The Civil Docket: From Civil Rights to Social Security

Jay E. Grenig

Marquette University Law School, jay.grenig@marquette.edu

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The Supreme Court’s 2001 term, with a large number of 5-4 decisions and decisions with separate concurrences, exhibited the continuing division between the wing of the Court consisting of Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy and the wing consisting of Justices Breyer, Ginsburg, Souter, and Stevens, with Justice O’Connor providing the swing vote in many cases. This grouping reflects the alignment in the per curiam opinion in *Bush v. Gore*, 531 U.S. 98 (2000).

Of course, there were decisions in which the justices did not act in accordance with this perceived division. For example, in *Wisconsin Dept. of Health & Family Services v. Blumer*, 122 S.Ct. 962 (2002), Chief Justice Rehnquist and Justice Thomas joined in the majority opinion written by Justice Ginsburg, while Justice Scalia, O’Connor, and Stevens dissented. And in *Board of Education v. Earls*, 122 S. Ct. 2559 (2002), Justice Breyer joined the five-justice majority finding random drug testing of students who participate in high school extracurricular activities to be constitutional. The number of opinions with justices specially concurring in the judgment but not in all the reasoning will delight legal scholars and bedevil law students for years to come. While a change in Court membership is always a significant event, the consistent alignment in many close cases last term points out the especially high stakes involved in replacing any of the justices who may retire in the near future from this Court. Indeed, President Bush may have the opportunity to appoint at least three justices in the next two years.

The following is a personal selection of some of the more significant civil cases decided by the Supreme Court this last term.

**Census**

In a decision determining whether North Carolina lost a house seat and Utah gained one, the Supreme Court rejected Utah’s argument that the U.S. Census Bureau’s use of statistical sampling to account for people missed by the 2000 census was contrary to a constitutional mandate that “actual enumeration” be made. *Utah v. Evans*, 122 S.Ct. 2191 (2002) (O’Connor, Thomas, and Kennedy, JJ., concurring in part; Scalia, J., dissenting). In an opinion written by Justice Breyer, the Court ruled that the bureau’s methodology was permissible under the census clause, and that some form of sampling has been used since 1800 to determine the number of persons missing from the census.

As a result of this decision, North Carolina kept a House seat to which Utah believed it was entitled. It’s too early to tell if this will have an impact on the balance of power in the House.
CIVIL RIGHTS

The Supreme Court issued four decisions limiting the application of the Americans with Disabilities Act (ADA) this term. At the same time, it issued three decisions making it somewhat easier for plaintiffs to bring other types of civil rights actions.

Definition of Disability
In order to qualify as a disability under the ADA based on a physical or mental impairment substantially limiting one or more major life activities, a unanimous Supreme Court held that a claimant must initially prove that he or she has a physical or mental impairment that limits a major life activity. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002). The Court concluded that an employee's inability to do repetitive work with hands and arms extended at or above shoulder level was not sufficient proof that she was substantially limited in the major life activity of performing manual tasks. The decision will make it more difficult for claimants to establish they are disabled within the meaning of the ADA.

Health and Safety
In *Chevron U.S.A., Inc. v. Echazabal*, 122 S.Ct. 2045 (2002), a unanimous Supreme Court held that an Equal Employment Opportunity Commission regulation authorizing refusal to hire an individual because the individual’s performance on the job would endanger the individual’s own health due to a disability did not exceed the scope of permissible rule making under the ADA. The ADA provides that an employer may refuse to hire an otherwise qualified disabled person if the person would pose “a direct threat to the health or safety of other individuals in the workplace.” Although there is no express language in the ADA permitting employers to refuse to hire a person because the job poses a direct threat to that individual, Chevron relied on an EEOC regulation permitting employers to refuse to hire a person when the job would pose a threat to that person’s health when it refused to hire Echazabal.

The Supreme Court rejected Echazabal’s argument that the EEOC had no authority to make such a regulation because Congress had refused to provide such an exception and Congress had specifically rejected proposed ADA language that would have permitted employers to refuse to fire or hire people on the grounds that the job presented a direct threat to the worker’s health. The Court found that the ADA seems to give the EEOC a good deal of discretion in setting the limits of permissible qualification standards, and since Congress has not spoken “exhaustively” on threats to a worker’s own health, the regulation can claim adherence to the statute so long as it makes sense of the statutory defense for qualification standards that are “job-related and consistent with business necessity.”

Disabilities and Seniority
The Supreme Court in *US Airways, Inc. v. Barnett*, 122 S.Ct. 1516 (2002) (Stevens and O’Connor, JJ., concurring; Scalia, Thomas, Souter, and Ginsburg, JJ., dissenting) held that an employer’s showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an “accommodation” is not “reasonable.” However, Justice Breyer stated in his opinion for the Court that an employee remains free to present evidence of special circumstances that make a seniority rule exception reasonable in the particular case. This ruling will have its primary impact in workplaces where a collective bargaining agreement provides for assignment of workers based on seniority. However, it will also have application in nonunionized workplaces with bona fide seniority systems. It may be easier to show special circumstances that make a seniority rule exception reasonable in the particular case in the latter situation.

