

## COURT DECISIONS FROM 2003

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## Spending Power Legislation Upheld

The Ninth Circuit has upheld the Religious Land Use and Institutionalized Persons Act of 2000.

The Ninth Circuit has found constitutional the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (RLUIPA), which prohibits governments from imposing a substantial burden on religious practices of prisoners unless there is a compelling state interest and the least restrictive means of advancing that interest are employed. *Mayweathers v. Newland*, 2002 WL 31875409 (9th Cir. Dec. 27, 2002). The District Court issued an injunction against state prison officials barring punishment for Moslem prisoners attending Friday afternoon services. The United States intervened on the side of the plaintiffs.

The state moved to dismiss, arguing the statute exceeded Congressional authority under the Spending Clause, the Commerce Clause, and the 14th Amendment. It also alleged the statute violated the Establishment Clause, the Tenth and Eleventh Amendments and the separation of powers. The Court upheld the statute under Spending Clause power. In footnote 2, the decision states that having reached a decision under the Spending Clause, it was unnecessary to address the Commerce Clause, pointedly omitting any reference to the 14th Amendment, possibly because the decision in *City of Boerne v. Flowers*, 521 U.S. 507 (1997), raised serious questions as to constitutionality.

The court applied a four part test to challenges to Spending Power legislation:

(1) The statute must be in pursuit of the general welfare. The Supreme Court has made clear in *South Dakota v. Dole* 483 U.S. 203 (1987), that courts should defer substantially to Congress in determining if a statute advances the general welfare. "In fact, the [Supreme] Court seems doubtful that failure to advance the general welfare could ever provide adequate grounds for invalidating a federal statute."

(2) Conditions on federal grants must be unambiguous, clearly communicating to states the consequences of their participation in the federally funded scheme. The language of (RLUIPA) is unequivocal.

(3) "The Supreme Court has suggested that federal grants conditioned on compliance with federal directives might [sic] be illegitimate if the conditions share no relationship to the federal interest in particular national projects or programs." This possible ground "is a far cry from imposing an exacting standard for relatedness. The Court has stated more recently that '[s]uch conditions must . . . bear some relationship to the purpose of the federal spending.'" The condition in RLUIPA meets that test. Congress has a strong interest in seeing to it that use of federal funds does not infringe religious liberty.

(4) Independent constitutional proscriptions may also provide a basis for striking Spending Clause legislation. The court then analyzes Establishment Clause tests and finds no violation. It also finds no restriction imposed by the Tenth Amendment, and that relief is available under *Ex parte Young*. Separation of powers is not breached. The statute does not purport to determine what constitutional protection is due religion, but rather imposes additional protection for religious liberty. The First Amendment imposes only a floor, not a ceiling, on religious liberty.

## Supreme Court Sharply Limits Punitive Damages

In a classic example of a bad case making bad law, the U.S. Supreme Court held that the Due Process Clause of the 14th Amendment sharply limits both the circumstances in which punitive damages may be awarded and the amount of such damages. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 2003 WL 1791206 (Apr. 7, 2003).

The case was initiated by an insured, Campbell, against State Farm, his insurer. Campbell claimed that in refusing to settle the claim of a third party against Campbell, State Farm was guilty of bad faith, fraud and intentional infliction of emotional harm. Campbell was distressed because he had been found liable to the third party for \$186,000, far more than his \$50,000 policy limit, after State Farm had refused an offer to settle for \$50,000. After originally refusing either to pay the extra \$136,000 or to assist Campbell in his unsuccessful appeal from the award, State Farm had relented and paid the entire judgment.

Campbell nonetheless sued State Farm arguing, among other things, that State Farm's conduct toward him was part of a nationwide scheme, orchestrated from the highest levels of corporate management. He was awarded \$1 million in compensatory damages and \$145 million in punitive damages. Unfortunately for Campbell, the Supreme Court has now reversed the punitive damage award.

