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The Rehnquist Court's
FINAL CHAPTER ON
ACCESS TO COURTS

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Win Some, Lose Some: The Rehnquist Court's Final Chapter on Access to Courts

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During William H. Rehnquist's tenure as chief justice, the U.S. Supreme Court issued a steady stream of decisions that, taken together, substantially rolled back access to federal courts and judicial remedies for a wide variety of plaintiffs. While blockbusters such as *Seminole Tribe* and *Sandoval* attracted a great deal of attention, each term also brought a grab bag of decisions on seemingly esoteric procedural points.¹ These decisions, many on obscure points of law, have played a critical role in determining who can sue in federal court and what remedies are available. In some of these cases, the Court upheld plaintiffs' access to judicial relief; the overall balance, however, weighed fairly heavily against plaintiffs, as the Court issued scores of decisions that narrowed the availability of private rights of action, constricted the scope of "rights" under Section 1983, limited the doctrine of standing, expanded the level of deference accorded administrative agencies, and reined in statutory attorney fees.

The 2004–2005 term brought no blockbusters in terms of access to courts, but it did include the usual stream of rulings. Despite harsh decisions in cases such as *Town of Castle Rock v. Gonzalez*, in which the Court found no due process violation when the police refused to come to the aid of a domestic violence victim seeking enforcement of a judicial restraining order, the Court did uphold jurisdiction in a fair number of cases this term.² In three decisions, for example, the Court upheld federal subject matter jurisdiction.³ One of the term's most discussed decisions upheld federal power and rejected a challenge to Congress' authority to regulate the medical use of marijuana.⁴ In part, these rulings may reflect the fact that the federal judiciary is now substantially *more* conservative than a number of state legislatures and court systems, leading conservatives to favor federal over state forums. The passage of the Class Action Fairness Act of 2005 offers a prime example of a conservative push to federalize class actions as a means of avoiding more liberal state courts.⁵

¹*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Clearinghouse No. 51,706). See Jane Perkins & Sarah Jane Somers, *Sandoval's Retrenchment on Civil Rights Enforcement: The Ultimate Sorcerer's Magic*, 35 CLEARINGHOUSE REVIEW 433 (Nov.–Dec. 2001).

²*Town of Castle Rock v. Gonzalez*, 125 S. Ct. 2796 (2005) (Clearinghouse No. 55,895).

³*Exxon Mobil Corporation v. Allapattah Services*, 125 S. Ct. 2611 (2005); *Grable and Sons Metal Products v. Darue Engineering and Manufacturing*, 125 S. Ct. 2363 (2005); *Exxon Mobil Corporation v. Saudi Basic Industries*, 125 S. Ct. 1517 (2005).

⁴*Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

⁵Pub. L. No. 109-2, 119 Stat. 4 (2005)

Due Process

Four days after the Court announced its now infamous eminent domain decision in *Kelo v. City of New London*, it dealt with a different kind of property right.⁶ While *Kelo*, which allowed the taking of private property for the “public use” of turning it over to private developers, generated considerable political and media outcry, the response to *Town of Castle Rock, Colorado, v. Gonzales* has been relatively muted.⁷ Perhaps this was due to the fact that the legal issue there was more esoteric—whether an individual has a protected property interest in the enforcement of a restraining order—but the ramifications are certainly no less drastic than those in *Kelo*. The practical implication of *Castle Rock* is that the police may ignore restraining orders without fear of consequences to themselves. By contrast, the consequences to the affected families—what the Court terms third party beneficiaries of the restraining order’s enforcement—are considerably harsher.

The underlying facts in *Castle Rock*, termed “horrible” even in Justice Scalia’s bloodless opinion for the 7-to-2 majority, are as powerful as one could imagine.⁸ A restraining order did not stop Ms. Gonzales’s estranged husband from absconding with the couple’s three daughters late one afternoon. On several occasions throughout the ensuing evening, Ms. Gonzales called the police and gave them an update on the children’s whereabouts after a telephone conversation with her husband; she repeatedly asked the police to enforce the restraining order and return the girls to her. Her efforts included going to her husband’s apartment at midnight to determine that he and the children were

not there and then to the police station when no police officer came to the husband’s apartment in response to her call. A few hours later, the husband showed up at the police station, opened fire, and was killed. The bodies of the three girls, murdered earlier, were found in the cab of his pickup truck.⁹

Ms. Gonzales sued the town under 42 U.S.C. § 1983 for the police department’s failure to enforce the restraining order. Reversing the district court’s granting of the town’s motion to dismiss, a divided Tenth Circuit Court of Appeals, sitting en banc, held that Ms. Gonzales had a protected property interest in enforcement of the restraining order and that the town had deprived her of due process by failing to enforce the order.¹⁰

The majority’s analysis began where *DeShaney v. Winnebago County Department of Social Services* left off, with the question of whether state statutes can confer an enforceable entitlement in the form of a property interest in receiving protective services.¹¹ The key to the decision is the Court’s determination that the police had discretion to enforce the restraining order, for the Court had previously “recognize[d] that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”¹² Crucial to that determination, in turn, was the majority’s refusal to defer to the Tenth Circuit’s interpretation of Colorado law.¹³

Freed from the constraints of deference, the Court proceeded through a lengthy analysis to explain that, although the statute and its preprinted paraphrased version on the back of the restraining order itself repeatedly use the word “shall” to describe the police depart-

⁶*Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (Clearinghouse No. 55,821).

⁷*Town of Castle Rock*, 125 S. Ct. at 2796.

⁸*Id.* at 2800.

⁹*Id.* at 2802.

¹⁰*Id.*, citing 366 F.3d 1093, 1101, 1117 (10th Cir. 2004) (en banc).

¹¹*DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989); *Town of Castle Rock*, 125 S. Ct. at 2803.

¹²*Id.* (citation omitted).

¹³*Id.* at 2803–4.

ment's obligation, "[w]e do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*."¹⁴ The explanation for this apparent anomaly consumes several pages of convoluted reasoning but, reduced to its essence, amounts to the assumption that police officers always have some discretion, regardless of the statute pursuant to which they act.¹⁵

Even the concession that, "in the specific context of domestic violence, mandatory-arrest statutes have been found in some States to be more mandatory than traditional mandatory-arrest statutes" did not deter the majority, for the opinion then noted that mandatory arrest was possible only when the alleged perpetrator was present.¹⁶ Ruminating rhetorically on what kind of enforcement would be required if the alleged perpetrator were unavailable (arrest, seeking an arrest warrant, or otherwise attempting to enforce the order), the Court concluded that "[s]uch indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed 'entitled' to something when the identity of the alleged entitlement is vague."¹⁷ Moreover, even if enforcement were mandatory, the majority would not equate that with the *plaintiff's* right to enforcement of that mandate: "Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people."¹⁸

Even if these other hurdles could be overcome, the majority doubted that enforcement of a restraining order could be considered property under the due process clause. Such enforcement neither resembles "any traditional conception of property" nor has a monetary value; rather, "the alleged property inter-

est here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed—to wit, arresting people who they have probable cause to believe have committed a criminal offense."¹⁹ Since the incidental or indirect benefits of a statutory scheme are insufficient to establish a property interest, individual entitlement to enforcement of a restraining order cannot constitute a property interest.²⁰

In what has become almost a traditional closer for the conservative wing of the Court, the majority's conclusion reiterated its determination not to give Section 1983 broader reach while soft-pedaling its harsh words with the unlikely specter of states riding to the rescue:

In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause This result reflects our continuing reluctance to treat the Fourteenth Amendment as a font of tort law, but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 ... did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.²¹

Ms. Gonzales is surely consoled with the knowledge that someday Colorado *might*

¹⁴*Id.* at 2805.

¹⁵*Id.* at 2805–8.

¹⁶*Id.* at 2806–7.

¹⁷*Id.* at 2807.

¹⁸*Id.* at 2808.

¹⁹*Id.* at 2809 (footnote omitted).

²⁰*Id.* at 2810.

²¹*Id.* at 2810 (citations and internal quotation marks omitted).

permit sanctions against police departments that allow children at risk to be kidnapped and murdered.

