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Section 6: Civil Rights

Institute of Bill of Rights Law, William & Mary Law School

CIVIL RIGHTS

In This Section:

Last Term:

Rita L. SAENZ, Director, California Department of Social Services, *et al.*, petitioners
v.
Brenda ROE and Anna DOE etc.

No. 98-97

Supreme Court of the United States

Decided May 17, 1999

CITIZENSHIP HAS ITS PRIVILEGES
The Court Resurrects A Civil War-Era Ideal

***The New York* Times**

Sunday, May 23, 1999

Linda Greenhouse

IN constitutional law, as in geology, things can look perfectly stable on the surface -- until the tectonic plates shift underneath.

As the Supreme Court term heads into its final weeks, the question is whether such a shift may be underway. In its decision last week striking down California's reduced welfare benefits for newcomers to the state, the Court relied on a portion of the 14th Amendment that forbids states to restrict the "privileges or immunities" of American citizens.

This is the long-neglected privileges-or-immunities clause, the sudden resurrection of which, by a broad 7-to-2 majority, was certainly one of the most surprising and possibly one of the most consequential constitutional developments in years.

The 14th Amendment, adopted in 1868 to ratify the outcome of the Civil War, says in its first paragraph, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." There is historical evidence that the amendment's drafters regarded the privileges-or-immunities clause as more important than the much-invoked guarantees of due process and equal protection that it precedes in the text.

But the clause was sent into early eclipse by an 1873 Supreme Court decision known as the Slaughter-House cases, which held that the clause protected

only the rights of national citizenship and placed no new obligations on the states.

So by turning back to this long-buried language, the Court was taking at least a tentative step on a new path of constitutional analysis. While the ultimate destination is uncertain, it appeals to both conservatives, who see the clause as a new source for protection for property and economic rights, and for weary liberals, who see it as a means for protecting individual rights without having to fight endless battles over the meaning of due process.

And indeed, Justices across the ideological spectrum signed their names to this opinion, from John Paul Stevens, its author and arguably the Court's most liberal member, to Antonin Scalia, one of the most conservative.

While Justice Clarence Thomas dissented, disagreeing that welfare was one of the historically protected privileges, he made clear his enthusiasm for reconsidering the privileges-or-immunitiesclause in an "appropriate case." That left Chief Justice William H. Rehnquist oddly isolated in his complaint that "the Court today breathes new life into the previously dormant privileges or immunities clause," an observation that the majority did not rebut.

The Justices who came together in the California welfare case, Saenz v. Roe, did not necessarily do so for the same reasons, or with the same expectations of where this new opening might lead. The privileges-or-immunities clause has been invisible for so long that there are few recognizable signposts, and there were no concurring opinions by which individual members of the majority might have elaborated on the analysis.

But at the least, to carry the geological analogy a step further, the opinion undoubtedly achieved a release of doctrinal tension much as an earthquake relieves pressure that builds up under the Earth's crust.

The two-tiered welfare program challenged in this case was quite clearly unconstitutional under the Court's most directly relevant precedent, a 1969 decision called Shapiro v. Thompson that invoked a constitutional "right to travel" to bar states from denying welfare benefits during a newcomer's first year of residency.

Yet there was probably no member of the current Court completely at ease with the analytic method that produced Shapiro v. Thompson. That decision represented a kind of high-water mark of the Warren Court's open-ended approach to constitutional analysis -- so much so that Chief Justice Earl Warren himself dissented from Justice William J. Brennan's majority opinion, which candidly conceded that the right to travel was not anchored to any particular place in the Constitution.

"We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision," Justice Brennan wrote. It goes without saying that there are no Warren Court-style liberals on the Court today. Briefs from a group of states and other interested parties in the current case urged the Justices simply to overrule the 1969 precedent.

Instead, in Justice Stevens's practiced hands, the right to travel did not disappear but morphed into a right of national citizenship that each state is obliged to honor and that, more to the point, has a solid foundation in the Constitution's text. For the Court's moderate Justices, the privileges-or-immunities clause offers a comfort zone that permits them to defend

individual rights while shedding the baggage of liberal methodology.

