] 18 U.S.C.A. § 1531(b)(1)(A) (2005) (Westlaw 2008).

Planned Parenthood Golden Gate and the Planned Parenthood Federation of America filed suit in the Northern District of California claiming the law violated its Fifth Amendment due process rights.[162]

Judge Phyllis Hamilton preliminarily enjoined enforcement of the Act, and after a bench trial on the merits, Judge Hamilton issued a seventy-five page opinion, holding the Act unconstitutional on three grounds.[163] First, the court held that the Act poses an undue burden on a woman's right to choose an abortion because the Act proscribes not only intact dilation and extraction ("D & E") procedures, but other pre-viability D & E procedures and possibly inductions, as well, in violation of the Supreme Court's holding in *Stenberg*.[164] Second, the court held that the Act was impermissibly vague.[165] Finally, Judge Hamilton held that Congress failed to include a health exception in the Act, as required under *Stenberg*.[166] Judge Hamilton then permanently enjoined the Attorney General from enforcing the Act against the Plaintiffs. She noted that "[w]hile . . . a nationwide injunction may be appropriate" in this case, she deferred that decision to the other courts around the nation also considering the issue.[167] On appeal in the Court of Appeals for the Ninth Circuit, the three-judge panel consisting of Judges Reinhardt, Thomas, and Fletcher affirmed the District Court's decision on all counts.[168] The Ninth Circuit interpreted *Stenberg* to require a health exception unless there exists a "consensus in the medical community that the banned procedure is never medically necessary to preserve the health of the women."[169] Relying on *Ayotte v. Planned Parenthood of Northern*

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[162] Similarly, the National Abortion Federation and Dr. Leroy Carhart, plaintiff in the *Stenberg* case, and other physicians filed similar lawsuits challenging the Act in the United States District Courts for the Southern District of New York and the District of Nebraska, respectively. *See* National Abortion Federation v. Ashcroft, 330 F.Supp.2d 436 (S.D.N.Y. 2004); Carhart v. Ashcroft, 331 F.Supp.2d 805 (D. Neb. 2004).

[163] Planned Parenthood Federation of America v. Ashcroft, 320 F.Supp.2d 957, 971 (N.D. Cal. 2004). Judge Hamilton declined to reach the fourth issue, whether the Act violates a woman's due process right to bodily integrity, because she found the Act unconstitutional on the other three grounds.

[164] *Id.* at 971. A D & E abortion is a surgical procedure, which is performed in two steps: dilation of the cervix and surgical removal of the fetus. An intact D & E procedure is what is politically referred to as a "partial-birth abortion." During an intact D & E, the fetus is removed from the womb while fully intact. Then, through some overt act, the physician intentionally causes fetal demise. An induction is another form of abortion, commonly referred to as a medical abortion, where the woman is given medication to induce labor to expel the fetus.

[165] *Id.* at,977.

[166] *Id.* at 1033.

[167] *Id.* at 1035 n.67.

[168] Planned Parenthood Federation of America, Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006).

[169] Gonzales v. Carhart, – U.S. –, 127 S.Ct. 1610, 1625 (2007); Planned Parenthood

New Eng., the Ninth Circuit determined that the Act was unconstitutional on its face and therefore should be permanently enjoined.[170]

The Supreme Court held that the Act was not void for being facially vague by prohibiting "intact" D & E procedures, and the Act does not sweep too broadly to include typical D & E procedures. Additionally, the Court held that the ban did not impose a substantial obstacle on women seeking an abortion; the Act furthered legitimate congressional purposes; and the absence of a health exception did not render the Act facially unconstitutional.

The Court explained that the Act at issue in *Carhart* differed from that in *Stenberg* because Congress supported the Act with its own factual findings, whereas the Court in *Stenberg* was required to rely on the district court's factual findings.[171] Additionally, the Court noted that the language of the Act differs in important respects from that in *Stenberg*.[172] The Court also held that Stenberg's requirement that an abortion regulation "contain a health exception if substantial medical authority supports the proposition that banning a particular procedure could endanger women's health . . . was too exacting a standard to impose on the legislative power."[173] Finally, the Court added that the facial challenge that was brought in these cases was not the proper vehicle for challenging this Act; an as-applied challenge would be.[174] For all of these reasons, the Supreme Court reversed the decision of the Ninth Circuit.[175]

c. *Morse v. Frederick*

On January 24, 2002, Joseph Frederick joined his classmates across the street from Juneau-Douglas High School to watch the running of the Olympic torch on its way to the 2002 Winter Olympic Games in Salt Lake City, Utah.[176] When the television cameras neared, Frederick and his friends exposed a banner reading "BONG HiTS 4 JESUS."[177]

Federation of America Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006).

[170] Gonzales v. Carhart, – U.S. –, 127 S.Ct. 1610, 1625 (2007); Planned Parenthood Federation of America, Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006).

[171] Gonzales v. Carhart, – U.S. –, 127 S.Ct. 1610, 1624 (2007).

[172] *Id.* .

[173] *Id.* at 1638 (quoting Stenberg v. Carhart, 530 U.S. 914, 938 (2000)) (internal quotations omitted).

[174] Gonzales v. Carhart, – U.S. –, 127 S.Ct. 1610, 1638-39 (2007).

[175] *Id.* at 1639.

[176] Frederick v. Morse, 439 F.3d 1114, 1115 (9th Cir. 2006).

[177] *Id.*

Juneau-Douglas High School's principal, Deborah Morse, took and destroyed the banner and suspended Frederick for ten days.[178]

After administratively appealing his suspension without success, Frederick filed sued under 42 U.S.C. § 1983 claiming that Morse and the school board had violated his First Amendment rights.[179] The District Court granted Morse and the school board's motion for summary judgment for two reasons. First, the court found that Morse did not violate Frederick's First Amendment rights.[180] Second, the court concluded that Morse and the school board had qualified immunity from civil liability in the alternative.[181] Frederick subsequently appealed to the Ninth Circuit.

The Court of Appeals began by classifying Frederick's speech as "student speech" despite being off campus because Frederick was at a school-authorized activity and some level of supervision existed.[182] As a result, Frederick's speech was analyzed under a narrower range of cases. The court restated its *Chandler v. McMinnivlle School District* test, whereby student speech is analyzed according to three distinct categories.[183] Under the first category, "vulgar, lewd, obscene, and plainly offensive speech" is controlled by the Supreme Court's decision in *Bethel School District No. 403 v. Fraser.*[184] However, the Ninth Circuit refused to categorize Frederick's speech as "vulgar, lewd, obscene, and plainly offensive speech" and distinguished *Fraser* in two ways. First, the Court of Appeals contrasted the type of speech at issue and found Frederick's banner was not similar to Matthew Fraser's sexually explicit speech at a school assembly.[185] More importantly, the court determined that Frederick's speech did not disrupt a school assembly;[186] therefore, no educational function was undermined.[187] As a

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[178] *Id.*

[179] *Id.* at 1116-17.

[180] Frederick v. Morse, D.Alas. (May 27, 2003) at 4-5 (slip copy) (reasoning that Bethel School District No. 403 v. Fraser, 478 U.S. 768 (1986) was controlling, as opposed to Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)).

[181] Frederick v. Morse, D. Alas. (May 27, 2003) at 3 (slip copy).

[182] *Frederick*, 439 F.3d at 1117 (stating that "Frederick was a student, and school was in session.").

[183] *Id.* at 1121 (citing Chandler v. McMinnville School District, 978 F.3d 524, 529 (9th Cir. 1992)).

[184] *Frederick*, 439 F.3d at 1121 (citing Chandler v. McMinnville School District, 978 F.3d 524, 529 (9th Cir. 1992) (applying Bethel School District No. 403 v. Fraser, 478 U.S. 675, 683-85 (1986))).

[185] *Frederick*, 439 F.3d at 1119.

[186] *Id.* at 1123.

[187] *Id.* at 1120-23.

result, Frederick's "BONG HiTS 4 JESUS" banner should be reviewed under another classification of student speech.

In the second *Chandler* classification, school-sponsored student speech, *Hazelwood School District v. Kuhlmeier* is controlling.[188] The Ninth Circuit again distinguished Frederick's speech from that in *Kuhlmeier* because his banner was not "sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as part of an official school activity."[189] Excluding the first two *Chandler* classifications, the court turned to the catch-all class of student speech.

In the final *Chandler* classification, student speech that does not fall under the "vulgar, lewd, obscene, and plainly offensive" or school-sponsored speech is reviewed under the *Tinker v. Des Moines Independent Community School District* decision.[190] The Ninth Circuit interpreted *Tinker* to hold that "to censor or punish student speech, the school must show a reasonable concern about the likelihood of substantial disruption to its educational mission."[191] Because Frederick's speech could be viewed as political,[192] and because Morse and the school board's concern was only to discourage drug use, the court found a violation of Frederick's First Amendment rights.[193]

In the second half of its decision, the Ninth Circuit dealt with Morse's qualified immunity from money damages. Applying the three-part test from *Saucier v. Katz*, the Court of Appeals first concluded that Morse had violated Frederick's First Amendment rights.[194] The court also determined that Frederick's constitutional right was clearly established when Morse destroyed the banner and punished him because the prior decisions in *Tinker*, *Fraser*, *Kuhlmeier* and other cases clearly established that right.[195] To satisfy the third prong of the *Saucier* test, the Ninth Circuit relied on the undeniable law which Morse had exposure to in advanced school law courses to find "no reasonable government

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[188] *Id.* at 1121 (citing Chandler v. McMinnville School District, 978 F.3d 524, 529 (9th Cir. 1992) (applying Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273 (1988))).

[189] *Frederick*, 439 F.3d at 1119-20.

