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Sargent Shriver Award

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Taking action to end poverty
Snapshots of the U.S. Supreme Court’s last term show that the legal landscape is shifting significantly: The newer justices, Roberts and Alito, joined Justices Scalia and Thomas to form a strong voting block. With Justice O’Connor retired, Justice Kennedy became the swing vote on the Court—the only justice to side with the majority in all twenty-four cases decided by a 5-to-4 margin.

The Court took a decidedly conservative ideological turn on issues ranging from abortion to school desegregation to employment discrimination. When choosing a winner, the Court was more likely to favor the government over the individual and big business over the employee. The Court was also increasingly likely to close the courthouse doors to plaintiffs on procedural grounds and repeatedly suggested that if plaintiffs did not agree with the result, they should go to Congress for help. Here we focus on these access-to-court cases, which include decisions on pleading requirements, standing, statutes of limitation, deference, and attorney fees.

Pleading Requirements

This past term the Court backed away from long-standing precedent governing how the lower courts are to review the sufficiency of a complaint. In Bell Atlantic Corporation v. Twombly the Court, in a 7-to-2 decision, expressly disavowed iconic language from a venerable opinion—Conley v. Gibson—that for fifty years has underscored (in the words of the Twombly dissenters) “the relaxed pleading standards of the Federal Rules, [where] the idea was not to keep litigants out of court but rather to keep them in.” The Twombly Court’s apparent constriction of the liberal pleading requirements under Rule 8(a) of the Federal Rules of Civil Procedure has profound and troubling implications for federal court access.

Twombly was a class action brought by subscribers to four local telephone and Internet service providers. Plaintiffs alleged that the defendants had violated the Sherman


2See, e.g., Morse v. Frederick, 127 S. Ct. 2618 (2007) (school did not violate the First Amendment when it punished a student for displaying a “bong Hits 4 Jesus” banner); Ledbetter, 127 S. Ct. 2162 (finding for Goodyear Tire and Rubber in sex discrimination case).

Act, resulting in higher service fees. The complaint charged that the service providers had conspired to restrain trade by (1) engaging in certain “parallel conduct” in their respective service areas that inhibited the growth of local competition and (2) entering into tacit “agreements” to refrain from competing against one another.

The district court granted the service providers’ motion to dismiss the complaint for failure to state a claim upon which relief can be granted, concluding that the subscribers’ allegations of parallel business conduct and noncompetition agreements did not sufficiently “raise an inference that [the defendants’] actions were the result of a conspiracy” to restrain competition. The Second Circuit, holding that plaintiffs’ allegations of “parallel anti-competitive conduct” need only “include conspiracy among the realm of plausible possibilities in order to survive a motion to dismiss,” reversed the district court and reinstated the complaint.

In a 7-to-2 opinion authored by Justice Souter, the Supreme Court reversed the Second Circuit and upheld the dismissal of the complaint. At the outset the Court framed the case as “present[ing] the … question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act.” Only after a review of decisions analyzing the liability standards for antitrust violations did the Court turn to the general pleading requirements of the Federal Rules.

The majority acknowledged that Rule 8(a)(2) “requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief’” in order to “give the defendant fair notice of what the claim is and the grounds upon which it rests.” Such “grounds,” according to the Court, “require more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Applying this standard to a Sherman Act claim, the Court concluded that the complaint must allege facts sufficient to establish “plausible grounds to infer an agreement” or conspiracy. Under the Court’s new “plausibility” standard, the complaint must include at least “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” The majority observed that a heightened fact-pleading requirement for antitrust complaints was appropriate in light of the “potentially enormous expense” of discovery in antitrust class action litigation.

Had the majority ended its analysis there and expressly (or even implicitly) limited its holding to antitrust litigation, the decision would have attracted little attention outside that field. However, Justice Souter felt compelled to respond

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*Id. at 1962.

*Id. at 1964.


*Id. v. Bell Atlantic Corporation, 425 F.3d 99, 114 (2d Cir. 2005).

*Id. at 1963.

*Id. at 1965.

*Id. at 1964.

*Id. at 1965.

*Id.

*Id. at 1967.

*Indeed, the Court’s grant of certiorari quite specifically focused upon “the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.” Id. at 1963 (citing *Bell Atlantic Corporation v. Twombly*, 126 S. Ct. 2965 (2006) (granting certiorari)).
to plaintiffs’ “main argument” in opposition to a heightened pleading requirement, which was based upon this famous admonition in Conley v. Gibson: “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”\footnote{Id. at 1968 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).} The Twombly Court rejected the lower court’s understanding of “[t]his ‘no set of facts’ language” as establishing a pleading standard whereby “any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings.”\footnote{Id. at 1968 (citation omitted).} According to the Court, the phrase merely meant that a plaintiff can rely on facts not stated in the complaint to prove his claims, but it did not establish “a minimum standard of adequate pleading to govern a complaint’s survival.”\footnote{Id. at 1969.} After “puzzling the [legal] profession for 50 years,” wrote Justice Souter, “this famous phrase has earned its retirement” and is “best forgotten as an incomplete negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”\footnote{Id.} Finding the allegations in Twombly insufficient to state an antitrust claim under the Sherman Act, the Court applied its newly fashioned “plausibility” pleading standard to the complaint and reversed the Second Circuit’s judgment.\footnote{Id. at 1971–74.}

In an acerbic dissent, Justice Stevens, joined in large part by Justice Ginsberg, attacked the Court’s “dramatic departure from settled procedural law.”\footnote{Id. at 1975 (Stevens, J., dissenting).} After describing the evolution of the “Byzantine special pleading rules” of English common law to the “notice pleading” concept embodied in the Federal Rules, the dissent derided the Court’s sudden evisceration—not sought by any party before the Court in Twombly—of Conley’s classic formulation:

> If Conley’s “no set of facts” language is to be interred, let it not be without a eulogy…. I would not rewrite the Nation’s civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so.\footnote{Id. at 1978–79.}

In a final bitter attack upon the majority’s motives, Justice Stevens concluded (in the portion of his dissent not joined by Justice Ginsberg) that “[t]he transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery,” a concern which cannot “provide an adequate justification for this law-changing decision.”\footnote{Id. at 1989 (Stevens, J., dissenting).}

