

COURT DECISIONS FROM 2002

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Suing the State (and Other Government Entities) in the Twenty-First Century

1. Who are you suing?

- A. Sometimes it's hard to tell if an entity is an "arm of the state," or a local government entity, and it's not always obvious from the name.

Compare *Chisolm v. McManimon*, 275 F.3d 315, 322-323 (3d Cir. 2001) (prior to unification, county courts were not an arm of state), with *Reiff v. Philadelphia County Court of Common Pleas*, 827 F. Supp. 319, 324 (E.D. Pa. 1993) (court of common pleas is an arm of the state); and *Clark v. Tarrant County, Texas*, 798 F.2d 736, 744-745 (5th Cir. 1986) (county adult probation department was an arm of the state), with *Flores v. Cameron County, Texas*, 92 F.3d 258, 264-269 (5th Cir. 1996) (county juvenile probation board not an arm of the state).

- B. This distinction is important because an "arm of the state" can claim 11th Amendment immunity, while a local government entity (e.g., a county, municipal corporation, or other political subdivision of the state) generally cannot. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 369 (2001).

- C. Factors for assessing whether an entity is an arm of the state are described in, among other cases, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (Ohio school board was not arm of the state); *Chisholm*, supra, 275 F.3d at 323; *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 318 (5th Cir. 2001) (regional transportation authority not an arm of the state); and *Brotherton v. Cleveland*, 173 F.3d 552, 561 (6th Cir. 1999) (eye bank, while a "state actor" subject to § 1983, was not an arm of the state). See also "Circumventing the Eleventh Amendment in the Third Circuit," 43 Vill. L. Rev. 923, 937 n.83 (1998); Wright & Miller, *Federal Practice & Procedure* § 3524 at nn.30-45.4.

- D. Some particular examples:

- School districts - in most states, they are local governmental entities with no 11th Amendment immunity. *Duke v. Grady Mun. Schools*, 127 F.3d 972 (10th Cir. 1997) (New Mexico schools); *Ambus v. Granite Board of Education*, 995 F.2d 992, 995 (10th Cir. 1993) (Utah); *Lopez v. Houston Independent School District*, 817 F.2d 351, 353 (5th Cir. 1987) (Texas); *Lenzo v. School City of East Chicago*, 140 F. Supp.2d 947, 959-962 (N.D. Ind. 2001) (and cases cited); *Herrera v. Russo*, 106 F. Supp.2d 1057 (D.Nev. 2000). See also Wright & Miller, *Federal Practice & Procedure* § 3524 at nn. 22-29. But cf. *Belanger v. Madera Unified School District*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993) (holding California school districts are arms of the state); *Biggs v. Board of Educ. of Cecil County*, 2002 WL 370195, at*7 (D.Md. March 6, 2002).
- Local MHMR authorities - *Farias v. Bexar County Board of Trustees for MHMR Services*, 925 F.2d 866, 874 (5th Cir.), cert. denied, 502 U.S. 866 (1991) (not an arm of the state).

- Transit systems - *Lizzi v. Alexander*, 255 F.3d 128, 132 (4th Cir. 2001) (WMATA is an arm of the state); *Elam Const., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343 (10th Cir. 1997) (not an arm of the state); *Access Living Metro v. Chicago Transit Authority*, 2001 WL 818789 (N.D. Ill. Mar 12, 2001) (not an arm of the state).
- Other entities - see *Wright & Miller, Federal Practice & Procedure* § 1110 at n.8 and § 3524 at nn. 33-38.

2. Suing the state (or state agency, or an "arm of the state")

- Damages - if you are suing the state, and you are seeking damages:
 - First consider whether or not the state has waived any claim of immunity.
 - To waive its 11th Amendment immunity, a state must express its consent to suit unequivocally. *Hibbs v. Department of Human Resources*, 273 F.3d 844, 851-852 (9th Cir. 2001); *Lopez v. Police Dep't*, 247 F.3d 26, 28-29 (1st Cir. 2001).
 - 11th Amendment immunity cannot be constructively waived. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 (1999) (court will find "waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction").
 - Some courts recognize a narrow "litigation exception" to this doctrine based on the state's conduct in a particular case. See *Armstrong v. Davis*, 275 F.3d 849, 877-878 (9th Cir. 2001) (state waived 11th Amendment immunity by failing to assert it); *Hibbs, supra*, 273 F.3d at 852 n.4 (finding the exception inapplicable under the facts presented); *Douglas v. California Dept. of Youth Authority*, 271 F.3d 812, 821 (9th Cir. 2001); *Varela-Fernandez v. Burgos*, 81 F. Supp.2d 297, 300-301 (D.P.R. 1999). See also *Marisol A. v. Giuliani*, 157 F. Supp.2d 303, 314 (S.D. N.Y. 2001) (state may waive 11th Amendment immunity by entering into a settlement agreement in which it unequivocally agrees to subject itself to federal court jurisdiction). But cf. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 467-468 (1945) (suggesting that state Attorneys General may not always have the authority to waive 11th Amendment immunity); *Lapides v. Bd. of Regents*, 251 F.3d 1372 (11th Cir.) (state's removal of a claim to federal court does not waive 11th Amendment immunity), cert granted, 122 S. Ct. 456 (2001).
 - Immunity may be waived by state statute. E.g., Chapter 159, 2001 Minnesota Session Laws.
 - Immunity may also be waived by accepting federal funds conditioned on such a waiver. See §§ 2(a)(iii)(2)(b) and 7(c)(iii)(2) below.

- Note that while some courts have held that 11th Amendment immunity may be waived if not timely asserted, *Armstrong v. Davis*, 275 F.3d 849, 877-878 (9th Cir. 2001), others have held that it may be raised for the first time on appeal, *Shaboon v. Duncan*, 252 F.3d 722, 737 n.9 (5th Cir. 2001); *Lapides*, supra, 251 F.3d at 1378 ("may be asserted at any point"), may be raised by the court sua sponte, *Lapides*, supra, 251 F.3d at 1378, and may be the subject of interlocutory appeals, *Shaboon*, supra, 252 F.3d at 729.
 - Some courts have held that the 11th Amendment does not bar a damage claim against a state, even in absence of a waiver of immunity, when:
 - The federal government will ultimately reimburse all or part of a money judgment against the state. Compare *Conrad v. Perales*, 92 F. Supp.2d 175, 180 (W.D. N.Y. 2000).
 - The entity invoking the immunity is sued only in its representative capacity. Compare *State of California v. Campbell*, 138 F.3d 784, 787 (9th Cir. 1998) (suit did not seek to recover assets of the state, but only named the entity in question in its capacity as a receiver of the assets of others).
 - 11th Amendment immunity from claims under particular statutes
 - ADA claims
 - Title I - damages unavailable, *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), unless the state has waived its 11th Amendment immunity.
 - Title II
 - The Supreme Court refused to decide the issue. *Garrett*, supra, 531 U.S. at 360 n.1.
 - The lower courts are divided
 - After *Garrett*, most courts considering the issue have held that Title II cannot abrogate 11th Amendment immunity. See, e.g., *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001); *Association for Disabled Americans, Inc. v. Florida International University*, 178 F. Supp.2d 1291, 1293-1294 (S.D. Fla. 2001) (collecting similar cases); *Badillo-Santiago v. Andreu-Garcia*, 167 F. Supp.2d 194 (D.P.R. 2001); *Lieberman v. Delaware*, 2001 WL 1000936 (D.Del. Aug 30, 2001); *Doe v. Div. of Youth and Family Serv.*, 148 F. Supp.2d 462, 487-88 (D.N.J. 2001). See also *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc), decided pre-*Garrett*.

- At least one circuit continues to hold that states are not immune. *Hason v. Medical Bd. of California*, 279 F.3d 1167, 1170-1171 (9th Cir. 2002). See also *Project Life, Inc. v. Glendening*, 139 F. Supp.2d 703, 707 n.5 (D.Md. 2001).
- The Second Circuit has held that, while Title II as a whole failed to validly abrogate 11th Amendment immunity, suits for money damages under Title II can be maintained against a state if the plaintiff can establish that the Title II violation was motivated by discriminatory animus or ill will. *Garcia v. SUNY Health Sciences Center of Brooklyn*, 280 F.3d 98 (2d Cir. 2001). Compare *Bowers v. National Collegiate Athletic Ass'n*, 171 F. Supp.2d 389, 407-408 (D.N.J. 2001), appeal pending (reading Title II "to call upon Congress' § 5 power only insofar as it makes available damages for intentional discrimination. In all other respects, Title II is simply regulation under the Commerce Clause"; note, too, that the court's view of intent does not appear to require ill will); *Doe v. Division of Youth and Family Services*, 148 F. Supp.2d 462, 487 (D.N.J. 2001) (courts are "constrained to formulate constitutional rules only to the extent necessary to resolve the issues," so the holding that immunity was not abrogated for the claim presented "in no way calls into question" other provisions of Title II).
- The Sixth Circuit has held that an action is barred by the 11th Amendment insofar as the action relies on congressional enforcement of the Equal Protection Clause, but it is not barred insofar as it relies on congressional enforcement of the Due Process Clause. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 811 (6th Cir. 2002) (en banc). Compare *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp.2d 509 (E.D. Pa. 2001) (acknowledging substantive due process right to community-based services in certain cases, but finding Title II cannot abrogate 11th Amendment immunity).
- ADA retaliation - the courts are divided on whether the states have 11th Amendment immunity from claims under the anti-retaliation

provisions of Title V. Compare *Demshki v. Monteith*, 255 F.3d 986, 988 (9th Cir. 2001) (states have immunity, at least in situations in which the retaliation claims are predicated on alleged violations of Title I), with *Roberts v. Pennsylvania Dept. of Public Welfare*, 2002 WL 253945 (E.D.Pa. Feb. 20, 2002) (no immunity).

- § 504
 - Most lower courts since *Garrett* have held that Congress cannot abrogate the states' immunity from damages under the Rehabilitation Act. See, e.g., *Garcia v. SUNY Health Sciences Center of Brooklyn*, 280 F.3d 98, 113 (2d Cir.2001); *Garrett v. University of Alabama at Birmingham Bd. of Trustees*, 276 F.3d 1227, 1228-1229 (11th Cir. 2001) (on remand); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000).
 - But most lower courts have also found that under Congress' Spending Clause authority, the states validly waive their 11th Amendment immunity from § 504 claims by accepting federal funds conditioned on such a waiver.
 - Finding such a waiver of immunity: *Carten v. Kent State University*, 282 F.3d 391, 398 (6th Cir. 2002); *Douglas v. California Dept. of Youth Authority*, 271 F.3d 812, 819-821 (9th Cir. 2001) (and cases cited); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000, en banc), cert. denied sub nom *Arkansas Dept. of Educ. v. Jim C.*, 121 S. Ct. 2591 (2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *August v. Mitchell*, 2002 WL 188406 (E.D. La. Feb 01, 2002); *Johnson v. State of Louisiana*, 2002 WL 83645, at *5 (E.D. La. Jan 18, 2002); *Bowers v. National Collegiate Athletic Ass'n*, 171 F. Supp.2d 389, 408 (D.N.J. 2001), appeal pending (rejecting *Garcia* argument); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp.2d 509, 523 (E.D. Pa. 2001); *Lieberman v. Delaware*, 2001 WL 1000936, at *5-6 (D.Del. Aug. 30, 2001). See also *Kvorjak v. Maine*, 259 F.3d 48, 50 n.1 (1st Cir. 2001) (stating that employment claim could proceed under § 504 after *Garrett*, though without analysis); *Maull v. Division of State Police*, 141 F. Supp.2d 463, 474 (D.Del. 2001) (relying in part on *Jim C.*, supra). Compare *Sandoval v. Hagan*, 197 F.3d 484, 493 (11th Cir.1999) (describing Rehabilitation Act's language as a "clear" waiver of state sovereign immunity in exchange for federal funds), overruled on other grounds, *Alexander v. Sandoval*, 531 U.S. 1049 (2001). Compare *Garrett*, supra, 276 F.3d at 1228-1229

(remanded for consideration of the issue); Reickenbacker, *supra*, 274 F.3d at 984 (issue not preserved).