Among other things, the Court determined that conduct outside of the forum state, i.e., similar reprehensible conduct in other states, cannot be used in determining liability for, or the amount of punitive damages, unless the outstate conduct has a nexus to the specific harm to the plaintiff. Further, a state cannot impose punitive damages based on evidence of conduct in another state which is lawful in that other state.

In addition, the Court states that punitive damages in almost all circumstances cannot exceed nine times the compensatory damages and possibly less when the compensatory damages are substantial. In a somewhat unfamiliar division of views, Justice Kennedy wrote for the majority, joined by Breyer, O'Connor, Rehnquist, Stevens, and Souter. Dissenting opinions were filed by Ginsburg, Scalia and Thomas.

## County Covered By 11th Amendment Immunity

Generally, immunity under the 11th Amendment extends only to states and not to local government. But local government can sometimes be protected by the 11th Amendment if it is considered an arm of the state in connection with the subject matter of a lawsuit.

For example, the Ninth Circuit has found local school boards in California to be state agents under the 11th Amendment. *Belanger v. Madera Unified School District*, 963 F. 2d 248 (9th Cir. 1992), cert. den. 507 U.S. 919 (1993). A recent decision involving zoning, a traditionally local matter, extends immunity to the county. *Lui v. Commission Adult Entertainment Establishment of the State of Delaware*, 213 F.R.D. 166 (D. Del 2003).

An owner of a bar sued the state and county for damages, among other things, alleging that a zoning provision barring adult entertainment within 2800 feet of a school or place of worship violated the First Amendment. The plaintiff conceded that the damage claim against the state was barred by the 11th Amendment. The court then dismissed the damage claim against the county under the state agent doctrine.

The Federal Circuits apply differing tests in determining state agency, but a common thread is whether the payment of a judgment will come from the state treasury or local government. In the *Lui* case, the record did not contain any information on this point, and the court moved to the two other criteria utilized by the Third Circuit, the status of the local government under state law and the degree of autonomy of the local entity.

Applying the second criteria, the court finds that under Delaware law the power exercised by the county in zoning matters is not its own but is delegated by the state. Under the third criteria, the county has no autonomy with respect to the 2800 foot requirement, as it is mandatory under state law in all zoning decisions. Even though the restriction was adopted by the county prior to the adoption of the state law, the state law has made it binding on all local governments.

Although the application of the third criteria may not be of great concern, at least to the extent it is limited to a facial challenge to the constitutionality of the state law, the application of the second criteria is troublesome. Local governments are almost always creatures of state law, either the state constitution or state legislation, so that in one sense all powers of local government may arguably be deemed delegated by the state to the county. The authority cited by the district court is simply a passing remark of the truism that the legislature has fundamental power to regulate land use. *New Castle County Council v. BC Development Associates*, 567 A. 2d 12171, 1275 (Del. 1989). That the court applies the state agent doctrine to zoning as a delegated state power indicates the potential for applying immunity to local governments in a variety of situations under the delegation criteria.

## Sovereign Immunity of States Does Not Protect Counties

A unanimous Supreme Court holds that a federal statute tolling the statute of limitations in state courts can be constitutionally applied to suits against counties.

*Jinks v. Richland County, South Carolina*, 2003 WL 1906299 (Apr. 22, 2003). 28 U.S.C. § 1367 grants supplemental jurisdiction in federal courts to state law claims which are related to a federal claim brought in federal court. If the federal claims is dismissed, the district court may dismiss the state claims without prejudice, in which case the statute of limitations on the state claim is tolled until 30 days after dismissal in federal court. § 1367(d).

In *Raygor v. Regents of the University of Minnesota*, 122 S. Ct. 999 (Feb.27, 2002), the Court held that when state law claims against nonconsenting States are dismissed on Eleventh Amendment grounds serious doubts are raised about the constitutionality of the provision given principles of state sovereign immunity. Therefore, the opinion applies the clear statement rule, that when Congress intends to alter the usual constitutional balance between the States and the Federal Government it must make that intent unmistakably clear in the statute. Since the statute makes no specific reference to suits against states, it does not apply to such suits.

