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Impact of Bankruptcy Reform on the Poor
Still Segregated After All These Years

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

The 2005–2006 U.S. Supreme Court term brought two new justices to the Court, beginning with the elevation of District of Columbia Circuit Judge John Roberts to the post of chief justice (after the death of William H. Rehnquist), followed by the more controversial appointment of Samuel Alito, a Third Circuit jurist with decidedly conservative credentials, to replace the retiring Sandra Day O’Connor, who over two decades had carved out a reputation for judicial and ideological moderation. Insofar as Chief Justice Rehnquist’s long tenure on the Court was marked by a consistent stream of decisions that “rolled back access to federal courts and judicial remedies for a wide variety of plaintiffs,” many public interest advocates were concerned that the addition of Justice Alito, in particular, would steer the Court in an even more restrictive direction.

The beginning of the Roberts era actually was marked by an unusual number of unanimous opinions early in the term, but the difficult cases decided later in the year divided the Court into more predictable ideological camps. In a well-publicized symbol of the Court’s new alignment, a widely anticipated decision involving a clash between private property rights and environmental protection policies under the Clean Water Act fractured the Court into a 4-1-4 split, with Justice Kennedy donning the mantle of retired Justice O’Connor as the new balance-tipper.

In general, the new chief justice voted reliably with the Court’s conservative wing, as expected, but authored a surprising decision expanding the scope of due process notice requirements. For those keeping score on Justice Alito, he also was consistently aligned with the Court’s conservative nucleus. Indeed, he wrote the majority opinion in Woodward v. Ngo, which slammed the federal courthouse door on untold numbers of prisoners who fail to comply properly with the procedural or timeliness requirements of prison administrative remedies prior to filing a lawsuit. In another case, while engaged in an otherwise unremarkable statutory intent analysis, he imposed a novel and severe constitutional limitation upon state spending obligations under federal statutory programs, which prompted alarm (and dissent) from the four members of the Court’s liberal bloc.

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2. Rapanos v. United States, 126 S. Ct. 2208 (2006); see infra text accompanying footnotes 43–51.
While the first Roberts term produced no blockbuster opinions implicating access to the federal courts, it did include the usual smattering of cases involving significant access issues, such as state sovereign immunity; judicial deference to administrative agencies; federal jurisdiction and procedure; and the retroactivity of statutes. Most of these decisions did not make for particularly fascinating reading, but advocates interested in federal court access should be watching how this decidedly “new” Supreme Court approaches access issues.

**Sovereign Immunity**

Given the expansion of state sovereign immunity during the Rehnquist era, Supreme Court watchers awaited the first signs of how the Roberts Court would deal with this contentious subject. Three major decisions of the past term addressed the issue, and, surprisingly, all of them rejected the government’s claims of immunity. However, as described below, these cases were decided on narrow issues and holdings and should not be viewed as signaling a new direction from the Roberts Court. The first case, *United States v. Georgia*, revisited the question of congressional authority to enact provisions of the Americans with Disabilities Act. The case was filed by Tony Goodman, a paraplegic inmate in the Georgia prison system. His complaint for injunctive relief and money damages alleged that the prison confined him to a cell so small he could not turn in his wheelchair; the prison forced him to rest in his own feces and urine by refusing to assist him in using the toilet and shower, and the prison denied him necessary medical treatment. The plaintiff alleged that this conduct violated the Eighth Amendment and Title II of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in public programs or services, including prisons, and abrogates state immunity from such claims.

After the Eleventh Circuit Court of Appeals affirmed the district court’s denial of plaintiff’s claims for monetary damages, the Supreme Court accepted review and reversed the Eleventh Circuit. In a brief opinion for a unanimous court, Justice Scalia stated:

> While the Members of this Court have disagreed regarding the scope of Congress’s ‘prophylactic’ enforcement powers under § 5 of the Fourteenth Amendment [citation omitted], no one doubts that § 5 grants Congress the power to ‘enforce… the provisions’ of the Amendment by creating private remedies against the States for actual violations of those provisions. [...] Insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates sovereign immunity.

*United States v. Georgia* thus recognizes an important basis for allowing a state government to be sued for violating a federal

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7*United States v. Georgia*, 126 S. Ct. 877 (2006). After the case was appealed to the Eleventh Circuit Court of Appeals, the United States intervened to defend the constitutionality of Title III’s abrogation of state sovereign immunity. Id. at 880.


law—when the federal law is authorizing a remedy for a constitutional violation. In the case of \textit{Georgia}, 527 U.S. 627 (1999) (Congress lacked the authority to authorize suits against states. Notably Justice O’Connor voted with the majority in the case, which was one of her last. Whether the Court would have reached the same decision with Justice Alito participating is not at all clear.

The final sovereign immunity case rejected a county’s claim of sovereign immunity. \textit{Northern Insurance Company of New York v. Chatham County} involved an admiralty claim by an insurer against Chatham County, Georgia, which owned and operated a drawbridge. After a piece of the bridge fell onto James Ludwig’s boat and caused damages, his insurance company sought to recover the cost of the claim from the county. Finding the suit barred by sovereign immunity, the lower courts dismissed it. With Justice Alito participating in his first decision, the Supreme Court unanimously reversed the lower courts. Writing for the Court, Justice Thomas noted that the county did not claim or prove that it was an “arm of the state” when it operated the drawbridge. The Court then rejected, on the basis of Eleventh Circuit Court of Appeals’ precedent, the county’s argument that a distinct “residual immunity” predated the Constitution and protected bankruptcy proceedings and that this authority included the ability to authorize suits against states. Notably Justice O’Connor voted with the majority in the case, which was one of her last. Whether the Court would have reached the same decision with Justice Alito participating is not at all clear.

The second case, \textit{Central Virginia Community College v. Katz}, looked at whether a state enjoyed sovereign immunity from a suit brought against it by a trustee in a bankruptcy proceeding. In a 5-to-4 opinion the Court held that sovereign immunity did not apply in bankruptcy court proceedings. Writing for the majority, Justice Stevens held that “[b]ankruptcy jurisdiction, at its core, is in rem” and did not implicate state sovereignty to the same extent as other types of jurisdiction. He noted that this was “as true in the 18th century as it is today. Then, as now, the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and distribution of the res.”

The opinion also noted that Article I of the Constitution gave Congress broad authority to enact uniform rules for bankruptcy proceedings. Writing for the majority, Justice Stevens held that “[b]ankruptcy jurisdiction, at its core, is in rem” and did not implicate state sovereignty to the same extent as other types of jurisdiction. He noted that this was “as true in the 18th century as it is today. Then, as now, the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and distribution of the res.”

