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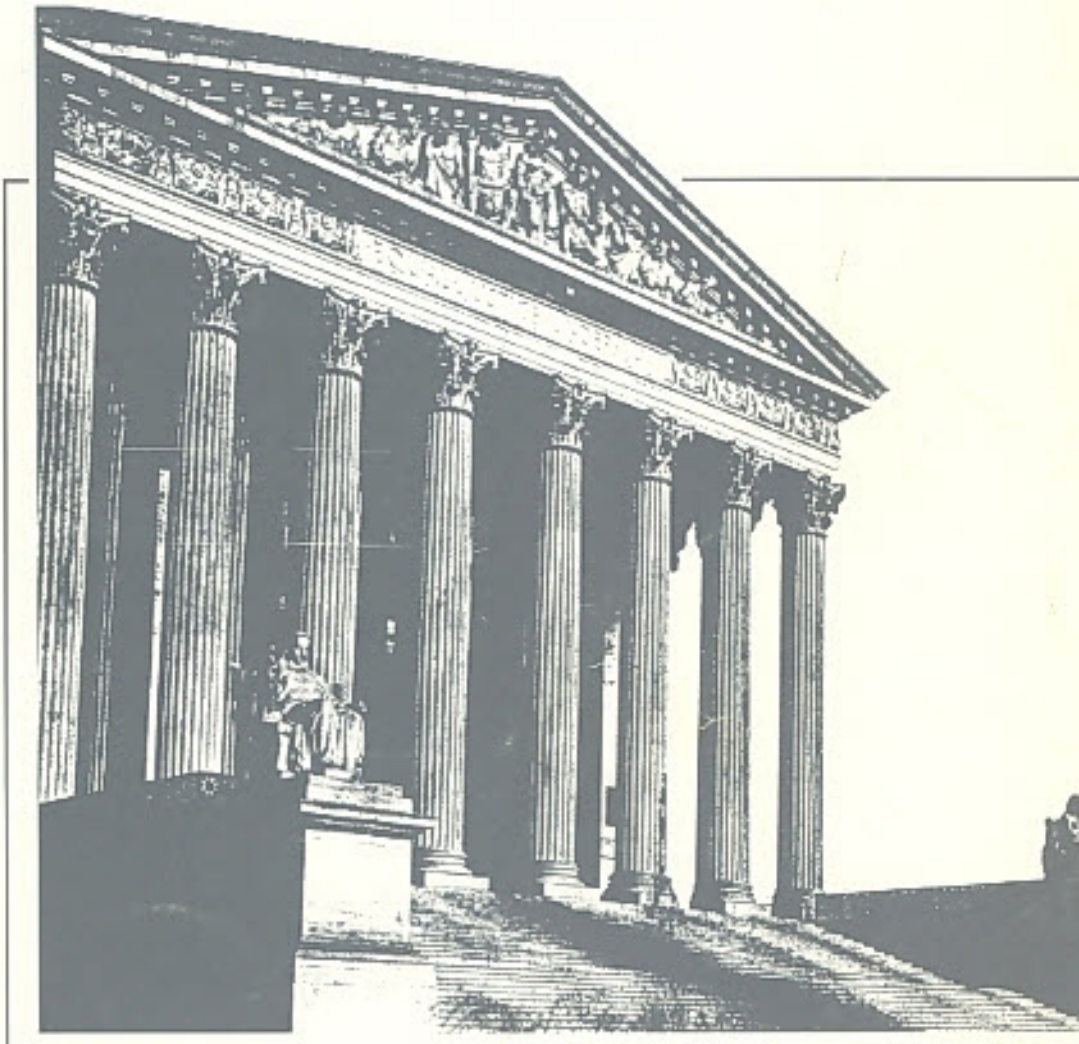

Decisions Concerning Access to Federal Court During the Supreme Court's 1995–96 Term

Governmental Immunity and Other Impediments: Decisions Concerning Access to Federal Court During the Supreme Court's 1995 -- 96 Term

By Laurie Davison, Gill Deford, Matthew Diller, Shelley Jackson, Brian Lawlor, and David Vladeck

For notes about the authors see footnote 1 below.

I. Introduction

Last term, the Supreme Court issued a number of decisions that create significant obstacles for individuals seeking access to and remedial relief from federal courts. Although a few of these decisions were benign, those in the cases against government entities were troubling at best.

On March 27, 1996, the Court handed down its decision in Seminole Tribe v. Florida. /1/ By a five-to-four vote, the Court held that states' Eleventh Amendment immunity from suit in federal court cannot be abrogated by Congress when it is acting through the Indian Commerce Clause or the Interstate Commerce Clause. Part II of this article discusses the Seminole Tribe decision and analyzes its potential impact. Parts III -- IX of the article summarize the other significant decisions from last term that affect access to the federal courts and give a brief preview of the access issues that will be before the Supreme Court this term.

II. Eleventh Amendment Immunity

A. The Decision

The question posed in Seminole Tribe v. Florida /2/ was whether the Eleventh Amendment barred Congress from authorizing an Indian tribe to sue a state in federal court to compel the state to negotiate in good faith with the tribe over gaming matters as provided in the Indian Gaming Regulatory Act. /3/ In concluding that the Indian Commerce Clause did not confer on Congress the power to abrogate the state's Eleventh Amendment immunity from suit in federal court, the majority engaged in a wide-ranging examination of the scope of the Eleventh Amendment.

