INSIDE

Community Integration of Individuals with Disabilities

Addressing Labor Law Issues for Low-Income Workers

Privacy Issues Affecting Welfare Applicants

Sandoval's Retrenchment on Civil Rights Enforcement

New Environment Sampling and Right-to-Know Strategies for Housing and Tenants' Rights Advocates

Highlights from the Supreme Court's 2000–2001 Decisions on Federal Court Access

By Jane Perkins, Gary Smith, Matthew Diller, and Gill Deford

When it was not handing the presidency to George W. Bush, the Supreme Court turned its attention in the 2000 term to a host of issues that have an impact on the ability of individuals to gain access to the justice system. From the perspective of poverty law practitioners, the most important of these decisions is the 5-to-4 ruling in Legal Services Corporation v. Velazquez, in which the Court struck down the requirement that law offices with funding from the Legal Services Corporation refrain from participating in litigation challenging welfare reform laws and rules.¹

As CLEARINGHOUSE REVIEW has already published a thorough analysis of this landmark decision, we will focus on the other decisions of note.²

As has been the case each term since 1996, the Court issued a number of decisions restricting the ability of individuals to sue states for violations of federal law. The Court’s growing solicitude for the states as sovereigns constitutes one of the most significant developments over the past decade. This year in a pair of 5-to-4 decisions, the Court found that states were not subject to suit under two major civil rights laws. In University of Alabama v. Garrett the Court’s holding is that states may not be sued for damages when they engage in employment discrimination under the Americans with Disabilities Act of 1990.³ Alexander v. Sandoval eliminated individuals’ long-standing ability to bring direct lawsuits to enforce civil rights laws that prohibited federally funded entities, including states, from engaging in activities that had the effect of discriminating against minorities.⁴ The Court also issued significant decisions concerning the scope of deference that judges must accord administrative agencies, attorney fees, state action doctrine, and an assortment of other issues.

I. Suits Against States: The Quiver Loses a Few More Arrows

As mentioned above, in two of the most significant decisions of the term the Supreme Court determined 5-to-4 that states were not subject to suit under two major civil rights laws. Among the effects of these two cases may be an increase in sovereign immunity defenses by state defendants and less stringent enforcement of disparate impact regulations.


For the note on the authors, see page 392.
A. The Americans with Disabilities Act and State Sovereign Immunity

Title I of the Americans with Disabilities Act of 1990 prohibits employment discrimination on the basis of disability and requires employers to make reasonable accommodations to enable employees with disabilities to work. In University of Alabama v. Garrett the Court considered whether employees of the State of Alabama could recover money damages to compensate for the state’s failure to comply with Title I, and held that the Eleventh Amendment barred the suit against the state. The decision is important not only for its retrenchment on individuals’ rights to enforce the Act but also for the limitations it places on Congress’ authority to apply civil rights legislation to the states.

The Garrett case involved two state employees who brought against the State of Alabama separate suits seeking money damages under Title I of the Americans with Disabilities Act. In holding that the suits were barred, the Supreme Court continued its trend toward limiting the ability of individuals to enforce federal laws against states. In a series of cases, the Court has invalidated a wide range of congressional enactments creating rights of action against states. Garrett adds Title I of the Act to this growing list. With each decision, the Court has refined and expanded its states’ rights jurisprudence to the point where, in Garrett, the majority has proclaimed a decision based on “long-settled principles.”

As with the previous cases, Garrett involves the interplay between the Eleventh Amendment and federal legislation. Over the years the Court has recognized exceptions to the Eleventh Amendment, so that states are not rendered completely immune from suit. The Court’s holding that Congress may abrogate Eleventh Amendment immunity allows suits against states and plaintiffs’ recovery of damages if the statute at issue authorizes the damages. However, in recent years, a harshly split Supreme Court has increasingly narrowed Congress’ power to abrogate state immunity.

According to the Court, for Congress validly to abrogate state sovereign immunity it must meet two requirements. First, Congress must unequivocally set forth its intent to abrogate in the legislation itself, and, second, it must enact legislation pursuant to a congressional power that is granted by the Constitution and can override sovereign immunity. In Seminole Tribe of Florida v. Florida the Court barred Congress from abrogating the states’ Eleventh Amendment immunity pursuant to the Commerce Clause or any other Article I powers. The cases following Seminole Tribe have therefore focused on whether particular statutes were validly enacted pursuant to the Fourteenth Amendment section 5, a congressional power which the Court continues to recognize as a basis for abrogating state sovereign immunity.

Because the Americans with Disabilities Act was enacted under the Four-

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6 Garrett, 121 S. Ct. at 960.
8 Garrett, 121 S. Ct. at 963.
9 The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI.
10 Garrett, 121 S. Ct. at 962 (citing Kimel, 528 U.S. at 73).
11 Seminole Tribe, 517 U.S. at 54.
teenth Amendment, Garrett focused on this issue as well. To decide whether the Act was a valid exercise of Congress’ Fourteenth Amendment powers, the Court applied the framework articulated in City of Boerne v. Flores. City of Boerne recognized that the Fourteenth Amendment granted Congress the authority to prohibit a “somewhat broader swath of conduct” than what the text of the Amendment itself forbade. However, legislation reaching beyond the text must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”

Citing Cleburne v. Cleburne Living Center Inc., the Court in Garrett reasoned that Title I of the Americans with Disabilities Act could be a valid use of Congress’ power to enforce the Fourteenth Amendment only if it was aimed at preventing or remedying irrational conduct by the states in their employment practices involving people with disabilities. To decide whether the enactment was properly focused, the Court looked at whether Congress identified a “history and pattern” of unconstitutional employment discrimination by the states against people with disabilities. Parsing through an extensive legislative record that consisted of congressional hearings, floor statements, and written legislative history, the Court rejected most of it as pertaining to discrimination by entities other than states or as “unexamined, anecdotal accounts.” Of those “half a dozen” examples of discrimination by states that it did acknowledge, the Court doubted whether they were irrational and, even if they were, found the incidents “taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which section 5 legislation must be based.”

Even if a pattern of irrational, unconstitutional discrimination by the states could be squeezed out of the examples, the Garrett Court said that the rights and remedies the Americans with Disabilities Act created against the states were not congruent and proportional to the targeted violation. In other words, the remedies go beyond what section 5 of the Fourteenth Amendment allows because they prohibit rational, constitutional discrimination against people with disabilities. For example, while it would be rational, and therefore constitutional, for a state employer to conserve financial resources by hiring employees who are able to use existing facilities, the Act requires employers to make existing facilities readily accessible to the disabled—a duty that “far exceeds what is constitutionally required” by the Fourteenth Amendment. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause,” the Court said.

Writing for the dissent, Justice Breyer charged the majority with improperly second-guessing the role of Congress: “It is difficult to understand why the Court, which applies ‘minimum “rational-basis” review’ to statutes that burden persons with disabilities...subjects to far stricter

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12 Garrett, 121 S. Ct. at 962–63. The requirement of a clear statement of intent to abrogate immunity was not at issue in Garrett because the Americans with Disabilities Act makes Congress’ intent to abrogate plain. 42 U.S.C. § 12202 (“A state shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter.”).