- Finding no waiver: *Garcia v. SUNY Health Sciences Center of Brooklyn*, 280 F.3d 98, 113-115 (2d Cir.2001) (no knowing waiver because at the time the state accepted funds [pre-Seminole decision in 1995], Title II was reasonably understood to abrogate state's sovereign immunity under Commerce Clause authority, so a state accepting federal funds conditioned on a waiver of immunity from § 504 claims, which proscribed the same conduct, could not have understood that it was actually giving up anything).
 - § 1983 - states have 11th Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 338 et seq. (1979). (For more on § 1983, see § 5 below.)
 - FMLA - undecided. *Hibbs v. Department of Human Resources*, 273 F.3d 844, 850-851 (9th Cir. 2001) (collecting authorities, and creating a split in the circuits by holding that one part of the FMLA was a valid exercise of Congress' 14th Amendment power).
 - Under any state law
 - In federal court - you cannot sue the state under state law in federal court unless the state waives immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Reyes v. Sazan*, 168 F.3d 158, 162 (5th Cir. 1999).
 - In state court - there is no 11th Amendment bar, but the claim is governed by state "sovereign immunity" law.
 - Note, too, that many courts have held that damages under Title II and § 504 are only recoverable for intentional discrimination. See, e.g., *Bowers v. National Collegiate Athletic Ass'n*, 171 F. Supp.2d 389, 405-406 (D.N.J. 2001), appeal pending.
- Equitable relief against the states
 - The Eleventh Amendment on its face applies equally to suits for damages and equitable relief. *Carten v. Kent State University*, 282 F.3d 391, 397 (6th Cir. 2002) (11th Amendment bars claim for injunctive relief against KSU); *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995) (suit against the state is barred by the 11th Amendment regardless of whether the relief sought is legal or equitable).
 - If you are suing the state, a state agency, or an "arm of the state," and you are seeking prospective injunctive relief, you cannot do it directly, and must instead name a state official in his or her official capacity in order to proceed under *Ex parte Young*. See § 3(a)(iii) below.

- Suing states in state court for violation of federal laws
 - The Supreme Court has held that reference to the states' immunity from suit as "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Although by its terms the 11th Amendment does not apply to actions in state courts, *id.* at 735-736, the Supreme Court has held that the states' "constitutional immunity from suit is not limited to the text of the Amendment," *id.* at 736, and the states "retain immunity from private suit in their own courts . . . [that is] beyond the congressional power to abrogate by Article I legislation." *Id.* at 754.
 - The limits on this sovereign immunity include:
 - The "good faith" of the states, that they will not refuse to honor "obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Id.* at 755.
 - Claims for which the states have consented to suit. *Id.* at 755.
 - Claims against states by other states or the federal government. *Id.* at 755.
 - Suits in which immunity is abrogated pursuant to Congress' 14th Amendment authority. *Id.* at 756.
 - Suits against local government entities. *Id.* at 756. See § 4 below.
 - Ex parte Young claims. *Id.* at 756-757. See § 3(a)(iii)(1) below.
 - Individual capacity claims against state officials. *Id.* at 757. See § 3(b)(i) below.
 - Possibly, situations in which states manipulate their immunity in a systematic fashion to discriminate against federal causes of action. Compare *Alden*, *supra*, 527 U.S. at 758. See also § 8(b) below.
- Suing a state official
 - If you are suing a state official in his or her official capacity:
 - For damages - unavailable. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70-71 (1989).
 - For equitable relief generally - unavailable. See § 2(b)(i) above.
 - For prospective injunctive relief
 - Federal cause of action
 - 11th Amendment is not a bar to an action under *Ex parte Young*. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (explicitly recognizing *Ex parte Young* actions for prospective injunctive relief against state

officials under Title I of the ADA). For cases allowing Ex parte Young actions to enforce the ADA, see, e.g., *Frazier v. Simmons*, 254 F.3d 1247 (10th Cir. 2001); *Daigle v. Louisiana Dept. of Social Services*, 2002 WL 126647 (E.D. La. Jan. 31, 2002); *Parker v. Michigan Department of Corrections*, 2001 WL 1736637, at*5 (W.D.Mich. Nov. 9, 2001). For more examples, see the NAPAS docket at <http://www.protectionandadvocacy.com/sept01.htm>, listing community integration cases. See also the cases cited in § 7(d) below.

- Some courts have identified four requirements for a valid Ex parte Young claim. See, e.g., *Lewis v. New Mexico Dept. of Health*, 261 F.3d 970, 975-976 (10th Cir. 2001). See also *Wright & Miller, Federal Practice & Procedure § 3524 at nn. 70.9-70.10 (2001 Supp.)*.
 - The plaintiffs must sue state officials, rather than the state itself. See, e.g., *Reickenbacker v. Foster*, 274 F.3d 974, 976 n.9 (5th Cir. 2001) (amended complaint named no state official, and was not entitled to proceed under Ex parte Young); *Lewis v. New Mexico Dept. of Health*, 261 F.3d 970, 975-976 (10th Cir. 2001); *Douglas v. California Dept. of Youth Authority*, 271 F.3d 812, 821 n.6 (9th Cir. 2001); *Association for Disabled Americans, Inc. v. Florida International University*, 178 F. Supp.2d 1291, 1295 (S.D. Fla. 2001); *U.S. v. Mississippi Dept. of Public Safety*, 159 F. Supp.2d 374, 378 (S.D.Miss. 2001); *Diaz Reyes v. Police Department*, 153 F. Supp.2d 74 (D.P.R. 2001); *American Soc. of Consultant Pharmacists v. Patla*, 138 F. Supp.2d 1062, 1070-1071 (N.D. Ill. 2001). Compare *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985).
 - The plaintiffs must allege a non-frivolous violation of federal law.
 - The plaintiffs must seek prospective equitable relief, rather than retroactive monetary relief from the state treasury. For example, claims for reinstatement are prospective in nature. *Carten, supra*, 282 F.3d at 396 (rejecting defense argument that the plaintiff was seeking a retrospective reversal of a completed state decision to expel him).

- The suit must not implicate the state's "special sovereignty interests." For more on this theory, see § 7(d)(iii) below.
 - The Ex parte Young distinction does not allow all equitable relief, but is limited to prospective injunctive relief. Compare *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995) (suit against the state is barred by the 11th Amendment regardless of whether the relief sought is legal or equitable).
 - It cannot be used to obtain declaratory relief for a past violation of federal law. *Green v. Mansour*, 474 U.S. 64 (1985); *Doe v. Division of Youth and Family Services*, 148 F. Supp.2d 462, 484 (D.N.J. 2001); *Robertson v. Huffman*, 144 F. Supp.2d 447, 452-453 (W.D. N.C. 2001). Compare *Wright & Miller, Federal Practice & Procedure* § 3524 at n. 61.1 (2001 Supp.).
 - There must also be an ongoing violation of federal law. *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995).
 - A prospective injunction is permitted even though a substantial state expenditures may be required to correct the violation. *Milliken v. Bradley*, 433 U.S. 267 (1977); *Lewis v. New Mexico Dept. of Health*, 261 F.3d 970, 977-978 (10th Cir. 2001); *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001); *American Soc. of Consultant Pharmacists v. Patla*, 138 F. Supp.2d 1062, 1069-1070 (N.D. Ill. 2001).
 - Similarly, there is no 11th Amendment bar to a claim for attorneys fees in an Ex parte Young suit. *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989) ("an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment").
- For state law claims
 - In federal court
 - State can claim 11th Amendment immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 109 (1984).
 - There is no exception to this immunity just because suit seeks only prospective injunctive relief (i.e., no Ex parte Young exception). *Pennhurst*, supra, 465 U.S. at 109; *Papasan v. Allain*, 478 U.S. 265, 277 (1986); *Lewis v. New Mexico Dept. of Health*,

94 F. Supp.2d 1217, 1229 (D.Colo. 2000), aff'd on other grounds, 261 F.3d 970 (10th Cir. 2001).

- There may be some other, narrower exceptions, however:
 - Federal courts may have jurisdiction to prospectively require state officials to obey state law if federal regulations make compliance with the state law a federal duty. See discussion and authorities in *Doe, 1-13 v. Bush*, 261 F.3d 1037, 1055 et seq. (11th Cir. 2001). See also *Cox v. City of Dallas*, 256 F.3d 281, 308 (5th Cir. 2001).
 - A consent decree normally does not confer jurisdiction on a federal court to enforce state law claims, but it can validly include protections found in a state statute as a means of correcting violations of federal rights, and a subsequent motion to enforce such a decree is not a "federal suit against state officials on the basis of state law." *Komyatti v. Bayh*, 96 F.3d 955, 960-961 (7th Cir. 1996).
 - 11th Amendment immunity does not prevent an action in federal court against a state official for ultra vires actions beyond the scope of statutory authority, or pursuant to authority deemed to be unconstitutional. *Pennhurst, supra*, 465 U.S. at 101-102, n. 11; *Scham v. District Courts*, 967 F. Supp 230, 232-233 (S.D.Tex. 1997).
 - In this context, ultra vires actions are those "without any authority whatever;" claim rests on the officer's lack of delegated power. *Pennhurst, supra*, 465 U.S. at 101-102, n. 11.
 - The test has been stated as whether there was any "colorable basis for the exercise of authority by state officials." A claim of error in the exercise of that power is insufficient. *Id.*
 - In state court - depends on state law
- If you are suing a state official in his or her individual capacity (i.e., getting money out of official's own pocket):
 - 11th Amendment does not bar suit against state officials in their individual capacities, even if arising from their official acts, *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991), unless

the claim will "run to the state treasury" under state law. *Reyes v. Sazan*, 168 F.3d 158, 162-163 (5th Cir. 1999).

