Decisions from the U.S. Supreme Court on Federal Court Access
Highlights from the U.S. Supreme Court’s 2001–2002 Decisions on Federal Court Access

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Over the past decade this annual review of U.S. Supreme Court decisions affecting the ability of individuals to gain access to the justice system has, from the perspective of poverty law practitioners, often been a somber exercise in tracking a continuing erosion of various legal avenues which traditionally have provided entries to and relief from the federal courts. In general, the Court’s 2001–2002 term continued this trend, with some significant opinions curtailing the scope of federal rights and remedies. In *Gonzaga University v. Doe* the Court appeared to narrow the definition of a federal right for purposes of enforcement under 42 U.S.C. § 1983.1 In *Correctional Services Corp. v. Malesko*, the Court, in spite of the growing trend toward “privatization” of traditional governmental functions, declined to extend a long-established implied right of action against federal officials for violation of constitutional rights to private entities contracting with the federal government.2 With respect to remedies, the Court decided in *Barnes v. Gorman* that punitive damages were not available to redress or deter violations of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973.3

The Court’s ongoing interest in the parameters of the Eleventh Amendment and state sovereign immunity again was evident this term, with four decisions implicating these issues. Unlike previous years, the Court did not inevitably uphold the state’s claim of immunity, and in two of the four cases it recognized immunity limits, which should prove helpful to plaintiffs.4 In perhaps the most significant of the four cases, however, the Court extended Eleventh Amendment immunity protections even beyond the doors of the courthouse; its holding is that states may not be compelled to defend against claimed violations of federal law brought by private parties in adjudicatory proceedings before a federal administrative commission.5

As usual, the Court also issued some significant decisions on an assortment of other access issues, including pleading.

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requirements, statutes of limitations, administrative exhaustion, and the scope of judicial deference to agencies’ statutory interpretations. In *Christopher v. Harbury* the Court engaged in an interesting (albeit largely theoretical) discussion of the components of a claim specifically alleging the denial of access to the courts.6

I. Section 1983 “Rights” in Spending Programs

In *Gonzaga University v. Doe* the Court continued its restrictive approach to judicial enforcement of federal law by taking a narrow view of the definition of a federal “right” for purposes of Section 1983.7 The question of whether federal legal requirements create “rights” arises most frequently in the context of federal spending programs in which Congress conditions the availability of federal funding on compliance with particular requirements.8 *Gonzaga* follows this pattern, posing the question of whether a provision of the Family Educational Rights and Privacy Act (FERPA) prohibiting federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons creates a federal “right” to educational privacy that can be enforced under Section 1983.9 By a 7-to-2 margin, the Court holds that this federal requirement does not constitute an individual “right” but is simply a directive to the U.S. secretary of education concerning the distribution of federal funds.10

In reaching this conclusion, the Court rejects relatively loose readings of a three-factor test for determining whether a requirement confers a “right” that it had enunciated five years ago in *Blessing v. Freestone*.11 Rather than focusing only on whether Congress intended to benefit the plaintiff in some general way, as it had in *Blessing*, the Court in *Gonzaga* emphasizes that the terms and structure of the statute must unambiguously demonstrate that Congress intended to confer a right on the plaintiff.12

In applying this somewhat circular test, the Court looks to the methodology that it has developed for determining whether Congress intends for a statute to create an implied private right of action.13 Previously the Court—on the rationale that the test should be less demanding in the context of Section 1983 because the section explicitly created a private right of action—had carefully separated the Section 1983 inquiry from this more general question.14 In *Gonzaga* the Court decided that the two inquiries overlapped in their requirement that Congress must intend to create a “right.”15 In the Section 1983 context, however, the court need not consider the addi-

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10 Id. at 2277.

11 Id. at 2274–75 (discussing Blessing v. Freestone, 520 U.S. 329 (1979)). In Blessing the Court explains that it has “traditionally” looked to the following three factors: (1) whether the provision benefits the plaintiff; (2) whether the provision is sufficiently specific, as opposed to “vague and amorphous”; and (3) whether the provision is couched in mandatory, rather than precatory, terms. 520 U.S. at 341–41. See also *Wilder*, 496 U.S. at 508 (applying similar test).

12 Gonzaga, 122 S. Ct. at 2274, 2276.

13 Id. at 2274.

14 See *Wilder*, 496 U.S. at 508–9 n.9.

15 Gonzaga, 122 S. Ct. at 2275.
tional question of whether Congress intended to create a remedy since the remedy is expressly available.  

Focusing on FERPA, the Gonzaga Court concluded that the statute did not create a “right” because the privacy requirements were phrased in terms of instructions to the secretary of education regarding which institutions to fund, rather than phrased in terms of entitlements of individuals. The Court noted that FERPA’s focus on the “policy and practice” of educational institutions showed that Congress was concerned with the aggregate actions of an institution, rather than the privacy of particular individuals. The Court observed that the centralized administrative complaint procedure established by the statute also tended to suggest that Congress did not contemplate individual suits over FERPA violations.  

Justice Breyer, with whom Justice Souter joined, concurred in the judgment only; Justice Breyer preferred the broader approach of prior cases to the more demanding requirement that a right was conferred only if it was set forth unambiguously in the text and structure of the statute. Justice Stevens, with Justice Ginsburg, dissented, arguing that the majority had inappropriately conflated the standards for implying private rights of action with the test for determining whether a statute created rights under Section 1983 and that plaintiffs had satisfied the traditional standards for showing that a statute conferred rights under Section 1983.

II. Punitive Damages for Violations of Requirements of Federal Spending Programs

In Barnes v. Gorman the Court took up another issue relating to judicial remedies for the violation of requirements of federal spending programs—the availability of punitive damages. In Barnes the plaintiff was injured in police custody due to the lack of policies concerning the arrest and transportation of suspects with spinal cord injuries. The jury awarded the plaintiff both compensatory and punitive damages under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Defendants appealed, arguing, inter alia, that punitive damages were not an available remedy in suits under these statutes.

