The U.S. Supreme Court’s 2002–2003 Decisions on Federal Court Access
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By Jane Perkins, Gill Deford, Matthew Diller, and Gary Smith

The U.S. Supreme Court revisited, during its 2002–2003 term, a number of court access issues that have interested public interest lawyers for years. Once again the Court examined Interest on Lawyers’ Trust Account (IOLTA) programs. Thanks to the silent defection of Justice O’Connor, the Court upheld the constitutionality of these programs. The Court issued yet another decision on Congress’ ability to abrogate states’ sovereign immunity from suits involving damages. Breaking with the recent past, however, it held that Congress had validly enacted the family leave provisions of the Family Medical Leave Act.1 This decision set off the retirement rumor mill, with some questioning whether the chief justice was attempting to improve upon his legacy. As on previous occasions, the Court decided questions affecting standing, ripeness, supplemental jurisdiction, and removal. Cases also included helpful discourse regarding the role of class action litigation and clarified the jurisdiction of magistrate judges.

IOLTA Survives

The takings clause of the Fifth Amendment, which applies to both the states and the federal government, states: “[N]or shall [1] private property [2] be taken for public use, [3] without just compensation.”2 In 1998 the Supreme Court applied the first component of the takings clause and held that interest generated on accounts consisting of client trust funds was the private property of the principal’s owner, that is, the client whose funds were held and pooled with those of other clients.3 Chief

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2U.S. CONST., amend. V.
Justice Rehnquist, joined by the four other members of the Court’s more conservative bloc, including Justice O’Connor, authored the five-justice majority decision. The Court’s decision placed the first nail in the potential coffin for IOLTA programs, which operate in every state and the District of Columbia and which have become a crucial revenue source for programs in legal services throughout the country. The Court did not reach, however, the second and third components of the takings clause and thus did not resolve the ultimate question of whether Texas’ IOLTA program violated that clause; the Court left those issues to be resolved on remand to the Fifth Circuit.4

In the meantime the Washington Legal Foundation, which had brought Phillips and was its lead plaintiff, had similarly challenged the state of Washington’s IOLTA program. That litigation, after two stops at the Ninth Circuit, came to the Supreme Court as Brown v. Legal Foundation of Washington.5 The Washington Legal Foundation is “a nonprofit public interest law and policy center with members and supporters nationwide, [that] devotes a substantial portion of its resources to protecting the speech and property rights of individuals from undue government interference.”6 While the Washington Legal Foundation was the plaintiff in Brown, the lead defendant and respondent was the Legal Foundation of Washington. Thus, in the lower courts, the case had the puzzling name of Washington Legal Foundation v. Legal Foundation of Washington.7 Happily, the Ninth Circuit concluded that the Washington Legal Foundation lacked standing.8 This decision left the case with a different lead plaintiff and a considerably less confusing name in the Supreme Court. The questions before the Supreme Court were whether the operation of an IOLTA program amounted to a “taking” for public use and, if so, whether any just compensation was due the parties whose property had been confiscated.

Several appellate opinions aided the Supreme Court’s analysis. A three-judge panel of the Ninth Circuit had reversed the district court and held that the state’s appropriation of the interest was a taking and that compensation was due, but also concluded that the amount of compensation depended on the circumstances, thus necessitating a remand.9 On rehearing before a limited en banc panel of eleven jurists, the seven-justice majority rejected the panel decision and affirmed the district court; the majority held that there was no taking because there had been neither an actual loss nor any interference with expectations and alternatively, in the event that there was a taking, that no compensation was due.10 Much of the disagreement between the majority and the four dissenters (which included the three original panel members) hinged on a dispute as to whether the “ad hoc approach” to taking or the “per se approach” was appropriate.11

Wasting little time on the takings issue, the Supreme Court stated that this “condition is unquestionably satisfied.”12 It also dispensed quickly with the second

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4 See Phillips, 524 U.S. at 172.
6 Id. at 1415 n.4 (quoting the Washington Legal Foundation’s brief).
7 Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (Clearinghouse No. 51,781).
8 Id. at 849–50.
9 Wash. Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1115 (9th Cir. 2001) (Clearinghouse No. 51,781).
10 Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 853–64 (9th Cir. 2001) (en banc) (Clearinghouse No. 51,781).
11 Compare id. at 854–57 with id. at 977–79 (Kozinski, J., dissenting).
12 Brown, 123 S. Ct. at 1417.
component of the takings clause by holding that the distribution of the funds was a public use.\textsuperscript{13}

The \textit{Brown} Court devoted considerable attention, however, to determining the kind of taking at issue. According to the Court, traditional physical takings, on the one hand, “involve[ ] the straightforward application of per se rules,” while “regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by essentially ad hoc, factual inquiries...designed to allow careful examination and weighing of all the relevant circumstances.”\textsuperscript{14} Among the examples offered of the former is the temporary government takeover of a leasehold and, of the latter, a regulation prohibiting landlords from evicting tenants unwilling to pay a higher rent. The majority rejected the plaintiffs’ contention that the required placement of their funds in an IOLTA account was the first step of a regulatory taking and concluded that the focus should be on the second step, the transfer of the interest to the IOLTA program.\textsuperscript{15} Since, under \textit{Phillips}, that interest is the property of the client, the Court determined that its transfer to the IOLTA program was a per se taking, analogous to the government appropriation of rooftop space for cable television access.\textsuperscript{16}

With that conclusion, the only takings clause requirement left for the Washington Legal Foundation to succeed in destroying IOLTA was just compensation. On that shoal its argument foundered. Noting first the traditional rule that “just compensation” was measured by the owner’s loss rather than the government’s gain, the Court summarily concluded that clients were not entitled to compensation for the “nonpecuniary consequences of the taking.”\textsuperscript{17} Then, relying on both the majority and dissenting opinions of the Ninth Circuit, it held “that any pecuniary compensation must be measured by [their] net losses.”\textsuperscript{18} The Court’s “net loss” analysis is critical because the amount of interest generated on each individual client’s account is invariably so small that the hypothetical transaction costs of paying that amount to the client reduce its actual value to below zero.\textsuperscript{19} Since the IOLTA rules prohibit attorneys from depositing client funds in an IOLTA account if the funds are sufficient to generate net earnings, a net earnings deposit can never legally be made.\textsuperscript{20} Since “just compensation for a net loss of zero is zero,” the IOLTA program effects no violation of the takings clause.\textsuperscript{21}

The words “arrogant” and “apoplectic” have appeared before in sentences describing a dissent authored by Justice Scalia, but they are summoned in this essay as well. Although his remarks in \textit{Brown} are nominally aimed at Justice Stevens’s majority opinion, the real target of his scorn is the one that got away, the one that left the fold to join the \textit{Phillips} dissenters in undoing what was there wrought—Justice O’Connor. Her de facto change of heart forms the subtext of the \textit{Brown} decision.