\textit{Central Virginia Community College v. Katz}, 126 S. Ct. 982 (2006), that assumed that plaintiffs were allowed to sue a state government for violations of federal laws addressing a type of discrimination receiving heightened scrutiny. Specifically \textit{Lane} recognizes suits under Title II of the Americans with Disabilities Act when states discriminate against people with disabilities who are trying to exercise their fundamental right of access to the court. For in-depth discussion of this case by the Federal Court Access Group, see Gill Deford et al., \textit{Federal Court Access Issues in the U.S. Supreme Court’s 2003–2004 Term}, 38 \textit{CLEARINGHOUSE REVIEW} 464, 465–67 (Nov.–Dec. 2004). By contrast, in \textit{Board of Trustees of the University of Alabama v. Garrett}, 531 U.S. 356 (2001), the Court noted that disability discrimination received only rational-basis review and held that Congress lacked authority under Section 5 to enact Americans with Disabilities Act Title I provisions which authorized suits against states for employment discrimination against people with disabilities. For in-depth discussion of this case by the Federal Court Access Group, see Jane Perkins et al., \textit{Beyond Bush v. Gore: Highlights from the Supreme Court’s 2000–2001 Decisions Concerning Access to the Courts}, 35 \textit{CLEARINGHOUSE REVIEW} 373, 374–77 (Nov.–Dec. 2001).

\textit{Central Virginia Community College v. Katz}, 126 S. Ct. 990 (2006). The lower courts were concerned with whether Congress had validly abrogated state sovereign immunity in the Bankruptcy Act, 11 U.S.C. § 106(a). However, under the Central Virginia holding, enactment of this provision was not necessary to authorize the bankruptcy court’s jurisdiction. \textit{Id.} at 995.

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political subdivisions, such as counties, from suit. Rather, the Court limited “preratification sovereignty”—a concept first articulated by the Rehnquist Court in *Alden v. Maine*—to only States and arms of the State. 

**Deference to Administrative Agencies**

The appropriate level of deference that courts should accord to statutory interpretations by administrative agencies was once again on the Court’s docket. In *Gonzales v. Oregon* the Court held that the Controlled Substances Act did not permit the attorney general to prohibit physicians from prescribing drugs as a means of assisting suicide, where state law had legalized physician-assisted suicide. Under the Controlled Substances Act the attorney general may place drugs under several categories of restriction. Schedule II drugs are available only through written nonrefillable prescriptions by physicians. The statute provides that physicians must register with the attorney general in order to issue prescriptions. The attorney general’s regulations provide that prescriptions must be issued for “a legitimate medical purpose by an individual practitioner in the usual course of his professional practice.” And the Act provides that it “shall not be construed as indicating an intent of Congress to occupy the field in which ... it operates ... to the exclusion of any State law on the same subject which would otherwise be within the authority of the State, unless there is a positive conflict between that provision and the state law.”

In 1994 Oregon enacted a statute authorizing physicians to prescribe drugs for the purpose of assisting in the suicide of terminally ill patients. In 2001 Atty. Gen. John Ashcroft issued an interpretive rule concluding that assisted suicide was not a “legitimate medical purpose” within the meaning of the attorney general’s regulations and that therefore the issuance of a prescription for such purposes was a violation of the Controlled Substances Act. The State of Oregon and a number of individual plaintiffs brought suit to challenge this interpretation of the attorney general’s regulations. Seeking review of the Ninth Circuit’s decision striking down the interpretive rule, the United States sought judicial deference on the ground that the rule was an interpretation by the attorney general of his own regulations. Writing for the majority, Justice Kennedy rejected this contention and found deference inappropriate because the regulation that the interpretation sought to elucidate simply tracked the statute itself. Thus the existence of the regulation does not, Justice Kennedy found, alter the reality that the

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17 Id. at 1692–93 (rejecting *Broward County v. Wickman*, 185 F.2d 614 (5th Cir. 1952)). See *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopted all decisions of the former Fifth Circuit announced prior to October 1, 1981, as binding precedent in the Eleventh Circuit).
18 *Northern Insurance Company*, 126 S. Ct. at 1693 (citing *Alden*, 527 U.S. at 713, announcing that immunity of States from suit “is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.”).
20 Controlled Substances Act, 21 U.S.C. §§ 801 et seq.
21 Id. § 829(a).
22 21 C.F.R. § 1306.04(a).
25 *Gonzales*, 126 S. Ct. at 913.
26 Id. at 914.
27 Id. at 914–15. The principle that courts should defer to an agency’s interpretation of its own regulations unless an interpretation is clearly erroneous is known as *Auer deference*, after *Auer v. Robbins*, 519 U.S. 452 (1997).
28 *Gonzales*, 126 S. Ct. at 915.
interpreative rule is really an interpretative rule of the statute, not a regulatory policy of the attorney general’s creation. Justice Kennedy then turned to the issue of whether the interpretive rule should receive deference as an authoritative agency interpretation of a statute under Chevron v. Natural Resources Defense Council. He found Chevron to be inapplicable because the Controlled Substances Act did not grant the attorney general authority to declare state-established standards of medical care to be “illegitimate” medical purposes. The opinion explains that the attorney general’s rule-making power under the Controlled Substances Act is limited—he may classify drugs as “controlled,” and he may register physicians. Justice Kennedy viewed the power to “control” drugs as relating to the ability to place them on the proscribed schedules that the Act established. Since the case does not focus on whether the drugs were properly classified on one of the schedules, the Court found this power to be irrelevant. Its analysis, therefore, centered on whether the interpretive rule could be based on the authority to register physicians “in the public interest.”

On the face of it, the attorney general’s authority seems broad indeed. The statute instructs him to focus on factors such as the state’s recommendation, compliance with state and federal law, and public health and safety. Justice Kennedy, however, found that the reference to public health and safety was not a general grant of authority for the attorney general to develop his own standards of medical care but rather a reference to standards created by other actors, particularly the U.S. Department of Health and Human Services secretary, who is also given a role in the administration of the statute. Justice Kennedy observed that in interpreting statutes that “divide authority” we presume that Congress intended to invest interpretive power in the administrative actor in the best position to exercise policy-making expertise.

Having cast Chevron deference aside, the Court turned to the issue of whether the interpretive rule was correct under the more limited principles of Skidmore deference. Noting that the attorney general in this instance lacked expertise in the subject matter and did not consult with agencies or outside actors that do have such expertise, the Court proceeded to consider the merits of the statutory question. Not surprisingly, Justice Kennedy wrapped up his opinion with a finding that the interpretive rule is not authorized by the Controlled Substances Act because the provisions dealing with physician registration are not intended as a plenary power to regulate the medical profession; instead the provisions incorporate state-established standards of medical care.

Writing for three dissenters, Justice Scalia took the majority to task at every turn. Justice Scalia rejected the argument that Auer deference is inappropriate; the regulation at issue does indeed

29Id.
30Id. at 916 (citing Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984)).
31Id.
32Id.
34Gonzales, 126 S. Ct. at 920–21.
35Id. at 921 (quoting Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144 (1991)).
36Id. at 922. Skidmore deference accords weight to an agency's interpretation to the extent that the administrative position is persuasive, considering the validity of its reasoning, consistency with other pronouncements, and other factors. See Skidmore v. Swift Company, 323 U.S. 134 (1944).
37Gonzales, 126 S. Ct. at 923.
38Id. at 922–26.
39Gonzales, 126 S. Ct. at 926 (Scalia, J., dissenting).
interpret (rather than merely track) the federal statute, he found, and, in any event, Chevron deference should apply since the interpretation is an expression of the attorney general’s power to “control” drugs. According to Justice Scalia, the power to “control” drugs entails much more than the question of whether a drug should be on or off the list of prescribed substances and includes authority to determine how listed drugs are used. The statutory term “legitimate medical purpose” is a term of art with a specific range of meanings, and assisted suicide is simply not a legitimate medical purpose, Justice Scalia, putting issues of deference aside, argued.