13 Garrett, 121 S. Ct. at 963 (applying City of Boerne, 521 U.S. at 519–24, 536).

14 City of Boerne, 521 U.S. at 536.

15 Id. at 520.


17 Id. at 964–68.

18 Id. at 966.

19 Id.

20 Id. at 964.

21 Id. at 967.
scrutiny a statute that seeks to help those same individuals." Justice Breyer objected to the majority’s “strict, judicially created evidentiary standard” that placed a special burden on Congress to amass a legislative record that negated a presumption that recorded instances of discrimination by the state were rational. “The problem with the Court’s approach,” he wrote, “is that neither the ‘burden of proof’ that favors the States nor any other rule of restraint applicable to judges applies to Congress when it exercises its § 5 power…. [T]he Congress of the United States is not a lower court.”

The dissent also took issue with the majority on congruence and proportionality. Appended to the opinion was a long list of state-specific allegations of discrimination that were before Congress when it enacted Title I of the Americans with Disabilities Act. By refusing to defer to the congressionally fashioned remedy in light of such a record, the Supreme Court, the dissent argued, usurped the role of Congress.

Garrett resulted in barring Americans with Disabilities Act Title I suits against a state or a state agency and money damages against states. States are not free to discriminate, however. As noted in Garrett, Title I still prescribes substantive standards that are applicable to the states and can be enforced both by the federal government in actions for money damages and by private individuals in Ex parte Young actions brought against state officials to obtain prospective injunctive relief for ongoing violations of federal law.

Plaintiffs may be able to show that the state has waived sovereign immunity. At least two circuit courts of appeal have noted circumstances under which a state may be found to have waived sovereign immunity in its litigation of a case. Moreover, states may enact general waivers of sovereign immunity. Following Garrett, Minnesota enacted a statute waiving state immunity to employees’ lawsuits brought under federal laws, and other states, including California and New York, are considering such legislation.

Plaintiffs will continue to make the case that Congress has accomplished a valid abrogation of state sovereignty in other civil rights statutes. For example, Garrett expressly refused to review whether state sovereignty has been properly abrogated under Title II of the Americans with Disabilities Act, which prohibits discrimination in services, programs, and activities run by state and local entities, and, as noted by the Court, contains “somewhat different remedial provisions from Title I.” The circuit courts

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22 Id. at 975 (Breyer, J., dissenting).
23 Id. at 972.
24 Id. at 972–73.
25 Id. at 974–75.
26 Id. at 968 n.9 (citing Ex parte Young, 209 U.S. 123 (1908)).
27 Neimast v. Texas, 217 F.3d 275, reh’g denied, 228 F.3d 275 (5th Cir. 2000), cert. denied, 121 S. Ct. 1188 (2001); Amanda J. v. Clark County Sch. Dist., No. 99-1715, 2001 WL 992125, *16 n.7 (9th Cir. Aug. 13, 2001) (Clearinghouse No. 53,977) (citing Hill v. Blind Indus. & Servs. of Md., 179 F.3d 754 (9th Cir. 1999), opinion amended and reh’g denied, 191 F.3d 1186 (9th Cir. 2000)).
29 Garrett, 121 S. Ct. at 960 n.1.
are now reviewing Title II, with a split among the circuits already developing.\(^30\) Looking at another civil rights statute, the Eighth Circuit has affirmed race and sex discrimination claims under Title VII of the Civil Rights Act of 1964 as valid Fourteenth Amendment legislation.\(^31\)

Pre- and post-Garrett courts are also reviewing the validity of abrogation (more appropriately, waiver-of-immunity) provisions contained in federal spending clause programs. A number of circuit courts have upheld abrogation under section 504 of the Rehabilitation Act of 1974.\(^32\) Yet, in a surprise move on remand of Garrett, the Eleventh Circuit sua sponte held that the state was immune from suit under the Rehabilitation Act.\(^33\) Do not be surprised if one or more of these cases find their way to the Supreme Court.

The most immediate effect of Garrett will be an increase in sovereign immunity defenses by state defendants in the lower courts. The Court has created a judicial standard of review that appears to render suspect until proven otherwise all legislation enacted under the Fourteenth Amendment. The plaintiff must show that the legislation and legislative record address a history of unconstitutional conduct by states. Given the voluminous record of discrimination the Court rejected in Garrett, this burden will be difficult to meet. Moreover, a complication in plaintiff’s task is that most of the Fourteenth Amendment legislation that courts will be reviewing came about when legislatures had no reason to anticipate such a rigorous standard of review.

**B. Private Enforcement of Civil Rights Laws**

In addition to determining that state employees may not sue states for money damages under Title I of the Americans with Disabilities Act, the Court also curtailed the ability of private citizens to enforce civil rights laws. In another 5-to-4 decision with the same lineup of justices as in Garrett, the Court, in Alexander v. Sandoval, rejected a direct right of action to enforce regulations that implement Title VI of the Civil Rights Act of 1964.\(^34\) Title VI prohibits discrimination on the basis of race, color, or national origin by programs or activities that receive federal funding.\(^35\) This decision potentially has greater reach than Garrett because it applies not only to states but also to all federal fund recipients, including private entities.

Martha Sandoval, a Mexican immigrant, alleged that Alabama’s new English-only driver’s license test had the effect of subjecting non-English speakers to discrimination based on their national origin. She sought to enforce Title VI of the Civil Rights Act and its implementing regulations. Neither the statute nor the regulations expressly authorize private enforcement; however, since its enactment, courts, Congress, federal agencies, federal fund recipients, and private individuals had all acknowledged that individuals had an implied private right of action to enforce both Title V and the regulations. The district court, enjoining Alabama’s English-only policy, ordered the accommodation of non-English speakers, and the Eleventh Circuit affirmed.\(^36\)

\(^{30}\) Compare Thompson v. Colorado, 258 F.3d 1241 (10th Cir. 2001) (Clearinghouse No. 54,038) (holding Title II does not properly abrogate state immunity), with Wroncy v. Or. Dep’t of Transp., No. 00-35356, 2001 WL 474550 (9th Cir. May 4, 2001) (unpublished opinion) (allowing suit against state agency under Title II, noting that Garrett did not affect prior decisions upholding abrogation of immunity under Title II). See also Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001) (Clearinghouse No. 53,868) (citing Garrett to allow plaintiffs to proceed with an Ex parte Young action against state officials to enforce Title II despite state argument that Title II refers only to public entities).

\(^{31}\) Okulik v. Univ. of Ark., 255 F.3d 615 (8th Cir. 2001).

\(^{32}\) E.g., Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000), cert. denied, 121 S. Ct. 2591 (2001) (Clearinghouse No. 53,607). For citation of additional cases, see Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000).

\(^{33}\) Garrett v. Univ. of Ala., No. 98-6069 (11th Cir. Aug. 16, 2001).

\(^{34}\) Sandoval, 121 S. Ct. at 1523.

