Class Certification, Section 1983, and More: Decisions Concerning Access to Federal Court During the Supreme Court's 1996–97 Term

by Gill Deford, Matthew Diller, Brian Lawlor, and Yolanda Vera

While the newspapers were filled with reports about the landmark decisions of the Supreme Court last term, including its decisions on the "right to die," religion in schools, Paula Jones and the Brady law, the Court also issued a steady stream of arcane technical decisions about procedural matters that, for the most part, drew little attention. Nonetheless, many of these decisions are potentially important for poverty lawyers litigating in the federal courts. This article rounds up last term's decisions that affect the ability of poor people to seek redress through the court system. For the most part plaintiffs dodged bullets as the Court declined invitations to restrict actions dramatically under section 1983 and to dissect the doctrine of Ex parte Young; the doctrine enables state officials to be sued in federal court without running afoul of Eleventh Amendment immunity. Indeed, the side of truth and justice even prevailed in a few close decisions, including a case holding that states must waive transcript fees when dealing with the termination of parental rights and a decision that prison guards employed by for-profit prison management companies may not claim qualified immunity from suit.

I. Class Certification Standards and Settlement Approval

The decision in Amchem Products v. Windsor is the Court's most far-ranging consideration of the standards governing class certification since its 1982 decision in General Telephone Co.

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1 See infra text accompanying notes 48-66. The authors dedicate this article to Laurie Davison, a nationally recognized and admired legal services attorney, a much-loved friend and colleague, and a founding member of the Federal Court Access Group. She died in late 1996 after a brief illness. The authors are members of the Federal Court Access Group, an ad hoc group of legal services and public interest attorneys monitoring 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. Gill Deford is an attorney with the American Association of Retired Persons' litigation unit; Matthew Diller is an associate professor of law at Fordham University School of Law; Brian Lawlor is regional counsel at Legal Services of Northern California; and Yolanda Vera is a staff attorney at the Western Center on Poverty Law. For more information about the Federal Court Access Group contact Matthew Diller, Fordham University School of Law, 140 W. 62d St., New York, NY 10023; (212) 636-6980.

2 See infra text accompanying notes 119-45.

3 See infra text accompanying notes 97-100.

The complaint in *Amchem* was filed on the same day as a proposed settlement. It raised claims on behalf of all persons who had been exposed to asbestos manufactured by any one of 20 defendants and who had not yet filed a lawsuit. The class included individuals who had already contracted illnesses due to exposure as well as individuals who had not yet contracted and might never suffer from asbestos-related illness. The parties asked the court to certify—contingent on approval of the proposed settlement—a plaintiff class under Rule 23(b)(3). The settlement was an elaborate scheme for paying out damages, including varying damage awards for particular categories of diseases and a series of procedures to resolve disputes about the classification of particular class members. In general, plaintiffs who had been exposed to asbestos but who suffered no illness could not recover unless and until they actually became sick. The notice of the proposed settlement also provided that class members could either opt out within a three-month period or be bound in perpetuity. The district court approved the settlement and certified the class. The Third Circuit reversed. The Supreme Court upheld the Third Circuit. Writing for the majority, Justice Ginsburg focused on the impact

8 See Coffee, supra note 7, at 1378–82.
10 The standards for class certification are set forth in Fed. R. Civ. P. 23(a)–(b). The requirement of judicial approval of settlements in class actions is created by Rule 23(e).
11 The Supreme Court noted that this practice had become a "stock device" in federal practice, *Amchem*, 117 S. Ct. at 2247.
12 *Id.* at 2239–40.
13 *Id.* at 2241.
of a proposed settlement on the question of whether a class should be certified. The courts of appeals had split on this issue. The Third Circuit held that the court should ignore the existence of a proposed settlement in determining whether to certify a class and focus on whether the case could and should be litigated as a class action.\textsuperscript{15} However, other courts, finding that the question of whether the settlement was fair subsumed all or part of the certification standards, had concluded that the prospect of settlement obviated the need for a separate inquiry into whether a class should be certified.\textsuperscript{16}

Justice Ginsburg, in rejecting both extremes, concluded that a proposed settlement was “relevant” to class certification but that many aspects of the certification standard must still be addressed.\textsuperscript{17} In particular, she found that when “confronted with a request for settlement[-]only class certification, a district court need not inquire whether the case[,] if tried, would present intractable management problems . . . for the proposal is that there be no trial.”\textsuperscript{18} That the class may be so diverse that the case cannot actually be brought to trial does not prohibit class certification for settlement purposes.

In other respects, however, the opinion embraced the Third Circuit’s suspicious view of simultaneous motions for certification and approval of a settlement. Justice Ginsburg concluded that courts could not rely on the fairness of a proposed settlement to fulfill the requirements of Rule 23(a) and (b) designed to protect absent class members.\textsuperscript{19} To the contrary, she suggested, “proposed settlement classes sometimes warrant more, not less caution.”\textsuperscript{20}

In particular, the requirement of Rule 23(b)(3) that common questions “predominate”\textsuperscript{21} cannot be met by viewing the proposed settlement as the pre-

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\textsuperscript{15} Id. at 625; \textit{In re General Motors}, 55 F.3d at 799–800.
\textsuperscript{16} See, e.g., \textit{In re Asbestos Litig.}, 90 F.3d 963 (5th Cir. 1996); \textit{White v. National Football League}, 41 F.3d 402 (8th Cir. 1994); \textit{In re A.H. Robins, Co.}, 880 F.2d 709, 740 (4th Cir. 1989). Prior to the decision in \textit{Amchem}, proposals had been made to resolve this disagreement by amending Rule 23. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 117 S. Ct. 1 (1996) (requesting comments on proposed amendment to Rule 23). What effect the \textit{Amchem} decision will have on these efforts is unclear.
\textsuperscript{17} \textit{Amchem}, 117 S. Ct. at 2248.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 2248 n.16.
\textsuperscript{21} \textit{FED. R. CIV. P.} 23(b)(3).
\textsuperscript{22} \textit{Amchem}, 117 S. Ct. at 2249–50.
\textsuperscript{23} Id. at 2249.
\textsuperscript{24} Id. at 2250 (quoting 83 F.3d at 626).
\textsuperscript{25} Id.; see \textit{FED. R. CIV. P.} 23 (1966 advisory committee’s note).
arising “from a common cause or disaster” nonetheless might satisfy the predominance requirement, courts should exercise caution “when individual stakes are high and disparities among class members great.”

