

**ASSOCIATION OF AMERICAN LAW SCHOOLS
SECTION ON FEDERAL COURTS**

Inaugural e-Newsletter: "CIVIL RIGHTS"

**Civil Rights Decisions:
The Supreme Court, 2003-04 Term, and Courts Below**

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Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004). This case was brought by a Mexican national who, while under indictment in the United States for murdering a U.S. DEA agent, was kidnapped in Mexico by Mexican nationals and delivered by private airplane to the United States, where he was handed over to the custody of DEA agents. After he was acquitted of the murder in the United States, he brought suit in federal court against the United States, the DEA agents and some Mexican nationals, relying on the Federal Tort Claims Act and customary international law. The Court rejected the FTCA claims because the tort occurred in a foreign country. As to the claim based on customary international law, the Court held that the conduct of the defendants violated no norm of customary international law that would justify the creation of a cause of action in this case. Such an action would, in effect, supplant the § 1983 and *Bivens* claims that already exist in such situations, because the international norm upon which the claims were based applies to arrests in the United States as well as in foreign countries.

City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219 (2004). In this case, the operators of an adult bookstore brought a facial challenge in federal district court to the City's licensing scheme for "adult" businesses. After a license is denied, the local ordinance provides that the applicant can seek judicial review under the Colorado Rules of Civil Procedure's judicial review provisions. The Tenth Circuit held that this was facially unconstitutional because it did not provide for sufficiently speedy judicial review to safeguard First Amendment rights. The Supreme Court disagreed, holding that sensitive application of normal procedures could provide review quickly enough to satisfy First Amendment interests in this case, and added that if there was evidence that the Colorado courts would not hear the case in a timely manner, federal jurisdiction under § 1983 would be available to provide a federal remedy in such a case. The Court did not elaborate on what federal remedy would be available if the only constitutional problem was delay on judicial review. Would a federal court order a state court to expedite its review, or would it simply compel the issuance of a license if it found excessive delay? The former possibility seems contrary to federalism principles, and the latter possibility seems to be an overreaction to the problem. Further, during the pendency of judicial review in state court, any attempt to litigate in federal court as well is likely to be met with some sort of abstention argument.

Tennessee v. Lane, 124 S. Ct. 1978 (2004). In this case, the Court (5-4) upheld Congress's authority under § 5 of the Fourteenth Amendment to subject states to damages and injunctions actions. This was an action under the Americans with Disabilities Act, claiming a denial to the plaintiff of physical access to courts. The majority found the "congruence and proportionality" test met by a history of state discrimination against the disabled. Chief Justice Rehnquist's dissenting opinion, joined by Justices Kennedy and Thomas, argued that there was insufficient evidence of state discrimination against the disabled to support the statutory remedy. Justice Scalia, in a separate dissent, argued that the "congruence and

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proportionality” test was too pliable and should be abandoned in favor of a liberal attitude toward legislation attacking race discrimination and a prohibition against exercises of § 5 power that go beyond remedying actual violations of the Fourteenth Amendment.

Jones v. R.R. Donnelly & Sons, Co., 124 S. Ct. 1836 (2004). A group of former employees brought suit against R.R. Donnelly & Sons under 42 U.S.C. § 1981 alleging racial discrimination. The Seventh Circuit held that all of their claims were barred by the Illinois general personal injury statute of limitations. The plaintiffs argued that the new federal catch-all statute of limitations, 28 U.S.C. § 1658(a), applies, because certain amendments to § 1981 were passed after the federal statute of limitations. The Court held that all federal statutes, including amendments to preexisting statutes, enacted after the federal statute of limitations, are governed by that statute, and not by borrowed state statutes of limitations.

Vieth v. Jubelirer, 124 S. Ct. 1769 (2004). This was a § 1983 claim brought to challenge Pennsylvania’s redistricting plan on equal protection grounds involving political gerrymandering. The Court (5-4) held that political gerrymandering claims are nonjusticiable because there are no standards adequate to adjudicate such claims. Justice Kennedy, in an opinion concurring in the judgment, concluded that an adequate standard may yet emerge, so the Court should not rule out adjudicating claims like this in the future.

