

## COURT DECISIONS FROM 2005

### Table of Contents

'Federalism' Justifies Vacating Consent Decree.....	3
Commerce Clause Issues Raised in Clean Water Act Certs.....	4
Cert. Granted in Dormant Commerce Clause, Taxpayer Standing Case.....	5
No Expert Fees under IDEA.....	5
9th Cir. Rejects 1983 Claim to Enforce Medicaid Methods and Procedures Provision.....	6
9th Cir. Rejects Another Sec. 1983 Medicaid Claim.....	8
Supreme Court Grants Cert in Federal Diversity Case.....	8
High Court Defers to Legislatures on Takings for “Public Use”.....	9
Supreme Court Upholds Broad Congressional Power in Marijuana Case.....	12
Religious Act Upheld; Radical Thomas Concurrence.....	15
No Standing if Third Party Breaks Causal Chain; Second Chance to Show Standing.....	16
Is the New Deal Under Attack?.....	17
NY Times: Lauren Saunders of NSCLC Quoted in Article on How Courts are Limiting Rights of Poor People to Use Legal System to Fight for Medicaid Benefits.....	18
TCA Creates Sect. 1983 Rights.....	18
Nuclear Option Fizzling on Launchpad.....	19
Supreme Court to Review Whether Bankruptcy Laws Can Abrogate States’ Immunity.....	21
Medicaid Act Enforceable by State as 3rd Party Beneficiary of Federal Contract.....	22
Supreme Court: ADEA Authorizes Disparate Impact Suits.....	23
Jackson v. Birmingham Board Is a Bit of a Throwback.....	25
Voting Rights Act Claim Against State Not Barred by Sovereign Immunity.....	27
No 1983 for FAA and AAIA.....	27
Garrett Back, Briefly; Everyone "Missed Something Big".....	28
5th Cir Upholds Preemption Claim Without 1983 "Rights".....	30
No State Waiver of Immunity Under RCRA or CERCLA.....	32

The Balance Between the Commerce Clause and the 14th Amendment in Protecting Individual Rights ..... 33  
Easterbrook on the Gonzaga “Oxymoron”; Roberts on Overturning Thiboutot ..... 36

## 'Federalism' Justifies Vacating Consent Decree

The Seventh Circuit, citing “considerations of public interest and federalism,” has all but ordered a district court to vacate a consent decree entered into in 1983 that prohibits the City of Chicago from considering political affiliation in hiring.

The decision in *Shakman v. City of Chicago*, No. 04-2105, ---F.3d---, 2005 WL 2713775 (7th Cir. Oct. 24, 2005) casts further doubt on the need for the pending Federal Consent Decree Fairness Act, which would seriously cripple the effectiveness of consent decrees. The legislation is sponsored by Tennessee Senator Lamar Alexander and grows out of Tennessee’s attempts to get out of several Medicaid consent decrees. But like the City of Chicago, Tennessee has been able to get all the relief it needs in the appellate courts.

This decision is the second appeal this year in the *Shakman* case; in January, the Seventh Circuit held that the City had to comply with the decree unless it was modified, but sent strong hints that it should be. Following that invitation, the City contended that the consent decree should be vacated because a 1987 Seventh Circuit decision – from an appeal by county officials who did not settle – held that the original voter plaintiffs did not have standing. The district court found that the City’s motion 15 years after that decision was untimely, and that the City’s agreement to the consent decree prevented it from attacking the judgment.

The Seventh Circuit found that the district court abused its discretion on both rulings by failing to take into account the “flexibility” that the Supreme Court has required when revisiting consent decrees in institutional reform litigation and litigation that involves “considerations of public interest and federalism.” The court observed: “A very important fact in this case is that the 1983 Consent Decree provides for the ongoing involvement of a federal district court in the hiring decisions of the City of Chicago.” Although the Seventh Circuit technically remanded the matter for the district court to reconsider, it made clear that “we do not believe that the district court’s denial of the City’s Rule 60(b) motion can be reconciled with this court’s decision in *O’Sullivan* or the decisions of the Supreme Court in *Rufo* and *Frew*.”

The decision was written by Judge Coffey and joined by Judges Ripple and Kanne, all three Reagan appointees.

## Commerce Clause Issues Raised in Clean Water Act Certs

The Supreme Court has agreed to review two cases under the Clean Water Act that raise both statutory and Commerce Clause issues. The constitutional issue in both cases, which were consolidated, is whether application of the Clean Water Act to the wetlands at issue was within Congress's authority under the Commerce Clause.

*U.S. v. Rapanos*, 376 F.3d 629 (6<sup>th</sup> Cir. 2004), *cert. granted* 2005 WL 2493858, 73 USLW 3466 (U.S. Oct 11, 2005) (NO. 04-1034) and *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 70 (6<sup>th</sup> Cir. 2004), *cert. granted* 2005 WL 2493859, 73 USLW 3632 (U.S. Oct 11, 2005) (NO. 04-1384).

In the *Carabell* case, the plaintiff was denied a permit to fill a wetland in northern Michigan for construction of a condominium complex. In the *Rapanos* case, the plaintiff was convicted of a criminal violation of the Clean Water Act for filling wetlands on his property without a permit. In both cases, the wetlands have only an intermittent, indirect runoff connection to navigable waters far from their property.

The cases may be decided on statutory grounds – whether the government's actions were within the scope of the Clean Water Act. On the constitutional issue, the cases turn in part on whether the wetlands have enough of a hydrological connection to navigable waters of the United States to bring them within the government's broad authority to regulate "channels" of interstate commerce. That issue might not have broad importance outside of environmental cases.

However, the Court might reach the United States' alternative argument that the Clean Water Act applications here were also within the government's power to regulate conduct that has a "substantial effect" on interstate commerce. The government contends that the government had a rational basis for concluding that discharges of pollutants (including fill) into wetlands that are adjacent to nonnavigable tributaries of traditional navigable waters have a substantial effect, in the aggregate, on the downstream navigable waters. The Court's endorsement or rejection of that argument – either the "rational basis" review or the broad reading of "substantial effect" – could have much broader implications for federal authority under the Commerce Clause.

## Cert. Granted in Dormant Commerce Clause, Taxpayer Standing Case

The Supreme Court has agreed to review a Sixth Circuit ruling that Ohio's investment tax credit impermissibly discriminates in favor of in-state investment and against out-of-state investment in violation of the dormant Commerce Clause.

*Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6<sup>th</sup> Cir. 2004), cert. granted 2005 WL 1452394, 73 USLW 3751 (U.S. Sept. 27, 2005)

The Court may not reach the merits, because it added to the grant of certiorari: "whether respondents have standing to challenge Ohio's investment tax credit." The respondents are state taxpayers. Standing was not raised in DaimlerChrysler's petition and was not address in either the district court or court of appeals decisions, neither of which contains any discussion of the plaintiffs' interest. The Court may be sending a signal for lower courts to crack down on taxpayer standing cases other than those based on the Establishment Clause or those alleging the "'direct dollars-and-cents injury' that our strict taxpayer-standing doctrine requires." *Elk Grove Unified School Dist. v. Newdow*, 124 S.Ct. 2301, 2312 n.8 (2004) (quoting *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 434 (1952)).

## No Expert Fees under IDEA

The D.C. Circuit has held that expert fees are not among the "reasonable attorneys' fees as part of the costs," 20 U.S.C. § 1415(i)(3)(B), awardable to a prevailing party under the Individuals with Disabilities in Employment Act.

The case is *Goldring v. District of Columbia*, --- F.3d ----, 2005 WL 1719586 (D.C. Cir. 2005).

## 9th Cir. Rejects 1983 Claim to Enforce Medicaid Methods and Procedures Provision

*Sanchez v. Johnson*, No. 04-15228, ---F.3d---, 2005 WL 1804195 (9th Cir. Aug. 2, 2005)

The Ninth Circuit has rejected a claim by developmentally disabled individuals and medical providers that the lower wages California pays to community-based providers compared to employees of state institutions resulted in unnecessary institutionalization. The court found that the Medicaid provision, 42 U.S.C. § 1396a(a)(30)(A), did not create rights enforceable under 42 U.S.C. section 1983. The court also rejected claims under the Americans with Disabilities Act and section 504 of the Rehabilitation Act, finding that the requested relief would result in the fundamental alteration of an already adequate program for deinstitutionalization.

The opinion contains some broad language about the “rare” cases in which section 1983 can be used to enforce a Spending Clause statute. But the opinion also distinguishes section 30(A) from other parts of the Medicaid Act in ways that may actually be helpful for section 1983 claims under other provisions.

### Legal/Factual Claims.

Section 30(A) provides:

A State plan for medical assistance--[must] provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area[.]

The plaintiffs claimed that the low wages paid to community based-providers resulted in high turnover, inexperienced staff, gaps in service provision, lengthy waits to receive services, and serious problems with the quality of services. (Note that the plaintiffs’ allegations are not discussed in the court’s opinion.)

