Decisions on Federal Court Access During the Supreme Court's 1999–2000 Term

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During its October 1999 term the Supreme Court, continuing its recent trend of issuing relatively few decisions, handed down opinions in only 77 cases for which there was plenary review. Although no rulings on access to the federal courts were comparable to the 1998 term’s blockbuster cases involving federalism and state action, a number from last term will affect federal court practice for legal services and other public interest practitioners.¹ In this article we look first at two decisions discussing proceedings under the Social Security Act and then move on to the latest federalism developments, standing and mootness, and deference to an administrative agency. In a sidebar we discuss Federal Rules amendments that are scheduled to take effect on December 1, 2000.

I. Review Under the Social Security Act

Sims v. Apfel addressed “issue exhaustion” in the social security context.² In a surprising split, Justice Thomas wrote a plurality opinion favoring the claimant; with a little help from Justice O’Connor’s concurrence, the opinion trumped the dissent written by Justice Breyer.

The case arose as a run-of-the-mill request for disability benefits under Titles II (Old Age, Survivors’, and Disability Insurance) and XVI (Supplemental Security Income) of the Social Security Act. Although there was no question that the claimant had met her obligation to exhaust the administrative process before proceeding to district court under 42 U.S.C. § 405(g), the commissioner of social security contended that the district court lacked jurisdiction because the beneficiary had not specifically raised before the Appeals Council two issues on which she sought judicial review.³ The district court agreed, and, on appeal, the Fifth Circuit affirmed.⁴

³ See id. at 2083-84.
⁴ 200 F.3d 229 (1998). The Fifth Circuit relied on a prior controlling decision. Paul v. Shalala, 9 F.3d 208, 210 (5th Cir. 1994). Before the Supreme Court, the government apparently dropped the contention that the issue was jurisdictional, and none of the three opinions viewed it in that light. See Sims, 120 S. Ct. at 2083 n.1.

For the note on the authors, go to the end of the article.
In the portion of his opinion that Justice O'Connor joined to form a majority, Justice Thomas noted first that neither a statutory nor regulatory requirement for issue exhaustion existed in the instant case, unlike most situations in which the doctrine is invoked. He then explained why the rationale for judicial imposition of issue exhaustion did not apply in Sims:

The desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding. Where an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker.

Having established the dichotomy between adversarial and investigatory administrative proceedings as the basis for determining when issue exhaustion could be required, Justice Thomas, joined only by Justices Stevens, Souter, and Ginsburg to form a plurality, devoted the remainder of the opinion to an explanation of the nonadversarial nature of the social security administrative process. Social security proceedings, he observed, are "inquisitorial rather than adversarial"; this is demonstrated by briefs not needing to be filed with the Appeals Council and by the commissioner acting not as a litigant but "as an advisor to the Council regarding which cases are good candidates for the Council to review . . . ." Furthermore, the regulations direct the Appeals Council to review the entire administrative record, and the notice of decision from the administrative law judge informs claimants that, should they appeal, the Council will consider every aspect of the decision, including those parts with which the claimant may agree.

Finally the plurality opinion relied on the form (filled out by beneficiaries) supplying only three lines for requesting Appeals Council review and taking an estimated ten minutes to read and complete: "The form therefore strongly suggests that the Council does not depend much, if at all, on claimants to identify issues for review. Given that a large portion of Social Security claimants have no representation at all or are represented by non-attorneys, the lack of such dependence is entirely understandable." Since the social security administrative process thus offers a particularly weak analogy to adversarial systems in which issue exhaustion is traditionally imposed, the plurality concluded that applying the requirement in the social security context was inappropriate.

In her short but crucial concurrence, Justice O'Connor did not substantially disagree with Justice Thomas's analysis. Instead she emphasized a different aspect of the administrative process and concluded that the lack of warning to claimants was the determinative factor: "The agency's failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision."

In his dissent Justice Breyer charged the plurality with creating a new exception to the general rule favoring issue exhaustion. Reviewing the usual reasons for requiring exhaustion, for example, "to avoid premature interruption of the administrative process and to enable the expert agency to develop the necessary facts," he found these reasons to be particularly relevant for an agency processing over one hundred thousand claims annually. Justice Breyer saw little significance in the nonadversarial

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5 Sims, 120 S. Ct. at 2084.
6 Id. at 2085 (citations omitted).
7 Id., at 2085–86.
8 Id., citing 20 C.F.R. § 404.970(b).
9 Id.
10 Id. at 2087 (O'Connor, J., concurring in part and concurring in the judgment).
11 Id. at 2088 (Breyer, J., dissenting).
nature of the social security process, except for the problem caused by its informality when the claimant is not represented. But, in his view, the Social Security Administration has corrected that by exempting unrepresented claimants from the issue exhaustion requirement.12

Regardless of whether the majority (the portion of the plurality opinion joined by Justice O'Connor) established a new rule on exhaustion, the ultimate holding in Sims will be helpful to social security beneficiaries. Nevertheless, the Social Security Administration could probably cure the "defects" detailed by the plurality and concurrence with relatively minor changes in its process and forms, as Justice Thomas expressly noted: "Although the question is not before us, we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion."13 Still, a victory for social security claimants in this forum is always a cause for cheer-and surprise, especially when orchestrated by Justice Thomas.