The Court barely mentioned principles of deference in its badly fractured decision in Rapanos v. United States. In Rapanos the issue was the interpretation of the term “navigable waters” in the Clean Water Act; the statute defines the term simply as “waters of the United States.” In what might be a preview of an enduring alignment on the Roberts Court, the split was 4-1-4, with Justice Kennedy in the center as the swing voter. Justice Scalia’s plurality opinion, joined by Justices Thomas, Alito, and the chief justice, stressed that the term “waters” as defined by Webster’s dictionary is limited to relatively permanent standing or flowing bodies of water. By contrast, the Army Corps of Engineers’ interpretation included intermittently wet areas that drain into navigable waterways. In dismantling the Corps’ interpretation, Justice Scalia dismissed the fact that the agency’s interpretation was long-standing and had been well known to Congress for decades; he described the “entrenched” position of the agency as a “30-year adverse possession” claim. Finding no ambiguity in the statute that could support the agency’s interpretation, the opinion similarly brushed aside any claim of deference.

Not surprisingly, Justice Stevens’s dissent opened with an appeal to deference to the Army Corps of Engineers and a call for respect for the agency charged with implementing the policies of the Act; Justice Stevens referred to the agency’s position as “a quintessential example of the executive’s reasonable interpretation of a statutory provision.” Justice Kennedy, whose concurrence swung the outcome of the case against the government, pursued a middle ground (rejecting the Corps’ interpretation) but offered an alternative reading of the statute (according more discretion to the agency).

Individuals with Disabilities in Education Act

Advocates for public school children with disabilities were disappointed by this term’s two decisions interpreting different provisions of the Individuals with Disabilities in Education Act (IDEA), which was enacted to ensure that “all children with disabilities have available to them a free appropriate public

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40 Id. at 928–29.
41 Id. at 929–30.
42 Id.
44 Rapanos, 126 S. Ct. at 2211 (interpreting Clean Water Act, 33 U.S.C. § 1362(7)).
45 Id. at 2225.
46 Id. at 2216–17.
47 Id. at 2231.
48 Id. at 2232.
49 Id.
50 Rapanos, 126 S. Ct. at 2252 (Stevens, J., dissenting). Justice Stevens was joined by Justices Breyer, Ginsburg, and Souter.
51 Id. at 2236 (Kennedy, J., concurring in the judgment).
education.” The IDEA requires public school districts to create an “individualized education program” (IEP) for every disabled child. Parents may challenge the appropriateness of their child’s IEP by requesting an impartial due process hearing. In Schaffer v. Weast, the first of this term’s IDEA cases, the question before the Court was which party—the parents or the school district—bears the burden of persuasion at these administrative hearings.

In Schaffer the parents of a child with various disabilities were dissatisfied with the IEP proposal by the school district, and, after enrolling their child in a private school, they initiated a due process hearing to recover the costs of the private education. After the first hearing, the administrative law judge deemed the evidence to be “close” and ruled in favor of the school district after concluding that the parents bore the burden of persuasion in such a hearing under the IDEA.

The parents sought judicial review of the administrative law judge’s decision in the federal district court, which reversed the judge and held that the school district bore the burden of persuasion in IDEA due process hearings. After several appeals and remands, a divided panel of the Fourth Circuit, while acknowledging a split in the circuits on the issue, concluded that “the normal rule of allocating the burden to the party seeking relief” required the parents to bear the burden of persuasion in a due process hearing under the IDEA.

Writing for a six-person majority, in one of her final opinions for the Court, Justice O’Connor concluded that “the burden [of persuasion] lies, as it typically does, on the party seeking relief.” After observing that “[t]he plain text of IDEA is silent” on the issue, the majority opinion essentially begins and ends by reference to “the ordinary default rule that plaintiffs bear the risk of failing to prove their claims” and the general presumption that “plaintiffs bear the burden of persuasion regarding the essential aspects of their claims.” The Court also expressed concern that allocation of the burden to the school districts would increase the already “expensive” administrative and legal costs imposed by the IDEA’s procedural requirements.

“Under typical civil rights and social welfare legislation, the complaining party,” Justice Ginsburg first acknowledged in a forceful dissent, bears the burden of alleging and proving discrimination or entitlement to statutory benefits. She argued, however, that “[t]he IDEA is atypical in this respect: It casts an affirmative, beneficiary-specific obligation on providers of public education.” Since the statute imposes upon school districts the obligation to create an IEP
suitable to the special needs of each disabled child, Justice Ginsburg reasoned that the district, as “[t]he proponent of the IEP... is properly called upon to demonstrate its adequacy.” 65 She argued that “the school district is... in a far better position to demonstrate that it has fulfilled its statutory obligation than the disabled student’s parents are in to show that the school district has failed to do so” because, for example, “the school has better access to relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child’s education), and greater overall educational expertise than the parents.” 66

With respect to the majority’s concern over costs, Justice Ginsburg countered by pointing to nine states which filed amicus briefs in support of the parents’ position: “If allocating the burden to school districts would saddle school systems with inordinate costs, it is doubtful these states would have filed in favor of petitioners.” 67

Justice Breyer filed a separate dissent, in which he characterized the case as presenting “a relatively minor issue that should not often arise” because cases such as this, where the administrative law judge “finds the evidence in precise equipoise, should be few and far between.” 68 In Breyer’s view, Congress left the burden-of-persuasion question to the states, and he would have remanded for a determination of that issue under applicable state law principles. 69

The second case which implicated the IDEA was Arlington Central School District v. Murphy. 70 There the parents of a child with disabilities had prevailed in IDEA proceedings brought to recover the cost of a private school placement. 71 The Court of Appeals eventually awarded the parents reimbursement for a nonattorney educational expert’s consulting services (in the amount of $8,650) for work performed during the IDEA proceedings. 72 The principal issue on appeal was whether the fee-shifting provision of the IDEA, 20 U.S.C. § 1415(i)(3)(B), authorized the reimbursement of expert witness fees as a portion of the “costs” awardable to prevailing parties. 73 The Second Circuit concluded, based primarily upon a statement appearing in the legislative history of the statute, that Congress intended to authorize the award of expert fees as part of the costs to the prevailing party. 74 The Supreme Court granted certiorari to resolve a conflict among the circuits on that issue. 75

In a 6-to-3 decision reversing the Second Circuit, the Court held that the IDEA did not “authorize recovery of expert

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65Id.
66Id. (Ginsburg, J., dissenting) (quoting Lascari v. Board of Education of Ramapo Indian Hills Regional High School District, 560 A.2d 1180, 1188-89 (N.J. 1989)). Justice O’Connor responded that the various procedural protections afforded parents under the IDEA and its regulations provided a sufficient counterweight to the school district’s conceded “natural advantage in information and expertise.” Id. at 536.
67Id. at 539 (Ginsburg, J., dissenting). In a curious reversal of position, the United States filed an amicus brief in support of the parents’ position before the Court of Appeals but advocated on behalf of the school district before the Supreme Court. Id.
68Id. at 541 (Breyer, J., dissenting).
69Id. The majority declined to address Justice Breyer’s novel argument because neither party raised it. The majority also declined to decide whether the states could, if they desired, “override” the “default rule” and expressly allocate the burden of persuasion upon the school district by statute or regulation. Id.