Punitive Damages for Violation of ADA
The Supreme Court has determined that punitive damages are not available against public entities in private suits under Section 202 of the ADA and Section 504 of the Rehabilitation Act. *Barnes v. Gorman*, 122 S.Ct. 2097 (2002) (Souter, Ginsburg, O’Connor, Stevens, Ginsburg, and Breyer, JJ., concurring). The plaintiff, a paraplegic, suffered injuries that left him unable to work full time after he was arrested and transported to a police station in a van that was not equipped to accommodate the disabled.

The plaintiff sued the police officials for discriminating against him on the basis of his disability by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries in violation of Section 202 of the
ADA and Section 504 of the Rehabilitation Act.
(Section 202 prohibits discrimination against the disabled by public entities and Section 504 prohibits discrimination against the disabled by recipients of federal funding, including private organizations.) A jury awarded the plaintiff $1 million in compensatory damages and $1.5 million in punitive damages.

Noting that the statutes in question invoke Congress' spending clause power, Justice Scalia's opinion for the Court stated that it has regularly applied a contract law analogy in defining the scope of conduct for which funding recipients may be held liable in money damages and in finding a damages remedy available in private suits under spending clause legislation. The Court explained that it has held that, unlike compensatory damages and injunctions, punitive damages are generally not available for breach of contract.

**Pleading**
Abrogating decisions from the Second and Sixth Circuits, the Supreme Court agreed with the majority of circuits and refused to require plaintiffs in civil rights actions to plead in more detail than that required in other civil actions. In *Steierkiewics v. Sorema N.A.*, 122 S.Ct. 992 (2002), the Court unanimously held that a complaint in an employment discrimination suit must contain only a short and plain statement of the claim showing that the pleader is entitled to relief.

**Continuing Violations**
An employee can recover on a hostile work environment theory for acts occurring more than 300 days before the charge was filed with the EEOC, as long as the acts were part of the same hostile work environment and at least one of them occurred within the 300-day period. In *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002) (Rehnquist, C.J.; O'Connor, Scalia, Kennedy, and Breyer, JJ., concurring). However, to the extent that employees seek to recover for discrete acts of alleged discrimination, Justice Thomas wrote for the Court, only those acts occurring within 300 days of the date the employee filed a charge with the Equal Employment Opportunity Commission are actionable under Title VII.

**Arbitration**
In its first decision in recent years limiting the use of arbitration in employment disputes, the Supreme Court held that an employee's agreement to arbitrate employment-related disputes does not prevent the EEOC from bringing an enforcement action against the employer to obtain victim-specific remedies, such as back pay, reinstatement, and damages. *EEOC v. Waffle House, Inc.*, 122 S.Ct. 754 (2002) (Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting).

Writing for the Court, Justice Stevens explained that, despite the Federal Arbitration Act (FAA) policy favoring arbitration agreements, nothing in the FAA authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered by the agreement. The Court stated that the FAA does not mention enforcement by public agencies. It ensures the enforceability of private agreements to arbitrate, but otherwise it does not purport to place any restriction on a nonparty's choice of judicial forum. The ruling will generally discourage employers from using compulsory arbitration of employment disputes to reduce the likelihood of EEOC enforcement actions.

**EDUCATION**
No sleeping in class this term! This term demonstrates that education, once thought of as a local issue, has become an issue of substantial federal significance. The Supreme Court decided four controversial cases involving school vouchers, random drug testing, and student privacy.

**School Vouchers**
In what is probably one of the most talked about civil decisions of the 2001 term, the Supreme Court, in a 5-4 decision, upheld a school voucher program in Cleveland, Ohio. *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002) (O'Connor and Thomas, JJ., concurring; Stevens, Souter, Ginsburg, and Breyer, J.J., dissenting). However, to the extent that employees seek to recover for discrete acts of alleged discrimination, Justice Thomas wrote for the Court, only those acts occurring within 300 days of the date the employee filed a charge with the Equal Employment Opportunity Commission are actionable under Title VII.

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Writing for the majority, Chief Justice Rehnquist stated that the Ohio voucher program did not breach the Constitution's wall between church and state because it offered "true private choice" among religious and secular schools and because it provides vouchers directly to the parents of pupils. The chief justice found that the citizens directed government aid to religious schools wholly as a result of their own genuine and independent private choice. The dissenters were of the opinion that the program offers only an illusion of free choice. In addition, the dissent claims that the aid to the religious-related schools is not "neutrally given."

Whether the decision will result in an increase in voucher programs throughout the nation remains to be seen. Some have suggested that state constitutional amendments barring aid to religious schools may be invoked by opponents of voucher programs to discourage expansion of voucher programs. There is also a question of whether voters desire voucher programs. Voters in Michigan and California rejected voucher referendums by wide margins in elections in 2000. Others have suggested that the states (12 of which considered voucher proposals in their most recent sessions) will be encouraged to enact voucher programs. In any event, this decision may result in major changes in the way our educational system is organized, run, and paid for.