Justice Breyer's administrative law expertise was also on display in Shalala v. Illinois Council on Long Term Care Inc., the other decision involving review under the Social Security Act.14 The composition of the majority and dissent in this case was even more unusual than in Sims, as Justice Breyer attracted votes from the Chief Justice and Justices O'Connor, Souter, and Ginsburg to make his opinion the Courts.

In Illinois Council an association of nursing homes, invoking federal question jurisdiction, challenged Medicare regulations dealing with sanctions and remedies.15 With the Seventh Circuit concluding that section 1331 was an appropriate basis for jurisdiction, the issue before the Supreme Court was whether the Social Security Act's prohibition against review except under that Act's jurisdictional provision, which requires exhaustion of administrative remedies, prohibited federal question jurisdiction.16 More specifically the Court looked to the specific prohibitory language of section 405(h) to determine whether an action challenging regulations on their face is an action "to recover on any claim arising under" the Social Security or Medicare Acts.17

After reviewing the ground trod by the Court in two previous Social Security Act cases, Justice Breyer concluded that these decisions required review under section 405(g).18 In rejecting the lines which the nursing home association and its supporting amici sought to draw to explain that section 405(h) should not always have its preclusive effect, Justice Breyer displayed considerable exasperation:

Those cases themselves foreclose distinctions based upon the "potential future" versus the "actual present" nature of the

12 Id. at 2089 (Breyer, J., dissenting). In response to this point, for which Justice Breyer relied on the government's brief, Justice O'Connor tactfully observed that, "as a matter of past practice, the agency's statement appears to be inaccurate. But even if this stated policy were uniformly applied, I think it would be unwise to adopt a rule that imposes different exhaustion obligations depending on whether claimants are represented by counsel." Id. at 2089 (O'Connor, J., concurring in part and dissenting in part).
13 Id. at 2084.
16 143 F.3d 1072 (7th Cir. 1998). The review provision, 42 U.S.C. § 405(g), is incorporated into the Medicare statute by 42 U.S.C. § 1395ff, and its complementary prohibition against using any other basis for jurisdiction, 42 U.S.C. § 405(h), is incorporated into Medicare by 42 U.S.C. § 1395ii.
17 Illinois Council, 120 S. Ct. at 1092 (quoting 42 U.S.C. § 405(h)).
18 Weinberger v. Salfi, 422 U.S. 749 (1975) [Title II, Old Age, Survivors', and Disability Insurance] (Clearinghouse No. 11,356); Heckler v. Ringer, 466 U.S. 602 (1984) [Title XVIII, Medicare].
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The second part of the majority’s analysis is a repudiation of the Seventh Circuit’s conclusion that the Supreme Court, in *Bowen v. Michigan Academy of Family Physicians*, limited the preclusive effect of sections 1395ii (Medicare) and 405(h) (social security) to amount determinations. Employing an extremely detailed parsing of that decision’s language, Justice Breyer concluded that *Michigan Academy* did not create a “distinction between a dispute about an agency determination in a particular case and a more general dispute about, for example, the agency’s authority to promulgate a set of regulations, i.e., the very distinction that this Court’s earlier cases deny.” Finally the majority rejected the plaintiffs contention that its only possibility of review was through section 1331: “‘The Council has not shown anything other than potentially isolated instances of the inconveniences associated with the postponement of judicial review.’***

For beneficiary advocates, *Illinois Council* is important largely for providing historical background on jurisdictional review in Social Security Act cases. Absent plaintiff’s status as a provider organization, there probably would have been little dispute among the Justices. *Salfi* and *Ringer* had long since established that, for social security and Medicare claimants, review was available only through section 405(g), which “demands the ‘channeling’ of virtually all legal attacks through the agency,” that is, filing a claim and exhausting administrative remedies. Since the majority decision reaffirms that approach, *Illinois Council* offers little that is new. Nevertheless, because advocates will undoubtedly have portions of the majority decision quoted to them extensively in briefs filed by government lawyers, some familiarity with it is urged.