### Section 1983 Ruling.

The court began by observing that the Supreme Court’s decision in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), established that the remedy announced in *Maine v. Thiboutot*, 448 U.S. 1 (1980) – which held that section 1983 may be used to enforce statutes as well as the Constitution – “was to be applied sparingly” to Spending Clause statutes. The court characterized *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498 (1990), which enforced a different Medicaid provision, as an “anomalous decision” that “[i]n hindsight ... was merely a rare case in which ... a statute ‘explicitly conferred specific monetary entitlements upon the plaintiffs ... [and] Congress left no doubt of its intent for private enforcement ...’” (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002)). The court also quoted Justice Stevens’ dissent in *Gonzaga*, which suggested that *Gonzaga* effectively overruled *Wilder* – implying that he was correct.

Despite this broad language, the court’s analysis of the specific Medicaid provision at issue will help advocates to distinguish this case from others involving different provisions:

[Section 30(A)] has an aggregate focus ....The statute speaks not of any individual’s right but of the State’s obligation to develop ‘methods and procedures’ for providing services generally.

Indeed, the only reference in §30(A) to recipients of Medicaid services is in the aggregate, as members of ‘the general population in the geographic area.’

Notably, the court focuses on the language of section 30(A) itself, not the general state plan language of the Medicaid Act, in finding an aggregate focus. Earlier in the opinion, the court mentions “an opaque item of legislative history” that makes state plan language irrelevant, 42 U.S.C. § 1320a-2, but concludes that the provision “does not disturb the Supreme Court’s reasoning in *Pennhurst*” or the general framework for analyzing section 1983 claims.

The court also noted that “§ 30(A) is concerned with a number of competing interests” – efficiency, economy, and quality of care – and the “tension between these statutory objectives” indicates that the provision is concerned with “overall methodology,” not individual rights, and requires balancing competing goals which “would involve making policy decisions for which this court has little expertise and even less authority.”

The court distinguished and did not disagree with the decision in *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004), which found that 42 U.S.C. §§ a(a)(8) and a(a)(10) create enforceable rights. Section 8 requires that medical assistance be provided “with reasonable promptness to all eligible individuals.” Section 10 contains the list of mandatory Medicaid services that the state “must ... provide ... to ... all individuals.” The *Sanchez* court observed that those two provisions “specifically focus on entitlements,” in contrast to section 30(A), which focuses on the methods and procedures for balancing incompatible goals.

Like section 30(A), section 8 and 10 are part of a list of required elements of Medicaid state plans:

Although 42 U.S.C. § 1396a(a) sets out a comprehensive list of requirements that a state plan must meet, it does not describe every requirement in the same language. Some requirements, such as those addressed in *Sabree*, focus on individual recipients, while others are concerned with the procedural administration of the Medicaid Act by the States and only refer to recipients, if at all, in the aggregate.

Thus, the court seemed not merely to distinguish *Sabree* but to agree with its holding. This fact should help temper the broad language at the beginning of the opinion.

### **ADA/504 Ruling**

The court also upheld the district court’s dismissal of the ADA and section 504 claims, which had been dismissed on three alternative grounds: the plaintiffs failed to show that increased wages would redress the alleged violation; the request for an additional \$1.4 billion in expenditures is not a “reasonable modification”; and the remedy would involve a fundamental alteration of an already acceptable plan for deinstitutionalization. The Ninth Circuit discussed only the third ground, finding that the record supported the district court’s holding.

## 9th Cir. Rejects Another Sec. 1983 Medicaid Claim

In a brief unsigned, unpublished memorandum, the Ninth Circuit has reversed a district court that had allowed Medicaid recipients to challenge California's reduction in the reimbursement rates paid to providers.

The case is *Clayworth v. Bonta*, No. 04-15498, 2005 WL 1805930 (9th Cir. Aug. 2, 2005) (reversing 295 F.Supp.2d 1110 (E.D. Cal. 2003)). The claim alleged that the reduction violated 42 U.S.C. § 1396a(a)(30) by adversely affecting quality of care and availability of doctors. The Ninth Circuit reversed the decision without oral argument: "The legal issue here has been resolved by *Sanchez v. Johnson*, 04-15228 \_\_ WL \_\_, (9th Cir.2005), filed this date, in which we held that neither Medicaid recipients nor providers have a private right to challenge California's compliance with Medicaid provision § 30(A) under 42 U.S.C. § 1983."

## Supreme Court Grants Cert in Federal Diversity Case

The Supreme Court has agreed to interpret the term "located" in a federal statute providing that national banking associations are citizens of the states in which they are located for purposes of federal diversity jurisdiction.

The Fourth Circuit, in a decision by Supreme Court hopeful (and Bush I appointee) Michael Lutig, held that a banking association is "located" in, and thus deemed to be a citizen of, every state in which the association maintains a branch. *Wachovia Bank v. Schmidt*, 388 F.3d 414 (4th Cir. 2004), cert. granted, No. 04-1186, --- S.Ct. ----, 2005 WL 555377, 73 USLW 3540 (U.S. Jun 13, 2005). Reagan appointee Robert Beezer of the 9<sup>th</sup> Circuit joined the *Wachovia* opinion, and Clinton nominee Robert King dissented. Three other courts of appeals held that banks have more limited citizenship.

The case could affect whether a wide range of consumer actions against banks are litigated in state or federal court. In the *Wachovia* case, the Fourth Circuit dismissed for lack of jurisdiction the bank's petition to compel arbitration of a complaint filed in state court alleging that the bank fraudulently induced the plaintiffs to engage in a risky tax-motivated investment scheme.

## High Court Defers to Legislatures on Takings for “Public Use”

*Kelo v. City of New London*, No. 04-108, --- S.Ct. ---, 2005 WL 1469529 (June 23, 2005)

The Supreme Court has upheld the City of New London’s plan to acquire private waterfront homes for private economic development, ruling that courts must defer to legislatures about whether a taking is for a “public use” within the meaning of the Fifth Amendment. The 5-4 decision was written by Justice Stevens and joined by the other three liberals and Justice Kennedy. Justice O’Connor wrote a dissent that was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Justice Thomas also wrote his own dissent.

The case is the second big defeat this Term for heightened protection of property rights. Unlike the commercial rent control case last month, however, in this case the property rights that lost out were largely those of low-income, heavily minority residents, whose homes or neighborhoods are deemed expendable for large private developments.

The decision caps a Term in which the Court has repeatedly endorsed deference to legislatures. Yet the fact that the decision was 5-4 with the conservatives in dissent shows that the battle for stricter controls on the authority of both state and federal legislatures may not be over if the composition of the Court changes.

### Majority Opinion

None of the justices disagreed with two “polar propositions” summarized by the majority. First, “the sovereign may not take the property of A for the sole purpose of transferring it to another private party B.” Second, the government “may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.” That is, the courts will defer when government takes property for its own use, or for ownership by a private party that allows public use – as with a railroad or other common carrier, or a stadium.

The question in this case was whether property may be taken for private economic development that has benefits for the public – i.e., an increased tax base, creation of jobs, or the aesthetic benefits of a revitalized area – but does not directly involve public use.

The majority answered a clear “yes.” It endorsed the Court’s earliest takings cases from the 19th century, which read the Fifth Amendment as requiring only a “public purpose,” determined by legislatures, not a literal public “use.” “Our earliest cases in particular embodied a strong theme of federalism, emphasizing the ‘great respect’ that we owe to state legislatures and state courts in discerning local public needs.”

The Court held that public benefit could not be a “mere pretext,” and indicated that a transfer from one single individual to another solely because the later would pay more taxes would be “unusual ... [and] would certainly raise a suspicion that a private purpose was afoot.” But in the instant case, New London was indisputably a “distressed municipality,” and the project involved “an integrated development plan.” Other hypothetical cases could be decided as they arise.

The Court squarely reaffirmed *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which had allowed the State of Hawaii to force 72 landowners, who owned nearly all of the nonpublic land in the state, to break up their land oligopoly and sell their houses to the renters. The Court also reaffirmed *Berman v. Parker*, 348 U.S. 26 (1954), which upheld the District of Columbia’s condemnation of a large

blighted area that also included a nonblighted department store as part of a large redevelopment project that included schools but also sales of land to private parties.

The majority did not cite or indicate its views on the notorious Michigan Supreme Court case of *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981), which upheld Detroit's decision to bulldoze an entire a working-class, immigrant community in order to give it to a General Motors assembly plant. (Justice O'Connor cited the case as a negative example.) The Michigan Court overruled that case last year under its own constitution. *County of Wayne v. Hathcock*, 471 Mich. 415, 684 N.W.2d 765 (2004). The *Kelo* decision, however, would probably make that taking permissible under the federal Constitution.

In short, the deferential standard of review adopted by the Court will make it quite difficult to challenge most government takings under the Public Use Clause.

**Justice Kennedy's Concurrence.** Justice Kennedy joined the majority opinion, but also wrote separately to emphasize that "meaningful rational basis review" might still invalidate some takings that, unlike in *Kelo*, were "intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits." He also did not foreclose the possibility of "a more stringent standard of review ... for a more narrowly drawn category of takings ...in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."

**Justice O'Connor's Dissent.** Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, wrote that the Court "abandons [a] long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable ...."

She did not dispute that government may at times take property for a public "purpose," not just a public "use." But she distinguished cases in which "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society --- in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth." Now, there is no constraint on government takings: "For who among us can say she already makes the most productive or attractive possible use of her property?"

