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Why We Can't Wait: Reversing the Retreat on Civil Rights

***231 THE EARLY ROBERTS COURT ATTACKS CONGRESS'S POWER TO PROTECT CIVIL RIGHTS**

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In its first two years, the Roberts Court decided numerous civil rights cases, [FN1][FN1] shifting the Court to the right of the previous, already extremely conservative Rehnquist Court. [FN2][FN2] Virtually every civil rights decision by the Roberts Court is justified as comports with precedent and the clear language of statutes, regardless of the number of cases overruled--explicitly or implicitly--and the abundance of judges who have read the same statutory language and concluded it had the opposite meaning.

While the decisions of the early Roberts Court are couched in legalistic, technical language, the impact of these cases is simple: the Court has threatened the power of Congress to protect civil rights. The conservative [FN3][FN3] bloc has rejected legislative intent, in some cases explicitly choosing not to follow clear expressions of congressional will and in other cases totally ignoring the question of congressional intent. Laws that overrule decisions of the Rehnquist Court have been narrowly construed by the majority, and numerous precedents that uphold civil rights have been limited to their facts or rejected outright. The early Roberts Court has abdicated its role to ensure that administrative interpretations of statutes comport with congressional intent, deferring heavily to executive branch litigation positions that contradict statutory goals. The Court has belittled the expertise of judges and juries to decide complex issues of law and fact, and a majority has explicitly ***232** overruled cases that support the equitable power of the judiciary. The conservative Justices have signaled that they will continue the Rehnquist Court's refusal to permit Congress to hold states accountable for violating civil rights. Usurping the constitutional power of Congress, the early Roberts Court has pursued a political agenda of eradicating the protections of individual rights in civil rights statutes.

I. The Rehnquist Legacy

The hostility of Chief Justice Rehnquist to civil rights and safety net statutes is renowned. [FN4][FN4] Under his leadership, the Supreme Court's conservative Justices used judicial power to thwart popular legislation and, in essence, curtail the power of Congress to protect disadvantaged individuals. [FN5][FN5] Scholars have noted that, beginning in 1995, the Rehnquist Court developed "a new judicial activism" in which "disrespect for Congress is a fundamental element." [FN6][FN6] In cases involving federal laws prohibiting discrimination based on race, sex, age, and disabilities, the Rehnquist Court placed "democratic rights in jeopardy" by "denigrating the political process and refusing to protect racial minorities from the effects of prejudice." [FN7][FN7]

A. The Rehnquist Court's Attacks on Civil Rights Laws

Civil rights and other progressive laws were invalidated by the Rehnquist Court on the basis that the statutes exceeded Congress's constitutional power under the Commerce Clause. [FN8][FN8] The precedents relied upon by the Court consisted largely of discredited cases from the anti-New Deal Supreme Court in the early twentieth century. Justice Souter, dissenting on behalf of the Court's four centrist [FN9][FN9] Justices, explained that the anti-New Deal Supreme Court's Commerce Clause jurisprudence from 1887 to 1937 was repudiated in 1942, after which, the Court respected Congress's broad power to regulate under the ***233** Commerce Clause for well over 50 years. [FN10][FN10] Nevertheless, in 1995, the Rehnquist Court resurrected the anti-New Deal approach of striking down

rational congressional statutes on the ground that they exceeded congressional power under the Commerce Clause, and utilizing this approach, invalidated the Violence Against Women Act in 2000. The Commerce Clause decisions of the Rehnquist Court exalt the power of both the courts and the states. [\[FN11\]](#)[\[FN11\]](#)

The Rehnquist Court further decreased congressional authority by invalidating numerous federal statutory provisions that authorized aggrieved individuals to sue states. [\[FN12\]](#)[\[FN12\]](#) While this diminution of congressional power was ostensibly based in the Eleventh Amendment, [\[FN13\]](#)[\[FN13\]](#) the Court admitted that the text of the Eleventh Amendment does not support such a result. [\[FN14\]](#)[\[FN14\]](#) Instead, the majority justified its rejection of federal legislation by pronouncing that “fundamental postulates implicit in the constitutional design” prohibit Congress from abrogating states’ sovereign immunity. [\[FN15\]](#)[\[FN15\]](#) The Court held that these “implicit” postulates conferred power on the states while the explicit grants of power in the Constitution under the Interstate Commerce Clause, the Indian Commerce Clause, [\[FN16\]](#)[\[FN16\]](#) the Patent Clause, [\[FN17\]](#)[\[FN17\]](#) and Congress’s general constitutional legislative power [\[FN18\]](#)[\[FN18\]](#) did not enable Congress to abrogate state sovereign immunity and legislate in furtherance of *234 legitimate policy objectives. These sovereign immunity cases provide a clear example of the Rehnquist Court majority not only diminishing the constitutional power of Congress to protect civil rights, but also tilting the balance of powers between the state and federal government set forth in the text of the Constitution.

Justice Rehnquist conceded, first as an Associate Justice and then again after becoming Chief Justice, that the Fourteenth Amendment enables Congress to empower individuals to sue states, expanding federal power at expense of states. [\[FN19\]](#)[\[FN19\]](#) However, the Rehnquist Court drastically restricted Congress’s power under the Fourteenth Amendment by establishing a stringent new test of “congruence and proportionality” for legislation enacted pursuant to the Fourteenth Amendment. [\[FN20\]](#)[\[FN20\]](#) Applying the “congruence and proportionality” test to the Religious Freedom Restoration Act, [\[FN21\]](#)[\[FN21\]](#) the Court held that the legislation was “beyond congressional authority” under the Fourteenth Amendment. [\[FN22\]](#)[\[FN22\]](#)

A favored approach of the Rehnquist Court to stymie legislation under the Fourteenth Amendment was to narrowly limit congressional power to enact effective remedies, such as damages or attorneys fees. [\[FN23\]](#)[\[FN23\]](#) For example, the conservative bloc ruled that Congress exceeded its powers under the Fourteenth Amendment when authorizing individuals to sue state employers under civil rights statutes for employment discrimination damages based on age or disability. [\[FN24\]](#)[\[FN24\]](#) Rather than utilizing the traditional test--whether Congress had acted rationally in response to the problem of discrimination [\[FN25\]](#)[\[FN25\]](#)--the Rehnquist*235 Court posed the question of whether the states were rational in discriminating against older persons and people with disabilities. [\[FN26\]](#)[\[FN26\]](#) The majority explicitly concluded that state discrimination against older persons and people with disabilities is rational, [\[FN27\]](#)[\[FN27\]](#) and then proceeded to invalidate remedies that were not “proportional” to the “rational” discrimination. [\[FN28\]](#)[\[FN28\]](#)

The Rehnquist Court frequently devised arduous procedural hurdles to deprive individuals of the ability to bring civil rights suits. For instance, the Court ruled in *Lorance v. AT&T Technologies, Inc.*, [\[FN29\]](#)[\[FN29\]](#) that female employees must challenge a seniority system upon its adoption and are time-barred from challenging the system when it subsequently impacts their seniority in a discriminatory manner. [\[FN30\]](#)[\[FN30\]](#)

For civil rights and safety net statutes clearly constitutional under the Spending Clause of the Constitution, [\[FN31\]](#)[\[FN31\]](#) the Rehnquist Court repeatedly held that aggrieved individuals had no right to enforce the law, completely denying court access when states allegedly violated federal law. In *Suter v. Artist M.*, [\[FN32\]](#)[\[FN32\]](#) the Court held that foster children did not have a cause of action, under [42 U.S.C. § 1983](#), [\[FN33\]](#)[\[FN33\]](#) to enforce the requirement that the state use “reasonable efforts” to reunite them with their families, because the Adoption Assistance and Child Welfare Act phrased the “reasonable efforts” requirement as a provision of a state plan. Exalting form over substance, the Court opined that Congress did not “unambiguously” express an intent to confer enforceable rights on beneficiaries via [§ 1983](#) when these rights were set forth as part of a state plan. [\[FN34\]](#)[\[FN34\]](#)

In the early 1990s, Congress fought back against the Court's restrictive interpretation of civil rights and safety net statutes. In the 1991 Civil Rights Act, [\[FN35\]](#)^[FN35] Congress repudiated the holding of *Lorance*, clarifying that an unlawful employment practice occurs when a person is subjected to a seniority system in a discriminatory manner, not when ***236** the seniority system is first implemented. [\[FN36\]](#)^[FN36] In interpreting another provision of the 1991 Act, Justice Stevens noted that the Act was intended to override eight separate Supreme Court decisions, including *Lorance*. [\[FN37\]](#)^[FN37] Similarly, in 1994, Congress passed legislation disapproving the Court's analysis in *Suter* of congressional intent to confer enforceable rights under [42 U.S.C. § 1983](#). [\[FN38\]](#)^[FN38] Congress specified in the “Suter fix” legislation that a “provision is not to be deemed unenforceable because of its inclusion in a section of the [Social Security] Act requiring a State plan or specifying the required contents of a State plan.” [\[FN39\]](#)^[FN39]

This congressional reproach was barely even acknowledged by the majority of the Rehnquist Court. The statutes repudiating the Court's interpretation of congressional intent were narrowly construed, and the conservative Justices continued to utilize the same judicial approach and reasoning that led to the results rejected by Congress. Justice Stevens, dissenting, protested that the Rehnquist Court failed to respond to the widespread rebuke of the Court in the 1991 Civil Rights Act and that the Court had continued to adhere to “judge-made rules” that disregard congressional intent. [\[FN40\]](#)^[FN40] Likewise, in cases denying access to the courts under [42 U.S.C. § 1983](#) to enforce Spending Clause statutes, the Court continued to rely upon *Suter*, without mentioning that Congress rejected the reasoning in *Suter* when it passed the Suter fix legislation. [\[FN41\]](#)^[FN41] Rather than changing course, the Court extended the reasoning in *Suter*, further narrowing the right of individuals to enforce federal legislation, by continuing to infer that Congress failed to “unambiguously” express its intent to create enforceable rights. [\[FN42\]](#)^[FN42]

In 1995, Republicans took control of Congress, [\[FN43\]](#)^[FN43] and Congress largely acquiesced in the Supreme Court's repudiation of congressional ***237** power to protect civil rights. [\[FN44\]](#)^[FN44] The Republican Senate confirmed numerous judicial nominees in the ensuing years who concurred in the Rehnquist Court's hostility to civil rights. [\[FN45\]](#)^[FN45]

B. The Roberts and Alito Confirmation Hearings Sought the Nominees' Views of Rehnquist Court Civil Rights Cases

In 2006, Chief Justice Rehnquist passed away and John Roberts was nominated to replace him. Just prior to Roberts's nomination hearings, Republican Judiciary Committee Chair Arlen Specter released two letters criticizing the Rehnquist Court for usurping congressional power, denigrating congressional competence, and rejecting congressional findings based on overwhelming evidence. [\[FN46\]](#)^[FN46] At the hearings, four Democratic and three Republican Senators questioned Roberts, emphasizing the importance of judicial respect for Congress. [\[FN47\]](#)^[FN47] In response, Roberts attempted to placate the Senators by questioning the precedential force of some of the Rehnquist Court's jurisprudence and suggesting that courts should be careful not to usurp the legislative role by reweighing congressional findings. [\[FN48\]](#)^[FN48]

Shortly afterward, the Senate considered the nomination of Samuel Alito to replace Justice O'Connor, who was retiring and had been a swing vote in favor of the protection of individual rights in some cases. [\[FN49\]](#)^[FN49] In response to questions similar to those posed to Justice Roberts by Senate Judiciary Committee members, Alito declined to offer any criticism of the Rehnquist Court's decisions. [\[FN50\]](#)^[FN50]

***238** In 2007, the Democrats took control of both houses of Congress for the first time in twelve years, [\[FN51\]](#)^[FN51] setting the stage for potential conflict with the Court's diminution of congressional power.

II. The Early Roberts Court Intensified the Judicial Assault on Congress's Power to Protect Civil Rights

Despite the ruminations of Justice Roberts during his confirmation hearings, the early decisions of the Roberts Court have perpetuated and amplified the judicial attack on congressional efforts to protect civil rights. The Court has diminished the power of Congress, the most representative of the three branches of government, and expanded the power of the judicial and executive branches as well as state governments.

A. Congressional Intent Expressed in Legislative History and Statutory Goals has been Rejected; Instead, the Roberts Court Relied upon Cases Congress Explicitly Overruled

Following the lead of the Rehnquist Court, a majority of the early Roberts Court has assaulted congressional power to enact effective remedies in civil rights legislation. In two decisions, both written by Justice Alito on behalf of the five more conservative Justices, the majority chose to disregard congressional intent to protect civil rights, holding Congress to a standard of rigorous clarity and excruciating detail that has no basis in the Constitution.

