INSIDE

Mental Illness and Domestic Violence

Representing Battered Immigrant Women and Children

The Future of Technology in Legal Services

A Practical Guide to Civil-Defender Collaboration

Closing the Courthouse Doors

The Cambodian Outreach Project of Merrimack Valley Legal Services

The TANF Child Care Collaborative

Breaking the Cycle of Defeat for Noncustodial Parents through Advocacy
In a series of decisions over the past several years, the U.S. Supreme Court created substantial obstacles to civil rights litigation. In *University of Alabama v. Garrett* the Court held that state governments may not be sued for employment discrimination in violation of Title I of the Americans with Disabilities Act of 1990.1 In *Alexander v. Sandoval* the Court ruled that there was no private right of action to enforce the regulations under Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal funds from engaging in practices that have a racially discriminatory impact.2 *Circuit City Stores v. Adams* declared that the Federal Arbitration Act required arbitration of state-law discrimination claims when employment contracts had provisions calling for arbitration of employment-related disputes.3 In *Booth v. Churner* the Court held that the Prison Litigation Reform Act of 1995 required that a prisoner seeking money damages exhaust prison administrative procedures even if such procedures could not provide for money damages as long as they could offer the prisoner something of value.4 *Saucier v. Katz* held that a police officer may be deemed protected by qualified immunity even when a jury finds that the officer used excessive force.5

Quite significantly, in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, the Court made recovering attor-
ney fees much more difficult for successful plaintiffs. The Court stated that plaintiffs were not deemed to “prevail” just because their lawsuits were the “catalyst” for the government to change its policy. Attorney fees were to be awarded only when there was a judicial action—a judgment or consent decree—in favor of the plaintiff.

Individually these rulings are likely to be important in civil rights litigation. Cumulatively they are an astounding number of anti-civil rights rulings in a single term. Yet it was not an aberrational year. In the October 2001 term, the Court held that

- Section 1983 may not be used to enforce the Family Educational Records and Privacy Act of 1974;
- punitive damages were not available in actions under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, or Section 202 of the Americans with Disabilities Act;
- individual prisoners must exhaust administrative remedies when complaining that prison guards used excessive force; and
- state governments may not be sued in federal agency proceedings.

I do not want to overstate the Court’s hostility to civil rights claims; civil rights plaintiffs have won some victories, such as *Easley v. Cromartie*, which made using race in drawing election districts to benefit minorities easier for the government, and *Hope v. Pelzer*, which held that there need not be a case on point to deny a government officer qualified immunity.

But, in the overwhelming majority of civil rights cases, the Rehnquist Court rules against civil rights plaintiffs. This in itself is an important and frequently overlooked aspect of the current Supreme Court. Because the Court has not overruled *Roe v. Wade*, its conservatism in civil rights cases is not fully appreciated.

But I want to focus on a more subtle and even more pernicious theme of the Rehnquist Court’s civil rights decisions: most of the civil rights cases show a profound disrespect for the importance of the availability of the judicial process to injured individuals. The consistent theme that unites the many recent civil rights decisions is how they close the courthouse doors to those whose rights have been violated.

---


7 See Buckhannon, 532 U.S. at 600, 604–5, 610.


12 Easley v. Cromartie, 532 U.S. 234 (2001) (Clearinghouse No. 51,221) (stating that the district court was clearly erroneous in finding that voting district lines were drawn primarily based on race and that drawing lines primarily for political purposes, even if they correlate with race, does not trigger strict scrutiny); Hope v. Pelzer, 536 U.S. 730, 741, 745 (2002) (stating that police officers are not protected by qualified immunity when they tie a prisoner to a hitching post because officers should have been on notice that this conduct was unconstitutional, even though no cases on point have found it to be unconstitutional).

To be sure, closing the courthouse doors is not a new technique for a conservative court to use to undermine rights. During its early years, the Burger Court did this by expanding the scope of abstention doctrines and by increasing standing as a barrier to civil rights litigation. But the recent decisions are different in an important respect. The Burger Court cases were primarily about channeling civil rights litigation from federal to state court. The Rehnquist Court rulings of the past few years are about precluding all judicial forums. For instance, Circuit City Stores v. Adams, in holding that employment discrimination claims must go to arbitration when a contract has an arbitration clause, means that victims of discrimination in such circumstances have no access to any court. Alexander v. Sandoval means that victims of practices with a racially discriminatory impact may not use the Title VI regulations to sue in federal or state court.

In this article I make two points. First, the decisions of last term and of recent years reflect the Supreme Court’s closing the courthouse doors to plaintiffs with civil rights claims. Second, there are some avenues for reopening the courthouse doors to civil rights litigants and restoring access to justice.