**Justice Thomas's Dissent.** Justice Thomas indicated that he would eliminate the entire category of public purpose takings – overruling *Midkiff* and *Berman* – and would allow only takings for the government's own use or for acquisition by common carriers whose property may be used by the public. In *Berman*, "if the slums at issue were truly 'blighted,' then state nuisance law ... not the power of eminent domain, would provide the appropriate remedy."

He based his position on his understanding of the original meaning of the Public Use Clause, supported by his interpretation of early English common law and early state takings cases. He was unconcerned that his theory disregarded most of the U.S. Supreme Court's taking jurisprudence, since those cases did not begin until the late 19th Century.

Justice Thomas also questioned why courts should defer to legislatures' interpretation of "public use" but not to their view of whether a search of a home was reasonable. Courts closely scrutinize the search of a home but not "the infinitely more intrusive step of tearing down petitioners' homes."

Finally, he observed that the property taken for economic development is overwhelmingly owned or rented by minorities and low income individuals. "In cities across the country, urban renewal came to

be known as ‘Negro removal’” (citation omitted). The poor and minorities “are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect ‘discrete and insular minorities,’” this was the case.

### **Commentary.**

This is one of those troubling cases where it is difficult to square consistent legal principles with unjust results or rules that are impractical in a modern society. There is a lot of truth to Justice Thomas’s final observation. The majority did not really address his concerns, and the Court’s silence on the Poletown case is telling. Yet, the powerless in society are at the losing end of legislative decisions every day; there is nothing unique about this case.

Conversely, Justice O’Connor was unwilling to limit the takings power to 18th century uses, but once she opened the door to public purposes not tied to public uses, she had difficulty articulating a clear decision line.

Justice Thomas articulated a clear, bright line rule. But it would have outlawed not only 21st Century development projects – many of which do benefit the entire community, including the poor – but even 19th Century statutes governing grist mills and manufacturing plants.

For both progressives and conservatives, the case also poses a challenge to develop consistent rules about when deference to legislatures is appropriate. It is too easy to have a results-oriented approach that overrules legislatures when they do things that one doesn’t like and defers to them when they do. For progressives, swallowing the consequences of this case (or the medical marijuana case) may be necessary to upholding deference to legislatures that adopt rent control ordinances, *see Lingle v. Chevron*, No.04-163, --S.Ct.--, 2005 WL 1200710 (May 23, 2005), or those that enact accommodations for individuals with disabilities or environmental protections.

For conservatives, they will have to ponder the meaning of a case that has Justice Stevens, not Chief Justice Rehnquist, on the side of federalism.

## Supreme Court Upholds Broad Congressional Power in Marijuana Case

In a case with implications for congressional power in widely ranging areas, the Supreme Court held by a 6-3 vote that Congress has the power under the Commerce Clause to criminalize the noncommercial use of medical marijuana under the federal Controlled Substances Act (“CSA”).

The case is *Gonzales v. Raich*, No. 03-1454, ---S.Ct.---, 2005 WL 1321358 (June 6, 2005). For now, the majority firmly upheld the Commerce Clause jurisprudence that has, for the most part, prevailed since 1937. But the split among the conservatives indicates that the battle may not be over if the composition of the Court changes.

Justice Stevens wrote the majority opinion, in which Justice Kennedy joined the moderates, with Justice Scalia in concurrence. Justices O’Connor and Thomas and Chief Justice Rehnquist dissented. As the alignment of the justices generally showed, the Court viewed the case as having more to do with Congress’s power vis a vis the states than with control of drugs or marijuana. Although the federal government was on conservative side in this case and the “states’ rights” position was a liberal one, in most federalism cases the positions are reversed. The Court’s endorsement of broad federal power will be important – though perhaps not decisive – in ongoing challenges under the Endangered Species Act, the Americans with Disabilities Act, the Freedom of Access to Clinics Act, and the interplay between the CSA and Oregon’s Death with Dignity Act, among others.

### Majority Opinion

After the Court struck down the Violence Against Women Act and the Drug Free School Zones Act in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), respectively, some had feared a resurgence of the Court’s pre-1937 practice of reading Congress’s commerce powers narrowly. In *Raich*, however, the Court rejected a “myopic focus” on *Lopez* and *Morrison* outside of the “larger context of modern-era Commerce Clause jurisprudence.”

The Court found that noncommercial medical marijuana is indistinguishable from the wheat in *Wickard v. Filburn*, 317 U.S. 111 (1942), which upheld Congress’s authority to restrict home-grown wheat for personal consumption as part of a national scheme of controls on agricultural production. The Court had previously cast some doubt on *Wickard*, characterizing it as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” *Lopez*, 514 U.S. at 560. But in *Raich*, the Court held that *Wickard* “firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” The Court noted that, unlike in *Lopez* and *Morrison*, the plaintiffs challenged only a particular application of the CSA, not the entire statute. The Court refused “to excise individual applications of a concededly valid statutory scheme.”

The majority also firmly endorsed the deference to Congress that has prevailed, by and large, since the Court abandoned strict scrutiny of economic legislation in 1937. “We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding” (citations omitted). Nor was it relevant that the CSA lacked legislative findings about the specific impact of medical marijuana on the interstate market: “[W]e have never required Congress to make particularized findings in order to legislate.”

## Scalia's Concurrence

Justice Scalia wrote separately but did not directly attack the majority's reasoning, explaining that his approach is, "if not inconsistent with that of the Court, at least more nuanced." He emphasized the "expansive scope of Congress's authority" to facilitate or restrict interstate commerce, reaching even, when necessary, to "those intrastate activities that do not themselves substantially affect interstate commerce." He relied on the 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which began the modern approach to the Commerce Clause, and also listed with approval cases upholding regulation of racial discrimination in restaurants and hotels, wage and hour laws, surface coal mining, intrastate price-fixing, the activities of a local grain exchange, and intrastate transactions at a stockyard.

Scalia noted, however, that these broad extensions of the power to regulate interstate commerce must comply with the Necessary and Proper Clause and must be "appropriate" and "plainly adapted" to exercise of that power. He hinted that this might not be the case if a statute, unlike the CSA, violates state sovereignty.

## O'Connor's Dissent

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Thomas, dissented. She emphasized the need "to protect historic spheres of state sovereignty" and "the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country'" (citation omitted).

Perhaps the most striking aspect of her dissent, however, was the adversarial approach it took towards Congress. She criticized the majority for giving "Congress a perverse incentive to legislate broadly," for endorsing "evasive or overbroad legislative strategies," and for "allowing Congress to set the terms of the constitutional debate ... [and] to regulate intrastate activity without any check." She recognized that it was "plausible" that California's medical marijuana law could undercut the CSA's regulation of the interstate marijuana market. But she insisted that the Court should not defer to Congress's legislative findings "without any proof.... If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers."

The majority countered that the dissenters' approach "would impose a new and heightened burden on Congress ... that legislation must contain detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme."

## Thomas's Dissent

Justice Thomas repeated his previous position that the power to regulate commerce includes only trade and not "productive activities like manufacturing and agriculture.... In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.... If the activity is purely intrastate, then it may not be regulated under the Commerce Clause." The majority noted that under Thomas's approach, "Congress would be equally powerless to regulate, let alone prohibit, ... marijuana for *recreational* purposes."

## Implications

Despite the split decision, in some ways this was an easy case for the Court that may not say much about the scope of federal power in other contexts. Not only was the case almost directly on point with *Wickard*; the case also directly involved regulation of a product sold in interstate commerce. The

Court noted that, unlike the statutes struck down in *Lopez* and *Morrison*, “the activities regulated by the CSA are quintessentially economic. ‘Economics’ refers to ‘the production, distribution, and consumption of commodities.’”

However, when Congress acts to protect individual rights as under the ADA or the Civil Rights Act of 1964, it is not directly regulating commodities. The link to commerce gets even less direct when these laws are applied in noncommercial contexts, like government programs. Justice Scalia’s hint about statutes restricting state sovereignty may have been intended for just such cases. Similarly, the Endangered Species Act does not regulate commercial products or economic matters, and the link to the commerce that spurs the land use development that endangers the environment is not as direct as in *Raich* or *Wickard*.

Furthermore, the fact that three conservative justices were willing to strike down Congress’s ability to regulate medical marijuana is a warning sign to Congress that not all conservatives are alike. Packing the Supreme Court and the lower courts with judges who are hostile to federal power may endanger even conservative legislation in areas like drug use, child pornography laws, and land use decisions restricting religious activities.

As the Senate considers the nomination of California Supreme Court Justice Janice Rogers Brown to the D.C. Circuit, it may want to take that possibility into consideration. It is amazing timing that, two days before her nomination is scheduled for a vote, the Supreme Court has issued an opinion going to the heart of the 1937 “revolution” that Brown has criticized. Senators should think twice about whether they want to side with the dissenters from that revolution.

## Religious Act Upheld; Radical Thomas Concurrence

The Supreme Court has unanimously rejected a facial Establishment Clause challenge to section 3 of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc-1(a)(1)-(2), which applies to individuals in institutions.