For conservatives, particularly those with libertarian leanings like Justice Thomas, the appeal of the clause is even clearer. There is no dispute that, as a matter of history, the privileges the amendment's drafters sought to protect included the right to earn a living, enter into contracts and acquire and maintain property free of government interference - all aspects of the natural law philosophy that inspired the signers of the Declaration of Independence.

THE privileges-or-immunities clause should be used to restore "the fundamental connection between the Constitution and its natural law foundations," Roger Pilon, director of constitutional studies for the Cato Institute, a libertarian policy group here, wrote in a law review article several months ago.

One result would be, Mr. Pilon argues, to raise the level of protection for economic rights, like unrestricted land use, which receive only minimal scrutiny under current constitutional analysis, to the level of protection given to individual rights that under the current approach are deemed "fundamental."

In any event, it is clear that the Justices in a sense are simply catching up with a lively discussion that has been going on for some time among legal academics and constitutional historians. A broad, although by no means universal, consensus has emerged that the Slaughter-House decision of 1873 was based on a mistaken understanding of the intent of the drafters.

Now that the Court has spoken, however tentatively, that conversation will expand to a wider audience. Arguments based on privileges or immunities will be developed in law review articles and presented to lower court judges, who in turn will write opinions that will provide more raw material for the Court, if the Justices want to use it to move further down the new path.

Just as the Court does not act in isolation from the rest of the legal system, cases on its docket do not exist in isolation from one another. Between now and the end of next month, the Justices will announce decisions in three cases that challenge the power of the Federal Government with respect to the states.

It would be surprising if the Court does not continue on its recent course of shifting power away from Congress, a result the states are actively seeking. But new power may come with a price if, as California learned on Monday, the Court at the same time is placing new obligations on the states to safeguard the rights of all their citizens.

TRAVELING BACK IN TIME

Privileges and Immunities Clause Unearthed to Strike Down State Welfare Law

Legal Times

Monday, July 12, 1999

Thomas E. Baker

The Supreme Court has amended the 14th Amendment. In Saenz v. Roe, 119 S. Ct. 1518 (1999), a seven-member majority revived the privileges and immunities clause after 130 years of judicial desuetude.

Ratified in 1868, the 14th Amendment is the most significant of all the amendments for protecting civil rights and liberties. The constitutional couplets "due process" and "equal protection" have generated volumes of annotations limning state action, procedural due process, substantive due process, fundamental rights, incorporation of the Bill of Rights, suspect classifications, privacy, etc.

But the third clause was virtually read out of the 14th Amendment in the Slaughter-House Cases (1873), decided by a 5-4 vote just five years after ratification. Since then, the privileges and immunities clause was used to invalidate state legislation only one time, in 1935, and even that decision was overruled five years later.

So it was a "Constitution-bites-state" kind of headline when the Court invoked the privileges and immunities clause in Saenz to strike down a California welfare code section requiring that families moving from a state with lower benefits would continue to receive the same amount of benefits provided by their former state for their first year in California.

California first enacted the new-resident differential in 1992. Congress authorized such differentials by states as part of a package of reforms in 1996 intended to "end welfare as we know it."

The pseudonymous plaintiffs, Brenda Roe and Anna Doe, sued the California Department of Social Services, department Director Rita Saenz, and other state officials, alleging that the new-resident differential burdened their constitutional right to travel.

The leading prior precedent was Shapiro v. Thompson, 394 U.S. 618 (1969), which struck down state laws that required one year of residency to qualify for welfare, but that opinion conflated the right to travel with the equal protection clause. It is important to emphasize, however, that the Saenz majority did not simply rely on Shapiro.

Instead, the majority revisited the Slaughter-House Cases and other precedents to demarcate three distinct understandings of the right to travel: the right to go from place to place; the right to be treated as a welcomed visitor; and the right to become an equal, permanent resident. Saenz involved the third understanding: "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." The Court found that this right of federal citizenship is guaranteed and protected by the privileges

and immunities clause in the 14th Amendment and may not be burdened by the states.

