COURT DECISIONS FROM 2004

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Some Courts Wary of Expanding Defense of Sovereign Immunity

In a series of recent decisions in different contexts, some courts have shown themselves to be wary of expanding states' sovereign immunity defenses beyond those set out in current law.

The Northern District of California has rejected a county's attempt to piggyback on state sovereign immunity, finding that where the county had discretion under state law governing foster care payment levels, it had no immunity if it committed non-state-sanctioned violations of applicable law. *Laurie Q v. Contra Costa Co.*, 2004 WL 318609 (N.D. Cal. Feb. 17, 2004) (Patel, C.J.).

The county claimed that, under *McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997), it was immune because the State of California was the relevant "policymaker" of foster care payment levels and the county was merely following and implementing state law. In*McMillian*, the Supreme Court had found that Alabama county sheriffs had sovereign immunity because they were state, not county, policymakers. The *Laurie Q.* court agreed that there was some analogy between a County's foster care program and a county sheriff: "just as the County here administers a program whose contours are defined by the state, so too do sheriffs enforce a system of criminal law and procedure delineated almost entirely state statute and rule."

However, in a lengthy analysis, the district court limited *McMillian* to its facts, which involved the peculiar status of sheriffs under the Alabama Constitution. Rather, the court found that to enjoy sovereign immunity, "a local official (or body) must do more than operate under the auspices of a structure of mandatory state rules and imperatives, or even under the supervision of a state official." The court refused to "carve out an enormous exception from the heart of section 1983 jurisprudence" or to "contradict decades of section 1983 jurisprudence, shrouding counties in an Eleventh Amendment mantle they previously did not enjoy."

The District of Rhode Island has similarly refused to engage in a dangerous expansion of Supreme Court rulings. In *Office of the Child Advocate v. Lindgren*, 296 F.Supp.2d 153 (D. R.I. 2004), the court found that a state official could not avoid a suit for prospective injunctive relief under the rule of *Ex parte Young* 209 U.S. 123 (1908), by claiming a "special" sovereignty interest in the child welfare system. In *Idaho v. Coeur d'Alene Tribe of Idaho*, the Supreme Court had found a special sovereignty interest in title to and control over "a vast reach of lands and waters long deemed by the State to be an integral part of its territory…". 521 U.S. 261, 282 (1997). The Rhode Island court found, however, that "while Rhode Island has a strong interest in the administration of its child welfare system, this interest does not rise to the level of a special sovereignty interest, such as a state's power to tax."

The Eighth Circuit has found that a court need not find a separate explicit waiver of sovereign immunity from liability for interest on money damages for which immunity has already been waived. *Entergy Arkansas, Inc v. State of Nebraska et al.,* 2004 WL 298967 (8th Cir. Feb. 18, 2004). The court quoted *Missouri v. Jenkins,* 491 U.S. 274, 281 n. 3 (1989) that there is no "equivalent rule relating to state immunity that embodies the same ultrastrict rule of construction for interest awards that has

grown up around the federal no-interest rule."

Finally, the Tenth Circuit has found that sovereign immunity does not bar removal to federal court of an action brought by a state. *State of Oklahoma ex rel. Edmondson v. Magnolia Marine Transport Co.*, 2004 WL 339372 (10th Cir. Feb. 24, 2004) (a tort action against a barge that struck the I-40 bridge over a river). However, the court reserved the question whether a case may be removed if it includes counter- or cross-claims against the state.

Taken together, these cases appear to show a tendency to limit the sovereign immunity defense to its current parameters. The courts appear to be particularly reluctant to expand immunity to contexts where the government has long been subject to suit. These cases emphasize for practitioners the importance of showing how extension of a sovereign immunity defense could have widespread ramifications and contradict long-standing caselaw that has not been wiped out by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) and its progeny.

Court Upholds FMLA Self-Care Provision Against Sovereign Immunity Defense

A magistrate judge in the Eastern District of Wisconsin has upheld the "self-care" provision of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2615(a) against a claim that it violates states' sovereign immunity.

Toeller v. State of Wisconsin Dep't of Corrections, 296 F. Supp. 2d (E.D. Wis. Dec. 23, 2003).In so doing, the court declined to follow the lead of the only post-Hibbs Court of Appeals ruling on the issue.

The FMLA allows qualified employees to take unpaid leave from their jobs under four circumstances. Three of these involve care of family members (birth and care of a child; adoption or foster care of a child; and care for a spouse, child or parent who has a serious health condition). 29 U.S.C. § 2615(a)(1)(A)-(C)). The fourth, at issue here, is when the employee him or herself has a serious health condition. *Id.* § 2615(a)(1)(D). All four provisions apply to public as well as private employers. The FMLA explicitly abrogates states' sovereign immunity by making them subject to suit in federal court for damages and injunctive relief.

Last year, the Supreme Court upheld the family-care provisions of the FMLA, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), finding Congress's abrogation of sovereign immunity to be a valid exercise of its power under section 5 of the Fourteenth Amendment. The Court's decision rested on the substantial legislative history showing a history of gender discrimination premised on the view that family care was most appropriately a female obligation. The Court found that the FMLA's family-care provisions were "congruent and proportional" to their aim of preventing unconstitutional discrimination, especially in light of the heightened scrutiny given under the Constitution to state gender discrimination.

It remains to be seen whether the Supreme Court will extend its ruling in *Hibbs* to the FMLA's self-care provision. Prior to *Hibbs*, eight Courts of Appeals had held either that the self-care provision or the entire FMLA violated sovereign immunity. *See Brockman v. Wyoming Dep't of Family Svcs.*, 342 F.3d 1159, 1165 n.3 (10th Cir. 2003) (listing cases). *Hibbs* overruled those decisions with respect to the family-care provisions; it is unclear if the courts will reconsider their decisions on the self-care provision. The key issue will be whether the provision is premised on the need to remedy gender discrimination. After reviewing the legislative history, the *Toeller court* concluded that the self-care provision is part of an attempt,

"to preclude any incentive for an employer to hire a man over a woman because, regardless of sex or family status, all eligible employees are entitled to leave under the FMLA. And, at the same time, Congress has been able to address its concern about single mothers with serious illnesses by ensuring that they are entitled to leave for their own serious health condition."

Last fall, in the first Court of Appeals decision to reconsider the issue post-*Hibbs*, the Tenth Circuit

reaffirmed its earlier holding that the FMLA's self-care provision violates states' sovereign immunity. *Brockman*, 342 F.3d at 1165. But the Tenth Circuit itself acknowledged that "[t]here is a colorable argument to the effect that the self-care provision of the FMLA must be viewed as part of the Act as a whole, and that it would therefore be a valid abrogation of states' sovereign immunity." *Brockman*, 342 F.3d at 1164.

On the other hand, in a summary unpublished decision, *Montgomery v. Maryland*, 72 Fed.Appx. 17, 19 (4th Cir. 2003), the Fourth Circuit applied *Hibbs* to uphold the entire FMLA, without distinguishing between the family-care and the self-care provisions.

Obviously, there is more to come on this topic.

Not All Waivers of Sovereign Immunity Construed Narrowly

The Second and Ninth Circuits, in different contexts, have held that when a state voluntarily invokes the jurisdiction of a federal court, thereby waiving sovereign immunity, the scope of those waivers need not be viewed narrowly.

Rather, following *Lapides v. Bd. of Regents of Univ. Sys. Of Ga.*, 535 U.S. 613, 620 (2002), the courts ruled that the guiding principle is not the states' intent but rather the "need to avoid inconsistency, anomaly, and unfairness."

In *Embury v. King*, 2004 WL 503813 (9th Cir. Mar. 16, 2004), the state removed to federal court a wrongful discharge case that included both state and federal claims, and then moved to dismiss based on sovereign immunity. The district court denied the motion, and the state appealed. In the interim, the Supreme Court held in *Lapides* that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum." 535 U.S. at 624. The Supreme Court reserved, however, the question of whether the defense was also waived as to the federal claims, which were dismissed on other grounds in the Lapides case.

The Ninth Circuit addressed that question, and held that the affirmative act of removal waived the sovereign immunity defense over the entire case, including both federal and state law claims, and also over claims that were only asserted for the first time after removal. The court declined to view the waiver narrowly. "[T]he State removed the case, not the claims, and like all cases in federal court, it became subject to liberal amendment of the complaint." The court found that "the federal court's power extends, once immunity is waived, to the entire case, consistent with Article III's grant of power to decide 'Cases.'" The court concluded that "[a]llowing a State to waive immunity to remove a case to federal court, then 'unwaive' it to assert that the federal court could not act, would create a new definition of chutzpah."