Arlington Central School District Board of Education v. Murphy [FN52][FN52] presented the issue of whether expert fees are covered by the cost-shifting provisions of the Individuals with Disabilities Education Act (IDEA). [FN53][FN53] Like many civil rights and safety net statutes, the IDEA conditions funding for the states on compliance with federal directives and was enacted pursuant to Congress's power under the Spending Clause of the Constitution. [FN54][FN54] Justice Alito acknowledged that the legislative history clearly expressed congressional intent that the cost-shifting provision cover expert fees, but the Court put “the legislative history aside.” [FN55][FN55] The majority justified its disregard of legislative history as protective of the rights of states. The Court declared, “In a *239 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.” [FN56][FN56] The Court suggested that it would provide more weight to legislative history for other statutes, but indicated that it would not follow congressional intent expressed in legislative history for civil rights and safety net laws enacted pursuant to the Spending Clause. [FN57][FN57]

This decision did not cite any constitutional provision that supports such a disregard of the legislative history of civil rights laws, and indeed there is no text in the Constitution that would support the Court's derogation of congressional power and dismissal of congressional intent for Spending Clause statutes. Naturally, the Roberts Court cited cases from the Rehnquist Court era to support its decision, primarily the *Pennhurst* decision written by Rehnquist when he was an Associate Justice [FN58][FN58] as well as two other cases from Rehnquist's tenure as Chief Justice: the *Crawford* case authored by Rehnquist and the *Casey* decision written by Justice Scalia. [FN59][FN59] The *Casey* decision was overruled by Congress in the 1991 Civil Rights Act. [FN60][FN60] Thus, the Roberts Court added insult to injury in its disrespect for congressional intent by relying on a case that Congress had superseded by statute. The *Arlington* decision reveals that Justice Roberts's Senate testimony professing his readiness to defer to the will of Congress [FN61][FN61] was disingenuous.

Justice Breyer's dissent in the *Arlington* case (on behalf of the four centrist Justices) noted initially that the majority opinion was contrary to the clearly expressed intent of Congress. [FN62][FN62] He pointed out that the *Arlington* decision went beyond the bounds of *Pennhurst* in reducing congressional power under the Spending Clause. He explained:

[N]either *Pennhurst* nor any other case suggests that every spending detail of a Spending Clause statute must be spelled out with unusual clarity. To the contrary, we have held that *Pennhurst*'s requirement that Congress “unambiguously” set out “a condition on the grant of federal money” does not necessarily apply to legislation setting forth “the remedies available against a noncomplying State.” [FN63][FN63]

*240 Justice Breyer's dissent highlights the new heights to which the Roberts Court has taken the judicial denigration of congressional power: requiring extraordinary specificity and detail in the statutory text of civil rights statutes.

A second, equally egregious example of the Roberts Court majority disregarding congressional intent is *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* [FN64][FN64] Lilly Ledbetter was an area manager at Goodyear Tire & Rubber Co., a position largely occupied by men. Initially, she received a comparable salary to men performing similar work. However, over time, due largely to poor performance evaluations, her salary fell substantially below that of every male manager. [FN65][FN65] After she retired, she sued the company, alleging that her poor evaluations resulted from sex discrimination and affected her pay throughout her employment, in violation of Title VII of the Civil Rights Act of 1964. [FN66][FN66] Her case went to trial, and the jury ruled in her favor, awarding substantial damages. The Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision prior to the EEOC charging period of 180 days. The Supreme Court, in a 5:4 decision written by Justice Alito, affirmed. [FN67][FN67]

The majority rejected Ledbetter's contention that 'discriminatory acts that occurred prior to the charging period had continuing effects during that period.' [FN68][FN68] Instead, the Court ruled that the 'a new charging period does not commence, upon the occurrence of subsequent non-discriminatory acts that entail adverse effects resulting from past discrimination.' [FN69][FN69] Justice Alito's decision asserted that Ledbetter's arguments were 'squarely foreclosed by our precedents.' [FN70][FN70]

The precedents relied upon by the majority were the Lorraine case - which Congress superseded in the 1991 Civil Rights Act [FN71][FN71] - and two cases which were cited in the overturned Lorraine case as the basis for its holding. [FN72][FN72] Justice Alito's decision limited the applicability of the Lorraine legislative fix to the exact facts of the Lorraine case, which involved a seniority system based on intentional sex discrimination. The Court held that the legislative fix did not apply to any other type of employment discrimination, including Ledbetter's claims of disparate*241 treatment. [FN73][FN73] Justice Alito stated that since the cases relied upon by Lorraine were not explicitly rejected by Congress in the 1991 Civil Rights Act, the Court was justified in basing its decision upon the reasoning in Lorraine and the cases that led to the result in Lorraine. [FN74][FN74] The Court ignored the obvious fact that the reasoning in Lorraine led to a holding that Congress repudiated. Instead, the Court narrowly construed the Lorraine legislative fix, rejecting the dissent's observation that the 1991 Civil Rights Act demonstrated Congress's conclusion that Lorraine was wrongly decided. [FN75][FN75]

The majority similarly rejected Ledbetter's argument that pay raise issues should be treated differently from other employment discrimination claims, due to their continuing effects. The Court distinguished *Bazemore v. Friday*, in which Justice Brennan, concurring, stated that '[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.' [FN76][FN76] The majority treated *Bazemore* exactly as it treated the Lorraine legislative fix: limiting *Bazemore* to its facts. The Court noted the factual differences between Ledbetter's claims of disparate treatment and the explicit racial discrimination in *Bazemore* and then concluded that, 'Bazemore is of no help to her.' [FN77][FN77] Any precedent that supported Ledbetter's case was rejected by the majority on the grounds of having different facts, while contrary precedents, superseded by statute, formed the basis for the majority's decision.

Justice Ginsburg authored a passionate dissent, which she read from the bench. [FN78][FN78] The dissent argued that a pay discrimination claim is like a hostile work environment, because both types of claims are based on the cumulative effect of individual acts. [FN79][FN79] Justice Ginsburg relied upon the Lorraine legislative fix and *Bazemore* and stressed that the majority's interpretation of Title VII 'strayed from ... fidelity to the Act's core purpose.' [FN80][FN80] Justice Alito characterized the dissent as 'coy,' for not acknowledging that under the dissent's approach, an employee could wait 20 years before bringing an EEOC charge based on a single discriminatory pay decision. [FN81][FN81] In response, the dissent replied that such a suit would be barred by the equitable defense of *242 laches. [FN82][FN82] Incredibly, the majority justified its result by claiming to defer to the will of Congress as expressed by the filing timeframes in the Civil Rights Act, [FN83][FN83] regardless of the intent of Congress as codified in the Lorraine legislative fix. The Court professed to be bound by a statutory filing

deadline while ignoring the purpose of the legislation and the explicit congressional rebuke of the Court's prior reasoning.

Statutes enacted specifically to supersede Supreme Court precedent clearly express congressional intent and therefore ought to guide future cases. [\[FN84\]](#)^[FN84] The Court should not follow the reasoning of a congressionally-reversed decision where doing so would lead to a very similar result, especially when, as in the 1991 Civil Rights Act, “Congress made clear . . . its view that [the] Court had unduly contracted the scope of protection” the statute provides. [\[FN85\]](#)^[FN85] The Court upsets the constitutional balance of power when it defies statutes that overturn judicial decisions and continues to rely upon cases superseded by statute.

B. Judicial Deference to the Federal Executive Branch has Undermined Congressional Intent in Civil Rights Laws

The Roberts Court has also diminished congressional power by ignoring congressional intent and deferring heavily to the interpretation of statutes by the executive branch. The Court has increased the level of deference accorded to federal agencies, deferring not only to regulations promulgated with public comment but also to mere expressions of agency opinion in legal briefs. The Court's deference to federal administrative agencies' interpretation of federal law has united the centrist and conservative members of the Court. The 2007 Supreme Court term included two unanimous decisions, one written by Justice Breyer and the other by Justice Scalia, emphasizing deference to administrative agency interpretations of law. [\[FN86\]](#)^[FN86]

In *Long Island Care at Home*, [\[FN87\]](#)^[FN87] a domestic worker sued her former employer alleging that the employer failed to pay her the minimum wages and overtime wages to which she was entitled under the Fair Labor Standards Act (FLSA). [\[FN88\]](#)^[FN88] The FLSA exempts from its coverage domestic service employees who provide companionship services, and ***243** the statute explicitly calls upon the Secretary of Labor to promulgate regulations to define the terms contained within the statutory exemption. [\[FN89\]](#)^[FN89] The Department of Labor (DOL) had issued two contradictory regulations regarding whether a worker providing companionship services who is employed by an agency, not the family, is covered under the Act. The first regulation, in a subpart entitled “General Regulations,” defines “domestic service employment” as services for the person by whom he or she is employed. [\[FN90\]](#)^[FN90] The second DOL regulation, located in a subsection entitled “Interpretations,” defines companionship workers to include those who “are employed by an employer or agency other than the family or household using their services.” [\[FN91\]](#)^[FN91] The Court referred to the second regulation as the “third-party regulation.” The district court dismissed the suit based on the third-party regulation, but the Second Circuit reversed, holding that the third-party regulation was “unenforceable.” [\[FN92\]](#)^[FN92] The Supreme Court unanimously reversed the Second Circuit. [\[FN93\]](#)^[FN93]

Justice Breyer's opinion for the Court is highly deferential to the agency's interpretation of its own regulations for litigation purposes. The worker argued that the third-party regulation conflicts with the definition of domestic service employment in the General Regulations. The Court admitted that “the literal language of the two regulations conflict as to whether workers paid by third parties are included within the statutory exemption.” [\[FN94\]](#)^[FN94] However, the Court held that the third-party regulation governs, stating that “the specific governs the general.” [\[FN95\]](#)^[FN95] The Court also conceded “that the Department may have interpreted these regulations differently at different times,” but found that the “interpretive changes create no unfair surprise” since the DOL utilized notice-and-comment rulemaking. [\[FN96\]](#)^[FN96] The Court further “concede[d] ... that the Department set forth its most recent interpretation of these regulations in an ‘Advisory Memorandum’ issued only to internal Department personnel and which the Department appears to have written in response to this litigation.” [\[FN97\]](#)^[FN97] Nevertheless, the Court found that DOL's interpretation “reflects its considered views” and was not plainly erroneous. [\[FN98\]](#)^[FN98]

***244** The Court of Appeals for the Second Circuit had held that the third-party regulation was entitled to limited deference--due largely to the agency's inconsistency in its position--and further held that the regulation was

contrary to the purpose of the law. [FN99][FN99] The Supreme Court was unconcerned with the inconsistency in the agency's position, finding the latest explanation of the agency's position to be "reasonable." [FN100][FN100] The Court was also unconvinced by the purpose of the law, focusing on the power of the administrative agency to interpret ambiguities in the statute. [FN101][FN101] The Court rejected the Second Circuit's holding that a court should review the interpretive regulation for its persuasiveness under the less deferential standard of *Skidmore v. Swift & Co.* [FN102][FN102] Instead, the Court found that the third-party regulation was entitled to full deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, [FN103][FN103] and *United States v. Mead Corp.* [FN104][FN104]

The Court stated that "where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination." [FN105][FN105] The Court utilized a highly deferential standard for reviewing agency positions, instructing lower courts to generally "assume" that Congress intended deference. Thus, even though the agency issued contradictory regulations and interpreted the regulations inconsistently over time--culminating in an agency interpretation articulated solely for purposes of litigation--the Court gave full deference to the most recent agency interpretation.

The unanimous opinion in *Beck v. PACE International Union* [FN106][FN106] was equally deferential to the federal executive. Crown Paper Company filed for bankruptcy and sought to liquidate its assets. Because Crown Paper had overfunded some of its pension plans, the purchase of an annuity would allow the company to reap a \$5 million reversion in surplus funds. PACE International Union proposed instead that Crown Paper merge its pension plans with other PACE pension plans. PACE's proposal would not permit the \$5 million reversion. Crown Paper rejected the union's proposal and purchased the annuity. PACE sued, alleging that Crown Paper breached its fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA)*245 by neglecting to give diligent consideration to PACE's merger proposal. [FN107][FN107] The Bankruptcy Court agreed with the union and issued a preliminary injunction preventing Crown Paper from obtaining the \$5 million reversion. The District Court and Ninth Circuit affirmed. [FN108][FN108] The Supreme Court unanimously reversed.