Drug Testing
The rights of school officials to randomly test students for drug use was expanded by the Supreme Court in Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 122 S.Ct. 2559 (2002) (Breyer, J., concurring; O'Connor, Souter, Ginsburg, and Stevens, JJ., dissenting). Writing for the majority, Justice Thomas held that a school system's policy of testing students who participate in extracurricular activities, including Future Farmers of America, choir, and cheerleading, was a reasonable means of furthering the school district's important interest in preventing and deterring drug use among its pupils and does not violate the Fourth Amendment. The district's policy required students who participate in competitive extracurricular activities, such as band or choir, to take a drug test before participating in an extracurricular activity, submit to random drug testing while participating in the activity, and agree to be tested for drugs at any time upon reasonable suspicion. Students found to be using drugs were referred to counseling and treatment.

The Court found that the pupils had a limited expectation of privacy because, among other things, a faculty sponsor monitors students for compliance with the various rules dictated by clubs and activities. In addition, the majority concluded that the degree of intrusion caused by collecting a urine sample—a process that includes having a faculty monitor wait outside the closed restroom stall, listening for the normal sounds of urination in an effort to guard against tampered specimens and ensuring an accurate chain of custody—is negligible.

Justice Breyer, in a special concurrence, acknowledged that "not everyone would agree with this Court's characterization of the privacy-related significance of urine sampling as 'negligible.'" Some find the procedure to be no more intrusive than a routine medical examination, but others are seriously embarrassed by the need to provide a urine sample with someone listening "outside the closed restroom stall."

Lastly, the Court asserted that preventing drug use by schoolchildren is an important governmental concern, noting that teachers had testified that they had seen students who appeared to be under the influence of drugs and that a drug dog had found marijuana "near" the school parking lot.

The ruling expands on the Court's 1995 decision (Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995)) holding that an Oregon school district, where there was heavy drug use, could randomly test high school athletes without a showing of individualized suspicion. In Vernonia, the Court found the testing to be permissible because of concerns that any drug use during sports activities could result in injuries and because the athletes had already given up some privacy rights by joining teams and undressing in locker rooms. Seeking some similarity between the 1995 decision and the extracurricular activities at issue in Earls, Justice Thomas explained that, among other things, students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. He noted that some
clubs and activities involve travel, which, in turn, often may involve "communal undress."

Dissenting, Justice Ginsburg wrote, "If a student has a reasonable subjective expectation of privacy in the personal items she brings to school, surely she has a similar expectation regarding the chemical composition of her urine." Justice Ginsburg noted that while extracurricular activities are "voluntary" in the sense that they are not required for graduation, they are part of the school's educational program and "[p]articipation in such activities is a key component of school life, essential in reality for students applying to college, and for all participants, a significant contributor to the breadth and quality of the educational experience." Justice Ginsburg also expressed concern that the personal information collected under the school district's policy may have been handled carelessly, with little regard for its confidentiality.

Taking aim at the majority's concern for the safety of participants in such extracurricular activities as Future Homemakers of America, Future Farmers of America, and the band, Justice Ginsburg wrote:

Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of the [city of] Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree.

It remains to be seen whether schools implement random drug testing as a result of this decision. First, there is the cost of implementing such programs. Second, there may be considerable opposition to requiring students to provide a witnessed urine sample in order to participate in extracurricular activities. Third, one wonders how faculty members will feel about being assigned to wait outside closed restroom stalls to listen for the "normal sounds of urination." Fourth, as Justice Breyer recognized in his concurrence, some pupils may object to random drug testing by refusing to participate in extracurricular activities—"a price (nonparticipation) that is serious, but less severe than expulsion from school."

More importantly, the question remains just how far this Supreme Court will go to find "special needs" exceptions to the constitutionally protected right of freedom from searches in the absence of reasonable suspicion. If the "war on drugs" is seen as justifying searches of students without reasonable suspicion, will the "war on terrorism" justify searches of adults without reasonable suspicion?

Peer Grading

According to the Supreme Court, peer grading does not violate the Family Educational Rights and Privacy Act (FERPA). Owasso Independent School District No. I-011 v. Falvo, 122 S.Ct. 934 (2002) (Scalia, J., concurring). The Court unanimously held that a student assignment does not satisfy the FERPA definition of "education records" as soon as it is graded by another student, so FERPA was not violated by such grading or by calling out the scores in class. The Court explained that, assuming the teacher's grade book is an education record, "the score on a student-graded assignment is not 'contained therein' until the teacher records it; the teacher does not maintain the grade while students correct their peer's assignments or call out their own marks."

The Court recognized that peer grading has several significant advantages for both teachers and the student learning process. Justice Kennedy, a former law professor, wrote, "Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils." In addition, the Court thought that without peer grading, some teachers would cover and assign significantly less material because of the administrative time spent outside of the classroom grading and recording students' assignments. The Court's wide-ranging discussion of pedagogy could make one wonder whether the Court was acting as a legislature or simply interpreting legislation.

As a result of the Court's decision, it has been suggested that other school-related activities that were temporarily halted in some school systems will likely resume, including posting exemplary student work on bulletin boards, publicly recognizing students for academic achievement, and posting the names of students who make the honor roll.