Using like reasoning, the Second Circuit has held that when a state agency has asserted a claim in a bankruptcy proceeding, that State may not then assert a sovereign immunity defense to a claim the bankruptcy trustee seeks to assert against another state agency as an offset against the first agency's claim. *In Re: Charter Oak Associates v. Department of Social Svcs.*, 2004 WL 541129 (2d Cir. Mar. 19, 2004). The court declined to address the issue, currently pending before the Supreme Court, whether Congress had the power in the Bankruptcy Code to abrogate sovereign immunity, or to "deem" a waiver that is broader than that permitted by the 11th Amendment. Rather, the court found that the Bankruptcy Code provision permitting such offset claims was consistent with the 11th Amendment because the state's litigation conduct in affirmatively invoking the power of a federal court by filing the proof of claim was a sufficient waiver of sovereign immunity to extend to the offset claim. The court noted that the trustee's claim against the state was merely an offset, and that limitation "protects the state's coffers because the state will never be liable to pay anything."

Like the Ninth Circuit, the Second Circuit thought it inappropriate to construe the state's waiver narrowly, reaching only the claim which the state wants to present. Relying on *Lapides*, the Second Circuit found that the narrow construction rule applies only to waivers effected through language, such as a statute, in which the issue is the state's intent. Waivers by conduct, in contrast, are "driven not by the state's 'actual preference or desire,' which might weigh in favor of construing a waiver narrowly, but rather by the 'need to avoid inconsistency, anomaly, and unfairness,' which requires a general assessment of the equities associated with the state's participation in the bankruptcy litigation." Quoting *Lapides*, 535 U.S. at 620. To permit states to invoke the court's jurisdiction selectively would enable them to collect from bankrupt estates "while permitting them to withhold the debts they owe to the estate, giving them a distinct and unfair advantage over other (non-state) creditors."

Court Finds Medicaid Nursing Home Provisions Enforceable Under 1983

Elderly Medicaid recipients represented by the National Senior Citizens' Law Center and the Office of Kentucky Legal Services Programs, Inc. have won an early victory in the district court's order denying defendants' motion to dismiss and granting plaintiffs' motion for a preliminary injunction.

The class action, *Kerr v. Holsinger*, No. 0-68-JMH (E.D. Ky. Mar. 25, 2004), was brought on behalf of elderly Medicaid beneficiaries who previously received nursing home or home-based long- term care services and then, without any change in their condition, were denied those services when Kentucky tried to address its budget shortfall. The analysis below focuses on the procedural portion of the opinion upholding jurisdiction under 42 U.S.C. § 1983.

The court examined and upheld the three causes of action based on§ 1983. The defendants had argued that under Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 28 (1981), programs enacted under the Spending Clause are generally unenforceable under § 1983. The court acknowledged the language in Pennhurst, but relied on Wilder v. Virginia Hops. Ass'n, 496 U.S. 498, 511-12 (1990), and Westside Mothers v. Haveman, 289 F.3d 852, 862-63 (6th Cir. 2002), to find that Medicaid provisions can in some circumstances create rights enforceable against state officers through § 1983 if they were intended to benefit the plaintiffs, set a binding obligation on the state, and were not so too vague to enforce.

The court found that all three relevant areas of the Medicaid statute created enforceable rights under § 1983. The nursing home and home-based long term care services were mandatory under Medicaid and required to be provided to eligible individuals who need those services. The services "are clearly intended to benefit Plaintiffs," and the statute "carefully details the services to be provided."

Similarly, the provision requiring states to have reasonable standards for determining eligibility consistent with the Medicaid Act is "by its terms ... intended to provide standards upon which individual applicant can rely in the determination of their benefit eligibility by state officials. It is intended to benefit the plaintiffs, and it is a binding obligation on the state agency." Markva v. Haveman, 168 F.Supp.2d 695, 711 (E.D. Mich. 2001), aff'd 317 F.3d 547 (6th Cir. 2002).

Finally, the court the right to a fair hearing was also a binding obligation on the state intended to benefit the plaintiffs, and was not too vague and amorphous an obligation "in light of the judiciary's regular review of matters to determine whether an individual has been afforded appropriate procedural due process by a state entity ...."

The court did not directly discuss or cite Gonzaga University v. Doe, 536 U.S. 273 (2002), which the defendants had relied on to argue that the Medicaid statute has no "rights creating" language and fails to confer, in unambiguous terms, enforceable individual rights. The defendants had made the argument that because the statute focuses on what the state must do, it creates no rights for individuals. But of course the state must provide services to individuals. The court apparently agreed with the plaintiffs that Gonzaga had not overruled Wilder but rather had cited it with approval. The court's analysis of the

Medicaid Act shows that the relevant provisions do meet the Gonzaga test. The court noted that the Medicaid services "'shall be furnished' to eligible persons and [the nursing home] services 'must be provided.'" Kerr, slip op. at 11 (quoting the Medicaid Act) (court's emphasis). Although these mandates are phrased in the passive tense, there is no ambiguity that the provisions mean that the services must be provided to individuals; combined with the eligibility requirements, which are also mandated, the individuals clearly have a right to those services. Indeed, Medicaid is commonly referred to as an "entitlement" program. It is hard to imagine how an entitlement could not be a right.

Gonzaga Contagion Quarantined?

NSCLC Victory in Kentucky is One of Three Federal Court Decisions to Allow Enforcement of Medicaid Statute

The "*Gonzaga* Contagion" (see *Washington Weekly*, March 19, 2004), apparently epidemic in the federal courts, has slowed, or halted, at least temporarily. Three different federal courts, in a mere seven-day span, have ruled for individuals enforcing the Medicaid statute against state Medicaid agency officials. Of course, increasingly disparate readings by the federal courts of *Gonzaga v. Doe*, 536 U.S. 273 (2002), may stir the high court to speak once again on enforceability of federal statutes against state officials. In the meantime, though, a growing contingent of federal courts is holding that Medicaid beneficiaries may enforce the statute against state Medicaid agencies.

***Kerr v. Holsinger* , No. 0-68-JMH (E.D. Ky. Mar. 25, 2004)**

The U.S. District Court for the Eastern District of Kentucky has granted the motion for preliminary injunction filed by the National Senior Citizens Law Center and the Office of Kentucky Legal Services Programs (OKLSP), on behalf of Kentucky residents whose Medicaid coverage for long-term care was terminated by the state. Concluding that "manipulating eligibility standards in order to make up for budget deficits is unreasonable and inconsistent with Medicaid objectives," the court ordered that the plaintiffs' Medicaid coverage be immediately reinstated.

The class action lawsuit, filed against officials in Kentucky's Medicaid agency in October, challenged the agency's new regulations, revising long-term care eligibility standards. See *Washington Weekly*, Oct 10, 2003. The changes were at the center of the state's effort to cut $50 million from its Medicaid long-term care spending, which officials apparently hoped to accomplish by simply making it unreasonably difficult for individuals to demonstrate a medical need for nursing home or home and community-based care services. In some cases, individuals who had resided in nursing homes for close to five years were being informed by the state that they did not need nursing facility care.

Pointing to Kentucky's previous findings that they were eligible for long-term care, plaintiffs charged the state with denying mandatory Medicaid services—nursing facility services—to eligible individuals in violation of 42 U.S.C. §§1396a(a)(10)(A) and 1396(d)(a)(4), and with employing an unreasonable eligibility standard in violation of 42 U.S.C. §1396a(a)(17). Plaintiffs also alleged that the state was not providing them notices regarding their eligibility that complied with the requirements of 42 U.S.C. §1396a(a)(3). The state moved to dismiss, alleging that, per *Gonzaga*, the plaintiffs did not have any rights in these provisions that could be enforced under 42 U.S.C. §1983.

The court held that all four provisions contain enforceable rights. Each, the court said, is clearly intended to benefit the plaintiffs, imposes a binding obligation on the state, and is not so "vague or amorphous" that its enforcement is beyond the scope of the judiciary. The court also held resoundingly that the state could not restrict these rights for the sole purpose of saving money. "Medicaid regulations adopted for

the wrong reason; i.e., without a Medicaid-related or health-related purpose, are contrary to the purposes of the Act because they are inherently arbitrary, unreasonable, and invalid." The court denied the state's motion to dismiss and granted a preliminary injunction, ordering defendants to reinstate plaintiffs' benefits.

***Rabin v. Wilson-Coker* , __F.3d__, 2004 WL 596090**

In *Rabin*, the U.S. Court of Appeals for the Second Circuit found the transitional medical assistance (TMA) provision of the Medicaid Act (42 U.S.C. §1396r-6) enforceable under 42 U.S.C. §1983, after specifically contrasting the provision with the Family Educational Rights and Privacy Act (FERPA) provision at issue in *Gonzaga*.