While the Ninth Circuit based its decision upon the ERISA statute and implementing regulations which supported the union's position, [FN109][FN109] the Supreme Court based its decision on deference to the opinion of the federal government, as expressed in the government's brief and agency opinion letters. [FN110][FN110] Both the Ninth Circuit and the Supreme Court agreed that the statutory text was ambiguous. The Ninth Circuit found that the statute and regulations did not prohibit merger. The Supreme Court deferred to the opinion of the agency expressed in its brief--not its regulations--that merger was impermissible under the statute. The decision, written by Justice Scalia, put the burden on the union to prove that the agency's interpretation was "unreasonable." [FN111][FN111] The Court acknowledged that portions of the statutory scheme were consistent with the union's position, but the Court concluded that the statute lacked the "clarity needed to disregard the [agency's] considered views." [FN112][FN112] Since the statute did not explicitly permit mergers, the Court found that the agency's interpretation was "permissible" and "plausible." [FN113][FN113] The Court indicated that, unless Congress explicitly indicates that the agency has limited discretion, the courts should give wide latitude to the agency's position, even if articulated only for purposes of litigation.

These cases are notable for broadening the scope of deference to federal agencies to the extent that the will of Congress is ignored. When statutes are ambiguous, it is the proper role of courts to look to the legislative history, purpose of the statute, overall structure of the statute, etc., to attempt to discern congressional intent. [FN114][FN114] The Court's assumption that an agency position articulated solely for litigation purposes, even when contrary to the purpose of the statute, is valid, is an abdication of judicial responsibility to scrutinize agency action for *246 its adherence to congressional intent. [FN115][FN115] The Court's broad deference to agency litigating positions enlarges the power of the executive branch and erodes congressional power to protect civil rights.

C. Denying Judicial Access, the Court Ignored Congressional Intent, with Some Exceptions

Several cases decided by the early Roberts Court have addressed the threshold question of whether injured parties have any right to bring their claims in court. The Roberts Court has not hesitated to deny judicial access to enforce civil rights, ignoring clear expressions of congressional intent while blaming Congress for the resulting inequities. Nevertheless, one decision by Justice Kennedy proclaimed the injustice of denying access to judicial remedies and two other cases unanimously upheld the rights of prisoners to bring suits.

1. The Roberts Court has denigrated the competence of the judiciary and undercut the equitable and remedial powers of courts in denying court access

The degree to which the early Roberts Court disallowed access to the courts to vindicate individual rights, portends increased difficulty for enforcing civil rights. The Court has evinced utter disregard for the right of aggrieved parties to have their day in court.

Credit Suisse Securities (USA) LLC v. Billing involved two class action antitrust suits brought by sixty investors against ten leading investment banks. [\[FN116\]](#)[\[FN116\]](#) The investors challenged the banks' underwriting practices during the initial public offering of shares in a company, alleging that the underwriters colluded to require investors to pay anticompetitive charges. The complaints attacked underwriter efforts to obtain excessive commissions through practices disapproved by the Securities and Exchange Commission (SEC). [\[FN117\]](#)[\[FN117\]](#)

Before the Second Circuit, [\[FN118\]](#)[\[FN118\]](#) the Antitrust Division of the Department of Justice filed an amicus brief in support of the investors, and the SEC submitted a letter that did not support the industry. [\[FN119\]](#)[\[FN119\]](#) The Second Circuit put the burden of showing that Congress intended to *247 implicitly repeal the antitrust laws on the industry. [\[FN120\]](#)[\[FN120\]](#) The Second Circuit found that there was “no legislative history indicating that Congress intended to immunize” the anti-competitive arrangements at issue in the litigation. [\[FN121\]](#)[\[FN121\]](#) The Court of Appeals further held that the antitrust laws did not conflict with any specific provision of the securities laws. [\[FN122\]](#)[\[FN122\]](#)

The Supreme Court did not address the question of whether Congress intended the securities laws to repeal the antitrust laws. Indeed, the Court ignored the issue of whether the legislature intended to immunize anti-competitive arrangements from suit by injured parties. The decision, written by Justice Breyer on behalf of six Justices, focused instead on the “efficient functioning of the securities market” and cautioned that investor suits posed “a substantial risk of injury to the securities markets.” [\[FN123\]](#)[\[FN123\]](#) The Supreme Court noted that the securities laws grant the SEC authority to supervise all the activities challenged in the litigation and the SEC does regulate the activities. [\[FN124\]](#)[\[FN124\]](#) Since the SEC actively enforces its rules and regulations, the Court saw a “diminished need for antitrust enforcement to address anticompetitive conduct.” [\[FN125\]](#)[\[FN125\]](#) In contrast to the Second Circuit's conclusion that no provision of the antitrust laws at issue in the case conflicted with the securities laws, the Supreme Court found “a serious conflict between, on the one hand, application of the antitrust laws and, on the other, proper enforcement of the securities law.” [\[FN126\]](#)[\[FN126\]](#)

Even though the Department of Justice's Antitrust Division had supported the investors before the Second Circuit, when the case moved to the Supreme Court, the SEC filed a brief in support of the industry's petition for certiorari. [\[FN127\]](#)[\[FN127\]](#) After certiorari was granted, the Solicitor General filed a brief on the merits in support of the banks, urging a remand to the district court for further fact finding. [\[FN128\]](#)[\[FN128\]](#)

The opinion by Justice Breyer justifies the decision to close the courthouse doors to investors on the grounds that judges and juries do not have sufficient expertise to determine the factual and legal questions at issue in such litigation. The Court stated:

[A]ntitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with

different nonexpert judges and different *248 nonexpert juries. . . . The result is an unusually high risk that different courts will evaluate similar factual circumstances differently. [FN129][FN129]

The Court concluded rhetorically that only the SEC had sufficient expertise to determine whether an underwriter engaged in conduct that violated the law. [FN130][FN130]

Justice Stevens, concurring in the result, stated that in his opinion the challenged conduct did not rise to a violation of antitrust law. [FN131][FN131] However, he did not join Justice Breyer's opinion, specifically objecting to its disparagement of the expertise of the courts. [FN132][FN132] Justice Kennedy recused himself, because his son is a managing director of Credit Suisse. [FN133][FN133] Chief Justice Roberts recused himself initially based on his financial interests in some of the defendant firms, but then he re-entered the case without explanation just before oral argument. [FN134][FN134]

Justice Thomas, dissenting alone, noted that the Securities Act had a savings clause that preserved rights and remedies outside the securities law, and therefore viewed the securities law as permitting the lawsuit under the antitrust law. [FN135][FN135] While the majority rejected this contention, because the savings clause did not explicitly mention the antitrust law, [FN136][FN136] Justice Thomas stated:

Although Congress may have singled out antitrust remedies for special treatment in some statutes, it is not precluded from using more general saving provisions that encompass antitrust and other remedies. Surely Congress is not required to enumerate every cause of action-state and federal-that may be brought. When Congress wants to preserve all other remedies, using the word "all" is sufficient. [FN137][FN137]

In this case, Justice Thomas, standing alone, defended the constitutional duty of the courts to uphold the will of Congress and the rights of civil rights litigants.

It is disturbing that Justice Breyer and the five members of the Court who joined his opinion, gutted investors' rights under antitrust law without even considering whether Congress intended in the securities law to implicitly immunize the banking industry from suits under the antitrust law. While agencies are certainly entitled to some measure of deference in interpreting ambiguous statutes, the Court's review*249 of congressional intent was too cursory and its deference to the agency interpretation was too expansive. As a result, the Court abdicated its proper role of ensuring that agency interpretation of law comports with Congress's intent to preserve legal remedies.

Even more troubling, the Court belittled the intellectual abilities of judges and juries to decide complex issues of fact and law. The Court's denigration of judges and juries as "nonexpert," undermines the constitutional duty of the judiciary to enforce complicated statutes. The possibility that the reasoning in this decision could be extended to other contexts is distressing. [FN138][FN138]

While members of the Court's centrist wing were willing to close the courthouse doors in Credit Suisse, the Court split along the typical conservative/centrist divide in the context of the appeal rights of a prisoner, in *Bowles v. Russell*. [FN139][FN139] The Court's five conservative members were united in their fervor for closing court access to prisoners, denying any right of appeal when a prisoner missed a filing deadline due to the inadvertent error of the district court judge.

In granting an extension for filing a federal habeas appeal, the district court judge in *Bowles* mistakenly gave the defendant seventeen days to file, but the statute and implementing federal rules permit only fourteen days. [FN140][FN140] The prisoner's appeal was filed by his attorney on the sixteenth day. [FN141][FN141] The Sixth Circuit refused to hear the appeal, holding that the notice of appeal was untimely. The Supreme Court affirmed, ruling 5:4 that a court has no power to give an equitable exception to filing deadlines for appeal. [FN142][FN142]

The majority began with the general rule that the 14-day time limit is "mandatory and jurisdictional." [FN143][FN143] The Court held that a filing deadline contained in a statute, as distinguished from a filing deadline based on

a rule of procedure but not a law, cannot be extended as part of the equitable power of the judiciary. Once again blaming Congress, the conservative bloc declared that the judicial branch does not have “authority” from the language of the statute to grant equitable relief when a statutory filing deadline is missed. [\[FN144\]](#)[\[FN144\]](#) The majority claimed to be bound by the will of Congress, suggesting that any possible inequitable result from the Court’s “rigorous” application of statutory time ***250** limits was due to congressional drafting. [\[FN145\]](#)[\[FN145\]](#) The Court stated that Congress could explicitly authorize the courts to “excuse compliance with the statutory time limits.” [\[FN146\]](#)[\[FN146\]](#) In this manner, the Roberts Court placed a new burden on Congress to confer upon the courts the power to interpret statutory deadlines in an equitable fashion.

Far from upholding precedent, the majority in *Bowles* invalidated prior Supreme Court decisions that recognized the equitable role of courts. The Court expressly overruled two prior cases from 1962 that established the judicial doctrine of “unique circumstances,” which permits the equitable extension of time to prevent great hardship to a party. [\[FN147\]](#)[\[FN147\]](#) The majority stated that the “unique circumstances” doctrine is “illegitimate” because, “this Court has no authority to create equitable exceptions to jurisdictional requirements.” [\[FN148\]](#)[\[FN148\]](#) The case cites no basis in the Constitution for its holding that the judiciary is bereft of such equitable powers. Instead, the Court focused on “a century’s worth of precedent and practice” that denied the right to appeal when the notice of appeal is untimely. [\[FN149\]](#)[\[FN149\]](#) The majority dismissed the possibility of a narrow exception to the general rule of timeliness to prevent a miscarriage of justice.

Justice Souter, dissenting on behalf of the Court’s four centrist Justices, responded that there was “not even a technical justification” for the majority’s decision. [\[FN150\]](#)[\[FN150\]](#) The dissent noted that the majority opinion conflicts with substantial precedent permitting an exception to filing deadlines in limited circumstances, including when a litigant relies upon the instructions of a district court judge. [\[FN151\]](#)[\[FN151\]](#) Souter’s dissent also points out the majority’s disregard of statements regarding jurisdiction in numerous recent and unanimous Supreme Court decisions--including two written by Justice Ginsburg. [\[FN152\]](#)[\[FN152\]](#) Those recent cases held that unless Congress expressly provides that a time limit may not be waived, courts have the power to exercise equitable discretion. The dissent protested:

In ruling that *Bowles* cannot depend on the word of a District Court Judge, the Court demonstrates that no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this ***251** Court. Yet more incongruously, all of these pronouncements by the Court, along with two of our cases [that were explicitly overruled], are jettisoned in a ruling for which the leading justification is *stare decisis*. [\[FN153\]](#)[\[FN153\]](#)

The dissent described the majority’s treatment of *Bowles* as “intolerable.” [\[FN154\]](#)[\[FN154\]](#)

The *Bowles* decision is worded in legal terminology regarding the nuances behind the meaning of “jurisdiction”--certainly not an issue that galvanizes the public. Even the legal media, while recognizing that the case reflects “the sharp conservative-liberal divide” of the early Roberts Court, characterized *Bowles* as a “low-profile case.” [\[FN155\]](#)[\[FN155\]](#)

Yet, it is important to recognize that, utilizing abstract legal language, the Court impaired the important constitutional role of the judiciary to effectuate justice. Once again, the Court placed a burden of elaborate detail and specificity on Congress, requiring that each and every statute delineate precisely the extent to which it may be interpreted equitably. There is no basis in the Constitution for the abdication of the judicial role in ensuring equity.

While the five conservative Justices were completely united in *Bowles*, they could agree only on the result--closing access to the courts for civil rights--in *Hein v. Freedom from Religion Foundation*. [\[FN156\]](#)[\[FN156\]](#) Justice Kennedy refused to join the other four in disapproving the result in *Flast v. Cohen*, [\[FN157\]](#)[\[FN157\]](#) a 1968 case which held that a taxpayer has standing to challenge a law authorizing the use of federal funds on the basis that it violates the Establishment Clause. Still, Kennedy was willing to join with Justices Roberts and Alito in limiting

Flast to its facts and charging Congress with policing the resulting injustice. Justices Scalia and Thomas, concurring only in the result, lampooned the plurality for refusing to overrule Flast explicitly and blasted the dissenters for adhering to Flast. [\[FN158\]](#)[\[FN158\]](#) Justice Souter authored the dissent on behalf of the Court's four centrist Justices--Justices Stevens, Souter, Ginsburg and Breyer.