We need not tarry long on Justice Scalia’s screed itself, for, as then Associate Justice Rehnquist pointed out over twenty years ago: “The comments in the dissenting opinion ... are just that: com-

\begin{footnotesize}
13\textit{id.}

14\textit{id.} at 1417–18 (internal quotation marks and citations omitted).

15\textit{id.} at 1418.

16\textit{id.} at 1419 (discussing \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419 (1982)).

17\textit{id.}

18\textit{id.} at 1420.

19\textit{id.} at 1420 & n.10.

20\textit{id.} at 1421.

21\textit{id.} at 1421 n.11.
\end{footnotesize}
ments in a dissenting opinion. "22 The short of it is that Justice Scalia and his three brethren are not pleased with the “net loss” approach, which “creates a novel exception to our oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken.”23 Justice Scalia excoriated the majority’s conclusion that no compensation is due, for it “contravenes our decision in Phillips—effectively refusing to treat the interest as the property of petitioners we held it to be—and brushes aside 80 years of precedent on determining just compensation.”24

Some of Justice Scalia’s barbs are truly remarkable. In questioning the majority’s alleged repudiation of a precedent, he posed this rhetorical question—with sarcasm dripping from every punctuation mark and intentionally incorrect grammar:

What can possibly explain the contrary holding today? Surely it cannot be that the Justices look more favorably upon a nationally emulated uncompensated taking of clients’ funds to support (hurrah!) legal services to the indigent than they do upon a more local uncompensated taking of clients’ funds to support nothing more than inspiring the Florida circuit courts. That were [sic] surely an unprincipled distinction.25

And, of course, the almost famous “Robin Hood conclusion”:

Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government’s extraction of wealth from those who own it is so cleverly achieved, and the object of the government’s larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended. One must hope that that is the case. For to extend to the entire run of Compensation Clause cases the rationale supporting today’s judgment—what the government hath given, the government may freely take away—would be disastrous.26

Luckily for our clients, the Sheriff of Nottingham was bested this time—thanks to the nimble action of Justice O’Connor (Maid Marian to complete the analogy?) in joining those merry pranksters in the wilderness of what passes for the Supreme Court’s left of center.

**Sovereign Immunity**

The Supreme Court again considered states’ sovereign immunity from suits by private individuals, but this time broke from tradition to allow the private suit. In *Nevada Department of Human Resources v. Hibbs* the Court allowed private individuals to bring actions against states in federal court for money damages in the event of the state’s failure to comply with the Family Medical Leave Act (FMLA).27

William Hibbs, who worked for the Nevada Department of Human Resources’ Welfare Division, sought leave to care for his ailing wife. The

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23Brown, 123 S. Ct. at 1422 (Scalia, J., dissenting).

24Id. at 1423.

25Id. at 1425.

26Id. at 1428.

department granted his request for twelve weeks of unpaid leave under FMLA but subsequently terminated him from employment after he refused to return to work early. In federal court Hibbs sued the department for damages under an FMLA provision expressly abrogating state sovereign immunity. The department argued that Congress lacked authority to enact the family leave provisions and that the Eleventh Amendment precluded the damages claim.

In a 6-to-3 decision, the Court ruled for the individual employee. Because state sovereign immunity was clearly abrogated in the statute, the opinion focused on whether Congress acted within the authority vested in it by Section 5 of the Fourteenth Amendment when it enacted the leave provisions. Section 5 grants Congress the power “to enforce” the Fourteenth Amendment Section 1’s substantive guarantees, which include equal protection of the laws, by enacting “appropriate legislation.” In the past, the Court acknowledged that Congress had the power both to remedy and to deter violations of the Fourteenth Amendment. However, recent Court decisions have strictly circumscribed Congress’ authority when it acts to deter violations; those decisions have been watchful that Congress not “attempt to substantively redefine the States’ legal obligations.” Using what it labeled “familiar principles,” a five-member majority required that valid Section 5 legislation exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” In determining whether there was “con-
gruence and proportionality,” this slim majority also established the Court as a minilegislature, parsing the legislative record to decide for itself whether evidence of violations by the states sufficed to justify Congress enacting a provision prohibiting otherwise constitutional conduct.33 Applying the “congruence and proportionality” test, this Court has repeatedly held legislation to be beyond the scope of Section 5 and thus affected enforcement of, for example, the Religious Freedom Restoration Act, the Age Discrimination in Employment Act, and Title I of the Americans with Disabilities Act.34

Given the Court’s recent track record against Congress and private enforcement, Chief Justice Rehnquist authoring the majority opinion in Hibbs came as a surprise. However, as the chief justice was quick to point out, the FMLA aims to protect the right to be free from gender-based discrimination in the workplace, and, under the Court’s Fourteenth Amendment decisions, gender-based classifications by states are subject to heightened scrutiny, as opposed to the more deferential rational-basis scrutiny.35 Chief Justice Rehnquist wrote:

Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test—it must “serve important governmental objectives” and be “substantially related to the achievement of those objectives” ...—it was easier for Congress to show a pattern of state constitutional violations.36

The Hibbs majority reviewed the legislative record leading to enactment of the FMLA and, with ease, discerned a pattern of constitutional violations on the part of the states in the administration of leave benefits.37 The Court also found that, “[u]nlike the statutes at issue in City of Boerne, Kimel, and Garrett, which applied broadly to every aspect of state employers’ operations, the FMLA is narrowly targeted to the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship.”38 The Court noted that Congress placed significant limitations on the scope of the legislation, for example requiring only unpaid leave, advance notice of foreseeable leave, certification by a health provider of the need for leave, and limitations on the extent of damages that may be awarded.39

Dissenting Justices Kennedy, Scalia, and Thomas complained that the majority opinion gave only superficial treatment to the legislative record of discrimination by the states; the justices noted that the record concerned, for the most part, discriminatory practices by the private sector, not the states, and that much of the evidence was taken for the Parental and Medical Leave Act of 1986, not the FMLA.40 The dissenters, seeming disgruntled altogether with the federal law, suggested that the history of the FMLA showed that the states were already solv-

33See Kimel, 528 U.S. at 91.
34On the Religious Freedom Restoration Act, see City of Boerne, 521 U.S. at 507; on the Age Discrimination in Employment Act, see Kimel, 528 U.S. at 62; on Title I of the Americans with Disabilities Act, see Garrett, 531 U.S. at 356.
36Id. at 1982 (citations omitted).
37Id. at 1979–80. The Court also noted that, until recently, its own opinions sanctioned gender stereotypes in the workplace. Id. at 1978.
38Id. at 1983.
39Id. at 1983–84.
40Id. at 1987–88 (Kennedy, J., dissenting).
ing any gender-based discrimination. Saying that there is “no guilt by association,” Justice Scalia separately faulted the opinion for not demonstrating that each of the fifty states covered by the FMLA was in violation of the Fourteenth Amendment.