Applying heightened scrutiny, the majority concluded that the discriminatory classification exacted a penalty on new residents that was not justified by the state's interest to save money or Congress' desire to avoid a "race to the bottom" in which states would lower benefits to avoid becoming "welfare magnets." One fact was particularly significant: an evenhanded, across-the- board reduction of about 72 cents per month for every recipient would have saved California the same amount of money as the new-resident differential. This was telling, since the impact could be dramatic for families living at the margin who moved from one of the lowest-paying states, like Mississippi ($144 per month), to California ($673 per month), one of the most generous jurisdictions.

Justice John Paul Stevens' majority opinion was joined by the Court's four former law professors--Antonin Scalia, Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer--as well as Justices Sandra Day O'Connor and David Souter. Chief Justice William Rehnquist and Justice Clarence Thomas wrote separate dissents and joined each other's opinion.

Rehnquist insisted that the plaintiffs were no longer traveling when they became citizens of California, subject to state laws, including reasonable welfare regulations. His dissent reads like a poster for the recent movie "The Mummy," with theatrical references to the majority's efforts to "breathe new life into" and "unearth from its tomb" the privileges and immunities clause--characterizations the majority did not bother to rebut.

Thomas harkened back to the intentions of the framers of the 14th Amendment. He admitted that he was dissatisfied with the case law interpreting the due process and equal protection clauses and stated that he would be "open to reevaluating" the privileges and immunities clause "in an appropriate case." But he worried that the Saenz majority and future majorities would simply invent rights they liked, without doing the heavy lifting of historical analysis. Thomas surmised that the framers of the clause probably had in mind fundamental natural rights rooted in history and common law, but he was certain that they were not thinking about public entitlements like welfare.

What should we make of the remarkable fact that all nine justices expressed at least some enthusiasm for reviving the privileges and immunities clause after 130 years? Is this holding a harbinger of new substantive rights? What sort of state laws might we expect to be challenged?

Constitutional Adjustment

Calls for reversing the Slaughter-House Cases have come from both sides of the ideological spectrum. Professors have always presumed that the decision was wrong, although there has been little academic consensus about just what is a privilege and immunity of federal citizenship. Indeed, the one thing that scholars seem to agree on is that the framers of the 14th Amendment expected the privileges and immunities clause to be far more significant than either the due process clause or the equal protection clause. Maybe now it will be.

Challenges likely will be brought against virtually all state residency requirements for programs and benefits. This will not mean that a person can drive along the interstate highways collecting welfare checks at every state welcome center. But if the Court requires heightened scrutiny, the states will be hard

pressed to justify any requirement beyond a simple determination that the person is in fact a bona fide resident. As a practical matter, policing eligibility for state benefits and licensing commercial activities will be harder.

We should expect that Saenz will lead to a fundamental reconceptualization of the 14th Amendment. Both the equal protection/fundamental rights cases and the due process/incorporation of the Bill of Rights cases would make much more sense as annotations of the privileges and immunities clause. Even the dissenters opined that this area of constitutional law lacks coherency and needs rethinking.

For advocates on the left, Saenz may help them strengthen and broaden nontextual rights. Most important, the right to privacy could be derived more directly from the privileges and immunities clause than from elliptical discursives about penumbras and unconvincing accounts of the history and tradition of ordered liberty. Perhaps the justices will find a synergy between the clause and the Ninth Amendment's textual expectation of rights beyond the four corners of the Constitution.

Libertarians will find in the privileges and immunities clause what Scalia once mocked as "that Thoreauvian you-may-do-what-you-like-so-long-as-it-does- not-injure-someone-else' beau ideal." Barnes v. Glen Theatre Inc., 501 U.S. 560 (1991)(Scalia, J., concurring). The clause could be employed to protect the core value of personal autonomy. If we imagine what Justice William Brennan might have done with this clause in support of human dignity, we can begin to appreciate its potential expansiveness.