\(^{35}\) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

\(^{36}\) Sandoval, 121 S. Ct. at 1515.
Although the Supreme Court had approved of private actions under Title VI on a number of occasions and all nine circuit courts that had addressed the issue had allowed these actions, the Court granted certiorari to consider this issue.37 The Court then held that individuals may not bring suit to enforce the Title VI disparate impact regulations.38 The decision is yet another example of the Court’s stingy approach to private rights of action; this approach is in stark contrast to the prevailing view on the Court when Congress enacted Title VI, namely, that courts should “provide such remedies as are necessary to make effective the congressional purpose.”39 Justice Scalia explained in Sandoval that, under the Court’s current approach, the decision whether to imply a private right of action turns on a determination of whether the particular statute “displays an intent to create not just a private right but also a private remedy.”40

Title VI of the Civil Rights Act of 1964, section 601, provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”41 Section 602 authorizes federal agencies “to effectuate the provisions of § 601 by issuing rules, regulations, or orders of general applicability.”42 Immediately following passage of Title VI, the Departments of Justice and Transportation promulgated the “disparate impact” regulations at issue in Sandoval; the regulations prohibit federal funding recipients from “utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of race, color, or national origin.”43 The Court acknowledged three aspects of Title VI that it would take as given: First, private parties have an implied private right of action to enforce section 601.44 Second, section 601 prohibits only intentional discrimination.45 Third, for purposes of deciding the case, the assumption is that the disparate impact regulations are valid.46 Beyond these three points, the Court conceded little else. It did not defer to its previous opinions—which the dissent argued had “overdetermined” the issue in favor of enforcement—and took issue with the proposition that congressional intent supported the private cause of action.47

Stating that the Court is “bound by holdings, not language,” Justice Scalia rejected the argument that the Court already had decided the issue.48 However, the Court had allowed enforcement of

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37 Id. at 1524 n.1 (Stevens, J., dissenting).
38 Id. at 1523.
39 J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964). But see Sandoval, 121 S. Ct. at 1520 (finding that understanding has been abandoned and “[h]aving sworn off the habit of venturing beyond Congress’ intent, we will not accept respondent’s invitation to have one last drink”).
40 Sandoval, 121 S. Ct. at 1518.
42 Id. § 2000d-1.
44 Sandoval, 121 S. Ct. at 1516.
45 Id. The dissent says that this aspect was “never the subject of thorough consideration by a Court focused on that question.” Id. at 1531 (Stevens, J., dissenting).
46 Id. at 1517.
47 Id.
48 Id. at 1528 (Stevens, J., dissenting).
49 Id. at 1517.
Title VI (or its gender-based twin, Title IX) in a number of cases. These cases do not contain simple, straightforward holdings but rather are deeply fractured decisions that, as Justice Stevens pointed out in his Sandoval dissent, required careful analysis. In an unsettling move that is sure to introduce confusion to concepts of stare decisis, the Sandoval Court narrowed these cases to single-sentence holdings. Thus, for example, the Sandoval Court wrote that Cannon v. University of Chicago “held that Title IX created a private right of action to enforce its ban on intentional discrimination, but had no occasion to consider whether the right reached regulations barring disparate impact discrimination” and that Guardians Association v. Civil Service Commission of New York City “held that private individuals could not recover compensatory damages under Title VI except for intentional discrimination.” Because the Sandoval Court could boil down none of these decisions to a single-sentence holding that a private right of action enforced the disparate impact regulations, the Court refused to be bound by them.

Having freed itself from previous decisions, the majority then applied its methodology to decide whether Congress intended a private right of action to enforce the disparate impact regulations. The Court agreed that regulations applying section 601’s ban on intentional discrimination might be privately enforced because a “Congress that intends the statute to be enforced through a private right of action intends the authoritative interpretation of the statute to be enforced as well.” However, the Court concluded, an implied right to enforce the disparate impact regulations could not be grounded in section 601 because the regulations forbade conduct that section 601, which proscribed only intentional discrimination, permitted.

With section 601 off the table, the question became whether section 602, the provision which authorized federal agencies to effectuate section 601 by issuing rules, independently authorized private enforcement of the regulations. The Sandoval Court identified numerous problems with this route. First, “Far from displaying congressional intent to create new rights, § 602 limits agencies to ‘effectuating’ rights already created by § 601.”

Second, the focus of section 602 is not on private individuals but on administrative agencies: “Statutes that focus on the person regulated rather than the individuals protected create ‘no implication of an intent to confer rights on a particular class of persons.’” Third, the methods of enforcement contained in section 602 do not reflect an intent to create a private remedy. Section 602 empowers agencies to enforce the rules by terminating funding to a program that has violated the regulation or “by any other means authorized by law” and establishes certain restrictions on agency enforcement.

Moreover, “The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” In sum, the Court found no evidence “anywhere in the text to suggest that Congress intended to create a private right to enforce regulations pro-

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50 For citation of these cases, see id. at 1517, 1518–19, 1528 n.8.
51 Id. at 1526 (Stevens, J., dissenting).
52 Id. at 1517–18 (discussing Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Guardians Ass’n v. Civil Serv. Comm’n of New York City, 463 U.S. 582 (1983)).
53 Id. at 1519.
54 Id. at 1518.
55 Id. at 1519.
56 Id.
57 Id. at 1521.
58 Id. (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).
59 Id.
60 Id. (quoting 42 U.S.C. § 2000d-1).
61 Id. at 1521–22.
mulgated under § 602.62 Failing to find authorization for private enforcement of the regulations in the text of either section 601 or section 602, the Court decided its search could end.

Justice Stevens, writing for the dissent, argued that the question before the Court "was only an open question in the most technical sense" and asserted that, by deciding against enforcement, the majority had issued a decision "unfounded in our precedent and hostile to decades of settled expectations."63 To the dissenting justices, the decision to allow enforcement should have been a matter of stare decisis.64 While agreeing that the Court had never said "in so many words" that a private right enforced the disparate impact regulations, the dissent noted the responsibility of the Court to canvas the prior opinions for guidance "with the care they deserve."65 This process, once achieved, would have shown that the Court had considered the question and concluded that a private right of action existed.66

The dissenting opinion turned to the methodology for analyzing the text and structure of Title VI. It criticized the majority for employing a straightjacketed analysis that enabled it to treat section 601 and judicial decisions interpreting it as authoritative but treat the regulations promulgated by the agencies under section 602 as "poor step-cousins," either parroting the text of section 601 and therefore enforceable or forwarding an agenda untethered to section 601 and therefore suspect.67 In stark contrast to the majority, the dissent argued that section 601 and section 602 did not stand in isolation but functioned as an integrated remedial scheme: "For three decades, we have treated § 602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in § 601, even if the conduct captured by these rules is at times broader than that which would otherwise be prohibited."68 Thus, the dissent stated, "the regulations are inspired by, at the service of, and inseparably intertwined with § 601's antidiscrimination mandate" and should be subject to private enforcement.69

Finally the dissent found the decision at odds with "lengthy, consistent, and impassioned" legislative history.70 At the promulgation of the disparate impact regulations, "prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law."71 Moreover, legislative history since the time of enactment and amendments to the civil rights legislation offered ample evidence of Congress' clear understanding of the existence of the private right of action.72