The Court also found that the case did not satisfy the adequacy-of-representation requirement of Rule 23(a)(4) because of conflicts of interest within the class. In this respect Justice Ginsburg found the inclusion of individuals who were currently ill with those who had been only exposed to asbestos in a “single giant class” to be particularly troubling. In her view the settlement necessarily reflected allocation decisions between these two groups “with no structural assurance of fair and adequate representation.” She rejected the district court’s view that a single representative could negotiate effectively on behalf of both groups by simply trying to get more from the defendants for each of them. Justice Ginsburg did not view the named plaintiffs being drawn from both groups as significant either. Absent formal subclasses, each of the representatives shared the same conflict. She quoted a Second Circuit decision that “the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.”

Justice Breyer, joined by Justice Stevens, concurred and dissented in part, noting that he placed greater weight on the benefits of settlement of the case and was “uncertain” about a number of aspects of the Court’s ruling. In particular, Justice Breyer indicated that the existence of a proposed settlement should bear on the question of predominance. He also stated that he would have granted more deference to the district court’s finding that the class was adequately represented.

On its own terms Amchem may not appear that relevant to poverty law practitioners, as they generally do not file toxic tort cases. Moreover, poverty lawyers tend to seek injunctive relief in class actions rather than damages and therefore usually rely on Rule 23(b)(2), instead of 23(b)(3).

Several aspects of Amchem, however, are pertinent to poverty lawyers. First, much of the Court’s discussion of simultaneous motions for class certification and approval of a settlement would apply in a Rule 23(b)(2) class action. Although the predominance test is inapplicable in Rule 23(b)(2) actions, Rule 23(a) still requires that the class be connected by “common questions” and be represented by plaintiffs who are “typical” of the class. Amchem suggests that

26 Amchem, 117 S. Ct. at 2250.
27 Id. at 2250-51.
28 Much attention has been focused on the issue of whether, because of questions about the ripeness of their claims, including the claims of exposure-only class members in class actions is at all proper, and whether notice to such class members can ever be adequate. See, e.g., Coffee, supra note 7, at 1422-38; Wolman & Morrison, supra note 9, at 451-56. The Court’s ruling that at a minimum these “future” class members were entitled to separate representation obviated the need to decide these issues. The Court did, however, comment on the notice issue. See infra note 30.
29 Amchem, 117 S. Ct. at 2251.
30 Id. (quoting In re Joint Eastern and Southern Dist. Asbestos Litig., 982 F.2d 721, 942-43 (2d Cir. 1992), modified on reb’g, 993 F.2d 7 (2d Cir. 1993)). The Court also noted that the notice to the class was “highly problematic” because the class included individuals who had been exposed to asbestos and their family members who were unaware of the exposure and therefore would not realize that their rights were affected by the settlement. Id. at 2252. In light of the Court’s other rulings, however, it did not make a ruling on the notice issue. Id.
31 Id. at 2252-53.
32 Id. at 2254-55.
33 Id. at 2256-57.
34 Fed. R. Civ. P. 23(a).
commonality and typicality should be determined through an analysis of the legal and factual claims raised by the case, rather than through reference to a proposed settlement. The Court's statement that judicial scrutiny of a proposed settlement under Rule 23(e) is not intended to ensure class cohesion implies that it cannot be viewed as subsuming the commonality and typicality requirements which are intended to serve this purpose.

Second, *Amchem* adopts a stringent view of the adequacy-of-representation requirement. In finding a conflict between class members who were currently ill and those who had been only exposed, the decision suggests that the pursuit of different goals by class members creates a conflict even when these goals are not inconsistent. This conflict arises from the Court's view that the settlement necessarily involved trading off class members' claims against one another. If, however, the adequacy-of-representation determination were made without regard to the settlement, as the Court requires of other certifications that bear on the fairness of class adjudication, no conflict would appear since both groups of class members could prevail at trial, and their legal or factual claims had no apparent inconsistencies. The problem arose from the settlement which included an implicit allocation of benefits among different groups of class members. Apparently then the settlement cannot be relied on as a basis for seeking class certification, except in matters going to convenience and efficiency, but it can be used as a basis for finding that the requirements of class certification have not been met.

One problem with this approach is that it invites lower courts making determinations of adequacy of representation to imagine hypothetical trade-offs that class representatives may be called on to make. Courts should not read Justice Ginsburg's opinion as holding that the representation of the class in *Amchem* was necessarily inadequate, only that the nature of the settlement made it inadequate. Thus the Court's discussion of adequacy of representation may not be that pertinent to certification motions made outside the context of settlement.

Within the settlement context, however, the Court's willingness to find that plaintiffs' counsel were implicitly allocating benefits among class members, instead of simply attempting to get the most possible from the defendants, means that subclasses may be necessary in negotiating settlements that accord different treatment to portions of the class. They may be necessary even in situations where the relief accorded to the subgroups is not inconsistent if the defendant appears to be only willing to hand over a limited amount of benefits and counsel is called upon to make distributional decisions among class members.

The Court could have avoided this result by addressing the problems relat-

35 Justice Ginsburg did not address these requirements directly because she viewed the predominance test of Rule 23(b)(3) to be a more stringent version of the same inquiry. *Amchem*, 117 S. Ct. at 2250 (noting that the predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a)).

36 Id. at 2249.


38 See *Amchem*, 117 S. Ct. at 2251 ("the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability").

39 Indeed, that almost all aspects of class representation require distributional decisions could be argued. As Nancy Morawetz wrote, "The very nature of lawyering requires the class attorney to make decisions at every stage of a case that reflect priorities for the goals of the litigation, and any such set of priorities will affect different members of the class differently" (*Bargaining, Class Representation and Fairness*, 54 OHIO ST. L.J. 1, 2–3 (1993)).
ing to the allocation of benefits in the settlement as part of the inquiry under Rule 23(e) which governs approval of the settlement, rather than reading them back into the adequacy-of-representation requirements of Rule 23(a).