In an opinion by Justice Rehnquist, the Court acknowledged that Congress clearly intended to abrogate states' sovereign immunity from suit. /4/ The Court has long required "a clear legislative statement" from Congress when it sought to abrogate the states' immunity. /5/

The Court then summarily rejected the tribe's argument that the Act's authorizing only prospective injunctive relief and not money damages was germane to the Court's inquiry. /6/ The Court held

that the type of relief authorized was irrelevant; the Eleventh Amendment exists not only to prohibit money judgments against states but also to protect against the "indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." /7/

The sole remaining inquiry, and the critical one, was thus simply stated: "Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate [the States' Eleventh Amendment immunity]?" /8/ In answer to that question, the Court said that it had recognized such power in only two instances. First, the Court expressly reaffirmed its prior ruling that the Fourteenth Amendment conferred such power on Congress. /9/ That confirmation is important because it leaves undisturbed the long-standing rule that citizen suits against states are available in the civil rights/civil liberties context where Congress acts pursuant to its powers under the Fourteenth Amendment.

Second, the Court observed that, in Pennsylvania v. Union Gas Co., /10/ a highly fractured Court found that the Interstate Commerce Clause gave Congress the power to abrogate Eleventh Amendment immunity. /11/ This point was important to the Court because the tribe had argued that there was no principled basis on which to distinguish the Indian Commerce Clause from the Interstate Commerce Clause and that the rationale of Union Gas compelled the conclusion that the Indian Commerce Clause also gave Congress the power to abrogate Eleventh Amendment immunity. /12/ Although the Court agreed with the premise of the tribe's argument regarding the comparability of the commerce clauses, it rejected the tribe's conclusion. /13/ The Court reexamined the Union Gas holding with regard to the Interstate Commerce Clause and determined that it had been wrongly decided and should be overruled. /14/

Union Gas was premised on the idea that the Eleventh Amendment carried forward only the common-law presumption of sovereign immunity for states that could be overridden by Congress. Thus Congress, through its power under Article I of the Constitution, could create Article III federal court jurisdiction over private causes of action against nonconsenting states brought by their own citizens, as long as Congress did so explicitly and to vindicate a federal interest. For that reason, Union Gas was seen as giving a green light to Congress to authorize citizen suits against nonconsenting states to enforce federal rights, provided that Congress' power derived directly from the Constitution.

The majority in Seminole Tribe rejected this reasoning. It concluded that the Eleventh Amendment was intended to erect a bulwark for states against unconsented actions in federal court brought by their own citizens. Far from creating a mere presumption that could be limited by Congress, the majority viewed the Eleventh Amendment as an affirmative and categorical limitation on the Article III power of the federal judiciary forbidding unconsented suits against states in federal courts. /15/ In contrast, the Fourteenth Amendment, because it was "adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between State and federal power achieved by Article III and the Eleventh Amendment." /16/ Thus, while the Fourteenth Amendment could be properly read to grant Congress the power to abrogate the states' immunity, nothing in the "antecedent provisions in the Constitution" could be similarly construed. /17/

Also significant is the majority's treatment of Ex parte Young, /18/ which authorizes suits against state officials in order to end continuing violations of federal law. /19/ The tribe argued that it was seeking only an injunction forbidding the governor from failing to comply with the good-faith negotiation provision of the Indian Gaming Regulatory Act -- relief authorized under Young. /20/ The majority disagreed. Relying principally on the Act's repeated and specific designation of the state, not the governor, as the responsible party, the Court held that Young did not authorize the tribe's action here because the target of any relief would be the state itself, not a state official. /21/

One aspect of the Court's reasoning is especially troublesome. In rejecting the applicability of Ex parte Young, the Court said that the detailed remedial scheme that Congress established in the Act weighed heavily against permitting an action to proceed against a state officer under Young. /22/ This raises the question of whether Congress forecloses a suit based on Young whenever it spells out a remedial scheme in detail. On the other hand, the majority opinion offers a road map to distinguish its holding in Seminole Tribe since few statutes contain remedial schemes comparable in detail to that in the Indian Gaming Regulatory Act. /23/

Four justices dissented. Justice Stevens argued that Union Gas was correctly decided and that the majority opinion "prevents Congress from providing a federal forum for a broad range of actions against the State, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy." /24/ Justice Souter, joined by Justices Ginsburg and Breyer, filed a lengthy dissent, arguing that the rationale underlying Union Gas was correct and that the Eleventh Amendment was never seen as a bar to the exercise of congressional authority under the Commerce Clause in providing for suits on a federal question by individuals against a state. /25/ Justice Souter's dissent also suggests that the Court's refusal to permit an Ex parte Young-type action to proceed signals a willingness by the majority to cut back on the settled principles of Young.

B. The Decision's Impact

Three observations are worth noting for legal services attorneys.

First, the ruling does not apply to claims against states based upon federal statutes enacted under the Fourteenth Amendment. Nor does the decision upset the long-standing rule that municipalities and other local governments and their officials are amenable to suit in federal court. On the other hand, lower courts may conclude that the decision does apply in virtually every other context. Seminole Tribe decision calls into question citizen suit provisions in a wide range of environmental, health and safety, and consumer protection laws that authorize direct actions against states -- not simply against state officials.

Second, the opinion does not explicitly question the rule in Ex parte Young that Congress may authorize suits against state officials seeking prospective injunctive relief, but not money damages, compliance, or other costs.

Third, the Court acknowledges that federal courts are empowered to review questions of federal law where the state has consented to suit.