The plurality opinion, written by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy, noted that Flast involved a challenge to a statute, while Hein involved an Establishment Clause challenge*252 to the actions of the executive branch. In Hein, the plaintiffs challenged the discretionary expenditure of general executive branch funds that was not the subject of any specific congressional action or appropriation. Once this factual distinction was drawn, the plurality simply held that Flast was not controlling and should not be extended to executive action. [\[FN159\]](#)[\[FN159\]](#)

The plurality criticized Flast for giving “too little weight” to “serious separation-of-powers concerns,” but the plurality expressed adherence “to the doctrine of stare decisis” and refused to overrule Flast in the absence of a case or controversy regarding the factual basis of Flast. [\[FN160\]](#)[\[FN160\]](#) The plurality's main concern was that the judiciary not infringe upon the power of the executive branch. [\[FN161\]](#)[\[FN161\]](#) The plurality viewed the independence of the executive from judicial review as integral to the constitutional separation of powers. [\[FN162\]](#)[\[FN162\]](#)

The plurality acknowledged the plaintiffs' argument that without court review, the executive branch was free to violate the Establishment Clause, for instance by using discretionary funds to build a church or hire a clergy and “send them out to spread their faith.” [\[FN163\]](#)[\[FN163\]](#) Unconcerned, the plurality stated that if such an “unlikely event ... did take place, Congress could quickly step in.” [\[FN164\]](#)[\[FN164\]](#) Thus, the plurality found that the courts did not have any role in preventing the establishment of religion by the executive branch in its disbursement of discretionary funds; instead, the plurality viewed enforcement of the Constitution in this context as a congressional role, without specifying how Congress could invalidate an executive action.

Although Justice Kennedy joined the whole of Justice Alito's opinion, he disagreed with the rest of the majority regarding Flast and expressed the view that Flast was correctly decided. [\[FN165\]](#)[\[FN165\]](#) The reluctance of Justices Roberts and Alito to join Scalia and Thomas in overruling Flast was likely intended to garner Kennedy's vote. Kennedy opined in his individual concurrence that it was proper to permit taxpayer standing to challenge a statute, but he viewed a challenge to the executive branch as improper. His concurrence concludes with the following observation:

*253 It must be remembered that, even where parties have no standing to sue, members of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations. [\[FN166\]](#)[\[FN166\]](#)

In this manner, Kennedy admonished the legislative and executive branches to obey the law, even when their actions cannot be challenged in court.

The dissent argued that there is no substantive difference between the spending of tax funds in accordance with a statute and the expenditures of discretionary funds by the executive branch. [\[FN167\]](#)[\[FN167\]](#) The dissent explained: “When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury.” [\[FN168\]](#)[\[FN168\]](#) The dissent was clearly looking to sway Justice Kennedy in the future by highlighting his agreement that Flast was correctly decided, stating: “Flast speaks for this Court's recognition (shared by a majority of the Court today) that when the Government spends money for religious purposes a taxpayer's injury is serious and concrete enough to be ‘judicially cognizable.’” [\[FN169\]](#)[\[FN169\]](#) The dissenters disputed the majority's characterization of precedent and suggested

that taxpayer standing in *Hein* would be consistent with prior cases. [\[FN170\]](#)^[FN170]

Hein is notable for the acknowledgement in the plurality opinion and Kennedy's concurrence that the Court's decision regarding taxpayer standing insulated the executive branch's support for religion from judicial review. In this case, the judiciary abdicated its role to ensure that the executive branch complies with the Establishment Clause of the Constitution. Under the most basic principles of the separation of powers in the American system of government, it is the role of the courts, as well as of the Congress, to declare when executive action violates the Constitution. [\[FN171\]](#)^[FN171] Justice Kennedy's directive that the executive must obey constitutional provisions even in the absence*²⁵⁴ of judicial oversight cannot seriously be expected to restrain the executive branch. [\[FN172\]](#)^[FN172]

2. The Roberts Court Has Permitted Some Civil Rights Litigation to Proceed

Despite the Roberts Court majority's limitation on access to judicial remedies in *Credit Suisse*, *Hein*, and *Bowles*, conservative Justices have upheld the right to access the courts in a few civil rights cases.

Justice Kennedy authored an opinion in *Winkelman v. Parma City School District* declaring the injustice of denying court access. [\[FN173\]](#)^[FN173] Justices Roberts and Alito joined Kennedy's decision, along with the four centrist Justices. [\[FN174\]](#)^[FN174] Justices Scalia and Thomas concurred in the judgment in part and dissented in part. [\[FN175\]](#)^[FN175]

The *Winkelman* case concerned the right of parents to litigate pro se on behalf of their children under the Individuals with Disabilities Education Act (IDEA). [\[FN176\]](#)^[FN176] The local school district had recommended placement of the parents' autistic son in a public elementary school. [\[FN177\]](#)^[FN177] The parents disagreed with that placement and paid for their son to attend a private school. The parents appealed the school's decision through the administrative process and lost. [\[FN178\]](#)^[FN178] They then filed suit pro se in the district court and lost. They appealed pro se to the Sixth Circuit. The Sixth Circuit dismissed their appeal without considering the merits, holding that the rights conferred by the IDEA belong to the child, and therefore non-lawyer parents could not pursue an appeal pro se. [\[FN179\]](#)^[FN179] The Sixth Circuit's ruling conflicted with a decision of the First Circuit. [\[FN180\]](#)^[FN180]

The Supreme Court began by noting that because the school district accepts federal funds to pay for the education of children with disabilities, "it must comply with IDEA's mandates." [\[FN181\]](#)^[FN181] Given the Court's derogation of congressional powers under the Spending Clause in cases such as *Arlington Central School District Bd. of Educ. v. Murphy*,*²⁵⁵ [\[FN182\]](#)^[FN182] it is helpful to have the Roberts Court acknowledge its role in enforcing a statute enacted pursuant to Congress's power under the Spending Clause.

Indeed, the State relied upon the *Arlington* case, arguing that the IDEA did not provide "clear notice" of the state's liability, as required for Spending Clause statutes. [\[FN183\]](#)^[FN183] The Court rejected the State's contention that permitting the parents to proceed pro se would place "any substantive condition or obligation" on the states. [\[FN184\]](#)^[FN184] The Court stated that the "basic measure of monetary recovery ... is not expanded by recognizing that some rights repose in both the parent and the child." [\[FN185\]](#)^[FN185]

The Court also dismissed the State's assertion that states would be subjected to frivolous suits and increased litigation costs, if parents are permitted to represent themselves. [\[FN186\]](#)^[FN186] The Court responded: "Effects such as these do not suffice to invoke the concerns under the Spending Clause." [\[FN187\]](#)^[FN187] The Court noted that the IDEA permits states to seek attorneys' fees from losing parents, [\[FN188\]](#)^[FN188] and therefore concluded that the impact on state treasuries would be minimal. [\[FN189\]](#)^[FN189] The Court's assessment that the costs to the states in *Winkelman* would be insubstantial contrasts sharply with the *Arlington* case, in which the parents sought close to \$30,000 to reimburse the costs of an expert. [\[FN190\]](#)^[FN190] The Court's appraisal of the minimal fees

involved in *Winkelman* could have influenced some conservative Justices to depart from the tenor and tone of *Arlington*.

Furthermore, in *Winkelman*, the Court relied heavily on the wording of the purpose of the IDEA, which includes ensuring “that the rights of children with disabilities and parents of such children are protected.” [FN191] The Court observed that the “grammatical structure would make no sense” if the IDEA did not confer independent rights on parents. [FN192] The Court found that other provisions presume “parents have rights of their own,” and any contrary interpretation would be “far too strained to be correct.” [FN193] The Court cited case law from *256 the 1920s for the proposition that “parents have a recognized legal interest in the education and upbringing of their children.” [FN194]

Winkelman contains a very helpful formulation of the connection between rights and remedies. The dissent by Justices Scalia and Thomas argued that if there is a right without a remedy, “that complaint is properly addressed to Congress.” [FN195] The other seven Justices rejected that pronouncement. Justice Kennedy's opinion responded that the dissent's approach of not permitting parents to appeal pro se the school placement of the child, “leaves some parents without a remedy,” in which case the “potential for injustice ... is apparent.” [FN196]

While devoid of any similar recognition of the injustice of depriving parties of a remedy, the unanimous decision authored by Chief Justice Roberts in *Jones v. Bock* [FN197] upheld access to the courts for prisoners. The Supreme Court reversed a Sixth Circuit decision that placed judicial roadblocks on the filing of prisoner litigation above and beyond statutory provisions and federal rules. The Prison Litigation Reform Act of 1995 (PLRA) [FN198] established new, additional requirements for exhaustion of administrative remedies and quick review of the sufficiency of prisoners' claims prior to the filing of an answer. [FN199] The Sixth Circuit went above and beyond the PLRA and the usual rules for the sufficiency of a complaint in dismissing prisoner litigation in three separate cases. [FN200] The Supreme Court stated that the Sixth Circuit's decisions were based on policy considerations that fell outside the bounds of the proper judicial role. [FN201]

The primary procedural issue addressed by the Supreme Court was whether the complaint must plead and prove that administrative remedies had been exhausted. [FN202] The prisoner, *Jones*, had in fact exhausted his administrative remedies, but he did not attach copies of the grievance forms to the complaint or describe the proceedings with specificity. [FN203] The Supreme Court held that the Sixth Circuit's dismissal was unwarranted. [FN204] The Court acknowledged that the PLRA was intended to reduce prisoner litigation by making exhaustion *257 mandatory, but the Court agreed with the majority of circuit courts that prisoners simply had to include a short and plain statement of the claim in the complaint, as required by the federal rules. [FN205] The Court stated: “The PLRA itself is not a source of a prisoner's claim; claims covered by the PLRA are typically brought under 42 U.S.C. § 1983, which does not require exhaustion at all.” [FN206] The Court explained that the usual practice is to treat exhaustion as an affirmative defense and not a heightened pleading standard. The Court emphasized that “courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.” [FN207] The Court refused to imply this heightened standard based on other procedural requirements in the PLRA, noting that “when Congress meant to depart from the usual procedural requirements, it did so expressly.” [FN208]

The Court found that the imposition of a pleading requirement “cannot fairly be viewed as an interpretation of the PLRA,” and cited Justice Frankfurter for the proposition that “the judge's job is to construe the statute--not to make it better.” [FN209] In this manner, the Court adhered to the will of Congress in permitting access to the courts.

Similarly, in a unanimous decision written by Justice Scalia, the Roberts Court permitted a prisoner to sue a state for damages under the Americans with Disabilities Act for alleged discrimination based on disabilities, but the

decision is devoid of any expression of general support for court access. [\[FN210\]](#)[\[FN210\]](#) Since the case concerned the issue of state sovereign immunity, it will be discussed in detail in Section D.

In sum, there is possible ambivalence on the Roberts Court toward restricting the right to sue in some cases, at least during the tenure of Justice Kennedy. This underscores the importance of carefully selecting civil rights cases to be presented to the Roberts Court, to maximize the potential for a positive outcome.

D. Early Indications Suggest that the Roberts Court Majority Will Adhere to the Reduction of Congressional Power to Protect Civil Rights that have been Violated by the States

After Chief Justice Roberts's appointment, but before the arrival of Justice Alito, the Supreme Court issued two decisions addressing state ***258** sovereign immunity in civil rights suits. [\[FN211\]](#)[\[FN211\]](#) Although Justice Alito has not joined an opinion directly addressing the issue of state sovereign immunity in the context of civil rights, his opinion in Arlington Central School District (narrowly construing Congress's power over the states under the Spending Clause) [\[FN212\]](#)[\[FN212\]](#) suggests that he joins the other conservative Justices' views on the power of states in the constitutional design.