In dissent Justice Stevens, joined by Justice Ginsburg, proceeded from the assumption that the majority improperly failed to follow the “tradition of judicial restraint [that] would have led this Court to defer to the judgment of more qualified tribunals in seeking the correct answer” as to whether Colorado law invested Ms. Gonzales with the right to enforcement.²² Justice Stevens would have deferred to the Tenth Circuit’s conclusion from its “diligent analysis” of the statute “that the Colorado Legislature intended precisely to abrogate that presumption [of police discretion] in the specific context of domestic restraining orders.”²³ Alternatively, certification of the question to the Colorado Supreme Court would have been “a wiser course.”²⁴

Proceeding *de novo* to answer the state-law question produced a flawed and “rather superficial analysis of the merits,” Justice Stevens explained.²⁵ The Court did not sufficiently credit the numerous statutes, passed in the 1980s and 1990s, that imposed a clear-cut mandatory-arrest label on domestic violence cases.²⁶ Thus, in his view, the Court’s rhetorical inquiry regarding enforcement was “a red herring.” “[T]he crucial point is that, under the statute, the police were *required* to provide enforcement; *they lacked the discretion to do nothing.*”²⁷ The Court erred in perceiving the statutory scheme to have a broad range of legitimate ends: “[T]here is little doubt that the statute at issue in this case conferred a benefit ‘on a specific class of peo-

ple’—namely, recipients of domestic restraining orders.”²⁸ Based on this reasoning, the dissent concluded that

[p]olice enforcement of a restraining order is a government service that is no less concrete and no less valuable than other government services, such as education. The relative novelty of recognizing this type of property interest is explained by the relative novelty of the domestic violence statutes creating a mandatory arrest duty.²⁹

Accordingly, to deprive Ms. Gonzales of this property interest, the state had to observe fair procedures; judging from the complaint, the police failed to do so.

Congressional Power Under the Commerce Clause

Twice during the last decade, the Supreme Court decided that Congress had exceeded its authority under the commerce clause to regulate interstate commerce. In *United States v. Lopez* the Court struck down the Gun-Free School Zones Act; the Court found that interstate economic activity was not involved when someone possessed a gun near a school.³⁰ The Court issued a similar ruling in *United States v. Morrison* with respect to the Violence Against Women Act.³¹

As a result, the stakes were high when the Court decided *Gonzales v. Raich*: would the Court continue to narrow the scope of congressional authority to legislate pursuant to the commerce clause?³² The case

²²*Id.* at 2814 (Stevens, J., dissenting).

²³*Id.* at 2814–15.

²⁴*Id.* at 2815.

²⁵*Id.* at 2816.

²⁶*Id.* at 2816–20.

²⁷*Id.* at 2819–20 (footnote omitted).

²⁸*Id.* at 2821.

²⁹*Id.* at 2823 (footnote omitted).

³⁰*United States v. Lopez*, 514 U.S. 549 (1995).

³¹*United States v. Morrison*, 529 U.S. 598 (2000) (Clearinghouse No. 54,332).

³²*Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

was all the more interesting because, on the one hand, a decision against Congress would allow states to ignore the federal war on drugs and legalize marijuana, albeit for medical uses. On the other hand, a decision that the legislation was valid would run counter to the conservative justices' protection of states' rights.

The case was set in motion in 1996 when California voters passed the Compassionate Use Act, which created an exemption from criminal prosecution for physicians, patients, and care givers who, with the approval of a physician, possess or cultivate marijuana for medicinal purposes.³³ In August 2002 county and federal law enforcement agents found marijuana at Diane Monson's home. Ms. Monson's physician had prescribed the marijuana consistent with the Compassionate Use Act. However, acting pursuant to the federal Controlled Substances Act, federal agents seized and destroyed the plants.³⁴ Ms. Monson, along with Angel Raich, another user of medical marijuana, filed suit claiming that to the extent that enforcement of the Controlled Substances Act totally prohibits the possession of marijuana and prevents individuals from growing and possessing marijuana for medical uses as allowed by California law, the Act violated the commerce clause.³⁵

The Ninth Circuit found that the Controlled Substances Act intruded on "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to a valid California state law."³⁶ The Ninth Circuit held that the Act was an unconstitutional exercise of Congress' commerce clause authority.

The Supreme Court granted review and reversed the Ninth Circuit. In a 6-to-3 opinion the Court held that, despite state law to the contrary, the Controlled Substances Act could prohibit local cultivation and use of marijuana for medical purposes.³⁷ In an interesting split among the justices, Justice Stevens delivered the majority opinion, joined by the other moderates, Justices Souter, Ginsburg, and Breyer, and by Justice Kennedy. Justice Scalia separately concurred in the judgment. Justices O'Connor, Rehnquist, and Thomas remained staunch federalists and dissented.

According to Justice Stevens, "the case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."³⁸ The Court found the case to be on all fours with *Wickard v. Filburn*, a 1942 decision that upheld Congress' authority to control the production of wheat for personal consumption as part of a comprehensive regulatory scheme to affect the price and market conditions for the production of wheat.³⁹ According to the Court, *Wickard* "establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of interstate market in that commodity."⁴⁰

Applying the *Wickard* principles to the Controlled Substances Act, the Court had no difficulty concluding that Congress had a "rational basis" for believing that failure to regulate the intrastate manu-

³³CAL. HEALTH & SAFETY CODE ANN. § 11362 (West 2005).

³⁴21 U.S.C. §§ 801-971 (West 2005).

³⁵See *Raich*, 125 S. Ct. at 2200.

³⁶*Raich v. Ashcroft*, 352 F.3d 1222, 1228 (9th Cir. 2003).

³⁷The decision does not overturn the California law or similar laws in other states. See *Raich*, 125 S. Ct. at 2198 n.1 (citing ten states' medical marijuana statutes). The ruling does mean that individuals who use marijuana for medical reasons risk federal prosecution, and state law will offer no defense.

³⁸*Id.* at 2205 (citations omitted).

³⁹*Id.* at 2205-6 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)). Cf. *Lopez*, 514 U.S. at 560 (calling *Wickard* "perhaps the most far-reaching example of Commerce Clause authority over intrastate activity").

⁴⁰*Id.* at 2206.

facture and possession of marijuana would leave a “gaping hole” in the Act’s national enforcement scheme. The Court added that it had “never required Congress to legislate with scientific exactitude” and that, if the “total incidence of a practice pose[d] a threat to a national market,” then Congress might regulate broadly.⁴¹ According to the Court, Congress was acting well within its authority to “make all Laws which shall be necessary and proper” to “regulate Commerce . . . among the several Sates.”⁴²

The majority found that the Controlled Substances Act, unlike the statutes reviewed by the Court in *Morrison* and *Lopez*, regulated activities that were “quintessentially economic.”⁴³ Justice Stevens also criticized the government’s “myopic focus” on the two cases as “overlook[ing] the larger context of modern-era Commerce Clause jurisprudence.”⁴⁴

Dissenting, Justice O’Connor found the case indistinguishable from *Lopez* and *Morrison*.⁴⁵ The dissent also complained that the majority’s “overreaching stifles express choice by some States.”⁴⁶ In a policy-oriented discussion, the dissent argued that federalism promoted innovation and concluded that, regardless of the wisdom of California’s law, “the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.”⁴⁷

Gonzalez v. Raich is one of the most important decisions of the term. Already the Court is planning to review Congress’ authority to enact the Americans with Disabilities Act and the Endangered Species Act and Oregon’s enactment of the Death with Dignity Act. *Raich* is sure to figure into subsequent cases.

Removal, Supplemental Jurisdiction, and the Rooker-Feldman Doctrine

Continuing a trend that it began two terms ago, the Court again expanded the scope of federal removal jurisdiction, which of course had the effect of *depriving* plaintiffs of their choice to proceed in *state* court.⁴⁸ In *Grable and Sons Metal Products Incorporated v. Darue Engineering and Manufacturing*, plaintiff had brought a quiet title action in state court against defendant, which had acquired the property at issue (formerly owned by plaintiff) through a federal tax delinquency sale by the Internal Revenue Service.⁴⁹ Plaintiff alleged that defendant’s title was invalid because the Internal Revenue Service had failed to give proper notice of the delinquency sale to plaintiff, as federal tax law required.⁵⁰ Defendant removed the case to federal court under 28 U.S.C. § 1441(a) on the ground that the claim of title depended upon a proper interpretation of the federal tax statute.⁵¹ The district court

⁴¹*Id.* (citations omitted).