The Eighth Circuit Court of Appeals began its analysis of the case by noting that Title II of the Americans with Disabilities Act incorporated the remedial scheme of the Rehabilitation Act and that the Rehabilitation Act, in turn, incorporated the remedial scheme of Title VI of the Civil Rights Act, prohibiting discrimination based on race, gender, or national origin in federally funded programs and activities. Relying on the Supreme Court’s acknowledgment in Franklin v. Gwinnett County Public Schools of “a general rule...that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute,” the Eighth Circuit concluded that...
punitive damages were allowed to be awarded. 24

The Supreme Court reversed the Eighth Circuit’s conclusion; the Court emphasized that the general rule included an inquiry into the “appropriateness” of any given remedy. 25 Justice Scalia, writing for the Court, stressed that Spending Clause programs such as Title VI were analogous to contracts between the federal government and funding recipients. Justice Scalia concluded that a remedy was “appropriate” in the Spending Clause context only if the funding recipient was on notice that it was exposed to the kind of liability in question, so that the recipient could be deemed to have assented to the liability by accepting the funds. 26 A funding recipient, the Court held, generally can be considered to be on notice that it is subject to remedies traditionally available for breach of contract. 27 Citing textbooks and restatements of the common law of contracts, Justice Scalia concluded that punitive damages were not generally available in contract actions and thus were not generally available as a remedy for violations of funding requirements. 28 He also rejected the idea that exposure to punitive damages was an implied term in Title VI because he found it “doubtful” that funding recipients would have accepted federal funding with such a condition attached. 29

Justice Stevens, joined by Justices Ginsburg and Breyer, concurred only in the judgment; Justice Stevens rejected the majority’s reliance on contract law to define the remedies available for conduct much more closely analogous to a tort. 30 Citing the district court opinion in Westside Mothers v. Haveman, Justice Stevens noted that a contract law approach to federal spending programs might have far-reaching and unforeseen consequences. 31 To assuage the concerns of the concurring justices, Justice Scalia dropped a footnote in the majority opinion stating, “We do not imply...that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise.” 32

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25 Gorman, 122 S. Ct. at 2100–2101.

26 Id. at 2100.

27 Id. at 2101.

28 Id. at 2101–2.

29 Id. at 2102. Although past cases had noted that the “contractual nature” of Spending Clause programs has implications for the availability of remedies in implied rights of action under such programs, the Court’s emphasis had been on the structure and purpose of the statute at issue rather than on principles of contract law. See, e.g., Gebster v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (looking to congressional purpose and structure of Title IX to determine whether school districts should be subject to liability under principles of respondeat superior).

30 Gorman, 122 U.S. at 2103–4 (Stevens, J., concurring). Justice Souter, with Justice O’Connor, also concurred, noting that the contract law analogy “may fail to give such helpfully clear answers to other questions that may be raised by actions for private recovery under Spending Clause legislation.” Id. at 2103 (Souter, J., concurring). Thus five justices cast doubt on how far the contract analogy may be taken.

31 Id. at 2104 n.3 (Stevens, J., concurring) (citing Westside Mothers v. Haveman, 133 F. Supp. 2d 549 (E.D. Mich. 2001), rev’d, 289 F.3d 852 (6th Cir. 2002) (Clearinghouse No. 52,678)). In Westside Mothers the district court held that Medicaid and other spending programs were contracts rather than federal laws enforceable under Section 1983 and Ex parte Young. Westside Mothers, 133 F. Supp. 2d at 557, 561, 575 (citing Ex parte Young, 209 U.S. 123 (1908)).

32 Gorman, 122 S. Ct. at 2102 n.2.
III. Bivens and the Corporate Defendant

Over thirty years ago, in Bivens v. Six Unknown Federal Narcotics Agents, the Supreme Court first recognized an implied right of action for damages against federal officials who violated constitutional rights. This term, in Malesko, the Court answered a question—again in the negative—concerning the applicability of constitutional rights and remedies in the context of privatization. By a one-vote margin, the Court held that federal offenders were not allowed to bring Bivens actions for damages against a private company that operated a prison under contract with the federal Bureau of Prisons.

Writing for the familiar five-member majority, Chief Justice Rehnquist explained that Bivens actions could not be maintained against entities, but only against individual officers. Relying on the Court’s 1994 decision in FDIC v. Meyer, which held that federal agencies could not be sued under Bivens, Justice Rehnquist noted that Bivens actions were intended to deter individuals from violating constitutional rights. He also noted that corporate liability could have the effect of easing the pressure for compliance on individuals, as the corporation would become the target of suit. Justice Rehnquist cited the availability of other remedies—including tort remedies, the availability of actions for injunctive relief, and an administrative grievance procedure—as a ground for the Court’s decision.

In dissent, Justice Stevens, joined by Justices Souter, Ginsberg, and Breyer, argued that the Bivens remedy traditionally had been available against agents of the federal government and that a corporate agent should not be treated any more advantageously than an individual agent. Justice Stevens viewed the fact that government agencies could not be held liable under Bivens as inapposite to the issue of the liability of private companies, and he questioned the relevance of alternative forms of remedies. In any event, Justice Stevens argued that state tort remedies might not be coextensive with the remedies provided under Bivens and were likely to vary from state to state, even with regard to the treatment of federal prisoners.

Justice Scalia, with whom Justice Thomas joined, concurred in the majority opinion but wrote separately to throw a few darts at Bivens. Justice Scalia termed Bivens as “a relic of the heady days in which this Court assumed common-law powers to create causes of action— decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.” Justice Scalia indicated that, because he viewed this era as over, he would limit Bivens and its successor cases to “the precise circumstances that they involved.”

IV. Sovereign Immunity

Surprisingly the Court’s decisions on Eleventh Amendment immunity this term did not always break into the anticipated 5-to-4 split. Two unanimous opinions actually contracted the concept of sovereign immunity. Two others—one decided 6 to 3 and the other 5 to 4—expanded the concept.

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34 Malesko, 122 S. Ct. at 515.
35 Id. at 517, 523.
36 Id. at 519.
37 Id. at 521 (citing FDIC v. Meyer, 510 U.S. 471 (1994); Bivens, 403 U.S. at 388).
38 Id.
39 Id. at 522–23.
40 Id. at 524–25 (Stevens, J., dissenting).
41 Id. at 525–26.
42 Id. at 526.
43 Id. at 524 (Scalia, J., concurring).
44 Id.
In a case helpful to plaintiffs, Verizon Maryland Inc. v. Public Service Commission of Maryland, Justice Scalia authored a unanimous opinion that rejected a state’s claim of Eleventh Amendment immunity. Public interest attorneys should take note of this case for at least three reasons. First, the Court held that it need not decide whether the state utility commission had waived its sovereign immunity because, even absent waiver, the plaintiff could proceed against individual commissioners in their official capacities pursuant to the doctrine of Ex parte Young. The Court stated what appeared to be a clear-cut rule: “In determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” The Verizon complaint met the test.