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Private Right of Action

In *Gonzaga University v. Doe*, 122 S.Ct. 2268 (2002) (Breyer and Souter, JJ., concurring; Stevens and Ginsburg, JJ., dissenting), the Supreme Court addressed an issue it did not consider in *Owasso Independent School District No. I-011 v. Falvo*, 122 S.Ct. 934 (2002): whether there is a private right to enforce FERPA's nondisclosure provisions under 42 U.S.C. § 1983. Disagreeing with the Ninth and Second Circuits, the Supreme Court, in an opinion by Chief Justice Rehnquist, held that provisions of FERPA prohibiting federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons created no personal rights to enforce under Section 1983. In a strongly worded dissent, Justice Stevens, joined by Justice Ginsburg, stated that the Court's "interpretation would explain the Court's studious avoidance of the rights-creating language in the title and text of the Act. Alternatively, its opinion may be read as accepting the proposition that FERPA does indeed create both parental rights of access to student's records and student rights of privacy in such records, but that those federal rights are of a lesser value because Congress did not intend them to be enforceable by their owners." According to Justice Stevens, the majority "has eroded—if not eviscerated—the long-established principle of presumptive enforceability of rights under § 1983."

**EMPLOYMENT**

Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) requires employers with 50 or more employees to provide eligible employees with up to 12 weeks of unpaid leave per year if the employee has a serious medical condition, an immediate family member with a serious medical condition, or a newborn or newly adopted child to care for. In its first case under the FMLA, the Supreme Court held that the Department of Labor had overstepped its authority in adopting a regulation requiring employers to inform an employee beforehand if it intends to count leave against that employee's FMLA entitlement and prohibiting the employer from retroactively designating leave as FMLA-qualifying. *Ragsdale v. Wolverine World Wide, Inc.*, 122 S.Ct. (2002) (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting). In his opinion for the Court, Justice Kennedy explained that the FMLA entitles eligible employees to a total of 12 weeks of leave—not 12 weeks plus the time the employee has already received under another plan.

**FREE SPEECH**

The Supreme Court has long struggled with protecting free speech and protecting the public—particularly children—from the unsavory and unacceptable. In two cases this term, the Supreme Court sharply divided on the question of regulating sexually explicit content—on the Internet and downtown. The Court's decisions highlight the difficulty in drafting and applying legislation intended to protect children from sexually explicit materials or to regulate "adult" businesses.

Sexually Explicit Materials on the Internet

In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court held that provisions in the Communications Decency Act of 1996 (CDA), attempting to protect children from exposure to pornographic material on the Internet, violated the First Amendment because, in part, the CDA's breadth was "wholly unprecedented." In response to that decision, Congress passed the Child Online Protection Act (COPA) prohibiting the commercial display of sexually explicit materials that are harmful to minors on the World Wide Web. COPA defines material that is harmful to minors by reference to contemporary community standards. A federal judge in Philadelphia blocked COPA from taking effect and the U.S. Court of Appeals for the Third Circuit held that COPA is hopelessly flawed because it depends on "community standards" to determine whether materials are harmful to minors.

Reversing the Third Circuit, the Supreme Court, in an opinion authored by Justice Thomas with five justices concurring specially in the result and one justice dissenting, held that COPA's reference to contemporary community standards did not, by itself, render COPA unconstitutionally overbroad. *Ashcroft v. American Civil Liberties Union*, 122 S.Ct. 1700 (2002) (Rehnquist, C.J.; O'Connor, Scalia, Kennedy, Souter, and Ginsburg, JJ., concurring; Stevens, J., dissenting).

In her opinion concurring in the result, Justice O'Connor wrote that "adoption of a national standard is necessary in my view for any reasonable
regulation of Internet obscenity.” Justice Breyer, who also concurred in the result, said he believed Congress intended a nationally uniform standard for defining what is harmful to minors. The Court expressed no view as to whether COPA suffers from substantial overbreadth for reasons other than its use of community standards, whether the statute is unconstitutionally vague, or whether the statute would survive constitutional review under the “strict scrutiny” standard.

Justices Kennedy, Souter, and Ginsburg voted with the majority but joined a separate opinion saying that the national variation in community standards could strangle the Internet if it became law. Justice Kennedy wrote that he doubted the measure would ever become law because there is a very real likelihood that COPA cannot survive a First Amendment challenge, as COPA is content-based regulation of speech. Clearly the question of whether COPA is impermissible content-based regulation of speech will be before the Court in the near future.

Virtual Child Pornography
In a case involving an issue that the founders could never have envisioned—“virtual” child pornography—the Supreme Court struck down provisions of the Child Pornography Prevention Act of 1996 (that CPPA—which is not to be confused with the COPA). Justice Kennedy wrote the opinion for the Court in Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (Thomas, J., concurring; O'Connor and Scalia, JJ., dissenting in part; Rehnquist, C.J., dissenting). The Court held that speech prohibited by the CPPA's ban on virtual child pornography is distinguishable from child pornography, which may be banned without regard to whether it depicts works of value. (“Virtual pornography” is sexually explicit images that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology.)

According to the Court, the ban on virtual child pornography in the CPPA abridges the freedom to engage in a substantial amount of lawful speech and thus is overbroad and unconstitutional under the First Amendment. The Court also held that a provision in the CPPA banning depictions of sexually explicit conduct that “are advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct” is also substantially overbroad and in violation of the First Amendment. This decision may presage how the Court will handle a claim that COPA is impermissible content-based regulation of speech.