II. Federalism

In recent terms the Supreme Court has moved boldly to redefine the relationship between the federal government and the

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19 *Illinois Council*, 120 S. Ct. at 1094.
22 *Id.* at 1099. In dissent Justice Thomas, joined by Justices Stevens, Scalia, and Kennedy, concluded that section 405(h) was not applicable to this situation because the Medicare Act’s incorporating provision, section 1395ii, was “triggered [only] when a particular fact-bound determination is in dispute but not in the case, as here, of a challenge to the validity of the Secretary’s instructions and regulations.” *Id.* at 1104 (Thomas, J., dissenting) (internal quotation marks omitted). In a separate dissent Justice Stevens focused on this case (unlike *Salfi* and *Ringer*) involving providers’ eligibility for reimbursement rather than beneficiaries’ claims for benefits. Consequently section 405(h) was not applicable because it applied only to attempts to recover on a claim. *Id.* at 1103 (Stevens, J., dissenting).
23 *Id.* at 1093.
states. A series of decisions expanding state sovereign immunity in both federal and state court has been in the vanguard of the trend to increase state prerogatives at the expense of federal power. Complementing this development is the Court’s effort to rein in the scope of Congress’ power to enact substantive legislation under both the Commerce Clause and Section 5 of the Fourteenth Amendment. In this past term the Court issued two major decisions that continue these trends. In Kimel v. Florida Board of Regents it held that the Age Discrimination in Employment Act did not constitute a valid abrogation of state sovereign immunity. Kimel greatly limits the ability of state employees to challenge age discrimination in federal court. In United States v. Morrison the Court struck down the Violence Against Women Act; the Court found the Act to be beyond the scope of congressional power under both the Commerce Clause and the Fourteenth Amendment. The Court’s drive to reinvigorate federalism affects access to courts most directly through the strengthening of state sovereign immunity. The recent decisions all flow from the Seminole Tribe case, in which the Court held that the Eleventh Amendment prohibited Congress from abrogating state sovereign immunity by legislating under the Commerce Clause. The Court, however, left intact and has reaffirmed decisions concluding that Congress may abrogate state sovereign immunity when it legislates pursuant to its power to enforce the Fourteenth Amendment. Accordingly, after Seminole Tribe, the scope of Congress’ power under the Fourteenth Amendment has become critical. Unfortunately a series of 5-to-4 decisions following Seminole Tribe has taken an increasingly narrow view of this congressional power. Both Kimel and Motion follow this pattern and conclude that the statutes at issue are not valid exercises of the Fourteenth Amendment enforcement power. In Kimel Justice O’Connor, writing for a majority of five, employed the traditional two-part test to determine whether Congress had properly abrogated the states’ Eleventh Amendment immunity. First, she concluded that the Age Discrimination in Employment Act was a sufficiently clear statement of congressional intent to abrogate state sovereign immunity so

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25 See City of Boerne v. Flores, 521 U.S. 507 (1997) (Fourteenth Amendment); Printz v. United States, 521 U.S. 898 (1997) (Commerce Clause); United States v. Lopez, 514 U.S. 549 (1995) (Commerce Clause) (Clearinghouse No. 50,644). This discussion does not focus on the Court’s treatment of the Commerce Clause, as that clause does not bear as directly on the question of access to court as the Court’s analysis of the Fourteenth Amendment.
27 United States v. Morrison, 120 S. Ct. 1740 (2000). In Reno v. Condon, 120 S. Ct. 666 (2000), however, the Court unanimously upheld the Driver's Privacy Protection Act, which restricts the ability of states to disclose motor vehicle records, as a proper exercise of Congress' interstate commerce power.
28 Seminole Tribe, 517 U.S. at 44.
30 Kimel, 120 S. Ct. at 640 (citing Seminole Tribe, 517 U.S. at 55).
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as to compel the Court to reach the constitutional issue.31

On the second part of the test, whether Congress had the authority to abrogate, Justice O'Connor applied the City of Boeme standard that, for a statute to be a valid exercise of congressional power under the Fourteenth Amendment, there must be “congruence and proportionality” between the constitutional injury to be remedied or prevented and the legislation in question.32 In applying this test, she surveyed the Court’s decisions involving equal protection challenges to classifications based on age; she pointed out that only rational basis scrutiny was applicable and that the Court had never upheld an equal protection challenge based on age. After reviewing the cases, Justice O'Connor concluded that “[o]ur Constitution permits States to draw lines on the basis of age when they have: a rational basis for doing so at a class-based level, even if it is probably not true that those reasons are valid in the majority of cases.”33

Justice O'Connor then reviewed the provisions of the Act and concluded that it required much more exacting scrutiny of employment decisions based on age than does the equal protection clause. She also reviewed the legislative history of the 1974 amendment to the Act—the amendment that made the Act applicable against states and concluded that Congress had fashioned “an unwarranted response to a perhaps inconsequential problem.”34 Accordingly Justice O'Connor found the Act to be “so out of proportion” to the purpose of enforcing the Fourteenth Amendment that it could not be considered a valid exercise of Congress’ power under that provision of the Constitution.35

The four dissenters reiterated in unusually strong language their opposition to the whole line of cases beginning with Seminole Tribe:

[T]he reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers’ conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. The kind of judicial activism manifested in [the Seminole Tribe line of cases] represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.36

In Morrison, in an opinion authored by the Chief Justice, the same five-Justice majority concluded that Congress had overstepped its authority in seeking to enforce the Fourteenth Amendment. After rejecting the Commerce Clause as a possible source of authority for the Violence