It is also worth noting that the majority in Seminole Tribe was razor thin. Given the depth of the justices' views on this matter, it is likely that the issue will be reexamined in the event that any one of the justices in the majority steps down.

C. What Comes Next?

Questions involving state immunity will occupy center stage at the Supreme Court next term. The Court has already granted review in at least two cases that potentially raise Eleventh Amendment issues.

Perhaps the most problematic of these cases is Idaho v. Coeur d'Alene Tribe, which raises the question of whether a federal court may entertain jurisdiction in a case challenging a state's title to disputed waters and submerged lands. /26/ This case is of concern because it has long been accepted, under Ex parte Young, that federal courts may hear claims involving assertions to title, provided that the relief sought is prospective. /27/ Given the tenor of Seminole Tribe, it is possible that a majority of the Court will hold that, since a title action necessarily is brought against the "state," and the state's property interest is always at stake, the federal courts must employ a presumption (perhaps rebuttable where the state's claim to the property is demonstrably frivolous) that the Eleventh Amendment bars litigation in federal courts over a state's assertion of lawful possession of property.

Ex parte Young may also be addressed in Blessing v. Freestone, a case brought under section 1983 to compel Arizona state officials to comply with Title IV-D of the Social Security Act by identifying "deadbeat" dads, collecting child support, and challenging payments to custodial parents. /28/ In many respects, Blessing is a classic invocation of Ex parte Young since the plaintiffs were quite careful to avoid any request for money damages and sought only prospective injunctive relief. Lower courts are split on whether section 1983 provides a right of action to enforce this statute, and the case may end up being decided without a reconsideration of Young. /29/ However, because state funds are needed to enforce Title IV-D, there is concern that the Court may reexamine its long-standing doctrine that Young authorizes federal courts to issue injunctions against state officials consistent with the Eleventh Amendment "even though such an injunction may have an ancillary effect on the state treasury." /30/

This concern takes on added force because the majority in Seminole Tribe found Young inapplicable in light of the detailed remedial scheme set out in the Indian Gaming Act. While the remedial provisions of Title IV-D are arguably less detailed than those in the Indian Gaming Act, some observers are concerned that the Seminole Tribe majority may use this rationale to cut back on Ex Parte Young.

Seminole Tribe signals a sea change within the Court on questions relating to the states' immunity under the Eleventh Amendment and, indeed, the balance of power between the federal and state governments struck by the Constitution. As a result, litigation against states and state officials may become more complex, and it may become necessary to use state courts more often to enforce federal rights.

III. Sovereign Immunity

In Lane v. Peña the Court ruled seven-to-two that the federal government cannot be sued for monetary damages when federal programs discriminate against individuals with disabilities outside of the employment context. /31/ The petitioner in Lane, a former student at the federally run Merchant Marine Academy, was dismissed from the academy when his diabetes was diagnosed. He claimed that the academy's actions violated Section 504 of the Rehabilitation Act of 1973, /32/ which prohibits disability-based discrimination by the federal government and by recipients of federal funds. /33/ The trial court ordered the petitioner reinstated to the academy and awarded him compensatory damages; the federal government contested the damages award as precluded by the doctrine of sovereign immunity. /34/

In an opinion by Justice O'Connor, the Court made its way through Section 504's "admittedly somewhat bewildering" statutory scheme /35/ and held that the law did not "unequivocally express" a waiver of sovereign immunity in federal program cases. /36/ The Court found that, although Congress clearly made the federal government liable for damages in disability employment discrimination cases and Section 504 specifically authorized damages from the recipients of federal assistance, Section 504 contained no similarly explicit language regarding programs run by executive agencies. /37/

The Court rejected petitioner's argument that Congress waived the government's sovereign immunity in Section 504's remedies provision, which authorizes damages against a "federal provider" of federal funds. /38/ The majority found that this provision was limited specifically to the government's role as a "provider" of funds; it refused to read the "federal provider" language to include "'any act' of an agency that serves as a 'federal provider' in any context." /39/ The Court held that such an interpretation would violate the "established practice of construing waivers of sovereign immunity narrowly in favor of the sovereign." /40/ Similarly, the majority rejected the argument that its decision in Franklin v. Gwinnett County Public Schools, which recognized a general right to monetary damages whenever a private right of action exists, /41/ authorized a damages remedy in Lane. /42/ Section 504 indicates Congress' intent to differentiate between remedies against federal and nonfederal defendants, the Court held, and thus "brings this case outside the 'general rule' we discussed in Franklin." /43/

In dissent, Justices Stevens and Breyer relied on the context in which Section 504 was enacted and subsequently amended and asserted that legislative history demonstrated Congress' understanding that the statute provided for a private right of action and damages against both federal and nonfederal defendants. /44/ The dissent decried the majority's insistence, based on United States v. Nordic Village, /45/ that legislative history was irrelevant in sovereign immunity analysis.

IV. Standing and Scope of Systemic Remedial Orders

In Lewis v. Casey the Supreme Court considered the propriety of a detailed injunction intended to provide a systemwide remedy for the failure of Arizona prison officials to give inmates adequate

access to law libraries. /46/ Although the Court was unanimous in its conclusion that the district court's remedial order was broader than necessary to remedy the violations, the justices disagreed about the nature of the underlying right of access and the legal basis for overturning the order. The upshot of Lewis is that suits seeking systemic relief for inadequate prison law libraries may be all but impossible to bring. Beyond the prison context, Lewis reemphasizes that plaintiffs must present proof of pervasive illegal practices to justify systemic remedies and that named plaintiffs must have standing to challenge each aspect of the unlawful practices for which relief is sought.