Relying on *Raygor* and principles of federalism under the Tenth Amendment, the South Carolina Supreme Court found the tolling provisions as applied to counties unconstitutional. The essence of that ruling was that the statute was a regulation of practice and procedure in state courts, a matter beyond the power of Congress. 563 S.E. 2d 104 (2002).

In an opinion by Justice Scalia, the Supreme Court unanimously reversed, resting on the usually quiescent Necessary and Proper Clause, Art. I, § 8, cl. 18. The Clause itself is not an independent grant of power but rather authority to pass laws to carry out powers otherwise granted to the federal government by the Constitution.

Since Congress has power to establish federal courts, all that is required under the Clause is that the legislation be conducive to the administration of justice. The opinion then gives several reasons why the tolling provision meets this test. The statute is therefore necessary.

The Court then finds the tolling is also proper, in that it is not a violation of state sovereignty by regulating procedure in state courts. To the extent the procedure/substance dichotomy is applicable, the tolling provision in 1367 falls on the substantive side, just as statutes of limitation are substantive for purposes of diversity cases under *Erie v. Tompkins*. There is no greater intrusion on state sovereignty here than the undisputed power of Congress to override state-law immunity when subjecting a municipality to suit under a federal cause of action...a State's authority to set the conditions upon which its political subdivision are subject to suit in its own courts must yield to the enactments of Congress.

The Court also rejects an argument that the unmistakably clear requirement applicable to states should apply to political subdivisions. Unlike suits against states, there is no constitutional doubt as to Congressional power over suits against subdivisions.

One interesting aspect of the decision is the lack of any inquiry to the legislative history to determine the objectives of § 1367. Rather, the Court simply offers its own justifications, relying on other judicial pronouncements about the section. This approach is in marked contrast to the requirement imposed by the five activist/conservative Justices when determining whether Congress acted within its legislative powers under the 14th Amendment. When determining whether Congress had power under the Equal Protection Clause to abrogate state sovereign immunity, the majority requires a legislative history explicitly demonstrating a pattern of conduct by States prohibited by the 14th Amendment. See *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).

### Congressional Power and the Necessary and Proper Clause

In recent years, federalism issues have focused primarily on Congressional power under the Commerce Clause and the Fourteenth Amendment and issues relating to sovereign immunity of the states. But another line of cases raise issues of Congressional power to legislate under the Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 18. It provides that Congress shall have Power...to make all Laws which shall be necessary and proper for carrying into Execution all the powers vested in the Government of the United States. The Clause itself is not an independent grant of power but rather authority to pass laws to carry out powers otherwise granted to the federal government by the Constitution. The Clause is frequently used in conjunction with Spending Power legislation.

Congress passed legislation making it a crime to bribe any agent of a state or local government if the public entity receives at least \$10,000 in a year from the federal government. 18 U.S.C. § 666(a)(2). As interpreted by the Eighth Circuit in *United States v. Sabri*, 2003 WL 17922150 (8th Cir. Apr. 7, 2003), there is no requirement in the statute that there be a connection between the offensive conduct and federal funds. Thus, bribery of a city official in a local zoning application which involves no federal funds is a federal offense if the city receives \$10,000 in federal funding for any purpose in the year in question.

The defendant in a bribery case asserted that Congress had no power to enact the statute absent a nexus between the criminal activity and federal funds. The 8th Circuit first finds that the statute is not a condition on the receipt of federal funds, providing federal power under the Spending Clause. The statute places no obligation on the recipient of federal funds, but rather regulates the conduct of third parties receiving no federal funds.