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31 Kimel 120 S. Ct. at 640–42. Justices Thomas and Kennedy dissented in part on this point; they contended that Congress’ intent was not “unmistakably clear” and that the Age Discrimination in Employment Act should therefore not be construed to call for an abrogation of immunity. Id. at 654 (Thomas, J., concurring in part and dissenting in part).
32 Id. at 644 (quoting City of Boeme, 521 U.S. at 520).
33 Id. at 647 (internal quotation marks omitted).
34 Id. at 648–49. The Court’s willingness to second-guess the findings of Congress in Kimel and other recent decisions is remarkable. In Kimel the Court acknowledged that a number of legislators had specifically referred to evidence of age discrimination by state and local governments, but the Court discounted these statements as insufficiently supported by specific evidence. Id. at 649. Apparently legislators are free to make wildly inaccurate classifications based on age without raising equal protection concerns, but legislation to stop states from discriminating will be scrutinized with a fine-toothed comb.
35 Id. at 647 (quoting City of Boeme, 521 U.S. at 532).
36 Id. at 653-54 (Stevens, J., dissenting in part and concurring in part). In turn, the majority chastised the dissenters for not playing by the rules: “[T]he present dissenters’ refusal to accept the validity and natural import of decisions by this Court makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution.” Id. at 643.
Against Women Act, the Court looked to the Fourteenth Amendment. Because the Act authorized suits against private parties, rather than state actors, the Court found, its validity problematic. As long ago as 1883, the Court had held that the Fourteenth Amendment served as a check on the conduct of state actors, but not on private parties.

Relying on congressional findings and legislative history, the plaintiff sought to establish state action by arguing that the Act was a response to "pervasive bias in various state justice systems against victims of gender-motivated violence." The Court, however, concluded that the Act could not be sustained on this ground because it provided no remedy against any state official and thus was not targeted at wrongdoing by the states. Moreover, the Court observed, the Act covered all states and did not focus on those with justice systems that discriminated against victims of gender-motivated violence. For these reasons, the Court concluded that the legislation was not a congruent and proportionate means of enforcing the Fourteenth Amendment.

In dissent, Justice Breyer argued that the Violence Against Women Act did remedy state discrimination against victims of gender-motivated violence, even though litigation under it is directed against private parties. According to his analysis, the enforcement power of the Fourteenth Amendment does not require that the defendant be a state actor but only that the remedy be designed to prevent or correct discriminatory state action. Since the Act remedies biases in state justice systems, it would satisfy this test.

Justice Breyer would thus take a broader view of the state action requirement for, purposes of Congress’ enforcement power than the analysis ordinarily undertaken to establish a Fourteenth Amendment violation directly. The majority, however, declined to adopt this approach.

II. Mootness and Standing

The Court also issued five (decisions which, in varying detail, describe how the Constitution’s “case or controversy” limitation upon the exercise of federal judicial authority “underpins both our standing and mootness jurisprudence” and seek to clarify the distinctions between these two doctrines. The cases, on their merits, range from environmental law to affirmative action to nude dancing. Perhaps surprisingly, given this Court’s reputation for judicial “restraint,” in each the Court rebuffed efforts to foreclose or terminate the litigation based upon lack of standing or mootness.

The first of the cases to be (decided, 

Friends of the Earth v. Laidlaw Environmental Services, contains the most extended discussion of these issues. In Friends of the Earth several environmental associations brought an action pursuant to the citizen-suit provisions of the Clean Water Act. They sought injunctive relief and civil penalties (payable to the government) against the defendant operator of a waste treatment plant for alleged violations of its mercury discharge permit. The Fourth Circuit ordered the district court to dismiss the case as moot after the defendant’s postlawsuit compliance with the permit, but the Supreme

37 Morrison, 120 S. Ct. at 1748-54.
38 See id. at 1756 (quoting United States v. Harris, 106 U.S. 629 (1883); The Civil Rights Cases, 109 U.S. 3 (1883)).
39 Morrison, 120 S. Ct. at 1755.
40 Id. at 1758.
41 Id. at 1759.
42 Id. at 1778-79 (Breyer, J., dissenting). Justices Stevens, Souter and Ginsburg joined Justice Breyer’s opinion. Justice Souter also wrote a dissent f&d on the Commerce Clause issues, in which he was joined by Justices Stevens, Ginsburg, and Breyer. Zd. at 1759 (Souter, J., dissenting).
43 U.S. CONST., art. III, § 2; Friends of the Earth v. Laidlaw Environmental Services, 120 S. Ct.693, 704 (2000).
44 Friends of the Earth, 120 S. Ct. at 693.

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Court reversed the Fourth Circuit’s decision, with Justice Ginsburg observing for the seven-member majority that, “[i]n directing dismissal of the suit on the ground of mootness, the Court of Appeals incorrectly conflated our case law on initial standing to bring suit with our case law on post-commencement mootness.”