71Id. at 2458.
72Id.
73Murphy, 402 F.3d 332, 336 (2d Cir. 2005). Section 1415(i)(3)(B) provides that “[i]n any action or proceeding brought under this section, the Court, in its discretion, may award reasonable attorneys’ fees as part of the costs” to the “parents of a child with a disability” who is “the prevailing party” in the action.
74Murphy, 402 F.3d at 336 (citations omitted).
75Murphy, 126 S. Ct. at 2458.
fees as part of the costs." Justice Alito wrote the majority opinion, joined by Justices Scalia, Thomas, Kennedy, and Chief Justice Roberts. The opinion’s analysis rested upon three points. First, the plain language of the fee-shifting provision of the IDEA made no reference to expert fees and allowed only for an award of reasonable attorney fees “as part of the costs” to the prevailing party. As the Court of Appeals itself recognized, “‘costs’ is a term of art that generally does not include expert fees.” And federal statutes governing the taxation of costs and fees in federal court strictly limit the list of normally recoverable costs.

Turning from the statutory text, the majority next contended that “the strongest support for our interpretation of the IDEA is supplied by our decisions and reasoning” in two cases: Crawford Fitting Company v. J.T. Gibbons Incorporated and West Virginia University Hospitals Incorporated v. Casey. In Crawford Fitting the Court held that the authorization of an award of “costs” to the prevailing party in Federal Rule of Civil Procedure 54(d) did not include reimbursement for fees paid to expert witnesses and broadly stated that, “absent statutory or contractual authorization for the taxation of the expenses of a litigant’s witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.”

The decision in Casey, according to Justice Alito, “even more dramatically” supported the majority’s interpretation. Casey interpreted the fee-shifting statute of 42 U.S.C. § 1988, which, in language substantially identical to the IDEA, authorized prevailing parties in civil rights actions to be awarded “a reasonable attorney’s fee as part of the costs.” In Casey the Court held that neither the term “reasonable attorney’s fee” nor the term “costs” could be read to authorize reimbursement for fees paid to expert witnesses.

Ordinarily the majority’s statutory analysis, buttressed by the holdings in Crawford Fitting and Casey, might have been sufficient to support its conclusion. However, the Court of Appeals had relied upon an express statement in the Conference Committee Report relating to the statute’s enactment; the statement provided that “[t]he conferees intend that the term ‘attorney’s fees as part of the costs’ include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the ... case.”

Faced with such specific evidence of congressional intent, Justice Alito countered with the third and most controversial argument of his opinion. The IDEA, he observed, was enacted pursuant to the Spending Clause of the Constitution. Providing federal funds to assist state and local agencies in educating children with disabilities, the IDEA conditions

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76 Id. at 2457.
77 Id.
78 Id. at 2459–60 (citing 20 U.S.C. § 1415(i)(3)(B)).
79 Id. at 2459 (quoting Murphy, 402 F.3d at 336).
80 Id. at 2460 (citing 28 U.S.C. §§ 1821, 1920). Section 1821 limits recovery for “witness fees” to $40 per diem and travel reimbursement.
81 Murphy, 126 S. Ct. at 2461 (citing Crawford Fitting Company v. J.T. Gibbons Incorporated, 482 U.S. 437 (1987), and West Virginia University Hospitals Incorporated v. Casey, 499 U.S. 83 (1991)).
82 Crawford Fitting Company, 482 U.S. at 445.
83 Murphy, 126 S. Ct. at 2462.
85 Id. (citing Casey, 499 U.S. at 102)
87 Murphy, 126 S. Ct. at 2458 (citing U.S. Const. art. I, § 8, cl. 1).
that funding upon a state’s “compliance with extensive goals and procedures.”

Under the Court’s Spending Clause jurisprudence, he asserted, “when Congress attaches conditions to a State’s acceptance of federal funds, the conditions must be set out ‘unambiguously,’” and “[s]ates cannot knowingly accept [funding] conditions of which they are ‘unaware’ or which they are ‘unable to ascertain.’” The Spending Clause, according to the majority, requires “clear notice” to the states of their potential liability for expert witness fees under the IDEA: “In a Spending Clause case, the key is not what a majority of the members of both Houses intend, but what the States are clearly told regarding the conditions that go along with the acceptance of those funds.”

Fortified by the Spending Clause analysis, Justice Alito brushed aside the troublesome evidence of congressional intent:

Whatever weight this legislative history would merit in another context, it is not sufficient here…. Here, in the face of the unambiguous text of the IDEA and the reasoning in Crawford Fitting and Casey, we cannot say that the legislative history on which respondents rely is sufficient to provide the requisite fair notice [under the Spending Clause].

The four other members of the Court all centered their attacks upon the majority’s invocation of the Spending Clause.

Justice Ginsburg actually agreed with the majority’s ultimate interpretation of the statute but filed a concurring opinion to emphasize her disagreement with “[t]he Court’s repeated references to a Spending Clause—derived ‘clear notice’ requirement.” In her view the majority’s reliance upon an analytical Spending Clause “prop” was unnecessary in light of the Court’s otherwise persuasive analysis.

Justice Breyer, joined by Justices Souter and Stevens, dissented. He dismissed the majority’s Spending Clause discussion and argued that the Court had misinterpreted its prior decisions: “[n]either Pennhurst nor any other case suggests that every spending detail of a Spending Clause statute must be spelled out with unusual clarity.” The issue of whether expert fees may be recovered in IDEA proceedings is “just such a detail” upon which, he asserted, a state’s decision to participate in the federal program surely would not have turned.

The dissent also took issue with the majority’s statutory interpretation, and particularly with its “failure to consider fully the statute’s legislative history.”

Justice Breyer concluded with a rhetorical flourish: “By disregarding a clear statement in a legislative report adopted without opposition in both Houses of Congress, the majority has reached a result no member of Congress expected or overtly desired…. And it has adopted an approach that, I fear, divorces law from life.”

Whether Justice Alito’s novel interjection of the Spending Clause into con-

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88Id. (citation omitted).
89Id. at 2459 (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)).
90Id. at 2459, 2463.
91Id. at 2463.
92Murphy, 126 S. Ct. at 2464 (Ginsburg, J., concurring in part and concurring in the judgment).
93Id. at 2465.
94Murphy, 126 S. Ct. at 2466 (Breyer, Stevens, and Souter, JJ., dissenting).
95Id. at 2471–72.
96Id. at 2472.
97Id. at 2474.
98Id. at 2475.
tested issues of statutory interpretation will prove to be an emerging doctrinal tool with respect to future battles over access to the federal courts remains to be seen.

