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December 2008

REINVIGORATING FEDERAL SAFEGUARDS FOR INDIVIDUAL RIGHTS AND BENEFITS: RECOMMENDATIONS FOR THE DEPARTMENT OF JUSTICE TRANSITION TEAM AND THE NEW SOLICITOR GENERAL

Introduction and Summary of Recommendations

As an organization devoted to the legal rights of low income older Americans, the National Senior Citizens Law Center (NSCLC) is deeply concerned about recent court-imposed limitations on Congress' power to secure individual rights and benefits, especially constraints on citizens' ability to enforce statutory protections in court. These doctrines thwart Congressional design and contradict the vision repeatedly outlined by President-elect Obama, of a legal system protective of the rights of vulnerable Americans. By consistently opposing these unwarranted barriers to judicial relief, the Solicitor General could help to restore the integrity of a broad array of vital statutory safeguards. Such a focus would serve a core mission of the Office – to vigorously defend congressional legislation and “ensure that proper respect is given to Congress' policy choices.”¹ At the same time, promoting greater judicial fidelity to Congressional goals can be effectively pursued consistent with the Solicitor General's “obligation to honor . . . stare decisis and . . . respect the rulings of the Court.”² Finally, such a posture is central to a well-established progressive vision of the Office itself: as often emphasized by distinguished past Solicitors General, “The United States wins its point whenever justice is done its citizens in the courts.”³

In summary, we recommend that the Solicitor General in its advocacy before the Supreme Court and the lower federal courts, and where appropriate, working with pertinent sectors of the Department of Justice and the administration, promote the following doctrinal principles and approaches:

- **When considering laws designed to protect individual rights or provide individual benefits, available private remedies should be interpreted broadly, as necessary to further core statutory goals.** Restoring statutory purpose as a paramount source for construing individual provisions, especially remedial provisions, would reinvigorate important laws and ensure respect for “Congress' policy choices.”
- **The Constitution requires the judiciary to recognize and defer to Congress' broad power to enact effective civil rights and other protective laws under the Commerce Clause and the Fourteenth Amendment, and to apply those laws to the States.** In the most significant constitutional “federalism” cases in the past few years, the Supreme Court has decided in favor of parties advocating comparatively broad scope for the

¹ Seth P. Waxman, *Defending Congress*, 79 N.C.L. REV. 1073, 1078 (2001).

² Waxman, *supra* note 1, at 1086.

³ Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 S.M.U. L. REV. 73, 78 (1995) (quoting former Solicitors General Frederick William Lehman and Simon Sobeloff as cited in *Brady v. Maryland*, 373 U.S. 83, 87 n. 2 (1963)).

constitutionality and enforceability of statutes implementing the Commerce Clause and enforcing the Fourteenth Amendment. The Bush administration's Solicitor General supported these results; a new Solicitor General could urge the Court to focus on these relatively recent precedents rather than predecessor "federalism" cases that marked a virtually unbroken restrictive trend in the late 1990s.

- **Where federal statutory provisions are not in actual or direct conflict with state laws, policies, or practices, and Congress has not made explicit its intent to preempt state authority affecting a particular subject matter, preemption should be asserted by agencies or courts in only the rarest of circumstances.** This approach would be furthered by advocacy and intra-administration counsel that takes seriously – rather than simply pays lip service to – long-established principles such as the presumption against preemption and the rule that preemption is at bottom a matter of Congressional intent. At the outset of the Obama administration, the Solicitor General and the Department of Justice should reverse the aggressive preemption posture of the Bush administration, and initiate departmental and administration-wide steps to ensure that federal agencies bring their preemption-related regulations, policies, and practices in line with Congressional intent.
- **Courts should reject special rules of interpretation that arbitrarily single out certain types of statutes for especially restrictive interpretation, untethered to actual Congressional intent or statutory design, on the basis that, e.g., they were passed pursuant to Congress's spending power, incorporate an implied private right of action, or impose restrictions on state officials.** In its advocacy, the Solicitor General should disfavor such rules, which enable judges to frustrate statutory purposes and effectively limit Congressional authority, with no justification in the Constitution or otherwise.
- **The Supreme Court should harmonize judicial approaches governing access to court in federal-state conflicts, so that business litigants and disadvantaged individuals are treated equally – and in genuine accord with pertinent federal statutory goals.** A glaring inconsistency in current judicial law and practice is that prevailing doctrine is far more hospitable to business litigants seeking Supremacy Clause-based preemption of state regulation than to individuals – in analogous circumstances – challenging state contravention of federal civil rights, safety net, or other protective statutes, pursuant to 42 U.S.C. §1983. The Solicitor General could play a constructive role in assisting the Court to reconcile these inconsistent approaches on terms that ensure that federal mandates can consistently be enforced by their intended beneficiaries.