- State law that bars individual liability and instead imputes it to the state means that the claim "runs to the state," *id.*, but
 - Several courts have held that indemnification statutes do not mean the judgment "runs to the state," and therefore pose no 11th Amendment bar against individual claims. *Id.*; *Cornforth v. University of Oklahoma Bd. of Regents*, 263 F.3d 1129, 1133 (10th Cir. 2001); *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986). See also *Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573 (11th Cir. 1994) (existence of state's liability insurance trust fund, voluntarily established to protect its employees against personal liability for damages, does not make state real party in interest for purposes of 11th Amendment immunity). Compare *Wright & Miller, Federal Practice & Procedure* § 3524 at n. 48.2 (2001 Supp.).
 - Voluntary payments by state to enable non-state agency to meet shortfall caused by adverse judgment do not trigger 11th Amendment immunity. *Christy v. Pennsylvania Turnpike Com'n*, 54 F.3d 1140, 1147 (3d Cir. 1995).
- It does not matter whether the individual capacity suit is to enforce federal or state law. *Sutta v. Acalanes Union High School Dist.*, 2001 WL 1720616, *3 (N.D.Cal. Oct. 3, 2001) (officers sued in their individual capacity for violations of state law can be liable for monetary damages).
 - But the cause of action must allow for individual liability.
 - Statutes allowing for individual liability: § 1983, *Hafer v. Melo*, 502 U.S. 21 (1991).
 - Statutes generally held not to allow such liability: ADA Title I - *Butler v. City of Prairie Village*, 172 F.3d 736, 744 (10th Cir. 1999); ADA Title II - *Navedo v. Maloney*, 172 F. Supp.2d 276, 288-289 (D.Mass. 2001) (collecting authorities); *Key v. Grayson*, 163 F. Supp.2d 697 (E.D. Mich. 2001) (similar). Rehabilitation Act employment claims - *Hiler v. Brown*, 177 F.3d 542, 546-547 (6th Cir. 1999); *Castro Ortiz v. Fajardo*, 133 F. Supp.2d 143, 150-151 (D.P.R. 2001) (collecting cases).
 - Statutes with less clear authority: FMLA - compare *Hibbs v. Department of Human Resources*, 273 F.3d 844, 871-872 (9th Cir. 2001) (some supervisors can be sued as employers), with *Wascura v. Carver*, 169 F.3d 683 (11th Cir. 1999) (no individual liability of public officials). § 504 non-employment cases - compare *Lue v. Moore*, 43 F.3d 1203, 1205 (8th Cir.1994) (holding that qualified immunity is a defense, suggesting the availability of individual capacity claims; compare § 3(b)(iv) below), with *Frederick L. v. Department of Public Welfare*,

157 F. Supp.2d 509, 531 (E.D. Pa. 2001) (not reaching the issue but citing cases finding no individual liability).

- Individuals are also entitled to claim qualified immunity
 - What it is: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Crawford-El v. Britton, 523 U.S. 574, 588 (1998).
 - Who can claim it:
 - This defense is not applicable to claims against a governmental entity itself. *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 166 (1993).
 - This defense is not applicable to claims against individuals in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 166-167 (1985).
 - Not applicable to suits (or portions of suits) for injunctive relief. *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1051 n.1 (5th Cir. 1997); *Lugo v. Alvarado*, 819 F.2d 5, 7 (1st Cir. 1987); *Frank v. Relin*, 1 F.3d 1317, 1327 (2d Cir. 1993) (because such claims are necessarily official capacity suits); *Rouse v. Plantier*, 997 F. Supp. 575 (D.N.J. 1998).
 - This defense is only available to claims against individuals in their individual capacity. *Familias Unidas v. Briscoe*, 619 F.2d 391, 403 (5th Cir. 1980).
- Suing a local government entity or official
 - Generally, there is no 11th Amendment immunity. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 369 (2001).
 - Note that some courts have granted 11th Amendment immunity to local governments when their actions were compelled by state law. See *Wright & Miller, Federal Practice & Procedure* § 3524 at nn. 251-253 (2001 Supp.).
 - Note that other kinds of immunity may apply. For a case discussing the effect of judicial immunity on ADA and § 504 claims, for example, see *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001).
 - Many courts have held that damages under Title II and §504 are only recoverable for intentional discrimination. See, e.g., *Bowers v. National Collegiate Athletic Ass'n*, 171 F. Supp.2d 389, 405-406 (D.N.J. 2001), appeal pending. The meaning of intent in this context is fluid. See *Garcia v. SUNY Health Sciences Center of Brooklyn*, 280 F.3d 98, 112, 115 (2d Cir.2001).

- Note, too, that there are certain attacks on Congressional authority that could impact claims against local government entities. See § 7(c)(ii) and (iii) below.
- § 1983 claims generally - 42 U.S.C. § 1983 is not a cause of action, but a procedural method to enforce:
 - Federal constitution
 - Certain federal statutory rights
 - § 1983 actions may sometimes be based on a violation of a federal statute, *Maine v. Thiboutot*, 448 U.S. 1 (1980), if the statute creates a federal right. *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353, 1359 (1997) (child support obligations under Title IV-D of Social Security Act statute did not create enforceable right under § 1983).
 - The Supreme Court discussed the standards for determining which federal statutes are enforceable under § 1983 in *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), *Suter v. Artist M.*, 503 U.S. 347, 355-356 (1992), and *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353 (1997). See *Messier v. Southbury Training School*, 916 F. Supp. 133, 142-146 (D.Conn. 1999).
 - The resulting *Wright/Wilder/Blessing* test, set out in *Blessing*, supra, 520 U.S. at 340-341, states:
 - There is a rebuttable presumption that a statute is enforceable under § 1983 if the Plaintiff can show that:
 - Congress intended the provision to benefit the plaintiff;
 - The right is not too vague and amorphous to enforce;
 - The provision unambiguously imposes a binding obligation on the states.
 - The statute is enforceable unless the Defendant can prove that Congress has foreclosed a § 1983 remedy.
 - Congress may clarify that a particular statute is not actionable under § 1983, either by express words, or by providing a comprehensive alternative enforcement scheme. *Livadas v. Bradshaw*, 512 U.S. 107 (1994).
 - Particular statutes:
 - IDEA - The case law is split. *Padilla v. School Dist. No. 1 in City and County of Denver, Colo.*, 233 F.3d 1268, 1272-1274 (10th Cir. 2000) (rejecting the use of §1983 to enforce IDEA, but collecting authorities on both sides); *Goleta Union Elementary School Dist. v. Ordway*, 166 F.

Supp.2d 1287, 1293-1295 (C.D.Cal. 2001) (also collecting authorities and reaching a contrary result). See also "A Diller, a Dollar: Section 1983 Damage Claims in Special Education Lawsuits," 36 Ga. L. Rev. 465, 496-497 (2002).

- Medicaid - for an exhaustive summary of § 1983 cases involving the Medicaid Act, see Jane Perkins, "42 U.S.C. § 983 and Enforcement of the Medicaid Act," (Updated March 25, 2002). For this resource online, see <<http://www.healthlaw.org/pubs/1983docket.html>>.
- Rehabilitation Act:
 - Title I (covering vocational rehabilitation programs): see Mallett v. Wisconsin Division of Vocational Rehabilitation, 130 F.3d 1245, 1251-1257 (7th Cir. 1997) (holding enforceable).
 - § 501: generally not enforceable under § 1983 because of its detailed remedial scheme. See, e.g., Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522, 1530-1531 (11th Cir. 1997).
 - § 504: The cases are divided. Compare W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995) (§ 504 enforceable under § 1983 in the special education context); Frederick L. v. Dep't of Pub. Welfare, 157 F. Supp.2d 509, 532-534 (E.D.Pa. 2001) (§ 504 community integration claim enforceable under § 1983), with cases finding § 504 not enforceable, like Bartlett v. New York State Board of Law Examiners, 970 F. Supp. 1094, 1145 (S.D.N.Y. 1997), aff'd on other grounds, 156 F.3d 321 (2d Cir. 1998); Silk v. City of Chicago, 1996 WL 312074, at *18-19 (N.D.Ill. 1996) (collecting cases). See also Hartley, "Enforcing Federal Civil Rights Against Public Entities After Garrett," 28 J. Coll. & Univ. L. 41, 77 n.196 (2001) (collecting cases). The question may be less important if the same relief is available directly under § 504. (See § 2(a)(iii)(2) above.) Some differences may be with regard to the availability of individual capacity claims and punitive damages.
- ADA:
 - Title I employment claims: generally not enforceable because of its detailed remedial scheme. E.g., Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522, 1530-1531 (11th Cir. 1997); Krocka v. Bransfield, 969 F. Supp. 1073, 1090 (E.D. Ill. 1997).

- Although § 504 overlaps § 501 in its application to federal employees, the courts are split as to whether individuals may sue federal employers under both §§ 501 and 504. See, e.g., *Prewitt v. United States Postal Service*, 662 F.2d 292, 301-304 (5th Cir. 1981) (holding claims available under both sections, but reading into § 504 administrative exhaustion requirements of § 501); *Rivera v. Heyman*, 157 F.3d 101, 104 (2d Cir. 1998) (recognizing split in circuits, but holding § 501 is exclusive remedy for disability discrimination in employment claims by federal employees).
 - Damages are not available, however, against the federal government or its agencies under § 504, because it does not waive the federal government's sovereign immunity. *Lane v. Pena*, 518 U.S. 187 (1996).
 - Congressional Accountability Act of 1995 - applies to various federal legislative entities, including Congress. 2 U.S.C. §§ 1301(3) and 1331(a). It adopts certain liability and remedy provisions of the ADA, the Rehabilitation Act, and the FMLA, among others. 2 U.S.C. § 1302, § 1311(a)(3) and (b)(3) (Rehabilitation Act § 501 and ADA Title I), § 1312 (FMLA), and § 1331 (ADA Titles II and III).
 - "Bivens" actions
 - In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the court implied a cause of action for damages against federal agents who violate the Constitution.
 - A Bivens action may only be brought against individuals in their individual capacity; such claims may not be brought against federal agencies or agents acting in their official capacities. *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 483-486 (1994).
 - Some constitutional violations are not actionable under Bivens. *Id.* at 484 n.9. See "Removing the 'Special' from the 'Special Factors' Analysis in Bivens Actions," 28 *Creighton L. Rev.* 795 (1995).
- "New" efforts to expand immunity
 - Any statute passed by Congress must be supported by valid constitutional authority.
 - Even suits against local governments (with no 11th Amendment immunity), and suits against the states under *Ex parte Young*, depend on a showing that Congress was empowered to enact the laws sued under.
 - The principal sources of Congressional authority
 - 14th Amendment power - as reflected above (see §§ 2(a)(iii)(1) and (2)(a)), many courts have held that the ADA and § 504, for example, are not valid 14th Amendment legislation, so we have to look for another source.
 - Commerce clause

- Many antidiscrimination laws are also based on Congress' Commerce Clause authority. See, e.g., 42 U.S.C. § 12101(b)(4) (ADA); *Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 202 et seq.(5th Cir. 2000) (FHAA); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996) (FHAA).
- While Commerce Clause legislation cannot abrogate the states' 11th Amendment immunity from damage claims, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), valid Commerce Clause legislation will support Ex parte Young actions against the states, as well as claims against local governments.
- But recent Supreme Court decisions have narrowed Congressional power to regulate interstate commerce. See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).
 - The Court has held that valid Commerce Clause legislation can regulate (1) instrumentalities of interstate commerce, (2) channels of interstate commerce, or (3) those things having a substantial effect on interstate commerce. *Lopez*, supra, 514 U.S. at 558-59.
 - In its recent cases, the Court has narrowed the concept of "substantial effects," and has focused on the economic impact of the activity. See *Lopez* and *Morrison*, supra.
- Advocates must be prepared for these Commerce Clause arguments, and might rely on, among other things, the fact that:
 - Courts have "long recognized the broadly defined 'economic' aspect of discrimination." *Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000) (upholding FHAA), citing *Heart of Atlanta Motel, Inc. v. United States*, 397 U.S. 241, 257-58 (1964).
 - Even relatively recent cases have recognized that employment is an area that Congress may regulate under the Commerce Clause. *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983); *United States v. Furrow*, 125 F. Supp. 2d 1178, 1183 (C.D. Cal. 2000). Presumably, this explains why the Supreme Court found Ex parte Young actions available for ADA Title I enforcement. *Garrett*, supra, 121 S. Ct. at 968 n.9.
 - See also "A Discussion of Congressional Authority to Enact Title II of the Americans with Disabilities Act under the Commerce Clause" (Bazelon Center 7/01), online at

< <http://www.protectionandadvocacy.com/private/dlpbazelonfactsheetre.htm>> (NAPAS Members Only).