Justice Thomas joined the opinion of the Court, but wrote separately to express his view that the Establishment Clause does not apply to states and that RLUIPA likely exceeds Congress’s power under the Spending and Commerce Clauses, positions with quite radical implications.

RLUIPA prohibits governments from imposing a substantial burden on religion unless the burden furthers a compelling governmental interest by the least restrictive means. It applies largely in prisons, but also in other types of government run or funded institutions like nursing homes or other facilities “for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped.” Justice Ginsburg’s decision for the unanimous Court noted the enormous control over institutionalized persons, and found that RLUIPA is consistent with the Establishment Clause because it “alleviates exceptional government-created burdens on private religious exercise.” She also noted that, notwithstanding the strict scrutiny standard, Congress expected courts to accord due deference to the security and safety needs of jail administrators.

Justice Thomas agreed that RLUIPA was constitutional “under our modern Establishment Clause case law,” but reiterated his belief that the Establishment Clause is not incorporated into the Fourteenth Amendment and “‘is best understood as a federalism provision’ that ‘protects state establishments from federal interference.’” That is, states can establish religion and Congress cannot preclude them from doing so.

Thomas also commented that RLUIPA “may well exceed Congress’ authority under either the Spending Clause or the Commerce Clause.” He cited his concurrence in last year’s decision in *Sabri v. United States*, 541 U.S. 600 (2004), in which he insisted that Spending Clause legislation must be reviewed under a higher standard than mere rationality to ensure that there is an obvious, direct condition between spending conditions and the spending itself. Such an approach could doom not only RLUIPA but also other measures that Congress has adopted to prohibit recipients of federal spending from discriminating against the elderly, disabled and other groups, as well as possibly rights under the Nursing Home Reform Act.

Thomas also quoted from his concurrence in *United States v. Lopez*, 514 U.S. 549, 587 (1995), where he indicated his view that the power to regulate commerce extends only to trade, not manufacturing or other commercial ventures. Again, that position has repercussions far beyond protections for religious practice. His approach would likely doom the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the sick leave portions of the Family and Medical Leave Act, the Freedom of Access to Clinics Act, as well as minimum wage and maximum hour laws and labor and environmental laws.

Indeed, Thomas’s restrictive views of Congress’s Commerce Clause and Spending Clause authority would leave Congress with virtually no ability to enact legislation to protect individuals. Because of restrictive interpretations of the Fourteenth Amendment, both in the 19th Century and under the Rehnquist Court, it is only because of expansive views of the Commerce Clause and Spending Clause that Congress has any ability to pass legislation protecting individual rights.

## No Standing if Third Party Breaks Causal Chain; Second Chance to Show Standing

The Fourth Circuit has held that a gun-show promoter and a gun-show exhibitor do not have standing to challenge a county law that denies public funding to venues owned by third parties that display and sell guns.

The Fourth Circuit has held that a gun-show promoter and a gun-show exhibitor do not have standing to challenge a county law that denies public funding to venues owned by third parties that display and sell guns. [\*Frank Krasner Ent., Ltd. v. Montgomery Co., MD\*, 401 F.3d 230 \(4th Cir. 2005\)](#). The county law led the owner of the venue to stop leasing its property for the gun show. The court held that the plaintiffs had failed the causation and redressability prongs of Article III standing because an intermediary not before the court “stands directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain.” The court observed that it was unaware of “a single case granting standing to a plaintiff challenging a government’s decision not to subsidize a third party, not before the court, with whom the plaintiff does business.”

A split D.C. Circuit has given a second chance to a plaintiff association to show that it has at least one member who would suffer direct injury from an FCC rule that would enable broadcasters to limit redistribution of digital television content. [\*American Library Ass’n v. Federal Communications Comm’n\*, No. 04-1037, --- F.3d ----, 2005 WL 588994 \(D.C. Cir. Mar 15, 2005\)](#). The majority opinion, written by Carter appointee Edwards and joined by Clinton appointee Rogers, found that plaintiff reasonably believed its standing was self-evident and should be allowed to supplement the record. The dissent by Reagan appointee Sentelle criticized the court for detailing a “road map” showing plaintiff how to “create standing where none is present on the record before us.”

## Is the New Deal Under Attack?

The American Constitution Society's blog this week has a good summary of commentary on conservative attempts to restore a "Constitution-in-Exile."

The term was first coined in 1995 by Federal Appeals Court Judge (and President Reagan's rejected Supreme Court nominee) Douglas Ginsburg to describe a conservative reading of the Constitution banished in the years after the Court reversed course in the 1930s and began upholding New Deal legislation. Judge Ginsburg lamented:

"So for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty-even if perhaps not in their own lifetimes."

The ACS blog discusses New Republic Legal Affairs Editor Jeffrey Rosen's pre-election warning that, instead of revisiting *Roe v. Wade*, a second Bush administration is more likely to focus on judges who will reinvigorate doctrines that "were largely abandoned in the 1930s to allow the federal government broad discretion to regulate health, safety, the environment, and the workplace."

Along similar lines, a piece on Salon.com by Sidney Blumenthal sees the Administration's Social Security proposals as part and parcel of an overall plan to undermine the New Deal. He argues that, in addition to packing the court with ultra-conservative judges committed to the Constitution-in-Exile, "now Bush has launched an assault on the social contract in earnest, seeking to blast away at its cornerstone, Social Security, which disburses pensions to the elderly and payments to the disabled."

["Constitution-in-Exile"](#)

[Salon.com's Article on Social Security Reform](#)

## NY Times: Lauren Saunders of NSCLC Quoted in Article on How Courts are Limiting Rights of Poor People to Use Legal System to Fight for Medicaid Benefits

NY Times: Lauren Saunders of NSCLC Quoted in Article on How Courts are Limiting Rights of Poor People to Use Legal System to Fight for Medicaid Benefits

The article quotes Lauren Saunders, Director of NSCLC's Herbert Semmel Federal Rights Project. [Read the article on the NY Timessite.](#)

## TCA Creates Sect. 1983 Rights

The Southern District of New York has found that two provisions of the Telecommunications Act create rights enforceable by telecom providers under 42 U.S.C. § 1983.

*Nextg Networks v. City of New York*, No. 03Civ.9672(RMB), 2004 WL 2884308 (S.D.N.Y. Dec. 10, 2004). The decision contains a good summary of the conflicting caselaw on the issue, which may be useful for litigants looking for other statutes that courts in their circuits have enforced, and also has helpful *Gonzaga* analysis.

The first provision at issue, 47 U.S.C. § 253(a), provides that “No State or local statute or regulation ... may prohibit ... *any entity* to provide ... telecommunication services.” The court added the emphasis to “any entity” to show that this was rights-creating language phrased in terms of the person benefited as required by *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). The court also enforced the provision that “State or local government” may “require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis ....” 47 U.S. C. § 253(c). This provision also satisfied *Gonzaga* because it was worded in terms of an identifiable class of beneficiaries, was concerned with individual entities as opposed to institutional policy or practice, and lacked any federal administrative review mechanism.

## Nuclear Option Fizzling on Launchpad

As Congress left Washington for its President's Day week-long recess, Senate Majority Leader Bill Frist appeared not to have corralled enough Republican votes to carry out his often repeated threat to use a parliamentary power-play called the "nuclear option" to extinguish Democrats' filibusters of judicial nominations.

The "nuclear option" covers a variety of stratagems to use a simple 51-49 majority vote to force a floor up-or-down vote on a nominee, rather than the 60 votes prescribed by Senate Rule 22 to end floor debate, or the 67 votes required to change the rules themselves.

Since netting four new Republicans in the November elections, Frist has frequently insisted he had the votes to prevail if he chose to go this route. The White House signaled a similar conclusion, when on February 11 the President resubmitted the names of seven appellate nominees who had been blocked in the 108th Congress by Democratic filibusters. But so far Frist appears unable to keep these seven, and other nominees who provoke united Democratic opposition, from encountering the same fate in the 109th.

On February 9, Frist told the *Washington Times* that he was "confident" he had his 51 votes, but then fudged that he "can't say that with certainty because I don't know exactly what it will be..." On February 16, *CQ Online* reported that Senators Olympia Snowe and Susan Collins of Maine, Lincoln Chafee of Rhode Island, John McCain of Arizona, Gordon Smith of Oregon, John Warner of Virginia, Chuck Hagel of Nebraska, Pete Domenici of New Mexico, and George Voinovich of Ohio remain opposed or uncommitted. Others, such as John Sununu of New Hampshire, Ted Stevens of Alaska, and most important, Senate Judiciary Committee Chairman Arlen Specter of Pennsylvania, have at other times been mentioned as unwilling to give Frist their support, at least for the time being. Soon after Frist's *Times* interview was published, his deputy, GOP Conference Chair Rick Santorum of Pennsylvania, lowered expectations by indicating that judicial nominations would probably not be scheduled for floor action until later in the Spring.

Conservative pundits reacted quickly. On February 22, *National Review Online* columnist Byron York suggested that the Republican leadership's strategy was to goad the Democrats into "strident" obstructionism in hopes of persuading wavering Republicans to unite behind the President's slate.