“Traditional” Fourteenth Amendment Jurisprudence

In a pair of decisions this term, the Court addressed the equal protection and due process guarantees of the Fourteenth Amendment. While far from groundbreaking, the cases are significant in that they signal the Court’s expectation that principles of equal protection and due process be applied by lower courts in a consistent and traditional manner.

Equal Protection and the Rational-Basis Test. In Fitzgerald v. Racing Association of Central Iowa, a unanimous decision by Justice Breyer, the Court held that taxing slot machine revenues at different rates depending on the industry in control of the earnings had a rational basis and therefore did not violate the equal protection clause of the Fourteenth Amendment. The Court also rejected the argument that, since the same analysis was applicable to both the federal and state equal protection claims, the decision below was actually a state-law holding barring federal review: “In such circumstances, we shall consider a state-court decision as resting upon federal grounds sufficient to support this Court’s jurisdiction.” Under Iowa’s tax system, racetracks, allowed to operate slot machines since 1994, have been taxed at up to 36 percent on slot machine earnings, while riverboat gambling excursions have been taxed at a 20 percent maximum. The Iowa Supreme Court decided 4-to-3 that this scheme violated the federal guarantee of equal protection because it defeated the statute’s alleged purpose of protecting racetracks from economic distress. If nothing else, the U.S. Supreme Court’s decision to reverse the Iowa Supreme Court is useful for public interest advocates because it sets out the basics of equal protection analysis and reiterates the virtually insurmountable standard—that most complainants encounter when there is neither a suspect class nor a fundamental right at issue.

The Court’s major disagreement with the state court was in the latter’s failure to recognize that viewing the negative impact of the higher tax rate in a vacuum was inappropriate. The overall objective and effect of the scheme had to be considered because otherwise, “if every subsidiary provision in a law designed to help racetracks had to help those racetracks and nothing more, then there could be no taxation of the racetracks at all.” Given that point, a rational legislator might believe that assisting racetracks was appropriate by allowing them to operate slot machines while imposing a tax that limited the extent of that assistance: “[T]he Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide.” At the same time the Court stated that numerous rationales were possible for limiting the tax rate on slot machines in

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41 Id. at 1986–94 (Kennedy, J., dissenting).
42 Id. at 1985 (Scalia, J., dissenting).
44 Id. at 2158–59.
47 Fitzgerald, 123 S. Ct. at 2159.
48 Id. at 2160.
This type of equal protection case—the application of different tax rates to different industries—is structurally different from the “typical” equal protection case involving benefits. In the latter, individuals in virtually identical circumstances are treated differently because they fall on different sides of an arbitrary line which has to be drawn somewhere. Here, by contrast, the differential treatment is the result—or is analyzed as the result—of different legislative concerns for the different industries at issue, with a plausible rationale needed for the legislature’s approach to each industry. Nevertheless, the Court quoted a classic line-drawing analysis from a benefits case in support of its position.

Fitzgerald makes clear that the Court assumes that (1) a “rational legislator” is behind every seemingly irrational classificatory system and (2) virtually any arguably logical explanation that the legislator might theorize for that distinction will suffice. That, without a suspect class or fundamental right at issue, the plaintiff will lose is, in short, a good bet.

Due Process and the “Eldridge” Test.

In another unanimous decision, City of Los Angeles v. David, the Supreme Court continued its practice of reversing the Ninth Circuit and added some humiliation to the equation. Granting a request for review, it issued a per curiam decision based on the pleadings filed in support of and against the petition for certiorari, dispensing altogether with plenary briefing and oral argument. The case grew out of a car towed for illegal parking. Although the plaintiff retrieved the vehicle on the same day by paying $134.50, his hearing to seek recovery of the fine was not held until twenty-seven days later. When that failed, he made a federal case out of it, filing an action under 42 U.S.C. § 1983 for violation of his due process right to a speedy postdeprivation hearing. The district court rejected the contention, but the Ninth Circuit majority, relying on circuit authority involving hearing rights for retrieving an impounded car, emphatically concluded that the delay violated due process.

Applying the three-factor balancing test of Mathews v. Eldridge to the loss of $134.50 for a few weeks, the Ninth Circuit dissenter concluded that it was “not such a big deal.” The Supreme Court essentially agreed with this view. Thus City of Los Angeles at least reconfirms that Eldridge makes for an appropriate analytical tool for evaluating hearing-related due process issues. On the first Eldridge factor the Court noted that the temporary deprivation of money was not a significant private interest, certainly not when compared to the loss of a job or “the temporary deprivation of the use of the automobile itself.” The second factor, usually described as an inquiry into whether the existing process created the risk of erroneous deprivation, and labeled by the Court here as “concern for accuracy,” also posed no serious hurdle, for the Court concluded that the length of the delay was not likely to lead to significant errors. The third consideration, the “Government’s interest,” includes the fiscal and administrative burdens that
additional procedures would entail.57 Although the Eldridge Court did at one point refer to this factor as “the Government’s interest,” it later described the factor in greater detail as “the public interest ... includ[ing] the administrative burden and other societal costs” that would be required by additional process.58 Nevertheless, this factor has generally come to be thought of, and referred to, as it is in City of Los Angeles, as “the Government’s interest.” In the Court’s view, this factor also favored the City because the difficulty of organizing hearings was considerable and scheduling many more hearings would be burdensome.59

The Supreme Court was emphatic in Eldridge that fiscal burdens on their own were not sufficient to tip the balance against additional procedures: “Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government’s interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.”60 Nevertheless, courts frequently treat this factor as conclusive if the government can show that it will suffer considerable financial burden from additional procedures.

The City of Los Angeles decision does not break any new ground, but it, like the Fitzgerald decision, does indicate that the Supreme Court expects the lower courts to apply principles of due process and equal protection in a consistent and traditional manner. While success on a procedural due process case is still far more likely than success when an equal protection challenge is premised on the rational-basis test, the Supreme Court will demand, in both instances, that the lower courts not stray from the relevant considerations. The Ninth Circuit’s failure to distinguish between a delay in a hearing on a car impoundment and a delay in a hearing on a relatively small fine was the catalyst for an embarrassing rebuke. As Judge Kozinski tastefully put it: “[T]his isn’t a car case.”61

Standing

In Gratz v. Bollinger, the University of Michigan undergraduate admissions case, the chief justice’s majority opinion refuted Justice Stevens’s dissenting contention that the petitioners lacked standing to obtain prospective relief.62 The majority first rejected the argument that the named plaintiff for the class seeking an injunction did not apply to transfer to the University of Michigan, but, rather, after failing to obtain admission originally and opting for another university, he only alleged an intention to do so if the challenged admissions policy were changed. Not actually applying to transfer is irrelevant, the majority concluded, because “[i]t is well established that intent may be relevant to standing in an Equal Protection challenge.”63 Furthermore, the Court found no need to show that elimination of the challenged policy would lead inevitably to admission because “[t]he “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”64 Since the peti-