Discussion

We briefly amplify the above five recommendations in the balance of the paper.

1. When considering laws designed to protect individual rights or provide individual benefits, available remedies should be interpreted broadly as necessary to further core statutory goals.

To ensure judicial respect for core Congressional “policy choices,” a simple but consequential advance would be express Supreme Court recognition, and consistent application, of a principle that courts are to construe individual statutory provisions so as to further, and in any case not to contravene or undermine, identifiable central goals behind major statutory schemes. Logical though such a rule of construction might seem, it is not currently operative, certainly not on a consistent basis. Indeed, Justice Scalia has expressly scorned the proposition that courts should take into account, much less give weight to “vague notions of a statute’s ‘basic purpose’”⁴ The result has been to severely undermine the effectiveness of important laws.

Obviously, cases of statutory interpretation arise which cannot be neatly resolved by reference to core statutory purpose – whether because the application of Congressional goals to a particular provision is unclear, because of multiple, conflicting Congressional goals, or for other reasons. But in many important cases in recent years, the Court has examined particular provisions in isolation without any reference to the purposes or priorities of the overall statutory scheme, then imposed on such provisions narrow, questionable constructions that ignore and often sharply undermine those core purposes or priorities. The most visible recent example of the above pattern is the 2007 decision in *Ledbetter v. Goodyear Tire & Rubber*.⁵ In this case the Court voted 5-4 to overturn a \$360,000 jury award to Goodyear supervisor and pay discrimination victim Lilly Ledbetter, on the ground that the 1964 Civil Rights Act required pay discrimination cases to be brought within 180 days of the defendant’s initial discriminatory -- regardless of when the victim did or could reasonably have discovered it. As Justice Ruth Ginsburg noted in her dissent, the majority’s “cramped” reading of the law “strayed from . . . fidelity to the Act’s core purpose.”⁶

Another egregious example of statutory construction in conflict with statutory goals is the Court’s widely criticized distortion of the remedial provisions of the Employee Retirement Income Security Act (ERISA). ERISA was enacted after more than a decade of Congressional investigations into widespread abuses of employee benefit plans by company and union administrators. Evident throughout the statute itself and its legislative history is its authors’ overriding focus on securing rights of plan beneficiaries. But the Court’s treatment of ERISA’s remedial provisions has severely undermined the capacity of the statutory scheme to accomplish its central aim.

In particular, a specific catch-all provision authorizing courts to award injunctive or “other appropriate equitable relief” was construed to preclude substantially any form of monetary

⁴ *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993).

⁵ 127 S. Ct. 2162 (2007).

⁶ *Id.* at 2187.

compensation for losses caused by breach of fiduciary obligations or other statutory violations. Justice Scalia wrote for 5-4 majorities in the critical 1993 and 2002 decisions producing this result⁷; he conceded that his tortured rationale – which required courts to decide whether a given form of relief would have been available a century or more ago when courts were divided into courts of law and courts of equity – was “unlikely,” and not consistent with the oft-repeated goals of the sponsors of the legislation. But, as noted above, in his analysis, “Vague notions of a statute’s ‘basic purpose’ were to be given no weight.

The Bush administration did not consistently embrace respect for core statutory goals as a touchstone for statutory construction. In the *Ledbetter* case, for example, Solicitor General Clement not only ignored the purpose of Title VII, but reversed Departmental practice, rejected the position of the Equal Employment Opportunity Commission, and disregarded precedents in all but one circuit to support the position narrowly adopted by the Court. In other instances, for example, construction of ERISA’s remedial provisions, the Department generally argued against the Court’s narrow approach. Sustained advocacy by the Obama administration’s Solicitor General may help persuade a majority of the Court to give more weight to Congress’ basic “policy choices” in construing individual statutory provisions. Indeed, in particular subject-matter areas, specifically including employment discrimination and ERISA remedies, the Court has on occasion shown flexibility and – conceivably – sensitivity to the widespread criticism provoked by decisions that seem to run counter to the goals of popular laws.⁸ Over time, it may be possible to enhance the precedential stature of such decisions, and subordinate decisions giving short shrift to Congressional intent.