Former Reagan Justice Department official Bruce Fein was more pessimistic and less charitable--concluding in a February 22 *Washington Times* op. ed. that "President George W. Bush's judicial agenda is sinking." Fein pinned the blame on "about 10 Republicans [who] are loath to risk the threatened venom of their Democrat colleagues," and on the President himself for refusing to "expend political capital to crush Democratic filibustering." Later that day, in an interview with the *Washington Post* editorial board reported in the next day's *Post*, Senator Specter delivered what would appear to be the coup de grace. For two months Specter had prostrated himself before right-wing pressure groups and colleagues to save his Judiciary Committee chairmanship; but now he felt emboldened to proclaim: "If we go to the nuclear option... the Senate will be in turmoil and the Judiciary Committee will be hell."

Less widely reported but perhaps of some interest to the lawyers in this audience was a related development this week--the surfacing of liberal evaluations of a January 2005 *Harvard Journal of Law & Public Policy* article defending nuclear option strategies to end filibusters. Co-authored by Martin Gold, recently floor manager for Frist and earlier for former Majority Leader Howard Baker, this piece was included in notebooks provided by Frist to Republican Senators as 65 footnoted pages of scholarly

reassurance that precedent exists for pushing aside governing Senate supermajority requirements. But on examination, Gold's article turned out to prove just the opposite: every pertinent Senate rule change on floor procedures has been accomplished within and in accordance with the rules prescribing procedures for amending the rules--not by some extralegal power-play akin to the nuclear option. Gold and his co-author expressly acknowledge that "Each time the Senate rules have been amended, the body has followed the rules-change procedures set forth in the rules themselves."

On February 22, People for the American Way posted an excellent in depth critique of the Gold analysis. *Also see the original article from Martin Gold and Dimple Gupta: [The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster](#).*

Of course, the manifest weakness of the Gold-Gupta defense may or may not itself bear responsibility for the caution of independent-thinking Republican Senators. However that may be, the nuclear option strategy is not now playing the role hard-line Republicans envisioned for it--namely, to free White House lawyers to recommend fire-breathing conservative Supreme Court candidates to President Bush unconstrained by the threat of a possible Senate filibuster. By the same token, conservative activists can be counted on to intensify pressure on all Republicans, and moderate Democrats as well. Attitudes and alignments on this issue are endemically fluid, and could shift back in Frist's favor at any point.

## Supreme Court to Review Whether Bankruptcy Laws Can Abrogate States' Immunity

The Supreme Court has agreed to decide the issue it sidestepped last Term: whether Congress has authority under the Bankruptcy Clause of Article I of the Constitution to abrogate states' sovereign immunity.

*Central Virginia Community College v. Katz*, No. 04-885, --- S.Ct. ----, 2005 WL 742622 (Apr. 4, 2004) (reviewing *In re Wallace's Bookstore, Inc.*, No. 03-6054, 106 Fed.Appx. 341, 2004 WL 1763229 (6th Cir. Aug 04, 2004)). In *Tennessee Student Assistance Corp. v. Hood*, 124 S. Ct. 1905 (2004), the Court decided that bankruptcy proceedings are *in rem* proceedings over the estate of the bankrupt individual, not *in personam* actions against the creditors, and thus even when assets held by states are at stake, the action is not a "suit" against a state that violates a state's sovereign immunity.

*Katz*, however, involves a situation explicitly reserved in *Hood*: "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference." *Hood*, 120 S.Ct. at 1914. An adversary proceeding is not *in rem* and thus the sovereign immunity issue cannot be avoided.

The bankruptcy trustee faces a steep challenge, as the Supreme Court has held repeatedly since *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that Article I of the Constitution does not give Congress power to abrogate states' sovereign immunity.

## Medicaid Act Enforceable by State as 3rd Party Beneficiary of Federal Contract

A Massachusetts district court has held that there is no implied right of action allowing a state to enforce the Medicaid Best Prices Statute, 42 U.S.C. § 1396r-8, against drug manufacturers who reported false prices to the federal government and thus underpaid rebates due to the state.

However, the state may enforce the statute indirectly as a third-party beneficiary of the contract between the federal government and the drug companies. *Massachusetts v. Mylan Laboratories*, 357 F.Supp.2d 314 (2005). The decision may not, however, be especially helpful to individuals seeking to enforce contracts with the federal government.

**No Implied Right of Action.** The Best Prices Statute allows the federal government to enter into agreements with drug manufacturers on behalf of itself “and all States.” 42 U.S.C. § 1396r-8(a)(1). Analyzing the statute under *Alexander v. Sandoval*, 523 U.S. 275 (2001), the court found that Massachusetts did not have an implied right of action under the statute. Although the statute was clearly enacted for the states’ especial benefit, there was no indication that Congress intended to create a remedy for states. The only remedies expressly provided are available to the federal government, suggesting that Congress intended to preclude others.

**Third Party Beneficiary Contract Claim.** Nevertheless, the state could bring a claim as a third party beneficiary of the contract that the statute calls for between the federal government and drug companies. The court balanced the tension between (1) the fact that Congress used language clearly making states third party beneficiaries under common law principles, and (2) the holdings of several courts that plaintiffs should not be permitted to bring contract law claims as an indirect way of enforcing a statute that they cannot enforce directly. The court reconciled these arguments in a single rule that “a beneficiary to a federal contract has the right to enforce an agreement imposing duties on a person contracting with the government so long as this is consistent with the statutory scheme, and not an end-run on it.” 357 F.Supp.2d at 328.

Although the statute’s silence as to state contract remedies could read as deliberate, the court ultimately relied on the contract’s language that it should be construed “in a manner which ‘best effectuates’ the statutory scheme. Permitting the states to sue as third-party intended beneficiary would advance congressional objectives of reducing Medicaid drug costs.” *Id.* at 329. The court’s ruling, however, may be of limited use to individuals seeking to enforce federal contracts.

The statutory scheme “involves close cooperation between the federal government and the state, each of which foots half the bill for Medicaid. This relationship differentiates those cases which decline to find third-party beneficiary status in private individuals because the federal government was deemed the sole enforcer of the laws or there were other remedies provided for the beneficiaries.” *Id.*

## Supreme Court: ADEA Authorizes Disparate Impact Suits

A majority of the U.S. Supreme Court has held that the Age Discrimination in Employment Act (ADEA) authorizes recovery based on disparate impact. *Smith v. City of Jackson*, \_\_\_ U.S. \_\_\_, 2005 WL 711605 (March 30, 2005).

But obtaining ultimate recovery under a disparate impact theory will be much more difficult under the ADEA than it is for discrimination on the basis of race, gender, religion or national origin under Title VII of the Civil Rights Act of 1964. Indeed, an otherwise divided Court unanimously affirmed dismissal of the complaint in the case before it.

The plurality opinion of Justice Stevens notes that the prohibitory language of §4(a)(2) of the ADEA (29 U.S.C. §623(a)(2)), is identical to language in Title VII, except referring to “age” instead of “race, color, religion, sex or national origin.” That language has long been interpreted to allow disparate impact recoveries under Title VII on the theory that Congress wanted to affect the “consequences of employment practices, not simply the motivation.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). The plurality opinion then concludes that since the language is the same in both statutes and the statutes have similar purposes, “Congress intended ... the same meaning in both statutes.” Hence, *Griggs* is an important precedent for construing the ADEA. While *Griggs* relied on the purposes of Title VII and its interpretation by the Equal Employment Opportunity Commission (EEOC), the Court also analyzed the statutory language, observing it “focuses on the *effects* of the action on the employee, rather than the motivation for the action of the employer.”

While the Court finds that disparate impact recovery is available under the ADEA, it also notes that the ADEA scope of liability is narrower than under Title VII. The ADEA, unlike Title VII, permits an “otherwise prohibited” action if “based on reasonable factors other than age.” (RFOA). This “reasonable factors” standard is much looser than the “business necessity” standard of Title VII. Another major difference results from *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), which significantly narrowed employer liability for disparate impact by holding that a generalized policy leading to disparate impact is not enough. Instead, plaintiff must isolate and identify the “specific employment practices that are allegedly responsible for any observed statistical disparities.” *Wards Cove* was widely seen as inconsistent with the purpose of Title VII. Congress took corrective action in the Civil Rights Act of 1991, but only with respect to Title VII and not the ADEA. Hence, *Wards Cove* is still the law for ADEA cases, although not for Title VII.

Plaintiffs in this case, police officers in Jackson, Mississippi, complained that the result of the city’s salary plan was to provide lower percentage salary increases for officers over age 40 than for younger officers. Although the lower courts had assumed that plaintiffs would be entitled to relief if they were allowed to proceed on a disparate impact theory, the Supreme Court affirmed the dismissal of their complaints, both because they failed to identify the relevant practice (*Wards Cove*) and because there was an RFOA. The reasonable factor was the city’s need to raise the salary of junior officers to make the positions competitive with other cities in the region.

Justice Scalia concurred in the opinion of Justice Stevens, except that he would have based the holding as to the availability of disparate impact relief on deference to the views of the EEOC in accord with his long-standing interpretation of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Justice O’Connor, joined by Justices Kennedy and Thomas, concurred in the judgment, but dissented from the Court’s conclusion as to the availability of relief under a disparate impact theory. She relied heavily on the legislative history, particularly the Wirtz Report which was mandated by the Civil

Rights Act of 1964, to conclude that the ADEA was restricted to “arbitrary” discrimination based on age and also on the “genuine relationship between age and ability to perform a job.”