While Chief Justice Rehnquist had been the primary architect and author of the expansion of state sovereign immunity, [\[FN213\]](#)[\[FN213\]](#) the Rehnquist Court's final two Eleventh Amendment rulings in civil rights cases both limited the sovereign immunity doctrine. [\[FN214\]](#)[\[FN214\]](#) The first case, *Tennessee v. Lane*, hinged on Justice O'Connor leaving the conservative block and joining the opinion of the centrist wing. With O'Connor's vote in a 5:4 split, the Court held that Congress had the power to permit suits against the state to enforce Title II of the ADA. [\[FN215\]](#)[\[FN215\]](#) The vigorous dissents by the other four members of the Rehnquist Court conservative bloc indicate no retrenchment from previous sovereign immunity decisions. [\[FN216\]](#)[\[FN216\]](#) Yet, in the second Rehnquist Court case narrowing sovereign immunity, *Tennessee Student Assistance Corp. v. Hood*, Justices Rehnquist, Kennedy and O'Connor sided with the centrist wing. The *Hood* case held that a bankruptcy proceeding to discharge a student debt was an in rem proceeding and was not a suit against the state for the purpose of the Eleventh Amendment. [\[FN217\]](#)[\[FN217\]](#) Only Justices Scalia and Thomas dissented. [\[FN218\]](#)[\[FN218\]](#)

The question of sovereign immunity in the context of bankruptcy reemerged in the first months of Chief Justice Roberts's tenure. *Central Virginia Community College v. Katz* presented the question of whether a bankruptcy proceeding to set aside preferential transfers that the debtor had made to state agencies was barred by sovereign immunity. [\[FN219\]](#)[\[FN219\]](#) Chief Justice Roberts and Justice Kennedy sided with Justices Scalia and Thomas, finding that the state was immune from ***259** such a suit. [\[FN220\]](#)[\[FN220\]](#) Thus, Justice Kennedy signaled that his vote in *Hood* was intended to carve out a narrow exception without retrenching on earlier sovereign immunity decisions. [\[FN221\]](#)[\[FN221\]](#) Yet, due to the swing vote of Justice O'Connor, who joined the four centrist Justices, the conservative bloc did not prevail. [\[FN222\]](#)[\[FN222\]](#)

The majority opinion by Justice Stevens and the dissent by Justice Thomas vigorously debated the intent of the framers of the Constitution in enacting the Bankruptcy Clause. [\[FN223\]](#)[\[FN223\]](#) The majority found that the states had acquiesced to subordinating their sovereign immunity by ratifying the Bankruptcy Clause. [\[FN224\]](#)[\[FN224\]](#) Justice Stevens rejected the state's argument that the text of the Clause contained no such subordination, stating: “text aside, the Framers, in adopting the Bankruptcy Clause, plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders.” [\[FN225\]](#)[\[FN225\]](#) Justice Stevens concluded that Congress had the constitutional power under the Bankruptcy Clause to subject the states to bankruptcy suits, and therefore the abrogation of state sovereign immunity was “effected in the plan of the [Constitutional] Convention, not by statute.” [\[FN226\]](#)[\[FN226\]](#) The majority opinion in *Katz* relied heavily upon and extended the ruling in *Hood*. The majority focused on the congressional power to achieve a “uniform” bankruptcy system, which would include suits nationwide against state entities. [\[FN227\]](#)[\[FN227\]](#)

Like many of the Roberts Court cases rejecting precedent without expressly overruling it, Justice Thomas's dissent sought to eradicate Hood on the basis of a factual distinction. While Hood involved property in the hands of the debtor, Katz involved property in the possession of the state. [\[FN228\]](#)[\[FN228\]](#) Justice Thomas found this factual distinction sufficient to obliterate any effect of the Hood decision. [\[FN229\]](#)[\[FN229\]](#) The dissent opined that a uniform system could treat different creditors differently, so that states would enjoy a protection from suit that did not apply to other creditors. [\[FN230\]](#)[\[FN230\]](#) The dissent also disputed the majority's characterization of the Bankruptcy Clause as abrogating sovereign immunity, focusing on the text of the clause and the Rehnquist Court's *260 sovereign immunity decisions regarding other portions of Article I of the Constitution. [\[FN231\]](#)[\[FN231\]](#) The dissent argued that there is “nothing special about the Bankruptcy Clause” that would distinguish it from the rest of Article I in abrogating sovereign immunity. [\[FN232\]](#)[\[FN232\]](#) The dissent concluded: “Nothing in the text, structure, or history of the Constitution indicates that the Bankruptcy Clause, in contrast to all of the other provisions of Article I, manifests the States' consent to be sued by private citizens.” [\[FN233\]](#)[\[FN233\]](#)

Since the Katz decision was based on the swing vote of Justice O'Connor, it is doubtful that there are presently five votes to adhere to the decision's reasoning. [\[FN234\]](#)[\[FN234\]](#) Justice Thomas's dissent is likely to portend the approach of the majority in future cases, in which Justice Alito will replace Justice O'Connor. The Katz dissent was unconcerned with the power of Congress to effectuate justice through a national bankruptcy system. The dissent's primary, if not exclusive, interest was whether there was an explicit agreement on the part of the state to being sued. Once again, the conservative members of the Roberts Court sought to impede congressional power to protect disadvantaged individuals when state entities conflict with individual rights.

In contrast to the clash of opinions in Katz, the second sovereign immunity case involving Chief Justice Roberts and Justice O'Connor, *United States v. Georgia*, unified the Justices in limiting the scope of sovereign immunity. This case involved a prisoner suing for violations of the ADA. [\[FN235\]](#)[\[FN235\]](#) A paraplegic prison inmate alleged that he was confined in a cell too small to move his wheelchair for 23 hours per day, denied needed assistance to use the shower and toilet, denied medical treatment and physical therapy, and denied access to all prison programs due to his disability. [\[FN236\]](#)[\[FN236\]](#) The Court unanimously upheld the abrogation of sovereign immunity for the prisoner's suit for damages, in a narrow opinion authored by Justice Scalia.

The decision held that Congress could abrogate sovereign immunity under the ADA for conduct sufficiently outrageous to violate the Constitution's prohibition on cruel and unusual punishment. [\[FN237\]](#)[\[FN237\]](#) The *261 decision sidestepped the central question of whether Congress could validly abrogate sovereign immunity for discrimination that did not rise to the level of a constitutional violation. The Court remanded that issue to the lower court. [\[FN238\]](#)[\[FN238\]](#)

Justice Scalia noted that the Eleventh Circuit had held that the prisoner alleged violations of the Eighth Amendment's prohibition on cruel and usual punishment, and the state did not challenge the appellate court's characterization of the complaint. [\[FN239\]](#)[\[FN239\]](#) Scalia's opinion attempts to distinguish a long line of cases in which the conservative members of the Court upheld sovereign immunity by claiming that none of the previous cases involved allegations of constitutional violations. [\[FN240\]](#)[\[FN240\]](#) That characterization is incorrect. In fact, constitutional violations had been alleged in *Lane*, [\[FN241\]](#)[\[FN241\]](#) but the conservative members of the Court opined in dissent, as cited by Scalia, that the constitutional allegations were baseless. [\[FN242\]](#)[\[FN242\]](#) Thus, it appears that *United States v. Georgia* was the only civil rights sovereign immunity case in which Justice Scalia and like-minded Justices believed that the constitutional allegations were credible. [\[FN243\]](#)[\[FN243\]](#)

After the Court of Appeals for the Eleventh Circuit held that there were allegations of constitutional violations, it dismissed the prisoner's damages claims based on its holding in a separate case that Congress could not abrogate sovereign immunity under the ADA for violations of the Eighth Amendment. [\[FN244\]](#)[\[FN244\]](#) Justice Scalia wrote that “no one doubts” Congress has the power to abrogate sovereign immunity and permit suits for damages under Title II when states violate the Constitution, [\[FN245\]](#)[\[FN245\]](#)--even though the judges of the Eleventh Circuit had come to the opposite conclusion. Justice Scalia's characterization notwithstanding, *United States v. Georgia*

significantly expanded the circumstances*262 under which suits against the states for damages under the ADA may proceed. [FN246][FN246]

Justice Scalia's opinion cites the majority decision in Lane only once, followed immediately by two citations to the separate dissents of Chief Justice Rehnquist and Justice Scalia in Lane. [FN247][FN247] He cites the majority opinion in Lane only for the proposition that there have been prior disputes among “Members of the Court” on the sovereign immunity issue. [FN248][FN248] In this manner, the opinion by Justice Scalia did not embrace the majority opinion in Lane and suggested that in future cases the conservative bloc may follow the Lane dissents.

Justice Stevens wrote a brief concurrence, joined by Justice Ginsburg, citing the majority opinion in Lane seven times and exhorting lower courts to apply the approach utilized by the majority in Lane. [FN249][FN249] Justice Stevens suggested that under the reasoning of Lane, Congress could properly permit suits against the states for damages based on conduct “not limited to violations of the Eighth Amendment,” including “the abridgment of religious liberties, undue censorship, interference with access to the judicial process, and procedural due process violations.” [FN250][FN250]

Following Lane and United States v. Georgia, some scholars expressed “hope that the pendulum is beginning to swing back in the direction of those elected by the people of the United States.” [FN251][FN251] However, with the replacement of Justice O'Connor by Justice Alito, the future appears less hopeful. Justice Scalia's opinion in United States v. Georgia citing the dissents in Lane makes it clear that, despite the result, he is not backing down from the Rehnquist Court's jurisprudence attacking congressional power to enable individuals to sue states. This viewpoint gives states subordinate to the federal government more power than foreign governments to evade suit in American courts. [FN252][FN252] Based solely on the conservative Justices' vision of *263 “fundamental postulates implicit in the constitutional design,” [FN253][FN253] the conservative bloc's approach to sovereign immunity remains an affront to Congress's explicit powers in the Constitution.

III. The Restriction of Congressional Power by the Roberts Court is a Policy Judgment Intruding upon the Legislative Function of Congress

By undercutting congressional power and ignoring congressional intent in civil rights cases, the majority of the early Roberts Court (following the lead of the majority of the Rehnquist Court) failed to fulfill the constitutional judicial role of interpreting the law. Instead, the conservative bloc of the Roberts Court assumed an inappropriate policy-making role, refusing to enforce laws that protect civil rights.

Certainly, all of the Justices are influenced by their political viewpoints. [FN254][FN254] Still, the constitutional role of the court is to enforce laws, regardless of individual politics. The decisions of the conservative Justices, ignoring or overruling precedent and distorting plain meaning, demonstrate that the Roberts Court majority is willing to act as a political policy-maker to achieve conservative social objectives. The Court's opinions can only be understood as a cohesive whole by acknowledging that the Roberts Court is actively working to promote a policy agenda that is overtly hostile to civil rights.

The activism of the early Roberts Court is clear. As one scholar assessing the Roberts Court observed of its first term:

The Court moved significantly to the right on key issues that divide liberals and conservatives--in particular, abortion and race. The Court tended to favor the government over individuals across a wide range of issues. And the Court tended to favor businesses over employees and consumers. [FN255][FN255]

*264 Another scholar has described the conservative bloc as a “right-wing phalanx ... guided by no judicial or political principle at all, but only by partisan, cultural, and perhaps religious allegiance.” [FN256][FN256]

The cases already discussed in this article demonstrate the manner in which the Roberts Court assumed a policy role in negating congressional intent and denying access to judicial remedies. The Court similarly pursued partisan objectives in deciding cases involving the interpretation of the Constitution.

One of the most high-profile cases of the early Roberts Court concerned the voluntary desegregation of public elementary schools. In *Parents Involved in Community Schools v. Seattle School District No. 1*, [FN257][FN257] the conservative bloc invalidated the school student assignment plans of Seattle and Louisville on the basis that the consideration of race violated the Equal Protection Clause. The Court distinguished but did not explicitly overrule *Grutter v. Bollinger*, [FN258][FN258] which had reached the opposite conclusion in the context of higher education. *Grutter* had been a 5:4 decision that hinged on the vote of Justice O'Connor. The majority decision written by Chief Justice Roberts in *Parents Involved* stated that the Court accepts the compelling government interest in diversity in higher education, but not elementary education, [FN259][FN259] narrowly limiting *Grutter* to its precise facts without overturning the prior case. The acceptance of the need for diversity in higher education, coupled with the rejection of the value of diversity in elementary school education “is the kind of distinction--unrelated to any difference in principle--that first-year law students are taught to disdain.” [FN260][FN260] The Roberts Court majority refused to accept the policy decision of city government and read into the Constitution its own policy decision that racial preference as part of an integration plan is undesirable. [FN261][FN261]

In another highly publicized case, *Gonzales v. Carhart*, [FN262][FN262] the Court eroded women's right to choose an abortion, upholding the Partial-Birth Abortion Ban Act of 2003. [FN263][FN263] The Court ignored the holding in *Stenberg v. Carhart*, [FN264][FN264] another case decided by the swing vote of Justice O'Connor, that abortion statutes are unconstitutional if they do not contain an exception for the preservation of the health of the mother. The majority decision demonstrated utter disregard for precedent.*265 [FN265][FN265] Justice Ginsburg, dissenting on behalf of the centrist bloc, protested:

Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices. [FN266][FN266]

These two cases are vivid examples that the Roberts majority is pursuing a policy agenda hostile to civil rights.

IV. Conclusion

Unfortunately, given the life tenure of Supreme Court Justices, it will not be easy to restore the civil rights guarantees eroded by these decisions. Advocates need to beware of the substantial threat to civil rights posed by the Roberts Court.