In a portion of Justice Scalia's majority opinion that was joined by four other justices, the Court interpreted its earlier decision in Bounds v. Smith /47/ as requiring an inmate plaintiff to show that "the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." /48/ Thus, a showing of lack of access to legal texts or assistance is insufficient to establish a constitutional violation. /49/ Justice Scalia reasoned that, absent a showing that the denial of access had an impact on the prosecution of a particular legal claim, an inmate could not satisfy the "injury in fact" component of the standing requirement under Article III. /50/ Moreover, the Court suggested that if an inmate's claim was found to be frivolous, even a denial of access to a law library that hindered prosecution of the claim would not constitute an "injury in fact" for standing purposes. /51/

These conclusions, however, did not dispose of the case because the district court found that two of the named plaintiffs in the action had been prejudiced in court proceedings by lack of access to the prison's law library. A five-judge majority found that these violations were inadequate to support the remedial order because the named plaintiffs lacked standing to challenge aspects of the prison's policies apart from the particular practice that the court had found to have hindered them. Justice Scalia cautioned that "standing is not dispensed in gross." /52/ He emphasized that this aspect of the standing requirement was "quite separate from the certification of the class," suggesting that, even when a class was properly certified, the scope of relief might be limited by the requirement that the named plaintiffs have standing for each element of the relief sought. /53/ Thus, Justice Scalia found that proof that inadequate library assistance hindered the ability of an illiterate prisoner to pursue a legal claim did not establish standing to challenge prison practices relating to non-English-speaking inmates, inmates in "lockdown," or inmates generally, regardless of whether these other groups were properly included in the plaintiff class.

The Court also concluded that the instances of demonstrated harm were inadequate to support systemwide relief even with respect to the practices that had been shown to have harmed the named plaintiffs. /54/ The Court found that the instances in which plaintiffs established harm to their ability to pursue legal claims were too isolated to justify systemwide relief. The Court discounted plaintiffs' evidence that class members were unable to conduct legal research because plaintiffs had not shown that other prisoners were unable to litigate claims as a result of their lack of access to legal materials. Absent such proof, the Court found that the evidence was "patently inadequate [as a] basis for a conclusion of system-wide violation and imposition of system-wide relief." /55/

Finally, the Court took the district court to task for inadequate deference to state officials in the crafting of the remedial order. The Court called the order "wildly . . . intrusive" and described the case as "a model of what should not [be done]." /56/ Instead of appointing a special master to

fashion a remedial order, the Court indicated it would be more appropriate to permit the defendants to formulate a remedial plan. /57/

Justices Souter, joined by Justices Ginsburg and Breyer, concurred in part and dissented in part. /58/ Justice Souter agreed with the Court's holding that plaintiffs' evidence was insufficient to support the systemwide remedial decree entered by the district court. /59/ However, believing that the case should be decided on the basis of the prisoners' failure of proof on the merits, he disagreed with the majority's interjection of the doctrine of standing into the case. Justice Stevens dissented. /60/ Arguing that Bounds should be completely overruled, Justice Thomas concurred separately. /61/

V. Organizational Standing

In a unanimous decision authored by Justice Souter, the Court considered an unanswered question about associational standing. /62/ The ultimate issue was whether Congress could constitutionally authorize a union to sue for damages of behalf of its members. Holding in the affirmative, the Court also provided a helpful summary of standing principles. /63/

The decision hinged on the third prong of the associational standing test, /64/ which requires an organization to show that neither the claim nor the relief requested requires participation by individual members. /65/ Courts had previously held that this standard was a constitutional requirement, rather than an aspect of the judicially imposed "prudential doctrine of standing," with the result that unions had been prohibited from bringing such suits.

The Supreme Court, however, determined that the "adversarial vigor" assured by the first and second prongs provided the necessary basis for Article III standing. /66/ By contrast, "the third prong is best seen as focusing on . . . matters of administrative convenience and efficiency, not on elements of a case or controversy within the Constitution." /67/ Accordingly, "because the only impediment to . . . suit is a general limitation, judicially fashioned and prudentially imposed, there is no question that Congress may abrogate the impediment." /68/

VI. Removal, Remand, and Abstention Cases

The Supreme Court issued two unanimous decisions addressing the jurisdictional consequences of federal removal authority. While both cases had their origins in prosaic procedural skirmishes over removal from or remand to state court, the decisions addressed other important jurisdictional issues, including whether remand orders are appealable, whether abstention may be grounds for a remand order, and whether the collateral-order doctrine applies.