Adult Business Ordinance
In seeking to clean up the Hollywood district by outlawing clusters of X-rated businesses, the City of Los Angeles enacted an ordinance making it illegal to have more than one adult entertainment business in the same building. In City of Los Angeles v. Alameda Books, Inc., 122 S.Ct. 1728 (2002) (Scalia and Kennedy, JJ., concurring; Souter, Stevens, and Ginsburg, JJ., dissenting; Breyer, J., dissenting in part), Justice O'Connor concluded that Los Angeles could reasonably rely on a police department study correlating crime patterns with concentrations of adult businesses when opposing a business's First Amendment challenge to a city ordinance prohibiting the operation of multiple adult businesses in a single building. The Court stated that reducing crime is a substantial government interest justifying a time, place, and manner regulation of speech.

The four dissenters said it was far-fetched to suggest that a video parlor located in an adult bookstore would draw more crime to the area. Justice Kennedy said the case should go back for trial to test the city's claim that its ban on the video parlor would combat crime, not just deter unsavory speech.

Judicial Speech
The Supreme Court threw out Minnesota's limits on what judicial candidates may tell voters in Republican Party of Minnesota v. White, 122 S.Ct. 2528 (2002) (O'Connor and Kennedy, JJ., concurring; Stevens, Souter, Ginsburg, and Breyer, J.J., dissenting). Justice Scalia concluded for the 5-4 majority that the Minnesota Code of Judicial Conduct violated the First Amendment by prohibiting judicial candidates from announcing their views on disputed legal or political issues. In a concurring opinion, Justice O'Connor stated that “if the state has a problem with judicial impartiality, it is largely one the state brought upon itself by continuing the practice of popularly electing judges.”

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Eight states (Arizona, Colorado, Iowa, Maryland, Mississippi, Missouri, New Mexico, and Pennsylvania) have rules similar to Minnesota's. At least 25 states have incorporated a clause from the ABA Model Code of Judicial Conduct prohibiting "statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court." While the Court held that the Minnesota "announce" clause was unconstitutional, it did not rule on the constitutionality of a "pledges or promises clause" such as in the ABA Model Code of Judicial Conduct. Because the Court stopped short of simply saying that a judicial election is an election like any other election, it is anticipated that there will be more litigation testing the boundaries of what limits can or cannot be placed on a judicial candidates' speech during the election campaign.

Advertising

Door-to-Door Advocacy
An Ohio village's ordinance requiring registration with the village's mayor and a permit before groups could engage in door-to-door advocacy violates the First Amendment as applied to religious proselytizing, anonymous political speech, and distribution of handbills. *Watchtower Bible & Tract Society of New York v. Village of Stratton*, 122 S.Ct. 2080 (2002) (Breyer, Souter, Ginsburg, Scalia, and Thomas, JJ., concurring in result; Rehnquist, C.J., dissenting). Writing for the Court, Justice Stevens held that the ordinance is "offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must inform the government of her desire to speak to her neighbors and then to obtain a permit to do so." The Court said that the lack of a permit is not likely to deter criminals, who could pose as surveyors or census takers not covered by the ordinance. The Court suggested that an ordinance targeted solely at commercial solicitors might be satisfactory.

In a concurring opinion joined by Justices Souter and Ginsburg, Justice Breyer noted that the village had not offered any evidence to support its interest in crime prevention. In his dissent, Chief Justice Rehnquist wrote, "[The majority's] doctrine contravenes well-established precedent, renders local governments largely impotent to address the very real safety threat that canvassers pose, and may actually result in less of the door-to-door-communication that it seeks to protect." The chief justice offered as an example in support of his premise the murder of two Dartmouth College professors in 2002 by teenagers who went door-to-door to conduct a purported environmental survey for school as evidence of the danger posted by door-to-door canvassing.

**PATENTS**

Doctrine of Equivalents
The doctrine of equivalents protects a patented element of design from infringement without a showing of exact duplication. Before 2000, the doctrine could be used if a patent holder had not materially changed the description of that element during the initial patent approval process. However, if the amendment changed the overall description of the invention, a defendant could invoke a defense called "patent history estoppel." In 2000, the U.S. Court of Appeals for the Federal Circuit held that if a patent holder had made any amendment to its patent, the doctrine of equivalents did not protect the patented element.

Reversing the Federal Circuit, the Supreme Court unanimously held that the Federal Circuit's ruling was inconsistent with precedent and discouraged incentives for innovation. *Festo v. Shoketsu Kineoku Kogyo Kabushiki Co.*, 122 S.Ct. 1831 (2002). In addition, the Court said that the retroactive application of the complete bar would disrupt "the settled expectations of the inventing community" and "destroy the legitimate expectations of inventors in their property." The Court imposed a rebuttable presumption placing the responsibility on the plaintiff to explain its amendments. To overcome this presumption, the drafter must show that he or she could not have reasonably foreseen an equivalent invention at the time the amendment was made.
PRISONERS

The Court generally ruled against lawsuits by prison inmates this term. Writing for the Court, Justice Kennedy ruled that jailed sex offenders could lose visitation and recreation privileges if they do not admit all past sexual assaults to prison counselors. McKune v. Lile, 122 S.Ct. 2017 (2002) (O’Connor, J., concurring; Stevens, Souter, Ginsburg, and Breyer, J.J., dissenting. The Court also ruled that inmates who claim they were abused must use an internal prison complaint system before filing a lawsuit. Porter v. Nussle, 534 U.S. 516 (2002). In a third case, the Court ruled in an opinion written by Chief Justice Rehnquist that federal inmates housed in private prisons or halfway houses cannot sue the operating companies for damages over civil rights violations. Correctional Services Corp. v. Malesko, 122 S.Ct. 515 (2001) (Scalia and Thomas, J.J., concurring; Stevens, Souter, Ginsburg, and Breyer, J.J., dissenting. However, in a fourth case, the Court held that a former inmate could sue prison officials for chaining him to a pole. Hope v. Pelzer, 122 S.Ct. 2508 (2002).