42 U.S.C. §1396r-6 provides that individuals whose Medicaid coverage is connected to their eligibility for Temporary Assistance for Needy Families (TANF) may maintain Medicaid eligibility for up to six months after becoming ineligible for TANF because of income from employment. When Connecticut lowered its TANF income eligibility limit last year, it terminated Medicaid coverage of those losing TANF because of the new eligibility limit. Plaintiffs claimed they were entitled to TMA since their income from employment was rendering them ineligible under the new TANF income limit. The state argued that the statute only provides for TMA when an individual loses TANF eligibility because of an *increase* in employment income, not a *decrease* in the TANF income limit. The district court agreed with the state's reading of the statute and granted summary judgment to the state. *Rabin v. Wilson-Coker*, 266 F.Supp.2d 332 (D. Conn. 2003).

The court of appeals reversed, finding that the statute provides TMA for individuals who lose eligibility for TANF because of a decrease in the income limit if they: (1) have earned income; and (2) would not have been ineligible under the new income limits if they had only unearned income. The court also rejected the state's argument that 42 U.S.C. §1396r-6 did not confer an enforceable right on the plaintiffs. The provision states that "each state plan...must provide that each family which was receiving [TANF] in at least 3 to 6 months immediately preceding the month in which such family becomes ineligible for such aid, because of…income from employment...remain eligible for assistance under the plan..."

The court distinguished the FERPA provision at issue in *Gonzaga* from the TMA provision, finding that the latter does not contain "qualifying language akin to FERPA's 'policy or practice.'" The court also rejected the state's argument that the TMA provision is focused not on an individual's benefits but rather what a "state plan" must require. "Congress has provided that 'in an action brought to enforce a provision of [Medicaid], such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan,'" citing 42 U.S.C. §1320a-2. The court remanded the case to the district court for a summary judgment ruling in favor of the plaintiffs.

***Mendez v. Brown*, __ F.Supp.2d __, 2004 WL 626550 (D.Mass.)**

The plaintiffs in *Mendez* are clinically obese women with a medical need for breast reduction surgery who were being denied coverage for the service by the state. The state informed the plaintiffs that it would only reconsider if they lost weight, at which point other less costly medical options would be available. The plaintiffs alleged that the state's denial violated 42 U.S.C. §1396a(a)(8) (requiring that services be provided with "reasonable promptness"), §1396a(a)(10) (requiring that services be provided to individuals in sufficient amount, scope and duration in comparison to other similarly situated individuals), and §1396a(a)(17) (mandating "reasonable" eligibility standards). The state moved to dismiss on grounds that plaintiffs did not have any rights enforceable in these provisions.

The court noted that prior to *Gonzaga*, all three provisions had been found by federal courts to be enforceable under §1983, and found no merit in the state's argument that *Gonzaga* "eviscerated" those prior rulings. It criticized *Sabree v. Houston*, 245 F.Supp.2d 653 (E.D.Pa.2003), now on appeal before the Third Circuit, as a decision which, "opines, in an unsupported footnote, that certain pre-*Gonzaga*cases" finding provisions of the Medicaid statute enforceable were "disavowed by *Gonzaga*." The court agreed with plaintiffs that, "*Sabree's*"disavow[al]" language is untenable."

The court agreed that the state's position had "some resonance" in light of the First Circuit's opinion in *Long Term Care Pharmacy Alliance v. Ferguson*, __F.3d__, 2004 WL 513790 (finding that, per *Gonzaga*, providers do not have an enforceable right in the statute's "equal access provision," 42 U.S.C. §1396a(a)(30)(A), see *Washington Weekly*, March 19, 2004). However, the court stated that the three Medicaid provisions at issue "readily survive any heightened analysis which *Gonzaga* requires…[E]ach subsection—again unlike (30)(A) [the equal access provision]—identifies a 'discrete class of beneficiaries.'" The court therefore denied the state's motion for dismissal.

D.C. Circuit Rejects Scalia, Thomas Views on Enforcement of Spending Clause Legislation

In a footnote in a Medicaid opinion, the D.C. Circuit rejected Justices Scalia's and Thomas's view that Spending Clause legislation such as Medicaid may only be enforced by private parties if there is an explicit private cause of action.

Plaintiffs, drug manufacturers, were claiming that drug rebate requirements in Michigan's Medicaid program violated and were preempted by the federal Medicaid statute under the Supremacy Clause. Although the court ultimately upheld summary judgment against the plaintiffs, in footnote 3 at the outset of the opinion, the court rejected Michigan's argument that the plaintiffs did not have private right of action for injunctive relief. Michigan had claimed that Spending Clause legislation is like a contract between the federal and state governments, and thus is enforceable by third parties –- i.e., Medicaid beneficiaries or providers – only if the "contract" gives them explicit third party beneficiary rights through an explicit private cause of action. See PhRMA v. Walsh, 123 S.Ct. 1855, 1878 (2003) (Scalia, J., concurring in the judgment); id. (Thomas, J. concurring in the judgment). This argument would invalidate implied causes of action, § 1983 causes of action, and preemption challenges for the vast reaches of legislation enacted under the Spending Clause.

The D.C. Circuit (Henderson, Rogers and Williams), however, noted that in the Supreme Court's opinion in Walsh, "[b]y addressing the merits of the parties' arguments without mention of any jurisdictional flaw, the remaining seven Justices appear to have sub silentio found no flaw. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-102 .... (1998) (federal courts must ensure they have jurisdiction before considering merits)."

Court Restricts Congress' Power to Legislate on Behalf of Disabled

The Commerce Clause Is Shrinking

In a rather startling decision, the Eighth Circuit has held that Congress does not have the power under the Commerce Clause to prohibit a $2 fee charged for disabled parking placards because the fee has no substantial effect on interstate commerce. *Klingler v. Director, Department of Revenue*, 2004 WL 936687 (8th Cir. May 3, 2004). The court's restrictive view of interstate commerce harkens back to pre-1937 decisions striking down New Deal legislation.

The plaintiffs claimed that the fee violated a regulation under the Americans with Disabilities Act that prohibits any "surcharge" on a disabled person to cover the costs of complying with the ADA's nondiscrimination requirements. The court declined to address whether the fee even violated the ADA regulation but went straight to the constitutional issue, saying, "this is one of those rare occasions where the appropriate resolution of the constitutional issue is reasonably straightforward and determinate and the resolution of the statutory issue is, by contrast, difficult and complex."

The court rejected the plaintiffs' claim that it need only examine whether Title II of the ADA, which prohibits public entities from discriminating against the disabled, is permissible legislation under the Commerce Clause. Instead, the court scrutinized whether the particular form of discrimination affects interstate commerce-that is, whether the $2 placard fee itself is "closely connected to some national commercial market." The court thought it important that Congress made "no findings that the type of parking placard fees being regulated here substantially affect interstate commerce." As the dissent points out, however, "Congress could not possibly make express findings about every situation to which the ADA might be extended, nor is it required to do so under the Commerce Clause."

The court set forth several ways in which the placard fee could be viewed as related to interstate commerce, but then rejected every one. The fee "does involve the collection of money, and can thus perhaps be classified as 'economic' in a sense." But the court insisted that Congress only has the power to regulate activities that are "commercial" rather than more broadly "economic," and held that "nonprofit revenue collection for state government" is not commercial. The court agreed that the transferable parking placards enable disabled persons to get into stores, use rental cars, and otherwise participate in interstate commerce, but the court then opined that the $2 fee does not substantially restrict those activities. Finally, the fee "could be deemed to affect interstate commerce substantially" because "[o]ne could reasonably presume that a sizeable portion of the [$400,000 per year generated by the fee] would, in the absence of the placard fee, have ended up flowing through the various channels of interstate commerce." But the court felt that this effect was too indirect and remote.

The plaintiffs argued that this case was similar to those under the Civil Rights Act of 1964 holding that Congress could prohibit discrimination in hotels that served interstate travelers or at a small local restaurant whose food had moved in interstate commerce. The court distinguished those cases by finding that the economic transactions at issue were significant in the aggregate, whereas there was no finding that the $2 fee was. Yet the discrimination that Congress was prohibiting in the Civil Rights Act is

no more commercial than discriminatory imposition of the placard fee, and the interstate commerce link seems equally strong or attenuated in both.

The dissent argued that the majority was attacking each of these interstate commerce justifications as though they were "an ordinary fact to be proved by a preponderance of the evidence." However, they were instead legislative facts, and "we owe it to Congress to assume the existence of any state of facts reasonably conceivable by the legislature at the time the statute was enacted." When the constitutionality of a statute is in question, "We should give Congress the benefit of the doubt."

The implications to the majority's approach are profound. Although the activity challenged in this case involves a public entity, the court's analysis is equally applicable to a private setting. Much of what Congress does under its Commerce Clause power is motivated by noncommercial concerns, and certainly has little to do with interstate commerce in the literal sense. Fair housing laws that protect the elderly and disabled against discrimination in private housing, for example, have little to do with interstate commerce. Similarly, the Endangered Species Act is under attack by conservative judges who believe that Congress only has the power to protect commercially viable species traded in interstate commerce. The Supreme Court has recently begun cutting back on the broad deference that it has given Congress since 1937. If the Eighth Circuit's decision in Klingler is any indication, soon Congress may only be able to protect the elderly, disabled and other vulnerable communities when doing so serves commercial purposes. It remains to be seen how far the Court will go but, clearly, the power of Congress to protect against discrimination is shrinking.