On the right, contemporary devotees of John Locke, ever solicitous of property rights, may also find Saenz useful. We can expect institutional litigators to invoke this holding to advocate economic liberty. Heightened scrutiny under the privileges and immunities clause may cut across all sorts of economic regulation on practicing an occupation and acquiring private property. It was a government-sponsored monopoly, after all, that was at issue in the Slaughter-House Cases.

We can expect challenges to occupational licensing laws that discriminate against outsiders; the interstate barriers to practicing law may be vulnerable. It is not a sure bet that states still will be allowed to extract out-of-state tuition premiums at state universities. The conservative Institute for Justice, which filed an amicus brief in Saenz, is already preparing court challenges against cabaret licensing in New York City and newsstand regulations in Baltimore. The right to contract of the Lochner era may be beneath the bandages of this mummy.

Whatever one thinks of judicial activism that reads rights into the Constitution, judicial activism that reads rights out of the Constitution is far worse. What is more remarkable than the invalidation of a state law under the privileges and immunities clause is that for 130 years the Supreme Court ignored one of the great clauses in the 14th Amendment. We will have to wait and see if the justices make up for lost time.

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THE SUPREME COURT EXHUMES THE 14TH AMENDMENT'S 'PRIVILEGES OR IMMUNITIES' CLAUSE

Legal Times

Monday, May 24, 1999

Clint Bolick

When I was studying for the bar examination, the constitutional law instructor told the class there was only one thing we needed to know about the 14th Amendment's "privileges or immunities" clause: It was never the right answer to a bar exam question.

Last Monday, the bar exam suddenly got tougher.

Not surprisingly, the U.S. Supreme Court in Saenz v. Roe struck down a California law that limited welfare benefits for new residents. But in the process, the Court did something remarkable—"unearthing from its tomb," as dissenting Chief Justice William Rehnquist put it, the privileges or immunities clause that was buried in its infancy 126 years ago. The Saenz decision opens the door to fill a previously empty constitutional vessel--and to advance the cause of economic liberty.

That the privileges or immunities clause has lain dormant for so long is astounding. Among the 14th Amendment's trilogy of protections, the edict that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" appears first. The clause also provides the amendment's only substantive, rather than procedural, restraint on government power. Yet as Justice Clarence Thomas observed in his Saenz dissent, "unlike the Equal Protection and Due Process Clauses, which have assumed near-talismanic status in modern constitutional law, the Court all but read the Privileges or Immunities Clause out of the Constitution in the Slaughter-House Cases" in 1873.

That decision betrayed the high hopes of the amendment's framers, who intended the clause to remedy grievous civil rights violations and provide a durable bulwark for freedom. Following the Civil War, Southern states enacted "black codes," designed to deprive former slaves of vital liberties such as freedom of contract, property ownership, and the right to pursue a chosen trade or profession.

Just five years after the adoption of the 14th Amendment in 1868, the clause was eviscerated. By a 5-4 vote, rare in those days, the Court upheld a Louisiana law that created a slaughterhouse monopoly in New Orleans and drove butchers out of business. The majority opinion by Justice Samuel Miller ruled that the clause protected against state infringement only those rights that derive from national citizenship, such as habeas corpus and the right of access to navigable waters. The economic rights asserted by the butchers were indeed "privileges or immunities," the majority conceded, but only insofar as states might elect to protect them.

The dissenters justifiably were appalled. As construed by the majority, Justice Stephen Field declared, the clause "was a vain and idle enactment, which accomplished nothing." By refusing to

acknowledge any significant restraint on state police power, Field lamented, "the right of free labor, one of the most sacred and imprescriptible rights of man, is violated." Another dissenter, Justice Noah Swayne, voiced hope that the consequences of the decision would "prove less serious and far-reaching than the minority fear they will be."

Unfortunately, Slaughter-House caused all manner of mischief. When Adolph Plessy challenged a Jim Crow law requiring segregated railway cars in Plessy v. Ferguson (1896), Slaughter-House deprived him of his strongest argument: freedom of contract. Forced to rely on the equal protection clause, Plessy lost 8-1, and "separate but equal" would receive judicial sanction for 58 years.