62 Id. at 1522.
63 Id. at 1536 (Stevens, J., dissenting).
64 Id. at 1524–28.
65 Id. at 1524.
66 In particular, the dissent analyzed Lau v. Nichols, 414 U.S. 563, 569 (1974), Cannon, 441 U.S. at 703, and Guardians, 463 U.S. at 594–95. See Sandoval, 121 S. Ct. at 1525–26, 1526 n.4 (Stevens, J., dissenting). The dissent characterized Lau, in which all the justices agreed that private parties could enforce Title VI and its regulations, as an "identical case" to Sandoval, 121 S. Ct. at 1525. The dissent also stated that the majority’s analysis in Sandoval was "wholly foreign" to the text and reasoning of Cannon, which held that all the discrimination prohibited by the regulatory scheme might be the subject of a private lawsuit. Id. at 1525–26, 1526 n.4. Noting the similarities between the two cases, the dissent asserted that the Sandoval decision should have followed Guardians, in which a "clear majority" of the justices expressly stated that private parties could enforce the disparate impact regulations. Id. at 1526.
67 Sandoval, 121 S. Ct. at 1529 (Stevens, J., dissenting).
68 Id. at 1529–30.
69 Id. at 1531.
70 Id. at 1530.
71 Id. at 1524.
72 Id. at 1528 n.9, 1532 n.19, 1534–35.
In addition to foreclosing the right of individuals to bring direct causes of action to enforce the disparate impact regulations, Sandoval emits a number of dangerous signals. First, the majority clearly evidences a desire to review the Title VI disparate impact regulations, and its decision is full of skepticism about their validity. Second, the opinion raises questions about when an implied cause of action exists. The majority does not give affirmative guidance regarding what sort of congressional intent will be necessary for the Court to uphold such a right. Following Sandoval, confusion surrounds the status of Cort v. Ash, which courts traditionally have used to determine implied rights of action.73 While acknowledging the controlling nature of the case, the majority does not in fact apply the Cort v. Ash factors but rather looks only at whether the text of the statute evidences the requisite intent.74 The Court even suggests that private plaintiffs cannot enforce regulations that go beyond the text of the statute.75 Third, Sandoval makes clear that an administrative agency cannot create private rights of action to enforce its own regulations unless Congress intended such an action to exist. Justice Scalia writes, “Agencies may play the sorcerer’s apprentice, but not the sorcerer.”76 This approach seems at odds with the deference normally accorded agency interpretations of ambiguous statutory questions.77

Without doubt, Sandoval’s holding and the confusion the case has raised will affect enforcement of the disparate impact regulations under other laws, such as section 504 of the Rehabilitation Act of 1974, Title II of the Americans with Disabilities Act, and Title IX of the Civil Rights Act.78 Each statute will require separate analysis.

Moreover, Sandoval is sure to focus the microscope on another avenue of private enforcement, Section 1983 of the Civil Rights Act, which provides an express cause of action to individuals when state action deprives them of the protections of federal law.79 Justice Stevens’s dissent notes that the disparate impact regulations may still be enforced under this law.80 Already at least one district court has so ruled.81

The overall thrust of Mead and the other cases addressing deference is to curtail the extent of judicial deference by finding the Chevron framework to be inapplicable in a variety of situations.

74 Sandoval, 121 S. Ct. at 1520. The dissent argued that in Cannon, 441 U.S. at 688, the Court applied all the Cort v. Ash factors to examine the nature of the rights at issue, the text and structure of the statute, and the relevant legislative history and concluded that Congress unmistakably intended a private right of action to enforce Title VI intentional discrimination and disparate impact claims. Id. at 1533–34 (Stevens, J., dissenting).
75 Sandoval, 121 S. Ct. at 1519 (quoting Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 173 (1994) (a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]") (interpolation in the original)).
76 Id. at 1522.
80 Sandoval, 121 S. Ct. at 1527 (Stevens, J., dissenting).
Yet enforcement through Section 1983 should not be taken as given, as such an approach would leave state governments, but not private entities, subject to enforcement—something this Court may not allow. Moreover, the circuit courts of appeal are divided on the question of whether regulations are “laws” that are independently enforceable pursuant to Section 1983.82 Meanwhile, the Seventh Circuit says that Section 1983 is not available in a Title VI action because Title VI provides its own remedial scheme.83

Sandoval has erased any thoughts that this Court would apply long-held principles that, as remedial statutes, the civil rights laws must be broadly construed. Absent a congressional enactment to return the law to its pre-Sandoval state, future litigants will be left with much to muddle through.

II. Deference to Administrative Agencies: An Avulsive Change

Many public interest attorneys spend the bulk of their time attacking federal agency regulations, policies, or practices that implement diverse programs ranging from food stamps to Medicaid to social security to Temporary Assistance for Needy Families to subsidized housing, arguing that agency rules conflict with the intent of the federal statutory scheme which established and governs the program at issue. A key issue in litigating such cases is the nature and extent of deference that courts will accord to administrative interpretations of statutes.

This term, the Court returned to the subject of deference in a number of cases, including U.S. v. Mead Corp., the Court's most comprehensive elucidation of the issue of deference since its 1984 decision in Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.84 The overall thrust of Mead and the other cases addressing deference is to curtail the extent of judicial deference by finding the Chevron framework to be inapplicable in a variety of situations.

In Chevron the Court first articulated the now ubiquitous two-step inquiry governing judicial review of administrative interpretations of law. First, a court must determine whether Congress has spoken to the specific point at issue. If so, the congressional intent trumps any administrative interpretation. Second, if Congress has not spoken to the specific question, or if its intent is ambiguous, the court must defer to the administrative interpretation as long as it is “reasonable.”85 Chevron rests on the premise that, in the typical statutory scheme, Congress implicitly delegates the task of resolving ambiguities and filling in interstices to the agency charged with implementing a statute.

In the years following Chevron the disposition of litigation over the validity of agency rules interpreting statutes has generally turned on the application of this two-step inquiry. Last term, however, in Christensen v. Harris County the Court declined to apply the Chevron framework to a Department of Labor opinion letter; the Court concluded that “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.”86 The Christensen majority then

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82 E.g., compare Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994), cert. denied, 513 U.S. 1150 (1995) (allowing enforcement of regulation), with Harris v. James, 127 F.3d 993, 1009 (11th Cir. 1997) (regulation not enforceable unless it “defines or fleshes out” the statute).

83 Alexander v. Chi. Park Dist., 773 F.2d 850, 856 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986); see also Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 2000) (holding Title IX provides its own comprehensive enforcement scheme to the exclusion of a Section 1983 action).