2. The Constitution requires the judiciary to recognize and defer to Congress’ broad power to enact effective civil rights and other protective laws under the Commerce Clause and the Fourteenth Amendment, and to apply those laws to the States.

From 1995 to 2001, the Supreme Court imposed progressively broader curbs on Congressional authority to implement the Commerce Clause and enforce the Fourteenth Amendment, on the basis of novel doctrines based on theories of “federalism” that the Court held to be implicit in the Constitution. Three successive solicitors general representing the Clinton administration were on the losing end of all of these cases, most of which were decided by 5-4 majorities.⁹ However, during the last eight years, the Court has decided against extending the reach of its “federalism” doctrines in several cases, accepting arguments from Bush

⁷ *Mertens*, 508 U.S. at 248; *Great-West Life & Annuity Insurance Co. v. Knudson*, 434 U.S. 204 (2002).

⁸ The 2007 *Ledbetter* decision was followed in 2008, to the surprise of many observers, by several employment discrimination decisions in which the Court reaffirmed precedents emphasizing statutory purpose-driven analysis. See, e.g., *CBOCS v. Humphries*, 126 S.Ct. 1951, 1955 (2008) (reaffirming, in a 7–2 decision, the implied inclusion of retaliation claims in 42 U.S.C. § 1981’s ban on discrimination, in part on the ground that contrary reading would “give impetus to the perpetuation of racial restrictions on property.”) Also during the 2007-08 term, the Court requested the Solicitor General’s view on whether to accept a petition for certiorari that could, if granted, have triggered a reconsideration of precedents barring monetary compensation for victims of ERISA violations in most cases; although the Solicitor General submitted a brief vigorously urging grant of the petition, the Court on the last day of the term declined to do so. *Amschwand v. Spherion Corp.*, 128 S. Ct. 2995 (June 27, 2008); 128 S. Ct. 1493 (March 3, 2008)

⁹ See Seth Waxman, *Foreward: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1121 (2001) (describing the Solicitor General’s low win rate in federalism cases during the so-called “federalism revolution”).

administration solicitors general.¹⁰ The Obama administration may be able to persuade the Court to further limit the impact of the late 1990s’ “federalism” cases, by taking the position that the more recent decisions clarify that the earlier cases are to be construed as having limited scope, or, if future decisional trends permit, even that their holdings should be restricted to their facts. For example, Justice O’Connor’s dissent in *Gonzales v. Raich*¹¹ observed that the majority’s opinion in that 2005 case had effectively reduced *United States v. Lopez*¹² to “nothing more than a drafting guide”¹³ – a view that Chief Justice Roberts appeared to obliquely endorse in his confirmation hearing later that year.¹⁴

3. Where federal statutory provisions are not in actual or direct conflict with state laws, policies, or practices, and Congress has not made explicit its intent to preempt state authority affecting a particular subject matter, preemption should be asserted by agencies or courts in only the rarest of circumstances.

It is black-letter law that federal courts may preempt state laws when required to do so by conflicting federal laws. When state law prescribes or permits conduct that violates a provision of federal law, the Supremacy Clause requires that the federal provision must prevail and the contrary state prescription must be superseded. In the context of statutes implementing the Spending Clause, when a state accepts federal funds it “must comply” with federal mandates.¹⁵

Federal courts may also preempt state legal requirements where there is no direct conflict between specific federal and state requirements, but where the state legal regime is an “obstacle” to the federal regime. But traditional preemption doctrine does not empower unelected judges or federal agency officials to invalidate state laws simply because in their own view they might impede implementation of a federal law. Accordingly, in “obstacle” preemption cases, “[t]he purpose of Congress is the ultimate touchstone” for determining whether, when, and to what extent the federal regime trumps state laws beyond the elimination of clear and direct conflicts.¹⁶ Further, in cases where the federal statute in question is unclear, federal courts must apply a presumption against preemption – to ensure that Congress, not unelected federal judges – actually makes the “policy choice” to invalidate laws or regulations adopted by state elected