Through this approach the court could have considered whether each subgroup received a settlement benefit that was fair in light of the attendant risks of continued litigation. Justice Ginsburg, however, was clearly more comfortable directing courts to focus on the fairness of the negotiation process, rather than the fairness of the substantive results. After Amchem, counsel for proposed classes can expect closer judicial scrutiny of potential intraclass conflicts. The use of separately represented subclasses may be necessary to overcome concerns about such conflicts.

II. Liability Under Section 1983

The Court issued five decisions last term addressing the liability of state and local governments and officials for violations of federal rights under section 1983. In Blessing v. Freestone the Court addressed the issue of when federal law gives rise to enforceable federal rights. In McMillian v. Monroe County, Alabama and Board of County Commissioners of Bryan County, Oklahoma v. Brown the Court addressed the scope of municipal liability under the statute. In Richardson v. McKnight the Court considered whether the defense of qualified immunity was available to prison guards who were employees of a for-profit company that had contracted with a state to manage its correctional facilities. And in Johnson v. Fankell the Court addressed the question of whether state courts must permit interlocutory appeals from denials of qualified immunity in section 1983 cases.

A. Federal Laws Versus Federal Rights

Blessing v. Freestone is principally noteworthy for what it did not do. The Court declined to address defendant's argument that it overrule Maine v. Thiboutot, the case which established that state officials can be held liable under section 1983 for violation of federal statutes. Instead, in an opinion by Justice O'Connor, the Court unanimously held that mothers whose children were eligible for state child support services under Title IV-D of the Social Security Act were barred from using section 1983 to challenge a state's failure to "substantially comply" with the federal requirements governing the program.

Title IV-D, like many federal laws, provides funding for states to operate a program designed to benefit a specific group, in this case children with claims

40 Courts generally take into account both the adequacy of the settlement and the fairness of the way benefits are distributed among class members in deciding whether to approve a proposed settlement under Rule 23(e). See Morawetz, supra note 39, at 12 & n.33 (noting that courts utilize a multifaceted text to review proposed settlements but that most of these factors bear on a comparison between how the plaintiffs would fare under the settlement with how well they might be expected to fare in court).

41 See id. at 4 (noting how the case law tends to avoid issues of substantive fairness by looking primarily to institutional arrangements as a guarantor of fairness).

42 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects...any citizen of the United States or other person within the jurisdiction thereof...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."


46 Richardson v. McKnight, 117 S. Ct. 2100 (1997).


48 Blessing, 117 S. Ct. at 1353.


50 Blessing, 117 S. Ct. at 1359 n.3.
for child support against absent parents. The federal statute and implementing regulations provide a series of requirements that states must meet to remain eligible for federal funding. Prior decisions of the Court have made clear that intended beneficiaries of such programs may sue state officials under section 1983 for failure to comply with federal requirements.

In Blessing the Court reiterated that three factors should be considered in determining whether a federal law creates rights that may be enforced through section 1983: (1) did Congress intend the statute to benefit the plaintiff; (2) is the statute so vague and amorphous that its enforcement would "strain judicial competence," and (3) does the statute unambiguously impose binding obligations on the state?

The plaintiffs claimed that Arizona violated the statutory requirement that it remain "in substantial compliance" with its child support enforcement plan. By all accounts, Arizona's child support enforcement program was a disaster, and the plaintiffs sought a broad injunction establishing judicial oversight over the program.

The Ninth Circuit concluded that the requirement of "substantial compliance" was not too vague to be capable of judicial enforcement because the elements of compliance were spelled out in detailed statutes and regulations. The Supreme Court, however, found that this approach "paints with too broad a brush." Justice O'Connor explained that "[o]nly when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set for determining whether a federal statute creates rights." The Court held that the "substantial compliance" requirement of the statute was not intended to benefit children and custodial parents. Instead the requirement was intended to create a "yardstick" to enable the Department of Health and Human Services to measure a state's performance.

The Court went on to add that Title IV-D contained many provisions that were not intended to benefit the plaintiffs, such as data collection, reporting, and staffing requirements. The Court viewed these requirements as too remote from the provision of services to plaintiffs to constitute rights. Justice O'Connor stated that "the link between increased staffing and the services provided is far too tenuous to support the notion that Congress meant to give each and every Arizonan who is eligible for Title IV-D the right to have [the state agency] staffed at a 'sufficient' level."

In concluding, however, Justice O'Connor noted that "[w]e do not fore-

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53 Blessing, 117 S. Ct. at 1359.
54 42 U.S.C. § 602(27).
55 Blessing, 117 S. Ct. at 1357. Perhaps in deference to her home state, Justice O'Connor termed the state's record "less than stellar." Id.
56 Id. at 1360.
58 Blessing, 117 S. Ct. at 1360.
59 Id.
60 Id. at 1361.
61 Id.
62 Id. at 1361-62.
63 Id. at 1362.
close the possibility that some of the provisions of Title IV-D give rise to individual rights. Therefore the Court remanded the case to the district court to determine whether plaintiffs were alleging the violation of any specific statutory requirements that gave rise to rights. In remanding the case the Court rejected defendant's argument that the authority of the Department of Health and Human Services to audit a state's Title IV-D program and to impose penalties amounted to a remedial scheme comprehensive enough to warrant a conclusion that Congress intended to foreclose judicial review at the behest of individuals under section 1983.

The decision in Blessing makes somewhat more difficult plaintiffs' use of section 1983 as a vehicle for correcting wide-scale massive administrative failures. Nonetheless, it leaves the door open for narrowly drawn complaints that seek the same end.

B. Municipal Liability

Since the landmark decision in Monell v. New York City Department of Social Services local governments have been held liable under section 1983 for policies causing constitutional torts. Those policies may be set by local government lawmakers or those whose acts represent official government policy. This past term the Supreme Court decided two police misconduct cases that examined the limits on municipal liability under section 1983 for the tortious acts of their local law enforcement officers.