Second, the Court rejected as meritless the state utility commission’s claim that the enforcement mechanisms of the Telecommunications Act of 1996 indicated congressional intent to foreclose jurisdiction under Ex parte Young. The state utility commission based its argument on Seminole Tribe of Florida v. Florida, in which the Court had found that the detailed appeal process set forth in the Indian Gaming Regulatory Act indicated congressional intent to limit judicial authority and therefore precluded resort to the more nearly complete and immediate relief that would be available under Ex parte Young. The Verizon Court rejected this argument and distinguished the enforcement provisions at issue in Seminole Tribe from those established by the Telecommunications Act. Notably, in assessing the enforcement provisions of the Telecommunications Act, the Court focused only on whether the statute restricted the relief that the court could award, not on the complex administrative process underlying the Act.

Third, the Court found that the plaintiff’s claim that the state utility commission’s action violated the Telecommunications Act fell within 28 U.S.C. § 1331’s general grant of federal subject-matter jurisdiction. This aspect of the decision is significant because it acknowledges that plaintiffs who present federal questions can proceed in federal court under Section 1331 and need not rest their claim on another express statutory cause of action. Thus Verizon could be helpful to plaintiffs who currently are encountering shifting concepts of statutory construction as they seek to enforce federal laws pursuant to 42 U.S.C. § 1983.

In another unanimous decision this term, Lapides v. Board of Regents, Justice Breyer held that removal of a case to federal court by a state was a voluntary invocation of the federal court’s jurisdiction sufficient to waive the state’s Eleventh Amendment immunity.

46 Id. at 1760 (citing Ex parte Young, 209 U.S. at 123).
47 Id. (quoting Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261, 296 (1997) (O’Connor, J., concurring in part and concurring in judgment)).
48 Id. (citing Edelman v. Jordan, 415 U.S. 651, 668 (1974) (Clearinghouse No. 5000)).
49 Id. at 1761 (citing Coeur d’Alene, 521 U.S. at 281 (“An allegation of an ongoing violation of federal law...is ordinarily sufficient”) (emphasis added by the Verizon Court).
52 Id.
53 Id.
54 Id. at 1758 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983)).
tions of state and federal law, Paul Lapides, a college professor, filed suit in state court against the state university system board of regents and university officials in their personal and official capacities. All of the defendants joined in removing the case to federal district court and then sought dismissal. The suit against the university officials in their personal capacities was dismissed based on the doctrine of qualified immunity. The State, though conceding that a state statute waived sovereign immunity from state lawsuits in state court, argued that it was immune from suit in federal court because of the Eleventh Amendment. The Supreme Court rejected the argument; the Court reasoned as follows:

It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the “Judicial power of the United States” extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the “Judicial power of the United States” extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results.\(^{57}\)

Although the State was brought involuntarily into the case, the Court found it significant that the State then voluntarily invoked the jurisdiction of the federal court by removing the case.\(^{58}\) Moreover, the Court overruled Ford Motor Co. v. Department of Treasury of Indiana to the extent that it had refused to recognize a waiver of immunity because the State attorney general was not authorized by state law to execute the waiver.\(^{59}\) Lapides is significant because it recognizes the validity of waiver by litigation conduct and raises the question whether other litigation conduct may constitute a waiver of immunity. For example, some federal circuit courts of appeal hold that a state may waive its immunity if it appears and litigates the case without raising the defense in a timely way.\(^{60}\)

In contrast to its actions in Verizon and Lapides, the Court expanded the concept of sovereign immunity in two other cases. Both cases are outgrowths of the Court’s 1999 decision, Alden v. Maine, which looked beyond the text of the Constitution to find that its structure and historical principles of sovereign immu-

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\(^{56}\) Id.

\(^{57}\) Id. at 1643.

\(^{58}\) Id. at 1644.

\(^{59}\) Id. at 1645–46 (overruling Ford Motor Co. v. Dep’t of Treasury of Ind., 323 U.S. 459 (1945)).

\(^{60}\) Compare Hill v. Blind Indus. & Servs. of Md., 179 F.3d 754 (9th Cir. 1999), opinion amended and reh’g denied, 201 F.3d 1186 (2000) (allowing waiver by active litigation conduct), with Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000) (finding sovereign immunity defense can be raised at any time).
nity prohibited Congress from authorizing suits against nonconsenting states in state court on federal claims.61

Raygor v. Regents of the University of Minnesota involves provisions of the federal supplemental jurisdiction statute, which authorizes federal courts to hear state law claims that arise from the same subject matter as federal claims over which the federal court has original subject-matter jurisdiction.62 The statute includes a protection for plaintiffs whose federal case is ultimately dismissed by providing that the statute of limitations for the state claims will be tolled while the case is pending in federal court and for thirty days thereafter unless the state establishes a longer tolling period.63 Raygor holds that the federal statute cannot toll the statute of limitations for filing state law claims against state defendants in state court while the claims are pending in federal court.64

Raygor presents the case of two plaintiffs who found themselves caught up in the Court's evolving concepts of state sovereignty. Filing actions against the state university board of regents in federal court, plaintiffs alleged a federal cause of action under the Age Discrimination in Employment Act of 1967 and a state cause of action under the Minnesota Human Rights Act.65 The State filed a motion to dismiss the case as barred by the Eleventh Amendment; the district court granted the motion. Plaintiffs' appeal was stayed pending the Court's decision in Kimel v. Florida Board of Regents, which held that nonconsenting state governments could not be sued under the Age Discrimination in Employment Act.66 As a result of Kimel, the plaintiffs moved to have their federal case dismissed and refiled their state law claims in state court. Arguing that the statute of limitations had run, the board of regents moved to dismiss the state case. In response, plaintiffs cited the tolling provisions of the federal supplemental jurisdiction statute.67

Writing for a 6-to-3 majority, Justice O'Connor said that the federal supplemental jurisdiction statute did not include the state law claims against state defendants. She wrote, “[A]n express grant of jurisdiction over such claims would be an abrogation of the sovereign immunity guaranteed by the Eleventh Amendment. Before Congress could attempt to do that, it must make its intention to abrogate ‘unmistakably clear in the language of the statute.’”68 The Court found that the supplemental jurisdiction statute provided only a broad, general grant of federal court jurisdiction and did not extend to claims against nonconsenting state defendants.69 Nor was the Court willing to enforce the tolling provision against the states. Again, the statute failed the clear statement test: “[A]lthough [the statute] may not clearly exclude tolling for claims against nonconsenting States dismissed on Eleventh Amendment grounds, we are looking for a clear statement of what the rule includes, not a clear statement of what it excludes.”70