[190] *Id.* at 1121 (citing Chandler v. McMinnville School District, 978 F.3d 524, 529 (9th Cir. 1992) (applying Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513-14 (1969)).

[191] *Frederick*, 439 F.3d at 1123.

[192] Frederick's speech was arguably political by virtue of advocating a position contrary to government policy because Alaska had recurring "referenda regarding marijuana legalization" *Frederick*, 439 F.3d at 1119, and because the Alaska Supreme Court had decided a controversial case upholding the private possession of marijuana in an individual's home for personal use Ravin v. State, 537 P.2d 494 (Alaska 1975).

[193] *Frederick*, 439 F.3d at 1123.

[194] *Id.* at,1123 (applying Saucier v. Katz, 533 U.S. 194, 201 (2001)).

[195] *Frederick*, 439 F.3d at 1124.

official could have believed the censorship and punishment of Frederick's speech was lawful."[196] As a result, Morse was not entitled to qualified immunity from money damages.

Morse and the school board would not be without vindication. The Supreme Court ultimately found that Morse and the school board had not violated Frederick's First Amendment right.[197] In so deciding, the Court began by agreeing with the Ninth Circuit's decision that Frederick's banner was speech, and specifically student speech.[198] The Court then set out to analyze the facts of this case in the context of *Tinker*, *Fraser*, and *Kuhlmeier*. The Court made short work of the *Kuhlmeier* precedent in a similar way to the Ninth Circuit, stating that it did "not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur."[199] The Court also rejected the classifications of *Tinker* and *Fraser* because the present case was "plainly not. . . . about political debate over the criminalization of drug use or possession" and Frederick's speech was not within the "definition of 'offensive.'"[200]

Instead of resolving the *Tinker/Fraser* debate, the Court borrowed from a hodgepodge of other cases to apply a wholly new test to Frederick's speech. Taking from *Tinker* and *Fraser*, the Court rationalized that there were "special characteristics of the school environment"[201] enough so that "the constitutional rights of students . . . are not automatically coextensive with the rights of adults in other settings."[202] The Court next borrowed from *Vernonia School District 47J v. Acton* to find an "important - - indeed, perhaps compelling-" interest in stopping drug abuse in school children.[203] Within this framework, the Court declared that schools can restrict student speech, so long as they "reasonably regard [it] as promoting illegal drug use."[204] Because Morse's reasonable interpretation of "BONG HiTS FOR JESUS" was that it promoted illegal drug abuse, Frederick's First Amendment right had not been violated.[205]

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[196] *Id.*

[197] Morse v. Frederick, ___ U.S. ___ , 127 S.Ct. 2618, 2622 (2007).

[198] *Id.* at 2624-25.

[199] *Id.* at 2627.

[200] *Id.* at 2625, 2629.

[201] *Id.* at 2629 (quoting *Tinker*, 393 U.S. at 506).

[202] *Morse*, 127 S.Ct. at 2626 (quoting *Fraser*, 478 U.S. at 682).

[203] *Morse*, 127 S.Ct. at 2628 (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[204] *Morse*, 127 S.Ct. at 2629.

[205] *Id.* at 2624.

d. *Los Angeles County, California v. Rettelle*

Finally, the Supreme Court reviewed the Ninth Circuit's decision in *Los Angeles County, California v. Rettele.* Los Angeles County Sheriffs had been investigating four African-American suspects on suspicion of fraud and identity-theft for several months.[206] On December 11, 2001, Deputy Dennis Watters obtained a search warrant for the suspect's home in Lancaster, California.[207] Unknown to the officers, the suspects had sold the home to Max Rettele several months earlier, a Caucasian male.[208] On December 19, 2001, Deputy Watters and six other Los Angeles County deputies executed their warrant.[209] After confronting seventeen-year-old Chase Hall, another Caucasian male, at the doorway, the officers continued their search of the home.[210] Eventually entering Rettele's bedroom, the officers ordered a naked Rettele and girlfriend out of bed at gunpoint.[211] All occupants of the home were Caucasian.

Rettele brought an action for a violation of their Fourth Amendment rights, arguing that the officers had conducted an unlawful and unreasonable search and detention.[212] The United States District Court for the Central District of California granted summary judgment because it found the offers were entitled to qualified immunity.[213] On appeal to the Ninth Circuit, the court applied the two-step analysis for law enforcement qualified immunity.[214] First, the Ninth Circuit set out to determine "whether the officer's conduct violated a constitutional right."[215] Based on several facts in the case, the court concluded that "a reasonable jury could conclude that the search and detention were 'unnecessarily painful, degrading, or prolonged,' and involved 'an undue invasion of privacy.'"[216] Thus, there was a genuine issue of material fact as to whether the officers violated Rettele's Fourth Amendment rights.[217]

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[206] Los Angeles County, California v. Rettele, 550 U.S. ___, 127 S.Ct. 1989, 1990 (2007).

[207] *Id.* at 1990-91.

[208] *Id.* at 1991.

[209] *Id.*

[210] *Id.* at 1991.

[211] *Id.* at 1991.

[212] U.S. CONST. amend. IV; 42 U.S.C.A. § 1983 (Westlaw 2008); Los Angeles County v. Rettele, 186 Fed. Appx. 765, 765-66 (9th Cir., 2006); *see generally* John R. Kennel & Jane E. Lehman, *Searches and Seizures*, 68 Am. Jur. 2d, §10 *et seq.*, (2008).

[213] Rettele v. Los Angeles County, 186 Fed. Appx. 765, 766 (9th Cir. 2006).

[214] Moreno v. Baca, 431 F.3d 633, 638 (9th Cir. 2005) (applying Saucier v. Katz, 533 U.S. 194, 201 (2001)).

[215] Los Angeles County v. Rettele, 186 Fed. Appx. 765, 766 (9th Cir. 2006).

[216] *Id.* at 767 (citing Franklin v. Foxworth, 31 F.3d 873, 876 (9th Cir. 1994)). Among the

Having found that the officers did violate a constitutional right, the Ninth Circuit applied the second step in the analysis: was the constitutional right clearly established when the violation occurred? According to the court, a reasonable officer would have known Rettele's Fourth Amendment rights were violated as soon as they saw three Caucasian individuals who posed no safety threat.[218] Because both elements of the *Moreno/Saucier* test were satisfied, the Ninth Circuit reversed the summary judgment order and remanded the case.

On appeal, the Supreme Court reversed the Ninth Circuit and found that the officers did qualify for immunity.[219] The Court focused on two aspects of the search in making its decision. First, the Court determined that there was a safety risk to the officers because Rettele could have been concealing a weapon in the bed and the African-American suspects could have been in the home.[220] Second, the Court determined that the length and circumstances surrounding the search were not enough to render it unreasonable.[221] Because the Court determined there was no violation of Rettele's Fourth Amendment rights, it avoided applying the second part of the *Moreno/Saucier* test.[222]

2. *Individual and Civil Liberties and the Courts' Decisions*

The First, Fourth, and Fourteenth Amendments have strong ties to individual rights and civil liberties, and the Supreme Court's decisions in these areas tend to disavow individual rights and civil liberties that the Ninth Circuit had previously determined existed. *Carhart* chipped away at the choices women have in seeking an abortion. *Morse*, while an arguably limited holding, chipped away at students' free speech rights.

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facts cited which were sufficient to find a constitutional violation, the court lists that no African-Americans lived in the home, Rettele purchased the home several months before the warrant was issued, no suspected crimes warranted an emergency search, and Rettele and his girlfriend were ordered out of bed at gunpoint. *Id.*

[217] Los Angeles County v. Rettele, 186 Fed. Appx. 765, 767 (9th Cir. 2006).

[218] *Id.* at 766.

[219] Los Angeles County v. Rettele, 550 U.S. ___, 127 S.Ct. 1989, 1993-94 (2007).

[220] *Id.* at 1993 (citing several cases where police officers found guns concealed in blankets and bedding: U.S. v. Enslin, 327 F.3d 788 (2003); U.S. v. Jones, 336 F.3d 245 (2003); U.S. v. Hightower, 96 F.3d 211 (1996); State v. Willis, 843 So.2d 592 (2003); State v. Kypreos, 115 Wash. App. 207 (2002)).

[221] *Rettele*, 127 S.Ct. at 1993 (following the rule in Michigan v. Summers, 452, U.S. 692, 705 n.21 (1981), the Court focused on the search lasting only fifteen minutes, Rettele and his girlfriend being naked for less than two minutes, and the officers rapid response after they determined no immediate threat existed).

[222] *Rettele*, 127 S.Ct. at 1993-94.

Rettele chipped away at the right to be free from unreasonable searches while in the sanctity of one's home. Finally, *Parents Involved* is a more complicated case, but it also chipped away at the inroads of the civil rights movement by instituting a colorblind theory of the Fourteenth Amendment into education.[223]

The Constitution of the United States was drafted to create a federal government, balance federal and state power, and protect individual rights.[224] Federalism refers to balancing power between state and federal governments, and the drafters intended to protect individual rights by restraining and balancing these governmental powers.[225] The Supreme Court however has taken a more active role in establishing individual rights, and the limits thereof, in its recent history by centralizing a national view and interpretation of these rights.[226] This is surprising because, at the same time, the Court has been decentralizing government power and distributing the power back to the states.[227]

The road leading to *Carhart* illustrates the Court's centralization of individual liberties. First, *Roe v. Wade* held that a woman has a right to choose whether to have an abortion so long as that decision is made during the first two trimesters of pregnancy.[228] Second, the Court determined that the government had an interest in protecting fetal and life therefore could place reasonable restrictions on a woman's ability to obtain an abortion so long as the restrictions did not pose an undue burden in *Casey v. Planned Parenthood.*[229] Next, the Court struck down partial-birth abortion bans in effect in thirty states in *Stenberg v.*

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[223] *See* Julie M. Cheslik, Andrea McMurtry, and Kristin Underwood, *Supreme Court Report 2006-2007: Closing the Courthouse Doors?*, 39 URB. LAW. 739, 777 (2007) (noting majority's "color-blind reading of *Brown* [*v. Board of Education*]" and comparing with dissent's opinion that such a reading undermines *Brown's* promise of integrated . . . education") (internal quotations omitted).