Interestingly the first citation to Twombly appeared just one week later in a per curiam decision which reversed the dismissal of a pro se complaint. In Erickson v. Pardus a prison inmate, suing prison officials, alleged that their unlawful termination of his treatment program for hepatitis C (in part as a disciplinary action) constituted deliberate indifference to a serious, life-threatening medical need in violation of his Eighth and Fourteenth Amendment rights.\footnote{Erickson v. Pardus, 127 S. Ct. 2197 (2007).} Although in his pro se complaint (and subsequent filings), the inmate had alleged that the defendants’ actions were causing “irreversible damage” to his liv-

\footnotesize{\textsuperscript{17}Id. at 1968 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).} 
\footnotesize{\textsuperscript{18}Id. at 1968 (citation omitted).} 
\footnotesize{\textsuperscript{19}Id. at 1969.} 
\footnotesize{\textsuperscript{20}Id.} 
\footnotesize{\textsuperscript{21}Id. at 1971–74.} 
\footnotesize{\textsuperscript{22}Id. at 1975 (Stevens, J., dissenting).} 
\footnotesize{\textsuperscript{23}Id. at 1978–79.} 
\footnotesize{\textsuperscript{24}Id. at 1989 (Stevens, J., dissenting).} 
\footnotesize{\textsuperscript{25}Erickson v. Pardus, 127 S. Ct. 2197 (2007).}
er and were “endangering [his] life,” the district court dismissed the complaint for failure to state a claim. The complaint did not, the court held, sufficiently allege that the prison officials’ conduct—as opposed to the inmate’s medical condition itself—had caused the plaintiff “substantial harm” (an essential element of an Eighth Amendment “deliberate indifference” claim).26 The Tenth Circuit affirmed.27

In a summary opinion granting plaintiff’s petition for certiorari and remanding the case for further proceedings, the Supreme Court vacated the Tenth Circuit’s decision.28 Quoting Twombly and portions of Conley, the Court emphasized that the “short and plain statement of the claim” required by Rule 8(a)(2) “need only ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’”29 The Court had little trouble concluding that plaintiff’s allegations satisfied this standard and further observed that “[t]he Court of Appeals’ departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding from the litigation’s outset without counsel.”30

While it has been suggested (and hoped) that the decision in Erickson signals a mitigation of the potential negative consequences of Twombly, at least one commentator is doubtful given (1) Justice Stevens’s clear understanding that Twombly made a dramatic change in pleading requirements and (2) the clearly distinguishing fact that Erickson involved a pro se plaintiff.31

Standing

The Supreme Court issued three major decisions addressing standing to sue under Article III. In Massachusetts v. Environmental Protection Agency, one of the few positive decisions of the term, a 5-to-4 majority found that Massachusetts had standing to sue the U.S. Environmental Protection Agency over its failure to regulate automobile emissions that contribute to global warming.32 By contrast, Hein v. Freedom from Religion Foundation Incorporated narrowed the doctrine of taxpayer standing.33 And, in a conclusory but not unimportant holding, the Court accorded standing to a group of parents in the blockbuster school desegregation cases, Parents Involved in Community Schools v. Seattle School District No.1 and its companion case Meredith v. Jefferson County Board of Education.34

Massachusetts, together with a gaggle of other states, local governments, and environmental groups, challenged, in Massachusetts v. Environmental Protection Agency, the refusal by the U.S. Environmental Protection Agency (EPA) to issue regulations limiting emissions of carbon dioxide and other greenhouse gases from new motor vehicles. EPA argued that since in its judgment carbon dioxide and other greenhouse gases are not “air pollutants” within the meaning of the Clean Air Act, it did not have authority to issue the requested regulations.35 EPA stated in the alternative that even if it did have

26Id. at 2199.
27Id.
28Id. at 2200.
30Erickson v. Pardus, 127 S. Ct. at 2200 (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976); pro se complaints must be “liberally construed” and held to “less stringent standards” than pleadings drafted by lawyers).
34Parents Involved in Community Schools, 127 S. Ct. 2738 (2007).
35Massachusetts, 127 S. Ct. at 1450.
the authority, such regulation would be unwise.\textsuperscript{36}

Writing for five justices, Justice Stevens concluded that plaintiffs had satisfied the three criteria for standing under Article III: injury in fact, causation, and redressability. His analysis opens, however, by introducing the novel proposition that this three-part analysis should be viewed more leniently when the plaintiff is a state.\textsuperscript{37} Citing the Court’s 1907 decision in \textit{Georgia v. Tennessee Copper Company}, Justice Stevens noted that “States are not normal litigants for the purposes of invoking federal jurisdiction” because they have interests as sovereigns “in all the earth and air within their domain.”\textsuperscript{38} The idea seems to be that in giving up a measure of their sovereignty by joining the union, states acquire a special claim to seek redress in the federal courts.\textsuperscript{39}

How this sovereignty gloss relates to the particulars of the standing doctrine is not clear since the Court then framed the discussion in conventional terms. Focusing first on the issue of injury-in-fact, Justice Stevens cited a number of plaintiffs’ expert affidavits that discussed the harm Massachusetts would suffer over the next century due to global warming.\textsuperscript{40} Noting that Massachusetts need not spell out “the precise metes and bounds of their soon-to-be-flooded land,” he dismissed as immaterial the contention that the harms are too generalized.\textsuperscript{41}

Turning to the proposition that defendant’s action must allegedly be the cause of plaintiff’s harm, Justice Stevens noted that EPA had repeatedly conceded that greenhouse gas emissions contributed to global warming. EPA, however, argued that to conclude that regulating greenhouse gas emission from new motor vehicles would curb global greenhouse gas emissions, particularly in light of the predicted growth of emissions from the developing world, was too speculative.\textsuperscript{42} Justice Stevens dismissed this contention as “overstated” since most regulatory action was intended as an incremental step toward resolution of a problem and that regulation of U.S. auto emissions might be only a “first step” did not render it an inappropriate subject of federal jurisdiction.\textsuperscript{43} Similarly the Court brushed aside the argument that the relief would not redress the alleged harms to plaintiffs. The majority conceded that, if granted, the relief would not by itself reverse global warming but concluded that the likely potential to slow or reduce global warming was sufficient to confer standing.\textsuperscript{44}

Having found that plaintiffs had standing, the Court addressed a second objection to its reaching the merits—EPA’s claim that the denial of a petition for rule making is not subject to judicial review. The Court, finding the situation here to be different from agency decisions to decline enforcement, which are not generally subject to judicial review, rejected this argument.\textsuperscript{45} Justice Stevens

\textsuperscript{36}Id.