However, the court then holds that the statute is a necessary and proper exercise of Congressional power under the Spending Clause. The Necessary and Proper Clause enables Congress to enact all laws which are convenient to the exercise of disbursing federal funds. The court holds that Congress has power to enact criminal penalties under the Clause. It then holds that the bribery legislation is rationally related to achieving the efficacious expenditure of federal funds and is, therefore, a law necessary and proper to the execution of the spending power.

Congress has determined that the most effective way to protect the integrity of federal funds is to police the integrity of the agencies administering those funds. The maladministration of funds in one part of an agency can affect the allocation of federal funds throughout an agency. The statute addresses this problem by policing the integrity of the entire organization receiving federal benefits. If the statute was

unconstitutional, the protection of federal funds would be left to the whim of state and local officials, perhaps the very same officials who have accepted a bribe.

Judge Bye dissented. Relying on federalism concepts in the Supreme Court decisions on sovereign immunity and the Tenth Amendment, he draws a distinction between necessary laws and proper ones, and finds the bribery statute not proper. He asserts a law is proper if it respects both the Constitution's limits on federal power and its grants of power to the states and the people. The statute intrudes upon state and local concerns by federalizing anti-corruption law, which is traditionally the domain of state and local legislation. The lack of any connection between the bribe and federal funds makes all too real the risk that federal anti-corruption efforts will replace state and local efforts to combat bribery. He compares the majority view to the unbounded extent of federal power under the Commerce Clause prior to *Lopez* and *Morrison*.

## Rebuttal to Garcia on Waiver of Immunity

Judge Wiener of the Fifth Circuit Court of Appeals has written a powerful and innovative rejection of the 2d Circuit decision in *Garcia v. SUNY Health Sciences Ctr.*, 280 F. 3d 98, (2d Cir. 2001).

*Johnson v. Louisiana Dept. Of Education*, 2003 WL 21000830 (5th Cir. May 5, 2003) (Wiener, J. Specially dissenting or specially concurring). *Garcia* held that a state could not knowingly waive its immunity if at the time it had reason to believe that Congress had abrogated its immunity, leaving the state with no real choice.

The Fifth Circuit adopted the *Garcia* analysis in *Pace v. Bogalusa City School Board*, 325 F. 3d 609 (5th Cir. 2003). Judge Wiener specially concurred in *Johnson* because he was bound to follow *Pace*, but he urged the Circuit to reverse *Pace* en banc. Sixth other Circuits have rejected the *Pace* approach and find a waiver of immunity by acceptance of federal funding. See cases cited by Wiener, J. in *Johnson* at fn. 24.

At its heart, the Wiener opinion distinguishes between the knowing waiver exception of 14th Amendment abrogation of sovereign immunity and the clearly and unambiguously stated non-coercive waiver exception for Spending Clause cases. Relying on language in the *College Park* decision by Justice Scalia, Judge Wiener concludes that in Spending power cases, the waiver of immunity is a condition precedent to accepting the federal funding, so it is immaterial whether the state mistakenly believed at the time that it had no real choice because Congress had validly abrogated its immunity. When the state accepted the funds, it had no expectation of immunity and cannot complain if that is the result accepted by the courts.

The majority opinion sets the date of the *Garrett* decision denying 14th Amendment power to abrogate immunity under Title I of the Americans with Disability Act at 2001, as the date when the states are in a position to knowingly waive its immunity. Justice Wiener, however, finds that the Supreme Court clearly made an ipso facto waiver of immunity in claims under Section 504 of the Rehabilitation Act of 1974 in 1998 in *Lane v. Weiner*, see *Johnson* at \*6, in which case the cut-off date would be 1998.