⁴²*Id.* at 2209 (quoting U.S. CONST., art. I, § 8). Concurring in the judgment, Justice Scalia stated that Congress’ ban on intrastate possession of marijuana was, under the circumstances, a “necessary and proper” way to regulate interstate commerce. *Id.* at 2216 (“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves affect interstate commerce”).

⁴³*Id.* at 2211.

⁴⁴*Id.* at 2209.

⁴⁵*Id.* at 2222.

⁴⁶*Id.* at 2229 (citing THE FEDERALIST No 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)).

⁴⁷*Id.* Justice Thomas wrote separately to argue that congressional authority under the commerce clause extended only to trade or exchange, not “productive activities like manufacturing and agriculture.” *Id.* at 2230 (Thomas, J., dissenting). Purely intrastate activity, such as the marijuana production at issue in the case, should, he maintained, fall outside of the scope of the clause. He added, “If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States.” *Id.* at 2236.

⁴⁸See Jane Perkins et al., *The U.S. Supreme Court’s 2002–2003 Decisions on Federal Court Access*, 37 CLEARINGHOUSE REVIEW 397, 408–13 (Nov.–Dec. 2003) (citations omitted).

⁴⁹*Darue*, 125 S. Ct. at 2366.

⁵⁰*Id.*, citing 26 U.S.C. § 6335.

⁵¹*Id.* at 2366.

denied plaintiff's motion to remand the case to state court, and on appeal the Sixth Circuit affirmed on the jurisdictional question, holding that removal was proper because the quiet title claim necessarily raised a statutory issue of "substantial federal interest."⁵² The Supreme Court granted certiorari as to the removal issue only in order to resolve a conflict in the circuits over the proper reading of its 1986 decision in *Merrell Dow Pharmaceuticals v. Thompson*; that case extensively analyzed the exercise of jurisdiction over federal issues "embedded" within state-law claims.⁵³

Justice Souter, writing for a unanimous Court, began by observing that the removal jurisdiction of the federal courts generally was implicated when plaintiffs asserted claims in state court that could have been brought originally in federal district court because the claims "arise[] under the Constitution, laws, or treaties of the United States."⁵⁴ However, a "less frequently encountered" variety of this "arising under" jurisdiction has long been recognized with respect to "state-law claims that implicate significant federal issues."⁵⁵ Various refinements in the Court's holdings on this subject, spanning 100 years of precedent, have produced a test for removal jurisdiction that "demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum."⁵⁶ Even where the requisite "contested and substantial" federal question exists, the issue "will ultimately qualify for a federal forum only if federal jurisdiction is consistent with ...

the sound division of labor between state and federal courts"; thus the jurisdictional analysis always requires an assessment of "the interrelation of federal and state authority and the proper management of the federal judicial system."⁵⁷

Applying this standard to the facts at hand, the Court had little difficulty in concluding that "[t]his case warrants federal jurisdiction" because interpretation of the federal tax notice statute not only was an "essential element" of plaintiff's quiet title claim but also appeared to be "the only legal or factual issue contested in the case."⁵⁸ In addition, "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court," and, due to the "rare" circumstances which gave rise to the federal issue in this case, the Court was confident that the assertion of jurisdiction would have "only a microscopic effect on the federal-state division of labor."⁵⁹

The Court then turned to the real reason that it granted certiorari: to smooth out some problematic language in its *Merrell Dow* opinion. In that case, plaintiff had argued that defendant's alleged violation of a federal rule governing the labeling of pharmaceuticals constituted presumptive negligence for purposes of plaintiff's state-law tort claim. The *Merrell Dow* Court had declined to sustain federal removal jurisdiction and found support for its conclusion in the fact that "Congress had not provided a private federal cause of action for violation of the federal branding requirement."⁶⁰ Plaintiff in *Darue* had

⁵²*Id.*, citing 377 F.3d 592 (6th Cir. 2004). On the merits, both the trial court and the Sixth Circuit ruled in favor of the defendant and rejected plaintiff's improper notice argument.

⁵³*Id.*; *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986).

⁵⁴*Darue*, 125 S. Ct. at 2366, citing 28 U.S.C. § 1331.

⁵⁵*Id.* at 2367.

⁵⁶*Id.*, citing, *inter alia*, *Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997).

⁵⁷*Darue*, 125 S. Ct. at 2367, quoting *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 (1983).

⁵⁸*Id.* at 2368.

⁵⁹*Id.*

⁶⁰*Id.* at 2369, citing *Merrell Dow*, 478 U.S. at 812. The *Merrell Dow* Court declined to "undermine congressional intent" by effectively providing a remedy in federal court for a violation of a federal statute that could not itself be enforced through an original action in district court. *Id.*

seized on this passage in *Merrell Dow* to argue that, because the federal tax notice law at issue provided no quiet title action that could be brought against the defendant in federal court, removal was improper.⁶¹

Delicately retreating from the “broad language” that it used in *Merrell Dow*, the Court concluded that “*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the ‘sensitive judgments about congressional intent’ that the removal analysis requires.”⁶² The Court noted that, because “the violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings,” the assertion of removal jurisdiction in cases such as *Merrell Dow* “would thus have heralded a potentially enormous shift of traditionally state cases into federal courts” and clearly would have intruded upon “Congress’s intended division of labor between state and federal courts.”⁶³ By contrast, in this case, “it is the rare state quiet title action that involves contested issues of federal law,” and, notwithstanding Congress’ failure to provide plaintiff with a private right of action, the assertion of jurisdiction in such cases “would not materially affect, or threaten to affect, the normal currents of litigation.”⁶⁴

The Court thus affirmed the assertion of removal jurisdiction over the federal issue that was embedded within plaintiff’s state-law claim. The ruling has potentially significant implications for plaintiffs who seek to challenge or enforce, in state court, state laws enacted

pursuant to federal-state cooperative programs, where the issue may turn on the interpretation of a governing federal statute that might not be itself enforceable through an original action in federal court.⁶⁵ Under the holding in *Darue*, such plaintiffs may well be forced to litigate all their claims in federal court.

In *Exxon Mobil Corporation v Allapattah Services* the Court turned its attention to the supplemental jurisdiction statute.⁶⁶ In 1990 Congress enacted a short and seemingly tidy statute attempting to clean up the messy and incoherent judicially created doctrines of ancillary and pendent jurisdiction. The statute merges the two doctrines into a single concept known as supplemental jurisdiction and attempts to establish clear and mechanical rules governing jurisdiction over state claims related to claims within the original jurisdiction of a federal court.⁶⁷ Supplemental jurisdiction promised to make everyone’s life easier while overruling two restrictive Supreme Court decisions.⁶⁸

For the past fifteen years, however, law professors and courts have discovered gap after gap in the statute—situations in which the pre-1990 law was clear, and in which the legislative history of the 1990 law implicitly or explicitly reaffirms the pre-1990 status quo but the statutory text appears to yield a different result.⁶⁹ The cluster of issues around the supplemental jurisdiction statute poses a particularly stark choice between a mode of statutory interpretation based on congressional understanding and one based on textualism, an approach limited to construing the words of the statute.

⁶¹*Id.*

⁶²*Id.* at 2370, quoting *Merrell Dow*, 478 U.S. at 810.

⁶³*Id.* at 2370–71, citing *Merrell Dow*, 478 U.S. at 811–812.

⁶⁴*Id.* at 2371.

⁶⁵E.g., the No Child Left Behind Act, 20 U.S.C. § 6053 (2001).

⁶⁶*Exxon Mobil*, 125 S. Ct. at 2611.

⁶⁷28 U.S.C. § 1367 (1990).

⁶⁸The two cases both involved the joinder of pendent parties in federal question cases. *Finley v. United States*, 490 U.S. 545 (1989); *Aldinger v. Howard*, 427 U.S. 1 (1976).

⁶⁹Compare Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY LAW JOURNAL 445 (1991), with Thomas D. Rowe et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, *id.* at 943.