57 Id.; see Eldridge, 424 U.S. at 335.
58 See Eldridge, 424 U.S. at 335, 347.
59 City of Los Angeles, 123 S. Ct. at 1897.
60 See Eldridge, 424 U.S. at 348.
61 David, 307 F.3d at 1149 (Kozinski, J., dissenting).
63 Id. at 2422.
64 Id. at 2423 (quoting Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993)).
tioner had demonstrated that he was “able and ready” to apply as a transfer student, he had standing to pursue prospective relief.65

The Court also rejected Justice Stevens’s position that plaintiff lacked standing because different factors were at issue in transfer admissions as opposed to freshman admissions. According to the dissent, these distinctions should have precluded the petitioner from representing a class seeking freshman admissions.66 The majority noted that whether the relevancy of the difference was one of standing or of adequacy of representation under Federal Rule of Civil Procedure 23(a) was unclear, but the majority determined that in any event the requirement was satisfied.67

Rejecting Justice Stevens’s reliance on Blum v. Yaretsky, in which the Court declined to allow the named plaintiffs to represent nursing home patients at more than one level of care, the majority here concluded that the uses of race in the two types of admissions did “not implicate a significantly different set of concerns.”68 This was largely due, the Court continued, to the diversity of the student body being the goal for both the freshman and transfer admissions programs.69

Although this second aspect of the Court’s standing analysis is largely fact-based, thereby rendering it difficult to apply to other situations, the discussion of the first issue could well be of significance. The difference between the situation in Gratz and the situations that the chief justice labors so hard to distinguish—the Medicaid patients at different levels of care in Blum and the minority employees and job applicants in General Telephone Co. of Southwest v. Falcon—hinges on the plaintiffs in this case having been able to prove that the alleged differences in the two types of admissions were not qualitative.70 Generalizing from that analysis to produce any principles that could be helpful in future litigation is difficult.

The majority and the dissent reach different ultimate conclusions in part because of the different inferences that they draw from the facts. Justice Stevens most critically believed that the differences between the freshman and transfer admissions policy were significant.71 But, in any event, the majority clearly stretches the concept of standing for injunctive relief in order to reach the merits. This stretch is certainly, as Justice Souter characterized it in a separate dissent, “indulgent standing theory.”72 Whether the decision may be employed in aid of different plaintiffs is unclear at this time. Still, to contemplate citing a majority opinion by the Chief Justice is pleasing when that opinion endorses standing for someone who cannot now benefit from the injunctive relief sought (because he has graduated from another university) but who, at the time of filing the complaint, claimed that he intended to take the action (submitting a transfer application) which would have put him in position to benefit in the event of a change in policy.

Class Actions

In another portion of Gratz the chief justice’s majority opinion has good things to say about class actions. There is nothing new in these observations, but they may carry some additional weight both

65Id. at 2423.
66Id. at 2426 (Stevens, J., dissenting).
67Id. at 2423; see also id. at 2423 n.15 (noting “tension in our prior cases” on this point).
68Id. at 2424 (citing Blum v. Yaretsky, 457 U.S. 991 (1982)).
69Id. at 2425.
71See Gratz, 123 S. Ct. at 2436–37 (Stevens, J., dissenting).
72Id. at 2439 (Souter, J., dissenting).
from being recent and from being authored by Rehnquist.

The decision points to how effectively a class action can prevent a case from becoming moot—a problem that advocates often face on behalf of indigent clients. The Court stated: “Indeed, class action treatment was particularly important in this case because ‘the claims of the individual students run the risk of becoming moot’ and ‘[t]he class action vehicle ... provides a mechanism for ensuring that a justiciable claim is before the Court.’”

The opinion also restates a famous line from Califano v. Yamasaki, a 1979 social security benefits decision in which the Supreme Court encouraged district judges to employ class actions as an effective tool: “Indeed, as the litigation history of this case demonstrates, ‘the class-action device save[d] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.’”

Twenty-four years after Yamasaki established conclusively that class actions in general and nationwide class actions in particular are appropriate tools, there may be less need to educate district judges that class actions are not a particularly novel or difficult mechanism. Still, there is no harm in reminding them—and, just to make sure that the message is clear, perhaps that proposition should be cited thus: “Gratz v. Bollinger, 123 S. Ct. 2411, 2426 & n.17 (2003) (per Rehnquist, C.J.).”

**Ripeness**

The Supreme Court returned to the issue of ripeness in National Park Hospitality Association v. Department of the Interior, finding unripe a challenge to a National Park Service regulation declaring that concession contracts are not subject to the dispute resolution procedures of the Contract Disputes Act. Taking the position that the Act covers suppliers of goods and services to the government, but not concessioners who serve the public, the National Park Service issued the regulation pursuant to its powers under the National Parks Omnibus Management Act of 1998.

Writing for a six-justice majority, Justice Thomas found that, in the absence of a particular contractual dispute, the case was not ripe for judicial resolution under the test enunciated in Abbott Laboratories v. Garner. According to Justice Thomas, the key issue was whether promulgation of the regulation inflicted hardship on the concessioners. The concessioners argued that the value of concessions depended in part on the availability of the dispute resolution mechanisms of the Contract Disputes Act and that the National Park Service regulation therefore affected bidding on concessions. Finding that the National Park Service did not administer the Contract Disputes Act and that its regulation therefore did not qualify as either a legislative or interpretative rule, the majority rejected this claim. Instead Justice Thomas found the regulation to be simply a statement to the public as to the agency’s position on the issue.

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73 Id. at 2426 (quoting in part from the appendix to the petition for certiorari).
74 Id. at 2426 n.17 (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)).
78 Id. at 2030–31.
79 Id. at 2031.
such, it created no legal rights or obligations.\textsuperscript{80} Justice Thomas rejected the claim that the regulation had an immediate impact on bidding over concessions; he noted that all legal uncertainty affected business decisions and that such uncertainty was insufficient to merit immediate judicial review.\textsuperscript{81}

Justice Stevens, concurring in the result, reasoned that the issue was purely legal in nature and would not benefit from further factual development.\textsuperscript{82} In his view, the existence of hardship may lead a court to find a matter ripe, even though further factual development would be useful, but the absence of hardship should not make an otherwise ripe controversy unripe.\textsuperscript{83} Nonetheless, agreeing with the outcome, he found that the lack of hardship deprived the plaintiffs of an injury necessary to establish standing. He noted in particular that the plaintiffs had failed to allege particular instances in which bids were altered or concessioners declined to bid on a contract because of the National Park Service regulation.\textsuperscript{84}

Justices Breyer and O’Connor dissented, arguing that the dispute was ripe and that plaintiffs had standing because they regularly bid on contracts and alleged that the availability of remedies under the Contract Disputes Act influenced the bidding.\textsuperscript{85}

Supplemental Jurisdiction

In \textit{Jinks v. Richland County, South Carolina}, the Court rejected a challenge to the constitutionality of the statute of limitations tolling provision of the supplemental jurisdiction statute.\textsuperscript{86} The supplemental jurisdiction statute provides that when a federal court declines to exercise jurisdiction over state claims, the time during which such claims were pending in federal court is excluded from the statute–of–limitations period. This protection enables plaintiffs to refile the dismissed claims in state court without being penalized by having sought a federal forum.