85 Chevron, 467 U.S. at 844–45.

went on to apply a weaker form of deference, stating that, even though agency interpretations set forth in such sources did not merit the often dispositive deference which flowed from Chevron, they were still “entitled to respect” and might be considered for whatever persuasive power they possessed.87 This form of deference is known in administrative law jargon as “Skidmore deference” after Justice Jackson’s 1944 opinion in Skidmore v. Swift & Co.88

This term, in Mead, the Court followed up on its decision in Christensen with an extended discussion of when courts should apply Chevron deference or its weaker cousin, Skidmore deference. At issue in Mead was whether the U.S. Customs Service correctly classified the plaintiff’s imported products within a subsection of the Harmonized Tariff Schedule of the United States; the classification resulted in the plaintiff having to pay import taxes.89 The classification at issue was pursuant to a “tariff ruling letter.” Such letters are authorized by regulation but are not themselves subject to any notice-and-comment or publication requirements, nor do they carry any binding force beyond the particular importer (and with respect to the particular product) to whom they are issued.90 The Customs Service contended that its interpretation and application of the statutory tariff schedule, as expressed through the tariff ruling letter, were entitled to Chevron deference.91

Writing for an eight-member majority, Justice Souter comprehensively reviewed the Court’s deference jurisprudence and attempted to articulate a unifying principle to guide the application of Chevron deference:

We hold that administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.92

The Court acknowledged that although “a very good indicator of delegation meriting Chevron treatment” was congressional authority to engage in formal rule making or adjudicatory processes, it was not an exclusive indicator.93 Justice Souter explained that while “the overwhelming number” of cases applying Chevron have dealt with rules promulgated after notice and comment or with decisions issued after formal adjudication, “we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded.”94 Accordingly the

87 Id. at 587 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). The majority then determined that the agency’s interpretation of the Fair Labor Standards Act provision at issue was not persuasive. Id.
88 Skidmore, 323 U.S. at 134-40 (1944). Justice Jackson wrote: “The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” Id. at 140.
89 Mead, 121 S. Ct. at 2168-70 (addressing the Harmonized Tariff Schedule of the United States, 19 U.S.C. §§ 1202 et seq.).
90 Id.
91 Id. at 2168.
92 Id. at 2171.
93 Id. at 2172.
94 Id. Before last term’s decision in Christenson, however, the Court had not appeared to pay much attention to the process used to develop the agency interpretation or to the form in which it was articulated. See, e.g., Pension Benefit Guaranty Corp. v. Litv Corp., 496 U.S. 633 (1990) (according Chevron deference to an advisory opinion).
Court examined the tariff classification scheme at issue for evidence of the requisite congressional authorization—explicit or implicit—for the agency to issue tariff rulings imbued with the “force of law.” Unable to unearth any such congressional intent, the Court concluded that the rulings at issue “are best treated like ‘interpretations contained in policy statements, agency manuals, and enforcement guidelines’...They are beyond the Chevron pale.”

Consistent with last term’s decision in Christensen, however, the Mead majority emphasized that an agency’s inability to secure Chevron deference will not preclude it from claiming “some deference” under the “practical criteria” set forth in Skidmore. The Court rejected the dissent’s “either-or” view that an administrative interpretation merited “either Chevron deference or none at all”:

Chevron did nothing to eliminate Skidmore’s holding that an agency’s interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity at and in its administrative and judicial understandings of what a natural law requires.

Writing alone in an acerbic dissent, Justice Scalia attacked the majority’s ruling for creating “an avulsive change in judicial review of federal administrative practice” and predicted that “the Mead doctrine, which has today replaced the Chevron doctrine,” will cause “protracted confusion” as the lower courts struggle to apply “the utter flabbiness” of the Court’s new standard governing Chevron deference. Attacking Skidmore deference as “an empty truism and a trifling statement of the obvious,” Scalia warned that the majority “has largely replaced Chevron...with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): the ol’ ‘totality of the circumstances’ test.”

Justice Scalia closed his dissent with a warning that “today’s decision [is] one of the most significant opinions ever rendered by this Court dealing with judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad.” Although his prediction that Mead will have a negative effect may be debatable, his assessment of its importance may well prove correct. Mead invites plaintiffs to try to sidestep the application of Chevron in many situations. When notice and comment rule making or formal adjudication does not precede an agency interpretation, courts must now focus on the threshold issue of whether Congress implicitly authorized the agency to make pronouncements that carry the force of law in the form that the agency uses. As Justice Scalia observed, it seems likely that the lower courts “will be sorting out the consequences of the Mead doctrine...for years to come.”

Two other cases this term touched upon issues of judicial deference, but neither discussion approached the poten-

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95 Mead, 121 S. Ct. at 2173–76.
96 Id. at 2175 (quoting Christensen, 529 U.S. at 587).
97 Id. at 2175 & n.19.
98 Id. at 2175–76 (quotations omitted).
99 Id. at 2177, 2181 (Scalia, J., dissenting).
100 Id. at 2183, 2178.
101 See, e.g., Christensen, 529 U.S. at 59 (Scalia, J., concurring in part and concurring in the judgment).
102 Mead, 121 S. Ct. at 2189 (Scalia, J., dissenting).
103 Id. at 2178.
ially “avulsive” effect of Mead. In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers the Court also rejected an attempt by an administrative agency to claim Chevron deference.104 Solid Waste resolved a dispute over the meaning of the term “Navigable waters” in section 404(a) of the Clean Water Act.105 In Solid Waste the plaintiffs, a consortium of 23 municipalities, challenged the Army Corps of Engineers’ “Migratory Bird Rule,” a regulation defining the term “Navigable waters” to include “intrastate waters “used as habitat by other migratory birds which cross state lines.”106 After the corps denied the plaintiffs’ permit application, the municipalities sued, contending that section 404(a) could not be construed “to cover nonnavigable, isolated, intrastate waters based upon the presence of migratory birds” and, if it could be so interpreted, that Congress lacked power under the commerce clause to regulate such waters.107

By a bare majority, the Court concluded that the corps’ interpretation of the term “Navigable waters” conflicted with Congress’ clear intent.108 This holding obviated the need for the Court to consider plaintiffs’ claim that the statute exceeded the bounds of Congress’ power under the commerce clause. From the point of view of judicial deference, the most significant aspect of the case is dicta in which the Court noted that even if the statute had been ambiguous, the Court would have declined to apply Chevron deference.109 Justice Rehnquist, writing for the majority, explained that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”110 He noted that “[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”111 In effect, the Court viewed the canon that ambiguous statutes were to be construed to avoid substantial constitutional questions to take precedence over the teaching of Chevron that ambiguous statutes were generally to be construed by the agency.

This approach represents something of a shift. Ten years ago in Rust v. Sullivan, Justice Rehnquist applied Chevron to sustain an administrative interpretation of an admittedly ambiguous statute, notwithstanding that the interpretation raised substantial constitutional questions.112 Perhaps the language in Solid Waste about “traditional state powers” is intended to signal that the nature of the constitutional issue will influence the willingness of the Court to displace the Chevron doctrine.

In Whitman v. American Trucking Associations the Court considered a series of opaque legal and technical issues arising under the Clean Air Act.113 A number of states and private companies had mounted an array of challenges to certain stringent revisions by the Environmental Protection Agency, or EPA, of various national ambient air quality standards.114

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107 Id. at 679.
108 Id. at 682.
109 Id. at 683.
110 Id.
111 Id.
112 Rust v. Sullivan, 500 U.S. 173 (1991). In Rust the dissents argued for an approach similar to that used in Solid Waste. See id. at 202 (Blackmun, J., dissenting); id. at 221 (O’Connor, J., dissenting).
113 Whitman v. Am. Trucking Ass’n, 121 S. Ct. 903 (2001) (addressing the Clean Air Act, 42 U.S.C. §§ 7409 et seq.). The Court’s description of the cases consolidated in American Trucking as “unusually complex” was an understatement. Id. at 919.
114 Id. at 907.
The biggest news about American Trucking is that the Court resoundingly rejected the D.C. Circuit’s bid to revive the “nondelegation” doctrine by reaffirming the long line of cases holding that policy making could be delegated to administrative agencies as long as Congress provided an “intelligible principle” to guide the agency.\(^{115}\)