Meanwhile, essential economic liberties were relegated to carte blanche "rational basis" review. With the privileges or immunities clause buried, the Bill of Rights was selectively and torturously applied to the states through the due process clause.

Calls for reversing Slaughter-House have spanned the ideological spectrum. For instance, Professor Michael Kent Curtis of the Wake Forest University School of Law and the American Civil Liberties Union's Nadine Strossen believe correctly that the privileges or immunities clause provides a far more secure foundation for the Bill of Rights than the due process clause.

ECONOMIC LIBERTIES AT STAKE

My own organization, the Institute for Justice, is perhaps the only group whose core mission includes reviving the privileges or immunities clause. In numerous cases, we have represented start-up entrepreneurs in constitutional challenges to occupational licensing laws, transportation monopolies, and other regulatory barriers. We have won several cases under the equal protection and due process clauses, but the legal terrain is treacherous for economic liberty so long as Slaughter-House stands.

The Court's Saenz decision unquestionably changes the equation, though it was an odd case to embark upon a jurisprudential journey to revive the privileges or immunities clause.

California's two-tiered welfare payment regime, which limited new residents during their first year to the level of benefits received in their former states, faced a tough challenge under past precedents. In Shapiro v. Thompson (1969), for instance, the Court invalidated durational residency requirements for welfare benefits as a violation of the "right to travel."

As Justice John Paul Stevens acknowledged in his majority opinion in Saenz, the right to travel "is not found in the text of the Constitution" yet is "firmly embedded in our jurisprudence." In Shapiro, the Court derived the right to travel from the equal protection guarantee. Thirteen years later in Zobel v. Williams, Justice Sandra Day O'Connor found the right to travel in Article IV, Section 2, which provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Either of those constitutional bases could have sufficed to invalidate the California welfare law. Nonetheless, the Saenz Court reached out to the privileges or immunities clause to find "an additional source of protection" for the right to travel. Citing only Slaughter-House, the Court stated that "it has always been common ground that this Clause protects . . . the right to travel." While the right to travel has been long established, Saenz is unique and remarkable because it

relied on the privileges or immunities clause to strike down state legislation.

In his dissent, Thomas criticized the majority for failing to address the historical underpinnings of the privileges or immunities clause. Exploring the common law and Reconstruction-era origins of the privileges or immunities guarantee, he concluded that the term was meant to encompass fundamental natural rights, but not public benefits.

While noting that he would "be open to reevaluating its meaning in an appropriate case," Thomas warned that such an inquiry, if bereft of historical analysis, could raise "the specter that the Privileges or Immunities Clause will become another convenient tool for inventing new rights."

Still, the fear of damaged cargo should not cause us to abandon the voyage to revive the privileges or immunities clause. Judicial activism that creates rights that do not exist in the Constitution is bad, but judicial activism that reads rights out of the Constitution is even worse. The drafters of the 14th Amendment plainly intended to limit oppressive state action and protect fundamental rights. For more than 130 years, particularly in the context of property rights and economic liberty, that promise has largely gone unfulfilled.

Properly construed, the privileges or immunities clause would require states to justify restraints on economic liberty by demonstrating that they are substantially related to a legitimate governmental objective. As the dissenters in Slaughter-House recognized, regulations that serve no purpose other than economic protectionism would be swept aside, while regulations reasonably designed to protect public health and safety would survive scrutiny.

The Saenz Court has issued an invitation to revisit a long-buried doctrine. While the civil rights struggles of the 20th century have focused on giving tangible meaning to the due process and equal protection clauses, it is time now to make good on the first and most basic promise of the 14th Amendment: the guarantee that states shall not abridge the privileges and immunities of citizens.

Clint Bolick is litigation director at the Institute for Justice in Washington, D.C. His most recent book is Transformation: The Promise and Politics of Empowerment (ICS Press, 1999).