It is certainly possible for Congress to take significant steps to restore civil rights, enacting legislation to strengthen civil rights laws: expanding definitions of individuals impacted by laws, improving and expanding private rights of action, and superseding erroneous Supreme Court interpretations of legislative intent. Since the Supreme Court has limited Congress's power to abrogate state sovereign immunity, it may be more effective for future legislation to condition federal funds on states' compliance with policy objectives. [FN267][FN267]

Nevertheless, legislation should be drafted with the clear knowledge that the Roberts Court will narrowly interpret statutes that protect civil rights. For instance, the Court is likely to dismiss legislative history in the context of Spending Clause cases, and therefore simply recording congressional intent in a congressional report is unlikely to sway the interpretation of the statute by the Court. Also, legislation that overrules prior precedent should specify that it applies to a wide range of facts and is not intended to be limited only to the fact pattern of the superseded case.

Litigation to enforce civil rights in the era of the Roberts Court will definitely be challenging. Advocates should consult with regional and national experts regarding which cases to appeal in this era of conservative courts, as well as how to frame jurisdictional claims to maximize the likelihood of overcoming procedural hurdles to court access. [\[FN268\]](#)^[FN268] For instance, preemption claims are an alternative form of *266 obtaining court access, in lieu of [42 U.S.C. § 1983](#), for enforcement of Spending Clause statutes. [\[FN269\]](#)^[FN269] As federal courts become more hostile to civil rights litigants, counsel should consider whether state court claims are likely to provide a more favorable result. For example, consider third-party beneficiary claims under state law to enforce federal law against government contractors. [\[FN270\]](#)^[FN270]

Finally, advocates should increase and improve communications to the general, non-legal media to improve public awareness of the Court's campaign to undercut civil rights. Public interest groups should work to facilitate widespread, grassroots protest of the further erosion of civil rights by the courts. These issues need to be translated from arcane legal terminology to accessible language that can galvanize public support for statutes that promote justice and equality for all.

[\[FN1\]](#). Directing Attorney, Herbert Semmel Federal Rights Project, National Senior Citizens Law Center. I thank Harper Jean Tobin for her excellent research assistance and comments. I also gratefully acknowledge comments and suggestions from Simon Lazarus, Timothy Jost, Steve Hitov, Jennifer Mathis, and Len Becker.

[\[FN1\]](#). In this article, I use the term “civil rights” broadly to include a wide range of laws that are protective of individual rights.

[\[FN2\]](#). See, e.g., Linda Greenhouse, In Steps Big and Small, Supreme Court Moved Right, N.Y. Times, July 1, 2007, at A1; Robert Barnes, A Rightward Turn and Dissension Define Court This Term, Wash. Post, July 1, 2007, at A07; David Savage, High Court Has Entered a New Era, L.A. Times, July 1, 2007, at A1.

[\[FN3\]](#). In this article, I use the terms “conservative” and “centrist” simply to distinguish two groups of Justices who frequently voted together in civil rights cases. There is certainly room for debate concerning whether these are the most accurate labels for the judicial alliances, but that issue is beyond the scope of this paper. Others have referred to the divisions of the Justices as a conservative/liberal split, and I have left those labels intact in quotations of their work.

[\[FN4\]](#). See, e.g., Simon Lazarus, [Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?](#) 56 DePaul L. Rev. 1 (2006); Andrew M. Siegel, [The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence](#), 84 Tex. L. Rev. 1097 (2006); Erwin Chemerinsky, [Closing the Courthouse Doors to Civil Rights Litigants](#), 5 U. Pa. J. Const. L. 537 (2003); Richard H. Fallon, Jr., [The “Conservative” Paths of the Rehnquist Court's Federalism Decisions](#), 69 U. Chi. L. Rev. 429 (2002).

[\[FN5\]](#). In most of the Rehnquist Court cases discussed in this article, the “conservative” majority was composed of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas, while the “centrist” dissenters were Justices Stevens, Souter, Ginsberg, and Breyer.

[\[FN6\]](#). Ruth Colker & James J. Brudney, [Dissing Congress](#), 100 Mich. L. Rev. 80, 87 (2001).

[\[FN7\]](#). Stephen M. Griffin, The Age of Marbury: Judicial Review in a Democracy of Rights, in Mark Tushnet (Ed.), *Arguing Marbury v. Madison* 104, 138-40, 145 (2005).

[\[FN8\]](#). [United States v. Morrison](#), 529 U.S. 598 (2000) (Violence Against Women Act); [United States v. Lopez](#), 514 U.S. 549 (1995) (Gun Free School Zones Act).

[FN9]. See *supra* note 5, explanation of the term “centrist.”

[FN10]. [Morrison](#), 529 U.S. at 637-43 (Souter, J., dissenting).

[FN11]. *Id.* at 616-18; [Lopez](#), 514 U.S. at 557, 561 n.3. (The Rehnquist majority's approach is often described as “federalism,” though one commentator notes that opponents “repeatedly insist that the current defenders of states' rights are doing little to empower states and may, perversely, be restricting their authority in the name of protecting it.” David J. Barron, [Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?](#) 74 *Fordham L. Rev.* 2081, 2082 (2006).).

[FN12]. See David Krinsky, [A Plan Revised: How the Congressional Power to Abrogate State Sovereign Immunity Has Expanded Since the Eleventh Amendment](#), 93 *Geo. L.J.* 2067, 2067-68 (2005) (summarizing cases).

[FN13]. U.S. Const. amend. XI.

[FN14]. [Alden v. Maine](#), 527 U.S. 706, 728-29 (1999) (dismissing textual arguments and stating that “sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself”); See also Erwin Chemerinsky, [Against Sovereign Immunity](#), 53 *Stan. L. Rev.* 1201, 1204-10 (2001) (discussing the Amendment's text and arguing in detail that “sovereign immunity cannot be justified under an originalist approach”).

[FN15]. [Alden](#), 527 U.S. at 729.

[FN16]. [Seminole Tribe v. Florida](#), 517 U.S. 44 (1996) (citing no authority under Interstate Commerce Clause and Indian Commerce Clause, [U.S. Const. art. 1, § 8, cl. 3](#)). The Rehnquist Court's decision in *Seminole Tribe* was a radical shift in the Court's approach, explicitly overruling the holding in [Pennsylvania v. Union Gas Co.](#), 491 U.S. 1, 14-22 (1989), that Congress had authority under the Commerce Clause to enact a statute abrogating sovereign immunity). See [Seminole Tribe](#), 517 U.S. at 66 (declaring *Union Gas* “wrongly decided” and overruled).

[FN17]. [Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank](#), 527 U.S. 627 (1999) (citing no authority under either Commerce Clause, [U.S. Const. art. 1, § 8, cl. 3](#), or Patent Clause, [U.S. Const. art. 1, § 8, cl. 8](#)).

[FN18]. [Alden](#), 527 U.S. at 730-54 (explaining why state sovereign immunity is “beyond the congressional power to abrogate by Article I legislation”).

[FN19]. [Seminole Tribe](#), 517 U.S. at 59 (citing the holding in [Fitzpatrick v. Bitzer](#), 427 U.S. 445, 456 (1976) (Rehnquist, J.)).

[FN20]. [City of Boerne v. Flores](#), 521 U.S. 507, 520 (1997). The Court formulated the requirement that in order for legislation under section 5 of the Fourteenth Amendment to be valid there “must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”; See Erwin Chemerinsky, [Court Revisits Sovereign Immunity in Discrimination Cases](#), 42 *Trial* 70, 70 (2006).

[FN21]. Religious Freedom Restoration Act of 1993, [42 U.S.C. § 2000bb](#) (2007).

[FN22]. [City of Boerne](#), 521 U.S. at 536 (holding that the Religious Freedom Restoration Act was not “appropriate” Fourteenth Amendment legislation, because the statute was too broad for the goal of remedying constitutional

violations).

[FN23]. See, e.g., David Rudovsky, [Running in Place: The Paradox of Expanding Rights and Restricted Remedies](#), 2005 U. Ill. L. Rev. 1199, 1212-44 (2005) (summarizing the Rehnquist Court's remedy-limiting doctrines). See also, [Buckhannon Bd. & Home Care, Inc. v. West Virginia](#), 532 U.S. 598 (2001) (limiting congressional power to permit civil rights litigants to recover attorneys' fees in claims brought under the Fair Housing Act and Americans with Disabilities Act).

[FN24]. [Kimel v. Florida Bd. of Regents](#), 528 U.S. 62 (2000); [Bd. of Tr. of Univ. of Ala. v. Garrett](#), 531 U.S. 356 (2001).

[FN25]. See, e.g., [Heart of Atlanta Motel v. United States](#), 379 U.S. 241 (1964) (upholding prohibition on race discrimination in public accommodations where Congress had a “rational basis” for believing a pattern of discrimination existed which could affect interstate commerce, and the prohibition was a “reasonable” response to that pattern).

[FN26]. [Kimel](#), 528 U.S. at 84.

[FN27]. See Samuel Bagenstos, [The Supreme Court, The Americans with Disabilities Act, and Rational Discrimination](#), 55 Ala. L. Rev. 923, 925 (2004).

[FN28]. [Kimel](#), 528 U.S. at 83-86; [Garrett](#), 531 U.S. at 366-68.

[FN29]. [Lorance v. AT&T Technologies, Inc.](#), 490 U.S. 900, 910-12 (1989).

[FN30]. *Id.*

[FN31]. U.S. Const. art. I, § 8, cl. 1. See [South Dakota v. Dole](#), 483 U.S. 203 (1987).

[FN32]. [Suter v. Artist M.](#), 503 U.S. 347, 358 (1992).

[FN33]. 42 U.S.C. § 1983.

[FN34]. *Id.* at 363 (“The term ‘reasonable efforts’ in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary [of Health and Human Services].”). See Timothy Stolfus Jost, [Disentitlement? The Threats Facing Our Public Health-Care Programs and a Rights-Based Response](#) 95 (2003) (“All of the Social Security Act welfare programs, of course, require in the first instance that the states have in place an approved plan so Suter had the potential of overruling all previous SSA cases.”).

[FN35]. 105 Stat. 1079, codified as amended, 42 U.S.C. § 2000e-5(e)(2).

[FN36]. [Lorance](#), 490 U.S. 900, 918 (1989).

[FN37]. [Landgraf v. USI Film Products](#), 511 U.S. 244, 251 (1994) (Rehnquist was the Chief Justice in seven of these cases and was in the majority in each of them). See also William Eskridge, [overriding Supreme Court Statutory Interpretation Decisions](#), 101 Yale L.J. 331, App. I (1991).

[FN38]. [Suter, 503 U.S. at 347.](#)

[FN39]. [42 U.S.C. §§ 1320a-2, 1320a-10](#) (identical provisions). See Jost, *supra*, n. 34 at 95 (“Congress confirmed first, its intent to provide a private remedy under [§ 1983](#) to Medicaid recipients and providers and, second, its belief that it had already done so.”).

[FN40]. [Lane v. Pena, 518 U.S. 187, 212 \(1996\)](#) (Stevens, J., dissenting).

[FN41]. See [Gonzaga Univ. v. Doe, 536 U.S. 273, 281 \(2002\)](#); [Blessing v. Freestone, 520 U.S. 329, 342 \(1997\)](#).

[FN42]. [Gonzaga, 536 U.S. at 283, 290](#). See also [Alexander v. Sandoval, 532 U.S. 275, 288-89 \(2001\)](#) (holding that congressional intent to create a private right of action in a statute must be clearly indicated by “rights-creating” language).

[FN43]. See, e.g., Evan Thomas, *Decline and Fall*, Newsweek, Nov. 20, 2006; <http://www.newsweek.com/id/44579>; Andrea Stone, *Republican Revolution Fades*, USA Today, Jan. 19, 2003, available at http://www.usatoday.com/news/washington/2003-01-19-gop-revolution-usat_x.htm (examining the “Republican Revolution” from the perspective of subsequent events).

[FN44]. One exception is that Congress responded to the Supreme Court's 1997 invalidation of the Religious Freedom Restoration Act of 1993, as applied to state and local governments, in [City of Boerne v. Flores, 521 U.S. 507 \(1997\)](#). Congress passed a much more limited statute, the Religious Land Use and Institutionalized Persons Act of 2000. The Supreme Court upheld the constitutionality of the narrow 2000 statute as applied to state treatment of prisoners. [Cutter v. Wilkinson, 544 U.S. 709 \(2005\)](#).

[FN45]. See, e.g., Kevin Johnson & Bill Hing, *The Immigrant Right Marches and the Prospects for a New Civil Rights Movement*, [42 Harv. C.R.-C.L. L. Rev. 99, 130-32 \(2007\)](#) (discussing some high-profile examples); and see generally Alliance for Justice: *Judicial Selection During the Bush Administration* (2007), <http://www.afj.org/assets/resources/publications/js6report.pdf>.