I. The Loss of Faith in the Importance of the Judicial Process

My central point is that the Rehnquist Court’s decisions in recent years have a consistent and disturbing theme: civil rights plaintiffs lose. The result has become strikingly predictable when the Court hears cases under federal civil rights law. Almost invariably the plaintiff loses in a 5-4 decision, with the majority comprising the Court’s five most conservative justices, Chief Justice William Rehnquist and Justices Sandra Day O’Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas.

Some might overlook this trend because the Court has used a number of different approaches to justify its conclusions, and the cases have involved several statutes. But the overall pattern is clear: the Court’s conservative majority almost always finds a way to rule against civil rights plaintiffs, and they usually do so by closing the courthouse doors to litigants.

A. Closing the Courthouse Doors Based on Trust in the Political Process

Some cases have justified restricting access to the courts based on a belief that the political process adequately will safeguard rights. The most explicit statement of this was in Alden v. Maine, which held that sovereign immunity broadly protected state governments from being sued in state court without their consent, even to enforce federal laws. At oral argument in Alden, the solicitor general of the United States, Seth Waxman, quoted to the Court from the supremacy clause of Article VI and contended that suits against states were essential to ensure the supremacy of federal law. Justice Kennedy’s response to this argument was astounding. He stated:

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are un-

14 See, e.g., Younger v. Harris, 401 U.S. 37, 41 (1971) (holding that federal courts may not enjoin pending state court proceedings); Warth v. Seldin, 422 U.S. 490 (1975) (holding that city residents did not have standing to challenge exclusionary zoning in a suburb because they could not demonstrate that elimination of exclusionary zoning would mean that housing would be constructed that they could afford); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (Clearinghouse No. 6118) (stating that plaintiffs have standing only if they can prove that defendant was the cause of the injury and that a favorable court decision is likely to remedy the injury).


willing to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.” U.S. Const., Art. VI.17

What, then, is the assurance that state governments will comply with federal law?: trust in the good faith of state governments. Is it possible to imagine that thirty or forty years ago, at the height of the civil rights movement, the Supreme Court would have issued such a statement that state governments simply could be trusted to comply with federal law voluntarily? James Madison stated that if people were angels, there would be no need for a Constitution, but there would be no need for a government either.18 The reality is that state governments, intentionally or unintentionally, at times will violate federal law. To rely on trust in the good faith of state governments is no assurance of compliance with federal law at all.

I regard this passage by Justice Kennedy as revealing a central aspect of the Court’s recent sovereign immunity decisions: there is no need for access to the courts because the political process can be trusted. In Alden the Court stated that both federal and state courts were closed to plaintiffs seeking to enforce the Fair Labor Standards Act of 1938 against state governments.19

Another, perhaps more subtle, example of the Supreme Court restricting access to the courts based on trust in the political process is Alexander v. Sandoval.20 In a 5-4 decision, the Court held that there was no private right of action to enforce regulations under Title VI of the Civil Rights Act of 1964, which prevents recipients of federal funds from engaging in practices that have a racially discriminatory impact.21 Regulations adopted under Title VI prohibit practices with racially discriminatory effect.22 The importance of these regulations cannot be overstated.

The Supreme Court had held that violations of equal protection required proof of discriminatory purpose.23 The Title VI regulations have been the key way of challenging actions that disadvantage racial minorities when discriminatory purpose cannot be proven. Because proving discriminatory intent is so difficult, Title VI has been an enormously important weapon in civil rights litigation. Thus the Supreme Court’s ruling in Alexander v. Sandoval that no lawsuits may be brought under these regulations means that civil rights plaintiffs have lost a key weapon for challenging practices that have a racially discriminatory impact.

Notably the Court, in Justice Scalia’s majority opinion, did not invalidate the Title VI regulations, although Justice Scalia did indicate that their validity was an open question to be considered on another occasion. Instead the Court assumed the validity of the regulations and ruled that no lawsuits may be brought to enforce them. How, then, are the Title VI regulations to be enforced? The only way is if the political branches of government are willing to cut off funds to recipients who engage in practices with a racially disparate effect. Once more the Court is

---

17 Alden, 527 U.S. at 754–55.
19 Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 et seq. To be accurate, this is not a complete closure of the courthouse. State officers still may be sued for injunctive relief, and the federal government still may sue states. However, that does not diminish the importance of Alden. The Court’s holding means that generally a state may not be sued in federal or state court when it violates federal law.
20 Sandoval, 532 U.S. 275.
21 Id. at 293; Title VI, Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq.
denying access to the judiciary and leaving enforcement of civil rights to the political branches of government.

Likewise, last term, in Gonzaga University v. Doe the Court held that the provisions of the Family Educational Rights and Privacy Act, which restricts educational institutions from releasing information about their students, may not be enforced through a private right of action or via a Section 1983 suit. Because this case is likely to have significance in many areas of law, and because it involves a complicated issue, I discuss it in some detail in the following subsection.