McMillian v. Monroe County, Alabama involved a section 1983 action brought by former inmate McMillian who, after six years on Alabama's death row for a murder conviction, was released on grounds that law enforcement officials had suppressed evidence. After his release McMillian brought suit in federal court against, among others, the county sheriff who investigated his criminal case. Suing the sheriff in the sheriff's official capacity under section 1983, McMillian alleged that the sheriff violated his constitutional rights by intimidating witnesses into making false statements and suppressing exculpatory evidence. The district court dismissed the civil rights claims, and the Eleventh Circuit affirmed, agreeing with the lower court that the county sheriff was not a "final policymaker" in the area of law enforcement for Monroe County "because Monroe County has no law enforcement authority." The parties disagreed about whether the sheriff—who admittedly had authority to make "final policy" in the area of law enforcement—acted as a county or state official. In a 5-4 decision written by Chief Justice Rehnquist the Court canvassed Alabama's constitution, laws, history, and state court decisions to determine whether a local sheriff under Alabama law should be viewed as a law enforcement "policymaker" for the county or the state. The majority decided that "the weight of the evidence is strongly on the side of the conclusion [that] Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties."

Based on this finding, the Court affirmed the decision in Blessing makes somewhat more difficult plaintiffs' use of section 1983 as a vehicle for correcting wide-scale massive administrative failures. Nonetheless, it leaves the door open for narrowly drawn complaints that seek the same end.

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Based on this finding, the Court affirmed

64 Id.
65 Id.
66 Id. at 1363.
68 Id. at 694.
70 McMillian v. Johnson, 88 F.3d 1573, 1583 (11th Cir. 1996).
71 McMillian, 117 S. Ct. at 1740.
the dismissal of the section 1983 official capacity suit against the sheriff. In dissent Justice Ginsburg noted that the majority's "Alabama-specific" approach should assure that the holding was of limited reach and did not disturb numerous other cases where local sheriffs had been deemed county, not state, policymakers.\textsuperscript{72}

In another police misconduct case, \textit{Board of the County Commissioners of Bryan County, Oklahoma v. Brown},\textsuperscript{73} the Supreme Court again split 5-4. In \textit{Brown} the county sheriff hired his nephew's son as a deputy, despite knowing of but not closely reviewing the son's record of driving infractions and misdemeanors, including assault and battery. A section 1983 action was later brought by Ms. Brown against the county on grounds that the same deputy had arrested her with excessive force and that the county was liable for her injuries because the sheriff had hired the deputy without adequately reviewing his background.\textsuperscript{74} In contrast to the \textit{McMillian} case, the parties in \textit{Brown} stipulated that the sheriff was the "policymaker" for the county for purposes of section 1983.\textsuperscript{75}

The Court in \textit{Brown} held that the sheriff's decision to hire the deputy did not make the county liable under section 1983 for the injuries caused by the deputy's use of excessive force.\textsuperscript{76} The Court held that to establish municipal liability for a hiring decision under section 1983 a plaintiff must show that the sheriff was "deliberately indifferent"\textsuperscript{77} to the obvious consequences of his hiring decision—specifically that the police officer would cause the \textit{particular} constitutional violation suffered by the plaintiff was "plainly obvious."\textsuperscript{78} Here the sheriff's indifference to his nephew's son's criminal record did not satisfy the requisite standard of fault.\textsuperscript{79} In his dissent Justice Souter noted the Court's new threshold makes it a virtual "categorical impossibility" to establish municipal liability based upon a single instance of inadequate screening of an applicant's background.\textsuperscript{80}

\section*{C. Qualified Immunity}

The increasing privatization of services that have traditionally been performed by government raises many critical questions concerning the legal status of the private entities that perform these functions.\textsuperscript{81} In \textit{Richardson v. McKnight}\textsuperscript{82}
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the Court began to answer some of these questions by holding that private prison guards have no right to a qualified immunity defense. **Richardson,** however, leaves unanswered many of the most important issues raised by privatization.

Justice Breyer's opinion for a five-justice majority relies on the analysis in **Wyatt v. Cole,** in which the Court held that private defendants who had been sued under section 1983 for employing state garnishment and attachment statutes were not entitled to qualified immunity. Turning first to the relevant history, the majority "found no conclusive evidence of a historical tradition of immunity for private parties carrying out these functions." **Richardson,** however, expressly leaves open the critical question of whether these defendants acted under "color of law" and thus whether they could even be liable under section 1983.

Justice Breyer also found that immunity was unnecessary to ensure that defendants would zealously perform their jobs because the competitive market pressures "provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful or 'non-arduous' employee performance." And, third, the Court found that the possibility that litigation might distract the prison guards from their work was insufficient to justify a grant of immunity. Justice Breyer summed up: "Since there are no special reasons significantly favoring an extension of governmental immunity, and since Wyatt makes clear that private actors are not automatically immune . . ., we must conclude that private prison guards . . . do not enjoy immunity . . ." Justice Breyer's opinion, however, expressly leaves open the critical question of whether these defendants acted "under color of law" and thus whether they could be liable under section 1983. It also leaves open the possibility that some kind of "good faith" defense may be applicable apart from qualified immunity.

Justice Scalia's opinion for the four dissenters contends that the majority decision "contradicts our settled practice of determining section 1983 immunity on the basis of the public function being performed" and that the "only sure effect . . .—and the only purpose, as far as I can tell—is that it will artificially raise the cost of privatizing prisons." **Richardson** is an initial foray into the issues raised by privatization rather than a comprehensive treatment. Be-

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83 Id.
85 Richardson, 117 S. Ct. at 2105.
86 Id. at 2106.
87 Id. at 2106-7.
88 Id. at 2107.
89 Id. at 2108.
91 Richardson, 117 S. Ct. 2108.
92 Id. at 2108-9 (Scalia, J., dissenting).
93 Id. at 2112-13. He also decries the result as one that "only the American Bar Association and the American Federation of Government Employees could love." Id. at 2112.
cause it does not address the issue of whether private prison guards act "under color of law," or whether they can rely on a "good faith" defense, it does not make clear whether they can be liable even under section 1983. Even with respect to the availability of qualified immunity, the issue that the case addresses, what is uncertain is how far the reasoning of the Court can be extended beyond the prison context in view of Justice Breyer's emphasis on the history of privatization in prisons and of his one-vote-majority opinion.