Because the appellate court did not address the defendant’s threshold contention that plaintiffs lacked Article III standing at the outset of the litigation, the Supreme Court turned to that issue first. Applying the traditional test for associational standing, the Court examined a number of association members’ affidavits and “extensive” deposition testimony, which described how the defendant’s discharges “directly affected those affiants’ recreational, aesthetic, and economic interests.” It held that such evidence satisfied plaintiffs’ burden of demonstrating an “injury in fact.”

Next, the Court addressed the defendant’s argument that plaintiffs could not satisfy the “redressability” prong of the test because, since civil penalties are paid to the government and therefore offer no “redress” to private plaintiffs, a “citizen plaintiff” under the Clean Water Act could not have standing to seek them. While reaffirming that “a plaintiff must demonstrate standing separately for each form of relief sought,” the Court rejected this argument and determined that the civil penalties carried “a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiffs’] injuries by abating current violations and deterring future ones.”

Having determined that plaintiffs had standing to commence the litigation, the Court finally considered whether the defendant’s voluntary conduct in complying with the terms of its discharge permit effectively mooted the case. Noting the “well-settled” principle that “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,” the Court repeated its “stringent” standard for determining whether a case is mooted by the defendant’s voluntary conduct: “A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” The party asserting mootness bears “the heavy burden of persuading” the court that the challenged conduct will not recur, so as to ensure that the defendant will not be left “free to return to his old ways.”

Perhaps surprisingly, given this Court’s reputation for judicial “restraint,” in each case the Court rebuffed efforts to foreclose or terminate the litigation based upon lack of standing or mootness.

45 Id. at 700 (citations omitted).
46 See id. at 704, citing Hunt v. Washington State Apple Adver. Comm’n, 432 U.S. 333, 343 (1977). This analysis of associational standing may be of particular significance to Legal Services Corporation-funded poverty law programs, which are prohibited from representing plaintiffs in class actions but are not barred from representing associations. Cf. 45 C.F.R. § 1617.
47 Friends of the Earth, 120 S. Ct. at 704–5. The Court contrasted the specific evidence of injury in this case with the mere “general averments” and “conclusory allegations” found inadequate to establish standing in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). By relying so conclusively on the fact findings of the district court, however, see, e.g., Friends of the Earth, 120 S. Ct. at 704–6, Justice Ginsburg attributed particular significance both to the declarations of the plaintiffs and to the deliberations of the district judge. The generally favorable legal analysis of Friends of the Earth is therefore somewhat undercut by the control that the district judge may exercise in shaping the findings.
48 Friends of the Earth, 120 S. Ct. at 706.
49 Id. at 706–7.
50 Id. at 708, quoting United States v. Concentrated Phosphate Export Ass’n, 393 U.S. 199, 203 (1968).
Reflecting on the relationship between standing and mootness, the Court found the Fourth Circuit’s “confusion” of the two issues “understandable,” given the Supreme Court’s past description of mootness as “the doctrine of standing set in a time frame: [t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” Here, however, the Court emphasized that such a description of mootness was “not comprehensive” and noted that, while the burden to establish standing by demonstrating an impending threatened injury rested with the plaintiff, a defendant who claimed that its voluntary conduct had mooted the case “bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.”

After analyzing some of its recent precedents, the Court concluded, in essence, that establishing mootness was generally more difficult than establishing a lack of standing: “The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.”

Finally the Court pointed to a practical distinction between the two doctrines in terms of the institutional interest in not wasting the judicial resources already invested in ongoing litigation: Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal.

Applying its discussion of mootness to the facts of the case, the Court concluded that the mere voluntary cessation of the defendant’s permit violations did not absolutely foreclose the possibility of “future violations” which could be deterred by the imposition of civil penalties. Indeed, although Laidlaw claimed that, subsequent to the court of appeals decision, its facility was “dismantled, . . . and all discharges from the facility permanently ceased,” even these allegations did not persuade the Court that the case was moot because the plaintiffs “disputed” the effect of the facility closure on the possibility of future violations. Accordingly the Court remanded the case for reconsideration of the mootness issues.

In a per curiam opinion issued the same day as Friends of the Earth, the Court again chided an appellate court (this time the Tenth Circuit) for “confusing[ing] mootness with standing” and for “placing[ing] the burden of proof [for establishing mootness] on the wrong party.” Adarand involved two separate lawsuits