Raygor raises difficult considerations for plaintiffs who have both federal and state law claims against state defendants.
Practically, it will encourage plaintiffs either to file the entire case in state court—thus perhaps losing a favorable federal forum—or to file both a federal and a state court case—thus raising case management and potential res judicata problems.\footnote{One positive outcome of \textit{Raygor}, in terms of access to the courts, is that the Ninth Circuit now reads the decision as dispelling “[a]ny lingering doubt” that existed as to the general constitutionality of supplemental jurisdiction. See \textit{Mendoza v. Zirkle Fruit Co.}, 301 F.3d 1163 (9th Cir. 2002). Previously the Ninth Circuit concluded that, independent of statutory authorization, the Constitution imposed a bar to the exercise of supplemental jurisdiction over “pendent parties” who were not already parties to a claim within a federal court’s subject-matter jurisdiction. \textit{Ayala v. United States}, 550 F.2d 1196, 1199–1200 (9th Cir. 1977), \textit{cert. dismissed}, 435 U.S. 982 (1978). Although the state defendants in \textit{Raygor} were not “pendent parties,” as federal claims were filed against them, the Ninth Circuit interpreted \textit{Raygor} as establishing that Article III generally permitted the reach of supplemental jurisdiction over state law claims against additional parties where the federal and state law claims “derive from a common nucleus of operative fact.” \textit{Mendoza}, 301 F.3d at 1174 (quoting \textit{Raygor}, 122 S. Ct. at 1004). That the Eleventh Amendment would bar supplemental jurisdiction over state-law claims raised against “pendent party” state defendants does seem certain. See \textit{Pennhurst State Sch. & Hosp.}, 465 U.S. at 118–20 (1984) (Eleventh Amendment bars state claims filed against state defendants in federal court even where federal subject-matter jurisdiction otherwise exists over the state defendants).
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In \textit{Federal Maritime Commission v. South Carolina State Ports Authority}, the Court returned to the predictable 5-to-4 split and, in an opinion written by Justice Thomas, held that a federal administrative commission was precluded from adjudicating a private party’s complaint that the state violated federal law.\footnote{\textit{Id.} at 1883 (Breyer, J., dissenting).} The case provides interesting reading because the majority was compelled to address Justice Breyer’s point in dissent that the Eleventh Amendment by its clear terms applied only to the “judicial power of the United States.”\footnote{\textit{Id.} at 1883 (Breyer, J., dissenting).} Admitting this, Justice Thomas, however, noted that the Court’s “well-reasoned precedent” had recognized an extension of the state’s sovereign immunity beyond the literal text of the Eleventh Amendment, and he discredited the dissent as engaging in the type of “ahistorical literalism we have rejected in interpreting the scope of the States’ sovereign immunity.”\footnote{\textit{Id.} at 1871 & n.8 (citing \textit{Alden}, 527 U.S. at 730).} From here, the majority determined that, because the Federal Maritime Commission proceeding “walks, talks, and squawks very much like a lawsuit,” making a nonconsenting state defend itself in such a forum would be an affront to the state’s dignity.\footnote{\textit{Id.} at 1873, 1874–75 (quoting \textit{Raygor}, 122 S. Ct. at 1004). That the Eleventh Amendment would bar supplemental jurisdiction over state-law claims raised against “pendent party” state defendants does seem certain. See \textit{Pennhurst State Sch. & Hosp.}, 465 U.S. at 118–20 (1984) (Eleventh Amendment bars state claims filed against state defendants in federal court even where federal subject-matter jurisdiction otherwise exists over the state defendants).} The decision does acknowledge that “private parties remain ‘perfectly free to complain to the Federal Government about unlawful State activity,’ and ‘the Federal Government [remains] free to take subsequent legal action.’”\footnote{\textit{Id.} at 1879 n.19 (quoting \textit{id.} at 1883 (Breyer, J. dissenting)) (alteration in original).}

V. Judicial Deference to Agency Interpretations

As usual, the Court this term was unable to resist returning to a favorite area of inquiry: the proper scope of judicial deference to the statutory interpretations of administrative agencies. Last term, in \textit{United States v. Mead Corp.}, the Court issued its most comprehensive analysis of the issue of deference since its watershed 1984 decision in \textit{Chevron USA Inc. v. National Resources Defense Council Inc.}\footnote{\textit{United States v. Mead Corp.}, 121 S. Ct. 2164 (2001) (Clearinghouse No. 53,894); \textit{Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837 (1984).} Under \textit{Chevron}’s familiar two-step inquiry governing judicial review of administrative interpretations of law, the courts first look to whether Congress has spoken to the specific point at issue. If so, that con-

\footnote{\textit{Id.} at 1873–75 (quoting \textit{id.} at 1883 (Breyer, J. dissenting)).}
gressional intent must be given effect, regardless of the agency’s interpretation. However, if (as is often the case) the court determines that Congress has not addressed the specific question, or if congressional intent as to that question is ambiguous, the court must defer to the administrative interpretation so long as it is “reasonable.”78 In *Mead* the Court attempted to articulate a unifying principle to limit the application of *Chevron* deference to those agency interpretations where “it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation was promulgated in the exercise of that authority.”79

This term, in *Barnhart v. Walton*, the Court applied the *Chevron-Mead* framework to resolve two disputed issues of statutory interpretation against a claimant seeking disability benefits under the Social Security Act.80 The Act authorizes payment of disability benefits to individuals who have an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death, or which has lasted, or can expect to last for a continuous period of not less than 12 months.”81 In *Walton* the claimant applied for benefits after developing a severe mental illness which caused him to lose his job and which indisputably satisfied the twelve-month durational requirement for “impairments.”82 However, the claimant returned to work eleven months later, and the agency denied his claim for benefits on the ground that the “inability to engage in substantial gainful activity” standard in the statute also was subject to the twelve-month duration period and that the plaintiff’s “inability” to work had lasted only eleven months.83 The district court affirmed the agency’s decision, but the court of appeals reversed the district court.