- Spending Clause
 - While the ADA is not Spending Clause legislation, because it comes with no federal funding, other laws used by disability advocates are Spending Clause legislation, like the Rehabilitation Act, the Medicaid Act, and IDEA.
 - There are several new challenges to Spending Clause authority.
 - § 504 has been challenged on the grounds that the requirements it imposes as a condition of accepting federal funding are not sufficiently related to the federal interest in the statute, citing, for example, *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987). Such a claim was rejected in *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp.2d 509, 521-523 (E.D. Pa. 2001), but apparently accepted in *Koslow v. Commonwealth of Pennsylvania*, 158 F. Supp.2d 539, 544 (E.D. Pa. 2001), appeal pending.
 - Conditioning receipt of funds on a waiver of 11th Amendment immunity states has also been challenged as unduly coercive, citing, for example, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999). This claim has been rejected. See *Jim C. v. U.S.*, 235 F.3d 1079, 1081 (8th Cir. 2000), cert. denied sub nom *Arkansas Dept. of Educ. v. Jim C.*, 121 S. Ct. 2591 (2001); *Bowers v. National Collegiate Athletic Ass'n*, 171 F. Supp.2d 389, 408-409 (D.N.J. 2001), appeal pending; *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp.2d 509, 522-523 (E.D.Pa. 2001); *Doe v. State of Nebraska*, 2002 WL 225907, at *8 (D.Neb. Feb. 14, 2002). See also *Robinson v. Kansas*, 117 F. Supp.2d 1124, 1134 (D.Kan. 2000).
 - Such waivers have also been challenged on the grounds that the state did not exercise a knowing waiver of immunity because the requirements of the law were unclear, citing, for example, *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). While a somewhat similar claim was successful in *Garcia, supra*, 280 F.3d at 113-115, they have more often been rejected. See *Bradley v. Arkansas Dept. of Educ.*, 189 F.3d 745, 753 (8th Cir. 1999) (regarding IDEA), vacated in part on other grounds sub nom *Jim C. v. Arkansas Dept. of Educ.*, 197

F.3d 958 (8th Cir. 1999); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp.2d 509, 521 (E.D.Pa. 2001) (regarding § 504).

- Challenges to §504 enforcement based on the "inferiority" of the Spending Clause
 - Another theory concocted by the new advocates for "states rights" is that § 1983 and *Ex parte Young* is not available to enforce Spending Clause legislation because such legislation is merely in the nature of a contract, and federal law is supreme only when enacted as part of Congress' enumerated powers. One district court has accepted this theory, *Westside Mothers v. Haveman*, 133 F. Supp.2d 549, 561-562 (E.D. Mich. 2001), appeal pending, but it has been rejected by others. See *Rancourt v. Concannon*, 175 F. Supp.2d 60, 62 (D.Me. 2001) (and cases cited); *Boudreau v. Ryan*, 2001 WL 840583, at *5 (N.D. Ill. May 2, 2001); *Antrican v. Buell*, 158 F. Supp.2d 663, 669 n.5 (E.D.N.C. 2001), appeal pending. See also *Bryson v. Shumway*, 177 F. Supp.2d 78, 87 (D.N.H. 2001) (rejecting *Westside Mothers* claim that Medicaid Act is not enforceable via *Ex parte Young* actions). See also *Frew v. Gilbert*, 109 F. Supp.2d 579, 665-670 (E.D.Tex. 2000), appeal pending.
 - For more on this theory, see Jane Perkins, "Sovereign Immunity Claims in Medicaid Cases," (Updated: March 22, 2002).
- States are also continuing to challenge the applicability of *Ex Parte Young* on a number of grounds in addition to those suggested in § 3(a)(iii) above.
 - Statutory language arguments regarding the ADA and § 504
 - Some states contend that *Ex parte Young* actions cannot be brought against state officials under Title II, § 504, or the FMLA, arguing that the language in those statutes only prohibits discrimination by entities, and individual defendants are thus not proper parties.
 - This argument was accepted in *Walker v. Snyder*, 213 F.3d 344, 346, 347 (7th Cir. 2000), cert. denied sub nom *United States v. Snyder*, 531 U.S. 1190 (2001); *Koslow v. Commonwealth of Pennsylvania*, 158 F. Supp.2d 539, 546 (E.D.Pa. 2001), appeal pending; *Lewis v. New Mexico Dept. of Health*, 94 F. Supp.2d 1217, 1230 (D.Colo. 2000), aff'd on other grounds, 261 F.3d 970 (10th Cir. 2001).

- It has been rejected by many other courts. *Carten v. Kent State University*, 282 F.3d 391, 396-397 (6th Cir. 2002) (Title II claim); *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001) (statutory language of the ADA providing for "public entity" liability does not bar *Ex parte Young* claim against a state officials in their official capacities, but only precludes individual capacity claims); *Gregory v. Administrative Office of the Courts of State of New Jersey*, 168 F. Supp.2d 319, 328-330 (D.N.J. 2001); *Doe v. Rowe*, 156 F. Supp.2d 35, 56-57 (D.Me. 2001); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp.2d 509, 530-532 (E.D.Pa. 2001). Without specifically discussing the statutory language argument, several courts have permitted such claims under *Ex parte Young*. See, e.g., *Sandoval v. Hagan*, *supra*, 197 F.3d at 500-501, reversed on other grounds *sub nom Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1286-1287 (10th Cir. 1999); *Nelson v. Miller*, 170 F.3d 641, 646-47 (6th Cir. 1999); *Armstrong v. Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *Brennan v. Stewart*, 834 F.2d 1248, 1251-1253, 1260 (5th Cir. 1988). Compare *Hibbs v. Department of Human Resources*, 273 F.3d 844, 871-872 (9th Cir. 2001) (finding that some supervisory employees can be sued as employers under the FMLA, but refusing to decide because of inadequate briefing).
 - The argument is also contradicted by *Garrett* itself, in which the Court expressly stated that Title I of the ADA still governed the conduct of states and that state officials could be subjected to *Ex parte Young* actions in federal court for injunctive relief for violations of Title I. *Garrett*, *supra*, 121 S. Ct. at 968 n. 9.
- States have also begun to argue that *Ex parte Young* actions are unavailable under ADA Title II and §504 because of Congressional intent.
 - This argument relies on a footnote in *Seminole Tribe*, suggesting that Congress did not intend to authorize *Ex parte Young* actions against state officials since the duties imposed by federal statute at issue in that case (the Indian Gaming Regulatory Act) were "not of the sort likely to be performed by an individual state executive officer or even a group of officers." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75 n. 17 (1996).
 - Such an argument should be inapplicable to Title II or § 504, because in virtually all areas covered by those laws, states cannot act except through their officials.
 - Moreover, the *Ex parte Young* doctrine is based on the understanding that official capacity suits are a way of pleading an action against a state entity of which an official is an agent. These issues have been briefed

extensively by the Department of Justice. See brief of United States in *McGarry v. Director, Dep't of Revenue, State of Missouri*, No. 00-1597 (8th Cir.), available at <<http://www.usdoj.gov/crt/briefs/mcgarry.htm>>.

- "Special Sovereignty Interests"
 - In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the principal opinion of the Court declined to permit a tribal land and water claim to proceed against state officials under *Ex parte Young*. This portion of the principal opinion, which did not command a majority, concluded that the *Ex parte Young* doctrine was inapplicable in the unique circumstances of this case (the functional equivalent of an action to quiet title), because of its impact on "special sovereignty interests" and because a state court forum was available. *Id.* at 281-87. Seven justices rejected the principal opinion's analysis, concluding that it was improper to consider whether special sovereign interests were implicated and whether a state forum was available. *Id.* at 291-97 (O'Connor, J., concurring in part); 297-319 (Souter, J., dissenting).
 - Nonetheless, states have repeatedly relied on *Coeur d'Alene* to argue that *Ex parte Young* actions are impermissible in a variety of contexts on the ground that the issues involved implicate special sovereignty interests. These arguments have been raised in disability discrimination cases, but so far, have been rejected. See, e.g., *Carten v. Kent State University*, 282 F.3d 391, 397 (6th Cir. 2002); *Lewis v. New Mexico Dept. of Health*, 261 F.3d 970, 978 (10th Cir. 2001) (no special sovereignty interest in administering Medicaid waiver program receiving federal funding); *John Roe #2 v. Ogden*, 253 F.3d 1225, 1234 (10th Cir. 2001) (*Coeur d'Alene* exception not applicable in cases seeking purely injunctive relief); *J.B. ex rel Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999) (no special sovereignty interest in administering welfare program funded in part by federal money); *Marie O. v. Edgar*, 131 F.3d 610, 616-17 & n.13 (7th Cir. 1997) (no special sovereignty interest in administering early intervention services); *Bonnie L. v. Bush*, 180 F. Supp.2d 1321, 1327-1328 (S.D. Fla. 2001) (EPSDT case); *Robinson v. Kansas*, 117 F. Supp.2d 1124, 1136-37 (D. Kan. 2000) (no special sovereignty interest in financing school system); *Neiberger v. Hawkins*, 70 F. Supp.2d 1177, 1189-90 (D. Colo. 1999) (no special sovereignty interest in welfare of NGRI patients).
 - Challenges to *Ex Parte Young* continue, however. The Supreme Court recently agreed to decide whether *Ex parte Young* claims can proceed against state officials under the Federal Telecommunications Act. *Mathias v. Worldcom Technologies, Inc.*, 532 U.S. 903 (2001).

- Challenges based on "detailed remedial schemes"
 - States have argued, based on language in *Seminole Tribe*, supra, 517 U.S. at 75 n.17, that *Ex parte Young* actions cannot be brought to enforce statutes with a detailed remedial scheme indicating Congressional intent to limit the available remedies. In *Seminole*, the statute in question dealt with Indian gaming, and imposed a very limited scheme of enforcement against states. The Court's concern in *Seminole* was that an *Ex parte Young* action against state officials would enable the plaintiffs to obtain more extensive remedies than those set forth in the provision targeting states.
 - In the disability context, the argument has generally been rejected, and no such intent to limit remedies found, either because the remedial scheme as written was sufficiently broad (for example, with regard to Title II, § 504, or IDEA), or because there was in fact no detailed remedial scheme (the Medicaid Act, for example). See, e.g., *Gibson v. Ark. Dep't of Correction*, 265 F.3d 718, 720-721 (8th Cir. 2001) (Title II); *Randolph v. Rodgers*, 253 F.3d 342, 346-348 (8th Cir. 2001) (Title II); *Frazier v. Simmons*, 254 F.3d 1247, 1253 n.2 (10th Cir. 2001) (Title I); *Marie O. v. Edgar*, 131 F.3d 610, 615-617 (7th Cir. 1997) (IDEA); *Maryland Psychiatric Soc., Inc. v. Wasserman*, 102 F.3d 717, 719 at n.* (4th Cir. 1996) (Medicaid Act); *Kevin M. v. Bristol Township School Dist.*, 2002 WL 73233, at *10 (E.D.Pa. Jan. 16, 2002) (IDEA); *Bonnie L. v. Bush*, 180 F. Supp.2d 1321, 1327-1328 (S.D. Fla. 2001) (EPSDT case); *Jane Doe v. Sylvester*, 2001 WL 1064810, at *5 (D.Del. Sept. 11, 2001) (Title II and § 504); *Reynolds v. Giuliani*, 118 F. Supp.2d 352 (S.D.N.Y. 2000) (Medicaid Act); *Parry v. Crawford*, 990 F. Supp. 1250, 1255 (D.Nev. 1998) (Medicaid Act). See also *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (explicitly recognizing *Ex parte Young* actions for prospective injunctive relief against state officials under Title I of the ADA); *Joseph A. v. Ingram*, 275 F.3d 1253, 1264 (10th Cir. 2002) ("Even if the Adoption Assistance Act provided for a private cause of action in addition to its funding remedies, that would not foreclose claims under *Ex parte Young* unless the cause of action was more limited than what would be available under *Ex parte Young*"). Contra: *Westside Mothers v. Haveman*, 133 F. Supp.2d 549, 574-575 (E.D.Mich. 2001) (Medicaid Act).
- Challenges based on official discretion.
 - Some courts have suggested that *Ex parte Young* suits are impermissible if they would require that the courts interfere with discretionary, rather than simply ministerial, acts by state officials *Lewis v. New Mexico Dept.*

of Health, 261 F.3d 970, 976 (10th Cir. 2001). Compare Wright & Miller, Federal Practice & Procedure § 3524 at nn. 70.1-70.6 (2001 Supp.).