52 Friends of the Earth, 120 S. Ct. at 708-9 (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997) (Clearinghouse No. 52,194)).
53 Id. at 709.
54 Id.
55 Id. at 710.
56 Id.
57 Id. at 703, 711.
58 Id. at 711. In so doing, the Court observed that, even if the action ultimately were determined to be moot, vacatur of the district court’s judgment (and favorable published opinion) was “far from clear” in being appropriate because “mootness attributable to the act of a nonprevailing party ordinarily does not justify vacatur of a judgment under review.” Id. at 711 n.6 (citing U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994)).
and years of litigation (including a previous trip to the Supreme Court on the merits) brought by a subcontractor challenging the constitutionality of a U.S. Department of Transportation disadvantaged business enterprise program. After the subcontractor had obtained a judgment from the district court (on remand) that the program was unconstitutional, the Tenth Circuit dismissed the government’s appeal as moot because the petitioner had become certified as a disadvantaged business enterprise by the state.60 The Supreme Court held that, because the state certification did not mean that the defendant subcontractor automatically would qualify as a disadvantaged business enterprise under federal law, defendant had failed to carry its burden of establishing mootness: “It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.”61

After its relatively extensive treatment of mootness in Friends of the Earth and Adarand, the Court wasted little time in rejecting a claim that Voting Rights Act challenges to a 1992 school board redistricting plan became moot by the subsequent election of different board members.62 Justice Scalia, writing for a Court unanimous on this point, concluded that, under any circumstances, the viability of future plans would depend, in part, on whether the challenged preclearance of the 1992 plan was proper.63

The Court next had occasion to discuss mootness in a First Amendment opinion, City of Erie v. Pap’s AM., which opened its discussion of the merits with the proposition that “[b]eing in a state of nudity is not an inherently expressive condition.”64 At issue in City of Erie was the constitutionality of a city’s “public indecency” ordinance, which prohibited nudity in public places and thus predictably put a damper on plaintiffs business featuring “totally nude erotic dancing performed by women.”65 After receiving a favorable, published decision from the Pennsylvania Supreme Court that enjoined enforcement of portions of the ordinance because it violated plaintiffs First Amendment rights to expressive conduct, the plaintiff sought to avoid U.S. Supreme Court review by arguing that the case had become moot.66

Notwithstanding imposing evidence that Pap’s had voluntarily ceased the disputed conduct, Justice O’Connor’s opinion for the seven Justices in agreement on the mootness issue noted that this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, now seeks to have the case declared moot. And it is the City of Erie that seeks to invoke the federal judicial power to obtain this Court’s review of the Pennsylvania Supreme Court decision. The City has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance.67

With respect to the plaintiffs continuing interests, the Court noted that it was still incorporated under state law and could again decide to operate a nude-dancing establishment in the city if it so chose.68 In response to the assertion that

60 Adarand, 120 S. Ct. at 724.
61 Id. at 726.
63 Id. at 871.
65 Id. at 1388.
66 Id. at 1388-91 (citing 553 Pa. 348 (1998)).
67 Id. at 1390 (citations omitted).
68 Id.
the sole shareholder’s age mitigated any reasonable expectation that he might reenter the nude-dancing business, Justice O’Connor wryly observed that “[s]everal members of this Court can attest... that the ‘advanced age’ of Pap’s owner (72) does not make it ‘absolutely clear’ that a life of quiet retirement is his only reasonable expectation.”@ While acknowledging that the mootness issue was “close,” the majority rejected the argument.70

The final opinion issued in this term’s quintet of cases touching upon these issues decided a disputed question of standing. The case involved an interpretation of the False Claims Act, a federal statute of significance to public interest attorneys because it provides a cause of action to private whistle-blowers, on behalf of the United States, against persons making fraudulent claims against the federal government.71

The first question the Court addressed was whether an individual private plaintiff has standing under Article III to maintain a suit under the Act, given the derivative nature of the injury.72 Although the allegations of unlawful conduct in this case—the submission of false claims by the defendant state agency to the federal government—clearly asserted an “injury,” within the meaning of Article III, to the United States, the Court noted that “the Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party.”73 After rejecting the possibility that a qui tam plaintiff (or “relator”) might be considered an “agent” of the United States, the Court noted that, because the statute provided for the relator to receive a portion of any proceeds obtained from the lawsuit, the relator certainly had “a concrete private interest in the outcome of [the suit].”74 The Court went on to observe, however, that the same interest would exist for “someone who has placed a wager upon the outcome” of the litigation; the Court noted that an interest which was unrelated to the asserted injury in fact, or which was a mere “by-product” of the suit itself, could not satisfy Article III standing requirements.75

The Court’s search for a doctrinal handle to support an affirmative holding as to standing finally concluded with its announcement that “[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.”76 To bolster this assignment theory of standing, Justice Scalia, speaking for a Court unanimous on this point, embarked upon a historical and jurisprudential analysis of “the long tradition of qui tam actions in England and the American Colonies”—spanning seven centuries—before concluding that “qui tam actions were ‘cases and controver-

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69 Id. at 1390.
70 Id. at 1391. In a fractured decision on the merits, the Court reversed the state court judgment and upheld the validity of the public indecency ordinance. Id. at 1397–98.
71 Vermont Agency of Natural Resources v. United States ex rel. Stevens, 120 S. Ct. 1858, 1860–61 (2000). The statute codifies the common-law qui tam cause of action, which authorized a private citizen to bring suit on “the King’s behalf as well as his own.” Id. at 1860 & n.1.
72 Id. at 1861. That this issue had not previously come before the Court is somewhat surprising since the statute was enacted in 1863.
73 Id. at 1862 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975) (Clearinghouse No. 12,739); emphasis added by the Court).
74 Vermont Agency, 120 S. Ct. at 1862 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1990)).
75 Id.
76 Id. at 1863 (footnote omitted).
sies of the sort traditionally amenable to, and resolved by, the judicial process."  