¹⁰ *United States v. Georgia*, 126 S. Ct. 877 (2006) (ADA damages suits against states do not violate the 11th amendment where alleged state misconduct violates the Constitution as well as the statute); *Gonzales v. Raich*, 125 S.Ct. 2195 (2005) (Congress may, under the Commerce Clause, forbid states from authorizing individuals to grow marijuana for their own use at home for medicinal purposes); *Tennessee v. Lane*, 541 U.S. 509 (2004) (Americans with Disabilities Act provisions authoring suits for civil damages are valid against states to “enforce” Fourteenth Amendment proscription of state denials of substantive due process); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (state employees may sue employers for violations of parental leave provisions of Family and Medical Leave Act).

¹¹ 125 S.Ct. 2195 (2005).

¹² 514 U.S. 549 (1995).

¹³ *Gonzales v. Raich*, 125 S. Ct. 2223 (O’Connor, J., dissenting).

¹⁴ Roberts was extensively questioned on the Court’s federalism doctrines in his hearings. See Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court’s Federalism Revolution?* 56 DEPAUL L.REV. 1, 9-28 (2006) Whatever *Raich* portends for future interpretations of Congressional authority to implement the Commerce Clause, *Hibbs*, *Lane*, and *Georgia* do not repudiate the limits on Fourteenth Amendment enforcement authority imposed by earlier Rehnquist Court decisions. *Id.* at 38-39.

¹⁵ *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 1998 (2007). See also Rochelle Bobroff, *The Early Roberts Court Attacks Congress’s Power to Protect Civil Rights*, 30 N.C. CENT. L.J. 231 (2008)

¹⁶ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

officials.¹⁷ But in an increasing array of cases, these important checks on judicial power have appeared as empty boilerplate, to be silently ignored or even overtly rejected.¹⁸ Under the Bush administration, both the Department of Justice and individual departments and agencies actively encouraged ever more aggressive preemption.¹⁹

An important objective for the Obama administration should be to reverse this trend and promote a return to first principles that securely vest in Congress the fateful power to invalidate policy decisions of elected state governments. Significant responsibility for pursuing this objective will necessarily rest with the agencies responsible for implementing relevant federal laws. But the Department of Justice, and the Solicitor General in particular, can also play an important and constructive role. In order to do so, at the outset of the Obama administration, the Department should establish a set of principles to guide the administration's administrative practice, to preclude support for statutorily unwarranted preemption claims. In accord with the same principles, the Solicitor General should consistently urge courts to align individual preemption decisions with actual Congressional intent, in cases where the United States is a party and, especially, in cases where the U.S. is, or has the opportunity to participate as *amicus curiae*. The Department should also recommend to the President, and assist in leading an administration-wide effort to replace agency regulations and policies that contravene its preemption principles. With respect to future agency decisions that could have preemptive effects, the Department should assist in the development of procedures that require agencies to address, with appropriate public notice and opportunity to comment, whether, to what extent, and why preemption is warranted. Where Supreme Court decisions in conflict with these principles require Congressional reversal, the Department and the administration should support appropriate legislation to accomplish that end.

4. Courts should reject special rules of interpretation that arbitrarily single out certain categories of statutes for especially restrictive interpretation, untethered to actual Congressional intent or statutory design, on the basis that, e.g., such laws were passed pursuant to Congress's spending power, incorporate an implied private right of action, or impose restrictions on state or local officials.

In stark contrast to its generally strong support for judicial authority to preempt state regulatory requirements, usually at the behest of business litigants,²⁰ the Supreme Court and the lower federal courts have imposed increasingly stringent barriers to court access for

¹⁷ *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁸ See, e.g., *Riegel v. Medtronic Corp.*, 128 S.Ct. 999 (2008) (presumption not mentioned except in dissent); *Watters v. Wachovia Bank*, 127 S.Ct. 1559 (2007) (same). See also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545-46, (1992) (Scalia, J., concurring in judgment in part and dissenting in part) (presumption does not apply in context of express preemption provision); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 456 (2005) (Thomas, J., concurring in judgment in part and dissenting in part) (same).

¹⁹ For a review of the Bush administration's practices through September 2007 see *Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?* Hearing Before the S. Comm. On the Judiciary, 110th Cong. (2007) (Statement of David C. Vladeck), available at <http://judiciary.senate.gov/pdf/07-09-12VladeckTestimony.pdf>.