*Smith* leaves many questions unanswered for older workers. What is clear is that there will be more litigation, particularly around what constitutes a legitimate RFOA. For example, if an employer faced with a need to cut costs decides to cut higher paid workers in a particular job category and retain those with lower wages, would the need to cut costs be an RFOA? Stay tuned.

## Jackson v. Birmingham Board Is a Bit of a Throwback

The United States Supreme Court has ruled that it is unlawful discrimination, in violation of Title IX of the Educational Amendments of 1972, 20 U.S. C. §1681(a), for a public high school to punish a male coach for complaining that the school's athletic program discriminated on the basis of sex against the girl basketball team he coached.

*Jackson v. Birmingham Board of Education*, 2005 WL 701076 (Mar. 29, 2005).

The Court's opinion addresses several significant legal issues related to access to federal courts, but the case is remarkable in great part because Title IX, in authorizing a private cause of action against discrimination "on the basis of sex...under any education program...receiving Federal financial assistance," is silent about retaliation. Both the District Court and the Eleventh Circuit Court of Appeals had ruled against the plaintiff/coach on that ground. Coach Roderick Jackson began complaining in December, 2000, that the girls' team was not receiving equal funding or equal access to athletic equipment and facilities, and that this hampered him in his work. Rather than address Jackson's complaints, school officials began giving him negative evaluations, then removed him as the girls' basketball coach in May, 2001. He remained employed as a teacher.

Jackson filed suit, asserting that the school board's actions constituted unlawful retaliation against him, in violation of Title IX. After losing before the District Court and then at the Eleventh Circuit Court of Appeals, Jackson sought certiorari. The writ was granted because of an existing split between the circuits as to whether Title IX's private right of action encompasses claims of retaliation in response to complaints about sex discrimination.

Writing for the majority on behalf of herself and Justices Stevens, Souter, Ginsburg, and Breyer, Justice O'Connor wrote that, "Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private right of action." This conclusion was based on the propositions that: (1) prior case law, i.e., *Cannon v. University of Chicago*, 441 U.S. 667 (1979), has already made clear that Title IX implies a private right of action to enforce its prohibition against intentional sex discrimination; (2) Congress gave Title IX a "broad reach"; (3) "discrimination" is a broad term covering a wide range of intentional unequal treatment; (4) "retaliation is, by definition, an intentional act;" and (5) "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." The Court acknowledged that §704 of Title VII of the Civil Rights Act of 1964 expressly prohibits retaliation, but did not view Title IX's lack of similar anti-retaliation language as indicating congressional intent to shield those who retaliate from liability under Title IX. Title VII is a "vastly different" statute from Title IX. In particular, "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions....By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute." Thus, "Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." In the course of its opinion, the Court touched on several issues affecting access to federal courts. These include:

**Implied right of action** - Decisions in recent years have weakened this once robust, apparently essential, doctrine to the point of near morbidity. Thus the majority's reliance on the doctrine as declared in the 1972 *Cannon* decision is remarkable, perhaps even heartening. This is particularly so in light of the conclusion that the broad language of Title IX bestows a private right of action even upon such an "indirect victim" of sex discrimination as Coach Jackson. If nothing else, the Court's attempt to interpret

the statute with an eye toward what is necessary to carry out the purpose of the legislation (e.g., “Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished.”), rather than by insisting that Congress must have foreseen the issue and declared expressly that Coach Jackson has a right to enforce a claim of retaliation, supplies a touch of nostalgia.

**The sweep of *Alexander v. Sandoval*** - The Court rejected the Birmingham, Alabama school board’s contention that *Alexander v. Sandoval*, 532 U.S. 275 (2001), another case which arose in Alabama in the days of Attorney General William Pryor, compelled a conclusion that Title IX’s private right of action does not encompass retaliation. The Court explained that its refusal in *Sandoval* to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964 was based merely on its conclusion that the statute itself did not prevent such conduct, so the disparate impact regulation was beyond the Department of Justice’s enforcement authority under that statute. In the instant case, the Court emphasized, it was relying not on a regulation but on the statute itself as establishing the right of action.

**Notice requirements for Spending Clause legislation** - Also noteworthy is the ease with which the Court cast aside the board’s reliance on the rather recent case law principle that as to legislation enacted by Congress under its spending power, “private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue.” In this instance, the Court responded, the requirement is met because, “Funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX, since we decided *Cannon*.”

**What does all this mean?** - It would be naive to assume that this case bespeaks the beginning of a change of direction in federal rights issue. In particular, it must be understood and remembered that the dissent by Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, contests every point in the majority decision. Thus the case may stand primarily for the already known truths that Justice O’Connor is quite sensitive to the need for effective enforcement of prohibitions against gender discrimination, and that with the present makeup of the Court, the swing voters, Justices O’Connor and Kennedy, continue to play a crucial balancing role.

## Voting Rights Act Claim Against State Not Barred by Sovereign Immunity

A district court has held that Congress validly abrogated states' sovereign immunity in the Voting Rights Act. *Reaves v. U.S. Dep't of Justice*, ---F.Supp.2d---, 2005 WL 237770 (D.D.C. Feb. 1, 2005).

In a short discussion, the court relied on Supreme Court VRA decisions from the 1960s and 1970s as well as the Court's more recent sovereign immunity cases in other contexts. The case involved a challenge to the decision of the South Carolina Democratic party to void a June 8, 2004 primary election and to hold a subsequent special election—for which the Justice Department granted pre-clearance—and the state's decision to change some of the polling places without seeking pre-clearance.

The court also dismissed the federal defendants on the grounds that under settled law pre-clearance decisions are unreviewable, and there was no Article III case and controversy regarding the polling places because only the state, not the federal government, could remedy the injury.

## No 1983 for FAA and AAIA

A district court has found that bankruptcy debtor Jet 1 Center, Inc. had no rights enforceable through 42 U.S.C. § 1983 under the Federal Aviation Act, 49 U.S.C. § 40103(e), or the Airports and Airways Improvement Act, 49 U.S.C. § 47107(a)(4).

*In re Jet 1 Center, Inc.*, --- B.R. ----, 2005 WL 419680 (M.D.Fla. Feb 15, 2005). The court noted the “especially demanding” test for finding a right in Spending Clause legislation, but largely relied on the virtually unanimous caselaw on the private enforceability of the FAA and AAIA, without discussing the statutory language.

## Garrett Back, Briefly; Everyone "Missed Something Big"

In an amazing opinion that should be required reading for a number of reasons, the district court on remand from *Garrett v. Board of Trustees*, 531 U.S. 356 (2001), has concluded that the Supreme Court appeal was a “horrible waste of time.”

The district court and everyone else along the way “missed something big”: the defendant “received a superabundance of federal dollars” to which it, like the rest of America, was “fatally addicted,” and thus the University admittedly waived its sovereign immunity under section 504 of the Rehabilitation Act. *Garrett v. Board of Trustees*, ---F.Supp.2d---, 2005 WL 281226 (N.D. Ala. Jan. 13, 2005). The Supreme Court’s dismissal of the claims under the Americans with Disabilities Act was therefore irrelevant, as the 504 claims were identical.

Nevertheless, Garrett’s resurrection was short-lived, as the court granted summary judgment against her on the facts, which she had “overstated.” The legal issues in the opinion are less interesting than the court’s ruminations on the course of the litigation and the judge’s own personal struggles with cancer.

### New Version of the Facts

The “story” of Garrett is that she was demoted to a lower-paying, less-prestigious position because she took time off work to have chemotherapy for her breast cancer. The district court has now revised those facts. The court found it was undisputed that the defendant responded “favorably to every request for accommodation, including a provision for sick leave.” When she indicated that she was fatigued, the University suggested but did not insist that she transfer to a less stressful position without any reduction in pay. Instead, it was purely Garrett’s idea that she transfer to a different, lower-paying position.

### Legal Issues

On the legal issues, the court concluded that (1) Garrett was not a “qualified person with a disability,” (2) the University’s agreement to her transfer request was not an adverse employment action, and (3) there was no evidence of retaliation, because Garrett did not identify any protected conduct, had no direct evidence of retaliatory motive, and could not rely on temporal proximity as a substitute because there was none. The court also questioned whether it should recognize the concept of “constructive transfer,” and whether working is a “major life activity,” but the decision did not turn on those issues.

### Great Quotables

Although the judge does not avoid the *mea culpa* on missing the section 504 issue, he expresses understandable frustration with the parties’, the Eleventh Circuit’s, and the Supreme Court’s failure to notice the issue “year after year after year.” When it was finally raised on remand to the Eleventh Circuit, the University “responded with a classic example of lame, insipid non-advocacy, in which UAB, in effect, confessed that a horrible waste of time had taken place.” All the time and effort of taking the case over seven years to the Supreme Court and back was “an academic exercise,” that may have provided “excitement” for the public, but was “meaningless for this case.”