- This rule does not preclude judicial review under *Ex parte Young* of discretionary acts that violate federal law. Lewis, *supra*, 261 F.3d at 976. See also the ATTAC/NAPAS Fact Sheet: "Sovereign Immunity Claims in Medicaid Cases," by Jane Perkins (12/31/01), at nn. 44-46, <[http://www.protectionandadvocacy.com/private/FactSheetNHLP 102 .htm](http://www.protectionandadvocacy.com/private/FactSheetNHLP102.htm)> (for NAPAS Members Only).
- Other possibilities
 - 11th Amendment immunity does not bar suits against the states by the federal government. Garrett, *supra*, 531 U.S. at 374 n. 9. But cf. *U.S. v. Mississippi Dep't of Public Safety*, 159 F. Supp.2d 374 (S.D. Miss. 2001) (holding that while the federal government can sue for damages to remedy a pattern of intentional discrimination on behalf of the United States or the citizens of a state, it cannot sue for money damages on behalf of a private individual).
 - *Erickson v. Board of Governors*, 207 F.3d 945, 952 (7th Cir. 2000), cert. denied sub nom *U.S. v. Bd. of Governors*, 531 U.S. 1190 (2001) ("All our holding means is that private litigation to enforce the ADA may not proceed in federal court. *Erickson* may repair to Illinois court--for although states may implement a blanket rule of sovereign immunity, see Alden . . ., Illinois has not done this. Having opened its courts to claims based on state law, including its own prohibition of disability discrimination by units of state government, Illinois may not exclude claims based on federal law.") (emphasis in original; citations omitted).
 - State courts of claims
 - Suing under state law in state court
 - Other ideas?

Appeals Court Reverses Westside Mothers; Medicaid Statute Enforceable Against States

Appeals Court Reverses Westside Mothers The infamous decision of Judge Robert H. Cleland in the federal District Court in Michigan that the Medicaid statute could not be enforced by a private suit has been reversed by the Sixth Circuit Court of Appeals.

Westside Mothers v. Haveman, 133 F. Supp. 2d 549 (E.D. Mich. 2001), rev'd 2002 WL 987291 (6th Cir. May 15, 2002). The Fourth Circuit, in a case decided May 9, 2002, also rejected the reasoning in *Westside Mothers*. *Antrican v. Odom*, 2002 WL 939566 (4th Cir. 2002). This is a particularly heartening result since the Fourth Circuit is considered the most conservative circuit on sovereign immunity issues.

There presently is no conflict among the circuits. None has held that the 11th Amendment bars enforcement of the Medicaid statute in actions for prospective relief. Both three-judge appellate panels, in *Westside Mothers* and in *Antrican*, ruled unanimously.

In *Westside Mothers*, the claim was failure of the state to provide required services under the EPSDT program for children. In *Antrican*, the claims included a violation of the requirement of the Medicaid law that services (there dental) be rendered in a timely fashion. Both cases appeared to be routine suits under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in which state officials are named defendants in their official capacity and the relief sought is prospective, that is, an injunction applicable to future conduct. As the Sixth Circuit noted, “[t]he *Ex parte Young* exception to Eleventh Amendment immunity is designed to preserve the constitutional structure established by the Supremacy Clause.” The district court in Michigan dismissed the complaint in *Westside Mothers* under the 11th Amendment; in *Antrican*, the district court denied the state’s motion to dismiss.

Sixth Circuit’s Decision

- **Medicaid is federal law, not a contract**

Judge Cleland held that federal Medicaid law is not “supreme law of the land” because, he said, Medicaid is merely a contract between a state and the federal government. 133 F. Supp. 2d at 558. But the Sixth Circuit said:

Contrary to this narrow characterization, the Court in *Pennhurst I* makes clear that it is using the term “contract” metaphorically, to illuminate certain aspects of the relationship formed between a state and the federal government....It does not say that Medicaid is only a contract....It did not limit the remedies to common law contract remedies or suggested [sic] that normal federal question doctrines do not apply....Binding precedent has put the issue to rest. The Supreme Court has held that the conditions imposed by the federal government pursuant to statute upon states participating in Medicaid and similar programs are not merely contract provisions; they are federal laws.

- **Spending power laws are supreme law**

Judge Cleland said spending power enactments are not supreme law because “they are not statutory enactments by which States must automatically submit to federal prerogatives.” 133 F. Supp. 2d at 561. He was undeterred by contrary Supreme Court opinions because in “recent years ... the Supreme Court has conducted a more searching analysis of the nature and extent of the Supremacy Clause.” Id. The Sixth Circuit rejected this assertion:

The well established principle that acts passed under Congress’s spending power are supreme law has not been abandoned in recent decisions....We reaffirm well-established precedent holding that laws validly passed by Congress under its spending powers are supreme law of the land.

- **Ex parte Young doctrine applies**

In addition to holding Ex parte Young inapplicable based on his view that Medicaid is not federal law qualifying for that doctrine, Judge Cleland held that Michigan was the real party in interest and that none of the exceptions to sovereign immunity would allow the case to proceed. 133 F. Supp. 2d at 559-60. The Sixth Circuit noted that when a court addresses a claim made under Ex parte Young, it should simply ask “whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” Under this analysis, the Westside Mothers complaint “fit squarely within Ex parte Young.”

The Fourth Circuit acknowledged that the effect of an injunction may require expenditures by the state and stated: “While such an order might result in an intrusion on North Carolina’s sovereignty, it would be precisely the type of order that is allowed under Ex parte Young and its progeny.”

- **Official conduct not protected as discretionary**

Both Circuits agreed that conduct of state officials that violates the Medicaid statute does not constitute discretionary actions protected against judicial review.

- **Possibility of terminating federal funding was not intended to preclude Ex parte Young**

Both Circuits agreed that the statutory remedy that allows the federal Medicaid agency to withhold all or a part of the federal funds due a state that is not in compliance with the federal statute is not the kind of detailed alternate remedial scheme that reflects a congressional intent to preclude private enforcement. The Supreme Court decided this issue in *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990).

- **No “special sovereignty” interest presented**

The Fourth Circuit held that Medicaid is a federally designed welfare program in which the state has no special sovereignty interest once it elects to participate.

- **Section 1983 issues**

The district court had decided the Westside Mothers case could not proceed under 42 U.S.C. § 1983 because, as third party beneficiaries of the Medicaid contract, Medicaid beneficiaries would not have

been able to enforce such a contract when § 1983 was enacted in the 1870s. The Sixth Circuit, having cast aside the contract analysis, held that the Supreme Court had set down three prongs for deciding whether a federal provision is enforceable under § 1983: (1) whether the plaintiff is the intended beneficiary of the provision (2) whether the provision sets a binding obligation on the state, and (3) whether the interests are so vague as to strain judicial competence to enforce. The panel then applied the test to find the EPSDT provisions to be enforceable.

Supreme Court Strongly Reaffirms *Ex parte Young*

It appears that the Supreme Court conservative majority has, at least for the time being, accepted a balance between the federal interests reflected in the Supremacy Clause and the majority's perception of the sovereignty interests of the States as reflected in the 11th Amendment.

Missing

In a major victory for advocates of enforcement of federal law against states, the U.S. Supreme Court unanimously rejected an attack on federal court enforcement of federal rights in suits applying *Ex parte Young*, reaffirming injunctive relief against state officials sued in their official capacity. *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (May 20, 2002). The opinion was by Justice Scalia, one of the more ardent proponents on the Court for restrictions on suits against states.

Congress adopted legislation which preempted regulation of local telecommunication competition, 47 U.S.C. §§ 151 *et seq.* The Act sets out a complex procedure when a local carrier receives a request for interconnection from another carrier, including negotiations, mediation, arbitration and judicial review in federal court only. A state may, at its option, act as the arbitrator in these disputes. The Act states: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether" the result complies with the federal Act. 47 U.S.C. § 252(e)(6).

A telephone company sued the Maryland Commission and its Commissioners in their official capacity in federal court to challenge a decision of the Commission, asserting federal jurisdiction under Section 252 and under the general federal question provision, 28 U.S.C. § 1331. The Fourth Circuit held that the Commission had not waived its 11th Amendment immunity by participating in the regulatory scheme and refused to proceed under *Young*.

Applying *Ex parte Young*

On appeal, the Supreme Court held that the federal court had jurisdiction under Section 1331 and found it unnecessary to reach the waiver issue because it held that plaintiff could obtain relief through the *Young* process. The decision makes clear that the test for applying *Young* is simple: ". . . a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective'." Since the prayer for relief asked that the Commissioners be enjoined from enforcing an order in contravention of federal law, the test was met. The addition of a claim for declaratory relief did not impose on the state any monetary loss for past breach of its duty.

The Court also rejected a claim that *Young* was inapplicable because the Commission's decision was probably consistent with federal law. ". . . the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim."

Justice Kennedy, concurring, sought to keep alive his approach to *Young* which he put forward in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268-280 (1997). Kennedy advocates a balancing test between the state interest, which he would usually find dominant, and the federal interest, thus applying a case by case analysis. Kennedy's opinion in *Verizon* is helpful, since it concedes that seven judges refused to follow his approach, instead "requiring nothing more than an allegation of an ongoing violation of federal law and a request for prospective relief." Note, however, that there may be more going on than the naked eye, not privy to internal discussions in the Court, may see. In the opening paragraph of Justice Souter's concurring opinion, he expresses some doubt over whether the "apparent assumption" that relief is generally available under *Young* is accurate.

Alternate Remedy Issue

The Court also held that the Telecommunications Act did not display an intent to foreclose jurisdiction under *Young*. Emphasizing the scope of the relief available under the Telecommunications Act, it held that the Act placed no restriction on the relief a court could grant in review under § 252 of the Act. Thus there was no Congressional indication to limit remedies more strictly than those available under *Young*. The Court's inquiry was solely directed to the remedies available in the courts, without consideration of the complexity of the administrative process under the Telecommunications Act, which was considerable.

In *Seminole Tribe of Florida, v. Florida*, 517 U.S. 44, 73-74, the Court referred to a "detailed remedial scheme for enforcement against a State of a statutorily created right": as a reason for a court not to proceed against a state official under *Young*. However, the decision in *Seminole* ultimately turned on the fact that the law suits authorized by the legislation in question provided for a more narrow remedy than could be obtained in a *Young* action as an alternate remedy.

Thus, the analysis applicable to the "alternate remedy" issue appears to be the same in *Seminole and Verizon*. One could argue that regardless of the statutory administrative process, if the judicial relief specified in the statute is no more restrictive than what is available in a *Young* suit, then there is no bar to using *Young*. Exhaustion of administrative remedies is not a prerequisite for a suit under Section 1983. *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496 (1982)

CAVEAT: If the plaintiff has participated in the administrative process, the defendant might claim administrative res judicata bars a suit (other than the applicable method of reviewing administrative decisions). See *University of Tennessee v. Elliot*, 478 U.S. 788 (1986); *Olson v. Morris*, 188 F. 3d 1083 (9th Cir. 1999).

Authority to Sue State Officials

Although not directly addressed in the opinion, the decision should be helpful in cases where states argue the *Young* suits cannot be brought because the statute in question imposes liability only on an entity such as a governmental unit (Americans with Disabilities Act, Title II) or on a recipient of federal funds (Title VI of the Civil Rights Act of 1964 or Section 504 of the Rehabilitation Act of 1974). The

Telecommunications Act primarily refers to "state Commissions" and not to the individual Commissioners, but the Supreme Court had no problem in applying *Young* to a suit against the Commissioners in their official capacity. See also *Board of Trustees of the University of Alabama v. Garrett*. 121 S.Ct. 955, 968, n. 9 (2001), where the Court states:

Our holding here that Congress did not validly abrogate the State's sovereign immunity from suit by private individuals for money damages under Title I [of the Americans with Disabilities Act] does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young* . . ."