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Congress has determined that the most effective way to protect the integrity of federal funds is to police the integrity of the agencies administering those funds. The maladministration of funds in one part of an agency can affect the allocation of federal funds throughout an agency. The statute addresses this problem by policing the integrity of the entire organization receiving federal benefits. If the statute was unconstitutional, the protection of federal funds would be left to the whim of state and local officials, perhaps the very same officials who have accepted a bribe. The Ninth Circuit reached the same result in *United States v. Bynum*, 2003 WL 1983790 (9th Cir. Apr. 30, 2003)

Judge Bye dissented in *Sabri*. Relying on federalism concepts in the Supreme Court decisions on sovereign immunity and the Tenth Amendment, he draws a distinction between necessary laws and proper ones, and finds the bribery statute not "proper." He asserts a law is "proper" if it respects both the Constitution's limits on federal power and its grants of power to the states and the people. The

statute intrudes upon state and local concerns by federalizing anti-corruption law, which is traditionally the domain of state and local legislation. The lack of any connection between the bribe and federal funds makes all too real the risk that federal anti-corruption efforts will replace state and local efforts to combat bribery. He compares the majority view to the "unbounded" extent of federal power under the Commerce Clause prior to *Lopez* and *Morrison*.

Judge Bye's approach would give judges carte blanche to nullify a Congressional enactment by finding it to intrude on ill-defined state sovereignty issues, even though the law is necessary to the Congressional purpose.

## Two Justices Could Make Medicaid Suits An Endangered Species

The ability of Medicaid beneficiaries to sue to enforce the federal law and regulations is under serious attack. The most dangerous predators are Justices Scalia and Thomas.

In their separate opinions in the Maine prescription drug case decided May 19, 2003 (*Pharmaceutical Research and Manufacturers of America v. Walsh*, 2003 WL 21134460) both Justice Scalia and Justice Thomas make clear that given the opportunity, they would reverse longstanding precedent allowing private suits under 42 U.S.C. § 1983 for alleged violations of the federal Medicaid law and regulations.

Justice Thomas wrote that Spending Clause legislation is

"much in the nature of a contract. This contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation-through pre-emption or otherwise...When Congress wishes to allow private parties to sue to enforce federal law, it must clearly express this intent. Under this Court's precedents, private parties may employ 42 U.S.C. § 1983 or an implied private right of action only if they demonstrate an 'unambiguously conferred right'. Petitioners quite obviously cannot satisfy this requirement and therefore arguably is not entitled to bring a pre-emption lawsuit as a third-party beneficiary to the Medicaid contract." (citations omitted).

This position echoes a statement by Justice Scalia in *Barnes v. Gorman*, 122 S. Ct. 2097 (2002). However, Justice Scalia also added that "[w]e do not imply, for example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise." 122 S. Ct. at 2102, n.12.. Justice Thomas makes his observation even though the respondents did not raise the issue, and adds that had they done so "I would give careful consideration to whether Spending clause legislation can be enforced by third parties in the absence of a private right of action."

The Court already has held that the Medicaid statute does not confer a private right of action. *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). Justice Scalia offers an alternative reason not to enforce the Medicaid statute, namely that the provision in the statute for termination of funding by the Secretary of Health and Human Services is the only remedy available to beneficiaries, subject to judicial review under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). This position also has been rejected by the Court in the past, which recognized that other than complaining to HHS, complainants have no role in the review of a state Medicaid plan by HHS. *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 521-22 (1990); *Rosado v. Wyman*, 397 U.S. 397 (1970) (AFDC statute identical to Medicaid as to funding cutoff).

Since most programs benefitting the poor or underserved populations are Spending Clause legislation with procedures for funding cut off, the adoption of these views by a majority of the Court would realize the far right agenda of eliminating entitlement programs.

## Post-Hibbs Decision Suggests the FMLA Battle is Not Over

A federal district court in Virginia has opined, but has not held, that full enforcement of the FMLA against states is not yet a sure thing.

In perhaps the first court discussion of sovereign immunity under the Family Medical Leave Act since the Supreme Court decided *Nevada Dept. Of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), a federal district court in Virginia has opined, but has not held, that full enforcement of the FMLA against states is not yet a sure thing.