A. Things Remembered v. Petrarca

The first case, Things Remembered v. Petrarca, addressed the appealability of a district court order remanding a case to the state court from which it was removed. /69/ Things Remembered began as

a state court action for unpaid rent under two commercial leases and was removed to federal court as a result of a subsequent Chapter 11 bankruptcy proceeding. /70/ The bankruptcy court, holding that removal had been timely, denied a motion to remand. On appeal, the district court reversed and remanded the case to state court. The district court held that the bankruptcy court lacked jurisdiction because removal had been untimely. /71/ An appeal of the remand order to the Sixth Circuit followed. The Sixth Circuit dismissed the appeal for lack of jurisdiction on the grounds that 28 U.S.C. Sec. 1447 barred appellate review. /72/

The Supreme Court affirmed. Justice Thomas's unanimous opinion examined the interplay between subsections (c) and (d) of 28 U.S.C. Sec. 1447. /73/ Section 1447(c) permits a remand in two specific situations: (1) upon a motion filed within 30 days after the filing of a notice of removal, on the basis of any defect in removal procedure, and (2) at any time before final judgment, on the basis that the district court lacks subject-matter jurisdiction. Section 1447(d) establishes a general prohibition against federal appellate review of remand orders. The Supreme Court reaffirmed its prior holding that these two subsections must be read in pari materia, "so that only remands based on grounds specified in Sec. 1447(c) are immune from review under Sec. 1447(d)." /74/ The Court held that, whether removal is based on the bankruptcy removal statute or the general federal removal statute, 28 U.S.C. Sec. 1447(d) bars appellate review of a district court order remanding the case to the state court from which it was removed if the remand order is based on a timely raised defect in removal procedure or lack of subject-matter jurisdiction. /75/

B. Quackenbush v. Allstate Insurance Co.

The second, and more significant case, Quackenbush v. Allstate Insurance Co., /76/ addressed the applicability of Burford abstention as a basis for an order remanding a case to state court. Quackenbush was a claim for contract and tort damages brought in state court by the California Insurance Commissioner, acting as trustee over the assets of the insolvent Mission Insurance Company, against Allstate. Allstate removed the case to federal court on the basis of diversity and then filed a motion in federal court to compel arbitration under the Federal Arbitration Act. /77/ In response, the state commissioner, arguing that the federal district court should abstain under Burford v. Sun Oil Co., moved to remand the case to state court. /78/ The district court accepted the commissioner's argument that it should abstain and remand because the federal court litigation might interfere with California's regulation of the insolvency of the Mission Insurance Company.

On appeal, the Ninth Circuit vacated the remand and ordered the case sent to arbitration. /79/ Holding that Burford abstention can be invoked by a federal court only when the relief sought is equitable in nature, the court of appeals found that abstention was improper because the state commissioner sought only legal relief. /80/ The Supreme Court affirmed, but on grounds different from those articulated by the Ninth Circuit. /81/

The Supreme Court quickly disposed of the threshold jurisdictional question of whether the remand order was itself subject to appellate review. First, taking note of its earlier decision this same term in Things Remembered, discussed above, the Court found that the district court's abstention-based remand order in Quackenbush did not fall into either category of remand orders described in 28 U.S.C. Sec. 1447(c), and therefore appeal of the remand order was not barred by operation of 28

U.S.C. Sec. 1447(d). /82/ Second, distinguishing and disavowing part of its earlier holding in Thermtron Products, Inc. v. Hermansdorfer, /83/ the Court held that the abstention-based remand order was an immediately appealable collateral order because (1) it functionally and conclusively determined an issue separate from the merits of the case, namely, whether the federal court should decline to exercise jurisdiction; (2) the rights asserted on appeal were of sufficient importance to warrant an immediate appeal; and (3) the district court's abstention-based remand order "will not be subsumed by any other appealable order entered" by the federal district court. /84/

Having disposed of the jurisdictional question, the Supreme Court set out an authoritative summary of federal abstention doctrines and the constitutional concerns that inform them. The Court canvassed all the familiar abstention cases, including Pullman, Younger, Huffman, Colorado River, and their progeny. /85/

Finally turning its attention specifically to the contours of the Burford abstention doctrine, the Court reinforced the notion that the balance to be struck between the competing concerns of comity and federalism "only rarely favors abstention" and application of Burford is an "extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." /86/ The Court observed that the state's interest in Quackenbush appeared to be "nothing more than a run-of-the-mill contract dispute." /87/

While affirming the court of appeals' judgment overturning the order of remand, the Court found the Ninth Circuit's analysis incomplete. The Court agreed that a federal court's "power to abstain" in certain cases was rooted in the unique "discretionary" power of equity courts to grant or deny relief. /88/ The analytical error of the Ninth Circuit, however, was its per se conclusion that the power to abstain under Burford, if otherwise applicable, is limited to cases where equitable relief is sought. /89/ According to the Court, the key distinction is whether the relief sought is discretionary, not whether it is equitable as opposed to legal. "Burford might support a federal court's decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law." /90/

VII. Granting Certiorari, Vacating the Judgment, and Remanding

Members of the Supreme Court aired their differing views about when it is appropriate to grant a petition for certiorari, vacate the judgment below, and remand the case (GVR) for further consideration in two unrelated cases. /91/ In Lawrence v. Chater the Fourth Circuit had affirmed the denial of survivors' benefits under Title II of the Social Security Act /92/ and expressly adopted the government's argument that the constitutionality of a state paternity law need not be considered before applying it to determine entitlement to child's benefits. /93/ While the case was pending before the Supreme Court, the government repudiated the position it had advanced below. /94/ The Solicitor General, although not conceding that claimant was entitled to child's benefits, asked the Supreme Court to GVR /95/ the case so that the court of appeals could consider the government's new position. /96/

The Court's per curiam opinion discussed the broad power to GVR conferred by 28 U.S.C. Sec. 2106. /97/ The Court stated that when intervening or recent developments that might not have been

fully considered by the Court below revealed a reasonable probability that the lower Court might change its decision, a GVR order was "potentially appropriate." /98/ Whether a GVR order is "ultimately appropriate" depends on whether "the overall probabilities and the equities support the GVR order." /99/