The Court makes this statement even though Title I imposes liability only on "employers" and officers of employing entities are generally held not personally liable under Title I. *EEOC v. AIC Security Investigations, Ltd.*, 55 F. 3d 1276 (7th Cir. 1995) (sole stockholder and CEO of corporate employer not liable under Title I.). Footnote 9 of the opinion in *Garrett* has no problem with applying the fiction of *Young*, that the suit against a state official in her/his official capacity is not against the state for Eleventh Amendment purposes. At the same time, the Court apparently accepts the reality that for purposes of Title I, the suit against the official in her/his official capacity is against the employer, i.e., the state.

No State Immunity to Suit by Federal Government

The Fourth and Seventh Circuits have reiterated that damage actions on federal claims against states brought by the Federal government on behalf of state employees are not barred by the 11th Amendment.

EEOC v. Board of Regents, 288 F. 3d 296 (7th Cir. 2002) (Age Discrimination in Employment Act)(ADEA) and *Chao v. Virginia Dept. of Transportation*, 2002 WL 1040195 (4th Cir. May 23, 2002) (Fair Labor Standards Act) (FLSA). The Supreme Court had already made the point as a justification for denying individuals the right to sue states. *See Alden v. Maine*, 527 U.S. 706, 755 (1999), but the defendants argued that the situation was different when the federal government was seeking damages for individual employees.

In the ADEA case, the Seventh Circuit emphasized the holding of the Court in *EEOC v. Waffle House, Inc.* 524 US.279 (2002), where the Court held that a suit by the EEOC under the Americans with Disabilities Act (ADA) could proceed even though the employee could have not sued in court because he had signed an arbitration agreement covering the asserted claim. The court emphasized that the suit is that of the EEOC, which is in command of the case, and the employee retains no independent cause of action.

The Fourth Circuit emphasized that it was well settled that in ratifying the Constitution, the States surrendered immunity from suit by the Federal Government. Although the suit seeks relief for individuals, it vindicates the interest of the Federal Government in the enforcement of federal laws. Further, the case is under control of federal lawyers.

Even if the federal government may sue, it rarely does so. For example, according to [the EEOC website](#), in FY 2001, individuals filed 80,840 charges with the EEOC, which in turn filed only 386 suits and intervened in 45 others.

The EEOC administers four major Acts: Title VII, ADA, ADEA and the Equal Pay Act.

Risk of Loss of Medicaid Funds Not Coercive Under Tenth Amendment

The federal Medicaid statute requires states to recover certain Medicaid benefits paid beneficiaries from their estate when they die.

In West Virginia, the federal government pays approximately 75 percent of Medicaid expenditures and thus receives 75 percent of recoveries from estates. West Virginia receives more than one billion dollars in Medicaid funds each year; the gross proceeds of its estate recovery program is \$2.5 million.

Under the federal Medicaid statute, West Virginia could lose all or part of its Medicaid funding if it failed to comply with federal requirements, including the estate recovery program. When the federal Medicaid agency threatened to initiate compliance proceedings, West Virginia came into compliance with the estate recovery provision. It then sued to declare the requirement unconstitutional, contending that the potential penalties are unduly coercive and hence violate the Tenth Amendment. The District Court questioned the authority of the coercion theory, as has some Circuits, *see e.g., Kansas v. United States*, 214 F 3d 1196, 1202 (10th Cir) , *cert. den.* 531 U.S. 1035 (2000), and the case was dismissed.

The Fourth Circuit affirmed, but on different grounds. *West Virginia v. U.S. Dept. of Health and Human Services*, 2002 WL 864263 (4th Cir. 2002). The Fourth Circuit recognizes the coercion doctrine as a Tenth Amendment limitation on federal conditions imposed on States through the Spending Power of Congress. However, because West Virginia's claim was a facial challenge to the estate recovery requirement, it affirmed the dismissal of the suit.

The Fourth Circuit relied on the fact that the Medicaid statute gave the Secretary discretion to limit the amount of the penalties imposed for non-compliance by the states. Applying a "proportionality" test, a limited penalty could be consistent with the purposes of the estate recovery program and hence not violate the Tenth Amendment.

West Virginia argued that the mere threat of loss of all Medicaid funds was coercive, since it could not risk loss of all Medicaid funds by not engaging in estate recovery. Therefore, it had no real choice but to comply. To be constitutional, it argued, the state must have sufficient information as to the penalty to intelligently weigh their public policy judgments against the cost of refusing to comply. But the Fourth Circuit found that the Medicaid Act is not coercive simply because it fails to reach an idealized standard of specificity of the penalty. The complexity of the Medicaid statute justifies giving the Secretary the discretion to determine the appropriate penalty. The court left open the question as to whether the Tenth Amendment would permit a total loss of Medicaid funding for non-compliance with the estate recovery requirement, but the opinion suggests that such a penalty would be coercive. 2002 WL 864263 at 8.

Spending Clause View of Justice Scalia

In a unanimous decision, the U.S. Supreme Court held that punitive damages are not recoverable in cases under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1974.

Both prohibit discrimination based on disability, the ADA as to public entities and 504 as to recipients of federal funds. *Barnes v. Gorman*, 2002 WL 1305773 (June 17, 2002). The relatively non-controversial result is overshadowed by the continuing split on the Court related to enforcing federal rights, particularly Justice Scalia's discussion of the Spending Clause, which may foreshadow his position when *Westside Mothers* or its progeny reaches the Court.

Plaintiff was a paraplegic who also required use of a catheter and a urine bag. He was arrested as a result of an altercation in a bar. When the police van could not accommodate his wheelchair, he was placed in the van and strapped down with a seat belt. During the trip he was thrown to the floor, and suffered several serious injuries. He sued under the ADA and 504; the jury awarded \$1 million in compensatory damages and \$1.2 million in punitive damages. The district Court vacated the punitive damages, but the Eighth Circuit reversed and reinstated them.

Both Title II and Section 504 are enforced under the procedures of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Title VI, the Court acknowledges, has been found to have an implied private right of action. The Court had recognized the traditional presumption in favor of any appropriate relief for violation of a federal right", but never decided the scope of "appropriate relief." Justice Scalia, writing for the Court then enters a discussion of the nature of the Spending Power "as in the nature of" a contract, citing *Pennhurst I*, 451 U.S.1 (1981), From this he goes on to state that "a recipient may be held liable to third party beneficiaries for intentional conduct that violates the clear terms of the relevant statute. but not for its failure to comply with vague language describing the objectives of the statute,. . . and if the statute implies that only violations brought to the attention of an official with power to correct them are actionable, not for conduct unknown to any such official".

These quotations offer fuel for arguments that seek to impose limits on recovery to cases (a) of "intentional conduct" (b) where a violation is of a clear term of the statute, and (c) if the statute implies liability limited to matters brought to the attention of an official, only if that knowledge is shown. The reference to intentional conduct is particularly vague: does it mean an act intentionally done or one with intent to discriminate, a much harder standard to prove. Further, despite the conservative majorities aversion to implying Congressional intentions, see *Hagan v. Sandoval*, 532 U.S. 275 (2001), Justice Scalia indicates a willingness to imply a severe limitation on traditional remedies in federal court.

Scalia then continues the contract analogy by relying on the absence of punitive damages for breach of contract. The remedy of compensatory damages is what is appropriate, because it compensates the "third-party beneficiary" for the loss it suffered. Justice Stevens' concurring opinion is quite rightly concerned that all this language about contracts is to lay the groundwork for a holding similar to that in the District Court in *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (ED Mich. 2001), rev'd 289 F. 3d

852 (6th Cir. 2002). His comments that the "Court's novel reliance on what had been, at most, a useful; analogy to contract law has potentially far-reaching consequences. . . ."

This remark had some success in limiting potential damage. Justice Scalia responds that "[w]e do not imply, for example, that suits under Spending Clause legislation are suits in contract [the *Westside Mothers* District Court rationale], or that contract-law principles apply to all issues that they raise."

This exchange sets off the great Chicken-Little war. Justice Scalia describes as a "Chicken-Little statement" Justice Stevens' comment on the potential far-reaching effects of the Scalia opinion. Justice Stevens responds: "I am not persuaded that "Chicken-Little," *ibid.*, is an appropriate characterization of judicial restraint; it is, however, a rhetorical device appropriately used by fearless crusaders."

Justice Scalia retorts: "we surely do not deserve his praise that we are fearless crusaders'." For those unfamiliar with the rich literature of Chicken-Little, see the accompanying box, researched and written by Diana Lesmez, NSCLC Administrative Assistant.

The Tale of Chicken Little

Chicken Little wanders through the woods when an acorn suddenly falls on her head. Panicked, she naively becomes convinced that the sky is falling and sets off for the King's palace to warn him of the impending doom. Along the way, Chicken Little sounds the alarm to her feathered friends—all of whom eagerly believe her. Eventually, a fox lures the group into a trap by promising to show them a short cut to the palace. However, just before the fox can gobble up Chicken Little and her many gullible friends, the King's hunting dogs chase the predator away. The King then gives an umbrella to Chicken Little, who from that day on never leaves home without it. And if an acorn should happen to fall on her again, Chicken Little is now happily undaunted, even oblivious to it.

Supreme Court Tightens Scope of Rights Enforceable Under 1983

In a decision that will surely result in a variety of arguments against enforcement of federal laws under 42 U.S.C. § 1983, the US Supreme Court held that one provision of the Federal Educational Rights and Privacy Act (FERPA) does not create a right enforceable under Section 1983.

Gonzaga University v. Doe, 2002 WL 1338070 (June 20, 2002). One of the many disturbing portions of the opinion of Chief Justice Rehnquist (for the five conservative Justices) is his equation of the criteria for implying a cause of action directly from a statute with the criteria for determining whether Congress created a right enforceable under 1983.

The FERPA provision in question, 20 U.S.C. § 1232g, prohibits federal funding to schools that have "a policy or practice" of releasing student records without the consent of the student or parent. Because the prohibition relates only to established general policies, rather than individualized unauthorized disclosures, the result could have been reached by applying the three-part test for enforceable rights under 1983, namely that Congress intended to benefit the plaintiff, the statute is not vague and amorphous and the provision is couched in mandatory rather than precatory terms. *Blessing v. Freestone*, 520 U.S. 329, 340-341 (1997). However, the decision is replete with broader statements.

The opinion says "we have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights." If the reference was solely to the "policy or practice" provision, the case would be unexceptional. But the court goes on to say the following:

"Some language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable" by § 1983, offering the *Blessing* three-part test as an example. The opinion then says "[w]e now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983".

"We further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." The significance of this statement is emphasized as the opinion then cites *Sandoval* for the proposition that "even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private remedy'[emphasis in original... . Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.

It is difficult to decide exactly what to make of all this, but clearly the majority are tightening the reins, if they are not yet ready to come to a complete stop in enforcement of federal rights. Only a week ago, in the *Verizon* case, the Court reaffirmed *Ex parte Young* as a method of enforcing federal rights against

states. It is not entirely clear from the two cases whether the absence of a private right of action, implied or under 1983, will leave anything to enforce, with the possible exception of preemption claims.

Further, the Court does not overrule cases going back to *Maine v. Thiboutot* which allowed 1983 actions to enforce the AFDC, Medicaid and federal housing laws, but distinguishes them from the FERPA claim. But the Court does emphasize the difference between statutes such as Titles VI and IX which use "rights creating" language such as "no persons shall be subject to discrimination" with statutes which speak only in terms of institutions, such as FERPA, which is addressed to federal agencies providing grants. The Court does not directly address the intermediate case where the statute addresses the recipient of federal funds, rather than the granting agency, in a manner intended to protect individuals. For example, "no recipient of federal funds shall discriminate...."