A Virginia state employee sued the state for damages for denying him medical leave. The district court pointed out that *Hibbs* involved only the family leave entitlement of the FMLA and not the employee medical leave provision. "Since the ability of Congress to abrogate Eleventh Amendment immunity in the FMLA depends upon the equal protection guarantee of the Fourteenth Amendment, the validity of such abrogation may be different as to the employee medical leave requirement." *Fields v. Commonwealth of Virginia*, 2003 WL 21383861 (W.D.Va. June 16, 2003).

However, since the state conceded that the claim was not barred by the 11th Amendment, the court did not decide the question.

## Medicaid Act Enforced Under Supremacy Clause Claim

A federal district court in Texas has ruled that the operation of a state law may be enjoined under an action under the Supremacy Clause of the federal Constitution even though the governing federal statutory provisions do not create rights that are enforceable under 42 U.S.C. §1983.

*Planned Parenthood of Cental Texas v. Sanchez*, 2003 WL 21800213.

The case serves as an important illustration of an alternative route to enforcing federal law in light of the shrinking scope of rights enforceable under §1983.

Texas passed a statute barring funding for family planning to any entity that provides elective abortions. Planned Parenthood affiliates brought suit under §1983, alleging the Texas statute deprived them of the "right" to participate in family planning programs which are federally funded under the Medicaid statute and under Titles X (family planning) and XX (social services) of the Social Security Act. Plaintiffs asserted that these federal laws permit any provider who meets the federal eligibility requirements to participate in the program. The court, however, found nothing in the statutes that conferred a right to participate, and stated that even if regulations can be a basis for a right under §1983, these regulations only allow providers to apply for a grant, they do not give a right to participate.

But plaintiffs also alleged a violation of the Supremacy Clause, with federal question jurisdiction under 28 U.S.C. §1331. Under that theory, the District Court found a likelihood of success on the merits...

There is significant support for the court's reliance on the Supremacy Clause. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96, n.14 (1983), the Court stated:

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. This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture. (Citations omitted)

In *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002), the Court stated:

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 courts have jurisdiction under 28 U.S.C. §1331 to resolve.

In *Golden State Transit Corp v. City of Los Angeles*, 493 U.S. 103 (1989), an opinion by Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor clearly states that the absence of a claim under

§1983 does not preclude a Supremacy Clause claim over which the federal courts have jurisdiction under §1331 and *Ex parte Young*. "By concluding that Golden State may not obtain relief under §1983, we would not leave the company without a remedy. Despite what one might think from the increase of litigation under the statute in recent years, §1983 does not provide the exclusive relief that the federal courts have to offer...Our omission of any discussion of §1983 perhaps stemmed from a recognition that plaintiffs may vindicate Machinists pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes."

See also *Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor*, 107 F. 3d 1000, 1006 (2d Cir. 1997) (concluding that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate federal law).

## 10th Circuit Reads Sandoval Narrowly, ADA Broadly

The Tenth Circuit has upheld and enforced regulations adopted to implement Title II of the American with Disabilities Act (ADA), rejecting an argument that the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001) precludes enforcement of regulatory requirements beyond those specified in a statute.

The court said, "[p]roperly construed, *Sandoval* holds only that regulations may not create a private cause of action where no such right was intended by Congress in the statute authorizing promulgation of such regulations." *Chaffin v. Kansas State Fair Board*, 2003 WL 22436243 (10th Cir. Oct. 28, 2003).

Title II of the ADA prohibits discrimination based on disability by public entities in broad general terms and authorizes the Justice Department to issue regulations to implement the prohibition on discrimination. Enforcement of Title II is identical to Section 504 of the Rehabilitation Act of 1974, which in turn references remedies under Title VI of the Civil Rights Act of 1964. The Supreme Court in *Sandoval* held that Title VI creates a private right of action to enforce its prohibition on intentional discrimination, but also ruled that Congress did not authorize a private right of action to enforce Title VI regulations that prohibit disparate impact discrimination not prohibited by the statute itself.