The judge also acknowledged that he has had cancer and had his prostate gland removed. “Either this judge should recuse himself because of a life experience similar to Garrett’s or he cannot avoid bringing his life experience into the decision making process.” Like Garrett, the judge recovered. “This judge is sure that there are lawyers who thought, or even hoped, that this judge would not come back to the bench. The perception that someone with cancer is ‘on the way out’ may be pervasive, but in today’s

world it is fallacious.... During treatment, a cancer patient may or may not be able to function at full capacity, but neither does a person with a bad cold function at full capacity.”

The judge concluded that based on the undisputed facts, “including overstated physical and mental shortcomings of a recovering cancer patient,” summary judgment should be granted.

## 5th Cir Upholds Preemption Claim Without 1983 "Rights"

March 15, 2005 5th Cir Upholds Preemption Claim Without 1983 "Rights" The Fifth Circuit has held that plaintiffs may use a preemption claim to enjoin a state law that conflicts with federal law, even if the federal law does not give the plaintiff any "rights" that would be enforceable under 42 U.S.C. § 1983.

*Planned Parenthood v. Sanchez*, No. 03-50930, ---F.3d---, 2005 WL 579912 (5th Cir. Mar. 11, 2005). The opinion has a very helpful discussion of the existence of the preemption cause of action to enjoin state laws that conflict with federal law; the use of preemption to enforce Spending Clause statutes; the irrelevance of section 1983 "rights" under *Gonzaga University v. Doe*, 536 U.S. 273 (2002); and the use of preemption to enforce federal regulations.

The decision is more equivocal on the merits of the preemption claim, both on these facts and in general regarding conflict preemption challenges to state eligibility rules. The court also hinted in a footnote that, though bound by precedent, the panelists (Higginbotham, joined by Dennis and Clement) agree with the minority views of Justices Scalia and Thomas that preemption should not be available for Spending Clause statutes.

### **Facts/ruling on merits.**

The plaintiffs, providers of abortion services, challenged a Texas budget rider that prevented plaintiffs from receiving federal family planning funds even if those funds were not used for abortion services. The court found that the budget rider could be interpreted to permit plaintiffs to form affiliates for the abortion services. The court reversed the preliminary injunction and remanded for a trial on the merits to determine how much of a burden forming affiliates would entail.

### **Preemption cause of action.**

The court summarized Supreme Court and lower court decisions and had "little difficulty in holding that Appellees have an implied right of action to assert a preemption claim seeking injunctive and declaratory relief" on the grounds that the budget rider conflicts with federal law. The court did not resolve the source of the cause of action. In a lengthy footnote (47), it summarized "one school of thought [that] holds that the Supremacy Clause itself creates an implied cause of action," whereas "[a]nother possible source is the Declaratory Judgment Act."

### **Use of preemption for Spending Clause statutes.**

The opinion also has an extensive discussion of the use of preemption claims under the Supremacy Clause to enforce Spending Clause statutes, going back to the welfare cases of the 1960s and 1970s starting with *King v. Smith*, 392 U.S. 309 (1968), and up to the recent Medicaid case, *Pharmaceutical Res. & Mfrs. v. Walsh*, 538 U.S. 344 (2003). Although "courts often proceed without invoking 'preemption'" (as in *King*, citing the Supremacy Clause alone), the "growing consensus, however, is to analyze such claims under traditional preemption doctrine." Previously, the Fifth Circuit had "decided the question of whether state law conflicted with federal Spending Clause legislation" without directly addressing "whether a valid cause of action existed .... Today we hold that one does."

More ominously, however, the court indicated that it was bound by authority but disagreed with its own conclusion. In a footnote (34), the court quoted the opinions of Justices Thomas and Scalia in *Pharmaceutical Research*, who espoused the view that preemption cannot be used to enforce Spending

Clause legislation. “These arguments have great purchase ...; however, their persuasive force is wasted on the inferior courts. Rather, they must persuade at least three other Justices.”

### **Irrelevance of section 1983 “rights.”**

The opinion also has a good discussion of the caselaw showing that “an implied right of action to seek injunctive relief from a state statute purportedly preempted by federal Spending Clause legislation ... does not require a showing, as per *Gonzaga*, that a § 1983 action would also be proper.” Earlier in the opinion, the court also indicated that the claim exists “even absent an explicit statutory claim” (citing cases in footnote 46).

### **Using preemption to enforce regulations.**

The opinion cites established Supreme Court caselaw that “[f]ederal regulations have no less preemptive effect than federal statutes,” and indicates in footnote 80 that regulations are entitled to the normal deference to the administering agency.

### **Problems on the merits of conflict preemption claim.**

Turning to the merits, a “‘modest impediment’ to eligibility for federal funds does not provide a sufficient basis for preemption. However, a state eligibility standard that altogether excludes entities that might otherwise be eligible for federal funds is invalid under the Supremacy Clause.” The court did not decide which category better describes the budget rider, as interpreted to allow plaintiffs to form affiliates: “either the affiliate requirement is a relatively empty formalism or it is a more substantial obstacle. The former is permissible, while the latter likely is not.”

The court’s summary of the caselaw is fairly accurate, and the burden of forming affiliates certainly sounds more like a “substantial obstacle” than an “empty formalism.” However, the court hinted at a contrary outcome. The state law should be upheld unless the plaintiffs “can show that the burden of forming affiliates in forthcoming years would in practical terms frustrate their ability to receive federal funds ... While creating affiliates might entail some time and expense, and might not be the most convenient arrangement, this extra effort alone would not relegate the state statute to preemption.”

## No State Waiver of Immunity Under RCRA or CERCLA

An Oregon district court has found that the state did not waive its sovereign immunity from suit under the Resource Conservation and Recovery Act (“RCRA”) or the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), either by consenting to suit in analogous state superfund statutes, or “by assuming the role of the federal government by administering and enforcing the RCRA program.”

*Burns v. MBK Partnership*, No. Civ.03-3021-HO, 2005 WL 552262 (D. Or. Mar. 2, 2005). The latter holding may be inconsistent with other decisions permitting Congress to impose waivers when states accept a “gratuity” like the authority to regulate under a federal statute.

Although Congress explicitly abrogated states’ sovereign immunity in both RCRA and CERCLA, that abrogation has been held to be invalid because the statutes were passed under the Commerce Clause, which does not give Congress the power to abrogate states’ immunity. The cross-plaintiffs argued, however, that those statutes could impose a waiver on the states.

The court relied on *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999), which held that states do not constructively waive their immunity by voluntarily participating in a field that is subject to federal regulation. However, “assuming the role of the federal government” and “administering and enforcing” a federal statute are quite different activities from merely engaging in a lawful activity, like interstate commerce in *College Savings Bank*, that is subject to federal law. In the context of the Telecommunications Act, some courts have held that states can be forced to waive their sovereign immunity when they participate in regulatory activity that would otherwise be foreclosed to them by federal occupation of the field. *See, e.g., MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 342 (7th Cir. 2000), cert. denied, 531 U.S. 1132 (2001); Sarah Rispin, *Cooperative Federalism and Constructive Waiver of State Sovereign Immunity*, 70 *Univ. of Chi. Law Rev.* 1639, 1640 & n.10 (2003). Those courts find that accepting the invitation to regulate under a federal statute is a “gratuity” like the federal spending that, under *College Savings Bank*, can come with an imposed waiver of sovereign immunity.

However, the *Burns* court did not discuss the gratuity theory. Nor did it explain how the state was assuming the role of the federal government or what activities were at issue. Thus, it is difficult to determine whether Oregon’s activities might be viewed as a regulatory waiver.

## The Balance Between the Commerce Clause and the 14th Amendment in Protecting Individual Rights

As a result of narrow readings of the Constitution by 19th Century judges and the Rehnquist Court, the most important source of Congress's power to protect individuals may now be the Commerce Clause, not the 14th Amendment or the Bill of Rights.

This creates the anomaly that courts struggle to justify (or delight in attacking) statutes on commerce grounds even if their purpose has little to do with commerce. Here are some recent examples:

- In *United States v. Bird*, the Fifth Circuit relied on an earlier decision that the Freedom of Access to Clinic Entrances Act (FACE) is a valid regulation of the national commercial market in abortion-related services. The dissent argued that driving a van through a Planned Parenthood clinic is not economic or commercial activity, and Congress does not have the authority to criminalize "private acts that are intended to interfere with another person's exercise of some constitutional right."
- In *McCarthy v. Hawkins*, Judge Emilo Garza argued in dissent that Congress does not have the power under the Americans with Disabilities Act (ADA) to prohibit states from discriminating in entitlement programs like Medicaid, or in any public services that do not compete with the private market and thus are not commercial activity.
- In 1997, the Supreme Court struck down the Religious Freedom Restoration Act, which applied strict scrutiny to governmental actions that burden religion, as outside of Congress's 14th Amendment powers. In response, relying on its commerce and spending powers, Congress passed the Religious Land Use and Institutionalized Persons Act, which applies to prisons and land use activities that receive federal funding or "affect" interstate commerce. Several RLUIPA cases are working their way through the courts.

That is, absurdly, legislation that Congress passed to protect the constitutional rights to privacy, to equal protection, and to freedom of religion may survive or fail depending on whether it can be justified as a regulation of interstate commerce.