Three Supreme Court Cases Upholding Congressional Power

In three opinions this week in different areas, the Supreme Court has upheld federal statutes against claims that the statutes exceeded Congress's legislative power under the Constitution.

Whether these decisions signal greater deference toward Congress will undoubtedly be the source of debate. What seems apparent is that Congress's power to enact broad protections for individuals will likely remain under siege, even if the Court will uphold more narrow measures.

In *Tennessee v. Lane*, 2004 WL 1085482 (May 17, 2004), the Supreme Court held that Title II of the Americans with Disabilities Act, as applied to the class of cases implicating judicial services, was within Congress's 14th Amendment power to abrogate state sovereign immunity.

In *Tennessee Student Assistance Corp. v. Hood*, 2004 WL 1085610 (May 17, 2004), the Court held 7-2 that the bankruptcy provision allowing discharge of state student loans does not violate state sovereign immunity because bankruptcy is an in rem proceeding over the debtor's estate and not an in personam suit against the state. This analysis obviated the need for a ruling on the question raised by petitioner, whether Congress has power under the Article I Bankruptcy Clause of the Constitution to abrogate state sovereign immunity. The reliance on the in rem nature of bankruptcy cases, not transferrable to many other classes of cases, gave the Court a way to uphold uniform application of bankruptcy rules to state debts without undercutting the ruling of Seminole Tribe v. Florida, 517 U.S. 44 (1996), that Congress lacks authority under Article I to abrogate state sovereign immunity.

Finally, in *Sabri v. United States*, 2004 WL 1085233 (May 17, 2004), the Court held that Congress had the power under the Necessary and Proper Clause to create a federal crime of bribing an official of a state or local entity that receives as least $10,000 in federal funds, even if there is no connection between the bribe and the federal money. This decision deserves a few more words, as it is interesting both for the scope of the Necessary and Proper Clause and for the discussion of as applied versus facial challenges.

In Sabri, petitioner Sabri claimed that a federal bribery statute was overbroad and beyond Congress's Article I powers because it did not require a connection between the bribery and federal funds, even if there was such a connection in his case. What is interesting is the Court's broad language to describe Congress's power under the Necessary and Proper Clause: the bribery statute was a "rational means" of protecting federal monies. Although not every bribe will have a direct connection to federal funds, "corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value.... [M]oney can be drained off here because a federal grant is pouring in there." The Court rejected Sabri's analogies to the decisions restricting Congress's Commerce Clause powers in United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000). "Sabri would be hard pressed to claim ... that [the bribery statute] 'has nothing to do with' the congressional spending power." (Quoting Lopez).

Justice Thomas concurred but wrote separately to criticize the Court's reasoning. "[T]he Court appears to hold that the Necessary and Proper Clause authorizes the exercise of any power that is no more than a 'rational means' to effectuate one of Congress' enumerated power." Rather, there must be "some obvious, simple and direct relation between the statute and the enumerated power."

The Court does appear to be more willing here to accept an attenuated link between federal spending and the bribery than it was in Lopez and Morrison to accept a link between crime and education, on the one hand, and interstate commerce. It is difficult to tell whether the Court is indeed adopting a more lax approach to the Necessary and Proper Clause, or more likely, is simply more deferential in the case of a criminal statute, especially one that has in its text a jurisdictional link to federal interests. Nevertheless, it is noteworthy that the Court did not use the Sabri case as an opportunity to begin restricting Congress' power under the Necessary and Proper Clause, as some observers had expected.

The Sabri decision (written by Justice Stevens) is also interesting for the dicta – not joined by Justices Scalia or Kennedy – on Sabri's facial challenge to the statute. "Facial challenges of this sort are especially to be discouraged.... [W]e have recognized the validity of facial attacks alleging overbreadth (although not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." As examples of those rare settings where facial challenges are appropriate, the Court listed free speech, abortion and – ominously – "legislation under § 5 of the Fourteenth Amendment" (citing City of Boerne v. Flores521 U.S. 507 (1997). Yet the Court did not mention the fact that the very same day, in Tennessee v. Lane, it had refused a facial challenge to the ADA, ruling instead held that the statute was appropriate 14th Amendment legislation as applied to cases implicating access to judicial services.

These three decisions taken together appear to show that at least five justices are uncomfortable about going too far with the Supreme Court's recent assault on congressional power and are willing to uphold federal statutes where they can.

Supreme Court Upholds ADA Title II Protection Of Access To Court Facilities

On May 17, 2004, a 5-4 Supreme Court majority upheld Congress' authority...to require state governments to ensure access by disabled persons to state court facilities, and to empower individuals to recover damages for violations of this requirement.

The decision, *Tennessee v. Lane*, 2004 WL 1085482 (May 17, 2004), redraws the boundaries between state sovereign immunity from private lawsuits under the eleventh amendment and Congressional authority to enforce the fourteenth amendment. In effect, the*Tennessee* majority tempers the expansion of state sovereignty originated in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and the contraction of Congress' fourteenth amendment enforcement authority in *Boerne v. Flores*, 521 U.S. 507 (1997). In *SeminoleTribe*, the Court held that only the fourteenth amendment, not the commerce clause or other Article I provisions, gives Congress the power to abrogate state sovereign immunity from private damage suits. In *Boerne* the Court introduced a doctrinal formula purporting to narrow Congress' authority to disturb state prerogatives, by requiring that fourteenth amendment enforcement legislation under section five of the amendment constitute a "congruent and proportional" response to demonstrated state violations of the substantive provisions of section one.

One year ago, in *Nevada Dept. of Human Resources v. Hibbs*, 583 U.S. 721 (2003), the Court signaled that, given its current membership, a majority cannot be assembled to carry the strict logic of the *Boerne* standards to extreme logical endpoints in all cases. The new decision strengthens and clarifies that signal.

In *Hibbs*, the Court, in a 6-3 opinion by Chief Justice Rehnquist, surprised observers by validating private damage suits against states under the federal Family and Medical Leave Act. Prior to *Hibbs*, a bare majority sometimes labeled the "Federalism Five" – Chief Justice Rehnquist and Justices Scalia, Thomas, Rehnquist, and O'Connor – had upheld immunity and struck down federal laws authorizing private damage actions in every case applying the *Boerne* fourteenth amendment jurisprudence. In these cases, the four dissenters – Justices Stevens, Souter, Ginsburg, and Breyer – remained equally firm in their disapproval of the new doctrine. They insisted that the majority's solicitude for state governments in *Boerne* and related cases was not only incorrect but invalid as precedent: "judicial activism [that] represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises." *Kimel v. Florida Board of Regents*, 528 U.S. 62, 99 (2000) (Stevens, J., dissenting) (*Kimel* held that the Age Discrimination in Employment Act of 1967 is unenforceable by private damage actions.)

However, *Tennessee v. Lane* may reflect, not simply a fracturing of the Federalism Five in this case and in *Hibbs*, but a new strategic realignment. If this alignment holds, Justice O'Connor has joined the erstwhile dissenters in a sort of grand compromise. The new majority embraces the *Boerne* "congruent and proportional" doctrinal framework, while giving its terms a comparatively flexible interpretation that accommodates Title II of the ADA, the FMLA, and, presumably, similar statutes purporting to "enforce" the fourteenth amendment. In*Hibbs*, the former dissenters – Breyer, Ginsburg, Souter, and

Stevens – issued concurring opinions specifically reaffirming their dissent from*Kimel, Garrett, Boerne, Seminole Tribe*, and related cases; in *Tennessee*, Stevens actually wrote the majority opinion, in which Breyer joined without comment; Souter and Ginsburg wrote subdued concurring opinions that reiterated their objections to the earlier cases but accepted the *Boerne* standards as applied by Stevens. Moreover, in *Tennessee*, the Federalism Five majority has splintered on the right as well as the left; Justice Scalia's lengthy dissent disowns the *Boerne* approach to construing section five enforcement authority as too "flabby." Justice Scalia seems to say that, if the "congruent and proportional" test can be applied to uphold "prophylactic" federal enforcement laws as well as to invalidate them, then he will no longer have any part of that approach.

Going forward, the broad question, of course, is what are the contours of the freshly redrawn lines?