In 2002 the Court ruled that, as applied to a state defendant, the tolling provision ran afoul of the Eleventh Amendment.\textsuperscript{87} In \textit{Jinks} the defendant, raising a more general challenge to the statute, claimed that it constituted an interference with state judicial procedure in violation of the Tenth Amendment. The Court brushed this challenge aside in a unanimous opinion that the tolling provision was rooted in Congress’ power to enact legislation “necessary and proper” to the implementation of Article III.\textsuperscript{88} Reiterating long–standing precedent that localities may not assert immunity, the Court also rejected the contention that the defendant county could rely on the sovereign immunity of the state.\textsuperscript{89}

Removal

The Court decided two cases expanding the scope of federal removal jurisdiction under 28 U.S.C. § 1441, which permits defendants, under certain circum–

\textsuperscript{80}Id.

\textsuperscript{81}Id. at 2032.

\textsuperscript{82}Id. at 2033 (Stevens, J., concurring).

\textsuperscript{83}Id. at 2033–34.

\textsuperscript{84}Id. at 2034–35.

\textsuperscript{85}Id. at 2035 (Breyer, J., dissenting).


\textsuperscript{88}Jinks, 123 S. Ct. at 1671–72. Justice Scalia found the statute to be “conducive to the due administration” of justice in federal court and “plainly adapted to that end.” Id.

\textsuperscript{89}Id. at 1673.
stances, to compel plaintiffs to litigate in federal court the claims which they filed in state court, thus effectively depriving plaintiffs of the choice of forum.

In the broader of the two decisions, Beneficial National Bank v. Anderson, the Court reviewed the standards governing removal of a state-law claim which is deemed to “actually arise” under federal law. A group of individuals seeking advances on their income tax refunds had secured short-term loans from the defendant bank in Alabama (a “national” bank chartered under the National Bank Act) by pledging their anticipated refunds.90 These customers, later suing the bank in Alabama state court, sought damages for various alleged violations of state statutory and common law, including claims that the bank’s interest rates were usurious.91 Although the complaint did not allege any violations of federal law, or indeed even refer to any federal law at all, the bank, removing the case to federal district court, alleged that the National Bank Act provided the exclusive standards governing the rate of interest that a national bank might charge and the exclusive remedies available against a national bank that charged excessive interest rates.92

The district court denied the plaintiffs’ motion to remand the case to state court, but on appeal the Eleventh Circuit, reversing the district court, held that because removal was generally not permitted absent an expressly alleged federal claim, and because the one narrow exception to that rule (known as the “complete preemption doctrine”) did not appear to apply to the federal law at issue (i.e., the National Bank Act), removal was improper.93 Writing for a seven-justice majority, Justice Stevens reversed the Eleventh Circuit and upheld the removal of the case to federal court.94 The majority began its analysis with a review of the relatively straightforward principles developed by the Court for determining when a state-law claim “[arose] under” federal law within the meaning of Section 1441(b) and was therefore removable to federal court.95 First, the “well-pleaded” allegations of the complaint initially control the determination, and a claim will be deemed to “arise under” federal law “only when the plaintiff’s statement of his own cause of action shows that it is based upon” federal law.96 Second, that the plaintiff’s complaint gives rise to, or even expressly refers to, an anticipated defense to the claim based on federal law is not a basis for removal jurisdiction.97 Significantly, for purposes of Beneficial National Bank, this second principle includes, as a general matter, defenses based upon the alleged preemptive effect of a federal statute.98 Application of these two guidelines yields the “general rule” that “a case will not be removable if the complaint does not affirmatively allege a federal claim.”99 Since the complaint in Beneficial National Bank indisputably did not allege

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91 Id.
92 Id. (citing 12 U.S.C. §§ 85–86). The bank also alleged that the rates charged to plaintiffs complied with the limitations set forth in the National Bank Act. Id.
93 Id. at 2061 (citing Anderson v. H & R Block, Inc., 287 F.3d 1038, 1048 (11th Cir. 2002)).
94 Id. at 2062.
95 Id.
96 Id. (quoting Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908)).
97 Id. (citing Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 10 (1983)).
98 Franchise Tax Bd., 463 U.S. at 10.
99 Beneficial Nat’l Bank, 123 S. Ct. at 2062.
any federal claims, the Court’s analysis shifted to whether the plaintiffs’ state-law usury claims fell within a narrow exception to the “well-pleaded” complaint rule. This exception, the “complete preemption” doctrine, was first announced in 1968 in *Avco Corp. v. Machinists*, in which the Court held that the wholly preemptive effect of Section 301 of the Labor Management Relations Act justified removal of the plaintiff’s state-law labor contract claims. *Avco* curiously contained little discussion or analysis to justify its departure from the settled principles governing removal other than to describe the effect of the Labor Management Relations Act as follows: “Any state [labor relations] law ... will be absorbed as federal law and will not be an independent source of private rights.” In 1983 the Court subsequently explained that the *Avco* holding rested upon the unusually powerful preemptive force of the Labor Management Relations Act, a force “so powerful as to displace entirely any [analogous] state law cause of action,” thus rendering the claim “purely a creature of federal law” and compelling a conclusion that the claim necessarily must “arise[] under” federal law. In 1987 the Court held that the wholly preemptive effect of the Employee Retirement Income Security Act supported the removal of state common-law causes of action involving an employee benefit plan that was subject to the exclusive regulation of the federal statute.

The *Beneficial National Bank* majority acknowledged the complete preemption doctrine:

Thus, a state claim may be removed to federal court in only two circumstances—when Congress expressly so provides ... or when a federal statute wholly displaced the state-law cause of action through complete preemption. When the federal statute completely preempts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law [and is therefore removable under Section 1441(b)].

The Court turned to the specific application of the “complete preemption” doctrine to the statute before it and framed the “dispositive question” as follows: “Does the National Bank Act provide the exclusive cause of action for usury claims against national banks? If so, then the cause of action necessarily arises under federal law and the case is removable.”

The majority opinion then reviewed, at some length, the history and intent of the National Bank Act, which set forth in considerable detail provisions governing the definition of usurious interest rates, penalties for the charging of usurious interest and “overcharges,” and the limitation period for commencement of usury claims. The Court also took into consideration “the special nature of federally chartered banks” and the historic congressional concern for “a national banking system that needed...
protection from ‘possible unfriendly state legislation.’” The majority concluded that, “even though the complaint makes no mention of federal law,” the “same federal interest that protected national banks from the state taxation that Chief Justice Marshall characterized as ‘the power to destroy’ ... supports the established interpretation of [the National Bank Act] that gives [the Act] the requisite preemptive force to provide removal jurisdiction.”