\textsuperscript{37}Id. at 1454–55. This discussion of state sovereignty may be seen as a concession to Justice Kennedy, who has long been taken with appeals to state sovereign power and who cast the majority’s fifth vote. See, e.g., \textit{Alden v. Maine}, 527 U.S. 706 (1999).

\textsuperscript{38}\textit{Georgia v. Tennessee Copper Company}, 206 U.S. 230 (1907); \textit{Massachusetts}, 127 S. Ct. at 1454.

\textsuperscript{39}The Court also draws on the notion that litigants seeking to vindicate a procedural right need not meet all the requirements of redressability and immediacy, although how this concept relates to this case is not clear. \textit{Massachusetts}, 127 S. Ct. at 1453. At one point Justice Stevens refers to the “procedural right” to challenge the denial of a petition for rule making as “arbitrary and capricious.” Id. at 1454.

\textsuperscript{40}Id. at 1455–56.

\textsuperscript{41}Id. at 1456 n.21.

\textsuperscript{42}Id. at 1457–58.

\textsuperscript{43}Id.

\textsuperscript{44}Id. at 1458.

\textsuperscript{45}Id. at 1459. \textit{Heckler v. Chaney}, 470 U.S. 821 (1985), held that agency decisions not to initiate enforcement proceedings were ordinarily not subject to judicial review.
explained that determinations not to engage in rule making were “less frequent and more apt to involve legal as opposed to factual analysis.” 46 The Court concluded that “refusals to promulgate rules are thus susceptible to judicial review, though such review is ‘extremely limited’ and ‘highly deferential.’”47

On the merits, the Court found that the Clean Air Act’s broad statutory definition of “air pollutant” authorized EPA to issue regulations that provided protection from a wide range of substances and matter, including greenhouse gas emissions.48 According to the majority, once EPA makes a judgment that an air pollutant endangers the public health or welfare, EPA has no choice but to regulate it. The Court recognized that EPA might well have substantial latitude in shaping its regulations but that, under the terms of the statute, EPA was not allowed to leave an air pollutant unregulated.49

Among the four dissenters, Chief Justice Roberts focused on the standing issues. He opened by disputing the concept that the standing analysis changes when the plaintiff is a state and pointing out that the idea finds so little support in the case law that the plaintiffs never mentioned it in their briefs.50 In terms of the three traditional elements of standing, the Chief Justice argued that by definition “global” warming did not satisfy the requirement that the plaintiff be injured in a particularized way.51 He termed Massachusetts’ concerns about rising sea levels to be based on conjecture and speculation rather than facts showing imminent injury.52 Similarly he dismissed the plaintiffs’ allegations of causation and redressability on the ground that climate change is a complex, global process and that plaintiffs could not show that the regulation of emissions of new motor vehicles in the United States would have any meaningful impact on the phenomenon.53

At a minimum, Massachusetts v. Environmental Protection Agency establishes broad standing principles for states acting as plaintiffs. However, the Court’s analysis of the particular requirements of standing did not explicitly rely on this notion. Going forward, the question is whether the lower courts will read the case as one limited to suits involving states or as a broader statement on the doctrine of standing. In any event, counsel planning to sue the federal government now have an additional reason for seeking state co-plaintiffs.

In Hein v. Freedom from Religion Foundation Incorporated a fractured Court narrowed the doctrine of taxpayer standing that was established in the 1968 landmark decision, Flast v. Cohen.54 In Flast the Court recognized taxpayer standing to raise claims that the federal government is using funds in violation of the establishment clause of the First Amendment. In Hein a corporation and three of its members opposed to government endorsement of religion sought to challenge activities of the White House Office of Faith-Based and Community Initiatives. Plaintiffs claimed that this office violated the establishment clause by organizing conferences to promote federal funding for faith-based groups.55

46Massachusetts, 127 S. Ct. at 1459.
47Id. (quoting National Customs Brokers and Forwarders Association of America v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989)).
48Id. at 1459–60 (analyzing the Clean Air Act, 42 U.S.C. § 7521(a)(1) (2000)).
49Id. at 1462–63.
50Id. at 1463, 1467 (Roberts, C.J., dissenting).
51Id. at 1467–68.
52Id.
53Id. at 1467–69.
55Hein, 127 S. Ct. at 2560–61.
Writing for a three-justice plurality, Justice Alito began with the proposition that taxpayers generally do not have standing to challenge allegedly unlawful federal expenditures. In Flast the Court had recognized a narrow exception to this principle for challenges to exercises of congressional power under the spending clause of Article I. However, the Flast expenditures, he noted, were specifically mandated by statute and congressional appropriation. In contrast, in Hein, plaintiffs were not challenging any statute or specific appropriation. Rather, they sought to challenge conduct that bore no congressional imprimatur and expenditures that were made by the executive branch from general appropriation measures. Thus the plurality viewed the claim as falling outside Flast’s exception to general principles of taxpayer standing.

Justice Alito then declined what he saw as plaintiff’s invitation to extend Flast to cover purely executive actions; he noted that over the past forty years Flast had, in essence, been “confined to its facts.” He rejected the argument that executive branch actions were traceable to congressional appropriation measures in some general way and stated that acceptance of this loose link would open up to taxpayer challenge all executive action.

The remaining six justices agreed that the plurality’s attempt to distinguish between challenges to executive branch conduct specifically mandated or authorized by Congress and challenges to other executive action was not convincing. Justices Scalia and Thomas concurred in the result but called for Flast to be overruled. The four dissenters would have found taxpayer standing sufficient in both contexts. The breakdown of the votes, however, suggests that for now the standing rules will indeed be different for challenges to governmental conduct expressly mandated by Congress and conduct by the executive branch that does not flow directly from congressional action, notwithstanding that a clear majority of the Court has rejected such an approach.