The Supreme Court, in a unanimous decision written by Justice Breyer, reversed the court of appeals; the Court upheld the agency’s interpretations of the statute.84 As to the first issue, whether the applicant’s “inability” to work must last for at least twelve months, the Court acknowledged that “linguistically speaking, the statute’s ‘12-month’ phrase modifies only the word ‘impairment,’ not the word ‘inability.’”85 However, this “linguistic point” is not determinative, according to the Court, because it simply leaves the statutory provision silent with respect to any duration requirement applicable to a claimant’s “inability to work.”86 Applying the first prong of the *Chevron* test, the Court concluded that the statutory language “does not unambiguously forbid” the agency’s construction of it.87 Accordingly the Court turned to the sec-

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78 *Chevron*, 467 U.S. at 844–45.
82 *Walton*, 122 S. Ct. at 1268.
83 *Id.* The agency also rejected the claimant’s contention that he qualified for benefits in any event because, at the time of his application (prior to his return to work), one reasonably would have “expected,” in the words of the statute, that he would be unable to work for at least twelve months. *Id.* The claimant apparently argued, and the court of appeals agreed, that a disabled person’s actual inability to work need last no more than a five-month statutory “waiting period.” *Id.* at 1268–69 (citing *Walton v. Apfel*, 235 F.3d 184, 189–90 (4th Cir. 2000) (Clearinghouse No. 54,446); 42 U.S.C. § 423(a)(1)(D) (2000)).
84 *Id.* at 1268.
85 *Id.* at 1270.
86 *Id.*
87 *Id.* at 1269.
ond Chevron inquiry, that is, “whether the interpretation for other reasons, exceeds the bounds of the permissible.”

The Court had little difficulty in deciding that the agency’s interpretation not only was “permissible” but also “makes considerable sense in terms of the statute’s basic objectives. ... The Agency’s interpretation supplies a duration requirement, which the statute demands, while doing so in a way that consistently reconciles the statutory ‘impairment’ and ‘inability’ language.” However, this endorsement did not end the matter, because at this point the Court was compelled to respond at some length to the claimant’s contention that, under Chevron and Mead, how the agency arrived at its interpretation did not warrant judicial deference.

The agency’s interpretation was based upon a regulation which provided that a claimant was not disabled “regardless of [his] medical condition” if he was doing “substantial gainful activity.” In 2000 the agency formally “interpreted” this regulation to mean that a claimant was not disabled if “within 12 months after the onset of an impairment...the impairment no longer prevents substantial gainful activity.”

The claimant urged the Court to disregard the agency’s most recent regulatory interpretation because it evidently was promulgated in response to this very litigation. In past decisions the Court had declined to defer to statutory interpretations which in its view were primarily designed to bolster a litigation position. Justice Breyer sidestepped this argument but cited instances where the Court had deferred to regulations promulgated in response to litigation. Curiously the Court nevertheless proceeded to review the agency’s pre-rule-making interpretation for deference-worthiness; the Court noted that a lack of formal rule making “does not automatically deprive [an agency] interpretation of the judicial deference otherwise its due.”

After a relatively brief analysis of the factors identified in Mead for determining the appropriate scope of that deference, the Court stamped the agency’s interpretation with the Chevron imprimatur:

In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that Chevron provides the appropriate legal lens through which to review the legality of the Agency interpretation here at issue.

For these reasons, we find the Agency’s interpretation lawful.

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88 Id. By twice framing the initial inquiry not in terms of whether the statute “unambiguously expresses[s]” the intent of Congress, as Chevron posed it, but rather whether the statute “unambiguously forbids” the agency’s construction, the Court seems to have made a subtle linguistic shift, which may make it significantly easier for agencies to clear the first Chevron hurdle. Compare Chevron, 467 U.S. at 843 (“unambiguously expressed intent of Congress”), with Walton, 122 S. Ct. at 1269 (“unambiguously forbids the Agency’s interpretation”; “unambiguously forbid the regulation”).

89 Walton, 122 S. Ct. at 1270.

90 Id. at 1269 (quoting 20 C.F.R. § 404.1520(b) (2001)) (alteration in original).


92 Id. at 1271.


94 Walton, 122 S. Ct. at 1271 (citing Smiley v. Citibank (South Dakota) N.A., 517 U.S. 735, 741 (1996) (Clearinghouse No. 51,207), United States v. Morton, 467 U.S. 822, 835–36 (1984)). In Smiley the Court accorded deference to regulations issued in response to litigation because it was satisfied that the agency’s interpretation was imbued with sufficient indicia of “deliberateness” and “authoritateness.” 517 U.S. at 741.

95 Walton, 122 S. Ct. at 1271 (citing Chevron, 467 U.S. at 843).

96 Id. at 1272 (citations omitted).
Turning to the second disputed issue of statutory interpretation, the Court rejected the contention that a claimant who in fact returned to work before twelve months had passed should nonetheless be entitled to benefits if his “inability” to work, as evaluated from the point at which he initially stopped working, could reasonably have been “expected to last.”

As usual, the Court this term was unable to resist returning to a favorite area of inquiry: the proper scope of judicial deference to the statutory interpretations of administrative agencies.

According to the statute, for a period of at least twelve months. Again applying the Chevron analysis, the Court found the statute to be ambiguous as to whether a prospective or retrospective assessment of the duration of disability was intended, and after a brief discussion it upheld the agency’s “reasonable, hence permissible,” regulatory interpretation requiring that the claimant’s inability to work must in fact continue for at least twelve months.

Having reversed the court of appeals on both issues where that court had found that the statutory language unambiguously favored the claimant, the Court rather gratuitously provided the agency with some dicta which it will surely make use of in future contests over the construction of the Social Security Act:

The statute’s complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience lead us to read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration.

VI. Denial of Access to the Courts

One of the more interesting discussions during this term occurred in a case which, arising under unique and tragic facts, directly addressed a claim involving an alleged denial of access to the judicial system. Christopher v. Harbury was brought pro se by Jennifer Harbury, a U.S. citizen and the widow of a Guatemalan rebel leader, Efrain Bamaca-Velasquez, who, the complaint alleged, was captured, detained, tortured, and eventually executed by Guatemalan army forces affiliated with the Central Intelligence Agency. Although U.S. officials allegedly were aware of Bamaca’s capture and detention, while Bamaca was still alive, they deliberately misled the plaintiff into believing that the government had no information as to his whereabouts or status.