Law students are often surprised to learn that literally hundreds of federal laws do not create a private right of action. Laws to be enforced by federal regulatory agencies often do not include express authorization for suits to enforce their provisions. Criminal laws frequently do not have a comparable civil statute to permit those harmed to sue. Statutes enacted under Congress’ spending power often specify duties for those receiving money but are silent as to whether violations by the recipients may be the basis for a lawsuit.

In Maine v. Thiboutot the Supreme Court held that Section 1983 may be used to enforce any federal statute and was not limited to enforcing only those statutes adopted by Congress under Section 5 of the Fourteenth Amendment. The Court stated that the plain language of Section 1983 permitted suits to enforce “the laws” of the United States when violated by action taken under color of state law. The Court also stated that Social Security Act provisions concerning calculation of welfare benefits could be enforced via a Section 1983 suit.

Subsequently the Court recognized two exceptions where Section 1983 may not be used to enforce federal statutes. The first exception is that a Section 1983 action is unavailable if Congress, expressly or implicitly, meant to foreclose such suits. In Middlesex County Sewage Authority v. National Sea Clammers Association the Court ruled that Section 1983 could not be used to enforce provisions of the Federal Water Pollution Control Act and the Marine, Protection, Research, and Sanctuaries Act of 1972. The Court found that the “comprehensive enforcement mechanisms” contained in these statutes demonstrated “congressional intent to preclude the remedy of suits under § 1983.” In other words, the Court concluded that the detailed enforcement mechanisms found in the laws indicated that Congress did not want suits through the separate mechanism of Section 1983 actions.

In Wright v. City of Roanoke Redevelopment and Housing Authority the Supreme Court clarified when Section 1983 suits were precluded by other statutory remedies and stated that the burden was on the defendant to demonstrate “by express provision or other specific evidence from the statute itself that Congress intended to foreclose [Section 1983 litigation].” The existence of remedial schemes within a statute did not preclude Section 1983 litigation unless Congress unambiguously indicated an intent to preclude such suits.

The second exception to Maine v. Thiboutot is that Section 1983 is available only to enforce federal laws that confer individual rights. In Pennhurst State School and Hospital v. Halderman the Court ruled that Section 1983 may not be used to enforce the Developmentally

26 See id. at 4–5; Social Security Act, 42 U.S.C. §§ 601 et seq.
28 Middlesex County Sewage Auth., 453 U.S. at 20.
30 See id. at 424–45.
Disabled Assistance and Bill of Rights Act of 1975 because the Act did not create individual rights. The Court stated that unless Congress “[s]pok[e] with a clear voice” and manifested an “unambiguous” intent to confer individual rights, federal funding provisions provided no basis for enforcement by Section 1983. Subsequently, in Suter v. Artist M., the Court reaffirmed that Section 1983 may not be used unless a statute “unambiguously confer[red] an enforceable right upon the Act’s beneficiaries.” Similarly, in Blessing v. Freestone, the Court refused to allow Section 1983 to be used to enforce a Social Security Act provision that required that states receiving federal child-welfare funds to “substantially comply” with requirements designed ensure timely payment of child support. The Court emphasized: “[T]o seek redress through § 1983, . . . a plaintiff must assert the violation of a federal right, not merely a violation of a federal law.”

**Gonzaga University v. Doe.** The Supreme Court’s decision in Gonzaga University v. Doe concerns the second exception to the use of Section 1983 to enforce federal statutes: such actions are limited to situations in which federal statutes create enforceable rights. John Doe was a former undergraduate at Gonzaga University, a private university in Spokane, Washington. Doe sought to become a public school teacher and needed to obtain an affidavit of good moral character from a dean at Gonzaga. A university official had overheard one student tell another student of sexual misconduct by Doe. The university official contacted the state agency responsible for teacher certification and discussed the allegations against Doe. Subsequently Doe was informed that the university would not give him the affidavit required for certification as a Washington schoolteacher.