[FN46]. Lazarus, *supra* note 4, at 10-11.

[FN47]. *Id.* at 11.

[FN48]. *Id.* at 20.

[FN49]. See, e.g., [Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 \(2005\)](#) (sex discrimination); [Tennessee v. Lane, 541 U.S. 509 \(2004\)](#) (Americans with Disabilities Act); [Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 \(2003\)](#) (Family Medical Leave Act); [Stenberg v. Carhart, 530 U.S. 914 \(2000\)](#) (“partial-birth” abortion).

[FN50]. Lazarus, *supra* note 4, at 29.

[FN51]. Robin Toner & Kate Zernike, *For Incoming Democrats, Populism Trumps Ideology*, N.Y. Times, Nov. 12, 2006, § 1.

[FN52]. [Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 2 \(2006\)](#).

[FN53]. [20 U.S.C. § 1415\(i\)\(3\)\(B\)](#).

[FN54]. [Arlington](#), 548 U.S. at 295 (citing [U.S. Const., Art. I, § 8, cl. 1](#)).

[FN55]. [Arlington](#), 548 U.S. at 304.

[FN56]. [Id.](#)

[FN57]. [Id.](#)

[FN58]. [Pennhurst State Sch. & Hosp. v. Halderman](#), 451 U.S. 1, 17 (1981).

[FN59]. [Crawford Fitting Co. v. JT Gibbons, Inc.](#), 482 U.S. 437 (1987); [W. Va. Univ. Hosp., Inc. v. Casey](#), 499 U.S. 83 (1991).

[FN60]. Civil Rights Act of 1991, [Pub. L. No. 102-166, § 113, 105 Stat. 1071 \(1991\)](#).

[FN61]. See [Lazarus](#), *supra*, note 4, at 22.

[FN62]. [Arlington](#), 548 U.S. at 308 (Breyer, J., dissenting) (Stevens & Souter, JJ., joining dissent; Ginsburg, J., concurring in part and in result).

[FN63]. [Id.](#) at 317 (emphasis in original) (citing [Bell v. New Jersey](#), 461 U.S. 773, 790, n.17 (1983)).

[FN64]. [Ledbetter v. Goodyear Tire & Rubber Co., Inc.](#), 127 S. Ct. 2162 (2007).

[FN65]. [Id.](#) at 2165-6.

[FN66]. [42 U.S.C. § 2000e-2\(a\)\(1\)](#) (2007).

[FN67]. [Ledbetter](#), 127 S. Ct. at 2165.

[FN68]. [Id.](#) at 2167.

[FN69]. [Id.](#)

[FN70]. [Id.](#) at 2169.

[FN71]. [42 U.S.C. § 2000e-5\(e\)\(2\)](#).

[FN72]. [Ledbetter](#), 127 S. Ct. at 2167-69 (citing [United Air Lines, Inc. v. Evans](#), 431 U.S. 553 (1977), and [Delaware State Coll. v. Ricks](#), 449 U.S. 250 (1980)).

[FN73]. [Id.](#) at 2169.

[FN74]. [Id.](#) at 2169 n.2.

[FN75]. [Id.](#) at 2183-84 (Ginsburg, J., dissenting).

[FN76]. [Bazemore v. Friday](#), 478 U.S. 385, 395-96 (1986).

[FN77]. [Ledbetter](#), 127 S. Ct. at 2174.

[FN78]. Robert Barnes, Over Ginsburg Dissent, Court Limits Bias Suits, *The Wash. Post*, May 30, 2007, at A01.

[FN79]. [Ledbetter](#), 127 S. Ct. at 2180 (Ginsburg, J., dissenting).

[FN80]. [Id.](#) at 2187 (Ginsburg, J., dissenting).

[FN81]. [Id.](#) at 2175.

[FN82]. [Id.](#) at 2186 (Ginsburg, J., dissenting).

[FN83]. [Id.](#) at 2176 n.8.

[FN84]. Statutes that supersede judicial opinions are not retroactive, unless Congress specifies retroactive application. [Rivers v. Roadway Exp. Inc.](#), 511 U.S. 298, 305 (1994). The Court also stated in dicta that a “legislative response does not necessarily indicate that Congress viewed [a statutory] decision as ‘wrongly decided’ as an interpretive matter.” *Id.*

[FN85]. [Ledbetter](#), 127 S. Ct. at 2183 (Ginsburg, J., dissenting) (emphasis in original).

[FN86]. [Beck v. PACE Int'l Union](#), 127 S. Ct. 2310, 2317 (2007) (Scalia, J.); [Long Island Care at Home, Ltd. v. Coke](#), 127 S. Ct. 2339, 2350-51 (2007) (Breyer, J.).

[FN87]. [Long Island Care at Home](#), 127 S. Ct. at 2350-51.

[FN88]. *Id.*

[FN89]. 29 U.S.C. § 213(a)(15).

[FN90]. 29 C.F.R. § 552.3.

[FN91]. 29 C.F.R. § 552.109(a).

[FN92]. [Coke v. Long Island Care at Home, Ltd.](#), 462 F.3d 48 (2d Cir. 2006).

[FN93]. [Long Island](#), 127 S. Ct. at 2352.

[FN94]. [Id.](#) at 2348.

[FN95]. *Id.*

[FN96]. [Id.](#) at 2349.

[\[FN97\]](#). *Id.*

[\[FN98\]](#). *Id.*

[\[FN99\]](#). [Coke v. Long Island Care at Home, Ltd.](#), 376 F.3d 118, 133 (2d Cir. 2004).

[\[FN100\]](#). [Long Island](#), 127 S. Ct. at 2350-51.

[\[FN101\]](#). See [id.](#) at 2339.

[\[FN102\]](#). [Skidmore v. Swift & Co.](#) 323 U.S. 134, 140 (1944).

[\[FN103\]](#). [Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.](#), 467 U.S. 837 (1984); [Long Island](#), 127 S. Ct. 2339.

[\[FN104\]](#). [U.S. v. Mead Corp.](#), 533 U.S. 218 (2001).

[\[FN105\]](#). [Long Island](#), 127 S. Ct. at 2350-51.

[\[FN106\]](#). [Beck v. PACE Int'l Union](#), 127 S. Ct. 2310.

[\[FN107\]](#). [Id.](#) at 2314-16.

[\[FN108\]](#). [Beck v. Pace Int'l Union](#), 427 F.3d 668 (9th Cir. 2005).

[\[FN109\]](#). *Id.*

[\[FN110\]](#). [Beck](#), 127 S. Ct. at 2317 n.4.

[\[FN111\]](#). [Id.](#) at 2318.

[\[FN112\]](#). *Id.*

[\[FN113\]](#). *Id.* at 2320.

[\[FN114\]](#). See, e.g., [Chevron](#), 467 U.S. at 843 n.9 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).

[\[FN115\]](#). See, e.g., [Bowen v. Georgetown Univ. Hosp.](#), 488 U.S. 204, 212 (1988) (“We have never applied the principle [of agency deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”).

[\[FN116\]](#). [Credit Suisse Sec. \(USA\) LLC v. Billing](#), 127 S. Ct. 2383 (2007). While this case is not a traditional “civil rights” case, the issue involved access to the courts to vindicate the rights of consumers and provides important insights into the approach of the early Roberts Court.

[\[FN117\]](#). [Id.](#) at 2393-94.

[FN118]. [Billing v. Credit Suisse First Boston, Ltd., 426 F.3d 130 \(2d Cir. 2005\).](#)

[FN119]. [Id. at 136, 168.](#)

[FN120]. [Id. at 168.](#)

[FN121]. [Id. at 169.](#)

[FN122]. [Id. at 169-70.](#)

[FN123]. [Credit Suisse, 127 S. Ct. at 2396-97.](#)

[FN124]. [Id. at 2397.](#)

[FN125]. [Id.](#)

[FN126]. [Id.](#)

[FN127]. [Id. at 2397, 2389.](#)

[FN128]. [Id. at 2386, 2397.](#)

[FN129]. [Id. at 2394.](#)

[FN130]. [Credit Suisse, 127 S. Ct. 2383.](#)

[FN131]. [Id. at 2398](#) (Stevens, J., concurring in judgment).

[FN132]. [Id.](#)

[FN133]. Tony Mauro, Supreme Court Grants Banks Broad Implied Immunity for Antitrust Lawsuits, Legal Times, (Jun. 19, 2007), available at <http://www.law.com/jsp/article.jsp?id=1182157543778>.

[FN134]. [Id.](#)

[FN135]. [Credit Suisse, 127 S. Ct. at 2399](#) (Thomas, J., dissenting).

[FN136]. [Id. at 2392.](#)

[FN137]. [Id. at 2399.](#)

[FN138]. See Mauro, *supra* note 133.

[FN139]. [Bowles v. Russell, 127 S. Ct. 2360 \(2007\).](#)

[FN140]. [28 U.S.C. § 2107; Fed. R. Civ. P. 4\(a\)\(6\).](#)

[FN141]. [Bowles, 127 S. Ct. at 2362.](#)

[FN142]. [Id.](#)

[FN143]. [Bowles, 127 S. Ct. at 2363](#) (quoting [Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 61 \(1981\)](#)).

[FN144]. [Bowles, 127 S. Ct. at 2366.](#)

[FN145]. [Id. at 2367.](#)

[FN146]. [Id.](#)

[FN147]. [Id. at 2366](#) (overruling [Harris Truck Lines v. Cherry Meat Packers, 371 U.S. 215 \(1962\)](#), and [Thompson v. INS, 375 U.S. 384 \(1964\)](#)).

[FN148]. [Bowles, 127 S. Ct. at 2366.](#)

[FN149]. [Bowles, 127 S. Ct. at 2364 n.2.](#)

[FN150]. [Id. at 2367](#) (Souter, J., dissenting).

[FN151]. [Id. at 2369](#) (referring to [Harris Truck Lines, 371 U.S. 215 \(1962\)](#) and [Thompson, 375 U.S. 384 \(1964\)](#)).

[FN152]. [Bowles](#) at 2369-70. In response, Justice Thomas characterized the Court's recent pronouncements as "dicta." [Id. at 2363-64 n.2.](#)

[FN153]. [Id. at 2370.](#)

[FN154]. [Id. at 2367.](#)

[FN155]. Tony Mauro, Low-Profile Supreme Court Case Offers Glimpse of Sharp Divide, *Legal Times* (Jun. 15, 2007), <http://www.law.com/jsp/article.jsp?id=1181811943722>.

[FN156]. [Hein v. Freedom from Religion Found., 127 S. Ct. 2553 \(2007\)](#). [Hein](#) does not involve an interpretation of congressional intent, but rather concerns constitutional requirements for standing. Still, the [Hein](#) case provides important clues about the early Roberts Court's view of the role of Congress.

[FN157]. [Flast v. Cohen, 392 U.S. 83 \(1968\)](#).

[FN158]. [Hein, 127 S. Ct. at 2582-84](#) (Thomas & Scalia, JJ., concurring).

[FN159]. [Id. at 2568-69](#) (plurality opinion).

[FN160]. [Id. at 2569-72.](#)

[FN161]. See [id. at 2569.](#)

[FN162]. See [id. at 2570](#).

[FN163]. [Id. at 2571](#).

[FN164]. [Id. at 2571](#). The plurality also stated that the taxpayers did not prove that there would be any other basis for standing if the executive branch were to engage in such “improbable abuses.” This is an absurd burden to place on the plaintiffs who were arguing that taxpayer standing is appropriate in such circumstances.

[FN165]. [Id. at 2572](#) (Kennedy, J., concurring).

[FN166]. [Id. at 2573](#).

[FN167]. See [id. at 2584-89](#) (Souter, J., dissenting).

[FN168]. [Id. at 2585](#).

[FN169]. [Id. at 2588](#).

[FN170]. [Id. at 2584-89](#).

[FN171]. See, e.g., [Marbury v. Madison, 5 U.S. \(1 Cranch\) 137, 178 \(1803\)](#) (noting that absence of effective judicial review of unconstitutional executive branch action “would subvert the very foundation of all written constitutions”). See also Suzanna Sherry, *The Intellectual Background of Marbury v. Madison*, in Tushnet, *supra* note 7, at 45, 57 (Marbury “established that the Executive Branch was subject to judicial oversight” and thereby restrained “any tendency toward an imperial presidency.”).

[FN172]. See Tushnet, *supra* n. 7, at 7-8 (suggesting that if each branch of government is entitled to make and act on its own independent judgment of what the Constitution means then getting the President to follow the court's position “might be difficult”).

[FN173]. [Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 \(2007\)](#).

[FN174]. [Id.](#)

[FN175]. [Id. at 2007-10](#) (Scalia, J., concurring and dissenting).