²⁰ See, e.g., *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002) (“[We have] no doubt that federal courts have jurisdiction” to entertain a suit alleging that a state requirement “is pre-empted by a federal statute, which, by virtue of the Supremacy Clause of the Constitution, must prevail . . .”)

plaintiffs seeking to enforce federal civil rights and safety net laws.²¹ Justices Scalia and Thomas have developed a theory that Spending Clause-based grants are merely “contracts” between the federal and grantee state governments, which intended beneficiaries of such laws—“third-party beneficiaries” in the Scalia-Thomas contract-law analogy—cannot, without specific authorization in the “contract,” enforce in court, regardless of Congress’ actual “intent.”²² This arcane theory would especially disfavor intended beneficiaries of safety-net laws protecting vulnerable populations, such, for example, as Medicaid. As yet the Scalia-Thomas “contract-third party beneficiary” theory has not been endorsed by a majority of the Court (and the theory was opposed by the Bush administration)²³. But in a 5-4 2005 decision, Justice Alito echoed their anti-Congressional thrust: “[i]n a Spending Clause case,” he wrote, “*the key is not what a majority of the Members of both Houses intend but what the States are clearly told [in the statutory text] regarding the conditions that go along with the acceptance of those funds.*”²⁴

Justice Alito’s 2005 *Arlington Central School District* opinion exemplifies a broader practice, applied (selectively) in cases involving state violations of all federal laws securing individual rights or benefits. In many such cases, courts invoke “super-strong clear statement rules,” that bar courthouse doors – and effectively frustrate congressional intent. As professors William Eskridge and Philip Frickey have observed, the Supreme Court and lower courts deploy these rules as if they were “quasi-constitutional” commands, and use them “to confine Congress’ power in areas in which Congress has the constitutional power to do virtually anything.”²⁵

The Court has similarly applied with increasing aggressiveness a self-generated policy disfavoring the inference of “implied” private rights of action to remedy statutory violations – most recently, during the 2007-2008 term, in *Stoneridge Investment Partners v. Scientific-Atlanta*.²⁶ In *Stoneridge*, a 5-3 majority held that this presumption against implied rights of action justified declining to impose liability, as a matter of substantive law, for violating the securities fraud provisions of the Securities Act of 1934 on third parties who *knowingly* participated in sham transactions to inflate the value of defendant’s stock. Thus, the Court’s policy of discouraging litigation took precedence over Congress’ purpose of deterring

²¹ See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002); (Private right of action under 42 U.S.C. §1983 to challenge unlawful state conduct barred unless statute in question manifests Congressional intent to authorize private enforcement suits through “rights-creating” language); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that the states are immune to suits brought under Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66–67 (2000) (holding that Congress did not constitutional abrogate state sovereign immunity through the Age Discrimination in Employment Act).

²² *Blessing v. Freestone*, 520 U.S. 329, 349–50 (Scalia, J., concurring); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 674–75 (2003) (Scalia, J., concurring); *Id.* at 675–83 (Thomas, J., concurring).

²³ In *Gonzaga Univ. v. Doe*, discussed *infra* notes 29–31 and accompanying text, the Solicitor General argued in favor of narrowing individual court access under 42 U.S.C. 1983 but did not support the extreme Scalia-Thomas approach. In opposing a petition for certiorari in *Haveman v. Westside Mothers*, 537 U.S. 1045 (2002), the Department also opposed this approach.

²⁴ *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 126 S.Ct. 2455, 2463 (emphasis added). Justice Ginsburg concurred narrowly in the result but rejected the majority’s approach.

²⁵ William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992).

²⁶ 128 S. Ct. 761 (2008).

securities fraud and ensuring redress for defrauded investors, as noted by Justice Stevens in his dissent.²⁷

Under the previous administration, the Solicitor General sometimes emphasized statutory purpose in its advocacy, sometimes dismissed or ignored it. For example, the Department took the narrow construction approach (adopted by the Court) in *Stoneridge*, whereas in *CBOCS v. Humphrey*,²⁸ a case reaffirming individual plaintiffs' ability to bring a cause of action under a Reconstruction-era ban on race discrimination, the Department emphasized statutory purpose in its argument and did not mention the presumption against implying rights of action that was the principal basis of its and the Court's argument in *Stoneridge* and other cases. A consistent effort by the new Solicitor General to spotlight and oppose such contrived obstructions to court access could serve both the integrity of particular statutory schemes and the primacy of Congress' constitutional policy-making role.