Applying these general principles, the Court concluded that a GVR order was appropriate in Lawrence. The Court found that there was a reasonable probability that the court of appeals would defer to the government's new position and that such deference might result in a decision favorable to the claimant. /100/ It also concluded that the equities supported a GVR order. The government's new interpretation appears contrary to its self-interest; the government plans to apply its new interpretation to future cases nationwide; it is only fair to give claimant an opportunity to benefit from this change in the government's position. /101/

In the second case, Stutson v. United States, the district court had dismissed an appeal of a criminal conviction and sentence on the grounds that it was untimely and not the result of "excusable neglect" under Rule 4(b) of the Federal Rules of Appellate Procedure. /102/ The court of appeals affirmed without hearing oral argument or writing an opinion. /103/ The Supreme Court's per curiam opinion identifies five factors supporting the GVR order. First, as in Lawrence, the government had repudiated the position it advanced below. Second, the district court's opinion did not refer to Pioneer Investments v. Brunswick Associates, a decision rendered one day before Stutson's brief was due and not cited in any of the briefs in the district court. /104/ Third, the court of appeals summarily affirmed the district court decision. Fourth, six courts of appeals have relied on Pioneer Investments to interpret Rule 4(b). /105/ Fifth, Mr. Stutson remains in jail having, through no fault of his own, had no plenary considerat
ion of his appeal. /106/

Justice Scalia, joined by Justice Thomas, dissented from the GVR orders in both cases. /107/ Justice Scalia argued that the GVR orders in these cases were improper extensions of the Court's limited power to vacate without first finding error below. /108/ Although Justice Scalia admitted that 28 U.S.C. Sec. 2106 was on its face unlimited, he argued that it was subject to implicit limitations imposed by the very nature of our appellate system. /109/ Justice Scalia would limit the use of a GVR order to three categories of cases: "(1) where an intervening factor has arisen that has a legal bearing upon the decision, (2) where, in a context not governed by Michigan v. Long, . . . clarification of the opinion below is needed to assure our jurisdiction, and (3) . . . where the respondent or appellee confesses error in the judgment below." /110/

Justice Scalia's discussion of the first factor is of particular interest to legal services practitioners. Justice Scalia does not believe that the Supreme Court should issue a GVR order based on an intervening event where the intervening event is a party's repudiation of its position below and it is not certain that the change in position is "legally cognizable." /111/ Justice Scalia argued that the Supreme Court's concern for parties litigating against the federal government and for lower court judges should induce the Court to refuse to defer to the government's litigation position first expressed at the certiorari stage. /112/ This discussion may be useful in opposing deference when the government changes its position in the litigation.

VIII. Preclusive Effect of State Class Action on Subsequent Federal Class Action

In Matsushita Electric Industrial Co. v. Epstein /113/ the Court applied its earlier holding in Marresse v. American Academy of Orthopaedic Surgeons /114/ to find that the release clause in a class action settlement in Delaware state court precluded a subsequent class action brought in federal court raising issues that were within the exclusive jurisdiction of the federal courts. The Court reiterated that principles of full faith and credit required that the preclusive effect of state court judgments should be determined pursuant to the law of the state that rendered the first judgment. /115/ Because the Court concluded that Delaware would give preclusive effect to a class action settlement that released all claims, regardless of whether they could have been raised in the first action, it found that the subsequent federal class action was barred. /116/

IX. Looking Forward with Trepidation

As of the end of the 1995 term, the Court agreed to hear four cases that could have federal court access ramifications.

Blessing v. Freestone. /117/ Whether Title IV of the Social Security Act creates a private right of action for custodial parents to enforce child support enforcement services against a state.

M.L.B. v. S.L.J. /118/ Whether a state that provides appeals as a matter of right from lower court decisions terminating parental rights may condition those appeals upon parent's ability to pay fees in excess of $2,000.

Idaho v. Coeur d'Alene Tribe of Idaho. /119/: Whether the Eleventh Amendment prohibits an action for declaratory and injunctive relief by an Indian tribe against state officials that will have the effect of adjudicating state's title to disputed waters and submerged lands.

Regents of University of California v. Doe. /120/ Whether an "arm of state" that would otherwise be immune from suit in federal court under the Eleventh Amendment loses its immunity when it has a reimbursement or indemnity claim from a third party.

Footnotes

/1/ Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (Clearinghouse No. 51,112). David Vladeck, director of Public Citizen Litigation Group, a public interest law firm in Washington, D.C., wrote part I of this article with research assistance from Brendan Lynch, a second-year law student. The other authors of this article are members of the Federal Court Access Group, an ad hoc group of legal services and public interest attorneys originally organized by the National Senior Citizens Law Center to monitor Supreme Court developments concerning poor people's access to federal court. The group gratefully acknowledges the continuing support of the Lou Stein Center on Ethics and Public Interest Law at Fordham University School of Law. Laurie Davison is litigation director

at Mid-Minnesota Legal Assistance; Gill Deford, a former National Senior Citizens Law Center staff attorney, is director of the Mental Health Legal Advisory Committee in Boston, Massachusetts; Matthew Diller is a professor at Fordham Law School; Shelley Jackson is a staff attorney at the Judge David L. Bazelon Center for Mental Health Law; and Brian Lawlor is regional counsel at Legal Services of Northern California. For more information on the Federal Court Access Group, contact Laurie Davison, Mid-Minnesota Legal Assistance, 430 1st Ave. N., Suite 300, Minneapolis, MN 55401-1780, (612) 334-5785, ext. 205.