Doe sued Gonzaga and the school official in state court for torts and breach of contract, as well as for violating the provisions of the Family Educational Rights and Privacy Act, which prohibits educational institutions receiving federal funds from releasing educational records to unauthorized persons. A jury found for Doe on all counts and awarded him $1,155,000, including $150,000 in com-

32 Pennhurst, 451 U.S. at 17, 28.
33 Suter v. Artist M., 503 U.S. 347, 363 (1992). In Wilder v. Virginia Hospital Association the Court found that Section 1983 could be used to enforce a reimbursement provision of the Medicaid Act because the Act left no doubt as to its intent for private enforcement. 496 U.S. 498, 509–12, 516–18, 524 (1990).
35 Blessing, 520 U.S. at 340.
36 Gonzaga Univ., 536 U.S. at 277.
pensatory damages and $300,000 in punitive damages on the statutory claim.38

Although the Family Educational Rights and Privacy Act does not expressly create a cause of action, Doe sued pursuant to Section 1983.39 The Washington Supreme Court, like every federal court of appeals that had considered the issue, ruled that Section 1983 may be used to enforce the Act.40

The Supreme Court reversed the state supreme court and in an opinion by Chief Justice Rehnquist held that the Act did not unambiguously confer a right on individuals and thus it may not be enforced via a Section 1983 action.41 The Court stated: “We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”42 The Court concluded that “[the Family Educational Rights and Privacy Act’s] nondisclosure provisions fail[ed] to confer enforceable rights.”43 The Court explained that the statute stated that the federal government may not give funds to educational institutions that had a “policy or practice” of releasing student educational records in violation of the Act’s requirements.44 The Court stated that this statutory provision was not sufficient to bestow enforceable rights on individuals.45

The greatest significance of the Gonzaga decision is in the Court’s expressly tying the availability of a Section 1983 suit to the question of whether there would be a private right of action to enforce the federal statute. Chief Justice Rehnquist wrote: “[W]e further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.”46 Chief Justice Rehnquist explained that “[a] court’s role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context.”47 Chief Justice Rehnquist concluded the majority opinion by declaring: “In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.”48

This is troublesome for civil rights plaintiffs because the Supreme Court has been very restrictive in its willingness to infer private rights of action for statutes that do not expressly authorize suits.49

---

38 Gonzaga Univ., 536 U.S. at 277.
39 Although Section 1983 applies only if there is state action and Gonzaga University is a private entity, the Washington courts found that the university acted “under color of state law” when it disclosed Doe’s personal information to state officials in connection with the state-law teacher certification requirements. The Supreme Court did not grant certiorari on this issue and stated that it was assuming, without deciding, that the actions occurred under color of state law. Id. at 277 n.1.
40 Id. at 278, 299 (Stevens, J. dissenting) (“[A]ll of the Federal Court of Appeals expressly deciding the question have concluded that [the Family Educational Rights and Privacy Act] creates enforceable rights under § 1983.”).
41 Id. at 276, 290.
42 Id. at 283.
43 Id. at 287.
44 Id.; 20 U.S.C. § 1232g(b)(1).
45 Gonzaga Univ., 536 U.S. at 287.
46 Id. at 283.
47 Id. at 285.
48 Id. at 290.
Gonzaga University thus will be a barrier for plaintiffs seeking to use Section 1983 to enforce federal laws that do not create a private right of action.

There are, however, some important ways of limiting the impact of the decision. First, Gonzaga University concerns a law adopted by Congress under its spending power; arguably the case’s impact is restricted to statutes enacted under this congressional authority. Second, in considering whether there is a private right of action under a law, courts must consider both whether there is an enforceable right and whether the law was meant to provide a remedy. Section 1983 expressly creates a remedy in its authorization for both money damages and injunctive relief. Therefore, there may be statutes where there is no private right of action, not because of the absence of a right but for the lack of a remedy, which still may be enforced via a Section 1983 action.

Laws have little meaning unless they are enforceable. Gonzaga University is troubling because it continues a recent trend, exemplified in cases such as Alexander v. Sandoval, of precluding lawsuits to enforce federal laws. Government defendants undoubtedly will attempt to use Gonzaga University to block litigation to enforce many federal laws.

B. Closing the Courthouse Doors in Favor of Arbitration

An important trend in recent years has been more businesses insisting on arbitration clauses in contracts. This trend is common in many areas, such as employment and health care. Frequently these clauses are written in broad terms and leave the other party to the contract no alternative but to forgo access to the courts.

Last year, while I was teaching these cases in my civil procedure course, I purchased a new computer. The documentation accompanying the computer had a clause that stated that I consented to arbitration for any claims that I had against the company. As a “class project,” I wrote a letter to the computer company refusing consent to this provision. Moreover, I wrote that by reading my letter the company consented that I could sue them in court. I still have not received a response.

The Supreme Court would not likely be receptive to such an effort. The Court has very aggressively enforced arbitration clauses even when doing so means that those with civil rights claims are denied access to the courts. Circuit City Stores v. Adams involved an employee of a Circuit City store in California who sued the company in state court under state discrimination laws. 50 His employment contract included a clause providing for arbitration of employment-related disputes. 51 Circuit City filed a lawsuit, pursuant to the Federal Arbitration Act, in federal district court to compel arbitration. 52

The Federal Arbitration Act has an exception for maritime and other employment contracts in interstate commerce. 53 Nonetheless the Supreme Court, in a 5-4 decision, ruled that the state-law discrimination claims had to go to arbitration and could not be litigated in court. The Court broadly construed the Federal Arbitration Act and narrowly interpreted its exception to apply only to employment of transportation workers. 54 The Court did not discuss, or even acknowledge, the compelling public purpose in allowing victims of discrimination to have access to the courts.