This Term the Supreme Court may revisit the scope of the commerce power in two cases, involving the question whether federal drug laws trump state laws on medical marijuana and assisted suicide. Lower court Commerce Clause decisions involving FACE, the ADA, RLUIPA or other federal laws might yet reach the Supreme Court.

As the Court debates the extent of Congress's power to regulate interstate commerce, it is important that the Commerce Clause not be viewed in isolation from other constitutional grants of power. The Court should not drastically reduce the breadth of Congress's commerce power unless it is prepared to reinvigorate Congress's 14th Amendment power to protect individuals.

It may surprise some to learn that Congress has no power under the 13th or 14th Amendments to address racially discriminatory actions by private persons. In *United States v. Cruikshank*, the Court held that Congress cannot prohibit private racial violence even when it is committed for the purpose of depriving individuals of constitutional rights such as the right to vote or to assemble. In *The Civil Rights Cases*, the Court relied on *Cruikshank* to strike down the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations like hotels, railroads and theatres. In both cases, the fact that

states were condoning the violence and that only the federal government was prepared to protect African Americans did not matter.

These decisions were the product of anti-Reconstruction justices who interpreted the 13th and 14th Amendments narrowly to gut Congress's power to protect Southern blacks. As described in a new article by the Brennan Center on Law and Justice, the Supreme Court in *Cruikshank* and *The Civil Rights Cases* ignored historic precedent concerning the breadth of Congress's power under the similarly worded Fugitive Slave Clause. The Court also ignored the views of the Congress that wrote and passed the 13th and 14th Amendments and believed that they authorized the civil rights laws enacted by the same Congress. Justice Harlan lamented in dissent: "Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law."

Nearly a century later, when the Supreme Court upheld the ban on racial discrimination in employment, restaurants and hotels in the Civil Rights Act of 1964, it did so by justifying the Act as a regulation of interstate commerce. The Court did not reverse *The Civil Rights Cases* or *Cruikshank*, but instead sidestepped them. The Court followed the lead of Congress, which relied on the commerce power rather than the 14th Amendment in light of prevailing caselaw interpreting the former broadly and the latter narrowly. That is the regime that, by and large, prevails today. Congress still has no power to protect civil rights for their own sake in nongovernmental settings, even in areas that go to the heart of the 14th Amendment's equal protection guarantees. While "no modern Court would ever cite *Dred Scott* or *Plessy* approvingly, hardly anyone noticed" when Chief Justice Rehnquist relied on *Cruikshank* and *The Civil Rights Cases* to justify striking down the Violence Against Women Act. The Court found that VAWA was aimed at private violence and therefore outside of Congress's 14th Amendment powers. The majority was not persuaded by the 36 state officials who supported the law and argued that it was needed to protect women from private gender-based violence. The Court deferred to the judgment of the 19th Century judges "who all had intimate knowledge and familiarity with the events surrounding the Amendment's adoption."

Indeed, the Rehnquist Court has narrowed Congress's power under the 14th Amendment even further. Congress now has little power even to subject states to legislation to promote equal protection, religious liberties, and other values embodied in the Bill of Rights and the 14th Amendment, beyond the minimal, redundant protections already in the Constitution.

Recent Supreme Court decisions have found that Congress exceeded its 14th Amendment powers when it passed the Age Discrimination in Employment Act, the employment discrimination provisions of the ADA, and the Religious Freedom Restoration Act. For example, the Court found that Congress has little power under the 14th Amendment to prevent disability discrimination because the Constitution gives scant protection to the disabled. With no acknowledgement of the irony, the Court stated that if "special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause" – positive law that the Court struck down a few paragraphs later because it went beyond the Constitution.

Although outnumbered right now on these issues, the conservative justices argue that the 14th Amendment gives Congress no power to make courthouses accessible to the disabled or to fight stereotypes about female workers by giving all employees unpaid leave to take care of sick family

members. Most lower courts have interpreted the Supreme Court's recent rulings to prevent state employees from enforcing the personal sick leave provisions of the Family and Medical Leave Act.

Nevertheless, the Court's narrow reading of the 14th Amendment is not a significant impediment to Congress's ability to protect individuals as long as the Court reads the Commerce Clause broadly. It matters little to victims of discrimination whether the Court upholds the Civil Rights Act of 1964 on Commerce Clause grounds or 14th Amendment grounds. Similarly, the ADA overall has been upheld under the Commerce Clause even though the ban on state and private employment discrimination exceeds Congress's 14th Amendment powers.

But the Supreme Court, in a series of 5-4 decisions, has already begun to restrict the commerce power in ways that affect individuals. In 1995, in *United States v. Lopez*, the Court struck down the Gun-Free Schools Zone Act as beyond the government's power to regulate interstate commerce. That decision was the first time that the Court found a statute outside the commerce power since the 1937 "switch in time that saved nine" that ended the Court's period of invalidating New Deal legislation. Relying on *Lopez*, in 2000, in *United States v. Morrison*, the Court struck down the Violence Against Women Act as too tangentially related to interstate commerce. Both decisions hinged in part on the fact that violence and education are not commercial or economic activities.

In 1996, the Court held that Congress does not have the power under the Commerce Clause to make states liable for damages when they violate federal law. Thus, under the Court's subsequent decisions, when states violate federal minimum wage laws, overtime laws, the ADA or the FMLA, courts can enter injunctions prohibiting future violations, but those laws violate the Commerce Clause when they make states responsible for back pay or damages.

If the Court builds on *Lopez* and *Morrison* and further restricts Congress's ability to justify legislation under its commerce power, individual rights under federal law could suffer. The most serious challenges to progressive federal legislation will not come from the cases before the Court this Term, which involve the Controlled Substances Act and put conservatives on the side of federal power. Rather, lower court cases that have yet to reach the Supreme Court, like those involving FACE and applications of the ADA in specific situations, illustrate the potential dangers ahead if the Court further restricts the commerce power without compensating by expanding Congress's 14th Amendment powers.

As these examples demonstrate, there is a delicate balance between Congress's powers under the Commerce Clause and under the 14th Amendment. Looking at the Commerce Clause alone, one can make a plausible argument that it has been read too broadly. Yet that is in part to compensate for overly restrictive readings of the 14th Amendment. The Court should not upset the settled understanding that Congress can use its commerce powers beyond strictly economic or commercial matters unless it is prepared also to revisit the anti-Reconstruction decisions to restore Congress's power to protect individual rights. If the Commerce Clause is viewed in isolation, the integrity of the Constitution as a whole and its concern for individual rights and freedoms will suffer.

## Easterbrook on the Gonzaga “Oxymoron”; Roberts on Overturning Thiboutot

The Seventh Circuit has held that the Driver’s Privacy Protection Act of 1994 does not give a businessman a right to records that he wants to help him buy cars auctioned to satisfy mechanics’ liens, and thus is not enforceable by him under 42 U.S.C. section 1983.

The opinion, written by Judge Frank Easterbrook (Reagan) and joined by Judges Kenneth Ripple (Reagan) and Clare Ann Williams (Clinton), applies the test of *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), but quips about the “oxymoron” of searching for “clear and unambiguous terms” in silence.

**Facts/Legal Claim.** Plaintiff McCready sought to compel disclosure of records under 18 U.S.C. § 2721(b), which provides the exceptions to the statutes’ privacy provisions, including that information “shall be disclosed for use in connection with ... theft.” McCready claimed that he needed the information to determine whether valid security interests were unlawfully removed from a vehicle’s title.

**Opinion.** After describing the general requirements of *Gonzaga* for finding a “right” enforceable under section 1983, the court observed:

The Court's oxymoron--how can an "implied" right of action be phrased in "clear and unambiguous terms," when statutory silence is what poses the question whether a right may be implied?--does not detract from the point of its message: § 1983 depends on person-specific "rights." What must be "clear and unambiguous" in the Court's formulation is the right-creating language.

After concluding that the *Gonzaga* test applies to all statutes, not only those enacted under the Spending Clause, the court found that section 2721(b) lacks such “person-specific ‘right,’” as it is “phrased in the passive ... and does not say either who does the disclosing or who is entitled to receive information,” and the list of beneficiaries identified subsequently does not include the plaintiff. “Because McCready is no different from any other member of the public, so far as § 2721(b) is concerned, he can't use § 1983 to supply the private right of action missing from § 2724(a).”

**Commentary.** The observation that searching for clear and unambiguous terms in silence is an oxymoron is a recognition that the Supreme Court’s tests for implied rights of action and section 1983 rights are designed to make those tests very difficult to meet – nearly impossible, now, in the implied right of action context, and heading in that direction for section 1983.

One of the John Roberts’ memos recently released from his days in the Department of Justice 23 years ago discloses the intent behind those tests. In a 1982 memo on proposed legislative changes to section 1983, Roberts refers to the “damage created by *Thiboutot*” (*Maine v. Thiboutot*, 448 U.S. 1 (1980)), which held that statutes may be enforced through section 1983. He describes approaches to restricting the statutes enforceable under section and suggested: “Our legislative proposals could perhaps even be cast as efforts to ‘clarify’ rather than ‘overturn’ that decision,” implying that the intent was the latter.