Obviously, the place to begin looking for answers is in the case itself. At issue in *Tennessee* was Congress' authority to authorize private damage actions to enforce Title II of the ADA, which provides (in 42 U.S.C. §12132) that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." Three years ago in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Federalism Five majority barred private suits against state governments to enforce *Title I* of the ADA, which bans*employment* discrimination on grounds of disability. In *Tennessee*, the plaintiffs, both paraplegics, sued the state under ADA Title II for failing to equip courthouses with elevators or other apparatus necessary to enable them to access court proceedings in their wheelchairs. Affirming a Sixth Circuit decision for the plaintiffs, the Supreme Court applied the *Boerne* regime for interpreting the enforcement provisions of section five of the fourteenth amendment. Under the *Boerne* approach, section five authorizes enforcement legislation (i) only in response to specific, identifiable, substantial state governmental violations of the substantive provisions in section one of the fourteenth amendment, and (ii) only if the legislation is a "congruent and proportional" response to these particular violations.

The Court gave several reasons why private damage actions could be "congruent and proportional" under Title II but not Title I. At some length, Justice Stephens' opinion for the Court contended that evidence from Congressional and other official hearings, and in court decisions, of state discrimination against the disabled in providing access to public facilities, was stronger than evidence reviewed in *Garrett*of discrimination against disabled state employees. In addition, following the Sixth Circuit, the Court stressed that denial of access to public facilities, specifically to court proceedings, violated the plaintiffs' rights to due process of law under the due process clause of the fourteenth amendment, not merely their nondiscrimination rights (such as they might be) protected by the equal protection clause. This distinction was critical, the Court argued, because these due process rights are more fundamental, and hence give Congress more leeway to safeguard than the employment nondiscrimination rights addressed by Title I. Because Congress found, with substantial evidentiary support, "extensive . . . disability discrimination" in "access to public services," the Court held, Congress was entitled, under the "congruent and proportional" *Boerne* standard, to enforce nondiscriminatory access on a "prophylactic" basis –i.e., to permit damage recovery for denials of such access, even when a particular denial might in and of itself not constitute a constitutional violation. Despite the potentially broad implications of his

allusions to the scope, quantity, and quality of evidence of disability discrimination, Justice Stevens made crystal-clear that the specific holding in *Tennessee v. Lane* covers little more than the facts of that case:

". . . .[T]he question presented in this case is not whether Congress can validly subject the States to private suits for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under §5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid §5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further."

No doubt, this tight limitation was a key factor in Justice O'Connor's decision to join the majority.

Nevertheless, *Tennessee v. Lane* is surely a momentous ruling – if only because of what the alternative would have meant: that in the 21 st century, American state governments have no obligation to ensure nondiscriminatory access by a disabled citizen to his or her own trial, or at the very least, that Congress is substantially powerless to enforce any such right even if it exists in an abstract or theoretical sense.

How much more than its holding does *Tennessee v. Lane* portend? To begin with the obvious, litigants would be well advised not to rush to court challenging denials of access to state controlled recreational facilities, e.g., the "hockey rink" hypothetical in Justice Stephens' argument above. At the other extreme, Title II guarantees of access to state electoral procedures (voting booths) would seem comparatively easy to analogize to court procedures. The difficult, and potentially painful cases will be in between, involving state facilities and services essential to participation in society but not necessarily to participation in processes of government itself, such as transportation or even education. In such areas, it is not inconceivable that a majority of the current Court could hold that Congress' only option for ensuring equal access is spending clause-based legislation. In this regard, the decision reinforces the magnitude of the threat posed by efforts to narrow or choke off altogether private rights of action to enforce conditions in federal spending clause legislation (such as the Rehabilitation Act, which finances state enhancements to benefit disabled citizens, subject to conditions similar to those in the ADA).

Also noteworthy for the future is that the *Tennessee v. Lane* majority gave Congress credit for the fact that "The ADA was passed by large majorities . . . after decades of deliberation and investigation into the need for comprehensive legislation [including] 13 hearings and . . . a special task force that gathered evidence from every State in the Union." In previous section five cases, particularly *Garrett*, *Kimel*, and*United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act), the Court had contemptuously dismissed large volumes of evidence supporting congressional judgments as, among other things, "anecdotal," "unsystematic," "outdated," inapposite for hyper-technical reasons, or conceptually inappropriate. Now that the Court has taken Congress' fact-gathering efforts seriously and evaluated them sympathetically, the implication may be that, after all, supporters of future civil rights legislation will find it worthwhile to help ensure that Congress does its investigational and drafting homework.

In the long run, the most significant question left open by this decision may be the scope of state substantive obligations (or citizens' correlative rights) prescribed by section one of the fourteenth

amendment, as distinguished from the scope of congress' remedial authority under section five to proscribe conduct that, taken alone, would be constitutional. Under the approach advocated by Chief Justice Rehnquist for the minority in *Tennessee*, in order to qualify as unconstitutional, state discriminatory conduct must be direct, purposeful, and systematic. According to Justice Scalia's 12 page dissent, except for the historically unique case of massive racial discrimination in the South, the fourteenth amendment imposes on states no affirmative obligation whatsoever to ensure equal access to services or facilities for the elderly, women, disabled, or any other class of citizens, and Congress has no authority to require them to do so. To fend off criticism of their *Seminole Tribe-Boerne-Kimel-Garrett* jurisprudence, conservative members of the Court have often insisted that barring damage actions to remedy federal rights violations still leaves private citizens with the right to enjoin future state misconduct under the *Ex Parte Young* doctrine. But as Justice Ginsburg responded to such a disclaimer during the oral argument last January, the minority's narrow approach to defining fourteenth amendment substantive liability could leave plaintiffs with no illegal conduct to enjoin, even on the comparatively compelling facts of *Tennesee v. Lane*.

Preemption/Supremacy Clause Developments

A preemption cause of action under the Supremacy Clause is becoming an important potential alternative to section 1983 when states violate federal law. This article discusses two developments on this.

A recent article on the subject analyzes 20 cases decided by the Supreme Court between October 1996 and June 2003 in which private plaintiffs filed civil actions in federal court against state officers or local governments or officers seeking prospective declaratory or injunctive relief to remedy an alleged violation of a federal statute or to block enforcement of a state or local law allegedly preempted by a federal statute. David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L.Rev. 355 (January 2004).

The author concludes that in all nine of the cases involving a state law or regulation, as well as one case that involved an administrative order, the Court went to the merits without considering whether the allegedly preemptive federal statute provided a cause of action. In the ten cases involving state "executive" action—policy or practice—the Court reached the merits only if the federal statute provided a cause of action. Sloss argues that the Supreme Court has implicitly recognized an implied cause of action under the Supremacy Clause, and that the cause of action should extend to the "executive" action cases as well.

In a case falling on the "executive" side of the line (i.e., policy rather than law), the Eastern District of Virginia recently found that immigrant plaintiffs, represented by MALDEF, had stated a cause of action under the Supremacy Clause to challenge the state's policy of denying college admission to undocumented aliens using standards that conflicted with federal immigration law standards on who is legally or illegally in the country. *Equal Access Educ. v. Merten*, 305 F.Supp. 2d 585, 593-94, 608 (E.D. Va. 2004). Like many of these cases, the court went straight to the merits without considering where the cause of action was.

States More Sovereign Than Sovereign Nations

Even without petty analogies to the transfer of sovereignty in Iraq, a Supreme Court opinion this month reminds us that under the Court's current doctrine, states have greater sovereign immunity than do sovereign nations.

In *Republic of Austria v. Altmann*, 124 S.Ct. 2240 (2004), the Court held that the 1976 Foreign Sovereign Immunities Act gave federal courts jurisdiction to hear an action against Austria to recover paintings allegedly stolen by the Nazis.

The Court emphasized that under Chief Justice Marshall's opinion in *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812), "the jurisdiction of the United Sates over persons and property within its territory 'is susceptible of no limitation not imposed by itself,' and thus foreign sovereigns have no right to immunity in our courts.'" Because "foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement, this Court has 'consistently ... deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction' over particular actions ...." 124 S.Ct. at 2248 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983)). The Court held that the FSIA could be applied retroactively, and also could be applied to events before the State Department adopted a restrictive view of foreign sovereign immunity in 1952.

The Court, of course, shows no such deference to the decisions of the federal political branches to abrogate state sovereign immunity. The Court has also imposed limits on federal jurisdiction over states that are not found in the Constitution or federal laws. Why it is an affront to the "dignity" of states to be a defendant in federal court, but not to the dignity of a foreign country (or of a Native American tribe, for that matter), is hard to understand.

Employee’s Rehabilitation Act Money Damages Claim Against State Agency Is Upheld

A split D.C. Circuit has held that Congress has the power under the Spending Clause to condition acceptance of federal public transit funds on a waiver of sovereign immunity for discrimination against the disabled in violation of the Rehabilitation Act of 1973.

Barbour v. Washington Metropolitan Area Transit Auth’y,___F.3d___, 2004 WL 1531945 (D.C. Cir. July 9, 2004). The court joins the First, Third and Ninth Circuits in so holding.