In *Exxon Mobil* the Court opted for the textualist approach by a 5-to-4 margin. *Exxon Mobil* involved two consolidated cases. The first addressed whether unnamed class members in a class action brought under diversity jurisdiction must each meet the amount-in-controversy requirement of 28 U.S.C. § 1332. In 1973 the Supreme Court answered this question in the affirmative, concluding that unnamed class members' claims below the threshold amount were not allowed to be piggybacked onto the claims of those who did satisfy the requirement, and such unnamed class members' claims were not allowed to be aggregated.⁷⁰

The second consolidated case involved a coplaintiff who joined under Federal Rule of Civil Procedure 20 and satisfied the citizenship requirements of diversity but not the amount in controversy. In 1939 the Court decided that each plaintiff must satisfy the amount-in-controversy requirement.⁷¹ The legislative history of the supplemental jurisdiction statute shows an express intent to preserve the validity of these prior Supreme Court decisions.⁷²

In *Exxon Mobil* the five-justice majority concluded that, despite this statement of intent, Congress overruled these prior Supreme Court decisions so that plaintiffs and unnamed class members with claims below the amount in controversy were now to use supplemental jurisdiction to bring claims in federal court under diversity jurisdiction. Writing for the majority, Justice Kennedy first found that, when claims by unnamed class members and coplaintiffs failed to meet the amount-in-controversy requirement, the claims fell within the terms of Section 1367(a). In other words, the claims are supplemental in actions that

are within the original jurisdiction of the court and form part of the same constitutional case and controversy as the claim giving rise to jurisdiction.⁷³ Under the statute, claims that fall into this category are within the ambit of supplemental jurisdiction unless expressly excluded by Section 1367(b). Justice Kennedy then noted that the claims at issue in *Exxon Mobil* were not explicitly set forth in 1367(b), and therefore he concluded that they were within the jurisdiction of the court.

The oddity of the interpretation is that while the Court concluded that the statute's plain language resolved the matter in favor of jurisdiction and thus rendered unnecessary a consideration of legislative history to the contrary, Justice Kennedy's majority opinion made clear that the Court would not take the same view of coplaintiffs who were joined under Rule 20 and failed to satisfy the citizenship component of diversity. Justice Kennedy stated that the presence of a nondiverse coplaintiff destroyed the original jurisdiction of the court, thus removing the basis for supplemental jurisdiction in the first place.⁷⁴ Despite the appeal to plain language, the statutory text draws no such distinction between the citizenship and the amount-in-controversy requirements. The Court treats nondiverse coplaintiffs and coplaintiffs with jurisdictionally insufficient claims differently on the ground that the presence of a nondiverse plaintiff undermines the rationale for diversity jurisdiction in the first place—protection against local prejudice.⁷⁵

The dissent, written by Justice Ginsburg, picked up on this chink in the majority's reasoning and pointed out that the statutory language contained no basis for dis-

⁷⁰*Zahn v. International Paper*, 414 U.S. 291 (1973)

⁷¹*Clark v. Paul Gray Incorporated*, 306 U.S. 583 (1939).

⁷²E.g., the House report for the bill stated: "This section is not intended to affect the jurisdictional requirements of 28 U.S.C. sec. 1332 in diversity only class actions, as those requirements were interpreted prior to Finley." H.R. Rep. No. 101-734, at 29 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6875.

⁷³*Exxon Mobil v. Allapattah Services*, 125 S. Ct. at 2619–20.

⁷⁴*Id.* at 2622.

⁷⁵*Id.* Justice Kennedy refers to the nondiverse coplaintiff as a "special context."

tinguishing between the citizenship requirement and the amount-in-controversy aspects of diversity jurisdiction.⁷⁶ Justice Ginsburg pointed out that if the principal bar to nondiverse coplaintiffs was rooted in tradition and precedent, then so was the bar against plaintiffs with claims that were jurisdictionally inadequate.⁷⁷ Moreover, the indicia of congressional intent to disallow the types of claims at issue are, Justice Ginsburg argued, overwhelming.⁷⁸ Given this context, Justice Ginsburg concluded that claims by coplaintiffs and unnamed class members with claims for jurisdictionally insufficient amounts negated the original jurisdiction of the Court and thus rendered supplemental jurisdiction inapplicable.⁷⁹

In a second case featuring Exxon Mobil, *Exxon Mobil Corporation v. Saudi Basic Industries Corporation*, the Court rejected an expansive reading of the Rooker-Feldman doctrine that cast doubt on federal jurisdiction in all cases with parallel state court proceedings.⁸⁰ The Rooker-Feldman doctrine embodies the concept that the lower federal courts may not exercise appellate jurisdiction over state courts.⁸¹ Thus a losing state court litigant may not file in federal district court an action designed to overturn a state court decision. In *Saudi Basic Industries* the Court unanimously held that this principle did not extend to bar a state court litigant from filing a parallel proceeding in federal court before the state court had reached judgment.

Saudi Basic Industries started things off by suing Exxon Mobil in state court.

Exxon Mobil both counterclaimed and filed its own federal action against Saudi Basic Industries. Ultimately Exxon Mobil prevailed on its counterclaims in state court. In the meantime, Saudi Basic Industries sought to dismiss the federal action, a motion ultimately granted by the Third Circuit on the ground that the state court had reached judgment first, thereby depriving the federal court of jurisdiction under Rooker-Feldman.⁸²

The Supreme Court concluded that Rooker-Feldman did not extend this far. Justice Ginsburg, writing for the Court, noted that in *Rooker* and *Feldman* the federal cases were filed after judgment in state court with the express goal of overturning the state court rulings.⁸³ Justice Ginsburg made clear that, where the federal case was filed before entry of a state court judgment, the federal court did not suddenly lose jurisdiction when a state court judgment bearing on the dispute was entered.⁸⁴ Rather than viewing the matter through a jurisdictional lens, Justice Ginsburg noted that preclusion principles might apply. In particular, according full faith and credit to the state court judgment would ordinarily lead the federal court to look to the preclusion doctrine of the state whose court rendered the decision.⁸⁵

Standing

In *Kowalski v. Tesmer* the Supreme Court returned to one of its favorite issues—standing—and to one of its favorite results—a finding that the plaintiffs lacked standing.⁸⁶ The slightly unusual

⁷⁶*Id.* at 2631, 2636 n.5 (Ginsburg, J., dissenting)

⁷⁷*Id.* at 2635.

⁷⁸*Id.*

⁷⁹*Id.* at 2639.

⁸⁰*Exxon Mobile v. Saudi Basic Industries*, 125 S. Ct. at 1517.

⁸¹See *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923) (no jurisdiction over claim by losing state court litigants that the state court judgment be declared void); *District of Columbia Circuit Court v. Feldman*, 460 U.S. 462 (1983) (losing state court litigant may not sue the state court for declaration that its judgment was erroneous).

⁸²*Exxon Mobil v. Saudi Basic Industries*, 125 S. Ct. at 1525–26.

⁸³*Id.* at 1526.

⁸⁴*Id.* at 1527

⁸⁵*Id.* (citing 28 U.S.C. § 1738).

⁸⁶*Kowalski v. Tesmer*, 125 S. Ct. 564 (2004).

twist in this instance was that the issue was third-party standing—whether the plaintiffs could assert the rights of others. The Court was apparently anxious to reach and decide the issue since the Court assumed without deciding that the three-factor test for standing under Article III had been satisfied, thus opening the way for the Court to decide whether it should apply prudential limitations to preclude federal court jurisdiction.⁸⁷

The case involved the validity of a Michigan statute that denied appointment of appellate counsel for indigent criminal defendants who pleaded guilty. Dismissing the indigent plaintiffs on abstention grounds but allowing the attorney plaintiffs to proceed on a third-party standing theory, the Sixth Circuit majority upheld an injunction against the statute on constitutional grounds.⁸⁸

In his opinion for the six-justice majority, however, the chief justice did not reach the merits. He noted that, while the general rule called for parties to assert their own rights, in some circumstances third-party action on behalf of others was necessary. This requires the third party to show also “whether the party asserting the right has a ‘close’ relationship with the person who possesses the right” and “whether there is a ‘hindrance’ to the possessor’s ability to protect his own interests.”⁸⁹ The opinion notes that the Court has “been quite forgiving with these criteria in certain circumstances” but has not generally “looked favorably upon third-party standing.”⁹⁰ The implication is that, except for the specific cited examples of the Court’s forgiving nature, third-party standing should not normally be approved.