In Medimmune Incorporated v. Genentech Incorporated the Court considered the issue of standing under the Declaratory Judgment Act and held that a patent licensee had standing to challenge the validity and enforceability of a patent, despite the licensee not having violated the patent and having continued to pay royalties pursuant to the licensee agreement. It is well established that where there is a “genuine threat of [government] enforcement,” plaintiff need not place itself at risk by violating a regulation or statute in order to challenge it. However, prior to Medimmune, the issue of whether a plaintiff seeking to challenge conduct by a private party must place itself at risk of a private enforcement action had not been decided. Writing for an eight-member majority, Justice Scalia resolved the matter by holding that the imminent risk of liability that plaintiffs would face if they stopped making royalty payments was sufficient to create a jus-

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56 Id. at 2563–64.
57 Id. at 2565.
58 Id. at 2566.
59 Id. at 2568–69.
60 Id. at 2569.
61 Id. at 2573–84 (Scalia, J., concurring).
62 Id. at 2584 (Souter, J., dissenting).
64 Medimmune, 127 S. Ct. at 772 (citing Terrace v. Thompson, 263 U.S. 197 (1923)).
65 Id. at 773. The issue had arisen in Altvater v. Freeman, 319 U.S. 359 (1943), which held that a patent licensee could raise a counterclaim challenging the validity of a patent where it had continued to pay royalties required by an injunction obtained by the patent holder.
ticiable controversy for purposes of both Article III and the Declaratory Judgment Act. 66

In the blockbuster school desegregation cases Parents Involved in Community Schools v. Seattle School District No. 1 and its companion case Meredith v. Jefferson County Board of Education the Court addressed standing and mootness as well.67 There the Court proscribed efforts by school systems in Seattle and Louisville to desegregate by using race as a factor when assigning students to schools.68 In the first case, the children of the Parents Involved organization had not yet been denied their desired school placements due to the Seattle school district’s assignment policy. Thus, the school district contended, the possibility that plaintiff’s children would be adversely affected by the assignment policy was too speculative to support standing. The Court rejected that argument for two reasons.

First, since the injury alleged was the possibility of being denied admission to the high school of their choice, that, the Court reasoned, the students might not be denied admission “does not eliminate the injury claimed.”69 The opinion offers neither authority for this position nor elaboration. Apparently, since the “claimed injury” is the possibility of harm, whether that possibility is realized is irrelevant for standing purposes. The Court’s second stated basis for granting the organization standing is that the members’ children are “being forced to compete in a race-based system that may prejudice the plaintiff.”70 In other words, any competition in which race is a factor creates a form of harm, whether or not the competing individual or entity is actually denied what is sought. This approach seems to conflate the merits with standing since the assumption is that any process in which race is a consideration is, by definition, prejudicial.

The Court rejected the Seattle school district’s contention that the claim was moot because the school district had stopped using race as a factor pending the outcome of the litigation. The Court repeats the now-familiar principle for demonstrating mootness: “Voluntary cessation does not moot a case or controversy ‘unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’”71 Since the school district had not promised not to resume its race-based policy in the event of success in the litigation, it could not meet its “heavy burden.”72

The Court also addressed mootness in the companion school desegregation case Meredith v. Jefferson County Board of Education.73 There an individual brought suit challenging the admission policies of the school system in the Louisville, Kentucky, area. The Court deemed the plaintiff a valid party, even though he had since transferred to the very school for which admission had previously been denied under the challenged guidelines; the Court reasoned that the plaintiff could “again be subject to assignment based on his race” when he enrolled in middle school.74

Although the Court’s mootness holdings plow no new ground, its standing analyses should be carefully considered—es-

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66Id. at 768 (plaintiffs faced the risk of treble damages, an injunction, and an attorney fee award).
67Parents Involved in Community Schools, 127 S. Ct. 2738.
68Id.
69Id. at 2751.
70Id.
71Id. at 2751 (alteration in original).
72Id. at 2751.
74Id. at 2751.
especially the apparent proposition that an allegation of possible denial or deprivation is sufficient to satisfy standing even when it is quite possible that the denial or deprivation will not occur. If “the injury claimed” need be only the possibility of a deprivation, then the probability that there will be no deprivation becomes irrelevant for standing purposes.\footnote{But cf. \textit{Warth v. Seldin}, 422 U.S. 490 (1975) (minority plaintiffs do not have standing to challenge restrictive zoning because they could not show that but for the zoning they would be able to find a place to live).}

\section*{Pro Se Representation in Disability Cases}

In \textit{Winkelman v. Parma City School District} the Court looked at whether the Individuals with Disabilities Education Act (IDEA) gives parents the right to enforce its provision requiring schools to provide a free appropriate public education to children with disabilities.\footnote{\textit{Winkelman v. Parma City School District}, 127 S. Ct. 1994 (2007).} If the IDEA does create enforceable rights, then pursuant to 28 U.S.C. § 1654, parents may represent their own interests in federal court without an attorney.\footnote{See 28 U.S.C. § 1654 (2007) (“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel….“).} If, however, the IDEA does not create such rights, then parents may not proceed \textit{pro se} because under the common-law rule nonlawyers may not represent the claims of another (here their child) in court. In the Winkelmans’ case, the Sixth Circuit had decided that the common-law rule applied and barred the Winkelmans from proceeding \textit{pro se} to challenge the education plan for Jacob, their 6-year-old autistic son.\footnote{\textit{Winkelman v. Parma City School District}, 166 Fed. Appx. 807 (6th Cir. 2006) (relying on \textit{Cavanaugh v. Cardinal Local School District}, 409 F.3d 753 (6th Cir. 2005), which rejected the argument that parents have an independent right to their child’s education; the Individuals with Disabilities Education Act does not grant parents the right to represent the interests of their children in court).}

The Court reversed the Sixth Circuit and held that parents had broad, independently enforceable rights under the IDEA. The decision is somewhat surprising because members of this Court have repeatedly called upon Congress to be specific when establishing mandates or creating private rights. The IDEA does not explicitly give parents an enforceable right to have their children obtain a free appropriate public education. Moreover, the Court’s most recent decisions regarding the IDEA had not been favorable to parents and children with disabilities.\footnote{\textit{Schaffer v. Weast}, 546 U.S. 49 (2005), placed the burden of proof on parents who seek to show that a school district proposed an inappropriate education plan for their child, thereafter \textit{Arlington Central School District Board of Education v. Murphy}, 126 S. Ct. 2455 (2006), held that the costs of experts used by parents to establish that the education plan was inappropriate were not reimbursable costs when the parents prevailed in their case).}