However, in Equal Employment Opportunity Commission v. Waffle House the Court held that an arbitration clause did not preclude the Equal Employment Opportunity Commission from bringing a discrimination claim on behalf of an individual. 55 The Court explained that an

---

50 Circuit City, 532 U.S. at 110.
51 Id. at 109-10.
52 Id. at 110.
54 See Circuit City, 532 U.S. at 109.
individual, via an arbitration clause, waived the right to sue, but the individual may not waive the government’s authority to bring an enforcement action. This is a significant ruling, but it does relatively little to undercut the effect of Circuit City. The Equal Employment Opportunity Commission’s ability to sue on behalf of individuals is inherently limited by scarce resources. The vast majority of employees with arbitration clauses in their contracts will not have any meaningful access to the courts when they are subjected to discrimination.

C. Closing the Courthouse Doors by Narrowing the Scope of Congress’ Powers

When constitutional historians look back at the Rehnquist Court, undoubtably they will say that its greatest changes in constitutional law were in the area of federalism. In a series of important rulings, many involving civil rights laws, the Court has narrowed the scope of Congress’ constitutional powers. The effect of many of these decisions is to deny access to the courts to injured individuals.

For example, the Supreme Court dramatically restricted the scope of Congress’ powers under Section 5 of the Fourteenth Amendment. Section 5 authorizes Congress to enact laws to enforce the Amendment. In Katzenbach v. Morgan the Court held that Congress may use this power to create new rights by statute, but it may not restrict rights recognized by the courts.56 However, in City of Boerne v. Flores the Court implicitly overruled Katzenbach and held that Congress under Section 5 of the Fourteenth Amendment may not create new rights or expand the scope of rights.57 Congress’ power is limited to enacting laws to prevent and remedy violations of rights, and these statutes must be narrowly tailored so as to be “proportionate” and “congruent” to the problem.58 In City of Boerne the Court declared unconstitutional the federal Religious Freedom Restoration Act of 1993, a key civil rights law, which passed almost unanimously through Congress, to expand the protections for free exercise of religion.59

The Court also has narrowed the scope of Congress’ Section 5 power by ruling that Congress may use it only to regulate state and local governments and not private conduct. In the Civil Rights Cases the Court decided that Congress, under Section 5, was limited to adopting laws regulating state and local government actions.60 But in several more recent cases, such as United States v. Guest, a majority of the justices stated that Congress could use its Section 5 powers to prevent private violations of civil rights.61

In United States v. Morrison the Court overruled cases like Guest and held that Congress under Section 5 may not regulate private behavior.62 In Morrison the Supreme Court, in a 5-4 decision, invalidated an important civil rights law: the provision of the Violence Against Women Act that authorized suits by victims of gender-motivated violence.63 The Court held that Congress lacked the power under both Section 5 and the commerce clause to enact such a law.64 Many other civil rights statutes are likely to be vulnerable to constitutional challenge as a result of Morrison’s narrow reading of Congress’ powers.

The effect of this holding is to deny injured individuals access to the courthouse. The provision of the Violence Against Women Act declared unconstitutional in Morrison ensured that victims of gender-motivated violence, rape, and domestic abuse would be able to sue. The

58 See id. at 519–20.
60 The Civil Rights Cases, 109 U.S. 3, 11 (1883).
63 See id. at 601–2; Violence Against Women Act, 42 U.S.C. § 13981.
64 Morrison, 529 U.S. at 627.
Court closed the courthouse doors to these individuals.

Another effect of the Supreme Court’s narrowing the scope of Congress’ powers under Section 5 of the Fourteenth Amendment is in barring suits under federal civil rights laws against state governments. For example, in Kimel v. Florida Board of Regents the Court ruled that state governments may not be sued for age discrimination in violation of the federal Age Discrimination in Employment Act of 1967. In University of Alabama v. Garrett the Court held that state governments may not be sued for employment discrimination in violation of Title I of the Americans with Disabilities Act.

The Court decided both cases by 5-4 margins and used the same reasoning. The Court held that Congress may authorize suits against states and override sovereign immunity only pursuant to Section 5 of the Fourteenth Amendment. The Court stated that, under City of Boerne, Congress may not expand the scope of rights under Section 5 and that each of these laws did just that by prohibiting more than the Constitution forbade. Both cases are very much about closing the courthouse doors to victims of discrimination. The Supreme Court did not declare unconstitutional the substantive provisions of the Age Discrimination in Employment Act or the Americans with Disabilities Act. Instead the Court limited their enforcement by barring suits against state governments.