In a typically tart dissent, Justice Scalia (joined by Justice Thomas) rather effectively lacerated the rationale underlying the Court’s “complete preemption” doctrine. Describing the initial appearance of the doctrine in Avco as “an unprecedented act of jurisdictional alchemy,” Scalia complained that nowhere in Avco, the Court’s “struggle[ ] to prop up Avco’s puzzling holding” in subsequent cases, or the majority’s opinion in Beneficial National Bank is it explained “how or why the claim of a [preempted state-law right] is transmogrified into the claim of a federal right.” Scalia contended that “[t]he proper response to the presentation of a [preempted state-law] claim to a state court is dismissal, not the ‘federalize-and-remove’ dance authorized by today’s opinion.” In Scalia’s view the Court’s continuing application of the “complete preemption” doctrine set forth in Avco, which, according to Scalia, “rest[s] upon nothing,” cannot justify the unexplained abrogation of the directly contrary rule governing removal jurisdiction, which is that “federal preemption is ordinarily a federal defense to the plaintiff’s suit, and as such it does not ... authorize removal to federal court.”

Justice Scalia found the real rationale behind the Court’s “expansion” of removal jurisdiction to rest in a policy concern, unstated by the majority but delicately raised by the United States in its Amicus Curiae brief. Therein the government suggested that, absent removal, the state court might “err and allow the claim to proceed under state law, notwithstanding Congress’ decision to make the federal cause of action exclusive.” However, in Scalia’s view, the “fear [of] state-court error” cannot possibly justify a “magical[ ] transformation” of state-law claims into federal ones in order to ensure their removal to a federal forum. He asserted that the majority’s holding evidenced “a sharp break from our long tradition of respect for the autonomy and authority of state courts” and concluded that “it is up to Congress, and not the federal courts, to decide when the risk of state court error with respect to a matter of federal law becomes so unbearable as to justify divesting the state courts of authority to decide the federal matter.”

In the term’s second decision vindicating a corporate defendant’s ability to invoke federal removal jurisdiction, Breuer v. Jim’s Concrete of Brevard Inc., a unanimous Court held that employees seeking relief against employers for violations of the Fair Labor Standards Act might be deprived of the state-court forum which the Act expressly allowed

108Id. at 2064 (quoting Tiffany v. Nat’l Bank of Mo., 18 Wall. 409, 412 (1874)).
109Id. (quoting McCulloch v. Maryland, 4 Wheat. 316, 431 (1819)).
110Id. at 2065 (Scalia, J., dissenting).
111Id. at 2066, 2068–69.
112Id. at 2068.
113Id. at 2067 & n.1 (quoting Franchise Tax Bd., 481 U.S. at 63).
114Id. at 2069 (quoting Brief for United States as Amicus Curiae at 17–18).
115Id. at 2066, 2069.
116Id. at 2068, 2070.
them to elect. In Breuer the plaintiff sued his former employer in Florida state court for unpaid wages, liquidated damages, prejudgment interest, and attorney fees, all of which the Act authorized. The Act’s Section 216(b), providing that a suit under the Act “may be maintained ... in any Federal or State court of competent jurisdiction,” authorized plaintiff’s election to sue in state court. The defendant employer removed the case to federal district court under 26 U.S.C. § 1441(a), which provides that, “except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant ... to the district court of the United States.” The plaintiff, moving to remand the case to state court, argued that the statute’s authorization for him to “maintain” his Fair Labor Standards Act claims in state court constituted a congressional prohibition against removal. The district court denied the motion, and, on plaintiff’s appeal, the Eleventh Circuit affirmed that the statutory jurisdictional provisions did not contain any “direct, unequivocal” bar to removal. The Supreme Court granted certiorari to resolve a conflict in the circuits as to the removability of Fair Labor Standards Act suits.

The Court noted that since there was no doubt that the plaintiff could have brought his suit in federal court, and that therefore the federal district court had original jurisdiction over the action under Section 1441(a), removal of the action was prohibited only if Congress had “expressly provided” such a bar. The plaintiff contended that Congress, in providing that Fair Labor Standards Act actions “may be maintained” in state court, had intended to express a statutory prohibition against removal. The plaintiff reasoned that his right to “maintain” his action in state court implied the right to conclude his action in that court and thus precluded the defendant from hauling the case into federal court. The plaintiff also argued, as a policy matter, that “many claims under the [Fair Labor Standards Act] are for such small amounts that removal to a sometimes distant federal court” would, due to the expense and inconvenience entailed, prevent many employees from vindicating their rights under the Act.

As evidenced from both the unanimity and relative brevity of its opinion, the Court was not impressed by these contentions. The plaintiff’s principal obstacle was the existence of a number of federal statutes providing for state-court jurisdiction which do, in fact, contain explicit language barring the removal of

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118 Id. at 1883.
119 Id. (quoting 29 U.S.C. § 216(b)).
120 Id. at 1884 (quoting 28 U.S.C. § 1441(a)).
121 Id.
122 Id. (quoting Breuer v. Jim’s Concrete of Brevard Inc., 292 F.3d 1308, 1310 (11th Cir. 2002) (Clearinghouse No.55,253)).
123 Id. The Eleventh Circuit agreed with a 1986 First Circuit decision that permitted removal, Cosme Nieves v. Deshler, 786 F.2d 445 (1st Cir. 1986), but conflicted with a 1947 decision of the Eighth Circuit, Johnson v. Butler Bros., 162 F.2d 87 (8th Cir. 1947).
124 Id. at 1884.
125 Id.
126 Id.
127 Id. at 1887.
such cases to federal court.\textsuperscript{128} As Justice Souter wryly observed, “nothing on the face of [the Fair Labor Standards Act] looks like an express prohibition of removal, there being no mention of removal, let alone of prohibition.”\textsuperscript{129} As for the plaintiff’s interpretation of the phrase “maintain,” the Court noted that “[t]he right to maintain an action may indeed be a right to fight to the finish, but removal does nothing to defeat that right; far from concluding a case before final judgment, removal just transfers it from one forum to another.”\textsuperscript{130} With respect to the plaintiff’s policy concern, the Court acknowledged that it carried some force as a “pragmatic appeal,” but the Court was ultimately unwilling to create a “removal exception for the [Fair Labor Standards Act] without entailing exceptions for other statutory actions [with jurisdictional language identical to that of the Act].”\textsuperscript{131}