In addition, the Court almost combines the issue of Congressional intent as to private enforcement with the alternate remedies analysis, finding that the conclusion that FERPA is not enforceable is "buttressed by the mechanism that Congress chose to provide for enforcing those provisions," referring to an unusual mechanism for enforcement of FERPA by a federal agency.

How this will affect cases like *Wilder*, which held the administrative remedy of cut off of federal Medicaid funds did not preclude a 1983 suit to enforce a provision of the Medicaid statute.

Justices Breyer and Souter concur in the result but reject the test of an unambiguous intent used by the majority. The concurrence does emphasize the unusual administrative remedy as a reason for concluding that Congress did not intend private enforcement.

Justice Stevens (with Justice Ginsburg) dissents. They emphasize the issue of separation of powers, which the majority ignore. To imply a private right of action, the Court must act where Congress has not done so. But the reverse applies to 1983, an express grant of authority by Congress for private suits, which the Court is negating.

Read it and weep, or, as Wobbly Joe Hill said as he faced the firing squad, "Don't mourn, organize" (or at least that is the way the song tells it).

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Conservative Judge Raps Supreme Court Majority

Yes, Virginia, there are true conservative judges who believe in judicial restraint and do not pursue a radical right activist agenda. Ninth Circuit Judge John T. Noonan, Jr. has written a stunning book that concludes that the five member conservative majority on the Supreme Court "as the devotee of dignity and the hitchhiker of history, has embraced with mistaken enthusiasm a doctrine of state immunity that is overextended, unjustified by history, and unworkable in any consistent way." Noonan, *Narrowing The Nation's Power* (U. Cal. Press 2002).

Judge Noonan is generally regarded as a conservative, but as his book demonstrates, out of the tradition of such conservatives as the second Justice Harlan and Justice Powell, combining a concern for individuals with a philosophy of limited judicial intervention in public affairs.. It is his reputation as a conservative that lends power to his book.

The *New York Times* Book Review Section printed a featured review on August 18, 2002, p.8, and followed with an editorial (Aug. 21) characterizing Judge Noonan as "arguing that the court's conservatives are actually engaged in a huge power grab, under the banner of respect for the states, that seriously erodes the rights of ordinary Americans." Ever hopeful, the *Times* wishes that the majority "chastened by this persuasive critique from a fellow conservative, could start practicing some of the restraint, and respect for the meaning of the Constitution, that it likes to preach."

The book emphasizes two topics: sovereign immunity and Congressional Authority to legislate under the 14th Amendment. It also touches on the scope of the Commerce Clause in the chapter "Gang Rape at State U.," discussing the *Morrison* case. There are many quotes that will be useful to advocates in presentations to the public and arguments to the lower federal courts. Citation of the book in the U.S. Supreme Court may be ill-advised at the moment.

Selected quotations from Judge Noonan's book are available to public interest advocates who subscribe to the Federal Rights E-mail Discussion Group.

May States Refuse to Enforce Federal Law?

In *Alden v. Maine*, (1) the U.S. Supreme Court held that under the structure of the federal Constitution and historic principles of sovereign immunity, Congress could not authorize suits against states in state courts on federal claims without the consent of the state to be sued, except when Congress acts pursuant to its Fourteenth Amendment powers . (2)

However, a subsequent decision of the Seventh Circuit in *Erickson v. Board of Governors*, 207 F 3d 945 (7th Cir. 2000), *cert. den. sub nom United States v. Board of Governors*, 2001 WL 178191 (Feb. 26, 2001), suggests that the decision may be more limited in scope than it initially appeared. The Seventh Circuit correctly predicted the outcome of the Garrett case, that sovereign immunity bars a damage suit under Title I (employment) of the Americans with Disabilities Act (ADA) against a state in federal court. It then went on to comment on the limited significance of its decision.

All our holding means is that private litigation to enforce the ADA may not proceed in federal court. *Erickson* may repair to an Illinois court-for although states may implement a blanket rule of sovereign immunity, see *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), Illinois has not done this. Having opened its courts to claims based on state law, including its own prohibition of disability discrimination by units of state government, see 775 ILCS 5/1-102, 5/2-101(B)(1)©), Illinois may not exclude claims based on federal law *Howlett v. Rose*, 496 U.S. 356, 367-75, 110 S. Ct. 2430, 11 L.Ed. 2d 332 (1990); *FERC v. Mississippi*, 456 U.S. 742, 759-69, 102 S. Ct. 2126, 72 L.Ed. 2d 532 (1982); *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967(1947). 207 F. 3d at 952. It concluded that "this suit belongs in state court." *Id.*

Howlett involved a suit in state court under Section 1983 seeking damages from a school board for an unconstitutional search and seizure. The Florida courts held that although school districts are subject to suit for tort claims and officials are subject to 1983 actions in their individual capacity, the statute that waived sovereign immunity did not apply to 1983 actions against school boards. The U.S. Supreme Court unanimously reversed. It held that federal law is enforceable in state courts because the Supremacy Clause makes those laws the supreme law of the land. The case does not present the question whether Congress can require the States to create a forum with the capacity to enforce federal statutory rights. Florida has such a forum in its Circuit Courts, which can enter judgments against school boards and against individuals under Section 1983. Florida cannot in those circumstances refuse to entertain a 1983 claim against a school board.

However, in *Alden v. Maine*, the Court distinguished *Howlett*, asserting that it involved a suit against a local entity rather than a State itself. 527 U.S. at 740. In *Alden*, Maine did precisely what the Court in *Howlett* objected to, it excluded from the state law waiving immunity claims for overtime under federal law because state law did not allow for overtime payments for state workers. Therefore, the principle set forth in *Howlett* and suggested in *Erickson* may not be applicable to suits against states. On the other hand, it may be argued that Maine had no statute comparable to the federal overtime law, rather it had a conflicting statute, whereas in *Erickson*, Illinois had a statute under which the state could be sued for the same type of discrimination for which the ADA creates liability. A focus on a comparable

state substantive law enforceable in state courts against the state is given support in a footnote in *Martinez v. California*, 444 U.S. 277, 284, n.7 (1980):

We have never considered, however, the question whether a State must entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim.

A second case cited by the 7th Circuit in *Erickson* is *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982). That case held that it did not violate the Tenth Amendment to require a state administrative agency applying federal law to follow certain procedures in the administrative process. The Court noted that the state already allowed broad public participation in administrative proceedings and the federal law did not require an expansion of this process. "In this light, we again find the principle of *Testa v. Katt*, *supra*, controlling: the State is asked only to make its administrative tribunals available for the vindication of federal as well as state-created rights." 456 U.S. at 768.

Testa v. Katt is the third case cited by the Seventh Circuit. A federal price control law in World War II allowed a buyer of goods over the ceiling price to sue for treble damages in any court of competent jurisdiction. The Rhode Island Supreme Court regarded the law as penal and refused to enforce it. The U.S. Supreme Court noted that if the same claim arose under Rhode Island law, the state courts would enforce it. Since the state courts have jurisdiction adequate and appropriate under established local law to adjudicate the action, they are not free to refuse enforcement of the federal claim.

Even if *Erickson* is a correct statement of the law after *Alden*, other problems are presented if a state court is unsympathetic to enforcement of federal laws in state courts. After *Erickson* was decided, an Illinois appellate court refused to allow suit against the state for violation of federal discrimination laws (race, Title VII and age, Age Discrimination in Employment Act). *Cooper v. Illinois State University*, 772 N.E. 2d 396 (Ill. App., 4th Dist. 2002). Plaintiff exhausted his administrative remedies through the EEOC under the federal acts and then sued the state in state court alleging violations of the federal laws. The trial court dismissed based on state sovereign immunity and the appellate court affirmed. Illinois has a statute that states: "Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." The statute prohibits discrimination by the state but requires exhaustion of state administrative remedies before any suit can be brought. The Appellate Court held that the state courts do not have jurisdiction to hear the claims because the state administrative process was not followed. Commenting on *Erickson*, the court described the language quoted above as "a regrettable choice of words," suggesting the Seventh Circuit should have referred to remedies under Illinois law rather than Illinois courts. The court stated that decisions of the Seventh Circuit are not binding on Illinois courts and the Seventh Circuit cannot confer jurisdiction on state courts not provided for under state law.

The decision leaves open an interesting question. If Illinois had a cooperative agreement with the EEOC to investigate discrimination claims and plaintiff had filed with the state agency, would the state court then have jurisdiction over the federal claims and could it refuse to hear those claims? Would it make any difference if plaintiff filed complaints with the state agency under both federal and state law?

Fourth Circuit Debates Congressional Power Under the 14th Amendment

A Fourth Circuit case has undertaken a comprehensive review of the respective roles of Congress and the courts in determining Congressional authority under Section 5 of the 14th Amendment to enforce the Amendment by legislation. *Wessel v. Glendening*, 2002 WL 31121398 (4th Cir. Sept. 26, 2002).

Wessel v. Glendening, 2002 WL 31121398 (4th Cir. Sept. 26, 2002). Because the 14th Amendment is one of the few bases for Congressional authority to abrogate state sovereign immunity, the differing approaches also affect 11th Amendment litigation. The case presents fundamental differences on the role of the courts and the deference due Congress.

The issue before the Fourth Circuit was a claim under Title II of the Americans with Disabilities Act (ADA) that state prison officials discriminated against plaintiff prisoner by denying him participation in a boot camp program that led to early release. Because the plaintiff had been released by the time the suit reached the Fourth Circuit, the claim was solely for damages.

The majority opinion found that Congressional abrogation of state immunity exceeded its authority under the 14th Amendment. Judge King dissented.

The Majority

The majority first turned to the question of the scope of the inquiry. The federal government, as intervenor supporting plaintiff, appeared to contend that the scope should be narrow, namely whether the criteria for 14th Amendment authority are met in respect to the particular program in question, here prisons and perhaps the boot camp program. The court rejects this approach and holds that the inquiry relates to all of Part A of Title II, the Part prohibiting discrimination by public entities. Since Title II addresses discrimination by any public entity, there cannot be a narrower framework for the constitutional test under Section 5 than the activities of the state itself.¹ (Note: From the standpoint of plaintiffs, whether the narrow or broader approach is preferred will depend on the legislative record under the particular statute. For example, if in the *Wessel* case, there was a record of a pattern of discrimination by states in prison programs but not in other programs, the plaintiff might prevail if the focus is on prisons but lose if it is on the broader area of state programs generally. On the other hand, if there is a pattern of state discrimination in a variety of programs but not in prisons, the plaintiff might lose under the narrow approach).

The majority then summarized the constitutional inquiry: first determine the constitutional right at issue, second, consider whether Congress identified a history and pattern of unconstitutional discrimination by the State and third, whether the legislation is congruent and proportional to the identified wrong.

Since disability discrimination is judged by the rational basis test, the court defined the constitutional right as follows: disabled people have a constitutional right not to be subject to arbitrary or irrational exclusion from the services, programs, or benefits provided by the state. (At *4).

Turning to the legislative record, the majority appears to believe that a pattern of discrimination must be shown to meet the constitutional test under Section 5. Congress must have legislated based on a pattern of unconstitutional discrimination. It noted that the Supreme Court has provided little guidance regarding what materials are relevant in the inquiry, noting apparent inconsistencies between *Garrett* and *Boerne* as to whether anecdotal testimony is considered. The Fourth Circuit did not resolve the question because it found the record lacking in any case.