After Harbury learned of her husband’s death, she sued a host of federal agencies and officials; she raised numerous causes of action seeking redress for her husband’s estate and herself. The issue before the Supreme Court on certiorari was the court of appeals’ ruling which denied the defendants’ motion to dismiss the plaintiff’s Bivens claim for damages resulting from the alleged denial of her constitutional right of access to the courts. The essence of the plaintiff’s

97 Id.
98 Id. at 1273. The Court seemed unimpressed by at least four circuit courts having reached a contrary conclusion and having rejected the agency’s interpretation. Id.
99 Id. A cynic might speculate that the result in this case was preordained in light of the curious (and legally irrelevant) observation by the Court, in its recitation of the background of the case, that, according to the government, the adoption of the lower court’s statutory interpretation “would create additional Social Security costs of $80 billion over ten years.” Id. at 1269.
101 Id. at 2182. According to the complaint, the government’s deceptions, which were intended initially to preserve the Central Intelligence Agency’s ability to obtain information from Bamaca during his detention, continued and intensified after his execution. Id.
102 Id. at 2185 (citing Harbury v. Deutch, 233 F.3d 596 (D.C. Cir. 2000)). Most of the plaintiff’s other claims, with the exception of her tort claims for intentional infliction of emotional distress, were dismissed. Id.
claim was that if, during the period her husband was held prisoner, she had not been misled by the defendants as to the fact of his capture, she would have filed some sort of legal action seeking emergency injunctive relief which might have saved her husband’s life.\textsuperscript{103}

In a 9-to-0 decision, the Supreme Court held that plaintiff had failed to state a cognizable constitutional claim for denial of access to the courts. Justice Souter’s analysis began by surveying prior cases from the Supreme Court and the courts of appeals for the purpose of dividing denial-of-access claims into two general categories.\textsuperscript{104} Although the Court characterized the textual source of the general constitutional right of access to courts as “unsettled,” it described the first (and presumably more common) type of “access” cases as those where “systemic official action” was “presently denying” the plaintiff the opportunity to adequately prepare, file, or litigate claims in court.\textsuperscript{105} Examples of such cases include challenges to various court-required fees and a host of claims raised by prisoners challenging institutional impediments to their access to the courts.\textsuperscript{106} The objective in this category of access suits “is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed.”\textsuperscript{107}

The second category of access claims, according to the Court, are those which on their merits may not now be brought, because some past official action has caused the loss of an opportunity to sue or interfered with plaintiff’s ability in a past lawsuit to prosecute the claim, obtain specific relief, or negotiate an adequate settlement.\textsuperscript{108} In these types of cases, the “ultimate object ... is not the judgment in a further lawsuit, but simply the judgment in the access claim itself, in providing relief obtainable in no other suit in the future.”\textsuperscript{109} Harbury’s claim—“the loss of an opportunity to seek some particular order of relief” at a critical time—fell into this second category.\textsuperscript{110}

Having divided access claims into these two general categories, the Court observed that the ultimate justification for recognizing each kind of claim is the same. Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some vindication for a separate and distinct right to seek judicial relief for some wrong.\textsuperscript{111}

For this reason, concluded the Court, the constitutional “right to access” cause

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\textsuperscript{103}Id. at 2184. At the oral argument in the court of appeals, plaintiff’s appellate counsel belatedly identified the substantive claim which she might have filed as an action for intentional infliction of emotional distress. \textit{Id.} at 2188–89 (citing \textit{Harbury}, 233 F.3d at 609).

\textsuperscript{104}Id. at 2185–87.

\textsuperscript{105}Id. at 2186, 2185–86. The Court observed that in various decisions it had grounded this right in the Privileges and Immunities Clause of Article IV; the First Amendment Petition Clause; the Fifth Amendment Due Process Clause; and the Fourteenth Amendment Equal Protection and Due Process Clauses. \textit{Id.} at 2186 n.12 (listing cases).

\textsuperscript{106}Id. at 2185–86. Examples include a mandatory marital-dissolution filing fee, which was invalidated in \textit{Boddie v. Connecticut}, 401 U.S. 371 (1971) (Clearinghouse No. 1692); the lack of a law library, as addressed in \textit{Bounds v. Smith}, 430 U.S. 817 (1977) (Clearinghouse No. 16,775); and the need to supply “readers” for illiterate prisoners, as discussed in \textit{Lewis v. Casey}, 518 U.S. 343 (1996) (Clearinghouse No. 51,359).

\textsuperscript{107}\textit{Harbury}, 122 S. Ct. at 2186.

\textsuperscript{108}Id. All of the examples that the Court cited in this second category of access claims were taken from the courts of appeals. Evidently the Court itself had not considered such a case.

\textsuperscript{109}Id.

\textsuperscript{110}Id.

\textsuperscript{111}Id.
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of action is always “ancillary” to the underlying legal claim sought to be vindicated.112 In cases where the plaintiff sought removal of “roadblock” to future litigation, the Court required the plaintiff to identify the “nonfrivolous” or “arguable” underlying claim which the plaintiff sought to litigate.113 The Court concluded that the same requirement should be demanded of plaintiffs (like Harbury) who sought compensation for a lost litigation opportunity: “[t]he underlying cause of action, whether anticipated or lost, is an element [of the access claim] that must be described in the complaint, just as much as allegations must describe the official acts frustrating the litigation.”114 With respect to this latter category of claims, the Court then added a critical element:

[When the access claim (like this one) looks backward, the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought. There is, after all, no point in spending time and money to establish the facts constituting denial of access when a plaintiff would end up just as well off after litigating a simpler case without the denial-of-access element.115]

Turning to Harbury’s claim, the Court determined that her “complaint did not come even close” to meeting the standards it had just described.116 First, the “nearly unintelligible” complaint did not adequately either identify the underlying cause of action (belatedly described by counsel on appeal as a claim for intentional infliction of emotional distress) or, more important, demonstrate that the denial of access claim was the only avenue through which the plaintiff could now obtain relief.117 Under the Court’s analysis, this second hurdle proved insurmountable to plaintiff, even disregarding her pleading deficiencies, because the tragic fact of her husband’s death left her now with only a damages remedy.118 Since that remedy was currently available through her surviving tort claims still pending in the district court, “the access claim cannot address any injury she has suffered in a way the presently surviving intentional infliction claims cannot,” and therefore she “is not entitled to maintain the access claim as a substitute” for the tort claims.119 The court of appeals ruling, which had allowed Harbury’s constitutional claim to go forward, was reversed.120

VII. Appealability of Settlements, Due Process, Pleading Requirements, and Miscellany

The Supreme Court also issued decisions on access in a number of discrete and unrelated areas. These areas include the right of a nonnamed class member to appeal a settlement; the standard applicable to due process challenges; the degree of specificity required in a complaint; the methodology for calculating attorney fees in social security cases; the applicability of the statute of limitations to Title VII cases;
and the exhaustion requirement in litigation over prison conditions. Some of these decisions are largely limited to the substantive statutes from which they arise, while others have applicability beyond the specific subject-matter areas.