IV. Deference to an Administrative Agency

Returning to a favorite subject, the Court also discussed the standards of deference that apply to administrative agencies' interpretations of federal statutes. Food and Drug Administration v. Brown & Williamson Tobacco Corp., and Christensen v. Harris County review and apply the three standards of deference that the Court has recognized:  

■ **Chevron** deference, which requires a reviewing court to accept an administrative agency's reasonable construction of a statute if Congress has not "directly spoken to the precise question at issue";  
■ **Skidmore** deference, which entitles certain agency statements "to respect," but only to the extent they have the "power to persuade"; and  
■ **Auer** deference, which provides that a court should defer to an agency's interpretation of its own regulation if the regulation is ambiguous.  

*Brown & Williamson Tobacco Corp.* applied Chevron to determine that the Food and Drug Administration had no authority to regulate nicotine and tobacco products as "drugs" and "drug delivery devices" pursuant to the Food Drug and Cosmetic Act. In looking first to the statutory language, Justice O'Connor, writing for the traditional five-member majority, required page after page to unearth what purported to be the clear intent of Congress. There is at least the appearance of a result-oriented determination not to reach the second step of *Chevron* analysis, deference to the agency. Thus she noted that Congress had spoken to the issue on six occasions since 1965 and, in so doing, had created a "distinct regulatory scheme for cigarettes and smokeless tobacco" that precluded a "meaningful role for any administrative agency in making policy on the subject of tobacco and health." While acknowledging that "an agency's initial interpretation of a statute that it is charged with administering is not 'carved in stone,'" the Court bolstered its conclusion by noting that the agency, over the entire period during which Congress legislated, repeatedly and consistently informed Congress that it lacked jurisdiction over the issue.

In *Christensen* the Court looked at provisions of the Fair Labor Standards Act that protect employees' rights to compensation for overtime work. Concerned about the cost of compensating for overtime through cash payouts, Harris County unilaterally adopted a policy that forced employees to schedule time off to use accrued compensatory time. County deputy sheriffs sued, arguing that the Act prohibited an employer from forcing  

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77 Id. at 1863-65 (quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102 (1998)). The Court's answer to the principal question posed in the case—that a state (or state agency) is not a "person" which can be held liable under the False Claims Act—prompted a dissent by Justice Stevens. Id. at 1871 (Stevens, J., dissenting).

78 For an exhaustive and, at times, exhausting discussion of deference, see Gary Smith: *The Quid Pro Quo for Chevron Deferral: Enforcing the Public Participation Requirements of the Administrative Procedure Act*, 30 CLEARINGHOUSE REV. 1132 (Mar.-Apr. 1997).


83 *Brown & Williamson Tobacco Corp.*, 120 S. Ct. at 1301-15.

84 Id. at 1312-13.

85 Id. at 1313 (quoting Chevron, 467 U.S. at 863). Justice Breyer's lengthy analysis for the dissenters is best summarized by his observation that "the majority's conclusion is counter-intuitive." *Brown & Williamson Tobacco Corp.*, 120 S. Ct. at 1331 (Breyer, J., dissenting).
employees to use compensatory time absent a specific agreement permitting such an arrangement.

The plaintiffs specifically asked the Court to accord Chevron deference to a Department of Labor opinion letter to Harris County agreeing with the deputies' interpretation of the statute. Through Justice Thomas’s opinion on behalf of the employees to use compensatory time to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.

Whether Christensen has plowed any new ground is arguable; even so, advocates should pay special attention to it. At the very least, it states explicitly that courts should not defer, Chevron-style, to agency pronouncements that do not have the force of law. Given the tendency of agencies to invoke nonregulatory material in support of their positions, Christensen offers advocates for the poor the opportunity to repudiate those efforts and to force courts to deal with agency positions on a more level playing field.

V. Conclusion

As of the beginning of the Supreme Court's 2000 term, there are five cases for which review has been granted and which bear watching for their potential effect on access. The Court will continue its recent foray into federalism, in the guise of determining whether the Eleventh Amendment precludes application of the Americans with Disabilities Act and the Rehabilitation Act to non-consenting states. It will also have a return engagement with state action, with its focus the sanctioning power of an athletic association for secondary schools.