[FN176]. [Winkelman, 127 S. Ct. 1994](#) (referring to Individuals with Disabilities Education Act of 2004, § 611, [20 U.S.C. § 1400 \(2007\)](#)).

[FN177]. [Winkelman, 127 S. Ct. at 1998](#).

[FN178]. [Id. at 1998](#).

[FN179]. [Winkelman v. Parma City Sch. Dist., 150 F. App'x 406 \(6th Cir. 2005\)](#).

[FN180]. See [Maroni v. Pemi-Baker Reg'l Sch. Dist., 346 F.3d 247 \(1st Cir. 2003\)](#).

[FN181]. [Winkelman, 127 S. Ct. at 1998](#).

[FN182]. See [Arlington](#), 548 U.S. at 29 (holding that Spending Clause legislation must provide clear notice of spending conditions).

[FN183]. [Winkelman](#), 127 S. Ct. at 1997.

[FN184]. [Winkelman](#), 127 S. Ct. at 2006.

[FN185]. [Id.](#) at 2006.

[FN186]. [Id.](#)

[FN187]. [Id.](#)

[FN188]. [Winkelman](#), 127 S. Ct. at 2002 (citing [20 U.S.C. § 1415\(i\)\(3\)\(B\)\(i\)\(I\)](#) (2005)).

[FN189]. [Winkelman](#), 127 S. Ct. at 2006.

[FN190]. [Arlington](#), 548 U.S. 29 2458.

[FN191]. [Winkelman](#), 127 S. Ct. at 2002 (quoting [20 U.S.C. § 1400\(d\)\(1\)\(B\)](#) (2005)).

[FN192]. [Winkelman](#), 127 S. Ct. at 2002.

[FN193]. [Id.](#) at 2002-03.

[FN194]. [Id.](#) at 2003 (citing [Pierce v. Soc'y of Sisters](#), 268 U.S. 510 (1925); [Meyer v. Nebraska](#), 262 U.S. 390 (1923)).

[FN195]. [Winkelman](#), 127 S. Ct. at 2011 (Scalia, J., concurring in part).

[FN196]. [Winkelman](#), 127 S. Ct. at 2005.

[FN197]. [Jones v. Bock](#), 549 U.S. 199 (2007).

[FN198]. Prison Litigation Reform Act of 1995, [Pub. L. No. 104-134](#), 110 Stat. 1321 (1996) (codified in scattered sections of 18, 28, & 42 U.S.C.).

[FN199]. [Jones](#), 127 S. Ct. at 914.

[FN200]. See [Jones v. Bock](#), 135 F. App'x 837 (6th Cir. 2005); [Walton v. Bouchard](#), 136 F. App'x 846 (6th Cir. 2005); [Williams v. Overton](#), 136 F. App'x 859 (6th Cir. 2005).

[FN201]. [Jones](#), 127 S. Ct. at 914.

[FN202]. [Id.](#) at 915.

[FN203]. [Id. at 917.](#)

[FN204]. [Id. at 923.](#)

[FN205]. [Id. at 919.](#)

[FN206]. [Id. \(citing Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 516 \(1982\)\).](#)

[FN207]. [Jones, 127 S. Ct. at 919.](#)

[FN208]. [Id. at 921.](#)

[FN209]. [Id. at 921](#) (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 533 (1947)).

[FN210]. [United States v. Georgia, 546 U.S. 151 \(2006\).](#)

[FN211]. [Tennessee v. Lane, 541 U.S. 509 \(2004\); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 \(2004\).](#)

[FN212]. [Arlington, 548 U.S. 291.](#)

[FN213]. See [Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356 \(2001\); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 \(1999\); Alden v. Maine, 527 U.S. 706 \(1999\); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 \(1996\).](#) (In each of these cases, Justices Stevens, Souter, Ginsberg and Breyer emphatically dissented.)

[FN214]. [Lane, 541 U.S. 509 \(2004\); Hood, 541 U.S. 440 \(2004\).](#)

[FN215]. [Lane, 541 U.S. at 513-14.](#) Justice O'Connor was probably influenced by the compelling facts in this case, involving a paraplegic man who refused to crawl up the stairs of a courthouse that did not have an elevator and therefore was jailed for failing to appear in court.

[FN216]. [Lane, 541 U.S. at 538.](#)

[FN217]. [Hood, 541 U.S. at 446-47.](#)

[FN218]. [Id. at 455-56.](#)

[FN219]. [Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 \(2006\).](#)

[FN220]. [Id. at 379.](#)

[FN221]. [Id.](#)

[FN222]. [Id. at 358.](#)

[FN223]. [Id. at 358, 379.](#)

[\[FN224\]](#). Id. at 356-57.

[\[FN225\]](#). Id. at 377.

[\[FN226\]](#). Id. at 379.

[\[FN227\]](#). See id. at 366-69 (discussing the difficulties created by “the uncoordinated actions of multiple sovereigns” in the early United States).

[\[FN228\]](#). Id. at 391-92.

[\[FN229\]](#). Id.

[\[FN230\]](#). Id. at 385.

[\[FN231\]](#). Id. at 381-82.

[\[FN232\]](#). Id. at 382.

[\[FN233\]](#). Id. at 393.

[\[FN234\]](#). The conservative bloc of the Roberts Court has already refused to follow a number of decisions that hinged upon the swing vote of Justice O'Connor. See Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. Rev. Books, Vol. 54, No. 14 (Sept. 27, 2007). Compare [Gonzales v. Carhart](#), 127 S. Ct. 1610 (2007); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); with [Stenberg v. Carhart](#), 530 U.S. 914 (2000); [Grutter v. Bollinger](#), 539 U.S. 306 (2003).

[\[FN235\]](#). [United States v. Georgia](#), 546 U.S. 151.

[\[FN236\]](#). Id. at 155.

[\[FN237\]](#). Id. at 158-59.

[\[FN238\]](#). Id. at 159.

[\[FN239\]](#). [Georgia](#), 546 U.S. at 157.

[\[FN240\]](#). Id. at 157-58 (discussing [Tennessee v. Lane](#), 541 U.S. 509 (2004)); [Nevada Dep't of Human Resources v. Hibbs](#), 538 U.S. 721 (2003); [Bd. of Tr. of Univ. of Ala. v. Garrett](#), 531 U.S. 356 (2001); [Kimel v. Florida Bd. of Regents](#), 528 U.S. 62 (2000); [Florida Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank](#), 527 U.S. 627 (1999).

[\[FN241\]](#). [Lane](#), 541 U.S. at 522-23, 533 (Stevens, J.). Justice Stevens' opinion in *Lane* emphasized that the case involved allegations of constitutional violations. The Sixth Circuit decision in *Lane* similarly noted that the plaintiffs alleged constitutional violations and the state disputed that allegation. [Lane v. Tennessee](#), 315 F.3d 680, 683 (6th Cir. 2003).

[FN242]. [Lane](#), 541 U.S. at 538.

[FN243]. Chief Justice Rehnquist's dissent disputed the credibility of the allegations of constitutional violations in [Lane](#), 541 U.S. at 543 n.4.

[FN244]. As the Supreme Court acknowledged, [United States v. Georgia](#), 546 U.S. at 156, the Eleventh Circuit's decision was predicated on the separate Eleventh Circuit case of [Miller v. King](#), 384 F.3d 1248 (11th Cir. 2004), which rejected claims for damages against state officials under the ADA for Eighth Amendment violations. [Id.](#) at 1275.

[FN245]. [United States v. Georgia](#), 546 U.S. at 158.

[FN246]. Erwin Chemerinsky, [Court Revisits Sovereign Immunity in Discrimination Cases](#), 42 *Trial* 70, 71-72 (2006).

[FN247]. [United States v. Georgia](#), 546 U.S. at 158.

[FN248]. *Id.*

[FN249]. *Id.* at 162 (Stevens, J., concurring). In recent ADA cases, the approach of *Lane* has been followed in most lower court cases that do not involve employment discrimination, although the *Garrett* methodology has been applied by lower courts in employment discrimination cases. Rochelle Bobroff, *Scorched Earth and Fertile Ground: The Landscape of Suits Against the States to Enforce the ADA*, 2007 *Clearinghouse Rev.* 298, 300.

[FN250]. *Id.* at 162.

[FN251]. Anthony Kovalchick, [Judicial Usurpation of Legislative Power: Why Congress Must Reassert Its Power to Determine What is "Appropriate Legislation" to Enforce the Fourteenth Amendment](#), 10 *Chap. L. Rev.* 49, 104 (2006). See also William D. Araiza, [The Section 5 Power After Tennessee v. Lane](#), 32 *Pepp. L. Rev.* 39, 86 (2004) (characterizing *Lane* as "an important, yet an incremental, step toward a more expansive Section 5 power").

[FN252]. In [Permanent Mission of India to the United Nations v. City of New York](#), 127 S. Ct. 2352 (2007), the Roberts Court broadly construed an ambiguous exception to the Foreign Sovereign Immunities Act, [28 U.S.C. § 1605\(a\)\(4\)](#), as congressional authorization to bring suit against foreign governments. In contrast, the Rehnquist Court held that Congress must explicitly, clearly, and unequivocally express its intention to abrogate the sovereign immunity of states, [Atascadero State Hosp. v. Scanlon](#), 473 U.S. 234 (1985). Even when Congress articulates its intention to abrogate sovereign immunity unambiguously, the Rehnquist Court has refused to permit suits against the states. See, e.g., [Kimmel v. Florida Bd. of Regents](#), 528 U.S. 62 (2000) and cases cited *supra* at notes 23-7. Under this approach, less specificity is required of Congress to breach the sovereign immunity of a foreign country than a state within the United States.

[FN253]. [Alden v. Maine](#), 527 U.S. 706, 729 (1999). See discussion *supra* at note 13.

[FN254]. See Cass R. Sunstein, David Schkade, Lisa M. Ellman, & Andres Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* 130 ("[J]udges appointed by Republican presidents are systematically different, in their voting behavior, from judges appointed by Democratic presidents.").

[FN255]. Erwin Chemerinsky, [Turning Sharply to the Right](#), 10 *Green Bag 2d* 423, 424 (2007). See also, Simon Lazarus, *The Most Activist Court*, *American Prospect* (Jun. 29, 2007), available at

http://www.prospect.org/cs/articles?article=the_most_activist_court.

[FN256]. Dworkin, *supra* note 234.

[FN257]. Parents Involved in Cmty. Sch. v. [Seattle Sch. Dist. No. 1](#), 127 S. Ct. 2738 (2007).

[FN258]. [Grutter v. Bollinger](#), 539 U.S. 306 (2003).

[FN259]. [Parents Involved](#), 127 S. Ct. at 2753.

[FN260]. Dworkin, *supra* note 234.

[FN261]. Chemerinsky, *supra* note 255, at 427.

[FN262]. [Gonzales v. Carhart](#), 127 S. Ct. 1610 (2007).

[FN263]. Partial-Birth Abortion Ban Act, [18 U.S.C.A. § 1531](#) (2003).

[FN264]. [Stenberg v. Carhart](#), 530 U.S. 914 (2000).

[FN265]. See Ronald Dworkin, *The Court & Abortion: Worse Than You Think*, N.Y. Rev. Books, Vol. 54, No. 9 (May 31, 2007).

[FN266]. [Gonzales v. Carhart](#), 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

[FN267]. See Kovalchick, *supra* note 251, at 112-13.

[FN268]. The Federal Rights Project of the National Senior Citizens Law Center maintains a listserv to inform public interest advocates of recent cases regarding access to court issues. For more information, see the federal rights page at www.nslc.org. There are many other national organizations that also provide advice to litigators, for instance, the National Health Law Program, the Center for Medicare Advocacy, and the Bazelon Center for Mental Health Law. These examples do not attempt to list the numerous groups supporting civil rights and safety net litigation.

[FN269]. See David Sloss, [Constitutional Remedies for Statutory Violations](#), 89 *Iowa L. Rev.* 355 (2004) (arguing that Supreme Court precedent requires recognition of an implied right of action arising from the Supremacy Clause to enforce federal statutes against violating states); Lauren Saunders, *Preemption as an Alternative to Section 1983*, 38 *Clearinghouse Rev.* 705 (2005) (discussing how a preemption cause of action can be employed by public interest lawyers). See also Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, 38 *Clearinghouse Rev.* 720 (2005) (discussing challenges of litigating under [section 1983](#)).

[FN270]. See, e.g., [Brown v. Sun Healthcare Group, Inc.](#), 476 F. Supp. 2d 848 (E.D. Tenn. 2007) (approving third-party contract claim against nursing home in absence of right of action under Medicare and Medicaid Acts); Steve Hitov & Gill Deford, *The Impact of Privatization on Litigation*, 35 *Clearinghouse Rev.* 590, 590-97 (2002) (discussing third-party contract claims).

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