Before reaching the merits, the Court rejected the EPA’s contentions that (1) the decision on the revised ozone air quality standards was not a “final action” subject to judicial review under the Clean Air Act, and (2) in any event the issue was not ripe for review.\(^{116}\) With respect to the issue of finality, the Court acknowledged that the rule at issue was embodied in an “interim” regulation and that “the agency has not dressed its decision with the conventional procedural accouterments of finality.”\(^{117}\) However, the test for whether an agency’s action is “final” (and thus reviewable) is a practical one and asks whether the action under review “mark[s] the consummation of the agency’s decisionmaking process.”\(^{118}\) In this case, given a variety of formal and informal comments and pronouncements from the EPA over a four-year period indicating that the rule at issue represented its “final word” on the subject, the Court had “little trouble” concluding that the EPA’s interpretation constituted “final agency action.”\(^{119}\)

The Court also concluded that the issue was ripe for judicial consideration, rejecting the agency’s contention that “preenforcement” review was premature.\(^{120}\) “Ripeness require[s] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”\(^{121}\) Here the Court noted that the issues before it were purely legal in nature and would not benefit from any further factual development.\(^{122}\) Judicial review would not inappropriately interfere with any further administrative action or consideration of the issue by the agency, and, as to hardship, any delay in review would require the respondents to undertake “lengthy and expensive tasks” to comply with the disputed agency standards.\(^{123}\)

### III. State Action: Emphasizing Entwinement

The debate about privatization and President Bush’s faith-based initiative make the issue of state action particularly timely. The Court returned to this issue this term in Brentwood Academy v. Tennessee Secondary School Athletic Association, holding that a secondary school athletic association with public schools comprising 84 percent of its membership was a state actor and therefore subject to suit in federal court pursuant to 42 U.S.C. § 1983.\(^{124}\) Justice Souter wrote the opinion for a majority made up of Justice O’Connor and the four justices who usually form a not-so-merry band of dissenters. Justice O’Connor jumped ship to agree that “the association’s regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association.”\(^{125}\) More important than the outcome, however, is that the Court may have announced a new theory for finding state action in the behavior

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\(^{115}\) Id. at 913.

\(^{116}\) Id. at 914.

\(^{117}\) Id. at 915.

\(^{118}\) Id. (quoting Bennett v. Spear, 520 U.S. 154, 177–78 (1997)).

\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) Id. (quoting Texas v. United States, 523 U.S. 296, 300–301 (1998) (Clearinghouse No. 52,224)).

\(^{122}\) Id. (citing Ohio Forestry Ass’n Inc. v. Sierra Club, 523 U.S. 726, 733 (1998)).

\(^{123}\) Id. at 115–16.


\(^{125}\) Id. at 927.
of private entities: entwinement. At the very least, the majority and dissenting opinions set out useful summaries of the law of state action.

The decision arose from a suit against the athletic association by one of its members when that body imposed sanctions on the member for violating a rule prohibiting "undue influence in recruiting athletes." The trial court enjoined enforcement of the rule on the grounds that the association was a state actor and that the rule violated the First and Fourteenth Amendments, but, reversing the trial court, the Sixth Circuit held that the athletic association was not a state actor. With eight federal and state appellate courts having previously determined that statewide athletic associations were state actors, the Supreme Court granted certiorari.

Although the Brentwood Academy majority pays lip service to the various theories on which state action has previously been premised, its real thrust is directed at the fact that "[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." Justice Souter pointed out that the association is primarily composed of public schools which select its governing board (presently made up entirely of public school officials), that most of its meetings are held during school hours, and that part of its revenue comes from its members' dues. Furthermore, "[t]o complement the entwinement of public school officials with the Association from the bottom up, the State of Tennessee has provided for entwinement from top down," including by allowing the association's employees to participate in the state retirement system.

That—with "the relevant facts showing pervasive entwinement to the point of largely overlapping identity"—other tests might have produced a different result did not trouble the Court. It did note that, under any test, some other public policy factor, such as when the putative state actor was a public defender, might outweigh a state action determination. The Court finds no such countervailing consideration in this circumstance, however.

The significance of this decision is uncertain. Justice Thomas's dissent notes that the Court had "never before found state action based upon mere 'entwinement,'" that the "majority does not define 'entwinement,' and [that] the meaning of the term is not altogether clear." With such ambiguity underlying the premise of the majority opinion, the dissent opines that this "entwinement test" could apply not only to other associations whose members are high schools but also to "other organizations that are composed of, or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties." In short, the reach of entwinement's tentacles is presently a mystery, but for now advocates should at least find useful language for countering the more egregious positions that defendants take on state action issues.

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126 The word "entwinement" appears seventeen times, including four times in one two-sentence paragraph, in the course of the majority opinion. See, e.g., id. at 933.
127 See id. at 930 (Souter, J.); id. at 937–39 (Thomas, J., dissenting).
128 Id. at 929.
129 See id.
130 Id. at 929 & n.1.
131 Id. at 932.
132 Id.
133 Id. at 932–33.
134 Id. at 934.
135 See id. (discussing Polk County v. Dodson, 454 U.S. 312, 322 (1981)).
136 Id. at 935, 939 (Thomas, J., dissenting).
137 Id. at 940.
IV. Attorney Fees: The Catalyst Theory

The old sports cliché applies to civil litigation as well: "Winning isn’t everything—it’s the only thing." In Buckhannon Board and Care Home Inc. v. West Virginia Department of Health and Human Resources, another 5-to-4 decision by the Bush-Cheney faction, the Supreme Court bucked the opinion of nearly every federal appellate court; the Court chose to side with the one-vote majority of the lone dissenting court on the question of “prevailing party” status in federal fee-shifting statutes.138 Per the chief justice, the Court held that the victory must have some “judicial imprimatur”; that the defendant changed the policy at issue in response to the plaintiffs’ lawsuit would not be sufficient to meet the condition precedent for an award of fees.139 With the “catalyst theory” for prevailing party status thus rejected, plaintiffs in federal actions will no longer be able to obtain fees without either a judgment on the merits or a consent decree.140

Much of the majority’s analysis is an effort to explain how it could reject the decisions and reasoning of most of the lower courts and how it had not approved of an award of fees in any circumstance without some judicial involvement in the resolution. The Court held that the statutes had a “clear meaning of ‘prevailing party,’” but the major premise for its statutory construction is Black’s Law Dictionary.141 Chief Justice Rehnquist wrote that since “Congress employed the term ‘prevailing party,’ a legal term of art,” it was appropriate to rely on Black’s Law Dictionary, which “defines ‘prevailing party’ as [a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded....” This view that a ‘prevailing party’ is one who has been awarded some relief by the court can be distilled from our prior cases.142

That is about the extent of the statutory analysis in Buckhannon Board and Care Home. The majority devotes much of its attention to why the term “prevailing party” does not encompass the “catalyst theory.”143 It also finds not compelling the policy argument that “mischievous defendants” will attempt to moot out cases voluntarily to avoid paying fees.144 If they do, however, the Court notes that, even where only equitable relief is involved, the district judge should not find that defendant’s voluntary action mooted the case, and plaintiff can then obtain an enforceable judgment and seek fees.145