In Johnson v. Fankell\textsuperscript{94} the Court unanimously held that a state need not follow the federal rule which allows defendants in an action under section 1983 an interlocutory appeal from a denial of qualified immunity. In his opinion Justice Stevens rejected the argument that the Idaho Supreme Court must use the federal construction of "final decision." Stevens said, "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state."\textsuperscript{95} He concluded that section 1983 did not preempt the Idaho appellate court rule at issue because an interlocutory appeal "is a federal procedural right that simply does not apply in a nonfederal forum."\textsuperscript{96}

III. Hearing and Appeal Rights

The Court, using procedural due process as a basis, also decided cases on parental and employment rights.

A. Transcript Fees in Termination of Parental Rights Cases

In M.L.B v. S.L.J.\textsuperscript{97} the Court held that Mississippi could not condition the right to appeal from a decision terminating defendant's parental rights on prepayment of the costs of preparing the record. After the Mississippi Chancery Court had terminated the parental rights of M.L.B., she was not permitted to appeal until she paid a record preparation fee of $2,352 that the state imposed on all appellants in civil cases. M.L.B.'s application to proceed in forma pauperis was denied by the Mississippi Supreme Court on the ground that no such relief was available at the appellate level. Accordingly the court dismissed the appeal.

Justice Ginsburg, writing for a five-justice majority of the Court, viewed the question as one requiring a decision about which of two lines of precedent should govern: the Court's cases beginning with Griffin v. Illinois,\textsuperscript{98} striking down fee requirements in criminal cases, or cases such as Ortwein v. Schwab,\textsuperscript{99} which upheld fee requirements in the civil context. Justice Ginsburg concluded that the Griffin line of cases should carry the day because of the importance of the interests at stake. She noted that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society."\textsuperscript{100} Thus the Court used a "fundamental" rights approach to distinguish termination of parental rights from other civil matters.

The Court's discussion of which component of the Fourteenth Amendment was violated by Mississippi's fee requirement is less clear. Justice Ginsburg explained that the Griffin line of cases reflects "both equal protection and due process concerns."\textsuperscript{101} Her decision, however, focuses more on equal protection than due process. The due process argument, she noted, runs afoul of the problem that "due process does not in-

\textsuperscript{94} Johnson, 117 S. Ct. at 1800.
\textsuperscript{95} Id. at 1804 (citations omitted).
\textsuperscript{96} Id. at 1806 (footnote omitted).
\textsuperscript{98} Griffin v. Illinois, 351 U.S. 12 (1956).
\textsuperscript{100} M.L.B., 117 S. Ct. at 563.
\textsuperscript{101} Id. at 566.
dependently require that the State provide a right to appeal" at all.\textsuperscript{102} Instead Justice Ginsburg viewed the constitutional infirmity as stemming from the fact that individuals with means could appeal while the indigent could not—a formulation of the issue that rests on principles of equal protection. Within this framework she focused on examination of the intensity of the individual interest at stake and the state's justification for its rule, finding the individual interest to be strong and the state's interest to be weak.\textsuperscript{103}

In dissent Justice Thomas rejected M.L.B.'s due process argument on the ground that due process does not require an appeal.

As a matter of equal protection analysis, M.L.B.'s claim appeared to be in tension with prior decisions of the Court that did not view a uniform government policy as creating two classes of individuals because of its disparate impact on people with means and on the indigent.\textsuperscript{104} Justice Ginsburg, however, stated two exceptions to the general rule that governmental fees need not be adjusted to the material circumstances of individuals: fees limiting access to the political process such as voting and running for office and fees limiting access to judicial process in cases that are criminal or "quasi criminal" in nature.\textsuperscript{105} She also distinguished the Court's other disparate-impact cases by observing that in this instance the filing fee did not simply have some disparate impact but rather was "wholly contingent on one's ability to pay" and precluded appeals by "all indigents and do[es] not reach anyone outside the class."\textsuperscript{106} Justice Ginsburg also distinguished the cases holding that government need not subsidize the exercise of a fundamental right\textsuperscript{107} on the ground that M.L.B. was defending against the government action of terminating her parental rights, not simply asking for a benefit from the state.\textsuperscript{108}

In dissent Justice Thomas rejected M.L.B.'s due process argument on the ground that due process did not require an appeal.\textsuperscript{109} He also rejected the equal protection argument because it rested on a disparate-impact analysis that the Court had rejected in other contexts.\textsuperscript{110}

B. Presuspension Hearings for Public Employees

That public employees dischargeable only for cause enjoy a constitutionally protected property interest subject to the strictures of the Due Process Clause has been clear for decades.\textsuperscript{111} What has been less clear is whether these due process protections extend to the discipline of tenured public employees short of termination. In \textit{Gilbert v. Homar}\textsuperscript{112} the Court unanimously held

\textsuperscript{102}Id.
\textsuperscript{103}Id.
\textsuperscript{105}M.L.B., 117 S. Ct. at 568.
\textsuperscript{106}Id. at 569.
\textsuperscript{107}See DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189 (1989); Harris v. McRae., 448 U.S. 297 (1980).
\textsuperscript{108}M.L.B., 117 S. Ct. at 568. Justice Kennedy concurred in the judgment, stating that he would rest the decision on due process grounds. \textit{Id}. at 570 (Kennedy, J., concurring).
\textsuperscript{109}Id. at 571 (Thomas, J., dissenting).
\textsuperscript{110}Id. at 572–74. For the same reasons Justice Thomas indicated that he would overrule the \textit{Griffin} line of cases. \textit{Id}. Justice Scalia joined Justice Thomas's opinion. Chief Justice Rehnquist joined all parts of the dissent, except the portion that called for overruling \textit{Griffin} and its progeny. \textit{Id}. at 570.
\textsuperscript{111}See, e.g., Board of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972); Perry v. Sindermann, 408 U.S. 593, 602–3 (1972).
that due process did not require a state to give notice and hearing before it suspended a tenured public employee without pay.