In Devlin v. Scardelletti the Court resolved a disagreement among the circuits by holding that a nonnamed class member who was not allowed to intervene may appeal a judgment approving a settlement. Writing for the six-person majority, Justice O'Connor began by rejecting standing as an issue and focused instead on whether the appellant should be considered a party. She premised her analysis on three previous decisions, including two from the nineteenth century, which she said stood for the proposition that "we have never...restricted the right to appeal to named parties to the litigation." The interest of the appellants in those cases, she explained, was similar to that of the appellant in Devlin, as they were all "bound by the order from which they were seeking to appeal." Justice O'Connor explained that the situation in Devlin differed from the one presented in Marino v. Ortiz because the individuals affected by the settlement in that case were not class members. Justice O'Connor also rejected the notion that, because nonnamed class members were not considered parties for purposes of the complete diversity requirement, they should not be considered parties for the purpose presented: "Nonnamed class members...may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." Justice Scalia's dissent disagreed with the reliance on the three previous decisions, which, he argued, permitted appeals by nonparties to the judgment only because the appeals were from collateral orders. He also sarcastically rejected the conclusion that the nonnamed class member should be allowed to appeal because he was bound by the judgment: "This will come as news to law students everywhere." As usual, though, Justice Scalia was most disturbed by the majority approach's replacement of a bright-line rule with a vague one "based on context." He preferred the suggestion of the United States as amicus curiae that only those class members who successfully intervened in the judgment should be allowed to appeal. This approach was rejected by the majority as unnecessary and not required by the rules of class actions, which permit nonnamed class members to object to a settlement without intervening.

In Dusenbery v. United States the Court appeared to take a backward step in refining its due process jurisprudence. In a holding for which there is a discussion but little explanation, the chief justice's opinion for the "Fab Five" briefly analyzed the standard for reviewing a due process

122 Id. at 2009.
124 Id. at 2010; see also id. at 2011 (“What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement”).
125 Id. at 2010 (contrasting Marino v. Ortiz, 484 U.S. 301 (1988)).
126 Id.
127 Id. at 2014 (Scalia, J., dissenting).
128 Id. at 2015 (Scalia, J., dissenting).
129 Id. at 2016 (Scalia, J., dissenting).
130 Id. (Scalia, J., dissenting).
131 Id. at 2012–13.
claim. The context for the decision involved determining the proper method for notifying an inmate about the forfeiture of seized property. Although giving actual notice to Dusenbery could hardly be claimed to be in any way difficult, given that he was incarcerated, the majority’s approval of the Federal Bureau of Investigation’s system, which did not result in actual notice and thereby deprived Dusenberry of the opportunity to contest the forfeiture, should come as little surprise. Nonetheless, the decision is startling in its rejection of the *Mathews v. Eldridge* balancing test as the appropriate analytical framework. The Court relied instead on an earlier case solely involving notice, *Mullane v. Central Hanover Bank & Trust Co.*, which, it explained, “espouses a more straightforward test of reasonableness under the circumstances.” The Court’s rationale for selecting *Mullane over Mathews* in this context appears in one somewhat enigmatic paragraph comparing the two standards:

The *Mathews* balancing test was first conceived in the context of a due process challenge to the adequacy of administrative procedures used to terminate Social Security disability benefits. Although we have since invoked *Mathews* to evaluate due process claims in other contexts... *we have never viewed Mathews as announcing an all-embracing test for deciding due process claims.* Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice. We see no reason to depart from this well-settled practice.

Presumably the distinction is between, on the one hand, due process challenges to the method of notice and, on the other, all other due process challenges. The Court does not explain, however, why a different standard should attach depending on the type of procedural deficiency at issue, nor does it attempt to distinguish its prior reliance on *Mathews* as the standard for due process analysis. Perhaps the reference to *Mullane’s* “more straightforward test of reasonableness” prefaces an attack on the more than twenty-five years of employing the *Mathews* balancing test in due process challenges. The dissent apparently adopted the majority’s view, as it ignored *Mathews* altogether and stated, without further discussion, that the majority “correctly identifies *Mullane* as the foundational case on reasonable notice as a due process requirement.”

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133 Id. at 697.
134 Id. at 700–701.
135 Id. at 699 (rejecting Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (Clearinghouse No. 11,466)).
136 Id. (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)).
137 Id. at 699–700 (emphasis added; citations omitted).
138 The decision that the Court cites for the proposition that *Mathews* has been applied “in other contexts,” id. at 699, states that “the *Mathews* balancing test was first conceived to address due process claims arising in the context of administrative law....[W]e have since characterized the *Mathews* balancing test as ‘a general approach for testing challenged state procedures under a due process claim,’ and applied it in a variety of contexts.” *Medina v. California*, 505 U.S. 437, 444 (1992) (emphasis added; citations omitted). Immediately after its acknowledgment of *Medina*, however, the Court pronounced that it “never viewed *Mathews* as announcing an all-embracing test for deciding due process claims.” *Dusenbery*, 122 S. Ct. at 699.
139 *Dusenbery*, 122 S. Ct. at 699. As of August 2002, the only federal court to cite *Dusenbery* for its approach toward determining the correct due process standard takes the Supreme Court’s approach one major step beyond: “In *Dusenbery*, the Supreme Court held that the test set out in [*Mullane*] supplied the appropriate analytical framework for deciding a due process claim. 122 S. Ct. at 699-700.” *Trachsler v. United States*, No. 3-01-CV-1069-R, 2002 WL 324295, at *2 n.2 (N.D. Tex. Feb. 25, 2002).
140 *Dusenbery*, 122 S. Ct. at 703 (Ginsburg, J., dissenting).
In *Swierkiewicz v. Sorema N.A.*, Justice Thomas wrote for a unanimous Court, emphasizing the significance of the simplified federal pleading rules, to resolve a circuit split on the degree of detail required in an employment discrimination complaint.¹⁴¹ In rejecting the prima facie case requirement as a necessary element for pleading such a case (rather than as an evidentiary standard, for which it is required), the Court held that "the ordinary rules for assessing the sufficiency of a complaint apply."¹⁴² Justice Thomas declined to treat employment discrimination cases differently from other federal civil cases and grounded the decision in Federal Rule of Procedure 8(a)(2), which, he explained,

provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.¹⁴³

Citing Federal Rules of Civil Procedure 8(e)(1), 8(f), 12(e), and 56, the *Swierkiewicz* Court noted that "[o]ther provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)’s simplified notice pleading standard" and reiterated that "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."¹⁴⁴