[224] Patrick M. Garry, *Liberty From On High: The Growing Reliance on a Centralized Judiciary to Protect Individual Liberty*, 95 KY. L.J. 385, 389 (2006) ("The Constitution's embodiment of the structural principles of federalism is designed not just to create a workable government but to create one that protects individual rights. . . . Alexander Hamilton argued that individuals who felt their rights were violated by the central government could use the state governments as the instrument of redress.").

[225] Patrick M. Garry, *Liberty From On High: The Growing Reliance on a Centralized Judiciary to Protect Individual Liberty*, 95 KY. L.J. 385, 389-90 (2006). Of course, there was a contingent that insisted on adding the Bill of Rights, which specifically enumerates a number of individual liberties, but even the Bill of Rights ends with two amendments—the Ninth and Tenth—which reserve non-delegated powers to the states and limits the enumerated federal powers because individual rights could not be left merely to specific enumeration.

[226] *Id.* at 387 (citing Robert F. Nagel, *The Implosion of American Federalism*, 12 (2001)).

[227] *See id.* at 387.

[228] Roe v. Wade, 410 U.S. 113 (1973).

[229] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

Carhart.[230] And most recently, as discussed above, the Court sanctioned a federal partial-birth abortion ban in *Gonzales v. Carhart*.[231] This decision, which explicitly sanctioned Congress' first attempt at regulating abortion, represents the culmination of regulating individual liberties from a centralized-federal perspective.

Unsurprisingly, this framework fits nicely into the Supreme Court's and the Ninth Circuit's analyses of habeas petitions described above.[232] The Ninth Circuit's review of federal habeas petitions from state prisoners indicates a move away from supporting federal power in this area.[233] The Supreme Court's review of these same cases, however, indicates that the Court is moving towards a decentralized view of federalism. As noted above, the Court has been progressively decentralizing government power.

C. IMMIGRATION CASES

Compared to the other circuits, immigration cases comprise a large part of the Ninth Circuit's docket every year.[234] Unlike habeas law, which can involve intertwined issues of state and federal law, immigration is regulated solely by federal law.[235] In fact, the federal immigration laws expressly preempt any state action within the field of immigration.[236] As a result, the courts—both the Ninth Circuit and the Supreme Court—are dealing solely with the scope of federal power in these cases.[237]

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[230] Stenberg v. Carhart, 530 U.S. 914 (2000).

[231] Gonzales v. Carhart, 550 U.S.__, 127 S.Ct. 1610 (2007).

[232] *See* section I(A), *supra*.

[233] See section I(A)(2), *supra*.

[234] Lenni B. Benson, *You Can't Get There From Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 423 (2007) ("Chief Judge Mary Schroeder of the Ninth Circuit Court of Appeals reported that more than 40 percent of her circuit's docket was immigration-related."); *see also* James C. Duff, *Judicial Business of the United States Courts: 2007 Annual Report of the Director*, Table B-3 (Washington D.C., U.S. Gov't Printing Office 2007) (reporting the number of appeals to the Ninth Circuit from the Board of Immigration Appeals for the years 2003 through 2007), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf.

[235] Adam L. Lounsbury, *A Nationalist Critique of Local Laws Purporting to Regulate the Hiring of Undocumented Workers*, 71 ALB. L. REV. 415, 427 (2008) ("the history of the power to regulate immigration has evolved to become an exclusive province of the federal government").

[236] *Id.* at 429 ("it would appear that by operation of the preemption doctrine [that] states are powerless to regulate immigration").

[237] *Id.* at 427 ("The delicate balance of power between the federal government and the several states has been a timeless and dynamic struggle. . . . The question whether the power to regulate immigration . . . rests exclusively with the federal government or with the several states is not

1. Summary of Cases

a. *Gonzales v. Duena-Alvarez*

In *Gonzales v. Duenas-Alvarez*, Luis Duenas-Alvarez, a permanent resident alien of the United States, was convicted of violating California Vehicle Code § 10851(a), which prohibits the theft, or the aiding and abetting of the theft, of an automobile.[238] A federal immigration judge found that Duenas-Alvarez's conviction, aiding and abetting the theft of an automobile, subjected him to removal from the United States because his offense was "a theft offense . . . for which the term of imprisonment [is] at least one year."[239] The Board of Immigration Appeals affirmed this decision, and Duenas-Alvarez appealed to the Ninth Circuit.[240]

While Duenas-Alvarez's petition for review was pending in the Ninth Circuit, the court held in *Penuliar v. Ashcroft* that the relevant California Vehicle Code provision, section 10851(a), sweeps more broadly than generic theft.[241] The Supreme Court granted certiorari to consider the Ninth Circuit's holding in *Penuliar* that aiding and abetting a theft is not a crime that falls within the generic definition of theft.[242] The Supreme Court overturned *Penuliar* in holding that, because there exists no distinction between principals and aiders and abetters in the commission of a felony and because the California Vehicle Code section at issue does not apply to conduct that falls outside the generic definition of theft, the crime of aiding and abetting a theft offense could subject the offender to removal proceedings.[243]

b. *United States v. Resendiz-Ponce*

In *United States v. Resendiz-Ponce*, the Supreme Court relaxed pleading requirements in federal immigration cases. Resendiz-Ponce was convicted of attempted reentry into the United States after having

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explicitly constitutionally committed.").

[237] Gonzales v. Duenas-Alvarez, 549 U.S. __, 127 S.Ct. 815 (2007).

[238] *Id.* at 819.

[239] *Id.* at 819; 8 U.S.C.A. § 1101(a)(43)(G) (Westlaw 2008).

[240] *Gonzales*, 127 S.Ct. at 819.

[241] *Id.* at 819 (citing Penuliar v. Ashcroft, 395 F.3d 1037 (9th Cir. 2005)).

[242] *Id.*

[243] *Id.*

been previously deported twice, once in 1988 and again in 2002.[244] When Resendiz-Ponce attempted reentry, he walked up to a port of entry, displayed a photo identification of his cousin to the border agent, told the agent that he was a legal resident, and stated that he was traveling to Calexico, California.[245] Resendiz-Ponce was charged with violating 8 U.S.C. § 1326(a), which proscribes any subsequent attempt at reentry after deportation.[246] The indictment alleged that on June 1, 2003, Resendiz-Ponce "knowingly and intentionally attempted to enter the United States of America at or near San Luis . . . , after having been previously . . . deported, and removed from the United States."[247] The Ninth Circuit set aside the conviction and remanded for dismissal of the indictment because the indictment failed to allege a specific overt act that Resendiz-Ponce committed in seeking reentry.[248] Instead, the indictment merely alleged a generalized attempt to enter the country, which in the view of the Ninth Circuit failed to alert Resendiz-Ponce to the specific overt act that would be proved at trial.[249] The Supreme Court granted certiorari and requested supplemental briefing after oral argument on the question of whether the indictment was in fact defective.[250]

The Supreme Court reasoned that the generalized "attempt" language in the indictment encompassed both the overt act and intent elements and that an allegation detailing respondent's presentation of a false identification, or other specific act, was unnecessary.[251] Additionally, the Court noted that the Federal Rules of Criminal Procedure were intended to eliminate the complicated technicalities of common law pleading requirements.[252] For these reasons, the Court reversed the judgment of the Ninth Circuit.[253]

2. *Immigration Law and the Courts' Decisions*

While the Supreme Court reviewed only two immigration law cases from the Ninth Circuit, the two cases demonstrate different

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[244] U.S. v. Resendiz-Ponce, 549 U.S. __, 127 S.Ct. 782, 785-86 (2007).
[245] *Id.* at 786.
[246] *Id.* at 786.
[247] *Id.* at 786.
[248] *Id.* at 785.
[249] *Resendiz-Ponce*, 127 S.Ct. at 787.
[250] *Id.* at 785-86.
[251] *Id.* at 787-88.
[252] *Id.* at 782, 789.
[253] *Id.* at 790.

approaches taken by the two courts. In both cases the Ninth Circuit took a view which strictly interpreted the federal immigration laws, and in both cases, the Supreme Court reversed the Ninth Circuit. The Supreme Court took a view that broadly interpreted the federal immigration laws, essentially broadening federal power in this area. In *Resendiz-Ponce* the Court held that non-particularized pleadings were sufficient, and in *Duenas-Alvarez* the Court held that a permanent resident alien who violates California's code provision prohibiting aiding and abetting automobile theft would be subject to removal proceedings.

D. FURTHER CASES

The following section outlines and summarizes the remaining cases decided during the Supreme Court's October 2006 term on certiorari from the Ninth Circuit. These cases include decisions regarding ERISA, the Fair Credit Reporting Act, the Communications Act, federal environmental regulations, and the Bankruptcy Code, among others.

1. Summary of Cases

a. *Beck v. PACE International Union*

Beck v. PACE Intern. Union involved a disagreement between the two courts over interpretation of the Employee Retirement Income Security Act ("ERISA").[254] Crown Vantage, Inc. and its subsidiary, Crown Paper Co. (consolidated here as "Crown") were spin-off corporations from the James River Corporation.[255] Crown produced paper products in seven paper mills and employed 2,600 employees, including Edward Miller and Jeffrey Macek, who were covered by PACE International Union's ("PACE") collective bargaining agreement.[256] Crown had eighteen defined-benefit pension plans for its employees, for which the board of directors served as trustees.[257]

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[254] Beck v. Pace Intern. Union, 427 F.3d 668 (9th Cir. 2005), *rev'd*, Beck v. Pace Intern. Union, 551 U.S. ___, 127 S.Ct. 2310 (2007).