As to Congressional findings, the court found the mere existence of findings insufficient to support abrogation. The ADA contains specific findings of discrimination in public programs. 42 U.S.C. §§ 12010(a)(3 and 5). In addition, the findings do not specifically refer to discrimination by the state. *Contra: Dare v. California*, 191 F. #d 1167,(9th Cir. 1999), *cert. den. sub nom California v. Dare*, 531 U.S. 1190 (2001) (relying on the Congressional findings). The majority then reviewed the legislative record and found little which had both elements: state action which was unconstitutional.

Turning to congruence and proportionality, the majority finds this test also lacking, even assuming a satisfactory legislative record was present. It finds that Title II prohibits a wide swath of discrimination, much of which is not unconstitutional.

Dissent

Judge King dissented as to the record and the weight to be given legislative findings. Given the strength of the record, a modicum of respect for the workings of the legislative branch should lead to a determination of valid abrogation.

Judge King noted that *Garrett* expressly found the record deficient only as to evidence of employment discrimination by states. The Appendix to Justice Breyer's dissent listed over 300 examples of discrimination by states, which the majority in *Garrett* referred to as violations of Titles II (public entities) and Title III, (private public accommodations).

Judge King also found that Title II addresses a series of activities that affect fundamental rights, which are subject to higher scrutiny, such as voting rights, parental rights and Eighth Amendment rights. Thus the examples of discrimination in the record, held to higher scrutiny, are of unconstitutional conduct.

The dissent also stated that Congressional findings of discrimination should be treated as compelling evidence of a judgment that a pattern of unconstitutional conduct was documented for Title II. It also notes the extensive reports of discrimination by a special task force appointed by Congress.

The dissent also finds that Title II meets the congruence and proportionality test. The reasonable accommodation provision charges the states with an affirmative duty to address the sources of discrimination against the disabled in the operation of their public programs. Title II requires more limited accommodations than does Title I and targets public entities acting as sovereigns. When a state acts as sovereign, its interest in conserving resources and efficiency is narrower. Title II intrudes less on states' rational interests than does Title I.

Clean Air Act Enforceable Against States Under Ex parte Young

A federal district court in Pennsylvania has held that the Clean Air Act may be enforced against states through Ex parte Young.

Clean Air Council v. Mallory, 2002 WL 31323360 (E.D. Pa. Oct. 18, 2002). The court found that the provision for citizen suits to enforce the Act "to the extent permitted by the Eleventh Amendment" indicates that Congress did not intend to preclude such suits by also including administrative remedies. The holding is hardly controversial, but the opinion contains a useful review of other cases involving the "alternate remedy" exception to *Young*.

The court also finds that the state has no special sovereignty interest in design of its clean air program so as to be able to invoke *Cour d'Alene*.

In perhaps the most interesting portion of the opinion, the court holds that plaintiffs' claim seeking enforcement of the State Implementation Plan (SIP) under the Act is a claim under federal law and is not barred by *Pennhurst II*, which held that federal courts may not enforce state law against states and state officials in their official capacity. The basic theory of the opinion is that the federal Environmental Protection Agency by approving the SIP, converts state law into federal law. *Contra: Bragg v. West Virginia Coal Ass'n*, 248 F. 3d 275 (4th Cir. 2001).

Enforcing Federal Rights Through 1331/Supremacy Clause Jurisdiction

For many years, attorneys for low income individuals, persons of color, and other public interest groups, enforced federal laws in private law suits by relying primarily on one of three bases for a federal claim.

The simplest of course, was where the statute expressly creates a private cause of action. *E.g.* Title VII employment discrimination cases, 42 U.S.C. § 2000e-5(f). Absent an express provision, attorneys relied upon either an implied private right of action¹ or upon 42 U.S.C. § 1983,² which provides a federal claim for violation of "rights, privileges and immunities" under the federal Constitution, laws and, to some extent, regulations.

The ability to enforce federal rights through the latter two routes appears to have been curtailed by the conservative majority on the Supreme Court,³ In *Alexander v. Sandoval*,⁴ the use of an implied right of action to enforce federal regulations on disparate impact discrimination under Title VI of the Civil Rights Act of 1964 was rejected. In *Gonzaga University v. Doe*,⁵ the Court refused to enforce federal educational privacy requirements in a 1983 case on the ground that they were not "rights" protected by federal law. Although the extent of the curtailment remains to be seen, attorneys for the affected groups must begin to look to other sources of authority to enforce federal rights.

One such possible source is using federal question jurisdiction under 28 U.S.C. § 1331 and a claim of conflict with federal law under the Supremacy Clause. Even if this route is available, there are certain advantages to using Section 1983 which are discussed below, so that 1983 claims should also be included if at all possible.

The Supreme Court has definitively stated that an assertion that federal law preempts a conflicting state law or regulation can be the subject of a suit in federal court under 1331. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96, n.14 (1983) states:

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex parte Young*, 209 U.S. 123, 160-162, 28 S.Ct. 441, 454-455, 52 L.Ed. 714 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. §§ 1331 to resolve. *See Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-200, 41 S. Ct. 243, 244-245, 65 L.Ed. 577 (1921); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 43, 53 L.Ed.2d 126 (1908); *see also Franchise Tax Board*, 463 U.S., at ----, and n. 20, 103 S.Ct., at 2851-2852, and n. 20, 75 L.Ed.2d, at ---, and n. 20; Note, Federal Jurisdiction over Declaratory Suits Challenging State Action, 79 Colum.L.Rev. 983, 996-1000 (1979). This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture. *See, e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978); *Jones v. Rath Packing Co.*, *supra*; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Although *Shaw* and other cases speak in terms of preemption, the recent Supreme Court decision in *Verizon*⁶ illustrates that in some cases what is actually involved in some 1331 Supremacy Clause cases is simply a conflict between federal and state laws or regulations. The Supreme Court treated the case as one involving preemption, but the complaint never mentions preemption. Treating the case as involving a preemption claim allowed the Court to find federal jurisdiction under 28 U.S.C. § 1331, the federal question jurisdiction section.

As the Supreme Court noted, there is ample precedent that a party can sue state officials using 1331/Supremacy Clause under *Ex parte Young* on a claim that state law is preempted by federal statute. If so, can we simply use 1331 and the Supremacy Clause to obtain declaratory judgments and injunctions requiring a state to adhere to federal law when state laws or regulations or administrative action conflict with federal law? Can poor people do what the telephone company can do? Can we assert a claim that federal law "preempts" state laws, regulations and administrative decisions⁷ (which was what was involved in *Verizon*) which are contrary to federal law (our usual claim) To do this in a Medicaid case, for example, we would plead the federal law, the conflicting state law and assert the federal law preempts the state law and seek an injunction against enforcement of the state law, alleging 1331 jurisdiction. We can rely on the numerous cases that say that once a state opts into the Medicaid program, it is obligated to follow federal law. *E.g., Harris v. McRae*, 448 U.S. 297, 301 (1980).

It is important to examine the facts of *Verizon* to see how far the preemption concept extends so we can do the same in benefit or discrimination cases. An examination of the complaint shows that the two Counts in the complaint simply allege that the Commission's order interpreting the connection agreement between Bell Atlantic (later *Verizon*) and the long distance carriers violates federal law, is arbitrary and capricious, and is not the result of reasoned decision-making.

Not only does the complaint not mention preemption, none of the several briefs filed by *Verizon* in the Supreme Court mention preemption in connection with *Verizon*'s claims. *Verizon*'s opening brief describes its claims as follows:

Verizon's claim rests on at least two sources of federal rights that the PSC's determination directly invaded. The first is the statutory right to enter into a "binding agreement" without regard to requirements that would otherwise be imposed under federal law. 47 U.S. C. §252(a)(1). The second is the interconnection agreements themselves; the rights and obligations that arise thereunder are intrinsically federal in nature. Either source of rights establishes an independent and sufficient basis for federal court jurisdiction.⁸

The Fourth Circuit supports this view of the complaint. It characterized the complaint as seeking a declaratory judgment that the Maryland Public Service Commission had violated the federal Telecommunications Act by failing to apply and misinterpreting the FCC ruling.⁹ It also sought an order requiring the Commission to order the other carriers to refund moneys received from *Verizon*.¹⁰ There is no mention of preemption here because no one asserted a preemption claim. This was straight and simple a question of interpreting the federal law as to whether it recognized the agreements between

the parties that the calls would be considered local calls even though the FCC had now ruled otherwise. What was in dispute was the meaning of the FCC ruling.

The FCC ruled (later vacated by the US Court of Appeals for DC)¹¹ that calls to the internet were not local calls and hence local telephone companies did not have to pay anything to the long distance carriers for calls to internet connections. However, Verizon and the long distance carriers had signed agreements under which, the Public Service Commission found, Verizon had agreed to make payments for the internet calls. As the Fourth Circuit opinion noted, the FCC had concluded that "[w]here parties have agreed to include this traffic within their . . . interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions."¹² "The Maryland Public Service Commission interpreted the agreements under state law and found that Verizon is bound by the agreements and must continue to make payments on internet calls. This is apparently the basis for the argument that the case is one of preemption: that the Commission applied state law which was contrary to the federal law (actually to the FCC ruling), and the state law is therefore preempted.

The Supreme Court characterized the complaint as follows:

Verizon alleged in its complaint that the Commission violated the Act and the FCC ruling when it ordered payment of reciprocal compensation for ISP-bound calls. Verizon sought a declaratory judgment that the Commission's order was unlawful, and an injunction prohibiting its enforcement.

That much was accurate, but the Court continued:

We have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit. Verizon seeks relief from the Commission's order 'on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail; and its claim 'thus presents a federal question which the federal court have jurisdiction under 28 U.S.C. § 1331 to resolve.' *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 96, n.14 (1983).

The *Verizon case* also makes clear that the absence of an express or implied cause of action under the statute or under 1983 does not bar 1331/Supremacy jurisdiction.

It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." (citation omitted). As we have said, 'the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.' 122 S.Ct. At 1758-59.

A recent case illustrates how casually courts use 1331/Supremacy Clause as a basis for resolving conflicts between state and federal laws. In *Illinois Assoc. of Mortgage Brokers v. Office of Banks and Real Estate*, 308 F. 3d 762 (7th Cir. 2002), mortgage brokers sued a state agency and its Director for a

declaratory judgment that a state regulation as to mortgage transactions conflicted with a federal law on the subject. Plaintiffs sued under Section 1983. Although the state is not a "person" under 1983, the suit could be maintained against the Director under *Ex parte Young*,

The Director claimed that the Supremacy Clause did not of its own force create a right enforceable under 1983. The Court responded:

It is not necessary for us to determine whether the 1982 Act is such a statute, because federal jurisdiction is supported by 28 U.S.C. § 1331 in any event. That statute supplies jurisdiction when the plaintiff seeks declaratory relief against regulation by a state agency and contends that the agency has violated federal law by adopting particular regulations;
308 F. 3d at 765.

Attorneys' Fees

There is no specific provision for attorneys' fees in 1331 cases, although 42 U.S.C. § 1988(b) would allow fees to a prevailing plaintiff in certain civil rights actions. In contrast, all 1983 cases are eligible for fees under 1988(b).

Notes

1. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979)
2. *See, e.g., Maine v. Thiboutot*, 448 U.S.1 (1980)
3. Chief Justice Rehnquist, Justices O'Connor, Scalia, Kennedy, and Thomas
4. 531 U.S. 1049 (2001)
5. 122 S. Ct. 2268 (2002)
6. *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002)
7. The expression "state law" will be used in this context to include regulations and administrative determinations as well.
8. 2001 WL 1007941 at 16
9. 240 F. 3d at 286
10. *Id.*
11. All the relevant facts of the case relevant to the jurisdictional issue occurred before the DC Court of Appeals decision, so that opinion does not affect the result in the Verizon case.
12. *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F. 3d 279 (4th Cir. 2001).