/2/ Id.

/3/ Indian Gaming Regulatory Act, 25 U.S.C. Secs. 2701 et seq.

/4/ Seminole Tribe, 116 S. Ct. at 1123 -- 24.

/5/ Id. at 1123.

/6/ Id. at 1124.

/7/ Id. (quoting Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)).

/8/ Id. at 1125.

/9/ Id. (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Clearinghouse No. 15,532)).

/10/ Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

/11/ Seminole Tribe, 116 S. Ct. at 1125.

/12/ Id.

/13/ Id. at 1127.

/14/ Id. at 1128.

/15/ Id. at 1127 -- 28.

/16/ Id. at 1128.

/17/ Id.

/18/ Ex parte Young, 209 U.S. 123 (1908).

/19/ Seminole Tribe. 116 S. Ct. at 1132 -- 33.

/20/ Id. at 1132.

/21/ Id.

/22/ Id. at 1132 -- 33.

/23/ In addition, the remedial scheme in the Indian Gaming Act stressed the role of the state, rather than particular state officials, thereby making the fiction of Ex parte Young particularly implausible.

/24/ Id. at 1133, 1134 (Stevens, J., dissenting).

/25/ Id. at 1145 (Souter, J., dissenting).

/26/ Idaho v. Coeur d'Alene Tribe, 42 F.3d 1244 (9th Cir. 1994), cert. granted, 116 S. Ct. 1415 (1996).

/27/ See Florida v. Treasure Salvors, 458 U.S. 670, 690 (1982).

/28/ Freestone v. Cowan, 68 F.3d 1141 (9th Cir. 1995), cert. granted sub nom. Blessing v. Freestone, 116 S. Ct. 1671 (1996) (Clearinghouse No. 50,109).

/29/ Suter v. Artist M., 503 U.S. 347 (1992) (Clearinghouse No. 48,036), erected substantial hurdles to private enforcement of certain provisions of the Social Security Act. Congress, however, explicitly overruled the holding of Artist M. relating to enforcement of state plan requirements. 42 U.S.C. Sec. 1320a-10.

/30/ Quern v. Jordan, 440 U.S. 332, 337 (1979) (Clearinghouse No. 5000).

/31/ Lane v. Peña, 116 S. Ct. 2093 (1996).

/32/ 29 U.S.C. Secs. 794 et seq.

/33/ Id. Sec. 794(a).

/34/ See Lane, 116 S. Ct. at 2095.

/35/ Id. at 2098.

/36/ Id. at 2096.

/37/ Id. at 2097 (citing a provision of the 1991 Civil Rights Act that amended section 501 of the Rehabilitation Act to authorize the recovery of compensatory and punitive damages against the federal government in disability-based employment cases, 42 U.S.C. Sec. 1981(a)(2), and 29 U.S.C. Sec. 794a(a)(2), providing that the remedies of Title VI of the Civil Rights Act of 1964

[including monetary damages] are available to "any person aggrieved . . . by any recipient of Federal assistance or Federal provider of such assistance").

/38/ Id. at 2096 (describing the plaintiffs' argument); see also id at 2100 -- 2101 (Stevens, J., dissenting) (citing 29 U.S.C. Sec. 794a(a)(2)).

/39/ Id. at 2097.

/40/ Id. at 2098.

/41/ Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992). Franklin concerned Title XIX of the Education Amendments of 1972, which prohibits gender discrimination in educational programs and which, like Section 504, was based on Title VI of the Civil Rights Act.

/42/ Both the petitioner, see Lane, 116 S. Ct. 2098, and the dissent, id. at 2100, 2105 n.13 (Stevens, J., dissenting), cited Franklin.

/43/ Id. at 2099.

/44/ Id. at 2102 -- 3 (Stevens, J., dissenting).

/45/ United States v. Nordic Village, 503 U.S. 30 (1992).

/46/ Lewis v. Casey, 116 S. Ct. 2174 (1996) (Clearinghouse No. 51,359).

/47/ Bounds v. Smith, 430 U.S. 817 (1977) (Clearinghouse No. 16,775). In Bounds the Court held that the "fundamental constitutional right of access to courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id. at 828.

/48/ Lewis, 116 S. Ct. 2180.

/49/ The Court disavowed language in Bounds that suggested that the state must enable prisoners to discover grievances and to litigate them effectively in court. Id.

/50/ Id. at 2180.

/51/ Id. at 2181 n.3.

/52/ Id. at 2183 n.6.

/53/ Id.

/54/ Id. at 2184.

/55/ Id. The requirement that plaintiffs show not only that there is a systemic denial of access to legal materials but also that this denial results in widespread or pervasive prejudice to the litigation of nonfrivolous claims will make it extremely difficult to establish the factual predicate necessary for systemic relief in prison library cases. Moreover, this requirement may be construed as requiring particularized proof with respect to different class members, thus making it difficult to establish the prerequisites for class certification.

/56/ Id. at 2185.

/57/ Id.

/58/ Id. at 2200 (Souter, J., concurring).

/59/ Id.

/60/ Id. at 2206 (Stevens, J., dissenting).

/61/ Id. at 2186 (Thomas, J., concurring).

/62/ United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529 (1996).

/63/ Id. at 1533 -- 34.

/64/ See Hunt v. Washington Apple Growers Comm'n, 432 U.S. 333, 343 (1977) (an association has standing when (1) its members would have standing to sue in their own right, (2) the interests it seeks to protect are germane to its purpose, and (3) participation by its individual members is unnecessary).