Exhaustion of Remedies

The Prison Litigation Reform Act of 1995 (PLRA) provides that “[n]o action shall be brought with respect to prison conditions under section 1983..., or any other Federal law, by a prisoner... until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). In Porter v. Nussle, a Connecticut prison inmate filed a lawsuit under 42 U.S.C. § 1983, without first filing an inmate grievance to complain that corrections officers had beaten him without justification. The trial court dismissed the action, holding that the prisoner had failed to exhaust his administrative remedies. The Second Circuit reversed, holding that the exhaustion of administrative remedies requirement covers only conditions affecting prisoners generally, not single incidents that immediately affect only particular prisoners, such as a corrections officer’s use of excessive force.

Disagreeing with the Second Circuit, the Supreme Court, in an opinion written by Justice Ginsburg, unanimously held that the PLRA applies to inmate claims regardless of whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. The Court held that, even when the prisoner seeks relief not available in the grievance proceedings—notably money damages—exhaustion is still a prerequisite to suit. Justice Ginsburg explained that Congress enacted the PLRA to reduce the quantity and improve the quality of prisoner suits. To this purpose, Ginsburg wrote, Congress afforded corrections officials the time and opportunity to address complaints internally before allowing the initiation of a federal case.

Relying on the Court’s earlier decision in Booth v. Churner, 532 U.S. 731 (2001), Justice Ginsburg stated that in some instances corrective action taken in response to an inmate’s grievance might improve prison administration and satisfy the inmate or, in other instances, the internal review might “filter out some frivolous claims.” She reasoned that the asserted distinction between excessive force claims that need not be exhausted on one hand and exhaustion-mandatory “frivolous” claims on the other is untenable because excessive force claims can themselves be frivolous. According to Justice Ginsburg, “Scant sense supports the single occurrence, prevailing circumstance dichotomy. Why should a prisoner have immediate access to court when a guard assaults him on one occasion, but not when beatings are widespread or routine?”

Cruel and Unusual Punishment

Law enforcement officers generally enjoy qualified immunity from lawsuits, unless their conduct violates the Constitution or established law. In Hope v. Pelzer, 122 S.Ct. 2508 (2002) (Rehnquist, C.J.; Scalia and Thomas, J.J., dissenting), the Supreme Court considered how officers should know that their challenged conduct was illegal or unconstitutional.

The Supreme Court declared unconstitutional an Alabama prison practice of handcuffing inmates to a metal pole in the summer heat. The plaintiff claimed that in 1995 he was not allowed to sit or move more than a few inches from the pole while his arms were chained at head level, and he once was left chained for seven hours without a bathroom break. The plaintiff stated that guards removed his shirt and taunted him by bringing a bucket of water that was then given to prison dogs and poured at his feet. The Alabama practice was discontinued in 1998 after a federal judge found its use to be unconstitutional.

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The Court said that prison officers should have known the treatment was unconstitutional, and thus they could be sued by a former inmate. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. He argued that traditional state immunity “has been turned on its head.” According to Justice Thomas, the question was whether it was clearly established in 1995 that using a restraining bar violated the Eighth Amendment’s ban on cruel and unusual punishments. Justice Thomas wrote, “The answer to this question is also simple: Obviously not.”

Justice Stevens disagreed, writing for the majority, “The obvious cruelty inherent in this practice should have provided [prison officials] with some notice that their alleged conduct violated [the plaintiff’s] constitutional protection against cruel and unusual punishment.” Stevens explained that the plaintiff had been “treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.”

**REAL PROPERTY**

**Eminent Domain**

In a change of pace from its recent takings cases, the Supreme Court held that a moratorium on development did not constitute a per se taking of property. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002) (Rehnquist, C.J.; Scalia, and Thomas, J.J., dissenting). Writing for the Court, Justice Stevens held that the question of whether the takings clause of the Fifth Amendment requires compensation when government enacts a temporary regulation denying a property owner all viable economic use of property is to be decided, not by any categorical rule, but by applying a complex set of factors, including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.

**Eviction**

The Supreme Court has ruled that the Anti-Drug Abuse Act requires lease terms giving local housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engaged in drug-related criminal activity on or near the premises, regardless of whether the tenant was personally aware of or should have been aware of such activity. *Department of Housing & Urban Development v. Rucker*, 122 S.Ct. 1230 (2002) ((Breyer, J., took no part in the consideration or decision of the case).