Exhaustion of Administrative Remedies

The Court’s decision in Woodford v. Ngo significantly and directly narrowed federal court access for incarcerated persons throughout the nation. The case arose under the Prison Litigation Reform Act of 1995 (PLRA), which provides that “[n]o action [in federal court] shall be brought with respect to prison conditions ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” At issue was the interpretation of the statute’s exhaustion requirement, described by the Court as “[a] centerpiece” of the PLRA’s effort to reduce the quantity of prisoner lawsuits in federal court. Respondent Ngo, an inmate in the California prison system, was prohibited by prison officials from participating in certain “special programs” including a variety of religious activities. Contesting the prohibition, respondent filed an administrative grievance, which prison officials denied as untimely because it was not filed within fifteen days of the action being challenged, as required by prison regulations. Following an unsuccessful administrative appeal of this denial, and the denial of a subsequent grievance (also as untimely) challenging the prison’s ongoing restrictions on his participation, respondent sued the prison administrators in federal district court for alleged violation of his constitutional rights. The district court dismissed the action because respondent had not properly exhausted his administrative remedies as required by the PLRA.

On Ngo’s appeal, the Ninth Circuit, reversing the district court, held that, notwithstanding respondent’s untimely invocation of the prison grievance procedure, respondent had satisfied the PLRA’s exhaustion requirement simply because no further administrative remedies “remained available to him.” The Supreme Court granted certiorari to resolve a conflict among the circuits on the question of whether the PLRA requires “proper” exhaustion, including compliance with administrative timelines and procedures, or whether the “bare unavailability” of administrative remedies—even if resulting from the prisoner’s own procedural default—satisfies the statutory requirement.

In an opinion joined by Justices Scalia, Kennedy, Thomas, and Chief Justice Roberts, Justice Alito concluded that the exhaustion requirement of the PLRA required “proper” exhaustion: “to exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require.”

In determining the meaning of the exhaustion requirement in the context of the PLRA, the majority opinion engaged in a lengthy analysis of the purposes and policies behind the general exhaustion doctrine in administrative law, as informed by the specific exhaustion prin-

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102Id. at 2383–84.
103Id. at 2384.
104Id. at 2384, 2403.
105Id. at 2384.
106Id. (citing Ngo, 403 F.3d 620, 629–30 (9th Cir. 2005)).
107Id. at 2384.
108Id. (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir.), cert. denied, 537 U.S. 949 (2002)). The Court’s holding was consistent with the majority of the circuit courts which had addressed the issue. Ngo, 126 S. Ct. at 2384.
ciples incorporated in the law of habeas corpus.\textsuperscript{109} Noting that the "exhaustion requirements are designed to deal with parties who do not want to exhaust," the Court observed that requiring "proper" compliance with administrative agency procedures "creates an incentive for these parties to do what they would otherwise prefer not to do, namely, to give the agency a full and fair opportunity to adjudicate their claims."\textsuperscript{110} Ultimately the majority's conclusion appeared to rest upon its belief that "[i]t is most unlikely that the PLRA, which was intended to deal with what was perceived as a disruptive tide of frivolous prisoner litigation ... [would allow] a party to bypass deliberately the administrative process by flouting the agency's procedural rules."\textsuperscript{111} To allow the PLRA's exhaustion provision to be satisfied by noncompliance with the prison's administrative procedures or timelines would, in the Court's view, "turn that provision into a largely useless appendage."\textsuperscript{112}

Justice Stevens, joined by Justices Souter and Ginsburg, filed a sharp dissent rejecting the majority's central assumption that, absent a severe sanction for doing so, "prisoners will purposely circumvent prison grievance procedures."\textsuperscript{113} Moreover, the text of the statute, argued the dissent, is "unambiguous…. It says nothing about the reasons why a grievance may have been denied. It does not distinguish between a denial on the merits and a denial based on a procedural error.... It does not impose a waiver, or a procedural default, or sanction upon those prisoners who make procedural errors."\textsuperscript{114} In the dissent's view, the statute cannot be read to punish "prisoners who make reasonable, good faith efforts to comply with relevant administrative rules but, out of fear of retaliation, a reasonable mistake of law, or simply inadvertence, make some procedural misstep along the way."\textsuperscript{115} Justice Stevens proposed a "simple solution" to address the majority's concern with prisoners "who seek to deliberately bypass" state administrative remedies: the federal courts could "simply exercise their discretion to dismiss suits" brought by such prisoners.\textsuperscript{116}

The dissent emphasized that the majority left open the question of whether the exhaustion requirement would apply even to administrative procedures which do not provide "a meaningful opportunity for prisoners to raise meritorious grievances."\textsuperscript{117} Justice Stevens predicted that "this question is sure to breed a great deal of litigation in federal courts in the years to come" and described a variety of situations, all taken from prior federal court decisions, which called into question the integrity of the administrative grievance process.\textsuperscript{118}

\textsuperscript{109}Ngo, 126 S. Ct. at 2384–87.
\textsuperscript{110}Id. at 2385. The majority suggested that prisoners, in particular, might have reasons grounded in "bad faith" for avoiding administrative exhaustion requirements, including "filing a lawsuit primarily as a method of making some correctional officer's life difficult, or perhaps even speculating that a suit will mean a welcome—if temporary—respite from his or her cell." \textit{id}. at 2385 & n.1.
\textsuperscript{111}Id. at 2389.
\textsuperscript{112}Id. at 2387.
\textsuperscript{113}Ngo, 126 S. Ct. at 2402 (Stevens, Ginsburg, and Souter, JJ., dissenting).
\textsuperscript{114}Id. at 2393.
\textsuperscript{115}Id. at 2402.
\textsuperscript{116}Id. In his brief concurrence in the majority's judgment, Justice Breyer adopted a similar approach but would put the burden on prisoners who did not "properly" exhaust their administrative remedies to demonstrate that their case falls within one of the "well-established [common-law] exceptions" to the exhaustion requirement. \textit{Ngo,} 126 S. Ct. at 2393 (Breyer, J., concurring in the judgment).
\textsuperscript{117}Ngo, 126 S. Ct. at 2392.
\textsuperscript{118}Ngo, 126 S. Ct. at 2406 (Stevens J., dissenting). E.g., "Does a 48 hour limitations period furnish a meaningful opportunity for a prisoner to raise meritorious grievances in the context of a juvenile who had been raped and repeatedly assaulted, with the knowledge and assistance of the guards, while in detention?" 126 S. Ct. at 2403 (Stevens, J., dissenting) (citations omitted).
Injunctive Relief for a Constitutional Violation

In *Ayotte v. Planned Parenthood of Northern New England*, an abortion case, the focus was the remedy rather than the merits.\(^{119}\)

With no dispute that New Hampshire’s parental notification statute swept too broadly because it lacked an exception to ensure protection of the minor mother’s health, the Court, in a unanimous opinion by the soon-to-be-departed Justice O’Connor, sought to tailor the relief to the limited constitutional imperfection. The First Circuit, by contrast, had invalidated the law altogether.\(^{120}\)

As its guiding parameter, the Court stated that, “when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.”\(^{121}\)

Three “interrelated principles” dictated the Court’s determination of the appropriate remedy.\(^{122}\) The first is that a court should not nullify more than is necessary in order to avoid frustrating the intent of the legislature.\(^{123}\) Second, the Court noted that, because its “constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it.”\(^{124}\) Third, legislative intent is crucial to devising a remedy: “After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?”\(^{125}\)