The majority concluded that plaintiffs could not meet either of the additional tests. First, to demonstrate closeness, the attorneys relied on the attorney-client relationships that would develop in the future with unnamed criminal defendants. Distinguishing its two prior decisions in which an attorney-client relationship had conferred third-party standing, the Court rejected this argument because those cases involved existing attorney-client relationships: “The attorneys before us do not have a ‘close relationship’ with their alleged ‘clients’; indeed, they have no relationship at all.”⁹¹

Regarding the second test, hindrance, the Court concluded that the indigent criminal defendants had other avenues through which to contest the Michigan statute. The majority conceded that proceeding *pro se* placed the prospective defendants at a disadvantage, but not sufficiently to meet the hindrance test.⁹² Furthermore, the Court observed that the attorneys could have participated in the state court proceedings but had chosen to proceed in federal court under Section 1983: “An unwillingness to allow the *Younger* principle to be thus circumvented is an additional reason to deny the attorneys third-party standing.”⁹³

The dissenting opinion by Justice Ginsburg, joined by Justices Stevens and Souter, rejected the Court’s precedents as a basis for distinguishing between existing and hypothetical future relationships: “Without suggesting that the timing of a relationship is key, the Court’s decisions have focused on the character of the relationship between the litigant and the rightholder.”⁹⁴ With respect to hindrance, she concluded, “this case

⁸⁷*Id.* at 567 & n.2.

⁸⁸*Tesmer v. Granholm*, 333 F.3d 683 (6th Cir. 2003) (en banc).

⁸⁹*Tesmer*, 125 S. Ct. at 567.

⁹⁰*Id.* at 567–68.

⁹¹*Id.* at 568.

⁹²*Id.* at 569.

⁹³*Id.* at 569–70 (footnote omitted); see *Younger v. Harris*, 401 U.S. 37 (1971).

⁹⁴*Id.* at 573 (Ginsburg, J., dissenting).

presents an unusual if not unique case of defendants facing near-insurmountable practical obstacles to protecting their rights in the state forum.”⁹⁵

Although the holding in *Tesmer* may impose new barriers to claims of third-party standing, the majority and dissenting opinions provide useful guidance and case law for charting and navigating the shoals of both standing in general and third-party standing in particular. It is one decision to bear in mind.

Private Rights of Action Under Section 1983 and Otherwise

In *City of Rancho Palos Verdes v. Abrams* the Supreme Court refused to allow an individual to enforce a provision of the Telecommunications Act pursuant to 42 U.S.C. § 1983.⁹⁶ Mr. Abrams, a property owner in Rancho Palos Verdes, sued the City when it denied him a zoning permit to erect a radio antenna on his property. He argued that the City violated the limitations placed on its zoning authority by the Telecommunications Act. He sought injunctive relief under the Act and damages and attorney fees under 42 U.S.C. §§ 1983 and 1988.

To prevail on his Section 1983 claim, Mr. Abrams needed to meet the Court’s two-part test. First, he had to establish that the statute he sought to enforce evidenced an unambiguous congressional intent to create an individually enforceable federal right. The Court assumed *arguendo* that the Telecommunications Act created a federal right because the City had conceded the point below and the government, as amicus, had not disputed it.⁹⁷ The Court thus focused on the second part of the test.

Second, once a plaintiff establishes a federal right, there is a rebuttable pre-

sumption that the statutory provision is privately enforceable. The defendant can overcome the presumption by demonstrating that Congress either stated its intent directly in the statute that no Section 1983 remedy be available or created a “comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.”⁹⁸

According to the Court, in an opinion by Justice Scalia, the inclusion of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend that plaintiffs be able to resort to Section 1983. Thus “the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not.”⁹⁹ The Court noted that in all of its cases allowing a Section 1983 action “we have emphasized that the statute at issue ... *did not* provide a private judicial remedy (or in most of the cases, even a private administrative remedy) for the rights violated.”¹⁰⁰

The Court held that the Telecommunications Act’s remedial scheme precluded resort to Section 1983. The Act requires a plaintiff to seek judicial review of a zoning decision within thirty days after the government entity takes final action. Once the action is filed, the court must “hear and decide” the case “on an expedited basis.”¹⁰¹ The Court also noted that the Act did not authorize attorney fees and costs. By contrast, a Section 1983 action can be brought much later than thirty days after the government’s final action, need not be heard on an expedited basis, and can result in attorney fees and costs for a successful plaintiff. The Court concluded that

⁹⁵*Id.* at 576.

⁹⁶*City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005) (concerning the Telecommunications Act, 47 U.S.C. § 332(c)(7)) (Clearinghouse No. 55,953).

⁹⁷*Id.* at 1458.

⁹⁸*Id.* at 1458 (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)).

⁹⁹*Id.*

¹⁰⁰*Id.* at 1459.

¹⁰¹*Id.* (quoting 47 U.S.C. § 332(c)(7)(B)(v)).

enforcement of the Telecommunications Act's provision through Section 1983 "would distort the [Act's] scheme of expedited judicial review and limited remedies."¹⁰²

Significantly the Court rejected an argument by the United States as amicus that the availability of a private judicial remedy in a federal statute was not just indicative of, but conclusively established, congressional intent to preclude Section 1983 relief. While agreeing with the ordinary inference that the remedy provided in the statute was exclusive, the Court held that the inference "can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983."¹⁰³

All of the Justices agreed that the Telecommunications Act's remedial scheme precluded a Section 1983 action. Thus the case is interesting less for its result than for the opportunity it gave the justices, when reviewing federal statutes, to continue to spar over the role of Congress and congressional history. Two concurring opinions were filed. Justice Breyer, joined by Justices Souter, Ginsburg, and O'Connor, wrote separately that the Court "wisely reject[ed]" the government's proposed rule that the availability of a private judicial remedy

would conclusively establish congressional intent to preclude resort to Section 1983.¹⁰⁴ He noted that "[t]he statute books are too many, federal laws too diverse, and their purposes too complex, for any legal formula to provide more than general guidance."¹⁰⁵ The concurring justices added that "context, not just literal text," would often lead a court to congressional intent regarding a statute.¹⁰⁶

Justice Stevens wrote separately to address two points. First, he declared that the Court had not properly acknowledged the "strength of the normal presumption that Congress intended to preserve, rather than preclude," the availability of the Section 1983 remedy or that a remedial statutory enforcement scheme would preclude the Section 1983 relief only in the "exceptional" case.¹⁰⁷ Second, Justice Stevens echoed the view, expressed in the other concurring opinion, that the Court "incorrectly assumes that the legislative history of the statute is totally irrelevant."¹⁰⁸

In *Jackson v. Birmingham Board of Education* a 5-to-4 majority of the Court held that the implied private right of action to enforce Title IX included claims for retaliation.¹⁰⁹ Title IX of the Educational Amendments of 1972 prohibits educational institutions that receive

¹⁰²*Id.* at 1462.

¹⁰³*Id.* at 1459.

¹⁰⁴*Id.* at 1462.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 1464 (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 700-701 (1978), and stating Section 1983 was "intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."); *id.* at 1465; see also *id.* at 1463 (noting that previous decision required the party to meet the "difficult showing" that a comprehensive scheme existed). The Court had found a comprehensive remedial scheme in only two previous cases, *Smith v. Robinson*, 468 U.S. 992 (1984), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981).

¹⁰⁸*City of Rancho Palos Verdes*, 125 S. Ct. at 1465.

¹⁰⁹*Jackson v. Birmingham Board of Education*, 125 S. Ct. 1497 (2005) (Clearinghouse No. 55,842). The Court ruled for the civil rights plaintiffs in two other cases during the term. In *Johnson v. California*, 125 S. Ct. 1141 (2005), the Court held that a state rule segregating prisoners based on race must be subjected to strict scrutiny. In *Smith v. Jackson*, 125 S. Ct. 1536 (2005), the Court held that disparate impact claims may be brought under the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(2) (West 2005). Writing for a plurality of four, Justice Stevens noted that the Act and Title VII were worded similarly and that in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), the Court held that plaintiffs could show a violation of Title VII by establishing disparate impact. Reaching the same conclusion for the Act, Justice Stevens said that "[w]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith*, 125 S. Ct. at 1541.

federal money from discriminating based on gender.¹¹⁰

The case arose after Roderick Jackson was removed as coach of the girls' basketball team following his complaint that the team was not receiving equal funding and access to the high school's athletic equipment and facilities. Mr. Jackson sued the school district; he alleged that the board of education violated Title IX by retaliating against him for alleging discrimination.¹¹¹ Both the district court and the Eleventh Circuit ruled that Mr. Jackson's case should be dismissed in large part because the text of Title IX did address retaliation.¹¹²