The Civil Rights Remedies Equalization Act of 1986 (CRREA), conditions a state agency’s acceptance of federal funds on its waiver of Eleventh Amendment immunity for violations of disability, age, gender, race and other federal antidiscrimination statutes. 42 U.S.C. §§ 2000d-7(a)(1). The D.C. court found that this condition was unambiguous and that the state’s purported belief in 1998 that it had no sovereign immunity to waive was immaterial. Thus, the D.C. Circuit is now the fourth court of appeals to reject the Second Circuit’s 2001 holding in *Garcia v. S.U.N.Y. Health Sciences Center,* 280 F. 3d 98.

The court also rejected the argument that the waiver condition was outside of Congress’ Spending Clause power because it was unrelated to the federal interest in transportation funds. The court noted that the Supreme Court has never overturned Spending Clause legislation on relatedness grounds. Congress “made clear that it did not want *any* federal funds to be used to facilitate disability discrimination, and that exposing recipient entities to the threat of federal damage actions was an effective deterrent.” Congress could reasonably insist that decisions on the use of federal funds not be based on or “frittered away” on irrational discrimination, just as with the graft prohibitions upheld this term in *Sabri v. United States*, 124 S.Ct. 1941 (2004).

Judge Sentelle in dissent argued that the connection between the federal interest in promoting public transportation and its interest in preventing discrimination against the disabled is too attenuated. He emphasized that the federal Spending Clause power is limited to conditions that bear some relationship to the federal interest in the spending program. “Prohibiting disability discrimination in employment is simply not ‘Necessary and Proper’ …to spending money for mass transit.” He argued that “there is nothing magical about disability discrimination that makes the ‘interest’ in preventing it distinctively federal.” Sentelle distinguished *Sabri* on the grounds that rampant bribery of the transit officials “would make it more difficult for federal funds to do the job of providing mass transit…[D]iscrimination against WMATA’s employees on the basis of disability would not.”

Judge Sentelle also argued that the waiver condition was not a valid exercise of Congress’ Fourteenth Amendment powers.

Fifth Circuit Allows ADA Title II Suit Against State Officials

The Fifth Circuit, over a chilling dissent by a potential Supreme Court nominee, has rejected Texas' claim that state officials cannot be sued under Title II of the Americans with Disabilities Act, which prohibits discrimination in public services and accommodations.

McCarthy v. Hawkins, ___F.3d.___, 2004 WL 1789945 (5th Cir. 2004).

The plaintiffs, individuals with mental disabilities seeking more community-based living options under Medicaid, sued several Texas state officials, claiming that they had violated the Medicaid statute, the ADA and section 504 of the Rehabilitation Act. The majority followed five other circuit courts in ruling that state officials are proper parties to suits under the ADA, despite the fact that the wording of the statute referred to "public entities." Because the interlocutory appeal was limited to the issue of sovereign immunity, the majority refused to consider whether plaintiffs' claims were otherwise valid. The court found that, for the purposes of *Ex Parte Young*, it need only determine whether plaintiffs alleged a violation of federal law and sought prospective injunctive relief.

However, Judge Emilio Garza, who is reputed to be on President Bush's short list of Supreme Court nominees, believed that to fit within the *Ex Parte Young* exception, the plaintiffs must allege violation of a *valid* federal law. He first examined whether ADA Title II, as applied to state decisions concerning entitlement programs, was a congruent and proportional response to a history of state violations of the 14th Amendment. Garza acknowledged that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs." *Tennessee v. Lane*, 124 S.Ct. 1978, 1989 (2004). However, he noted that the Supreme Court identified examples of irrational discrimination against the disabled only in the following categories: voting, marriage, jury eligibility, state mental institutions, zoning decisions, public education, the penal system, and access to the judicial system. Assuming that Congress only had the power under the 14th Amendment to protect the disabled in these categories, Garza found that plaintiffs' claims did not fit any of them.

Garza also found that Title II of the ADA, as applied to a state's decisions concerning entitlement programs, does not regulate activity that is either interstate or commercial, and is thus outside of the Commerce Clause power. When states provide public services, they are not competing with the private market, and thus are not engaging in commercial activity. The federal government, which filed an amicus brief on behalf of the plaintiffs, had argued that the ADA is a comprehensive economic regulation of the activities of the disabled in the national economy, and can survive a Commerce Clause challenge without showing that every single facet of the program is independently and directly related to interstate commercial. Yet Judge Garza found that Title II was not an integral or necessary part of the otherwise valid ADA economic regulatory scheme.

Somewhat surprisingly, after finding that the ADA claims should be dismissed, Judge Garza indicated that he would uphold the plaintiffs' section 504 claims. Although in substance the section 504 claims are the same as those under the ADA, section 504 rests on Congress' power under the Spending Clause to put conditions on acceptance of federal funds. Judge Garza rejected Texas' claim that, because Texas

receives no section 504 funds, Congress could not condition acceptance of Medicaid funds on compliance with section 504. Rather, he found that Congress can make conditions generally applicable to all federal monies, which states are free to accept or reject.

There are a couple of noteworthy points about Judge Garza's dissent. First, he reached out to decide the constitutionality of the statute, a question that would not normally be decided when addressing a sovereign immunity issue. Second, whereas his 14th Amendment analysis is not surprising–given the scant protection that the Supreme Court has given the disabled under that Amendment–his Commerce Clause analysis breaks new ground. Since the Supreme Court reinvigorated Commerce Clause scrutiny in 1995, it has only twice invalidated statutes, and the two statutes struck down–the Gun-Free School Zone Act and a section of the Violence Against Women Act–were minor statutes focused on criminal activity traditionally within the purview of state governments. The ADA, by contrast, is a major statute meant to integrate the disabled into the larger life and economy of the nation, which Judge Garza conceded is a valid goal under the Commerce Clause.

Commerce Clause restrictions are also much more dangerous than those under the 14th Amendment. Restrictions on Congress' 14th Amendment powers generally only prevent it from imposing damage remedies on states while still allowing Congress to regulate state conduct. Limitations on the commerce power, however, go to the heart of Congress' ability to legislate, not only with respect to states, but also with respect to local governments and private parties.

11th Circuit: ADA Unconstitutional As Applied to State Prisons

In a decision having implications for 14th Amendment doctrine generally, the Eleventh Circuit has held that Title II of the Americans with Disabilities Act, as applied to state prisons, is not a valid abrogation of state sovereign immunity.

Miller v. King, 2004 ---F.3d.---, 2004 WL 2035197 (11th Cir. Sept. 14, 2004).

The court reached that decision despite the fact that the plaintiff presented triable evidence of cruel and unusual punishment.This is the first decision post-*Tennessee v. Lane*, 124 S.Ct. 1978 (2004), to find that a statute was outside of Congress' Fourteenth Amendment powers in a context involving fundamental constitutional rights.

Plaintiff Miller is a paraplegic, wheelchair-bound inmate with multiple health problems. Due to disciplinary problems, he is held in a high security isolation cell so small that he cannot move his wheelchair. Able-bodied inmates with disciplinary problems are held in less stringent units.

The court found that Miller had sufficient evidence of violations of the Eighth Amendment to survive summary judgment on his 42 U.S.C. § 1983 claim against the state warden in his individual capacity. Although the court noted that the Eighth Amendment only prohibits conditions that involve "wanton and unnecessary infliction of pain," Miller had evidence that "serious medical needs" were denied, "effectively rendering Miller immobile and causing his muscles to atrophy," and causing his spinal condition to deteriorate. There was also evidence that he was denied "the basic levels of humane care and hygiene," forcing him to urinate and defecate on himself, due to deliberate indifference by the warden. The court thus remanded the § 1983 claims as well as the claims for injunctive relief under the ADA, which fell within the *Ex Parte Young,*209 U.S. 123 (1908), exception to the doctrine of sovereign immunity.

Three-Part Test from *City of Boerne*

Addressing whether Congress had acted within the scope of its Fourteenth Amendment power to abrogate state sovereign immunity under the ADA, the court applied the three-part "congruence and proportionality" test of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997): the court must (1) identify the precise constitutional right at issue, (2) determine whether Congress identified a history and pattern of unconstitutional conduct by the States, and if so, (3) analyze whether the legislation is a congruent and proportional response to that history and pattern.

On the first issue, the constitutional right at issue here is the Eighth Amendment's ban on cruel and unusual punishment. Although this is a fundamental right, like the fundamental right of access to the courts upheld under the ADA in *Tennessee v. Lane,* but unlike the ADA Title I claim struck down in *Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 363 (2001), the court did not mention this fact or discuss its significance.

Second – in the one piece of good news for ADA proponents – the court found that the Supreme Court in *Lane* "concluded that Title II *in its entirety* satisfies *Boerne'*s step-two requirement that it be enacted in response to a history and pattern of States' constitutional violations" (emphasis added). Thus, the Eleventh Circuit did not need to consider whether Congress' evidence of unconstitutional discrimination against the disabled in the specific prison context (of which there was some but not a lot) met this standard.