/65/ United Food, 116 S. Ct. at 1534.

/66/ Id. at 1536.

/67/ Id.

/68/ Id. at 1537.

/69/ Things Remembered, Inc. v. Petrarca, 116 S. Ct. 494 (1995).

/70/ Id. at 496.

/71/ Id.

/72/ Id.

/73/ Section 1447 governs procedures following removal from state to federal court.

/74/ Id. at 497 (citing Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 345 -- 46 (1976)).

/75/ Id.

/76/ Quackenbush v. Allstate Insurance Co., 116 S. Ct. 1712 (1996).

/77/ See 9 U.S.C. Secs. 1 et seq.

/78/ Derived from the holding in Burford v. Sun Oil Co., 319 U.S. 315 (1943), Burford abstention is premised on the notion that federal courts should avoid the disruptive impact caused by federal intervention in a state's operation of a unique and complex administrative structure regulating certain vital state activities. See generally Michael Masinter et al., Federal Practice Manual for Legal Services Attorneys 210 -- 12 (1989). Burford abstention is "rarely invoked by federal courts" and, "[a]mong the various abstention doctrines, . . . is least likely to affect federal litigation." Id. at 211 -- 12.

/79/ Garamendi v. Allstate Ins. Co., 47 F.3d 350 (9th Cir. 1995).

/80/ Id. at 354 -- 56.

/81/ Quackenbush, 116 S. Ct. at 1718. Justice O'Connor delivered the opinion of the Court, and Justices Scalia and Kennedy each concurred separately.

/82/ Id.

/83/ Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976). In Thermtron Products the Supreme Court had held that "an order remanding a removed action does not represent a final judgment reviewable by appeal." Id.. at 352 -- 53. In Quackenbush the Supreme Court disavowed that decision as inconsistent with its subsequent holding in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). See Quackenbush, 116 S. Ct. at 1720.

/84/ Quackenbush, 116 S. Ct. at 1719 -- 20.

/85/ See id. at 1720 -- 27 (citing Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941); Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)).

/86/ Id. at 1727 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)).

/87/ Id. at 1727.

/88/ Id.

/89/ Id. at 1728.

/90/ Id.

/91/ Stutson v. United States, 116 S. Ct. 600 (1996); Lawrence v. Chater, 116 S. Ct. 604 (1996).

/92/ 42 U.S.C. Secs. 402(d)(1)(C), 416(h)(2)(A).

/93/ See Lawrence, 116 S. Ct. 604, 605.

/94/ Id. at 605.

/95/ Although not yet in Webster's, the term GVR is used by the Court itself as a noun, an adjective, and a verb.

/96/ Id. at 606.

/97/ Section 2106 confers broad authority to vacate and remand not only on the Supreme Court but also on any other court of appellate jurisdiction.

/98/ Id. at 607.

/99/ Id. at 607, 609.

/100/ Id. at 610.

/101/ Id.

/102/ Stutson, 116 S. Ct. at 602.

/103/ Id.

/104/ In Pioneer Inv. v. Brunswick Assocs., 507 U.S. 380 (1993), the Court interpreted "excusable neglect" in the context of failure to file a timely proof of claim in a bankruptcy case. See Stutson, 116 S. Ct. at 602.

/105/ Id. at 601 (citing United States v. Clark, 51 F.3d 42 (5th Cir. 1995); United States v. Hooper, 9 F.3d 257 (2d Cir. 1993); Chanute v. Williams Natural Gas Co., 31 F.3d 1041 (10th Cir. 1994); Fink v. Union Central Life Ins. Co., 65 F.3d 722 (8th Cir. 1995); Reynolds v. Wagner, 55 F.3d 1426 (9th Cir. 1995); Virella-Nieves v. Briggs & Stratton Corp., 53 F.3d 451 (1st Cir. 1995)).

/106/ Stutson, 116 S. Ct. at 602.

/107/ Id. at 611 -- 12.

/108/ Id.

/109/ Id.

/110/ Id. at 619. In Michigan v. Long, 463 U.S. 1032, 1042 (1983), the Supreme Court held that it would presume that state-court decisions that discussed federal law were based on federal law unless it was clear from the opinion itself that the state court relied upon adequate and independent state grounds.

/111/ Id. at 617.

/112/ Id. at 616 -- 17. Justice Scalia described the government's repudiation of the position it advanced below as a "bait-and-switch performance" and warned that the government would take full advantage of the opportunity to "wash out, on certiorari, disadvantageous positions it has embraced below; and . . . focus less of its energy upon getting its position 'right' in the Court of Appeals." Id. at 617.

/113/ Matsushita Elec. Indus. Co. v. Epstein, 116 S. Ct. 873 (1996).

/114/ Marresse v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985).

/115/ Matsushita, 116 S. Ct. at 877.

/116/ Id. at 880.

/117/ Blessing v. Freestone, 116 S. Ct. 1671 (1996) (No. 95-1441). See supra section II.C.

/118/ M.L.B. v. S.L.J., 116 S. Ct. 1349 (1996) (No. 95-853).

/119/ Idaho v. Coeur d'Alene Tribe of Idaho, 116 S. Ct. 1415 (1996) (No. 94-1474). See supra section II.C.

/120/ Regents of Univ. of Cal. v. Doe, 65 U.S.L.W. 3157 (Aug. 1, 1996) (No. 95-1694).