In a decision written by Justice O'Connor, the Supreme Court reversed the Eleventh Circuit. According to the majority, "Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action."¹¹³ The starting point for the majority was an earlier Supreme Court case, *Cannon v. University of Chicago*, which found an implied private right of action to enforce Title IX's prohibition against intentional sex discrimination.¹¹⁴ The Court also found that Title IX's prohibition against "discrimination" had a "broad reach."¹¹⁵ The Court reasoned that "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination."¹¹⁶ Thus, the Court concluded,

"when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex' in violation of Title IX."¹¹⁷

The majority rejected the school board's argument that, even if a private right of action for retaliation were available under Title IX, the right would not extend to Mr. Jackson because he was not female.¹¹⁸ Moreover, the Court looked beyond the text of Title IX to justify its decision as necessary to keep Title IX's enforcement scheme from unraveling. The Court said that achieving the purposes of Title IX would be difficult if teachers were hesitant to report discrimination because of the fear of retaliation.¹¹⁹

Justice Thomas, joined by Justices Scalia, Kennedy, and the chief justice, objected to the majority opinion at every turn. The minority opinion argued that the text of Title IX did not address retaliatory conduct and that retaliation was not based on a person's sex.¹²⁰ Affirming the importance of *Pennhurst State School and Hospital v. Halderman* to the dissenting justices, the minority opinion complains that the teaching of *Pennhurst* has been ignored—as a spending clause enactment, Title IX fails to place recipients of federal funds on clear notice that a condition of the funding includes private suits based on retaliation.¹²¹ The majority responded that "[f]unding recipients have been on notice that they could be subjected to private suits for intentional

¹¹⁰See 29 U.S.C. § 1681 (West 2005).

¹¹¹*Birmingham*, 125 S. Ct. at 1503.

¹¹²*Id.* (citing 309 F.3d 1333 (11th Cir. 2002)).

¹¹³*Id.* at 1504.

¹¹⁴*Id.* (citing *Cannon*, 441 U.S. 667 (1979)).

¹¹⁵*Id.* at 1505.

¹¹⁶*Id.* at 1504.

¹¹⁷*Id.*

¹¹⁸*Id.* at 1507.

¹¹⁹*Id.* at 1508.

¹²⁰*Id.* at 1510, 1512–13.

¹²¹*Id.* at 1514 (citing *Pennhurst*, 451 U.S. 1 (1981)).

sex discrimination under Title IX, since we decided *Cannon*.”¹²²

Preemption

In *Bates v. Dow Agrosciences* plaintiffs were twenty-nine Texas peanut farmers who had purchased “Strongarm,” the defendant’s newly marketed pesticide.¹²³ Although highly recommended for use as a weed killer “in all areas where peanuts are grown,” Strongarm turned out to have little effect on weeds. However, it killed most of the peanut crop.¹²⁴ The farmers gave Dow notice (as required by a Texas consumer statute) of their intent to bring suit under various state-law theories of fraud, breach of warranty, strict liability, and negligence.¹²⁵ In response, Dow filed in federal district court a declaratory judgment action seeking a ruling that the farmers’ claims were all preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, under which the Environmental Protection Agency had registered Strongarm’s labeling and thus approved it for marketing in the United States.¹²⁶

The district court granted summary judgment to Dow, and the Fifth Circuit affirmed, holding that the farmers’ state-law claims were all preempted by 7 U.S.C. § 136v(b), which provides that states “shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.”¹²⁷ The Supreme Court granted certiorari in light of the conflicting decisions over the preemptive effect of the Federal Insecticide,

Fungicide, and Rodenticide Act from both federal and state courts.¹²⁸

In an opinion authored by Justice Stevens on behalf of a seven-member majority, the Court reversed the Fifth Circuit and held that most of the farmers’ state-law claims were *not* preempted by the federal labeling statute.¹²⁹ The Court began its analysis by observing that, “for at least a decade” after the statutory language at issue was enacted in 1972, defendants seldom argued that the Federal Insecticide, Fungicide, and Rodenticide Act preempted a state-law tort action, and defendants who made such arguments did not succeed.¹³⁰ As the Court put it, “[i]t was only after 1992, when we held in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), that the term ‘requirement or prohibition’ in the Public Health Cigarette Smoking Act of 1969 included common law duties, and therefore pre-empted certain tort claims against cigarette companies, that a groundswell of federal and state decisions emerged holding that [the Federal Insecticide, Fungicide, and Rodenticide Act] pre-empted claims like those advanced in this litigation.”¹³¹ The Court distinguished the Act’s narrow provisions at issue from the broader scope of the preemptive statutory language at issue in *Cipollone*, which stated that “[n]o requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this

¹²²*Id.* at 1509.

¹²³*Bates v. Dow Agrosciences*, 125 S. Ct. 1788 (2005).

¹²⁴*Id.*

¹²⁵*Id.*, citing Texas Deceptive Trade Practices–Consumer Protection Act, TEX. BUS. & PROF. CODE ANN. §§ 17.01 *et seq.*

¹²⁶*Id.*, citing 7 U.S.C. §§ 136 *et seq.*

¹²⁷*Id.* at 1793.

¹²⁸*Id.* at 1794. The Court also noted a conflict within the Executive Branch: in 2000 the Environmental Protection Agency filed amicus briefs urging that the statute was *not* preemptive, while the solicitor general’s amicus brief in this case adopted the contrary position. *Id.* at 1794 n.7.

¹²⁹*Id.* at 1798.

¹³⁰*Id.* at 1796, citing *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir. 1984).

¹³¹*Id.* at 1797.

[Act].”¹³² With respect to the provisions at issue in the Federal Insecticide, Fungicide, and Rodenticide Act, however, the Court concluded:

Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as “requirements for labeling or packaging” Thus petitioners’ claims for defective manufacture, negligent testing, and breach of express warranty are not pre-empted.¹³³

Justices Scalia and Thomas dissented in part. They complained that the bulk of the farmers’ claims might still be pre-empted, even under the Court’s analysis and at a minimum should be remanded to the Fifth Circuit for further review.¹³⁴

Statute of Limitations

In *Graham County Soil and Water Conservation District v. United States ex rel. Wilson* the Supreme Court shortened the time within which “whistle-blowers” who participate in an action or investigation against their employer for defrauding the United States may sue the employer for retaliating against them.¹³⁵ Under the False Claims Act, private individuals may bring *qui tam* actions, in the government’s name, against any person or entity making false or fraudulent

claims for payment against the United States; the so-called relator or plaintiff must give the government notice of the action (the government may then intervene), and the plaintiff may receive up to 30 percent of the proceeds—including statutory and treble damages—of the action.¹³⁶

The False Claims Act was amended in 1986 to include a private cause of action for individuals who suffer retaliation from their employers for assisting a False Claims Act investigation or proceeding.¹³⁷ The Act’s language that established a six-year statute of limitations was also amended, so that the relevant language now reads: “(b) A civil action under section 3730 may not be brought (1) more than six years after the date on which the violation of section 3739 [i.e., the submission of a false claim] is committed.”¹³⁸

The plaintiff in this case notified federal officials in 1995 of her North Carolina employer’s suspected fraudulent activity, and she alleged that, as a result of her cooperation with the ensuing federal investigation, the employer repeatedly harassed her and ultimately forced her to resign in 1997.¹³⁹ She filed an action under the False Claims Act against her employer in 2001; she sought damages for both the false claims and the retaliation.¹⁴⁰ The employer successfully moved to dismiss the retaliation claim by arguing that (1) the six-year limitations period applied only to the false claims cause of action; (2) the retaliation cause of action was subject to the most analo-

¹³²*Id.* at 1800 n.22, quoting 15 U.S.C. § 1334(b). The term “requirement or prohibition” was read broadly in *Cipollone* to include common-law “duties” and therefore to preempt certain common-law tort claims. *Cipollone v. Liggett Group Incorporated*, 505 U.S. 504, 521 (1992).

¹³³*Bates*, 125 S. Ct. at 1798.

¹³⁴*Id.* at 1805–7 (Thomas & Scalia, J.J., concurring in the judgment in part and dissenting in part). Predictably the dissent also dismissed the majority’s “legislative silence” argument: “The history of tort litigation against manufacturers is irrelevant.” *Id.* at 1806.

¹³⁵*Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 125 S. Ct. 2444 (2005).

¹³⁶31 U.S.C. § 3729(a) (1986).