D. Closing the Courthouse Doors by Narrowly Interpreting Civil Rights Laws

The Court precluded access to the courts by adopting very restrictive interpretations of federal civil rights laws. For example, in 1999 in Sutton v. United Air Lines Inc. the Court held that, under the Americans with Disabilities Act, a disability did not exist if the condition had been corrected. The Court ruled that individuals whose vision had been corrected so that it did not interfere with major life activities did not have a disability within the meaning of the Americans with Disabilities Act. Therefore the failure to hire them based on their impaired vision did not violate the Act. Likewise, in Murphy v. United Parcel Service Inc. the Court held that determination of whether an individual’s physical or mental impairment substantially limited major life activity so as to satisfy the Americans with Disabilities Act definition of “disability” must take into consideration medication or other corrective devices that mitigated the individual’s impairment.

These rulings make it permissible, for example, for an employer to refuse to hire a person with epilepsy or diabetes if these conditions are under control with medication; according to the Court, the correction means that there is no disability for purposes of the Act. Of course, if the condition is not under control, the employer may refuse to hire on that basis.

The Supreme Court’s most recent decision concerning the Americans with Disabilities Act, Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, continues the pattern of restrictive interpretations of the law. A unanimous Court held that an impairment that prevented performing some job tasks was not a disability unless it prevented or severely restricted the individual from doing activities that were of central importance to
most people’s daily lives.\textsuperscript{72} The Court ruled specifically that a plaintiff’s proof that she could not perform repetitive work with her hands and arms was not a disability because she did not demonstrate that her inability to do so substantially limited her in a major life activity.

\textit{Toyota v. Williams} unquestionably will create an additional obstacle for many plaintiffs in disability cases. Individuals like Williams, who have a medical condition that interferes with some job tasks but not others, will find it difficult to prevail. More generally, this case adopts a very restrictive definition of disability, a definition requiring a substantial impairment of a major life activity. Work alone does not appear to be sufficient to qualify as a major life activity; Williams could not work at her assigned job, but the Court did not regard her as disabled.

The problem with the Court’s analysis is that disability always must be assessed relative to particular tasks. A key purpose of the Americans with Disabilities Act was to end workplace discrimination against the disabled. The focus of Title I of the Act is prohibiting such discrimination and requiring that employers make reasonable accommodations for disabilities. From this perspective, work certainly should be regarded as a major life activity, and an impairment that interferes with work should be regarded as a disability.

Moreover, the Court’s approach makes the determination of what is a disability inherently subjective. Courts have great discretion in deciding what is a major life activity or what is a substantial enough interference to constitute a disability. Unfortunately the Supreme Court and many lower courts use this discretion primarily against plaintiffs. The result is to close the courthouse doors to many civil rights plaintiffs.

\textbf{E. Closing the Courthouse Doors by Eliminating Incentives to Litigation and Creating Disincentives}

The above techniques of closing the courthouse doors have involved the Supreme Court precluding all access. The Court also rules against civil rights plaintiffs by eliminating incentives to litigation and creating obstacles that are a disincentive to suits.

An example of eliminating incentives to litigation is the Supreme Court’s important ruling in \textit{Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources}, in which the Court made recovering attorney fees much more difficult for successful plaintiffs.\textsuperscript{73} The availability of attorney fees under civil rights statutes is a major incentive for suits. The reality is that, without this incentive, enforcing civil rights laws would be far more difficult.

\textit{Buckhannon} involved a challenge to state regulations under several federal statutes, including the Rehabilitation Act and the Americans with Disabilities Act.\textsuperscript{74} After protracted litigation, the state ultimately voluntarily changed its policy and adopted what the plaintiffs had been seeking through their suit. The plaintiffs then sought attorney fees on the ground that they had been the catalyst for the suit.\textsuperscript{75} The Supreme Court, in a 5-4 decision, rejected plaintiffs’ request for attorney fees and held that plaintiffs were not deemed to “prevail” just because their lawsuits were the “catalyst” for the government to change its policy. Attorney fees were to be awarded only when there was a judicial action—a judgment or consent decree—in favor of the plaintiff.\textsuperscript{76}

The result is that a defendant can preclude a deserving plaintiff from recovering attorney fees simply by changing its

\begin{flushleft}
\textsuperscript{72} \textit{Toyota}, 534 U.S. at 198.
\textsuperscript{73} \textit{Buckhannon}, 532 U.S. 598.
\textsuperscript{74} \textit{See id. at 600–601; Rehabilitation Act, 29 U.S.C. §§ 701 et seq.; Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.}
\textsuperscript{75} \textit{Buckhannon}, 532 U.S. at 601.
\textsuperscript{76} \textit{See id. at 600, 604–5, 610.}
\end{flushleft}
policies before a verdict. Reducing the chances of a plaintiff being awarded attorney fees in this way removes a crucial incentive to litigation in many cases and effectively closes the courthouse doors in many civil rights cases.