86 Christensen, 120 S. Ct. at 1659 (quoting opinion letter from U.S. Department of Labor, Wage and Hour Division (Sept. 14, 1992)).
87 Id. at 1662. The Court did not offer a definitive list of agency interpretations for which there must be deference. Rather, it gave two examples: “a formal adjudication or notice-and-comment rulemaking.” Id. Consequently, while the decision lists numerous specific types of interpretations for which deference is or is not appropriate, there may be others that do not fit into these categories.
88 Id. (quoting Skidmore, 323 U.S. at 140).
90 Christensen, 120 S. Ct. at 1663. The dissenting justices, Stevens, Ginsburg, and Breyer, would have accorded Skidmore deference to the department’s opinion letter. Id. at 1665 (Stevens, J., dissenting). Justice Scalia’s concurring opinion found Skidmore deference to be an “anachronism, dating back to an era . . . which came to an end” with Chevron. Id. at 1664 (Scalia, J., concurring in part and concurring in the judgment). Applying the Chevron standard to both the opinion letter (“a single opinion letter signed by an Acting Administrator”) and to the brief submitted by the solicitor general of the United States and the secretary of labor (which stated the secretary’s position “even without existence of the opinion letter”), he concluded that the agency’s position did not represent a reasonable interpretation of the statute. Id. at 1665 (Scalia, J., concurring in part and concurring in the judgment).
91 See Garrett v. University of Ala. at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir 1999), cert. granted, 120 S. Ct. 1669 (2000) (Clearinghouse No. 52,744).
The issue of implied private causes of action will be considered in the context of Title VI of the Civil Rights Act of 1964.93 The Fourth Circuit's lonely contention that, after *Farrar v. Hobby*, the catalyst theory does not establish prevailing party status for purposes of plaintiffs' right to federal statutory attorney fees, will be reviewed.94 Finally, in perhaps the ultimate issue of access to the courts, the Court will consider the Legal Services Corporation Act's 1996 restrictions against representation involving welfare laws.95

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### 2000 Amendments to the Federal Rules of Civil Procedure and Evidence

In April 2000 the Supreme Court promulgated a number of amendments to the Federal Rules of Civil Procedure that will go into effect on December 1, 2000, unless Congress passes a law to the contrary.* The most significant changes concern discovery.

The amendments narrow the scope of discovery for the first time since 1938. The revised Rule 26(b)(1) limits discovery to matters "relevant to the claim or defense of any party" rather than the broader traditional standard of any matter "relevant to the subject matter" of the action.² The import of this change, however, may not be great. The trend toward judicial management already forces parties to be prepared to justify their requests in a manner similar to that required by the new rule.

The amendments simultaneously water down the requirements of mandatory disclosure adopted in 1993 and eliminate the ability of judicial districts to opt out of the process by issuing local rules.³ As a result, mandatory disclosure will become more pervasive but less demanding. The amendments exempt several categories of cases from the requirements of mandatory disclosure, including actions for review on an administrative record and actions by the United States to recover benefit payments.* The amendments limit the basic disclosure requirements to cover only information "that the disclosing party may use to support its claims or defenses, unless solely for impeachment."⁵ Thus mandatory disclosure will no longer require parties to reveal information that is adverse to them. This amendment is presumably intended to respond to the charge that the 1993 version of mandatory disclosure required lawyers to think for the other side, by anticipating the information that their adversary would want.⁶ Note, however, that the amendments still permit the parties to stipulate out of mandatory discovery, or the court to conclude that the process is inappropriate in a particular case.⁷

The amendments change the procedures for depositions by retracting the power of judicial districts to opt out of the limits on depositions and interrogatories established in the 1993 amendments.⁸ The amendments establish a time limit for each deposition of a single seven-hour day, unless otherwise ordered by the court or agreed to by the parties.⁹ The amended rule provides that the court must permit additional time if needed for the "fair examination of the deponent" or if the deponent or other person impedes or delays the examination.”¹⁰

Finally the Supreme Court has promulgated several Federal Rules of Evidence amendments that are also due to go into effect in December.” The most significant of these concerns the use of expert testimony in the wake of the Supreme Court’s 1993 decision in *Daubert* v. *Merrill Dow Pharmaceuticals.*¹² Attorneys conducting evidentiary hearings in federal court are advised to take note of the specific changes.

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2. Fed. R. Civ. P. 26(b)(1) (proposed). The amendment would make the broader standard applicable only upon a showing of good cause.
4. Fed R. Civ. P. 26(a)(l)(E) (proposed). Other exempted categories include petitions for habeas corpus and pro se litigation brought by prisoners. *Id.*
7. Fed. R. Civ. P. 26(a)(l) (proposed) (requiring disclosure except "to the extent otherwise stipulated or directed by order").
8. Fed. R. Civ. P. 26(b)(2). Districts may still adopt local rules limiting the number of requests for admissions. *Id.*
10. *Id.* The amended rule also authorizes sanctions for conduct that frustrates the fair examination of a deponent. Fed. R. Civ. P. 30(d)(3) (proposed).