[255] *See* In re Crown Vantage, Inc. 421 F.3d 963, 967 (9th Cir. 2005).

[256] *See Beck*, 427 F.3d at 668.

[257] *See* Beck v. Pace Intern. Union, 551 U.S. ___ , 127 S.Ct. 2310, 2314 (2007) (clarifying that a "defined-benefit pension plan" is a retirement plan entitling participants to a fixed periodic payment, whereby the employer shoulders the investment risk, i.e., making up for any deficits in the plan, but also benefits if the plan exceeds expectations).

In March 2000, Crown filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the Northern District of California.[258] Over a year later, Crown's board of directors began investigating the purchase of an annuity as a means to a "standard termination" of the pension plans.[259] At the same time, PACE proposed an alternative to the annuity, whereby the assets of the seventeen pension plans covering PACE members would be merged into the PACE Industrial Union Management Pension Fund ("PIUMPF").[260]

Under ERISA, Crown was subject to certain procedural and methodological requirements when terminating its pension plans.[261] The longstanding practice of pension plan standard terminations was to purchase annuities through lump-sum payments.[262] Crown ultimately decided to terminate twelve pension plans by purchasing an annuity from Hartford Life Insurance Company ("Hartford").[263] Under that arrangement, Crown paid Hartford $84 million, but was given a projected reversion of nearly $5 million; equal to the amount Crown had overfunded certain plans.[264] A central issue in this case was therefore Crown's method when terminating the plans and making a final distribution of assets.[265]

Miller, Macek, and PACE sued in bankruptcy court arguing that the PIUMPF merger proposal was a legal alternative method to the Hartford annuity, and when Crown failed to adequately consider the merger, Crown breached its fiduciary duties under ERISA. The bankruptcy court agreed with PACE and issued a preliminary injunction that required Crown to place all cash assets still in the pension plan into an interest-bearing account, prohibited the reversion of assets to Crown, and ordered Crown and PACE to 'report on the feasibility of distribution the reversion 'for the benefit of the pension plan participants;'" however, the Hartford annuity transaction was not voided.[266] Based on the joint reports submitted by Crown and PACE, the bankruptcy court approved

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[258] *Crown Vantage*, 421 F.3d at 967.

[259] *See Beck*, 427 F.3d at 672-73 (an annuity is generally a contract giving the holder a right to receive periodic fixed payment over a period of time).

[260] *Id.* at 672.

[261] 29 U.S.C.A. § 1341 (Westlaw 2008).

[262] *See Beck*, 551 U.S. ___ , 127 S.Ct. at 2318.

[263] *Beck*, 427 F.3d at 672-73.

[264] *Id.* at 672-73.

[265] 29 U.S.C.A. § 1341(b)(3)(A) (Westlaw 2008).

[266] *Beck*, 427 F.3d at 673.

the distribution of assets to the plan participants, but it left the injunction regarding the remaining pension plan assets in effect.[267]

Crown appealed to the District Court of Northern District of California arguing three points: (1) Miller, Macek, and PACE lacked standing, (2) Crown was not subject to a fiduciary obligation, and (3) similarly, Crown did not breach any duty because the proposed merger was an impermissible method of terminating the pension plans.[268] The District Court found that Miller and Macek had standing, while PACE did not because it was not a pension plan participant, beneficiary, fiduciary, employer, or state pursuant to ERISA's requirements.[269] PACE's standing was also rejected because PACE failed to allege a violation of ERISA § 4041 in its complaint.[270] The District Court disagreed with Crown's second and third arguments, affirming the bankruptcy court's preliminary injunction and found a breached fiduciary duty.[271]

On appeal to the Ninth Circuit, Crown again argued that ERISA and the pension plans prohibited a merger into the PIUMPF; thus, not adequately considering the proposal was not a breach of a fiduciary duty. PACE also cross-appealed, arguing that it had standing to challenge the termination.[272] The Ninth Circuit first rejected Crown's argument that the pension plans themselves prohibit a merger into the PIUMPF because Crown never raised the issue before the bankruptcy court.[273] The court then drew a distinction between deciding to terminate a pension plan and implementing a decision to terminate, where the former is not fiduciary in nature but the latter is.[274] The court found that the merger was within the implementation of a plan termination because the merger itself was a permissible method, stating that "neither [ERISA] nor its implementing regulations preclude mergers into multiemployer plans as a method of providing such benefit liabilities."[275] Therefore Crown owed a fiduciary duty to the plan participants and beneficiaries under ERISA.

The Ninth Circuit thus agreed with both the District Court and bankruptcy court and found that Crown "failed to make the requisite

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[267] *Id.* at 673.

[268] *Id.*

[269] 29 U.S.C.A. § 1132(a) (Westlaw 2008).

[270] 29 U.S.C.A. § 1341 (Westlaw 2008).

[271] *Beck*, 427 F.3d at 673.

[272] *Id.* at 673-74.

[273] *Id.* at 674.

[274] *Id.* at 673.

[275] *Id.* at 676.

'intensive and scrupulous' investigation of investment options."[276] This and other events had the effect of prioritizing another interest—buying the Hartford annuity—above those of the plan's participants and beneficiaries. As a result, Crown breached its fiduciary obligation under ERISA's "exclusive benefit" rule.[277]

The Ninth Circuit, however, vacated the District Court's ruling that PACE lacked standing.[278] The court reasoned that even though the case could proceed without PACE, because PACE "has institutional resources and experience . . . it may be in a better position to protect the rights of all of its members," the case should be remanded to the bankruptcy court for PACE to amend its complaint and allege violations of ERISA and new theories of standing.[279] Crown subsequently appealed to the Supreme Court.

The Court did agree with the Ninth Circuit and determined that the permissibility of the merger under the pension plans themselves was not at issue.[280] The Court next turned to the permissibility of the merger under ERISA. Unlike the Ninth Circuit, the Pension Benefit Guaranty Corporation ("PBGC"), which filed an amicus curiae brief, had concluded that because a merger was an alternative and not an example of a plan termination method, the merger was not permissible.[281] It would then follow that Crown had not breached its fiduciary duties.

The Court has a history of deferring to the PBGC when interpreting ERISA because "to attempt to answer [ERISA] questions without the views of the [PBGC] . . . would be to embar[k] upon a voyage without a compass."[282] As a result, the Court's analysis centered on PBGC's statutory interpretation. The Court ultimately agreed with the PBGC rather than the Ninth Circuit and PACE, holding "that merger is not a permissible method of terminating a single-employer defined-benefit pension plan."[283] The Court concluded that a "merger is not like the purchase of [an] annuity" for three reasons.[284] First, while the purchase of an annuity would "formally sever[] the applicability of

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[276] *Id.* at 677 (applying the standard set forth in Leigh v. Engle, 727 F.2d 113, 125-26 (7th Cir. 1984)).

[277] 29 U.S.C.A. § 1104(a)(1)(A) (Westlaw 2008).

[278] *Beck*, 427 F.3d at 680.

[279] *Id.* at 679-80.

[280] *Beck*, 551 U.S. ___ , 127 S.Ct. at 2317 n.3.

[281] *Id.* at 2317 (referencing PBGC's *amicus curiae* brief) PBGC was created by ERISA to insure the defined benefit pension plans covered under ERISA by levying insurance premiums.

[282] *Id.* (quoting Mead Corp. v. Tilley, 490 U.S. 714, 726 (1989)).

[283] *Id.* at 2321

[284] *Id.* at 2318

ERISA," a merger would not.[285] Second, the Hartford annuity method allowed for Crown to obtain a $5 million reversion, whereas the PIUMPF merger would not.[286] Third, mergers were distinguished from terminations because mergers were not mentioned in ERISA § 1341,[287] mergers had their own sections within ERISA,[288] and mergers and terminations had separate rules and procedures.

Because the merger was an alternative rather than an example of a permissible plan termination, thus making it an impermissible form of termination under ERISA, no fiduciary obligation under ERISA existed for Crown to violate.[289] The Court did not reach the issue of PACE's standing, and having disagreed with the Ninth Circuit's statutory interpretation, reversed on the issue of the merger's permissibility under ERISA.

b. *Safeco Insurance Company of America v, Burr*

Unlike *Beck*, the Supreme Court agreed with the Ninth Circuit's statutory interpretation, in *Safeco Ins. Co. of America v. Burr.*[290] In *Safeco*, the Supreme Court was called upon to settle a split in the Circuit Courts by determining if the Fair Credit Report Act's willful failure standard extended to acts of reckless disregard, and also to clarify the Act's notice requirements.[291]

To guard against unfair and inaccurate credit reporting, Congress enacted the Fair Credit Report Act in 1970.[292] Under this Act, those who seek to adversely affect an individual based on their credit report must

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[285] *Id.*

[286] *Beck*, 551 U.S. ___ , 127 S.Ct. at 2319 The Court reached its conclusion for two reasons. First, because the PIUMPF merger was only the anticipation of a future termination rather than a valid termination, a reversion was impermissible under 29 U.S.C. § 1344(d)(1)-(3). Secondly, the reversion under the PIUMPF merger would violate the anti-inurement provision found in 29 U.S.C. § 1103(c).

[287] 29 U.S.C.A. § 1341 (Westlaw 2008).

[288] *See e.g.*, 29 U.S.C.A. §§ 1058, 1411, 1412 (Westlaw 2008).

[289] *Beck*, 551 U.S. ___ , 127 S.Ct. at 2320 (2007).