An example of the Court creating a disincentive to litigation is the Supreme Court’s decision in *Raygor v. Regents of University of Minnesota.* The Court imposed a significant restriction on supplemental jurisdiction in suits against state governments and thus created an obstacle to litigation of civil rights claims. The law of federal court jurisdiction long has allowed a federal court to hear state-law claims that arise from the same facts as federal-law claims properly before the federal court. For example, in *United Mine Workers v. Gibbs* the Court ruled that federal courts hearing federal-question claims may decide state-law claims properly before the federal court. For example, in *United Mine Workers v. Gibbs* the Court ruled that federal courts hearing federal-question claims may decide state-law claims properly before the federal court.

In 1990 Congress revised the jurisdictional statutes expressly to authorize federal courts hearing such suits. Specifically 28 U.S.C. § 1367 creates supplemental jurisdiction and essentially codifies the prior law into statute. Section 1367(d) addresses a commonsense, practical problem: if the federal court ends up dismissing a case because the federal questions are not viable, in many cases the statute of limitations will have run in the meantime on the state claims, precluding plaintiffs from filing them in state court. Section 1367(d) thus provides that the statute of limitations on the state claims “shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”

The issue in *Raygor v. Regents of the University of Minnesota* was whether Section 1367(d) is constitutional when the claims are against a state government. Lance Raygor and James Goodchild sued the University of Minnesota in federal court for age discrimination. They alleged a violation of the federal Age Discrimination in Employment Act and state antidiscrimination laws. In January 2000, while their case was pending, the Supreme Court decided *Kimel v. Florida Board of Regents* and held that state governments may not be sued for violations of the Age Discrimination in Employment Act without their consent.

The federal district court then exercised its discretion under Section 1367 to dismiss Raygor’s and Goodchild’s suit because only state-law claims remained. Raygor and Goodchild filed suit in state court under them, but the state, contending that the statute of limitations had expired in the meantime, moved to dismiss. Raygor and Goodchild pointed to Section 1367(d), which tolled the statute of limitations while the claims were pending in federal court. However, the Minnesota Supreme Court declared this provision unconstitutional and concluded that Congress constitutionally could not toll the statute of limitations on state claims in state court.

The Supreme Court, in a 6-3 decision, affirmed. Justice O’Connor wrote for the Court and emphasized that, “with respect to suits against a state sovereign in its own courts, . . . a State ‘may prescribe the terms and conditions on which it consents to be sued.’” Justice O’Connor wrote that Section 1367(d) did not clearly state that

---

79 Raygor, 534 U.S. at 539.
80 Id. at 536–37; Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq.
81 Kimel, 528 U.S. 62.
82 Raygor, 534 U.S. at 537–38.
83 Id. at 538.
84 Id.
85 Id. at 539.
86 Id. at 543 (citing Beers v. Arkansas, 61 U.S. 527 (1858)).
it was meant to apply to claims against state governments. She therefore concluded that to avoid serious constitutional questions the Court would interpret Section 1367(d) not to apply to state claims filed against a state government in state court.

From a practical perspective, this case is very troubling in terms of the choices that it will pose for litigants. A lawyer having both federal- and state-law claims will have a few options, none desirable. One option would be to file both the federal and state claims in state court and forgo federal court entirely. This approach, of course, undermines the availability of federal courts and is especially undesirable in areas in which the federal court is perceived as being more hospitable to civil rights claims than the state court. Another option would be to file suit in both federal court and state court, or at least to file in state court right before the statute of limitations on the state-law claims is about to run. This is certainly permissible, but the problem is that whichever court decides first, federal or state, will completely preclude the other from deciding the matter. Res judicata, claim preclusion, will apply after one court renders a decision.

Thus the effect of Raygor is to undermine the availability of federal courts to hear federal claims. This is particularly troubling because the case is based on a principle—that sovereign immunity protects states from being sued in state court—that has no foundation in the Constitution’s text, history, or even precedents before a few years ago.

F. Broadly Interpreting Statutes That Close the Courthouse Doors

The Court has closed the courthouse doors by very expansively interpreting statutes that preclude access to the judiciary. The Prison Litigation Reform Act requires that prisoners exhaust administrative remedies before bringing in court suits concerning prison conditions. Specifically it states: “No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”

Porter v. Nussle posed the question of whether this exhaustion requirement applies to a prisoner’s claim for excessive force by prison authorities. Ronald Nussle, an inmate in a Connecticut prison, filed suit in federal court; he charged that corrections officers subjected him to a severe beating in violation of the Eighth Amendment’s ban on cruel and unusual punishment. The Second Circuit ruled that the Prison Litigation Reform Act’s exhaustion requirement did not apply because it concerned complaints about general conditions in the prison, not single incidents of excessive force.