¹³⁷*Graham County*, 125 S. Ct. at 2447, citing 31 U.S.C. § 3730(b) & (h).

¹³⁸31 U.S.C. § 3731(b)(1).

¹³⁹*Graham County*, 125 S. Ct. at 2447–48.

¹⁴⁰*Id.* at 2448.

gous state limitations period under federal “borrowing” principles; and (3) North Carolina had a three-year limitations period for retaliatory discharge, and since plaintiff’s retaliation claim under the False Claims Act was filed outside of that period, the retaliation claim was time-barred.¹⁴¹ Interpreting the False Claims Act’s six-year statute to encompass the retaliation claims as well as claims for fraudulent payments, the Fourth Circuit reversed the district court.¹⁴²

Writing for a five-member majority, Justice Thomas acknowledged that the interrelated statutory terms could reasonably be read either to include the retaliation claim section (§ 3730(h)) within Section 3731’s six-year limitations period or to restrict that period only to claims arising from false payments (§ 3729).¹⁴³ Notwithstanding the amicus arguments of the United States in support of the plaintiff, the majority concluded that the six-year statute did not govern retaliation claims.¹⁴⁴ The majority reached this result after determining, through a complex analysis of the statutory language, that if the six-year statute were applicable to retaliation claims, such claims would necessarily begin to accrue not on the date of the retaliatory conduct, but on the date which the “actual or suspected [False Claims Act] violation occurred.”¹⁴⁵ As the Court observed, the plaintiff’s construction of the statute “allows a retaliation action to be time barred before it ever [fully] accrues, for example, if the employer discovers more than six years after the suspected violation of § 3729 that an employee aided in investigating that

fraud, then retaliates.”¹⁴⁶ The majority was unwilling to accept such a “counter-intuitive” result and accordingly held that the six-year provision did not apply to retaliation claims.¹⁴⁷ The case was remanded to the Fourth Circuit for a redetermination of the most analogous state statute of limitations applicable to the claim.¹⁴⁸

Deference to Administrative Agencies

The issue of deference to administrative agencies implicates access-to-justice issues in a way that is different from most of the issues we discuss here. The question is not whether plaintiffs may file suit—their right to proceed in court is not in doubt. Rather, the question is whether plaintiffs will receive meaningful judicial review or whether the court will effectively rubber-stamp the challenged administrative decision. This issue has evoked bitter opinions on the Court, and no term would be complete without a decision prompting a scathing dissent from Justice Scalia on the topic. In *National Cable and Telecommunications Association v. Brand X Internet Services* Justice Scalia proved to be still on top of his game.¹⁴⁹

The issue in *Brand X* was whether cable companies providing broadband Internet access were “offering ... telecommunications services” so as to subject them to mandatory common carrier regulation under Title II of the Telecommunications Act of 1934 or merely providing “information services” outside the purview of the statute.¹⁵⁰ Following a rule-making

¹⁴¹*Id.*

¹⁴²*Id.*, citing 367 F.3d 245 (4th Cir. 2004).

¹⁴³*Id.* at 2448–50.

¹⁴⁴*Id.* at 2449–50.

¹⁴⁵*Id.* at 2452.

¹⁴⁶*Id.*

¹⁴⁷*Id.*

¹⁴⁸*Id.* at 2453.

¹⁴⁹*National Cable and Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).

¹⁵⁰*Id.* at 2695–97, quoting 47 U.S.C. § 153 (46).

proceeding, the Federal Communications Commission (FCC) issued a formal ruling concluding that cable companies providing Internet access were not offering “telecommunications services” within the regulatory scope of the Telecommunications Act.¹⁵¹ Numerous parties petitioned for judicial review of this ruling, and the Ninth Circuit (selected as the venue by “judicial lottery”) vacated the FCC’s decision that cable modem service was not “telecommunications service” under the Act.¹⁵²

A 6-to-3 majority of the Supreme Court, in an opinion written by Justice Thomas, ultimately reversed the Ninth Circuit. The Court concluded that the FCC’s administrative determination, that is, that broadband Internet access providers were *not* engaged in the “offering of telecommunications services,” was a “permissible” interpretation of an “ambiguous” statutory term and therefore was entitled to deference under the familiar rubric of *Chevron U.S.A. Incorporated v. National Resources Defense Council Incorporated*.¹⁵³ The three dissenting justices argued that the statutory language did not permit such an “implausible” construction, through which the FCC had, in their view, “once again attempted to concoct ‘a whole new regime of regulation (or of free market competition)’ under the guise of statutory construction.”¹⁵⁴

For our purposes, the significance of this case lies not in its impact on the future regulation of the broadband Internet provider industry but in its manifestation as the latest battle in the continuing warfare within the Court between Justice Scalia and virtually every other member

of the Court (at one time or another over the last decade) regarding principles of judicial deference. Justice Thomas, in his majority opinion, fired the opening salvo; he felt it “prudent,” although “not logically necessary,” to address an unusual and potentially far-reaching issue that arose as a result of the Ninth Circuit’s analysis in the proceedings below.¹⁵⁵ The Ninth Circuit panel had *not* reviewed the FCC’s construction of the statute under the deferential *Chevron* framework but instead had believed itself bound, under *stare decisis*, to follow a prior circuit decision in a different case, which had held that cable Internet service was a “telecommunications service” subject to FCC regulation.¹⁵⁶ The Ninth Circuit in *Brand X* therefore “declined to apply *Chevron* because it thought the [FCC’s] interpretation of the Communications Act foreclosed by the conflicting interpretation of the Act it had adopted” in its prior decision and because it assumed that a prior *judicial* construction of the statute “overrode” the FCC’s interpretation.¹⁵⁷

To resolve the “genuine confusion in the lower courts over the interaction between the *Chevron* doctrine and *stare decisis* principles,” the Court concluded that the Ninth Circuit panel erred in considering itself bound by its prior construction of the Communications Act. The Court began its analysis by observing that “*Chevron*’s premise is that it is for agencies, not Courts, to fill statutory gaps.”¹⁵⁸ The Court then proceeded to the somewhat startling conclusion that “a court’s opinion as to the best reading of an ambiguous statute that an agency is charged with administering is

¹⁵¹*Id.* at 2697–98.

¹⁵²*Id.* at 2698, citing 345 F.3d 1120, 1132 (9th Cir. 2004).

¹⁵³*Id.* at 2695, citing *Chevron U.S.A. Incorporated v. National Resources Defense Council Incorporated*, 467 U.S. 837 (1984).

¹⁵⁴*Id.* at 2713 (Scalia, Souter, & Ginsberg, J.J., dissenting), quoting *MCI Telecommunications Corporation v. AT&T*, 512 U.S. 218, 234 (1994).

¹⁵⁵*Id.* at 2702.

¹⁵⁶*Id.* at 2698–99, citing *AT&T Corporation v. Portland*, 216 F.2d 871 (9th Cir. 2000).

¹⁵⁷*Id.* at 2699, citing 345 F.3d at 1227–32.

¹⁵⁸*Id.* at 2700, citing *Chevron*, 467 U.S. at 843–44.

not authoritative"; rather, subsequently "the agency may ... choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."¹⁵⁹ The majority summarized this new principle as follows: "A court's prior judicial construction of a statute trumps a [subsequent] agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."¹⁶⁰ The Court concluded that this principle not only comported with *Chevron's* presumption that "Congress, when it left ambiguity in a statute, ... desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows" but also was consistent with *Chevron's* acknowledgment that occasionally agencies might, for good reason and with sufficient explanation, reverse course on matters of statutory interpretation.¹⁶¹

Justice Scalia, in a portion of his dissent which was joined by no other justice, began by characterizing the majority's deference analysis as a continuation of "the administrative-law improvisation project it began four years ago in *United States v. Mead Corp.*," the Court's last significant foray into judicial deference.¹⁶² After reprising the blistering critique that he had leveled at the Court in his solo

dissent in *Mead* for not being deferential enough to administrative construction of statutes, Justice Scalia attacked the majority's "dictum" in this case for "inventing yet another breathtaking novelty: judicial decisions subject to reversal by Executive officers."¹⁶³ In Justice Scalia's view, the majority's analysis created a "bizarre" and "probably unconstitutional" separation-of-powers conflict between the executive and judicial branches, and he hypothesized various scenarios under which agencies might, through the subsequent invocation of *Chevron* deference, evade prior judicial constructions of statutory intent.¹⁶⁴ In Justice Scalia's judgment, "[w]hen a court interprets a statute without *Chevron* deference to agency views, its interpretation (whether or not asserted to rest upon an ambiguous text) is the law."¹⁶⁵ By going "so far out of its way to make bad law," the Court had created, he caustically suggested, "a wonderful new world ... one full of promise for administrative law professors in need of tenure articles and, of course, for litigators."¹⁶⁶

Attorney Fees

In *Commissioner of Internal Revenue v. Banks* the Supreme Court held in a unanimous decision written by Justice Kennedy (with the chief justice not participating) that the contingent-fee portion of a judgment or settlement was income to the plaintiff for federal tax

¹⁵⁹*Id.* at 2701.