[290] Reynolds v. Hartford Financial Services Group, Inc., 435 F.3d 1081 (9th Cir. 2006), *rev'd on other grounds*, 551 U.S. ___, 127 S.Ct. 2201 (2007).

[291] Safeco Ins. Co. of America v. Burr, 551 ___, 127 S.Ct. 2201, 2208 (2007). The Third Circuit adopted a reckless disregard standard. Cushman v. Trans Union Corp., 115 F.3d 220, 227 (3rd Cir. 1997). The Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, by contrast, required knowledge and intentional violations. Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 418 (4th Cir. 2001); Cousin v. Trans Union Corp., 246 F.3d 359, 372 (5th Cir. 2001); Duncan v. Handmaker, 149 F.3d 424, 429 (6th Cir. 1998); Wantz v. Experian Information Solutions, 386 F.3d 829, 834 (7th Cir. 2004); Phillips v. Grendahl, 312 F.3d 357, 368 (8th Cir. 2002).

[292] 15 U.S.C.A. § 1681-1681x (Westloaw 2008).

notify them beforehand.[293] In the context of insurance companies, "adverse action" includes denying, canceling, increasing, or reducing the terms or insurance amount of existing or future policies.[294] To give the FCRA teeth, Congress allowed for a private cause of action if a business uses credit reports to adversely affect an individual but fails to comply with the Act, including failure to give required notice.[295] If the insurance company acts willfully, the affected individual can collect actual damages, punitive damages, and/or statutory damages.[296] If the insurance company acts negligently, affected individuals can collect actual damages, costs of litigation, and reasonable attorney fees.[297]

The case before the Supreme Court was the consolidation of two Ninth Circuit cases. In *Reynolds v. Hartford Financial Services Group, Inc.*, the Ninth Circuit itself consolidated two additional appeals: *Reynolds v. Hartford Financial Service, Inc.* and *Edo v. GEICO Casualty Co.*[298] In *Reynolds*, Jason Jay Reynolds received a home and auto insurance policy from various subsidiaries of Hartford Financial Services Group, Inc (consolidated here as "Hartford").[299] In issuing home and auto insurance policies, employees of Hartford consulted one of the "consumer information bureaus" to determine an applicant's credit report.[300] Under Hartford's practice, credit scores were used to determine an insurance rate, for which there was a direct correlation to an applicant's insurance rate.[301] However, to be assigned to the top insurance tier and receive a lower rate, an applicant's insurance score must have been based on an actual credit report score as opposed to a "no score."[302] Reynolds' policy was based only on his insurance score and not on a credit score; thus, he did not qualify for a reduced rate.[303]

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[293] 15 U.S.C.A. § 1681m(a) (Westlaw 2008) (requiring the notice to include the specific adverse action, detail how to contact the acting party, and also give information on how to gain a free copy of the report and dispute the adverse action).

[294] 15 U.S.C.A. § 1681a(k)(1)(B)(i) (Westlaw 2008).

[295] 15 U.S.C.A. §§ 1681n, 1681o (Westlaw 2008).

[296] 15 U.S.C.A. §1681n (Westlaw 2008).

[297] 15 U.S.C.A. §1681o (Westlaw 2008).

[298] Reynolds v. Hartford Financial Services Group, Inc., 435 F.3d 1081, 1085 (9th Cir. 2006), *rev'd on other grounds*, 551 U.S. ___, 127 S.Ct. 2201 (2007).

[299] *Id.* at 1086-88.

[300] "Consumer information bureaus" are more commonly known as credit reporting agencies; *Id.* at 1087. Hartford Fire consulted Trans Union; however, the other common credit reporting agencies include Equifax and Experian. *Id.*

[301] *Id.* .

[302] *Id.*

[303] *Id.* at 1087 n.5 Reynolds' homeowner's insurance credit score request returned a "no score" result because insufficient information existed, and his auto insurance credit score request returned a "no hit" result because his personal information did not match the national database. *Id.*

Nevertheless, Hartford did not give Reynolds notice of the adverse action.[304]

Similar to *Reynolds*, Ajene Edo applied for an auto insurance policy from subsidiaries of the GEICO Corporation (consolidated here as "GEICO").[305] GEICO's practice was similar to Hartford's, with one additional step.[306] GEICO compared an applicant's actual insurance score and an artificial insurance score derived from a "neutral" credit report.[307] If an applicant's artificial and actual insurance scores were equal, no notice of adverse action was sent; however, if an applicant's artificial score would have qualified her for a lower insurance rate, a notice of action was sent.[308] Because there was no difference between Edo's artificial and actual scores, he was not issued an adverse action notice.[309] The situation was very similar in *Safeco*.[310] In all three of the consolidated cases, plaintiffs sought damages under the FCRA on behalf of a class.[311] And in all three cases the insurance companies were granted summary judgment by the district courts.[312]

The Ninth Circuit first tackled the consolidated appeal of *Reynolds* and *Edo*. In rejecting the argument that only the insurance policy issuing company can be liable under the FCRA, the Ninth Circuit reversed the summary judgment order and articulated several definitions and standards.[313]

First, the Ninth Circuit held that the initial issuance of an insurance policy is tantamount to an "increase" under FCRA if the company "charges . . . a higher initial rate than it would otherwise have charged."[314] Second, the court concluded that an "adverse action" under the FCRA occurs whenever an individual "would have received a lower rate for his insurance had the information in his consumer report been

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[304] *Reynolds*, 435 F.3d at 1087.

[305] *Id.* at 1088.

[306] *Id.* at 1089.

[307] *Id.*

[308] *Id.* at 1089-90.

[309] *Id.* at 1090.

[310] Safeco Ins. Co. of America v. Burr, 551 U.S. ___, 127 S.Ct. 2201, 2207 (2007). Insurance applicants, Charles Burr and Shannon Massey, were given lower insurance rates based on their credit report scores without being issued an adverse action report. *Id.*

[311] Rausch v. Hartford Financial Services Group, Inc., D. Or., 2003 (July 31, 2003); Reynolds v. Hartford Financial Services Group, Inc., 416 F.3d 1097 (9th Cir. 2005); Spano v. SAFECO Ins. Co. of America, 215 F.R.D. 601 (D. Or. 2003).

[312] Rausch v. Hartford Financial Services Group, Inc., D.Or., 2003 (July 31, 2003); Reynolds v. Hartford Financial Services Group, Inc., 416 F.3d 1097 (9th Cir. 2005); Spano v. SAFECO Ins. Co. of America, 215 F.R.D. 601 (D.Or. 2003).

[313] *Reynolds*, 435 F.3d at 1096.

[314] *Id.* at 1092.

more favorable."[315] Third, it held that the definition of a "consumer report" under FCRA was extended to include "communication that a consumer has no information available or an insufficient credit history to permit the calculation of a credit rating."[316] Next, the Ninth Circuit stated that minimum "notice" under the FCRA "must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action."[317] Finally, the court concluded that an act is "willful" under the FCRA if "a company . . . performs an act . . . in reckless disregard of [a consumer's rights under 15 U.S.C. § 1681n]."[318] In light of its decision in *Reynolds*, the Ninth Circuit merely issued a memorandum decision reversing the district court's summary judgment order in *Safeco*.[319]

In resolving the circuit split, the Supreme Court ultimately agreed with the Ninth Circuit's definition and standards. After considering the distinction between criminal and civil willfulness and looking at the drafting history of the FRCA, the Court agreed with the Ninth Circuit that "willful" in the FRCA could be read to include reckless disregard.[320] The Court also agreed with the Ninth Circuit's conclusion that initial issuances of insurance policies constitute "increases" under the FRCA.[321] The Court went further in articulating the test for determining the baseline when determining if an "adverse action" occurred and an initial rate disadvantages an individual under the FCRA. According to the Court, the difference between the rate an individual receives and the rate they would have received had no credit information been used (i.e., a "neutral" score) should be considered in determining their disadvantage.[322]

Despite agreeing with the Ninth Circuit's interpretation of FRCA, the Court disagreed with its application thereof. According to the Court, GEICO's action was permissible because the initial rate received was no different then a rate based on no credit reports; thus GEICO had no duty to notify Edo and escaped liability.[323] The Court also freed Safeco of any

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[315] *Id.* at 1093.

[316] *Id.* at 1094.

[317] *Id.* at 1094-95.

[318] *Id.* at 1099.

[319] Spano v. Safeco Corp., 140 Fed. Appx. 746 (9th Cir. 2005).

[320] *Safeco*, 551 ___, 127 S.Ct. at 2208-09.

[321] *Id.* at 2211-12.

[322] *Id.* at 2213-14. Contrast the Court's theory with comparing the initial rate received and the rate that would have been received using the highest possible creditworthiness available.

[323] *Id.* at 2214.

liability to Burr and Massey because Safeco's "reading of the [FCRA], albeit erroneous, was not objectively unreasonable" and therefore not reckless.[324]

c. *Global Crossing Telecommunications, Inc. v. Metrophone Telecommunications, Inc.*

As with *Safeco*, the Supreme Court affirmed the Ninth Circuit's statutory and regulatory interpretation in *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc*, only this time the Court also agreed with the Ninth Circuit's application of its interpretations.[325] Metrophones Telecommunications Services, Inc. ("Metrophones") owned and operated public payphones as a "payphone service provider."[326] Before 1996, payphone service providers like Metrophones were uncompensated for and unable to block "dial-around" calls, such as "1-800" numbers, accessed on their phones but placed through long distance carriers.[327] In the Telecommunications Act of 1996, which amended the Communications Act of 1934, Congress allowed the Federal Commutations Commission ("FCC") to enact regulations for compensation to payphone service providers from long distance service carries.[328] Congress also created a mechanism for enforcement, stating that "[a]ny person claiming to be damaged by any common carrier . . . may bring suit for recovery of the damages for which such common carrier may be liable under the provision of [Title 47, Chapter 5], in any district court of the United States."[329] However, this power was limited to instances when the statue "prohibited" the conduct, or when the FCC "declared [the conduct] to be unlawful."[330]

In April 2003, Metrophones sued four long distance phone service carries (consolidated here as "Global Crossing") for not compensating Metrophones for "dial-around" calls made using Metrophones' public payphones.[331] Metrophones initially brought its suits alleging a violation

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[324] *Id.* at 2215.