Applying this approach to the case before it, the Court blunted its criticism of the lower courts’ complete invalidation of the statute by noting that the Supreme Court itself had taken the same action with respect to a Nebraska law prohibiting “partial birth abortion.” The difference, the Court pointed out, was that, while the parties in the Nebraska case did not request limited relief, the parties in the instant case appeared to prefer, or at least accept, a more modest remedy.\(^{126}\)

The Court therefore remanded the case so that the lower courts could determine the precise nature of the legislative intent and devise the appropriate relief accordingly.\(^{127}\)

In a second case involving a challenge to Vermont’s campaign financing restrictions, however, the Court saw no need to remand for a determination of legislative intent.\(^{128}\) Justice Breyer’s plurality opinion for the Court concluded that to sever the unconstitutional contribution-limit provisions from others that were acceptable was not possible since to do so “would require us to write words into the statute …, or to leave gaping loopholes …, or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found.”\(^{129}\) He therefore conclud-

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\(^{120}\) *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53 (1st Cir. 2004).

\(^{121}\) *Ayotte*, 126 S. Ct. at 967 (citations omitted).

\(^{122}\) *Id.*

\(^{123}\) *Id.*

\(^{124}\) *Id.* at 968 (citation, internal quotation marks, and brackets omitted).

\(^{125}\) *Id.* (citations omitted).

\(^{126}\) *Id.* at 969.

\(^{127}\) *Id.*


\(^{129}\) *Id.* at 2500. The chief justice and Justice Alito joined in this portion of the decision. *Id.* (Alito, J., concurring in part and concurring in the judgment). Justice Kennedy concurred in the judgment but did not discuss the remedial issue, *id.* at 2501 (Kennedy, J., concurring in the judgment), as did Justice Thomas, joined by Justice Scalia, in a separate concurrence. *Id.* at 2501–6 (Thomas, J., concurring in the judgment). Justice Stevens and Justice Souter filed decisions dissenting from the decision on the merits. *Id.* at 2506 (Stevens, J., dissenting), 2511 (Souter, J., dissenting). Thus only three justices explicitly embraced the remedial discussion.
ed that the state legislature “would have intended us to set aside the statute’s contribution limits, leaving the legislature free to rewrite those provisions in light of the constitutional difficulties we have identified.”

These two decisions do not break any new ground, but together they demonstrate the importance that the Court ascribes to discerning legislative intent for purposes of shaping injunctive relief when part of a statute is held unconstitutional. The Ayotte decision in particular offers a helpful road map for analyzing the issue.

Retroactivity of Statutes

In two decisions the Court dealt at great length—and often in mind-numbing detail—with the question of when a statute is impermissibly retroactive. In the first case, the issue was the retroactivity of a substantive provision, and, in the second, the issue was retroactivity in the context of a jurisdiction-stripping law.

Justice Souter’s opinion for eight members of the Court in Fernandez-Vargas v. Gonzales is a useful guidance for retroactivity analysis. Relying on a key retroactivity case, Landgraf v. USI Film Products, the Court noted the “sequence of analysis” when a new statute is alleged to affect a vested right or impose a burden for an act that occurred before the statute’s enactment. If Congress has not “expressly prescribed the statute’s proper reach,” courts should employ the rules of construction to determine its temporal applicability. If no clear answer presents itself, then a court must ask whether application of the statute would have a negative impact on the rights, liabilities, or duties of the person objecting based on conduct that preceded its passage. “If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the absence of a clear indication from Congress that it intended such a result,” the Court found.

At issue in Fernandez-Vargas was whether an amendment to the immigration law, which was passed in late 1996 and effective on April 1, 1997, applied to an alien who had been deported for immigration violations but who had reentered the country, living here since 1982, ultimately starting a business, and fathering a child and marrying a wife; both child and wife were U.S. citizens. Under the previous version of the law, he could have applied for adjustment of his status, but the new law automatically reinstated the prior order of removal due to his illegal reentry into the country and rendered that prior order not subject to review.

Since the new statute did not expressly deal with individuals illegally in the country on its effective date, the Court turned to the canons of construction. It rejected Fernandez-Vargas’s contention, based on the interpretive rule of negative implication, that Congress’ failure to include temporal reach language in the new law, when such language had been included in the prior version, indicated that Congress did not intend the new law to be applicable to preenactment reen- trants. Given that the point of the statute was “to expand the scope of the reinstatement authority and invest it with something closer to finality, ... it would make no sense to infer that Congress meant to except the broad class of persons who had departed before the time of enactment but who might return illegally at some point in the future.”

130Id. at 2500.
131Id. at 2428 (relying on Landgraf v. USI Film Products, 511 U.S. 244 (1994)).
132Id. (quoting Landgraf, 511 U.S. at 280).
133Id.
134Id. (citations, quotation marks, and brackets omitted).
135Id. at 2426–27.
136Id. at 2429.
The Court concluded its analysis by explaining that the new law had not actually had a retroactive effect on Fernandez-Vargas. Thus the Court avoided the presumption against retroactivity that otherwise would have attached. The Court found this case to be unlike *INS v. St. Cyr*, where a law that took effect after an alien had pleaded guilty to a crime changed the alien’s immigration status from the possibility of deportation to a guarantee of deportation.\(^\text{138}\) The new law in this case was applicable because of the ongoing and present violation, not a past one. The Court indicated: “[I]t is the conduct of remaining in the country after entry that is the predicate action; the statute applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country.”\(^\text{139}\) That leaving the country to avoid the operation of the new law before its effective date would have had severe personal consequences for Fernandez-Vargas did not affect the analysis. The Court stated: “[T]he branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law.”\(^\text{140}\)

Reading the history of the new law and its predecessor versions in light of “our normal rules of statutory construction,” Justice Stevens, the sole dissenter, believed “that Congress intended the provision to cover only postenactment reentries.”\(^\text{141}\) He also disagreed that the new law had no retroactive effect. Under the previous rule, he explained, Fernandez-Vargas was encouraged to stay in the country, but, as of April 1, 1997, “all of [his prior] activities were rendered irrelevant in the eyes of the law.… [R]egardless of whether his 1982 reentry was or was not an act that he could not now ‘undo,’ it is certainly an act to which the 1996 reinstatement provision has attached serious adverse consequenc-es.”\(^\text{142}\) Given this “undeniably harsh retroactive effect,” and with no clear indication from Congress that such a result was intended, Justice Stevens would have applied the presumption against retroactivity and held that the new provision did not apply to Fernandez-Vargas.\(^\text{143}\)

If the analysis in *Fernandez-Vargas* seems convoluted—with a certain *Back to the Future* confusion to it—the analysis in the other retroactivity case is close to incomprehensible. In *Hamdan v. Rumsfeld*, this term’s Guantanamo Bay case, the jurisdictional retroactivity issue arose when the government filed a motion to dismiss Hamdan’s previously granted petition for certiorari due to the intervening passage of the Detainee Treatment Act of 2005.\(^\text{144}\) Putting off that motion until the argument on the merits, the Court, in a 5-to-3 opinion authored by Justice Stevens, concluded that the Detainee Treatment Act did not apply to Hamdan and therefore did not strip the federal courts of jurisdiction.\(^\text{145}\) The case arose as a petition for writ of habeas corpus to avoid trial before a military commission. After the Supreme Court agreed to review the Court of Appeals’ decision allowing the commission to go forward, Congress passed the Detainee Treatment Act.