In a footnote the Court brushed aside two additional authorities that the plaintiff cited: in an Eighth Circuit case the U.S. secretary of labor’s 1947 \textit{amicus} brief contending that Fair Labor Standards Act actions were not removable and a 1958 U.S. Senate report that accompanied enactment of a federal workers’ compensation statute and stated that actions brought in state court under the Act were not removable.\textsuperscript{132} The Court stated that the fifty-year-old opinion from the Department of Labor “cannot make up for the absence of express statutory language” in the Act and dismissed the plaintiff’s legislative history citation as “a stray comment in a congressional report.”\textsuperscript{133} The Court affirmed the lower court’s ruling that the case was properly removed.\textsuperscript{134}

**Jurisdiction of the Magistrate**

In \textit{Roell v. Withrow}, a decision that might have special implications for unsophisticated or unrepresented (or both) plaintiffs in federal court, a closely divided Court held that the “consent of the parties” necessary for federal magistrate judges to exercise jurisdiction over entire civil actions need not be “express” consent but might be “inferred from a party’s conduct during litigation.”\textsuperscript{135} In \textit{Roell} the plaintiff, a Texas state prison inmate, bringing a civil rights suit in federal court, alleged that three members of the prison medical staff, in violation of the Eighth Amendment, had been deliberately indifferent to his medical needs.\textsuperscript{136} During preliminary proceedings in the case, the magistrate judge advised the plaintiff that he could elect to have her, rather than the district judge, preside over the entire case.\textsuperscript{137} The plaintiff consented to this offer verbally and later executed the court’s written consent form as well.\textsuperscript{138} At the initial hearing, a lawyer (from the Texas attorney general’s office) not permanently assigned to the case indicated that any decisions as to consent to proceed before the magistrate judge would have to be made by the defendants’ assigned attorneys.\textsuperscript{139} Without waiting for the defendants’ consent, the district

\begin{itemize}
\item \textsuperscript{128}Id. at 1885. The Court listed a number of substantive federal claims which, if commenced in state court, were not to be removed to federal court, e.g., Securities Act of 1933, 15 U.S.C. § 77v(a), and 28 U.S.C. § 1445.
\item \textsuperscript{129}Breuer, 123 S. Ct. at 1844.
\item \textsuperscript{130}Id. at 1886.
\item \textsuperscript{131}Id. at 1888 (citing, inter alia, Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b)).
\item \textsuperscript{132}Id. at 1887 n.3 (citing \textit{Johnson v. Butler Bros.}, 162 F.2d 87 (8th Cir. 1947); \textit{S. REP. NO. 1830}, at 9 (1958)).
\item \textsuperscript{133}Id.
\item \textsuperscript{134}Id. at 1887.
\item \textsuperscript{135}Roell v. Withrow, 123 S. Ct. 1696, 1699 (2003) (Clearinghouse No. 55,428).
\item \textsuperscript{136}Id.
\item \textsuperscript{137}Id.
\item \textsuperscript{138}Id.
\item \textsuperscript{139}Id.
\end{itemize}
judge referred the case to the magistrate judge for final disposition on the condition that “all the defendants would be given the opportunity to consent” to her jurisdiction, and if any did not, the case would be returned to the district judge.\(^{140}\) Pursuant to the court clerk’s procedures, the referral order, along with a summons directing the defendants to include in their answers a statement as to whether all of them consented to the jurisdiction, was sent to the defendants.\(^{141}\) One defendant, who was represented by private counsel, consented in writing to the magistrate judge’s jurisdiction, but the two other defendants, who were represented by the Texas attorney general’s office, filed answers that said nothing about the referral.\(^{142}\)

The two “nonconsenting” defendants raised no subsequent objections to the magistrate judge’s jurisdiction, and on three different occasions their counsel were silent, in apparent acquiescence, when the magistrate judge stated that all parties had consented to her jurisdiction.\(^{143}\) The case proceeded to trial in front of the magistrate judge and resulted in a jury verdict in favor of all the defendants.\(^{144}\) The plaintiff appealed, and the Fifth Circuit\(^{145}\) \(\text{sua sponte}\) remanded the case to the district court to determine if all the parties had consented, verbally or in writing, to proceed before the magistrate judge.\(^{146}\) At this point, the two “nonconsenting” defendants, in an effort to preserve their favorable jury verdict, hastily filed, with the district court, formal letters stating that they indeed consented to all the proceedings held before the magistrate judge in the case.\(^{146}\)

The magistrate judge found on remand that, although the two “nonconsenting” defendants “clearly implied their consent” to her jurisdiction, under Fifth Circuit precedent “consent cannot be implied by the conduct of the parties” and that failure to express consent prior to the defendant’s postjudgment letter meant that she lacked jurisdiction over the case.\(^{147}\) The district judge agreed, and the Fifth Circuit affirmed that consent to a magistrate’s jurisdiction must be express and not implied.\(^{148}\) The Fifth Circuit also held that the defendants’ postjudgment “express” consent did not cure the earlier defect.\(^{149}\)

Reversing the Fifth Circuit, Justice Souter construed the Federal Magistrate Act of 1979, which expanded the power of magistrate judges by authorizing them to conduct “‘any or all proceedings in a jury or non-jury civil matter and order entry of judgment in the case.”’ all without district court review, as long as they are “‘special-ly designated to exercise such jurisdiction by the district court,’” and are acting “‘[u]pon the consent of the parties.’”\(^{150}\) The Federal Magistrate Act specifies the procedure by which a district judge may refer a “designated” case to a magistrate judge; the referral occurs after the clerk of court confirms that all the parties have given written consent to the magistrate judge’s jurisdiction.\(^{151}\)

\(^{140}\)Id. at 1699–1700.

\(^{141}\)Id. at 1700.

\(^{142}\)Id.

\(^{143}\)Id. at 1700 n.1.

\(^{144}\)Id. at 1700.

\(^{145}\)Id.

\(^{146}\)Id.

\(^{147}\)Id.

\(^{148}\)Id. (citing Roell v. Withrow, 288 F.3d 199 (5th Cir. 2002) (Clearinghouse No. 55,428)).

\(^{149}\)Id. (citing Roell, 288 F.3d at 201).

\(^{150}\)Id. at 1701 (quoting Federal Magistrate Act of 1979, 28 U.S.C. § 636(c)(1)).

\(^{151}\)8 U.S.C. § 636(c)(2); see also Fed. R. Civ. P. 73(b). The process contemplates execution of a consent form, Federal Rule of Civil Procedure Form 34, and contains provisions designed to ensure that an individual party’s decision to consent or not is kept confidential. Roell, 123 S. Ct. at 1701.
In *Roell*, as the Court noted, the referral procedure “was honored in the breach” because the district court referred the matter to the magistrate judge before the two “nonconsenting” defendants gave their express consent. However, because the two defendants “clearly implied their consent” by appearing without reservation before the magistrate (after being notified of their right to refuse consent), the “only question,” in the majority’s view, was whether such consent counted as conferring jurisdiction under the Federal Magistrate Act.