Mr. Homar was a police officer employed by a Pennsylvania state university. While at the home of a friend, he was arrested as part of a drug raid and charged with drug offenses. In short order, state police notified Mr. Homar's supervisor of the arrest, and Mr. Homar was immediately suspended without pay pending an investigation into the criminal charges filed against him. Less than a week after the arrest, the criminal charges were dismissed, but the university's suspension of Mr. Homar remained in effect. Three weeks later Mr. Homar was given the first opportunity to meet with university officials to tell his side of the story. He was told at the meeting that information provided to the university by police was "very serious in nature," but he was not told that the police report included a confession that he allegedly made on the day of the arrest. A few days after this meeting, university officials demoted Mr. Homar to the position of grounds keeper but provided him with back pay from the date of suspension.

Mr. Homar responded with a section 1983 civil rights suit, claiming that his due process rights were violated by the failure to afford him with notice and an opportunity to be heard before suspending him without pay. He lost before the district court but prevailed on appeal before a divided panel of the Third Circuit.

In a decision reversing the Third Circuit, Justice Scalia makes short work of that court's reliance on dictum in Cleveland Board of Education v. Loudermill,113 which the Third Circuit mistakenly read as "strongly suggest[ing] that suspension without pay must be preceded by notice and an opportunity to be heard in all instances . . . ."114 Rejecting this "sweeping and categorical rule,"115 Justice Scalia lays out a largely prosaic analysis under the three-prong Mathews v. Eldridge balancing test for determining what process is constitutionally due116 and concludes that presuspension notice and hearing are not required under the due process clause.117 No doubt the Court's analysis here is informed by its apothegmatic aside that "the government does not have to give an employee charged with a felony a paid leave at taxpayer expense."118

IV. The Eleventh Amendment

The Supreme Court decided two cases dealing with state immunity from suit under the Eleventh Amendment. In the prior term the Supreme Court announced its unsettling 5-4 decision in Seminole Tribe v. Florida,119 which held that Congress, when acting through the Indian or Interstate Commerce Clause, was not allowed to abrogate a state's Eleventh Amendment immunity from suit in federal court. This term, again in a case involving a Native American tribe, Idaho v. Coeur d'Alene Tribe of Idaho,120 the Supreme Court took on another aspect of Eleventh Amendment immunity—the application of the Ex parte Young121 doctrine.

At its heart the Coeur d'Alene Tribe case involves a historical and legal dis-

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114 Gilbert, 117 S. Ct. at 1811 (quoting Homar v. Gilbert, 89 F. 3d 1009, 1015 (emphasis added)).
115 id. at 1812.
117 Gilbert, 117 S. Ct. at 1812-13. The Court remanded the case to consider the separate question of whether Mr. Homar was given an adequately prompt postsuspension hearing. Id. at 1814.
118 id. at 1813.
121 Ex parte Young, 209 U.S. 123 (1908).
pute over the possession and control of submerged land. The Coeur d'Alene Tribe brought suit in federal court to wrest ownership from Idaho of the submerged lands and bed of Lake Coeur d'Alene, as well as its watershed. Subject to the trusteeship of the United States, the tribe claimed its beneficial interest in these lands within the original boundaries of the Coeur d'Alene Reservation defined by an 1873 Executive Order. In the alternative the tribe claimed ownership of the submerged lands pursuant to unextinguished aboriginal title. The tribe also sought broad declaratory and injunctive relief to the same effect. The district court dismissed the suit on grounds that Eleventh Amendment immunity barred the claims against Idaho and the agencies, as well as the claims for quiet title and declaratory relief because the claims were the functional equivalents of a damages award against the State. Agreeing that the Eleventh Amendment barred all claims against Idaho and its agencies, as well as the quiet title action against the officials, the Ninth Circuit affirmed in part and reversed in part. Finding the doctrine of *Ex parte Young* applicable, the Ninth Circuit allowed the claims for declaratory and injunctive relief against the officials to proceed to challenge continuing violations of federal law.

A splintered Supreme Court reversed the Ninth Circuit's application of *Ex Parte Young*. While easy enough to discern the dissent, one needs a scorecard to track the votes of the majority and the plurality to state accurately the holding of the Court. The Court held that the *Ex parte Young* exception to Eleventh Amendment immunity, which in the normal course would permit one to sue state officials in federal court for prospective relief to prevent ongoing violations of federal law, did not apply under the circumstances of this particular case. The circumstances that are mentioned—but not dispositive given the splintered voting in the case—include the availability of an adequate judicial forum in Idaho state courts to hear the tribe's dispute, the adequacy of the state judicial forum to resolve the federal claims, and the "essential nature and effect" of the suit by the tribe against Idaho and its officials. Here the action is viewed by the Court as "a quiet title action that implicates special sovereignty interests," an action which one could not in the

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122 In addition to its title claims, the Tribe further sought a declaratory judgment to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs or usages which purport to regulate, authorize, use or affect in any way the submerged lands. Finally, it sought a preliminary and permanent injunction prohibiting defendants from regulating, permitting or taking any action in violation of the Tribe’s rights of exclusive use and occupancy, quiet enjoyment and other ownership interest in the submerged lands... *Coeur d'Alene Tribe*, 117 S. Ct. at 2032.

123 *Coeur d'Alene Tribe* of Idaho v. Idaho, 798 F. Supp. 1443 (D. Idaho 1992). The district court also dismissed the claim for injunctive relief against the officials on the merits on the ground that Idaho was in rightful possession of the submerged lands as a matter of law. *Id.*

124 *Coeur d'Alene Tribe* of Idaho v. Idaho, 42 F.3d 1244 (9th Cir. 1994).

125 *Id.* at 1252–54.

126 *Coeur d'Alene Tribe*, 117 S. Ct. at 2047–59 (Souter, Stevens, Ginsburg, Breyer, JJ., dissenting).

127 See *id.* at 2043.

128 *Id.* at 2035, 2043.

129 *Id.* at 2036–37.

130 *Id.* at 2038.

131 *Id.* at 2040.

132 *Id.*
normal course bring in federal court against a state because of the Eleventh Amendment.\textsuperscript{133}

Justice Kennedy, writing the principal opinion, unequivocally conveys his alarm about the relief sought by the tribe:

[T]he declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe. This is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action . . . The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.\textsuperscript{134}

Thus the outcome of the \textit{Coeur d'Alene Tribe} case was all but inevitable. Justice Kennedy concluded: "Under these particular and special circumstances, we find the \textit{Young} exception inapplicable."\textsuperscript{135}

If the \textit{Coeur d'Alene Tribe} case were limited to its "particular and special circumstances," there would seem little reason for pause apart from those with a stake in the relationship between sovereign Native American tribes and the states in which they reside. However, the case reveals a willingness of some justices to jettison the long-standing analytical premises of the \textit{Ex parte Young} doctrine. That these justices are firmly in the minority is clear, however.