Bunting v. Mellen, 124 S. Ct. 1750 (2004). This is a rare case in which a dissent from the denial of certiorari by two members of the Court provoked an opinion in favor of denying certiorari joined by three members of the Court. The case arose as a challenge to the invocation of God during the Virginia Military Institute’s Supper Roll Call, which is apparently a form of grace before the meal. The Fourth Circuit held that the plaintiffs’ injunctive claims were moot because they had graduated, and that the plaintiffs could not recover damages because the individual defendants were entitled to qualified immunity. However, as Supreme Court precedent requires, before reaching the immunity question, the lower court adjudicated the constitutional issue and held the invocation of God unconstitutional. The individual defendant then petitioned for certiorari even though he won in the lower courts because he was afraid that in the future, qualified immunity would not be available since the Court of Appeals’ decision clearly establishes that the practice is unconstitutional. In his opinion, Justice Stevens expressed dissatisfaction with the inflexible rule that courts must reach the constitutional issue before addressing qualified immunity. Without that rule, there would have been no reason for the defendant to seek certiorari since he prevailed in the lower court. However, Justice Stevens finds no good reason to grant certiorari in the case, disagreeing with Justice Scalia’s assertion that the decision creates a conflict among the circuits.

Frew ex. rel. Frew v. Hawkins, 540 U.S. 431 (2004). Texas state officials entered into a consent decree in federal court agreeing to operate the Texas Medicaid program in accordance with federal law. When they violated the decree, they argued that the Eleventh Amendment barred enforcement of the decree in federal court. The plaintiffs made two arguments in favor of enforcement, first that by entering into the decree the defendants had consented to enforcement in federal court notwithstanding the Eleventh Amendment, and second, that enforcement was available under *Ex Parte Young*. The Court agreed with the plaintiffs on *Young*, and did not reach the Eleventh Amendment. The Court reasoned that as long as the terms of the decree itself are permissible under *Ex Parte Young*, the decree is also enforceable under *Young*.

A pair of pending cases that may have implications for § 1983 involve the tax treatment

of attorney's fees. The cases are *C.I.R. v. Banaitis* and *C.I.R. v. Banks*, Nos. 03-907 and 03-892 respectively. In these cases, the Sixth and Ninth Circuits held that attorney's fees obtained as a fraction of damages pursuant to a contingency fee agreement are not includable in gross income for purposes of § 61(a) of the Internal Revenue Code, 26 U.S.C. 61(a).

Evans v. City of Zebulon, 351 F.3d 485 (11th Cir. 2004), *reh'g en banc granted*, 364 F.3d 1298 (11th Cir. 2004). In this case, the court acknowledged that "A jury could find that the searches [of the plaintiffs] were not performed with sensitivity and professionalism, but rather were performed in a degrading, humiliating and terrifying fashion, punctuated by taunting, threats, rough contact, and abusive language unjustified by the surrounding circumstances or the conduct of the appellees and unnecessarily exacerbating the degrading and terrifying nature of the searches." Nonetheless, the court held that the right to be free from this type of search was not clearly established at the time of the incident, and therefore the defendants were immune. This opinion has been vacated and rehearing en banc has been ordered.

Gilbertson v. Albright, 381 F.3d 965 (9th Cir. 2004) (*en banc*). A surveyor was disciplined by the state board that regulates surveyors. During the pendency of his state court appeal from the board's decision, the surveyor sued members of the board for damages in federal court under § 1983. The Ninth Circuit held *Younger* abstention applicable in damages cases, even though damages do not interfere with parallel state proceedings; but that in damages cases the proper remedy is stay rather than dismissal.

Carswell v. Borough of Homestead, 381 F.3d 235 (3d Cir. 2004). In this case, an officer shot and killed an unarmed suspect in a domestic violence situation. The wife sued both the officer and the city. The court was reluctant to engage in the usually required analysis of whether the Constitution had actually been violated before reaching the immunity issue, so the court merely assumed that the Constitution had been violated by the use of deadly force against an unarmed suspect and held in favor of qualified immunity. (Perhaps the court was concerned, as in the case at the Supreme Court involving *VMI*, *supra*, that it might clearly establish some law it did not like.) The court held that the city's failure to train the officer in less than deadly methods of subduing unarmed suspects did not amount to a deliberate policy on the city's part, and thus the city could not be held liable.