In step three, however, the court found that applying the ADA to state prisons would not be congruent and proportional to the "the limited nature" of Eighth Amendment rights. The "robust, positive due-process obligation of the States to provide meaningful and expansive court access [in *Lane*] is in stark contrast with the States' Eighth-Amendment, negative obligation to abstain from cruel and unusual punishment." Applying the ADA to state prisons would affect a broad swath of prison services and activities, including education, recreational, and job-training programs, which have nothing to do with the ban on cruel and unusual punishment.

In finding that the ADA's mandates were disproportional to the requirements of the Eighth Amendment, the court seemed to forget its earlier observation that the ADA right to "reasonable" accommodations is "relative to circumstances, and the circumstances of a prison are different from those of a school, an office, or a factory." Thus, the court failed to consider whether application of the ADA to state prisons would be constitutional if the statute were construed to limit reasonable accommodations to those required by the Eighth Amendment. Of course, reading the statute that narrowly would also narrow the right to injunctive relief, as well as rights against non-state prisons, both of which are unaffected by the sovereign immunity ruling.

Trouble in a Footnote?

In an extended footnote that may prove especially troubling to advocates, the court also rejected the plaintiff's argument that the ADA could be "narrowly enforced against States only where the alleged ADA violations also actually violate the constitutional right at issue – in this case, the Eighth-Amendment right to be free from cruel and unusual punishment." Although noting that the First and Second Circuits have taken this approach, the Eleventh Circuit found that it was inconsistent with *Lane*, which allows "as applied" analyses, but only on a "context by context" basis (i.e., whether the ADA applies to state prisons as a whole). Given the broad requirements of the ADA and the little protection the disabled receive under the Constitution, it will be difficult for advocates to justify the statute's congruence and proportionality if the contexts cannot be narrowed to those implicating constitutional rights.

The court's approach has thus set up a Catch-22 for advocates. If plaintiffs attempt to justify application of a statute to a broad category of cases, courts will find either that Congress has not amassed a sufficient record of constitutional violations by states in the broad category, or that the legislation reaches too much state conduct that is not unconstitutional. But if plaintiffs try to apply a statute in a more specific context, courts will find either that there is insufficient legislative history on those specific facts, or that it is an improperly narrow "as applied" application.

It is a particular paradox to see a court find that the Fourteenth Amendment prohibits application of a statute to violations of the Fourteenth Amendment itself (through its incorporation of the Eighth Amendment). The serious nature of Miller's claims is reflected in the fact that the United States Department of Justice--hardly an aggressive proponent in the current Administration of civil rights lawsuits against states--intervened in support of the plaintiff. What seems to be getting lost in the Fourteenth Amendment caselaw is the obligation of courts to respect Congress as a co-equal branch and to construe legislation to be constitutional if at all possible.

Supremacy Clause Cause of Action to Enforce Medicaid

The District of Minnesota has held that plaintiffs stated a claim under the Supremacy Clause that state administrative orders conflicted with Medicaid rules and regulations.

Association of Residential Resources et al. v. Minnesota Comm'r of Human Svcs., 2004 WL 2066822 (D. Minn. Aug. 18, 2004).

Minnesota provides Medicaid services to disabled individuals through its Home and Community Based Services waiver program. Plaintiffs--providers of waiver services as well as Medicaid recipients and their families--challenged a cost-savings plan (the "rebase program") that impacted the way the state distributed waiver funds.

The plaintiffs' complaint alleged that the state "'elevated a state administrative order over federal statutory and regulatory requirements thereby violating the *Supremacy Clause of the United States Constitution'*…. Plaintiffs suggest that the DHS rebase program conflicts with various Medicaid rules and regulations, and that therefore the rebase violates the *Supremacy Clause.* This is adequate to state a claim" (original emphasis). The court did not explain which Medicaid rules and regulations were involved or how they conflicted with the rebase program.

The court cited as authority *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1040-41 (8th Cir. 2002) (citing cases to showthat "the Supreme Court has specifically held that, under the Supremacy Clause, federal Spending Clause legislation trumps conflicting state statutes or regulations"); *Pharm. Research & Mfr. v. Walsh*, 538 U.S. 644 (2003) (in which the Court reached the merits of a claim that the state's pharmaceutical rebate program was preempted), and *Pharm. Research and Mfrs. v. Thompson*, 362 F.3d 817, 819 n.3 (D.C. Cir. 2004) (noting that "[b]y addressing the merits of the parties' arguments without mention of any jurisdictional flaw, the remaining seven Justices [other than Scalia and Thomas] appear to have *sub silentio* found no flaw").

This case once again points up the importance of preemption claims under the Supremacy Clause as an alternative to causes of action under 42 U.S.C. section 1983, which has been under increasing attack. A preemption claim can provide a cause of action to attack a state law that conflicts with federal law when the federal statute does not create a "right" enforceable through section 1983. It can also be used to enforce federal regulations, which after *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001), are not independently enforceable through section 1983 or an implied right of action unless they merely interpret or flesh out a right or cause of action that the statute creates. Of course, the major flaw of a Supremacy Clause claim is that it does not allow for damages or attorneys' fees.

Medicaid Recipients Enforce the Medicaid Act

A federal district court in Pennsylvania has reaffirmed the right of Medicaid recipients to enforce the Medicaid Act. *Clark v. Richman*, 339 F.Supp. 2d 631 (M.D. Pa. 2004).

The case revolves around the Pennsylvania Medicaid program's coverage of dental services. A state has the option to provide dental services to its adult Medicaid population, 42 U.S.C. §1396d(a)(10), which Pennsylvania has exercised (making it, according to the district court, one of eight states to do so). For children under the age of 21 who are covered under the state Medicaid program, dental services are mandatory. Every state must provide early and periodic screening, diagnostic, and treatment (EPSDT) services to its Medicaid-eligible children, 42 U.S.C. §1396d(a)(4)(B), and EPSDT services are defined to include dental services. 42 U.S.C. §1396d(r)(3). Thus, all Pennsylvania residents eligible for Medicaid are eligible for coverage of dental services.

Plaintiffs, two subclasses of Medicaid eligible adults and children, alleged they were not receiving dental services primarily because the state's outdated and insufficient provider reimbursement rates were not ensuring a sufficient number of dental providers. Plaintiffs claimed that the state's actions violated 42 U.S.C. §§1396a(a)(8) (the "reasonable promptness" provision); 1396a(a)(10); 1396a(a)(30) (the "equal access" provision); and 1396a(a)(43) (requiring states to inform eligible individuals of EPSDT services and provide or arrange for provision of them).

On the basis of the Third Circuit Court of Appeal's decision in *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180 (3rd Cir. May 11, 2004), the district court agreed that 42 U.S.C. §§1396a(a)(8) and (10) do set out enforceable rights. But the court ultimately rejected plaintiffs' contention that their failure to receive dental services gave rise to claims based on these provisions. The court concluded that 42 U.S.C. §§1396a(a)(8) and (10) do not require states to directly provide services to its Medicaid population. A state could only be in violation of these provisions, according to the court, if the state was denying coverage of medically necessary dental services, which the plaintiffs were not alleging the state agency was doing. "...[T]he statutory sections require the provision of medical assistance, i.e., financial assistance, not direct services." The court granted partial summary judgment to the state agency on plaintiffs' claims under these provisions.

The court also found 42 U.S.C. §§1396a(a)(30) and (43) to provide an enforceable rights. "Section 1396a(a)(43) speaks in mandatory terms, as it mandates that a state plan 'must' provide for informing eligible individuals of EPSDT services, as well as mandates that a state plan 'must' provide or arrange for the provision of EPSDT services." In regard to the equal access provision, the court stated, "[S]ome circuit courts have either permitted MA recipients to allege claims under the equal access provision, or have only held that MA service providers, as opposed to MA recipients, cannot vindicate any rights under the equal access provision under §1983...[T]he equal access provision is couched in mandatory language which, when combined with the absence of an administrative mechanism to enforce that language, connotes an intent to permit private enforcement of the provision." The plaintiffs' equal access and EPSDT claims will proceed to trial.

Supremacy Clause/§1983 Upheld Unanimously In Provisional Vote Cases; DOJ Opposed

Now that the dust has settled a bit from the election, courts have unanimously upheld causes of action under 42 U.S.C. § 1983 and preemption/Supremacy Clause to enforce the right to a provisional ballot under the Help America Vote Act (HAVA).
The preemption holdings in particular should be useful to litigants seeking to enforce federal law. The unanimity of the § 1983 holdings-- unremarkable given the clear language of the statute--makes it all the more astonishing to find out that the federal government had intervened to argue that HAVA can only be enforced by the Justice Department and not private parties. The government's position does not bode well for its stance toward future § 1983 cases involving other statutes.