Writing for the majority, Justice Kennedy found that “a proper interpretation of the Act requires a consideration of the entire statutory scheme.”\footnote{\textit{Winkelman v. Parma City School District}, 127 S. Ct. at 2000.} While the IDEA did not specifically state that parents might enforce its provisions in court without an attorney, “interlocking statutory provisions” showed that Congress intended parents to have these rights.\footnote{Id. at 1999.} For example, the goals of the IDEA include “ensur[ing] that the rights of children with disabilities and parents of such children are protected.”\footnote{Id. at 2000 (alteration in original) (quoting 20 U.S.C. § 1400(d)(1)(A)–(B) (2000 ed. & Supp. IV)).} The IDEA allows a parent without counsel, the Court noted, to participate in decision making regarding the development of their child’s education plan and to protect their child’s right to a free appropriate public education during an administrative challenge. Parents may also sue to obtain reimbursement for private educational services that they obtain for their child while a successful challenge is being heard.\footnote{Id. at 2000–2002.} According to the Court, “[t]he statute’s procedural and reimbursement-related rights are intertwined with the substantive adequacy of
the education provided to a child … and it is difficult to disentangle the provisions in order to conclude that some rights adhere to both parent and child, while others do not.”

Significantly the Court rejected the argument that, as a spending clause enactment, the IDEA needed to put states on “clear notice” before they could be burdened with a new obligation or liability. The Court reasoned that its decision did not impose on states any substantive obligation that the states would not otherwise be required by law to observe. On the one hand, the Court stated that any increased costs that states would incur in defending against untrained advocates “do not suffice to invoke the concerns under the Spending Clause.” On the other hand, Justice Kennedy was careful to point out that the spending clause argument might have more force if another statute were at issue.

In a partial dissent, Justices Scalia and Thomas would have allowed parents to proceed pro se only to appeal reimbursement decisions or to complain about violations of their own procedural rights but not to challenge decisions about the child’s education plan. The parents would need a lawyer to pursue problems with an education plan because, according to Justice Scalia, “[t]he parents of a disabled child no doubt have an interest in seeing their child receive a proper education. But there is a difference between an interest and a statutory right. The text of the IDEA makes clear that parents have no right to the education itself.”

**Statutes of Limitation**

Another important ruling from the Court involved computation of the statute of limitations in sex discrimination cases. In *Ledbetter v. Goodyear Tire and Rubber Company*, another 5-to-4 decision, the Court ignored what Justice Ginsburg’s dissenting opinion describes as “the real-world characteristics of pay discrimination.” The majority’s highly technical approach effectively requires employees to guess quickly that they may have been the subject of discriminatory treatment—or forever lose their right to challenge that action. By focusing on the most recent paycheck rather than on the cumulative effect of years of discrimination, the Court overlooks that pay disparities often occur in small increments which, taken alone, preclude any suspicion of gender or racial discrimination being at work.

Lucy Ledbetter had worked for nineteen years for Goodyear when she filed with the Equal Employment Opportunity Commission (EEOC) a questionnaire alleging her employer discriminated against her on the basis of sex by paying her less than her male counterparts. She prevailed at trial, but the Eleventh Circuit, reversing the federal district court of Alabama, held that any pay decision taking place more than 180 days prior to the filing of the questionnaire (“the EEOC charging period”) was barred from challenge by the statute of limitations.

Justice Alito’s lengthy affirmance rejects Ledbetter’s contention that acts occurring prior to the charging period could make out a claim because of their continuing effects on later paychecks. Citing three prior decisions, none of which involves discrimination based on pay differential, the Court stated that “the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from
the date when the effects of this practice were felt.”92 A fourth case, the Court pointed out, emphasized the importance of “a discrete act or single ‘occurrence’” that takes place at a “particular point in time.”93 As a result, “[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.”94

The majority took greatest issue with the dissent’s reliance on *Bazemore v. Friday.*95 In that case the Court held that an employer’s pay scale was, in violation of Title VII, discriminatory toward African American employees. Justice Alito explained that in *Bazemore* “the employer engage[d] in intentional discrimination whenever it issue[d] a check to one of these disfavored employees.”96 In an effort to distinguish that situation from *Ledbetter,* he contended that *Bazemore* did not “stand[]” for the proposition that an action not comprising an employment practice and alleged discriminatory intent is separately chargeable, just because it is related to some past act of discrimination.97

The majority rejected the suggestion that claims based on pay differential were different from most other claims and similar to hostile work environment claims. Unlike the latter, where “the actionable wrong is the environment, not the individual acts that, taken together, create the environment,” the instant situation described a series of discrete acts, each of which was independently actionable and therefore required separate charges to the EEOC.98 Further, the Court noted, discriminatory intent is “the central element” of disparate treatment, and the employer’s intent is often in dispute.99 Accordingly a short statute of limitations is necessary because “evidence relating to intent may fade quickly with time.”100

In dissent, Justice Ginsburg characterized the question before the Court as whether the unlawful employment practice was “the pay-setting decision” or “the pay-setting decision and the actual payment of a discriminatory wage.”101 Relying largely on *Bazemore* and *National Railroad Passenger Corporation v. Morgan,* the dissent concluded that it must be the latter.102 Discrimination in compensation, the dissent explained, is not easy to identify because “[c]ompensation disparities … are often hidden from sight.”103 Consequently the cases which the majority cites and which involve discrete acts of discrimination are not relevant. The dissent also noted that “the Courts of Appeals have overwhelmingly judged as a present violation the payment of wages infected by discrimination” and that the EEOC took the

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94 *Id.*

95 *Bazemore v. Friday,* 478 U.S. 385 (1986).

96 *Ledbetter v. Goodyear Tire and Rubber Company,* 127 S. Ct. at 2173.

97 *Id.* at 2174.

98 *Id.* at 2175 (footnote omitted).

99 *Id.* at 2167.

100 *Id.* at 2171.

101 *Id.* at 2179 (Ginsburg, J., dissenting).