The first clue that the \textit{Ex parte Young} doctrine is in for a beating is Justice Kennedy's early but guarded assurance: "We do not . . . question the continuing validity of the \textit{Ex parte Young} doctrine. Of course, questions will arise as to its proper scope and application."\textsuperscript{136} Justice Kennedy then proceeds to lay out at length what he later describes as a "case-by-case approach to the \textit{Young} doctrine," reflecting "sensitivity to varying contexts," implicating "special factors counseling hesitation," and warranting consideration of a "broad" range of concerns.\textsuperscript{137} Among the factors considered in the principal opinion written by Justice Kennedy were that the Tribe could have brought suit in Idaho state court,\textsuperscript{138} whether that forum was adequate to determine the federal claims,\textsuperscript{139} and that the suit was the "functional equivalent" of a quiet title action.\textsuperscript{140}

However, this "case-by-case balancing approach to the \textit{Young} doctrine"\textsuperscript{141}

\textsuperscript{133} "It is common ground between the parties, at this stage of the litigation, that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent." \textit{Id.}
\textsuperscript{134} \textit{Id.} at 2040–41.
\textsuperscript{135} \textit{Id.} at 2043.
\textsuperscript{136} \textit{Id.} at 2034.
\textsuperscript{137} \textit{Id.} at 2039.
\textsuperscript{138} "The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case." \textit{Id.} at 2043.
\textsuperscript{139} "Interpretation of federal law is the proprietary concern of state, as well as federal, courts." \textit{Id.} at 2037.
\textsuperscript{140} \textit{Id.} at 2040.
\textsuperscript{141} \textit{Coeur d'Alene}, 117 S. Ct. at 2047 (O'Connor, J., concurring in part and concurring in the judgment).
advanced by Justice Kennedy is plainly not controlling authority. The five-member majority joined only in the parts of the principal opinion that presented the statement of the case, the black-letter law description of the Eleventh Amendment and Ex parte Young, and the conclusion that the Ex parte Young exception does not apply in this case. The majority did not agree with Justice Kennedy's loose-jointed, case-by-case approach, which garnered only the votes of Justices Kennedy and Rehnquist.\textsuperscript{142} In a concurrence Justices O'Connor, Scalia, and Thomas are critical of Justice Kennedy's analysis because it "replaces a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a 'broad' range of unspecified factors."\textsuperscript{143}

In an opinion by Justice Souter the four dissenters voiced strong concern about the combined effect of Justice Kennedy's principal opinion and Justice O'Connor's concurring opinion on federal subject-matter jurisdiction to vindicate federal rights.\textsuperscript{144} Nonetheless, Justice Souter in the same breath expressed "great satisfaction that Justice O'Connor's view is the controlling one . . . ."\textsuperscript{145} Put another way, the "case-by-case" approach advanced by Justice Kennedy in Coeur d'Alene Tribe faces seven votes against it in the next Supreme Court case to consider the Ex parte Young doctrine.

In the other Eleventh Amendment case last term, Regents of the University of California v. Doe,\textsuperscript{146} the Court confronted the question of whether a state university loses its immunity to suit in federal court where the federal government has agreed to indemnify the state instrumentality against the costs of litigation, including adverse judgments. The Court held that it did not.

Regents of the University of California involved a contract dispute between "John Doe," a New York resident, who was a prospective employee at the Lawrence Livermore National Laboratory owned by the federal Department of Energy (DOE) and the University of California, which operated the laboratory for DOE. The gist of the claim was that university had wrongfully refused to perform its agreement to employ John Doe because it determined that he could not obtain from DOE the required security clearance. John Doe brought suit against university in district court, which held that the suit was barred by the Eleventh Amendment. On appeal a divided Ninth Circuit reversed, with the view that university was "acting in a managerial capacity" for the laboratory, and "liability for money judgment is the single most important factor in determining whether an entity is an arm of the state."\textsuperscript{147}

The Supreme Court reversed. Writing for a unanimous court, Justice Stevens rejected outright the relevance of John Doe's core contentions that indemnification by a third party somehow removed the jurisdictional bar imposed by the Eleventh Amendment or should even have a bearing on whether an agency was the kind of entity that should be treated as an "arm of the state."\textsuperscript{148} "[I]t is the entity's potential legal liability for judgments, rather than its ability or inability to require a third party to reimburse it, or to discharge the

\textsuperscript{142} Id. at 2031.
\textsuperscript{143} Id. at 2047.
\textsuperscript{144} Id. at 2048.
\textsuperscript{145} Id.
\textsuperscript{146} Regents of the Univ. of Cal. v. Doe, 117 S. Ct. 900 (1997).
\textsuperscript{147} Doe v. Lawrence Livermore Nat'l Lab., 65 F.3d 771, 774 (9th Cir. 1995).
\textsuperscript{148} Regents, 117 S. Ct. at 904.
liability in the first instance, that is relevant in determining the underlying Eleventh Amendment question.\textsuperscript{149}

V. Retroactive Application of Statutes

In \textit{Lindh v. Murphy},\textsuperscript{150} the Court dealt with the retroactive effect of a federal statute on a pending case. Specifically the Court dealt with the impact of the new provision governing habeas corpus petitions in noncapital cases.\textsuperscript{151}

Although its detailed analysis is largely based on the specifics of the statute at issue,\textsuperscript{152} Justice Souter's opinion for the five-justice majority is a useful summary of law regarding retroactivity, reiterating the presumption against retroactive application of law where a change is not merely procedural.\textsuperscript{153} In light of the Court's recent decision in \textit{Landgraf v. USI Film Products},\textsuperscript{154} the Court concludes that Congress is on notice that if it intends a statute to have a genuine retroactive effect, it must be explicit in its intent to apply the new standard to pending cases. Moreover, because Congress is sufficiently explicit in one provision, its failure to include similar language in the next provision of the same act implies that the latter is not intended to apply to pending cases: "Nothing, indeed, but a different intent explains the different treatment."\textsuperscript{155}