In *Gisbrecht v. Barnhart* Justice Ginsburg authored an opinion memorable primarily for its historical discussion of how American lawyers embraced the practice of hourly billing.¹⁴⁵ More significant, the Court determined that contingent-fee agreements should be evaluated for their reasonableness in calculating the fees payable to an attorney representing a social security claimant.¹⁴⁶ Although there was no dispute that the Social Security Act requires calculation of a "reasonable fee" not in excess of 25 percent of the past-due benefits recovered, the circuit courts were split on whether the amount ordered by the district court should be based on the fee agreement, which is invariably set at 25 percent of past-due benefits, or on the lodestar method (hours reasonably spent on the case times reasonable hourly rate), which has been used to calculate the payment under fee-shifting statutes.¹⁴⁷ Based on contingent-fee agreements in social security cases predating the fee provision, the Court concluded that the latter does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, [42 U.S.C.] § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield

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¹⁴²Id. at 997.
¹⁴³Id. at 998 (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2)).
¹⁴⁴Id. at 998–99.
¹⁴⁵Gisbrecht v. Barnhart, 122 S. Ct. 1817, 1824–25 (2002) (Clearinghouse No. 54,663). Initially the hourly record approach was "only an internal accounting check. The fees actually charged might be determined under any number of methods: the annual retainer, the fee-for-service method, the ‘eyeball’ method, under which the attorney estimated an annual fee for regular clients; or the contingent-fee method...." Id. at 1824 (citation omitted).
¹⁴⁶Id. at 1820, 1829.
¹⁴⁷Id. at 1822 (citing 42 U.S.C. § 406(b) (2000)), 1823–24, 1825–26. Justice Scalia termed the standard social security fee agreements for 25 percent of past-due benefits “akin to adherence contracts.” Id. at 1830 (Scalia, J., dissenting).
The Court determined that contingent-fee agreements should be evaluated for their reasonableness in calculating the fees payable to an attorney representing a social security claimant.

Construing a statutory requirement that prisoners file a grievance before seeking judicial relief, the Court noted that the language of the provision was so broad that “[e]ven when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit.” The Court found no exceptions: the “exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”

Porter rejected the court of appeals’ view that it was obligated to “construe statutory exceptions narrowly, in order to give full effect to the general rule of non-exhaustion in 42 U.S.C. § 1983.” The Supreme Court stated, “While the canon on which the Second Circuit relied may be dependable in other contexts, the legislation at issue establishes a different regime. For litigation within § 1997e(a)’s compass, Congress has replaced the ‘general rule of non-exhaustion’ with a general rule of exhaustion.”

VIII. Next Term
Two cases already accepted for review warrant watching in the upcoming term. First, the IOLTA (interest on lawyers’ trust accounts) controversy makes a return engagement in Washington Legal Foundation v. Legal Foundation of Washington as the Court considers the second step in its bifurcated inquiry, namely, whether

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148 Id. at 1828. Writing solely for himself in dissent, Justice Scalia would have employed the lodestar method on the ground that “a ‘reasonable fee’ means not the reasonableness of the agreed-upon contingent fee, but a reasonable recompense for the work actually done.” Id. at 1830 (Scalia, J., dissenting).


150 Id. at 2072–73. The Court recognized that the “time period for filing a charge is subject to equitable doctrines such as tolling or estoppel,” but added that those “are to be applied sparingly.” Id. at 2072.

151 Id. at 2074; see also id. at 2077. In partial dissent, Justice O’Connor rejected the notion of hostile environment claims as representing a single event and opined that, even for hostile environment claims, the charge must be filed within 180 or 300 days of each act at issue. Id. at 2078–79 (O’Connor, J., dissenting).


154 Id. at 992.

155 See id. at 988–89 n.4 (quoting Nussle v. Willette, 224 F.3d 95, 106 (2d Cir. 2000)).

156 Id.
funding legal aid programs out of the interest on clients’ accounts held by lawyers violates the takings clause of the Fifth Amendment.157 Second, in Hibbs v. Nevada Department of Human Resources, the Court will once again address the abrogation of state sovereign immunity as the Court considers whether application to the states of a provision of the Family and Medical Leave Act of 1993 constitutes a valid exercise of congressional power under Section 5 of the Fourteenth Amendment.158

Note on the Authors
The authors are members of the Federal Court Access Group, an ad hoc assembly of legal aid and public interest attorneys monitoring Supreme Court developments concerning poor people’s access to federal court. Gary Smith is executive director, Legal Services of Northern California, 517 12th St., Sacramento, CA 95814; 916.551.2150; gsmith@lsnc.net. Matthew Diller is a professor of law, Fordham University School of Law, 140 W. 62d St., New York, NY 10023; 212.636.6980; mdiller@mail.lawnet.fordham.edu. Gill Deford is with the Center for Medicare Advocacy, P.O. Box 350, Willimantic, CT 06226; 860.456.7790; gdeford@medicareadvocacy.org. Jane Perkins is with the National Health Law Program, 211 N. Columbia St., 2d Floor, Chapel Hill, NC 27514; 919.968.6308; perkins@healthlaw.org. For information about the Federal Court Access Group, contact Diller (see above).

Join Advocates Seeking to Restore Civil Rights
How to respond to recent U.S. Supreme Court decisions, such as Alexander v. Sandoval and University of Alabama v. Garrett, that threaten the validity and enforceability of federal civil rights laws was the focus of a conference convened by the National Campaign to Restore Civil Rights last October. Conference participants worked to create practical strategies useful to activists in many areas, including women’s rights, children’s rights, environmental justice, rights of racial and ethnic minorities, workers’ rights, and rights of persons with disabilities.

To learn about future activities of the National Campaign to Restore Civil Rights, contact Denise White, New York Lawyers for the Public Interest, dwhite@nylpi.org, or Camille Holmes, NLADA/CLASP Project for the Future of Equal Justice, chomles@clasp.org.