103 *Ledbetter v. Goodyear Tire and Rubber Company,* 127 S. Ct. at 2181 (Ginsberg, J., dissenting).
same position.\textsuperscript{104} In apparent exasperation with the majority’s view that “[e]ach and every pay decision [that Ledbetter] did not immediately challenge wiped the slate clean,” Justice Ginsburg stated that this was “not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose” and thus “[o]nce again, the ball is in Congress’ court.”\textsuperscript{105}

The majority and dissenting opinions in \textit{Ledbetter} rely almost exclusively on Title VII cases, and there is no hint that the majority’s unrealistic view of what constitutes actionable behavior for purposes of applying that law’s statute of limitations will adhere outside that context. Nevertheless, advocates should be familiar with the majority’s analytical approach for fear that it may crop up in other, seemingly unrelated situations.

\section*{Appellate Review}

One of the Court’s most criticized decisions this term was \textit{Bowles v. Russell}, in which a bare majority of the Court overruled long-standing precedent allowing the consideration of equitable circumstances to excuse the untimely filing of a notice of appeal.\textsuperscript{106} Petitioner Bowles, a prisoner convicted of murder in state court, filed an application for habeas corpus relief in federal court. It was denied.\textsuperscript{107} Bowles’s attorney failed to file a notice of appeal within thirty days of the judgment as required by both statute and appellate rule.\textsuperscript{108} Bowles’s attorney then moved under Rule 4(a)(6) of the Federal Rules of Appellate Procedure to reopen the thirty-day filing period. Rule 4(a)(6), as mandated by 28 U.S.C. § 2107(c), permits district courts to extend the filing period for fourteen days (from the date of the order granting the extension), provided the petitioner meets certain conditions.\textsuperscript{109} The district court granted Bowles’s motion, but instead of extending the appeal period fourteen days, the district court “inexplicably” (and mistakenly) gave the petitioner seventeen days to file his notice.\textsuperscript{110} Bowles filed his notice of appeal with the Sixth Circuit within the seventeen-day period, but after expiration of the fourteen-day maximum permitted under the appellate rule and statute.\textsuperscript{111}

The Sixth Circuit agreed with the respondent that the notice of appeal was untimely, that the fourteen-day period in Rule 4(a)(6) was “mandatory and jurisdictional,” and that accordingly the Sixth Circuit was without jurisdiction to hear the case.\textsuperscript{112} The Supreme Court granted certiorari to consider whether the Sixth Circuit lacked jurisdiction to entertain an appeal filed outside the fourteen-day period prescribed by 28 U.S.C. § 2107(c).\textsuperscript{113} In a 5-to-4 decision written by Justice Thomas, the Court affirmed.\textsuperscript{114} The majority began its analysis by observing that “[t]his Court has long held that the taking

\textsuperscript{104}Id. at 2184–85. The majority rejects the relevance of the Equal Employment Opportunity Commission’s position on this point because “[a]gencies have no special claim to deference in their interpretation of our decisions. \textit{Reno v. Bossier Parish School Board}, 528 U.S. 320, 336, n.5 (2000),” Id. at 2177 n.11 (majority opinion). This observation is a much more explicit and stronger statement on the point of not deferring to agency interpretation of judicial decisions than that in the authority upon which it relies.

\textsuperscript{105}Id. at 2187–88 (Ginsburg, J., dissenting).


\textsuperscript{107}Id. at 2362.

\textsuperscript{108}Id. (citing F. R. App. P. 4(a)(1)(A) and 28 U.S.C. § 2107(a) (2006)).

\textsuperscript{109}Id. (citing 28 U.S.C. § 2107(c) (2006)).

\textsuperscript{110}Id.

\textsuperscript{111}Id.

\textsuperscript{112}Id. at 2362–63 (quoting \textit{Bowles v. Russell}, 432 F.3d 668 (6th Cir. 2005)).

\textsuperscript{113}Id. at 2363.

\textsuperscript{114}Id. at 2367.
of an appeal within the prescribed time is ‘mandatory and jurisdictional.’”115 While recognizing, in response to the dissent’s critique, that the Court’s past use of certain jurisdictional terminology had been “careless,” the majority identified in its precedent a “jurisdictional distinction” between statutory time limits enacted by Congress for filing appeals and “court-promulgated rules” adopted for “the orderly transaction of [judicial] business” or “claims-processing” purposes.116 In this case the fourteen-day period provided in Rule 4(a)(6) is authorized by statute (Section 2107(c)), and under the Court’s analysis the petitioner’s failure to comply with such a limitations period “is one of jurisdictional magnitude.”117

The Court then turned to petitioner’s principal argument, which invoked the “unique circumstances” doctrine to excuse the untimely filing on equitable grounds.118 That doctrine was announced in a 1962 decision, Harris Truck Lines Incorporated v. Cherry Meat Packers Incorporated, and applied again two years later in Thompson v. Immigration and Naturalization Service.119

In Harris the petitioner, within the original period for filing an appeal from the final judgment, sought an extension of time from the district court because lead counsel was out of the country and unavailable for consultation on the issue.120 The district court granted petitioner’s motion, and petitioner filed the notice of appeal within the additional period permitted by the district court.121 On appeal the Seventh Circuit ruled that the district court had erred in granting the motion because petitioner simply did not meet the specific exception set forth in the procedural rule relied upon by the trial court.122 The Supreme Court summarily reversed the Seventh Circuit and concluded that the appellant’s reasonable reliance upon the trial court’s (erroneous) grant of an extension of time and the “obvious great hardship” to a party who relied upon such an extension only to have it subsequently reversed on appeal constituted “unique circumstances" justifying an equitable extension of the appeal period.123

In Thompson the petitioner filed post-judgment motions that, if timely filed, would have tolled the appeal period until the district court disposed of the motions.124 The trial court specifically noted that the motions were timely filed, and accordingly petitioner calculated his appeal period from the date of the denial of the motions rather than the entry of judgment. This meant that his subsequent notice of appeal was timely if measured from the former date but untimely if measured from the latter.125 The Seventh Circuit decided that the posttrial motions were not timely filed with the district court and therefore did not toll the time for appeal.126 The Supreme Court, however, concluded that the case “fit[1]
squarely” within the “unique circumstances” contemplated in Harris: “[T]he petitioner relied on the statement of the district court and filed the appeal within the assumably new deadline but beyond the old deadline.” The Court deemed the appeal to be timely filed.