The complicated statutory interrelationships on which the Court relied are impossible to describe in fewer than several pages of references and cross-references to paragraphs, subpara-

\(^\text{138}\) Id. at 2432 (referring to *INS v. St. Cyr*, 533 U.S. 289 (2001)).

\(^\text{139}\) Id. at 2432.

\(^\text{140}\) Id. at 2433.

\(^\text{141}\) *Fernandez-Vargas*, 126 S. Ct. at 2435 (Stevens, J., dissenting).

\(^\text{142}\) Id. at 2436 (Stevens, J., dissenting).

\(^\text{143}\) Id. (Stevens, J., dissenting).


\(^\text{145}\) Chief Justice Roberts did not participate in the case because he had been on the Court of Appeals panel that had ruled on the case below. See *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).
graphs, sections, and subsections of the Detainee Treatment Act. A few principles were established or reiterated, however. As in traditional retroactivity analysis, the Court noted a presumption against application of an intervening statute conferring or ousting jurisdiction. An exception to this, however, applies when the only effect of the new statute is to change the tribunal that will hear the case because that does not alter a substantive right.

Backtracking in the “sequence of analysis” discussed in Fernandez-Vargas, the Court observed that the “normal rules of construction, including a contextual reading of the statutory language, may dictate” that a jurisdiction-stripping provision would not apply to a pending case. In this case, that rule of construction is the negative inference drawn when language is excluded from one provision of a statute while included in other provisions. Viewing the lack of relevant language as “evidence of deliberate omission,” the Court concluded that “Congress’ rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government’s interpretation.” Accordingly the courts had jurisdiction to consider the writ, the motion to dismiss was denied, and the Court went on to hold that the military commissions lacked the authority to try detainees.

Justice Scalia’s dissent, joined by Justices Thomas and Alito, took issue with the core premise of the majority’s analysis. The statute’s prohibition against jurisdiction was “simply not ambiguous as between pending and future cases,” a position supported by “[a]n ancient and unbroken line of authority attest[ing] that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date.” The majority, Justice Scalia added with his characteristic definitiveness, “cannot cite a single case in the history of Anglo-American law (before today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation.” Furthermore, since the statute’s application to the instant case was “entirely clear,” Justice Scalia found that the negative inference on which the majority rested was meaningless, as that canon of construction is relevant only to clarify an ambiguous provision.

Due Process Notice Requirements

Injecting a note of common sense into the question of what constitutes adequate notice, the Court held that due process was not satisfied when a state failed to take additional action after a certified letter was returned unclaimed because the intended recipient no longer lived at the address where it was sent. The surprising Jones v. Flowers decision may derive from the effect of

146Hamdan, 126 S. Ct. at 2764–65.
147Id. at 2765.
148Hamdan, 126 S. Ct. at 2765.
149Id. at 2765–66.
150Id. at 2766; see also id. at 2766 nn. 9–10.
151Id. at 2769.
152Hamdan, 126 S. Ct. at 2810 (Scalia, J., dissenting).
153Id. at 2812 (Scalia, J., dissenting).
154Id. at 2812–13 (Scalia, J., dissenting). In the course of dissecting—or perhaps disemboweling—the majority’s opinion, Justice Scalia, in characteristically entertaining prose, invoked analogies from Ancient Greece in disputing the majority’s contention that some “floor statements” should be discounted because they were not spoken but inserted after the fact into the Congressional Record. Id. at 2815–16 (Scalia, J., dissenting). And, in an aside suggesting a possible future role for another form of legislative history, the dissent rebuked the majority for its failure to rely on that authority: “Of course in its discussion of legislative history the Court wholly ignores the President’s signing statement, which explicitly set forth his understanding that the DTA [Detainee Treatment Act of 2005] ousted jurisdiction over pending cases.” Id. at 2815–16 (Scalia, J., dissenting) (footnote omitted).
the ineffective notice being the sale of the intended recipient’s house for property tax delinquency, but the outlined principles are, on their face, applicable to any notice situation. This outcome from this Supreme Court borders on the remarkable, and the lineup in the majority is not one likely to be seen soon again, if ever.

Chief Justice Roberts wrote the opinion for the Court, with Justice Thomas providing a dissent joined by Justices Scalia and Kennedy. (Justice Alito did not participate.) The majority recited the familiar refrain that due process does not require actual notice, but the dissent noted, perhaps correctly, that the logic of the decision “requires the States to achieve something close to actual notice.”

The Court viewed its prior notice decisions as setting the standard only for notification when the original notice was sent, and this left unanswered the question of whether a government has additional responsibility when it becomes aware that the attempted notification had failed.

Repeatedly citing language from the seminal notice case, *Mullane v. Central Hanover Bank and Trust Company*, to the effect that “the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it,” the Court determined that, when the government knows that notice was not received, it must at least consider whether further reasonable steps are available.

Ignoring that the letter was unclaimed is no different, the chief justice theorized, from if the government official had taken no additional action after he had “prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain.”

To support its belief that a government must make an extra effort when it becomes aware that no notice was received, the majority relied on two decisions in which the government had been required to utilize “unique information about an intended recipient.” Those two situations involved a notice of forfeiture sent to a home address when the government knew that the property owner was incarcerated, and notice by mail, posting, and publication when the government knew that the property owner was incompetent. The dissent saw these two decisions as inapposite because the government’s awareness that its effort could not be effective occurred before notification was attempted: “[W]hether a method of notice is reasonably calculated to notify the interested party is determined *ex ante*, i.e., from the viewpoint of the government at the time its notice is sent.” The majority found that distinction unpersuasive.

Once it had determined that due process required the government to contemplate taking further action, the Court had to address the second question of whether there were any steps that the government could have taken. The Court posited: “What steps are reasonable in response

156 Id. at 1724 (Thomas, J., dissenting).
159 Id. at 1716.
160 Id. at 1716.
161 Id. (discussing *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972), and *Covey* v. *Town of Somers*, 351 U.S. 141 (1956)).
162 Id.
163 Id. at 1723 (Thomas, J., dissenting).
164 Id. at 1716.
165 Id. at 1718.
to new information depends upon what the new information reveals.”

In this case the Court suggested that following up the unclaimed certified letter with regular mail, which does not require the signature of the recipient, and posting a notice on the front door would have been sufficient.

In dissent Justice Thomas suggested that neither of these methodologies was more likely to be successful than certified mail, and, probably more important, he believed that they imposed too much of a burden on the state: “[T]he prospect of physically locating tens of thousands of properties every year, and posting notice on each, [is] impractical.”

The facts of this case—involving the potential forfeiture of one’s home to the government—followed in the wake of last term’s controversial decision allowing governments to use eminent domain to take private property for commercial development.