[325] Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., 423 F.3d 1056 (9th Cir. 2005), *aff'd*, 550 U.S. ___, 127 S.Ct. 1513 (2007).

[326] *Id.* at 1062.

[327] *Id.*

[328] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *see also, e.g.*., 47 C.F.R. § 64.1300 (Westlaw 2008); *see also* Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., 423 F.3d 1056, 1062 n.1 (9th Cir. 2005)

[329] 47 U.S.C.A. § 207 (Westlaw 2008).

[330] 47 U.S.C.A. § 206 (Westlaw 2008).

[331] Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc., 423 F.3d 1056, 1062 (9th Cir. 2005) (defendant carriers initially included Global Crossing

of 47 U.S.C. § 276 and a state law claim for *quantum meruit*.[332] Three months after Metrophones filed its action, the Ninth Circuit ruled that there was no private right to recover compensation under 47 U.S.C. § 276.[333] Global Crossing thereafter filed a motion for judgment on the pleadings.[334] The District Court denied Global Crossing's motion and allowed Metrophones to amend its complaint to include two additional federal claims and two additional state law claims.[335]

On an interlocutory appeal to the Ninth Circuit, Metrophones asserted five grounds to recover compensation: (1) 47 U.S.C. § 201(b), (2) 47 U.S.C. § 416(c), (3) quantum meruit, (4) breach of implied contract, and (5) negligence. Dealing with the first claim, the FCC had interpreted 47 U.S.C. § 201(b) to find that a "failure to pay in accordance with the [FCC]'s rules . . . constitutes . . . an unjust and *unreasonable practice*" which is therefore actionable in federal district court under 47 U.S.C. §§ 206 and 207.[336] Because of the dichotomy between the FCC's interpretation, the Communications Act, and the Ninth Circuit's earlier case, the court applied the *Chevron* deference test.[337] After finding that the Communication Act was ambiguous as to Congress' intent,[338] and concluding that the FCC's interpretation of 47 U.S.C. § 201(b) was a "fair and considered judgment" which was a "reasonable" interpretation, the Ninth Circuit deferred to the FCC's interpretation and affirmed the grant of leave to Metrophones to amend and include 47 U.S.C. § 201(b) in its complaint.[339]

The Ninth Circuit came to the opposite conclusion regarding Metrophones' 47 U.S.C. § 416(c) claim, and refused to defer to the FCC's interpretation because "it would make every pronouncement of the Commission automatically enforceable in a private action, contrary to the intent of Congress."[340] As a result, the court reversed the district

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Telecommunications, Inc., Southwestern Bell Communication Services, Inc., Wiltel Communications, Inc., and Vartec Telecom, Inc.).

[332] *Id.* at 1062-63.

[333] Greene v. Sprint Communications Co., 340 F.3d 1047, 1053 (9th Cir. 2003).

[334] *Metrophones*, 423 F.3d at 1062-63 (9th Cir. 2005).

[335] *Id.*

[336] *Id.* at 1064 (quoting from the FCC's 2003 Payphone Order) (emphasis added).

[337] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

[338] *Metrophones*, 423 F.3d at 1067-69 (9th Cir. 2005) (determining the statute was ambiguous because the FCC had been given broad regulatory powers under §201, the statute did not clearly limit a definition of "practice" to something other than what the FCC had interpreted, and Congress had not "expressed a clear intent to make private actions to recover payphone compensation unavailable under any provision of the Act").

[339] *Id.* at 1070.

[340] *Id.* at 1071.

court's order giving Metrophones leave to amend and include 47 U.S.C. § 416(c) in its complaint.

Finally dealing with Metrophones' state law claims, the Ninth Circuit wrestled with the issue of federal preemption because the Act stated: "To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."[341] Because "state contract law, not the federal regulations, would govern the resolution of contract-related questions," Metrophones' breach of implied contract claim was not barred by federal preemption.[342] Similarly, Metrophones' *quantum meruit* claim was not barred by federal preemption because the measure of Metrophones' compensation under this theory would be equal to that under the federal regulations.[343] The Ninth Circuit therefore affirmed the District Court's denial of Global Crossing's judgment on the pleadings and order allowing Metrophones to amend it complaint to include breach of implied contract.[344] However, the Ninth Circuit reversed the District Court's grant of leave to amend and include a claim of negligence because it would extend Global Crossing's liability beyond calls "for which the regulations make it responsible," which was preempted under the Communication Act.[345]

The Supreme Court granted certiorari to determine "[w]hether 47 U.S.C. § 201(b) of the Communications Act of 1934 creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls."[346] The Court ultimately affirmed the Ninth Circuit's decision because the FCC had acted lawfully in its "unreasonable practice" interpretation of 47 U.S.C. § 201(b); thus, because Global Crossing had violated the FCC's compensation regulations, it was subject to suit in a district court under 47 U.S.C. §§ 207 and 206.[347]

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[341] 47 U.S.C.A. §276(c).

[342] *Metrophones*, 423 F.3d at 1076 (9th Cir. 2005).

[343] *Id.* at 1076-77.

[344] *Id.* at 1079.

[345] *Id.* at 1078.

[346] Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc., 546 U.S. 1169 (2006) (petitioner writ of cert. 6 (Nov. 25, 2005)).

[347] Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc., 550 U.S. ___, 127 S.Ct. 1513, 1520 (2007).

d. *National Association of Home Builders v. Defenders of Wildlife*

The conflict in *National Association of Home Builders v. Defenders of Wildlife* arose from the interaction of the Federal Water Pollution Control Act (commonly known as the Clean Water Act)[348] and the Endangered Species Act.[349] In 1972, Congress passed the Clean Water Act and established the National Pollution Discharge Elimination System.[350] Initially, permits for the discharge of pollutants into navigable waters were administered by the Environmental Protection Agency (hereafter "EPA").[351] However, individual states could apply to administer the permits for waters within its jurisdiction.[352] One year after the Clean Water Act, Congress passed the Endangered Species Act.[353] To accomplish to goal of "conserv[ing] endangered species and threatened species,"[354] substantive and procedural requirements were placed on all federal agencies.[355] Under these requirements, if any federal agency believes its actions or funding will endanger a listed species or their habitat, the agency must consult with the Fish and Wildlife Service (hereafter "FWS").[356] The FWS must then issue a Biological Opinion determining whether the federal agency's action is "likely to jeopardize the continued existence of a listed species or . . . [its] critical habitat."[357] After the FWS issues a Biological Opinion, it is the responsibility of the federal agency to proceed or not.[358]

Because the Endangered Species Act interagency cooperation requirements apply specifically to federal agencies, conflict arises when a state's actions impact the Act.[359] For example, if a state receives water pollution permit authority under the Clean Water Act, its subsequent decisions do not require interagency cooperation under the Endangered Species Act because the state is not a federal agency.

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[348] 33 U.S.C.A. §§ 1251-1387 (Westlaw 2008).

[349] 16 U.S.C.A. §§ 1531-1544 (Westlaw 2008).

[350] Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (adding the Federal Water Pollution Control Act to the United States Code at 33 U.S.C. §§ 1251-1387).

[351] 33 U.S.C.A. § 1342(b) (Westlaw 2008).

[352] *Id.*

[353] Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (adding the Endangered Species Act of 1973 to the United States Code at 16 U.S.C. §§ 1531-1544).

[354] 16 U.S.C.A. § 1531(c)(1) (Westlaw 2008).

[355] 16 U.S.C.A. § 1536(a)(2) (Westlaw 2008).

[356] 50 C.F.R. § 402.14 (Westlaw 2008). If the issue is a marine species, i.e., those species who survive in water, then the National Marine Fisheries Service is substituted for the FWS.

[357] 50 C.F.R. § 402.14(h (Westlaw 2008)).

[358] 50 C.F.R. § 402.15 (Westlaw 2008)

[359] 16 U.S.C.A. § 1536 (Westlaw 2008).

This is exactly what occurred in *National Association of Home Builders*. In 2002, the State of Arizona became the forty-fifth state to apply to administer the permits for discharging pollutants into its navigable waters under the Clean Water Act.[360] Under the proposed transfer, the Arizona Department of Environmental Quality (hereafter "ADEQ") would take over responsibility for issuing water pollution permits from the EPA.[361]Two days after the FWS released its Biological Opinion, the EPA approved the transfer of permitting authority to the State of Arizona and the ADEQ.[362]

Defenders of Wildlife challenged the transfer of permitting authority in two lawsuits, consolidated before the Ninth Circuit.[363] The Court of Appeals ultimately found that the EPA was under a duty and had the power to determine if its transfer of permit authority to the ADEQ would jeopardize protected species.[364] Furthermore, the Court of Appeals held that the EPA had acted arbitrarily and capriciously when it made its decision.[365]A petition for rehearing en banc was filed, but the Ninth Circuit denied over the dissents of Judges Kozinski, O'Scannlain, Kleinfeld, Tallman, Callahan, and Bea.[366] The Supreme Court reversed the decision, siding with the EPA and the State of Arizona.[367] The Court held that permit transfer authority was mandatory once a state "met the criteria set forth in § 402(b) of the [Clean Water Act]" and the EPA was therefore under no duty to adhere to § 7(a)(2)'s requirements.[368] The Court also attacked the Ninth Circuit's "arbitrary and capricious" finding by concluding that "the Ninth Circuit's determination . . . [was] not fairly supported by the record" and the Ninth Circuit should not usurp federal agencies of the ability to explain and reconcile their decisions.[369]

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[360] Defenders of Wildlife v. United States Environmental Protection Agency, 420 F.3d 946, 952 (9th Cir. 2005) (Thompson, D., dissenting), *en banc* rehearing denied, 450 F.3d 394 (9th Cir. 2006).