The Bowles majority, armed with its characterization of statutory time limits as “mandatory and jurisdictional,” dismissed the “unique circumstances” doctrine as “illegitimate” and overruled Harris and Thompson “to the extent they purport to authorize an exception to a jurisdictional rule.” In response to a vociferous dissent, Justice Thomas mildly observed for the majority that “[i]f rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits.”

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, blasted the majority for reaching a result requiring “every statement by a federal court … to be tagged with a warning ‘Beware of the Judge.’” The bitterest rhetoric is aimed at the majority’s disposal of the “unique circumstances” doctrine: “Why should we have rewarded Thompson, who introduced the error [by filing his motions late], but now punish Bowles, who merely trusted the District Court’s statement?” The dissent makes abundantly clear its distaste for the result endorsed by the majority: “It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch.”

Statutory Construction and Deference to Federal Agencies

Zuni Public School District No. 89 v. Department of Education concerns subject matter that is, at its core, so boring, technical, and convoluted that to fathom what the justices are jabbering about is nearly impossible. Yet it is a fascinating read. Justice Breyer, writing for a nontraditional majority (Justices Breyer, Ginsburg, Stevens, Kennedy, Ginsburg, and Alito (the latter four also concurring in judgment), turned the Chevron test on its head (either to clarify his analysis or for some nefarious purpose, depending on your point of view). Justice Kennedy lamented this inversion of the two-step Chevron test (regarding deference to agency interpretation of enabling statutes and regulations) and the repudiation of “our obligation to set a good example.” Justice Stevens saw the case as one “in which I cannot imagine anyone accusing any Member of the Court of voting one way or the other because of that Justice’s own policy preferences.” And Justice Scalia not only “can readily imagine it” but also railed against virtually every suggestion in every other opinion written in this case. One almost wishes that one could forgo discussion of

127Id. at 387.
128Id.
130Id. at 2367.
131Id. at 2372 (Souter, J., dissenting).
132Id. at 2370.
133Id. at 2367.
135Id. at 1541–46 (discussing Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)).
136Id. at 1551 (Kennedy, J., concurring).
137Id. at 1550 (Stevens, J., concurring).
138Id. at 1556 (Scalia, J., dissenting).
the case and skip right to Justice Scalia’s invitation to “return to Statutory Interpretation 101,” but, alas, the majority and concurring opinions must first receive their due.139

The case involves the validity of a U.S. Department of Education 30-year-old regulation promulgated pursuant to a statute supplanted by the current school financing statute. The regulation concerns the formula for determining how federal aid is distributed to school districts.140 Although recognizing that the case presents a classic instance for applying the Chevron test, Justice Breyer relied on the “technical nature of the language in question” to reverse the order of analysis, looking first to the statute’s background and purposes and only then to the statutory language.141 He noted several factors suggesting that Congress intended to leave the Education secretary free to use the method at issue: the technical nature of the calculation is typical of matters that Congress usually leaves to agencies; the history of the statute, especially since no one in Congress ever criticized the regulation, suggests legislative acquiescence; and the method chosen is a reasonable one given the purpose of the provision at issue.142

In analyzing the statutory language itself, Justice Breyer relied at length on numerous dictionary definitions of the word “percentile,” on Congress having used more precise language in other statutes, on the context in which the key language appears, and on no statisticians having suggested that the language could not be read as the majority reads it, and Justice Breyer concluded that the statutory language was broad enough to permit the Education secretary’s reading.143 While Justice Breyer’s order of analysis is skewed, his analysis is ultimately a determination under Chevron Step 2, namely, that, since the language is ambiguous, the courts must defer to an agency’s permissible or reasonable interpretation of that language.144

Justice Stevens used his concurrence to restate that discerning the intent of Congress is the goal of Chevron Step 1, and that goal is accomplished through the traditional tools of statutory construction. Legislative history is one such tool, he continued, and in determining congressional intent there is no reason to examine statutory language first “if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue.”145 Although he joined the majority opinion, he based his concurrence on resolution under Step 1 since he makes clear that the intent of Congress (as set out in the “pellucidly clear” legislative history) should trump the statutory language.146

By contrast, Justice Kennedy, joined by Justice Alito in his concurrence, is concerned that Justice Breyer engaged in an analysis that turned the Chevron test upside down. He believes that, if this inversion of “Chevron’s logical progression” were “to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes.”147

All of this is helpful in understanding how to employ Chevron but is really

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139Id. at 1552.

140See id. at 1538–39 (majority opinion) for a complete description of the regulation.

141Id. at 1541.

142Id. at 1541–42.

143Id. at 1543–46.

144Although the majority opinion does not explicitly state that its conclusion flows from Chevron Step 2, the concurrence by Justice Kennedy does make that point. See id. at 1551 (Kennedy, J., concurring).

145Id. at 1550 (Stevens, J., concurring).

146Id.

147Id. at 1551 (Kennedy, J., concurring).
just prologue to Justice Scalia’s dissent (which is joined by the Chief Justice, Justice Thomas, and Justice Souter in part). His first and major source of irritation was that the majority implicitly, and Justice Stevens explicitly, in his view, resurrected a 115-year-old precedent that elevates “judge-supposed legislative intent over clear statutory text.” He is not as deferential as Justice Kennedy to Justice Breyer’s analysis insofar as it looks at intent first and then statutory language: “The very structure of the Court’s opinion provides an obvious clue as to what is afoot…. This is a most suspicious order of proceeding.” He found Justice Breyer’s reliance on the technical nature of the statutory language unconvincing and mocks “the smoke-screen that the Court lays down with its repeated apologies for inexperience in statistics…. This case is not a scary math problem; it is a straightforward matter of statutory interpretation.” Indeed, you can almost hear him guffawing at the majority’s reliance on “statutory context” (his quotation marks) to interpret the statutory language; that analysis, he says, “is a complete non sequitur.”

His excitement rose to a fever pitch, however, in the second part of the dissent (which Justice Souter declined to join). Reprising his introductory theme, he attributed the victor’s success in the case to the return of that miraculous redeemer of lost causes, Church of the Holy Trinity. In order to contort the statute’s language beyond recognition, the Court must believe Congress’s intent so crystalline, the spirit of its legislation so glowingly bright, that the statutory text should simply not be read to say what it says.