After a textual analysis of the statutory language and the intent behind the Federal Magistrate Act, the majority concluded that a litigant who, after being notified of his right to consent, forwent that procedural opportunity to communicate his decision directly to the clerk of court, but still voluntarily gave his consent through a general appearance before the magistrate judge, was subject to the magistrate’s jurisdiction under the Federal Magistrate Act.

Responding to the dissent’s contention that “a bright-line rule” requiring express consent would be easier to administer and would bring clarity and predictability to the process, the majority opined that “[t]he bright line rule is not worth the downside.” That downside, according to Justice Souter, was “the risk of gamesmanship” checked, judicial efficiency served, and the Article III right to a district judge substantially honored.

In dissent, Justice Thomas, joined by Justices Stevens, Scalia, and Kennedy, read the Federal Magistrate Act and the statutory scheme as a whole to require express consent. According to the dissent, the majority’s adoption of an “implied consent” standard would require courts “to study the record of a proceeding on a case-by-case basis, searching for patterns in the parties’ behavior that would provide sufficient indicia of voluntariness to satisfy this newly minted, but vague, test for consent.” A “bright line” standard of express consent would eliminate the risk of “‘spawn[ing] a second litigation of significant dimension’” over the consent issue.

**Pending Docket**

At writing, two cases sure to interest practitioners in legal services had already appeared on the Court’s docket. The first case, *Tennessee v. Lane*, will

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152 Roell, 123 S. Ct. at 1701.  
153 Id.  
154 Id. at 1702 n.5. The Federal Magistrate Act’s intent is “to relieve the district court’s ‘mounting queue of cases’ and ‘improve access to the courts for all groups.’” Id. at 1702 (quoting S. Rep. No. 96-74, at 4 (1979), reprinted in 1979 U.S.C.C.A.N. 1469, 1472).  
155 Id. at 1706 (Thomas, J., dissenting); id. at 1703.  
156 Id. at 1703. In *Roell* the two defendants were not accused of such manipulation since their failure to express consent put their trial victory in jeopardy.  
157 Id. at 1703. The majority expressly declined to address the question of whether “express post-judgment consent would be sufficient in a case where there was no prior consent, express or implied.” Id. at 1704 n.8.  
158 Id. at 1704–5 (Thomas, J., dissenting).  
159 Id. at 1706.  
160 Id. (quoting Buckhannon Bd. & Care Home Inc. v. W.V. Dep’t of Health & Human Res., 532 U.S. 598, 609 (2001) (Clearinghouse No. 53,373)).
decide whether Congress has the power to abrogate the states’ immunity from suit and authorize plaintiffs to seek money damages from a state that is violating Title II of the Americans with Disabilities Act. Title II prohibits governmental entities from denying public services, programs, and activities to individuals on the basis of a disability. Lane represents the Court’s second attempt to assess Title II abrogation. The case comes after the federal circuit courts of appeal have issued widely divergent opinions on the issue. Five circuit courts held that Congress lacked authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity in cases concerning Title II of the Americans with Disabilities Act. One circuit upheld the abrogation. The Sixth Circuit upheld abrogation if the Title II claim was based on enforcing rights under the due process clause, but not the equal protection clause. The Second Circuit decided that abrogation was valid if the state action was taken with “discriminatory animus or ill will.” A First Circuit Court of Appeals decision recognized the Title II abrogation where the individual claimed a specific violation of a constitutional right.

The second case, Frew v. Hawkins, concerns a federal court’s authority to require state Medicaid officials to comply with the provisions of a consent decree that they entered into with a class of beneficiaries. When the state failed to implement some of the provisions, the class obtained from the federal district court an injunction ordering the state to develop a compliance plan. Now before the Court is the Fifth Circuit’s curious decision that the district court had no jurisdiction to enforce the decree because sovereign immunity limited the court to enforcing only those parts of the decree that also constituted federal rights under 42 U.S.C. § 1983, and none of the provisions at issue constituted such rights. The Supreme Court has agreed to review two questions: (1) Do state officials waive


163 See Medical Bd. of Cal. v. Hason, 279 F.3d 1167 (9th Cir.), cert. granted, 123 S. Ct. 561 (2002), cert. dismissed, 123 S. Ct. 1779 (2003) (Clearinghouse No. 54,604). The Court dismissed the case after the California attorney general withdrew its petition.

164 See Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002) (Clearinghouse No. 54,918); Reckenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001) (Clearinghouse No. 54,370); Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001) (Clearinghouse No. 55,130); Randolph v. Rogers, 278 F.3d 343 (5th Cir. 2001) (Clearinghouse No. 55,868); Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002) (Clearinghouse No. 54,038).


168 Kiman v. N.H. Dept of Corr., 301 F.3d 13 (1st Cir.), reh’g en banc granted, opinion withdrawn, 310 F.3d 785 (1st Cir.), order vacated in part, 311 F.3d 439 (1st Cir. 2002), aff’d, 332 F.3d 29 (1st Cir. 2003) (equally divided court resulting in reinstatement of the district court decision and dismissal of the complaint, finding a plaintiff need not first prove a constitutional violation to proceed with the claim) (Clearinghouse No. 54,862).


170 See Frazar, 300 F.3d at 530. The court applied the three-part test of Blessing v. Freestone, 520 U.S. 329 (1997) (Clearinghouse No. 50,109), to the provisions.
Eleventh Amendment immunity by urging the district court to adopt a consent decree when the decree is based on federal law and specifically provides for the district court’s ongoing supervision of the officials’ decree compliance? (2) Does the Eleventh Amendment bar a district court from enforcing a consent decree entered into by state officials unless the plaintiffs show that the “decree violation is also a violation of a federal right” remediable under Section 1983? The Court refused to hear a third question of whether the underlying Medicaid statutory provisions created federal rights that could be privately enforced through Section 1983.  

The issue of private enforcement of federal statutes continues to simmer in the lower courts and is clearly on the minds of two of the justices. In *Pharmaceutical Research and Manufacturers of America v. Walsh* Justices Scalia and Thomas wrote concurring opinions making clear their desire to reverse those cases allowing private enforcement of spending clause enactments under 42 U.S.C. § 1983. Justice Scalia stated that the remedy available to the petitioners is set forth in the Medicaid Act: to seek termination of funding by the U.S. secretary of health and human services and, if the petitioners are dissatisfied, to seek judicial review under the arbitrary and capricious standard of the Administrative Procedure Act.  

Justice Thomas’s parting shot focused on spending clause enactments as analogous to contracts. He asserted that in contract law only intended third-party beneficiaries could enforce the contract, so that when Congress wished to allow private enforcement by third parties, it must express its intent clearly in the underlying statute.

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172 Id. at 1874 (Scalia, J., concurring) (addressing Medicaid Act, 42 U.S.C. § 1396c; Administrative Procedure Act, 5 U.S.C. § 706(2)(A)).

173 Id. at 1878 (Thomas, J., concurring).