[361] *Defenders of Wildlife*, 420 F.3d at 952 (Thompson, D., dissenting).

[362] 67 C.F.R. § 79629-01 (Westlaw 2008.

[363] *Defenders of Wildlife*, 420 F.3d at 954-55 (Thompson, D., dissenting) Petitioners in this case were Defenders of Wildlife, the Center for Biological Diversity, and Craig Miller.

[364] *Id.* at 969.

[365] *Id.* at 962.

[366] Defenders of Wildlife Center for Biological Diversity v. U.S. E.P.A., 450 F.3d 394 (9th Cir. 2006).

[367] National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. ___, 127 S.Ct. 2518 (2007).

[368] *Id.* at 2531-38.

[369] *Id.* at 2529.

e. *Traveler's Casualty and Surety Company v. Pacific Gas and Electric Corp.*

In *Travelers Casualty & Surety Co.*, the Supreme Court reviewed whether contract-based claims for attorney fees incurred while litigating issues of bankruptcy law were allowed under the Bankruptcy Code.[370] The Ninth Circuit had determined that Travelers could not recover attorney fees because "attorney fees are not recoverable in bankruptcy for litigating issues peculiar to federal bankruptcy law."[371] The Supreme Court reversed stating that the Bankruptcy Code did not prohibit contract-based claims for attorney fees incurred litigating issues of bankruptcy law because claims enforceable under state law are presumed to "be allowed in bankruptcy unless they are expressly disallowed."[372] The Court noted that the Bankruptcy Code does not expressly disallow such claims, and in light of its prior decisions recognizing the propriety of enforcing such claims, the Court reversed the Ninth Circuit's decision.[373]

f. *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*

In *Weyerhaeuser*, the Supreme Court reviewed the Ninth Circuit's determination that *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*'s standard for claims of predatory pricing did not apply to claims of predatory bidding.[374] The Ninth Circuit had reasoned that the *Brooke Group* standard, which requires showing that the conduct resulted in below cost pricing of the predator's output and that the predator has a dangerous probability of recouping losses from its predatory pricing through a buyer monopoly power, should not apply to predatory bidding claims because this practice "does not necessarily benefit consumers or stimulate competition in the way that predatory pricing does."[375]

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[370] Travelers Cas. And Sur. Co. of America v. Pacific Gas and Elec. Co., 549 U.S. __, 127 S.Ct. 1199, 1202 (2007).

[371] *Id.* at 1205 (2007) (internal quotation omitted); *see also* Travelers Cas. And Sur. Co. of America v. Pacific Gas and Elec. Co., 167 Fed. Appx. 593, 594 (9th Cir. 2006) (citing Fobian v. Western Farm Credit Bank (In re Fobian), 951 F.2d 1149 (9th Cir. 1991)) (internal quotations omitted).

[372] *Travelers Cas.*, 127 S.Ct. at 1204, 1206 (2007).

[373] *Id.* at 1206 (2007) (citing Security Mortgage Co. v. Powers, 278 U.S. 149 (1928)).

[374] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. __, 127 S.Ct. 1069, 1072-73 (2007) (citing Brooke Group Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)).

[375] *Weyerhaeuser*, 127 S.Ct. at 1072-73 (2007) (citing Confederated Tribes of Siletz Indians of Ore. V. Weyerhaeuser Co., 411 F.3d 1030, 1037 (9th Cir. 2006)).

Because the Supreme Court found that claims of predatory bidding mirror claims of predatory pricing and these claims are similar in ways deemed significant to the analysis in *Brooke Group*, the Court reversed the Ninth Circuit's decision and held that the *Brooke Group* standard did apply to claims of predatory bidding.[376] The Court vacated the judgment of the Court of Appeals and remanded the case for further proceedings.[377]

g. *Powerex Corp. v. Reliant Energy Services, Inc.*

Powerex Corp. v. Reliant Energy Services, Inc. involves a convoluted labyrinth of procedural history. It began when the state of California and other plaintiffs (consolidated here as "California") brought actions against several wholesale energy companies ("Reliant" and "Duke") in state court, alleging that they engaged in a price-fixing conspiracy in violation of California's Cartwright Act and Unfair Competition Law.[378] Reliant and Duke then filed cross-complaints for indemnification, naming two American federal agencies, the Bonneville Power Administration ("BPA") and the Western Area Power Administration ("WAPA"), one corporation owned indirectly and one entity directly owned by the Canadian Province of British Columbia, respectively Powerex Corporation and the British Columbia Hydro and Power Authority ("BC Hydro"), and one entity directly owned by Mexico, the Comision de Federale Electicidad.[379] The Canadian entities and American federal agencies removed the case to federal court.. Then California sought to remand the case back to state court, but BPA, WAPA, Powerex, and BC Hydro argued that they were either immune or entitled to removal to federal court under the Foreign Sovereign Immunities Act (hereafter "FSIA").

The District Court for the Southern District of California held that BC Hydro, WAPA, and BPA were immune, but Powerex was not.[380] The court then remanded the case against Reliant and Duke to state court.[381] Reliant and Duke appealed to the Ninth Circuit where California first argued that the Ninth Circuit lacked jurisdiction under 28 U.S.C. § 1446(d) which requires that a defendant seeking removal give prompt notice to adverse parties and file a copy of the notice of removal

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[376] *Id.* at 1076-77.

[377] *Id.* at 1078.

[378] *See* California v. NRG Energy Inc., 391 F.3d 1011 (9th Cir. 2004); Cal. Bus. & Prof. Code §§ 1670, *et seq.*, and 17200.

[379] *See NRG Energy, Inc.*, 391 F.3d at 1011.

[380] *See id.* at 1022.

[381] *Id.*

with the state court.[382] The Ninth Circuit dismissed this argument, concluding that this limitation did not preclude its review of "substantive issues of law."[383] Because the case was more than about issues of jurisdiction or procedural defects, the Ninth Circuit's appellate review was not barred on jurisdictional grounds. With respect to BPA and WAPA's sovereign immunity, the Ninth Circuit agreed with the district court that the two agencies were immune because "only Congress can waive immunity of a federal government agency."[384] However, the Ninth Circuit disagreed with the district court's decision not to dismiss the case against BPA and WAPA before it was remanded.[385]

The Ninth Circuit also agreed with the district court that "BC Hydro did not waive its sovereign immunity under the FSIA" for three reasons.[386] First, BC Hydro's action "did not cause direct effects in the United States within the meaning of the FSIA" because only Powerex's decisions "affected the California markets."[387] Second, BC Hydro's activities (e.g., flood control, managing fisheries, constructing dams) were those typically government responsibilities.[388] Lastly, while BC Hydro and Powerex may have cooperated as parent and subsidiary, the lack of control was sufficient to find no agent/principal existed.[389]

The Ninth Circuit again agreed with the district court that Powerex was "not a foreign instrumentality under FSIA" for several reasons.[390] Turning to the "organ" test of the FSIA, Powerex was not immune for several reasons.[391] Because Powerex acted as an independent commercial enterprise and the Canadian government did not fund nor compensate Powerex for its losses, the court distinguished its recent decision in *EIE Guam*.[392] The court then analogized *Patrickson v. Dole Foods Co.* and quashed any degree of Powerex's public purpose by the separation from the Canadian government.[393] Finally, Powerex did not qualify for immunity under the ownership exception of the FSIA because

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[382] *Id.*

[383] *Id.*

[384] *Id.* at 1023.

[385] *NRG Energy, Inc.*, 391 F.3d at 1026-27.

[386] *Id.* at 1025.

[387] *Id.* at 1024.

[388] *Id.*

[389] *Id.*

[390] *Id.* at 1026.

[391] 28 U.S.C.A. § 1603(b)(2) (Westlaw 2008).

[392] *NRG Energy Inc.*, 391 F.3d at 1025-26 (distinguishing EIE Guam Corporation v. Long Term Credit Bank of Japan, 322 F.3d 635 (9th Cir. 2003)).

[393] *NRG Energy Inc.*, 391 F.3d at 1026 (applying Partickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001), *aff'd on other grounds* 538 U.S. 468 (2003)).

BC Hydro, and not the Canadian government, owned a majority of its corporate shares.[394]

The Supreme Court granted certiorari to review Powerex's immunity under the "organ" theory and also directed the parties to "brief and argue . . . whether the [Ninth Circuit] had jurisdiction to review the district court's remand order."[395] The Court ultimately concluded that the district court had made its decision based on subject-matter jurisdiction; therefore, the Ninth Circuit's appellate review authority was barred by 28 U.S.C. §1447(d).[396]

II. UNRAVELLING COMMON THREADS

The Supreme Court's review of Ninth Circuit cases during the latter's October 2006 term suggests several common themes. First, there appears to be a difference between the courts with respect to federalism. As discussed above, it appears that the Supreme Court, unlike the Ninth Circuit, took a state-deferential position, in so far as it relates to the punishment of criminals. But this stance was not isolated in the area of prisoners' rights. In *National Ass'n of Home Builders*, the two courts' decisions again had converse impacts on the relationship between federal and state power. Although the Ninth Circuit recognized the difficulties involved in rescinding Arizona's permit issuing authority, the court nevertheless found against the EPA and the State of Arizona. Despite the fact that the EPA is a federal agency, the holding was still favorable to the federal government because it directly challenged Arizona's permit issuing authority. The Supreme Court ultimately reversed and found in favor of the EPA and the State of Arizona. Thus when it came to prisoners' rights and environmental law, the Supreme Court favored state power; whereas the Ninth Circuit favored a dominant federal authority.[397]

Conversely, in the areas of immigration and business law, either there was no difference between the courts or the Supreme Court favored broader federal power. In *Global Crossing*, both courts allowed two state law claims to succeed in the face of a clear federal preemption

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[394] *NRG Energy Inc.*, 391 F.3d at 1026.