**SOCIAL SECURITY AND MEDICAID**

**Community Spouse Resource Allowance**

*Wisconsin Dept. of Health & Family Services v. Blumer*, 122 S.Ct. 962 (2002) (Stevens, O’Connor, and Scalia, J.J., dissenting), involves mind-numbing analysis and terminology, but is an important case affecting thousands and thousands of persons who depend upon Medicaid for long-term care. Medicaid is a joint federal-state program established in 1965 as Title XIX of the Social Security Act. Among other things, the program provides coverage for elderly persons whose income and resources are insufficient to meet the costs of medical services, such as nursing home care. The federal government provides states that participate in the program with partial funding. The federal government also establishes mandatory and optional categories of eligibility and services covered. No state may adopt programs or policies that violate the mandate of the Social Security Act.

In 1988 Congress enacted the Medicare Catastrophic Coverage Act of 1988 (MCCA). The MCCA seeks to protect married couples when one spouse is institutionalized in a nursing home so that the spouse who continues to reside in the community is not impoverished and has sufficient income and resources to live independently. Before 1988, the Medicaid eligibility rules required a couple to deplete their resources before the institutionalized spouse was eligible for benefits, often leaving the community spouse impoverished and unable to live without public assistance.

When an application for Medicaid is made, the couple’s total resources are calculated as of the date that continuous institutionalization began for the institutionalized spouse, and then a share of those resources is allocated to each spouse. The amount of resources allocated to the community spouse is called the community spouse resource allowance (CSRA). The CSRA is considered an “unavailable asset” in determining the Medicaid eligibility of an institutionalized spouse. States have used two methods for determining the
CSRA. Under the "income-first" method used by most states, a community spouse's income includes not only the community spouse's actual income at the time of the eligibility hearing but also an anticipated "community spouse monthly income allowance" (CSMIA). Because the income-first method takes account of the potential CSMIA, that method makes it less likely that the CSRA will be increased and tends to require couples to expend additional resources before the institutionalized spouse becomes Medicaid eligible. The "resources-first" method used in the remaining states excludes the CSMIA from consideration.

In 1994, Irene Blumer was admitted to a nursing home in Wisconsin. Sometime later, Irene, through her husband Burnett, applied for Medicaid (also referred to as Medical Assistance). The county department of human services conducted an asset assessment to determine if Irene was eligible for Medicaid benefits. The county determined that the Blumers had total assets of $145,644 in 1994 when Irene was admitted to the nursing home.

The county set Burnett's community spouse resource allowance (CSRA) at $72,822, or one-half of the couple's non-exempt assets. Based upon this CSRA, the county established a total asset limit of $74,822—$72,822 for Burnett, as the community spouse, and $2,000 for Irene, as the institutionalized spouse, before Irene would be eligible for Medicaid. The county determined that the Blumers had total assets of $145,644 in 1994 when Irene was admitted to the nursing home.

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Irene then requested a hearing for the purpose of setting a higher CSRA. At the hearing, it was established that Burnett's share of assets generated $377.85 per month in interest and dividends. When combined with his Social Security payments and payments from an annuity, the hearing examiner concluded that Burnett's total monthly income was $1,702.45. This amount was below the minimum monthly maintenance needs allowance of $1,727 established by federal law as the minimum monthly income a community spouse would need to live independently. Irene argued that because the CSRA set by the county did not have the capacity to generate sufficient income to meet Burnett's minimum monthly maintenance needs allowance, the examiner should have set a higher CSRA so that Burnett would have more assets to generate more income. Setting a higher CSRA would allow a transfer of assets to Burnett, making Irene eligible for Medicaid sooner.

Relying on Wisconsin's Medicaid spousal impoverishment statute, the hearing officer concluded that he could not raise the CSRA and permit a transfer of assets to Burnett until Irene first made all of her income available to him. By imputing Irene's Social Security retirement income and her pension to Burnett, the hearing examiner concluded that he had a monthly income of more than $2,000, well above the minimum monthly maintenance needs allowance established by federal statute. The hearing officer concluded that no additional assets above the initially established CSRA needed to be retained by Burnett and that the county had correctly denied Medicaid benefits to Irene. On appeal, the Wisconsin Court of Appeals held that application of the "income-first rule, instead of the resources-first" method when determining whether to increase the CSRA conflicted with federal law.

The U.S. Supreme Court reversed. Writing for the majority, Justice Ginsburg held that the income-first prescription of Wisconsin statutes, requiring potential income transfers from the institutionalized spouse to be considered part of the "community spouse's income" for purposes of determining whether a higher CSRA was necessary, did not conflict with the MCCA. The dissenting justices contended that the text of the federal statute, which expressly authorizes the resources-first method without mentioning the income-first method, identifies, at the very least, a congressional preference for the former.

Disability Benefits
The Social Security Administration's interpretation of a statutory definition of "disability" as requiring that a claimant's "inability to engage in any substantial gainful activity" last, or be expected to last, for at least 12 months, is based on a lawful construction of the statute, according to the Supreme Court. Barnhart v. Walton, 122 S.Ct. 1265 (2002) (Scalia, J., concurring). Writing for
the Court, Justice Breyer also upheld a regulation providing that a return to work that takes place both prior to the lapse of a 12-month period after the onset of impairment and prior to an adjudication of disability precludes a finding that a claimant is disabled or entitled to a trial work period.