The majority seems less than convinced by its analysis. It views its resolution as only "according more coherence . . . than any rival we have examined. That is enough."\textsuperscript{156} Not surprisingly, Chief Justice Rehnquist's dissent is scathing: "The Court [majority] . . . proceeds . . . to disregard all of our retroactivity case law . . . in favor of a permissible, but by no means controlling, negative inference . . ."\textsuperscript{157}

VI. Motion for Relief from Judgment

A case that has garnered considerable attention because of its Establishment Clause analysis and overruling of a 12-year-old decision also presents a significant development to Federal Rule of Civil Procedure 60(b).\textsuperscript{158} In \textit{Agostini v. Felton},\textsuperscript{159} Justice O'Connor wrote the decision for a five-justice majority holding that public school teachers may be sent to parochial schools to provide remedial education without violating the Establishment Clause. The issue was raised by defendants by seeking relief from a judgment under Rule 60(b) that

\textsuperscript{149}Id.
\textsuperscript{150}Lindh v. Murphy, 117 S. Ct. 2059 (1997).
\textsuperscript{151}Id.
\textsuperscript{153}Lindh, 117 S. Ct. at 2062.
\textsuperscript{154}Landgraf v. USI Film Products, 511 U.S. 244 (1994).
\textsuperscript{155}Lindh, 117 S. Ct. at 2064. In his exhaustive outline of the provisions' history Justice Souter states the "familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." Id. at 2065.
\textsuperscript{156}Id. at 2068. Indeed, frustrated by its inability to reconcile its reasoning with every aspect of the statutory scheme, the majority simply abdicates its obligation to explain one "loose end": "No answer leaps out at us. All we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." Id.
\textsuperscript{157}Id. at 2068 (Rehnquist, C.J., dissenting). Contrary to the majority, the dissent concludes that the provision "is a procedural statute, regulating prospective relief, and addressed directly to federal courts and removing their power to give such relief in specified circumstances. Our cases therefore strongly suggest that, absent congressional direction otherwise, we should apply [the provision] to pending cases." Id. at 2072.
\textsuperscript{158}Rule 60(b) provides: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application . . . " Fed. R. Civ. P. 60(b).
had enjoined such practices pursuant to an earlier ruling by the Court in the same case that found the practice to be unconstitutional.\textsuperscript{160} For our purposes the Court's discussion of Rule 60(b) is most salient.

On remand after the Supreme Court's 1985 ruling in\textit{ Aguilar v. Felton},\textsuperscript{161} the district court entered a permanent injunction. Ten years later the defendants filed motions for relief from judgment. In a lengthy substantive analysis that has received most of the case's publicity, the majority concludes that there have been changes in the "criteria used to assess whether aid to religion has an impermissible effect"\textsuperscript{162} and that the Establishment Clause, therefore, does not prohibit the government aid to sectarian schools at issue.

After noting that neither \textit{stare decisis} nor the law of the case precluded overturning \textit{Aguilar},\textsuperscript{163} the Court concluded that it could grant relief under Rule 60(b)(5) even though it agreed that the rule was being employed "in an unprecedented way—not as a means of recognizing changes in the law, but as a vehicle for effecting them."\textsuperscript{164} Furthermore, although Justice O'Connor acknowledged that the district court had been correct to deny the motion (and the court of appeals was correct in affirming) because the alleged change in the law had not been explicitly announced,\textsuperscript{165} it refused to affirm the lower courts: "[T]he exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained."\textsuperscript{166}

In the main dissent on this issue\textsuperscript{167} Justice Ginsburg, on behalf of herself and three others, soundly rejected the use of Rule 60(b) in this context and analogized such use to a late request for a rehearing.\textsuperscript{168} She restated the traditional rule that relitigation of underlying claims was not the purpose of a Rule 60(b) motion and zeroed in on the majority's failure to recognize its circumscribed function as an appellate tribunal: "[T]he District Court made no legal error in determining that \textit{Aguilar} had not been overruled. And our appellate role is limited to reviewing that determination."\textsuperscript{169}

The majority contends that its Rule 60(b) analysis "will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue."\textsuperscript{170} The dissent expresses the hope that the decision will be "aberrational."\textsuperscript{171} But Justice Ginsburg also recognizes the decision's potential, the possibility of "an 'anytime' rehearing . . ."\textsuperscript{172} This is a disturbing thought for plaintiffs and their attorneys who obtain injunctions with the expectation that they will be enforceable unless and until the control-

\textsuperscript{160} See \textit{Aguilar v. Felton}, 473 U.S. 402 (1985).
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 117 S. Ct. at 2010.
\textsuperscript{163} Id. at 1985.
\textsuperscript{164} Id. at 2016–17.
\textsuperscript{165} Id. at 2018.
\textsuperscript{166} Id. at 2017.
\textsuperscript{167} Id. at 2018.
\textsuperscript{168} Id. at 2026 (Ginsburg, J., dissenting).
\textsuperscript{169} Id. at 2028. She added: "[N]othing can disguise the reality that, until today, \textit{Aguilar} had not been overruled. Good or bad, it was in fact the law." Id.
\textsuperscript{170} Id. at 2026 (Ginsburg, J., dissenting).
\textsuperscript{171} Id. at 2026 (Ginsburg, J., dissenting).
\textsuperscript{172} Id. at 2028.
ling law is explicitly overruled. Moreover, the decision invites defendants to make Rule 60(b) motions in the hope that courts will change their minds about their decisions.

VII. Supreme Court Cases to Watch

In terms of access to the justice system, the most important case that the Supreme Court has agreed to hear in the upcoming term is Phillips v. Washington Legal Foundation. The Court will decide whether the interest earned on client trust funds held by lawyers in Interest on Lawyers' Trust Accounts (IOLTA) accounts is the property interest of the client or the lawyer, cognizable under the First or Fifth Amendment, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, may not earn interest for the client or the lawyer. The Court also has agreed to hear five cases dealing with damage actions under section 1983; most of them deal with immunity defenses.