[395] Powerex Corp. v. Reliant Energy Services, Inc. 551 U.S. ___, 127 S.Ct. 1144 (2007).

[396] *Id.* at 2417.

[397] *See also* Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 217 (2004) (arguing that a review of cases since 1970 "demonstrates that the Court's current majority . . . gives substantially more weight . . . to Anti-Federalist views.").

statute; however, the Supreme Court's holding seems to have empowered a federal agency–the FCC. Turning to the immigration cases, the Supreme Court broadly interpreted federal immigration laws. In *Resendiz-Ponce* the Court held that non-particularized pleadings were sufficient, and in *Duenas-Alvarez* the Court held that a permanent resident alien who violated California's code provision prohibiting aiding and abetting automobile theft would be subject to removal proceedings. The Ninth Circuit, however, had taken a view which strictly interpreted the federal immigration laws. This view would have essentially limited federal power, but, as previously noted, the Supreme Court reversed both of these cases.

In addition to the disparity over federalism, the two courts struggled with the rights of businesses in three cases.[398] These cases can be further subdivided into classes where individuals and businesses were in conflict with one another, and where businesses clashed with themselves. In *Becks*, the Ninth Circuit found the existence of a duty under ERISA to the detriment of the business entity. The Supreme Court came to the opposite conclusion to the detriment of the individual employees. In *Safeco*, the Ninth Circuit, in a holding favorable to consumers, reversed a summary judgment order and indicated that liability under the FCRA could be found. While the Supreme Court agreed with the Court of Appeal's standards, the Court spared GEICO and Safeco from liability through a new baseline measure and an objectively reasonable standard for interpreting the Act which stand to protect insurance companies from liability under the FCRA. Taken together, *Becks* and *Safeco* suggest that the Ninth Circuit favors employees and consumers when in conflict with businesses, while the Supreme Court seemed inclined in favor of employers and merchants when they are in conflict with individuals.

In the second category of business right cases, where businesses are in conflict with each other, the Ninth Circuit and Supreme Court seemed to be in agreement. In *Global Crossing* a payphone service provider sought to enforce compensation from long distance carriers for dial-around calls. Both the Ninth Circuit and Supreme Court upheld the right of action under 47 U.S.C. § 201(b), but the holdings are fairly narrow. As a result it is not clear if the two courts are truly in agreement with inter-business conflicts, or if this case was unique in its limited holding.

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[398] For purposes of this subsection, "business" encompasses the entire gambit of entities engaged in some form of commerce. While *Powerex* is arguably a business law cases, the issue between the two courts was a procedural and jurisdictional one. Therefore it does not lend its hand to any analysis of business or individual rights.

Overall the fact that the Supreme Court's preference for business rights over individuals fits with the Court's consistent treatment of individual liberties in other cases. In the Constitutional law cases discussed above, the Supreme Court has disavowed individual rights and civil liberties that the Ninth Circuit had previously determined to exist. The Supreme Court has also continued to take an active role in centralizing a federal view of individual rights, or the lack thereof, instead of allowing the States to determine the limits.

The Supreme Court's review of Ninth Circuit cases suggests that the Supreme Court's analysis with respect to federalism is becoming more state-centric.[399] The Court has been decentralizing government power and distributing the power back to the states.[400] Unsurprisingly, this framework fits nicely into the Supreme Court's and the Ninth Circuit's analyses of habeas petitions described above.[401] The Ninth Circuit's review of federal habeas petitions from state prisoners indicates a pro-federal viewpoint in this area.[402] The Supreme Court's review of these same cases, however, indicates that the Court is moving towards a decentralized view of federalism. As noted above, the Court has been progressively decentralizing government power, and the October 2006 term suggests that this is likely to continue.

III. CONCLUSION

Chief Justice William H. Rehnquist's thyroid cancer diagnosis in 2004 and the retirement of Justice Sandra Day O'Connor in 2005 fueled speculation about the future make-up of the Supreme Court.[403] President George W. Bush was given the rare opportunity to nominate two replacement Supreme Court Justices only months apart. Chief Justice John Roberts eventually took the bench on September 29, 2005 to replace Chief Justice Rehnquist, and Associate Justice Samuel Alito succeeded Justice O'Connor when he took the bench on January 31, 2006.[404] The confirmation of these two new Justices gave rise to

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[399] *See* Patrick M. Garry, *Liberty From On High: The Growing Reliance on a Centralized Judiciary to Protect Individual Liberty*, 95 KY. L.J. 385, 387 (2006) (citing ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 12 (2001)).

[400] *See id.* at 387.

[401] *See* section I, *supra.*

[402] *See* section I(B),*supra.*

[403] William N. LaForge, *Chief Justice William H. Rehnquist Remembered*, FEDERAL LAWYER, 26, at 27(October 2005); Justice Sandra Day O'Connor letter to President Bush, July 1, 2005; *see e.g.*, 58 STAN. L. REV., *Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor*, April 2006.

[404] Biographies of the Current Justices of the Supreme Court, available at

anticipation regarding the level of conservatism being added to the Court, and this anticipation led up to the October 2006 term –the first full introduction to the "new" Supreme Court.

While many of the major cases decided in this term fell to a 5-4 vote, the 5-4 voting patterns rarely changed, and, as anticipated, the majority bloc—comprising Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito—tended to vote conservatively.[405]This put Justice Kennedy in a position of power as the new swing vote, becoming Justice O'Connor's replacement in that respect. Justice Kennedy not only voted with the majority in every 5-4 decision this term, but he also dissented only twice.[406] This majority bloc similarly controlled the cases on certiorari from the Ninth Circuit. In eighteen of the twenty Ninth Circuit cases addressed in this Comment, the controlling bloc of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito were in the majority.[407]

Notably, two members of the current majority bloc have previously expressed a negative view of the Ninth Circuit. In 1998 Justice Antonin Scalia twice wrote to the White Commission which ultimately recommended splitting the Ninth Circuit. Justice Scalia noted the "incomplete and random nature of [the Ninth Circuit's] en banc panel," along with the Ninth Circuit's high reversal rate.[408] He also concluded that the Ninth Circuit has a "singularly (and I had thought notoriously) poor record on appeal."[409] Justice Anthony Kennedy also expressed a

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www.supremecourtus.gov (last visited Mar. 19, 2008).

[405] Charles Whitebread, *The Conservative Kennedy Court—What a Different a Single Justice Can Make: The 2006-2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 2 (2007). Twenty-four outour of sixty-eight cases this term were decided on a 5-4 vote. Id. at 6. Dean Chemerinsky has gone so far as to say that "the central message of the Supreme Court's 2006 Term" is that "[c]onservatives finally got their Court." Erwin Chemerinsky, Turning Sharply to the Right, 10 GREEN BAG 2D 423, 423 (2007).

[406] Charles Whitebread, *The Conservative Kennedy Court—What a Different a Single Justice Can Make: The 2006-2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 3 (2007).

[407] The only cases from the Ninth Circuit that do not fit into this pattern are: Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc., 550 U.S. __, 127 S.Ct. 1513 (2007) (8-1 with Scalia dissenting) and United States v. Resendiz-Ponce, 549 U.S. __, 127 S.Ct. 782 (2007) (8-1 with Scalia dissenting).

[408] Letter from Justice Antonin Scalia to Hon. Byron R. White, Chair, White Commission 1 (Aug. 21, 1998), available at http:// www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia1.pdf ("Justice Scalia Letter #1"); Letter from Justice Antonin Scalia to Hon. Byron R. White, Chair, White Commission 2 (Sept. 9, 1998), available at http:// www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia2.pdf ("Justice Scalia Letter #2").

[409] Letter from Justice Antonin Scalia to Hon. Byron R. White, Chair, White Commission 2 (Sept. 9, 1998), available at http:// www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia2.pdf ("Justice Scalia Letter #2").

similar view, even after having served on the Ninth Circuit before his appointment to the Supreme Court.[410]Writing in support of splitting the Ninth Circuit, Justice Kennedy said that, "[w]hat began as an experiment should not become the status quo when it has not yielded real success . . . [i]n my view, the judicial system would be better served if the states of the present Ninth Circuit were to comprise more circuits than one."[411]

While these comments are not, of themselves, predictive of how these Justices or the Court might review cases on review from the Ninth Circuit, they do suggest that Justices Scalia and Kennedy have long held feelings about the general quality of the decisions issued by the Ninth Circuit. The decision issued by the Supreme Court during the October 2006 term do nothing to suggest either that the two Justices have changed their views, or that their view is not shared by other Justices. To the contrary, the October 2006 term indicates that generally speaking, there are a number of fundamental differences of outlook between the two courts on key concepts. The October 2006 term suggests that such divergences are likely to continue to occur until the Ninth Circuit is split or the composition of either court changes significantly.

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[410] Letter from Justice Anthony M. Kennedy to Hon. Byron R. White, Chair, White Commission (Aug. 17, 1998) at 2-4, available at http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/kennedy.pdf (Justice Kennedy Letter).

[411] Letter from Justice Anthony M. Kennedy to Hon. Byron R. White, Chair, White Commission (Aug. 17, 1998) at 5, available at http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/kennedy.pdf (Justice Kennedy Letter).

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