In *Chaffin*, plaintiffs alleged violations of ADA's ban on discrimination and of the regulations requiring accessible bathrooms, seating with visible sight lines for persons using wheelchairs, accessible pathways from parking lots, and failure to prepare an adequate ADA self-evaluation plan. Defendants, the Kansas State Fair Board, argued that because the ADA does not explicitly contain a private right of action to enforce the regulations, plaintiffs had no claim. They argued that only the regulations, not the statute itself, require the particular accommodations sought by plaintiffs. Thus, they insisted, this is the *Sandoval* situation, with regulations demanding more than is required by the statute.

The Tenth Circuit held that the Fair Board was misinterpreting *Sandoval*. "Although the court held there was no right of action to enforce regulations regarding disparate impact discrimination that went beyond the substantive provision of §601 of the statute, the Court reaffirmed that the regulations applying the ban on intentional discrimination came within the private right of action to enforce the statute... Thus, the Supreme Court found that the private right of action contained in §601 included a right to vindicate violation of the regulations implementing §601's ban on intentional discrimination because the regulations simply interpreted and implemented the statute and did not substantively expand it."

The Tenth Circuit went on to find that, unlike Title VI, the ADA's prohibitions are not limited to intentional discrimination, but extend to disparate impact discrimination as well. Thus, the court said, the regulations do not expand the obligations under Title II but simply interpret and implement them, providing the details necessary to implement the statutory right created by §12132 of the ADA. Hence, the private cause of action under the statute also applies to the implementing regulations.

## Commerce Clause Attacks Continue

A new attack on Congressional power under the Commerce Clause comes from the Central District in California.

The decision in *Elsinore Christian Center v. City of Lake Elsinore*, 2003 WL 22724539 (C.D. Cal. Aug. 21, 2003) applies Tenth Amendment concepts to Commerce Clause analysis.

The case involves a denial of a zoning permit to build a church. After the Supreme Court declared the Religious Freedom Restoration Act unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 ((1997), Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The general rule of RLUIPA relating to land use is that government shall not impose a land use regulation in a manner that imposes a substantial burden on religious exercise unless the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. This rule applies in limited circumstances, including where the burden or removal of the burden would affect interstate commerce.

### Fourteenth Amendment

The District Court first finds the denial of the permit violates the statutes, but then finds the statute unconstitutional. First it finds the statute goes beyond existing constitutional law under the First Amendment Freedom of Religion and Establishment Clauses. It then finds that the Act is not valid under the legislative authority in Section 5 of the 14th Amendment because it failed to meet the congruence and proportionality tests, which permits prophylactic legislation which goes beyond strict constitutional limits imposed on Congress. The court describes the statute as a blunderbuss remedy and concludes that [b]y vastly expanding the types of exercise protected by the most exacting standard of review, Congress has effectively redefined the First Amendment rights it is purporting to enforce.

### Commerce Clause

Congress has the power, among others under the Commerce Clause, to regulate intrastate activities where the activity has a substantial effect on interstate commerce. Where this power is invoked, a statute's aggregate effect on commerce will be measured in determining substantial effect, even if the conduct at issue does not itself have a substantial effect. The court then assumes a real estate transaction like that involved in the case meets the substantial effect requirement. But the court then finds the Act goes beyond the authority of Congress.

No Supreme Court precedent stands, however, for the proposition that Congress may nakedly dictate the manner in which States regulate private conduct, citing 10th Amendment decisions. The court acknowledges that Congress may encourage a state to regulate in a particular manner by attaching

conditions on the receipt of federal funds. Congress may also regulate private conduct directly and offer the states the opportunity to regulate that conduct in accordance with federal standards.

What Congress cannot do under the Commerce Clause is mandate the way states must regulate private conduct. The court also states that the distinction between States and municipalities in Eleventh Amendment jurisprudence is irrelevant to the federalism analysis. . . in this case, a municipality is synonymous with the state that creates it.