Not surprisingly the dissent is somewhat acerbic: “The Court today detects a ‘clear meaning’ of the term prevailing party...that has heretofore eluded the large majority of courts construing those words.”146 The dissent does not reject the

139 Id. at 1840.
140 Although the case at issue nominally involved only the fee-shifting statutes of the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act, 42 U.S.C. § 12205, the discussion is largely about the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988. See Buckhannon Board & Care Home, 121 S. Ct. at 1839 & n.4. There is no indication that the holding in Buckhannon Board & Care Home will not apply to all federal fee-shifting statutes which employ a prevailing party requirement. See, e.g., Bennett v. Yoshina, 259 F.3d 1097 (9th Cir. 2001) (explicitly holding that Buckhannon Board and Care Home applies to 42 U.S.C. § 1988). These statutes would include, among others, the Equal Access to Justice Act, 28 U.S.C. § 2412, the provision generally applicable to cases involving the federal government.
141 Buckhannon Board & Care Home, 121 S. Ct. at 1839, 1843.
142 Id. at 1839.
143 Id. at 1840–42.
144 Id. at 1842–43.
145 Id. (quoting and relying on Friends of Earth Inc. v. Laidlaw Envtl. Servs. (TOC) Inc., 528 U.S. 167, 189 (2000)).
146 Id. at 1853 (Ginsburg, J., dissenting).
majority’s total dependence on Black’s Law Dictionary out of hand but views it with disdain: “In prior cases, we have not treated Black’s Law Dictionary as preclusively definitive; instead, we have accorded statutory terms, including legal ‘term[s] of art’…a contextual reading.”

For legal services advocates, perhaps the most important lesson of Buckhannon Board and Care Home lies in the majority’s determination not to allow voluntary cessation of challenged activity to preclude the right to fees. Thus, when a governmental defendant “voluntarily” provides the requested relief and declares the matter moot, advocates should respond with the Court’s refrain “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’ unless it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’”

Buckhannon Board and Care Home will undoubtedly create additional hurdles to the award of fees in some cases, but it is not a definitive repudiation of fee awards in all instances of voluntary cessation.

V. Retroactive Application of Statutes, Judicial Estoppel, and Miscellany

In one of its final decisions of the term, the Court took a fresh look at the thorny issue of retroactive application. In Immigration and Naturalization Service v. St. Cyr the plaintiff, a lawful permanent resident, pled guilty to a crime that rendered him deportable. Although at the time of his conviction he would have been eligible to seek a discretionary waiver of deportation from the attorney general under applicable immigration law, by the time his deportation proceedings commenced, Congress had enacted two new immigration statutes which, as the Immigration and Naturalization Service interpreted them, withdrew the availability of a deportation waiver. Further, the agency contended that those same statutes deprived the courts of jurisdiction to even consider St. Cyr’s federal habeas corpus petition.

Writing for a five-member majority, Justice Stevens spent the bulk of his opinion discussing the threshold issue, that is, whether the statutory amendments contained the requisite “clear statement of congressional intent to repeal habeas jurisdiction.” Employing the same canons of construction a very different majority used in the Solid Waste case (four of whom dissented in St. Cyr), the Court noted that if Congress designed a statute to push the “outer limits” of Congress’ constitutional power, Congress must clearly state its intent to do so. The majority concluded that the absence of any forum whatsoever to hear plaintiff’s legal claims, “coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration of habeas of such an important question of law, strongly counsels against

147 Id.
148 Id. at 1842-43 (quoting Friends of Earth, 528 U.S. at 189).
151 Id. at 2278.
152 Id.
153 Id.; see Solid Waste, 121 S. Ct. at 683; supra notes 104-11 and accompanying text.
adopting a construction that would raise serious constitutional questions."154

The Court then addressed the merits of St. Cyr’s claim that the Immigration and Naturalization Service’s application of the statute “imposes an impermissible retroactive effect upon aliens who, in reliance upon [the availability of waiver of deportation] relief, pled guilty to [deportable] felonies.”155 The Court began its discussion with the reasons why “[r]etroactive statutes raise special concerns,” the most basic being that “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly.”156 Of particular applicability to this case, the Court expressed concern that the legislature’s “responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.”157 Here the immigrant population that the statutes target “are particularly vulnerable to adverse legislation” because noncitizens may not vote.158 For these reasons, “congressional enactments...will not be construed to have retroactive effect unless their language requires this result,” and although Congress has the power to enact laws with retroactive effect, its intent to do so must be unambiguous.159

Parsing through the thicket of amendments to the Immigration and Nationality Act, the majority concluded that the Immigration and Naturalization Service could not meet the “demanding standard” for demonstrating retroactive intent.160 The various textual arguments the agency offered failed to persuade the Court that “Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.”161 In a wonderfully logical footnote, the majority curtly dismissed the agency’s suggestion to accord Chevron deference to its interpretation of the retroactive intent of the statute: “Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for Chevron purposes, no ambiguity in such a statute for an agency to resolve.”162

Having resolved the issue of intent, the majority had no difficulty deciding that the Immigration and Naturalization Service’s interpretation of the statutes to eliminate any possibility for discretionary relief from deportation for persons such as St. Cyr, who entered into plea agreements with the expectation of eligibility for such relief, in fact imposed an impermissible retroactive effect.163 According the Court held that discretionary relief from deportation “remains available for aliens...whose convictions were obtained through plea agreements [prior to enact-
ment of the statutes] and who...would have been eligible for [such] relief at the time of their plea under the law then in effect."\textsuperscript{164}

In New Hampshire v. Maine the Court applied the doctrine of judicial estoppel for the first time in over a century to prevent New Hampshire from arguing that the Piscataqua River lay within the borders of the state.\textsuperscript{165} The decision thus puts the Supreme Court's imprimatur on the lower federal courts' increasing use of the doctrine.\textsuperscript{166} Writing for a unanimous Court, Justice Ginsburg stated that judicial estoppel aimed "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."\textsuperscript{167} She explained that "several factors typically inform the decision whether to apply the doctrine in a particular case": (1) the party's position must be "clearly inconsistent" with its earlier position; (2) a court must have accepted the earlier position; and (3) the party must be seeking an "unfair advantage" over its opponent.\textsuperscript{168} Justice Ginsburg, however, cautioned that this list was not "an exhaustive formula" for determining when estoppel applied and that "additional considerations" might bear on the issue in particular cases.\textsuperscript{169} The Court found no reason to refrain from using estoppel in this case because of New Hampshire's status as a state. It noted, however, that other situations might well yield reason to accord states greater leeway than private citizens to shift positions.\textsuperscript{170}

Three additional cases are worth noting. In Becker v. Montgomery the Court held unanimously that the failure of a pro se litigant to sign a notice of appeal was not a jurisdictional defect.\textsuperscript{171} In Booth v. Churner the Court construed a provision of the Prison Litigation Reform Act of 1995, which required prisoners to exhaust available administrative remedies before filing civil rights suits under Section 1983.\textsuperscript{173} In Booth the Court unanimously concluded that the statute required prisoners to go through administrative grievance systems, even though the remedy sought (damages) was not available administratively.\textsuperscript{174} Because the holding of Booth centers on interpretation of the Prison Litigation Reform Act of 1995, the decision is likely to have little impact on exhaustion requirements in other contexts. Finally in Saucier v. Katz the Court returned to the issue of qualified immunity of state officials in suits brought under Section 1983.\textsuperscript{175}

\textsuperscript{164} Id. at 2293.