5. The Supreme Court and lower federal courts should harmonize judicial approaches governing remedies and court access in federal-state conflicts, so that business litigants and disadvantaged individuals are treated equally – and in genuine accord with pertinent federal statutory goals.

As outlined above in Sections 2 and 3, two parallel and starkly inconsistent approaches mark doctrine and decisions pertinent to lawsuits alleging state violations of federal legal requirements. “The pattern,” according to the principal study of the Court's approaches to these issues, “is clear:” when state or local officials are charged with violating federal civil rights or safety net requirements, “the Court does not reach the merits . . . unless plaintiffs can establish an explicit statutory right of action, either under the federal statute that creates the substantive right at issue, or under [what we have seen to be the formidable screens imposed on] Section 1983.” In contrast, in the otherwise similar, usually business-generated “preemption” challenges to state laws, regulations, and decisions, “the Court decides the merits of cases without considering whether plaintiffs have a private right of action under the preemptive federal statute or Section 1983.”²⁹

Advocacy by the Solicitor General could assist the Supreme Court and the lower federal courts to rationalize the jurisprudence in these areas. Most important, the Solicitor General could recommend approaches to reconciling these conflicting lines of precedent and doctrine on terms that ensure that judicial practice regarding court access promotes, rather than frustrates Congressional goals. As noted above, such an outcome would entail greater judicial deference to Congressional direction before deciding to preempt state regulatory laws, and, simultaneously, giving less scope to “super-strong clear statement rules” when screening individual claims that state laws violate federal civil rights or safety net requirements.

²⁷ 128 S. Ct. at 779-82.

²⁸ 126 S. Ct. 1951 (2008).

²⁹ David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 365-69 (2004) “Section 1983” refers to 42 U.S.C. §1983, which authorizes individuals to sue in federal court to redress the deprivation by state officials of “rights . . . secured by the Constitution or laws” of the United States.

In one particular area – narrow but significant – the conflict between the treatment of individual rights plaintiffs and business plaintiffs is likely to come to a head in the near-term. This involves recent situations in which “individual rights” plaintiffs have invoked supremacy clause-based preemption as a basis for challenging allegedly unlawful state action, as an alternative to Section 1983; since 2002, limitations imposed by the Supreme Court in *Gonzaga v. Doe* have significantly narrowed the scope of Section 1983.³⁰ To date, all courts of appeal that have spoken to the issue have upheld preemption as a basis for challenging allegedly unlawful state action in situations where Section 1983 would no longer apply.³¹ However, state governments continue to attack such applications of preemption doctrine as an evasion of the Court’s Section 1983 rulings; it is not certain whether other courts of appeal, much less the Supreme Court, will accept the approach of the unanimous court of appeals decisions. As noted above, Justices Scalia and Thomas have developed a theory – opposed by the Bush administration as well, so far, as the other seven members of the Court – that would bar suits to vindicate rights prescribed by spending clause-based statutes altogether; were this or any similar approach to prevail in the Court, the accountability of state officials to comply with Medicaid and other statutes lacking specific right-of-action authorization would be significantly diminished.

Attention by the Solicitor General to developments on this issue in particular, in the lower courts as well as the Supreme Court, could have a substantial and positive effect.

³⁰ 536 U.S. 273 (2002). Traditionally, Section 1983 was the preferred route to court for individuals seeking to challenge allegedly unlawful state action. As recounted by Professor Sloss, the Rehnquist Court progressively narrowed the circumstances in which Section 1983-based challenges would be upheld, culminating (thus far) in *Gonzaga*. See Sloss, *supra* note 29 at 441.

³¹ See e.g., *Independent Living Center v. Shewry*, 543 F.3d 1050 (9th Cir. 2008); *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006); *Planned Parenthood of Houston & Southeast Tex. v. Sanchez*, 403 F.3d 324 (5th cir. 2005); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *Local Union No. 12004, United Steelworkers of America v. Mass.*, 377 F.3d 64 (1st cir. 2004); *Pharmaceutical Research and Manufacturers of America v. Thompson*, 362 F.3d 817 (DC Cir. 2004).