The Supreme Court unanimously reversed the Second Circuit and held that a prisoner must exhaust the prison grievance procedure for all claims, whether they involved a particular instance or general conditions. The Court, in an opinion by Justice Ruth Bader Ginsburg, expansively interpreted “conditions” and the exhaustion requirement in the law. The result is that prisoners will be delayed in getting to court, and the procedural hurdles may keep some from getting there at all.

This is the second time in the past year that the Court has broadly interpreted the exhaustion requirement in the Prison Litigation Reform Act. In Booth v. Churner the Court held that a prisoner seeking monetary relief must exhaust prison administrative procedures, even if such procedures could not provide for money damages as long as they could

---

87 Id. at 544–46.
89 Id.
90 Porter, 534 U.S. 516.
91 Id. at 519.
92 Id. at 520.
93 Id. at 532.
afford some benefit to the prisoner.\textsuperscript{94} Together \textit{Porter v. Nussle} and \textit{Booth v. Churner} interpret the exhaustion requirement extremely expansively and effectively close the courthouse doors to many prisoners.

\textbf{II. What Can Be Done to Reopen the Courthouse Doors?}

There are no obvious or easy solutions precisely because the Supreme Court gets the last word and because it has been so consistently hostile to civil rights plaintiffs. But there are avenues for reopening the courthouse doors to civil rights litigants.

First, federal legislation can remedy many of the recent Supreme Court decisions. Constitutional decisions obviously may not be overruled by statute. But many of the recent rulings have been construing federal statutes, not the Constitution. Thus, for example, Congress, by statute, could amend Title VI to overcome \textit{Alexander v. Sandoval} and allow suits to enforce the regulations that prohibit recipients of federal funds from engaging in practices with a racially discriminatory impact. Congress could amend the Federal Arbitration Act to overrule \textit{Circuit City Stores v. Adams} and provide that employment discrimination cases may be litigated. Congress could revise the attorney-fee laws to nullify \textit{Buckhannon} and specify that plaintiffs who are the catalyst for action are the prevailing party. Congress even could try to overcome some of the recent sovereign immunity decisions by documenting a pattern of state discrimination against the elderly and the disabled.

Yet such legislation has not occurred. Why not? At other times Congress has acted to overturn Supreme Court decisions that narrowly interpreted federal civil rights statutes. In part, the answer may be political. Republicans have controlled the House of Representatives since 1994 and were the majority in the Senate until 2001. Advancing civil rights obviously is not a part of the Republican agenda.

But another, more subtle explanation exists for the congressional inactivity. The Supreme Court decisions described in this article have been primarily procedural in nature. Interesting the public and therefore Congress in laws about aspects of jurisdiction and court procedure is much more difficult. \textit{Buckhannon} may be vitaly important to civil rights litigants, but it is not a ruling that will get headlines. Supplemental jurisdiction does not engage the media’s attention. A significant obstacle to legislative solutions is the complicated and procedural nature of the rulings.

Second, state legislatures can act in many of these areas. Some states have enacted laws waiving their sovereign immunity with respect to discrimination suits. Some have adopted or are considering their own versions of the Violence Against Women Act.

The primary problem with this solution is that it requires fifty state legislatures to act, and this is much more difficult than persuading one federal legislature, Congress, to act. The reality, of course, is that even a concerted effort at state legislation will leave without protections many citizens in many states that do not act. Also, in some areas, state governments may not provide an effective remedy. For instance, the Supreme Court’s decision in \textit{Circuit City Stores v. Adams}, requiring arbitration of discrimination claims, was based on an interpretation of the Federal Arbitration Act and thus may not be overcome by state legislation.

Third and perhaps most important, there must be a major effort to block conservative judicial nominees for the federal courts. The decisions described throughout this article are a product of conservative judicial ideology. The composition of the courts thus determines whether this trend will continue and even become much worse. That the Senate force President Bush to pick moderates, rather than conservatives, for the federal bench is essential.

\textsuperscript{94} \textit{Booth}, 532 U.S. at 733–34.
than the American document. The ques-
tion, of course, that I want them to con-
sider is how to explain the abuses of
rights that occurred in the former Soviet
Union? The answer, in large part, is that
no court in the Soviet Union had the
authority to invalidate any government
act. Rights only have meaning if they can
be enforced. The insidious aspect of the
Rehnquist Court decisions is that they
close the courthouse doors and under-
mine the ability of individuals to enforce
their constitutional and statutory rights.