\textsuperscript{165} New Hampshire v. Maine, 121 S. Ct. 1808 (2001). The Supreme Court's last detailed discussion of the doctrine was in Davis v. Wakelee, 156 U.S. 680 (1895).


\textsuperscript{167} New Hampshire v. Maine, 121 S. Ct. at 1814 (quotations and citations omitted).

\textsuperscript{168} Id. at 1815.

\textsuperscript{169} Id.

\textsuperscript{170} Id. at 1817. The Court cited cases indicating that the actions of its agents should not preclude the government from enforcing laws and cases dealing with shifts in public policy. Id.


\textsuperscript{172} Id. at 1808.


\textsuperscript{174} Id. at 1821.

clarified the framework for analyzing immunity in suits alleging that law enforcement officers used excessive force.\textsuperscript{176}

\textbf{VI. The Outlook for This Term}

For the term that has just begun, the Court has so far taken two cases which may affect access to federal courts. In one, Illinois Bell Telephone Co. v. Worldcom Technologies Inc., the Court is likely to determine whether a state commission’s acceptance of a congressional invitation to participate in implementing a federal regulatory scheme providing for review in federal court is a waiver of Eleventh Amendment immunity.\textsuperscript{177} That same case may also decide whether the \textit{Ex parte Young} doctrine precludes an official-capacity action seeking prospective relief against state public utility commissioners for ongoing violations of federal law.\textsuperscript{178} The other potentially relevant case, Raygor v. Regents of the University of Minnesota, raises the question of whether the provision of the federal supplemental jurisdiction statute which tolls the statute of limitations on state law claims while they are pending in federal court violates the Eleventh Amendment as applied to claims against unconsenting states.\textsuperscript{179}

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\textsuperscript{176} The Court also clarified that, in considering whether the federal right allegedly violated was well established at the time of its violation, courts should focus on whether the contours of the right are sufficiently clear that “a reasonable officer would understand that his conduct was unlawful in the situation that he confronted.” Id. at 2156.

\textsuperscript{177} Ill. Bell Tel. Co. v. Worldcom Techs. Inc., 179 F.3d 566 (7th Cir. 1999), cert. granted, 121 S. Ct. 1224 (2001) (No. 00-878).

\textsuperscript{178} \textit{Ex parte Young}, 209 U.S. 123 (1908).

\textsuperscript{179} Raygor v. Regents of Univ. of Minn., 620 N.W.2d 680 (Minn. 2001), cert. granted, 121 S. Ct. 2214 (2001) (No. 00-1514) (considering 28 U.S.C. § 1367(d)).
Supreme Court Decisions on Federal Court Access

NOVEMBER–DECEMBER 2001 | JOURNAL OF POVERTY LAW AND POLICY 393

On March 26, 2001, a federal district judge in Michigan issued one of the most astounding decisions in Section 1983 history. In Westside Mothers v. Haveman Judge Robert H. Cleland threw down the gauntlet to the Sixth Circuit and the U.S. Supreme Court by rejecting decades of law holding that 42 U.S.C. § 1983 provides a mechanism to obtain injunctive relief against state officials for failing to comply with federal Medicaid law (and, by extension, other joint federal-state programs). With Judge Cleland’s arguments cropping up in litigation around the country, the prospect of that issue finding its way to the Supreme Court looms menacingly on the horizon. Westside Mothers itself is now on appeal before the Sixth Circuit.2

Westside Mothers should have been a run-of-the-mill case, as plaintiffs sought to impose, through Section 1983, certain Early and Periodic Screening, Diagnosis, and Treatment requirements on Michigan’s Medicaid program. In the first paragraph of the decision, however, Judge Cleland made clear that this case would be a little different: “Having a virtuous goal in sight...does not endow a court with the power to hear a case, nor create a cause of action where none exists.”3 The court held that the doctrine set out in Ex parte Young, under which the general belief had been that the Eleventh Amendment did not bar suits against state officials for injunctive relief, was “inapplicable for at least four reasons.”4 First, the doctrine “does not apply to congressional enactments under the Spending Power.”5 Second, it does not apply when state officials are acting within their lawful authority because then the state is the real party in interest.6 Third, it does not apply when state officers are performing discretionary functions.7 And, fourth, it does not apply because the Medicaid statute provides an alternative remedy: the withholding of funds by the federal government.8

Not content with undercutting the applicability of Ex parte Young, Judge Cleland also held that Section 1983 did not provide a cause of action for challenges under the Medicaid statute. His reasoning was that (1) Medicaid created a contract; (2) that the third-party beneficiaries of such a contract had the right to enforce it was not unambiguously clear at the passage of Section 1983 in 1871; and (3) therefore, under the holding in Will v. Michigan Department of State Police, “§ 1983 [should] be interpreted to reflect the ‘common-law principles’ existing in 1871”; Section 1983 does not provide a cause of action in this context.9

There is more, including a section entitled “Whether This Court’s Rulings Are Foreclosed by Precedent.”10 (It turns out that they are not.)11 Among the remarkable aspects of the case is that Judge Cleland apparently set out to leave his mark in this area of the law—and was not discreet in that intention. The decision notes that he sua sponte ordered the parties to address “certain threshold issues...pertaining to the nature of the relationship between the federal government and the State under the Medicaid program,” but, “[f]inding the state’s discussion of these issues to be less than fully satisfactory, the court invited and accepted the participation of the Michigan Municipal League as amicus curiae to address the issues raised by the court.”12

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2 Id., appeal filed, No. 01-1494 (6th Cir. Apr. 4, 2001).
3 Westside Mothers, 133 F. Supp. 2d at 552.
4 Id. at 560–61 (discussing Ex Parte Young, 209 U.S. 123 (1908)).
5 Id. at 561.
6 Id. at 562–72.
7 Id. at 574.
8 Id. at 575.
9 Id. at 581 (quoting Will v. Mich. Dep’t of State Police, 491 U.S. 58, 67 (1989)).
10 Id. at 582.
11 Id. at 582–85.
12 Id. at 552. Judge Cleland noted: “Particularly noteworthy for its quality and helpfulness is the amicus participation at the court’s request of the [Michigan Municipal] League and its pro bono counsel, Mr. Jeffrey Sutton,...for whose assistance the court here expresses its gratitude.” Id. at 552 n.3. Shortly thereafter Mr. Sutton, who was attorney general of Ohio and has been a leader in the recent federalism rampage, got more than a show of gratitude: he was nominated to the Sixth Circuit.
As of this writing, briefing of the Westside Mothers appeal has been completed, but no oral argument date has been set. Although two district courts have since rejected the Westside Mothers analysis, one of those is on appeal before the Fourth Circuit. The issue has also been injected into an appeal pending in the Fifth Circuit and has been raised in district courts in Florida, Montana, and Oklahoma. Consequently the federal appellate courts will be handing down decisions on the issues raised by Westside Mothers over the next year or so. Given the Supreme Court's continuing interest in the relationship between the federal and state governments, the Court quite possibly will take one of these cases in the next few years.