¹⁶⁰*Id.* at 2700.

¹⁶¹*Id.*, quoting *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 740–41 (1996). As the Court noted, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency must ... consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.*, quoting *Chevron*, 467 U.S. at 863–64.

¹⁶²*National Cable*, 125 S. Ct. at 2718 (Scalia, J., dissenting), citing *United States v. Mead Corporation*, 533 U.S. 218 (2001). In Justice Scalia's view, *Mead* had wrongly and "drastically limited the categories of agency action that would qualify for deference" under *Chevron*. *Id.*; see *Mead*, 533 U.S. at 245–46 (Scalia, J., dissenting); see also Jane Perkins et al., *Beyond Bush v. Gore: Highlights from the Supreme Court's 2000–2001 Decisions Concerning Access to the Courts*, 35 CLEARINGHOUSE REVIEW 373, 382–84 (Nov.–Dec. 2001).

¹⁶³*National Cable*, 125 S. Ct. at 2719 (Scalia, J., dissenting). Under Justice Scalia's "broad" view of administrative agency decision making, "any agency position that plainly has the approval of the agency head" should be accorded *Chevron* deference. *Id.* at 2719 n.10.

¹⁶⁴*Id.* at 2719–21. Justice Scalia also laments the practical problems that the Court's analysis will, in his view, create to "bedevil the lower courts." *Id.* at 2720.

¹⁶⁵*Id.* at 2721.

¹⁶⁶*Id.*

purposes.¹⁶⁷ The Court did not reach, however, the issue of greater concern to public interest lawyers and their clients: whether attorney fees awarded pursuant to fee-shifting statutes are income to the plaintiff.

In dicta, the Court recited two arguments that have been offered against such a result. First, since many plaintiffs who avail themselves of fee-shifting statutes seek only injunctive relief or obtain relatively low damages, “[t]reating the fee award as income to the plaintiff in such cases, it is argued, can lead to the perverse result that the plaintiff loses money by winning the suit.”¹⁶⁸ Second, “it is urged that treating statutory fee awards as income to plaintiffs would undermine the effectiveness of fee-shifting statutes in deputizing plaintiffs and their lawyers to act as private attorneys general.”¹⁶⁹

The Court also pointed to a 2004 Internal Revenue Code amendment that allows taxpayers to deduct fees and costs paid in connection with a claim of “unlawful discrimination,” a term that was given a fairly broad meaning.¹⁷⁰ This amendment, the Court suggested, “redresses the concern for many, perhaps most, claims governed by fee-shifting statutes.”¹⁷¹

Access Cases on the Docket for 2005–2006

Although the Supreme Court has not yet finished assembling its docket for 2005–2006, the John G. Roberts Jr. Court will hear a number of cases that follow hard on the heels of the 2004–2005 decisions. The Court will hear another case on the interaction of the Federal Controlled Substances Act and state law, in this instance Oregon’s physician-assisted suicide law.¹⁷² Federalism will be center stage in *United States v. Georgia*, which will focus on the validity of the Americans with Disabilities Act’s abrogation of state sovereign immunity with respect to suits by prisoners.¹⁷³ In *Central Virginia Community College v. Katz* the Court will decide whether legislation enacted under the bankruptcy clause of the Constitution may abrogate state sovereign immunity.¹⁷⁴ Questions relating to diversity and removal jurisdiction are once again on the Court’s docket.¹⁷⁵ Advocates for low-income clients will also want to keep an eye on *Schaffer v. Weast*, in which the Court will decide whether parents or school districts bear the burden of proof in administrative proceedings under the Individuals with Disabilities Education Act.¹⁷⁶ Finally, the Court has agreed to hear *Arkansas Department of Human Services v. Ahlborn*, which deals with the authority of a state to recover its Medicaid costs from recipients’ tort recoveries beyond the portion of those recoveries that represent payment for medical expenses.¹⁷⁷

¹⁶⁷*Commissioner of Internal Revenue v. Banks*, 125 S. Ct. 826 (2005).

¹⁶⁸*Id.* at 834.

¹⁶⁹*Id.*

¹⁷⁰See *id.* at 831.

¹⁷¹*Id.* at 834.

¹⁷²*Gonzales v. Oregon*, No. 04-0623 (cert. granted Feb. 22, 2005). The appeal will focus on the legality of Attorney General John Ashcroft’s interpretation of the Federal Controlled Substances Act to prohibit states from authorizing physicians to prescribe drugs for the purpose of euthanasia.

¹⁷³*United States v. Georgia*, No. 04-1203/04-1236 (cert. granted May 16, 2005).

¹⁷⁴*Central Virginia Community College v. Katz*, No. 04-0885 (cert. granted April 4, 2005).

¹⁷⁵*Lincoln Property Company v. Roche*, No. 04-0712 (cert. granted Feb. 28, 2005) (citizenship); *Martin v. Franklin Capital Corporation*, No. 04-1140 (cert. granted April 25, 2005) (availability of fees for work on improperly removed case).

¹⁷⁶*Schaffer v. Weast*, No. 04-0698 (cert. granted Feb. 22, 2005). [Editor’s note: On November 14, 2005, the Court ruled 6-to-2 that parents bear the burden of proof in these proceedings.]

¹⁷⁷*Arkansas Department of Human Services v. Ahlborn*, No. 04-1056 (cert. granted Sept. 27, 2005).

The Class Action Fairness Act

The Class Action Fairness Act of 2005, signed into law last February by President Bush, aims to limit frivolous class actions, decrease forum shopping, and curtail class settlements that allegedly yield significant fees to class counsel with marginal benefits to class members. What became clear during the debates in Congress was that many proponents of the legislation were primarily focused upon limiting the ability of plaintiffs to obtain significant classwide awards, via judgment or settlement, in state courts. Some of the principal features of the Act, codified in principal part at 28 U.S.C. §§ 1711 *et seq.*, are as follows:

Original Federal Jurisdiction

The Act provides for expanded original jurisdiction over class action amounts in which (1) the *aggregate* amount in controversy exceeds \$5 million; (2) the class contains at least 100 members; (3) any class member is a citizen of a state different from that of any defendant; and (4) the case does not fall within any exception to the new diversity requirements set forth below. The Act does not apply to prospective class actions in which the primary defendants are state governments or government officials, to certain securities-related claims, or to state-law-based claims challenging the internal affairs of governance of corporation or other business enterprise.

The Act amends the federal diversity statute, 28 U.S.C. § 1332, to require a district court, under certain circumstances, to decline jurisdiction or to exercise its discretion in determining whether to accept jurisdiction over a putative class action that relies on diversity of citizenship for federal court

jurisdiction, based upon an analysis of the percentage of class members who are citizens of the forum state (and the citizenship of the defendant). The Act also expands diversity jurisdiction to certain so-called mass actions, defined as claims for monetary relief of 100 or more persons involving common questions of law or fact.

Removal Jurisdiction

The Act sets forth new provisions governing the removal of interstate class actions, permitting removal without unanimous consent of all defendants, and provides for discretionary and expedited appellate review of district court orders granting or denying motions to remand.

Coupon Settlements/Attorney Fees

The Act imposes additional requirements for the approval of proposed “coupon” settlements to class members and restricts contingent attorney fees, with respect to coupon settlements only, to the value of the coupons actually redeemed by class members, rather than to the value of the coupons awarded or issued. The Act expressly gives courts the discretion to distribute the value of unredeemed coupons to charitable or governmental organizations, as agreed by the parties.

Notice of Settlements

The Act provides that defendants must notify “the appropriate” state or federal official of a proposed class action settlement no later than ten days after the settlement has been filed in court.