For that reason, the majority’s determination to find a way around the cavalier result in Dusenbery (which may have been driven by the fact that the plaintiff was a convicted drug dealer), and the Chief Justice’s willingness to throw his crucial vote in with the “liberal” wing of the Court, should be taken with a grain of salt. Still, the decision has some excellent language and principles that could be put to use in notice cases involving legal aid clients.

**Permanent Injunction Test**

The Court unanimously confirmed that the four-factor test used by equity courts when considering whether to award a permanent injunction applied to disputes arising under the Patent Act.

While patent infringement litigation is not the bread and butter of legal aid practice, Ebay v. Mercexchange does remind practitioners that a permanent injunction must be grounded on more than just a violation of the law. To obtain a permanent injunction, a prevailing plaintiff must demonstrate that (1) the plaintiff has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) when the balance of hardships between the plaintiff and defendant is considered, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.

**Statute of Limitations**

In a case that the justices themselves believed would have little practical impact, the Court held in a split vote that a district judge had the discretion (but not the obligation) to dismiss an untimely filed federal habeas petition after the state had erroneously conceded in its answer that the petition was timely.

The magistrate judge noticed the

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165Id.
166Id. at 1718–19. Since Jones’s daughter lived in the house, and finally alerted him to developments after the fact when the new owner served her with an unlawful detainer notice, the Court thought it likely that a posted notice of the government’s intent would have brought to the daughter’s attention what was contemplated. See id. at 1719.
167Id. at 1726 (Thomas, J., dissenting). Justice Thomas also decried what he viewed as the majority’s radical departure from its precedent on this issue. Id. at 1724.
168Kelo v. City of New London, 125 S. Ct. 2655 (2005). See Flowers, 126 S. Ct. at 1716 (“the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house”).
170Id. at 1839.
171Day v. McDonough, 126 S. Ct. 1675 (2006). In his dissent, Justice Scalia stated that he “agree[d] with the Court that today’s decision will have little impact on the outcome of district court proceedings.” Id. at 1688 n.2 (Scalia, J., dissenting).
state’s miscalculation and, after issuing a show-cause order, dismissed the petition as untimely. 172

The majority opinion by Justice Ginsburg recognized that statute-of-limitation defenses, such as exhaustion and procedural default, are not jurisdictional, but the Court declined to apply the general rule of the Federal Rules of Civil Procedure that the defense is forfeited if not raised in the answer. 173 Rather, the Court viewed the magistrate judge’s decision to alert the parties to his recalculation of the time at issue and then to dismiss after they had briefed the issue as having “no dispositive difference” from if the magistrate judge had informed the state of the apparent mistake and entertained an amendment to the answer, which would have allowed the state to cure the error and raise the statute of limitations as a defense. 174

In his dissent on behalf of himself and Justices Thomas and Breyer, Justice Scalia relied primarily on the Federal Rules of Civil Procedure, which “adopt the traditional forfeiture rule for unpleaded limitations defenses.” 175 Determining that habeas petitions traditionally had not been treated any differently in this context from other civil proceedings, the dissent would have rejected the magistrate judge’s right to act on his own. 176

**Subject-Matter Jurisdiction or Claim for Relief**

In *Arbaugh v. Y & H Corporation* a unanimous Court brought some clarity to “two sometimes confused or conflicted concepts: federal court ‘subject-matter jurisdiction’ over a controversy; and the essential ingredients of a federal claim for relief.” 177 The plaintiff, a former bar-tender and waitress of the defendant restaurant, claimed she was forced to leave her employment because of sexual harassment by one of the owners. 178 She brought an action alleging unlawful discrimination under Title VII of the Civil Rights Act of 1964. 179 The case was tried by a jury, which returned a verdict for the plaintiff in the amount of $40,000. 180 The defendant filed a posttrial motion in which it asserted, for the first time in the litigation, that it had fewer than fifteen employees on its payroll, and therefore did not fall within Title VII’s statutory definition of “employer.” 176 The defendant argued that the fifteen-employee threshold constituted a prerequisite for federal subject-matter jurisdiction and that the failure to meet the employee numerosity requirement required dis-
The district court, while lamenting the “unfairness” to plaintiff and “waste of judicial resources” resulting from defendant’s extraordinary delay in raising the issue, nevertheless concluded that it was bound to dismiss the case for lack of subject-matter jurisdiction. The Court of Appeals affirmed, and the Supreme Court granted certiorari to resolve a conflict among circuits as to “whether Title VII’s employee-numerosity requirement ... is jurisdictional or simply an element of plaintiff’s claim for relief.”

Justice Ginsburg’s opinion for the Court distinguished, upon the federal courts’ subject-matter jurisdiction, between statutory conditions which implicate the essential power to hear a case and conditions which simply constitute required elements of the claim for relief. The Court noted that “jurisdiction ... is a word of many, too many meanings” and cited examples where the Court itself had incorrectly applied the label. The distinction is critical in this case insofar as “subject matter jurisdiction, because it involves the Court’s power to hear a case, can never be forfeited or waived”; indeed, the issue of jurisdiction may be raised by the court on its own initiative and may be considered at any stage of the litigation even after entry of judgment. By contrast, a challenge to the plaintiff’s failure to allege or prove an essential element of the claim may not be raised after trial. If the fifteen-employee threshold constituted a jurisdictional limitation, the failure to meet that condition would require “erasure” of the judgment, but if the employee numerosity requirement concerned the merits of the plaintiff’s claim, then the defendant raised it too late.

Perhaps motivated in part by unexpressed equitable concerns, the Court had little difficulty in concluding that the employee threshold was not a “jurisdictional” element of Title VII. Nothing in the statutory language evidenced any intent that subject-matter jurisdiction was implicated by the numerosity requirement. In reinstating the plaintiff’s judgment, the Court also articulated a “readily administrable bright line” test for guidance in future cases posing the same issue: “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in nature.”


The first term of the Roberts Court showed only a few hints as to how the addition of the new chief justice and Justice Alito might push the majority further to the conservative end of the ideological spectrum. In this coming term, however, the Court will address two controversial issues that have deeply divided the courts (and the nation) for decades: abortion and affirmative action in pub-
lic education. In *Gonzales v. Carhart* the Court will review the constitutionality of the Partial Birth Abortion Ban Act of 2003, which has been struck down by several courts for its failure to include a health exception for the mother.\textsuperscript{193}

In *Parents Involved in Community Schools v. Seattle School District No. 2* the Court will consider whether racial diversity in public education is a compelling state interest, permitting the use of race as a tie-breaking factor in deciding when to admit students to the public high school of their choice.\textsuperscript{194} Two circuit courts have upheld such programs.\textsuperscript{195}

An upcoming case more likely directly to implicate issues of access to the federal courts is *Massachusetts v. Environmental Protection Agency*, where the Court likely will engage in one of its recurring (and entertaining) debates over the scope of deference to administrative agency policies, in the context of a challenge by a number of states to the Environmental Protection Agency’s refusal to regulate automobile emissions, which contribute to greenhouse gases.\textsuperscript{196}


\textsuperscript{195}Parents Involved in Community Schools, 426 F.3d at 1162; McFarland, 416 F.2d at 513.

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