STATES
In 1996 the Supreme Court ruled that, under the Eleventh Amendment, states are generally immune from private lawsuits brought under federal law. Seminole Tribe v. Florida, 517 U.S. 44 (1996). Since that decision, the Supreme Court has held that states are immune from suit in a variety of contexts, including suits against state agencies over patent, trademark, and copyright infringement, age discrimination, and disability discrimination. A sharply divided Supreme Court continues to wrestle with cases involving sovereign immunity of states.

Administrative Hearings
In Federal Maritime Commission v. South Carolina State Ports Authority, 122 S.Ct. 1864 (2002) (Stevens, Breyer, Souter, and Ginsburg, JJ., dissenting), the Supreme Court extended state sovereign immunity to adjudicative hearings by federal administrative agencies. Writing for the majority, Justice Thomas stated that the majority was defending the structure of the original Constitution even if it is "not a model of administrative convenience." He added, "By guarding against encroachments by the federal government on fundamental aspects of state sovereignty, we strive to maintain the balance of power embodied in the Constitution." Pointing out that the majority was not striking down the Shipping Act of 1916 or depriving the Federal Maritime Commission of its power to enforce the act, Justice Thomas stressed that all the majority was prohibiting was a requirement that state-run ports defend themselves in a complaint brought by a private party.

In dissent, Justice Breyer accused the majority of inventing a principle that is not mentioned in the Constitution and then using it to reduce the federal government's power to enforce progressive laws.

Supplemental Jurisdiction
In Raygor v. Regents of University of Minnesota, 122 S.Ct. 999 (2002) (Ginsburg, J., concurring in part; Stevens, Souter, and Breyer, JJ., dissenting), the Supreme Court held that a provision in the supplemental jurisdiction statute (28 U.S.C. § 1367(d)) does not toll the statute of limitations for claims against nonconsenting states that were filed in federal court but subsequently dismissed on Eleventh Amendment grounds.

In Raygor, state employees had filed complaints in federal district court against the University of Minnesota, alleging a federal cause of action under the Age Discrimination in Employment Act (ADEA) and a state law discrimination action under the Minnesota Human Rights Act (MHRA). In its answer, the university responded that the federal claims were barred by the state's Eleventh Amendment immunity. The court thereafter dismissed all the claims.

The employees refiled their state law claims in state court. The university argued that the claims were barred by the applicable state statute of limitations and that the federal supplemental jurisdiction statute did not toll the limitations period on those claims because the federal court never had subject matter jurisdiction over ADEA claims. The state court's dismissal of the claims as untimely was upheld by the Minnesota Supreme Court.

Upholding the Minnesota court, the majority, through Justice O'Connor, explained that it is far from clear whether Congress intended tolling to apply when claims against nonconsenting states were dismissed on Eleventh Amendment grounds and that it is not relevant whether Congress acted pursuant to Section 5 of the Fourteenth Amendment. Section 5 gives Congress the power to enact laws enforcing the due process clause of the Fourteenth Amendment. When Congress intends to alter the usual constitutional balance between the states and the federal government, the majority said, it must make its intention to do so unmistakably clear in the language of the statute.

The dissent, through Justice Stevens, said that Section 1367(d) was a response to the risk that the plaintiff's state law claim, even though timely when filed as a part of the federal lawsuit, might be dismissed after the state period of limitations has expired. The dissent stated that Section 1367(d) is intended to avoid the necessity of duplicate filings by providing that the state statute
shall be tolled while the claim is pending in federal court and for 30 days thereafter. Pointing out that Minnesota has given consent to be sued in its own courts for alleged violations of the MHRA, Justice Stevens wrote, "In light of such a clear consent to suit, unencumbered by any special limitations period, it is evident that tolling under § 1367(d) similarly 'amounts to little if any broadening of the [legislature's] waiver.' Given the fact that the timely filing in Federal Court served the purposes of the [Minnesota limitations period], it seems to me quite clear that the application of the tolling rule does not raise a serious constitutional issue."

**Removal to Federal Court**

In an uncommon unanimous Supreme Court decision involving state sovereign immunity, the Supreme Court held that a state waives its Eleventh Amendment immunity from suit in federal court when it removes a case from state court to federal court. *Lapides v. Board of Regents*, 122 S.Ct. 1640 (2002). The decision is consistent with previous Supreme Court decisions holding that a state's voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity. The Court explained that a rule that finds waiver through a state attorney general's invocation of federal court jurisdiction avoids inconsistency and unfairness.

**Regulation of HMOs**

Last but not least, in one of the seemingly ho-hum cases that in reality may have a significant impact on the day-to-day lives of many individuals, the Supreme Court held that the Employee Retirement Income Security Act of 1974 (ERISA) does not pre-empt an Illinois law requiring independent review when a health maintenance organization and a patient disagree over whether a course of treatment is medically necessary. *Rush Prudential HMO Inc. v. Moran*, 122 S.Ct. 2151 (2002) (Rehnquist, C.J.; Scalia, Thomas, and Kennedy, JJ., dissenting). The Court held the independent review law was saved from preemption by 29 U.S.C. § 144(b)(2)(A), which preserves state laws that regulate "insurance, banking, or securities." In an opinion written by Justice Souter, the majority stated that an HMO "cannot checkmate common sense by trying to submerge HMOs' insurance features beneath an exclusive characterization of HMOs as providers of health care." The decision may encourage states to regulate HMOs more closely.