Justice Stevens, who admitted that intent should trump statutory language, came in for the bulk of the criticism, such as this barb: “Intellectual honesty does not exclude a blinding intellectual bias. And even if it did, the system of judicial amending veto over texts duly adopted by Congress bears no resemblance to the system of lawmaking set forth in our Constitution.” Justice Scalia added: “Why should we suppose that in matters more likely to arouse the judicial libido … a judge in the School of Textual Subversion would not find it convenient (yea, righteous!) to assume that Congress must have meant, not what it said, but what he knows to be best?” One final observation deserves attention. In rejecting the majority’s reliance on no one in Congress having ever questioned the regulation at issue, Justice Scalia asked rhetorically: “[C]an it really be that this case turns, in the Court’s view, on whether a freshman Congressman from New Mexico gave a floor speech that only late-night C-SPAN junkies would witness?”

The bottom line of Zuni Public School is that a majority of the Court believes that congressional intent is the key to the Chevron analysis and that intent is discernible from any number of sources. Another lesson is not to cross Justice Scalia on matters of statutory construction.

In another case involving statutory construction and deference, Long Island Care...

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148For a discussion of deference and Chevron, see Graham G. Martin & David A. Super, Judicial Deference to Administrative Agencies and Its Limits, 40 CLEARINGHOUSE REVIEW 596, 597–603 (March–April 2007).

149Zuni Public School, 127 S. Ct. at 1551 (Scalia, J., dissenting). The precedent at issue is set forth in Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

150Zuni Public School, 127 S. Ct. at 1551 (Scalia, J., dissenting).

151Id. at 1553.

152Id. at 1555.

153See id. at 1559 (Souter, J., dissenting).

154Id. at 1556 (Scalia, J., dissenting) (citing Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)).

155Id.

156Id.

157Id. at 1558.
at Home Limited v. Coke, the Court considered the exemptions from the wage and hour requirements of the Fair Labor Standards Act that pertain to persons “employed in domestic service employment to provide companionship services for individuals… unable to care for themselves.” The issue was whether workers who are not directly employed by the individual receiving care but rather work for agencies are covered by the exemption and thus not protected by the wage and hour provisions of the Act. In a unanimous opinion siding with the employer, the Court applied Chevron finding that the statute leaves gaps in the scope and definition of the terms “domestic service employment” and “companionship services” and that the U.S. Department of Labor is explicitly empowered to “prescribe necessary rules, regulations and orders with regard to the amendments made by this Act.” The Court also noted that the subject matter concerned questions upon which the agency was expert and that the agency “focused fully upon the matter in question,” issuing regulations through notice and comment.

The opinion rests in part upon an “advisory memorandum” issued by the Labor Department during the pendency of the litigation. Significantly the Court found no reason to suspect that the position was merely a “post hoc” rationalization of agency conduct. Instead the Court stated that “where, as here, an agency’s course of action indicates that the interpretation of its own regulation reflects its considered views—the Department has clearly struggled with the third-party-employment question since at least 1993—we have accepted that interpretation as the agency’s own, even if the agency set forth those views in a legal brief.

**Attorney Fees**

*Sole v. Wyner* deals with the civil rights fee-shifting provision, 42 U.S.C. § 1988(b), which authorizes federal district courts to “allow the prevailing party … a reasonable attorney’s fee as part of the cost” of the litigation. In a narrowly tailored, unanimous decision, the Court held “only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under § 1988(b) if the merits of the case are ultimately decided against her.”

The case began in January 2003, after Wyner informed the Florida Department of Environmental Protection that on Valentine’s Day she and others would stage a nude art display (a peace sign) at a state park. The department informed Wyner that “the bathing suit rule” applied to the activity. That rule requires all state park visitors to wear, at a minimum, a thong and, if female, a bikini top. Two days before Valentine’s Day Wyner filed against the department and other state officials a complaint seeking to enjoin the bathing suit rule as a violation of the First Amendment. A hearing was held the next day. Although concerned about the hurried nature of the proceeding, the judge granted a preliminary injunction. He strongly encouraged the parties to erect a screen around the performance as they had agreed to do on a previous occasion involving Wyner’s nude art.

On Valentine’s Day a screen was erected, apparently by the department. However, the display occurred outside the barrier and at its conclusion the performers went skinny-dipping. Thereafter Wyner, saying that she planned to stage nude art in the future, pressed for a permanent injunction. After discovery and full brief-

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159 Id. at 2346.
160 Id. at 2348–49.
161 Id. at 2349.
163 Sole, 127 S. Ct. at 2196.
ing, the judge granted the department’s motion for summary judgment. Wyner’s deliberate failure to remain behind the screen during the 2003 Valentine’s Day display had, according to the judge, demonstrated the need for the bathing suit rule. Wyner moved for attorney fees, and the court, reasoning that she had prevailed at the preliminary injunction stage, awarded counsel $25,924 in fees. On the appeal of defendant state officials, the Eleventh Circuit affirmed.

The department, with the support of twenty-four other states and the Bush administration, appealed to the Supreme Court, which reversed the earlier rulings. Writing for the Court, Justice Ginsburg reasoned that Wyner’s “fleeting success” did not establish that she had prevailed on the substance of her claim for injunctive relief. Rather, at the end of the day, the bathing suit rule remained valid. According to the Court, “[p]revailing party status … does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case.” Of controlling importance to the Court was that the trial court’s merits ruling rejected the premise upon which the preliminary injunction was based, namely, that the nude artists would perform behind a screen. Thus, at the end of the fray, Wyner’s “initial victory was ephemeral” since she had gained “no enduring change in the legal relationship between herself and the state officials she sued.”

Of note, the unanimous decision is a narrow one that “express[es] no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees.”

At his Senate confirmation hearing, then-Judge Roberts testified, “I don’t think the courts should have a dominant role in society and stressing society’s problems.” Last term’s decisions show that Chief Justice Roberts is having his way (when he wants to) on this point. A majority of justices are indeed narrowing the role of the courts in resolving disputes. The Chief Justice is not, however, realizing all his goals. Upon joining the Court, Justice Roberts expressed his hope for a “greater degree of consensus.” However, the decisions of the last Term reflect the same type of continuous, divided decision making that typified the Rehnquist era.
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