HAVA provides, *inter alia*, that "if an individual declares that such individual is a registered voter" …but the name of the individual does not appear on the official list …such individual shall be permitted to cast a provisional ballot as follows." 42 U.S.C. § 15482(a). The statute contains detailed provisions implementing this right, including a requirement that "information on the *right of an individual* to cast a provisional ballot…be posted at polling places." *Id*. § 15482(b)(2)(E) (emphasis added).

Not surprisingly, courts have found that HAVA focuses on individuals and includes "rights-creating language," as required by *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), and thus is enforceable under § 1983. The Sixth Circuit, *Sandusky Co. Democratic Party v. Blackwell*, CF.3d C, 2004 WL 2384445 (6th Cir. Oct. 26, 2004), affirmed the § 1983 district court holding that we previously reported (while reversing on the merits). At least four other district courts have upheld HAVA's enforceability under § 1983. *See Lucas Co. Democratic Party v. Blackwell*, CF.Supp.2dC, 2004 WL 2382297 (N.D. Ohio Oct. 21, 2004); *Florida Democratic Party v. Hood*, CF.Supp.2dC, 2004 WL 2414419 (N.D. Flor. Oct. 21, 2004); *Bay Co. Democratic Party v. Land*, CF.Supp.2dC, 2004 WL 2345560 (E.D. Mich. Oct. 19, 2004);*ACLU v. Kiffmeyer*, 2004 WL 2428690 (D. Minn. Oct. 28, 2004).

The Sixth Circuit in *Sandusky* did not address the lower court's holding that HAVA is also enforceable through a preemption claim under the Supremacy Clause. However, three other courts have addressed the issue in some fashion. The best discussion is found in *League of Women Voters v. Blackwell*, CF.Supp.2dC, 2004 WL 2359988 (N.D. Ohio Oct. 20, 2004). After discussing the Supreme Court cases that uphold federal jurisdiction over preemption claims without addressing the cause of action, the court stated:

> "The best explanation of Ex Parte Young and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws." *Burgio and Campofelice v. NYS Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir.1997) (quoting Wright, Miller, and Cooper, Federal Practice and Procedure: Jurisdiction 2d '' 3566 (1984)); *see also* Fallon, Meltzer, & Shapiro, Hart & Wechsler's The Federal Courts & The Federal System 903 (5th ed. 2003) ("[T]he rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision ... is well-established.").

> Because plaintiffs' claim is that defendant's actions in his official duties violate a federal law which has preemptive effect, the Supremacy Clause provides the cause of action and federal jurisdiction.

The court also found that "'in suits against state officials for declaratory and injunctive relief, a plaintiff may invoke the jurisdiction of the federal courts by asserting a claim of preemption, even absent an explicit statutory cause of action.'" *League of Women Voters*, 2004 WL 2359988 at *4 (quoting Local Union No. 12004 v. Mass., 377 F.3d 64 (1st Cir. 2004)).

In addition, the court in *Bay County Democratic Party, supra*, proceeded to the merits of the preemption/Supremacy Clause claim without discussing the existence of the cause of action, and the court in *ACLU, supra*, upheld jurisdiction over the Supremacy Clause claim in a single sentence with no discussion.

These Supremacy Clause/preemption holdings clearly establish that preemption is a viable alternative means of enforcing federal statutes even if there is no "right" enforceable under § 1983. However, so far courts have generally enforced preemption claims only where a state or local law, regulation or policy of general application is being challenged, not when a discrete action by governmental officials is alleged to violate federal law. Preemption claims also are not available to seek damages or attorneys' fees.

Court Upholds Congressional Spending Clause Power To Protect Rights

The 11th Circuit, in a decision authored by Judge William Pryor, has ruled that Congress did not exceed its authority under the Spending Clause of the Constitution in enacting §3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Benning v. Georgia, ___F.3d___, 2004 WL 2749172 (11th Cir. Dec. 2, 2004).

This brings to 4-1 the count of circuit courts in favor of the constitutionality of §3 of RLUIPA. The court held that Congress's spending conditions need meet only a "minimal standard of rationality." The issue has important ramifications for seniors, the disabled, and others protected by anti-discrimination statutes, as the Spending Clause has increasingly become Congress's primary source of authority to protect individuals who receive scant protection under the Constitution itself.

Plaintiff, an inmate in the Georgia prison system, asserted that as a "Torah observant Jew" he was being prevented from fulfilling his religious duties, such as eating only kosher food, and wearing a yarmulke. Georgia moved to dismiss and argued that §3 of RLUIPA exceeds the authority of Congress under the Spending and Commerce Clauses, and violates the Tenth Amendment and the Establishment Clause. The United States intervened to defend the constitutionality of RLUIPA.

RLUIPA is Congress's latest action in a long-running feud with the Supreme Court over the protection given individuals whose religious exercise is burdened by state action. In Employment Div. v. Smith, 494 U.S. 872 (1990), the Court required only rational basis review of a neutral law of general applicability (criminalizing peyote) that had an incidental burden on religious exercise. In response, Congress enacted the Religious Freedom Restoration Act ("RFRA"), which required strict scrutiny of such laws. The Court then struck down RFRA, finding that Congress exceeded its powers under §5 of the Fourteenth Amendment because it expanded, rather than just enforced, the constitutional right to free exercise of religion that had just been defined in Smith. City of Boerne v. Flores, 521 U.S. 507 (1997). Congress responded this time by enacting RLUIPA, which reimposes the strict scrutiny standard on actions that burden the religious rights of institutionalized persons (in section 3, at issue here, 42 U.S.C. §2000cc-1), and on land use decisions (in section 2 of RLUIPA, 42 U.S.C. §2000cc(a)(1) and (b)). In both cases, RLUIPA applies, inter alia, to programs or activities that receive federal funds and to governmental actions that affect interstate commerce. That is, Congress sought to avoid the Boerne holding by grounding its authority in the Spending and Commerce Clauses, rather than in the Fourteenth Amendment.

This scenario has parallels for the rights of the elderly and disabled under the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"). The Supreme Court relied on Boerne in finding that Congress exceeded its Fourteenth Amendment powers when it made states liable under the ADEA and Title I of the ADA (discrimination in employment), because those statutes expand, rather than enforce, the rights of the elderly and disabled under the Equal Protection Clause. Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (ADEA); Board of Trustees v. Garrett, 531 U.S. 356, 363 (2001) (ADA). Although earlier this year the Court upheld Title II of the ADA (discrimination in public services and accommodations), it did so only as applied to the fundamental right of access to the courts.

Tennessee v. Lane, 124 S.Ct. 1978 (2004). Lower courts have relied on Lane to strike down Title II of the ADA as applied to state services and accommodations that do not involve fundamental rights.

Yet as with RFRA and RLUIPA, Congress has largely avoided the holdings of Kimel and Garrett, and the limited holding of Lane, by using its Spending Clause authority to impose the ADEA and §504 of the Rehabilitation Act (which largely parallels the ADA), as well as other anti-discrimination provisions, on state programs and activities that receive federal funds. 42 U.S.C. §§ 2000d-7. Thus, the scope of Congress's power under the Spending Clause is of keen interest to the elderly, disabled and other victims of discrimination.

The Eleventh Circuit had no problem finding that RLUIPA is a proper exercise of Congress's Spending Clause authority. Although "conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs," South Dakota v. Dole, 483 U.S. 203, 207 (1987), the Eleventh Circuit found the relationship between the conditions and the federal interest need only meet "a minimal standard of rationality." That standard was easily met, because protecting religious exercise of prisoners is a rational goal, and the United States "has a substantial interest in ensuring that state prisons that receive federal funds protect the federal civil rights of prisoners."

The court also rejected the state's argument that "the extensive conditions imposed by RLUIPA are not in proportion to the small amount of federal funds dedicated to state correctional systems." The court found "there is no standard of proportionality for spending legislation."

In addition to upholding RLUIPA under the Spending Clause, the Eleventh Circuit in Benning also concluded that the statute did not violate the Tenth Amendment by infringing on areas reserved to the states, nor did it violate the Establishment Clause.

Although the Benning decision did not cite the Supreme Court's holding earlier this year in Sabri v. United States, 124 S.Ct. 1941 (2004), Sabri also supports the extensiveness of Congress's Spending Clause authority. In Sabri, the Court held that a statute criminalizing bribery of officials of government agencies that receive federal funds did not require prosecutors to show a connection between the object of the bribery and the federal funds. The majority opinion, joined by the entire Court other than Justice Thomas, concluded that that statute was a constitutional exercise of Congress's Spending Clause authority because it was a "rational means" of securing Congress's objectives. Justice Thomas argued for a stricter standard than mere rationality.

Supporting Congress's authority under the Spending clause is especially important to groups like the elderly and the disabled who must primarily look to Congress, rather than the Constitution, for protection.