Last Term:

James B. HUNT, Jr., Governor of North Carolina, *et al.*, petitioner
v.
Martin CROMARTIE, *et al.*

No. 98-85

Supreme Court of the United States

Decided May 17, 1999

VOTING DISTRICTS GET SOME LEEWAY
Supreme Court Overturns Ruling in Racial Gerrymander Case

***Austin* American-Statesman**

Tuesday, May 18, 1999

Linda Greenhouse

WASHINGTON – Revisiting a much-disputed North Carolina congressional district Monday, the Supreme Court ruled with surprising unanimity that even a conscious concentration of black voters did not automatically make a district unconstitutional as long as the state's primary motivation in drawing the district might have been political rather than racial.

The court overturned a judgment won last year by a group of white voters who challenged the latest version of North Carolina's 12th Congressional District as an unconstitutional racial gerrymander. The case now will go back to a special three-judge federal district court in Raleigh with instructions to take account of the state's evidence that it wanted to create a district of loyal Democrats, many of whom happened to be black.

The plaintiffs were allied with the white voters whose challenge to an earlier and more heavily black version of the same district led in 1993 to the Supreme Court's Shaw vs. Reno decision, which opened the door to strict and -- until now -- invariably fatal judicial scrutiny of districts drawn as part of an effort to enhance black political representation.

Justice Clarence Thomas' decision for the court Monday in no way disavowed Shaw vs. Reno or the four cases that followed it, striking down majority black districts in Georgia and Texas as well as in North Carolina. Rather, Thomas said, those cases had limits: Plaintiffs retain the burden of proving that race was, impermissibly, "the predominant factor" in drawing district lines, and lower courts are not free to ignore, as this one did, evidence of other permissible motivations.

"A jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the state were conscious of that fact," Thomas said, adding, "Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference."

The question of motivation is a fact to be proved at trial, he said, not a conclusion to be assumed by a court at the summary judgment stage, as happened in this case. Thomas emphasized that the court was taking no position on the ultimate question of the 12th District's constitutionality. He said there was evidence of both a political motive and a racial motive for the district, which is now 47 percent black.

Although the 9-0 decision was in that sense inconclusive, its importance on the eve of the next national round of redistricting could reach considerably beyond the fate of this particular district, a thin, 90-mile-long squiggle that links centers of black population in west-central North Carolina.

Monday's decision, Hunt vs. Cromartie, was essentially a set of instructions to the lower court judges who will be hearing similar challenges after the 2000 census.

Thomas appeared to go out of his way to make clear that simple consciousness of race among district line-drawers is not, by itself, enough to invalidate a district. Lower court judges misunderstand the Supreme Court's recent precedents if they think the court has instructed them to root out any use of race, Thomas said.

While all nine justices agreed with the decision, the four who consistently have dissented from the recent redistricting cases did not sign Thomas' opinion, instead filing a separate opinion to emphasize what they said was the weakness of the evidence for a racial gerrymander in this case. Justice John Paul Stevens wrote the separate opinion, which Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer also signed.

The practical effect of the ruling Monday may be to give states "very significant breathing room" as they approach the next round of redistricting, Walter Dellinger, who argued the case for North Carolina, said Monday. Dellinger, the former acting solicitor general, handled the case as a private citizen and North Carolina resident.

Since there tends to be a strong correlation between race and voting patterns in many areas, the court's approach may well permit the incumbent politicians who draw district lines to achieve two goals at once: concentrate predictable Democratic and Republican voters in separate districts while at the same time ensuring continued black representation from certain areas.

MOTIVE COUNTS
Clarence Thomas' Redistricting Guide

The Connecticut Law Tribune

Monday, May 24, 1999

Stuart Taylor Jr.

While racial gerrymandering of election districts is unconstitutional, race-conscious political gerrymandering is not.

That is the sensible message of the Supreme Court's May 17 decision holding unanimously that the boundaries of a North Carolina congressional district had not been proven unconstitutional -- not yet, at least -- and sending the case back to a lower court for further proceedings.

Justice Clarence Thomas' brief opinion (joined by four other justices) in the case of Hunt v. Cromartie may help steer the Court's history of conflicted and confusing jurisprudence in this area toward a coherent resting place.

The decision at least gives states better guidance on how to get through the decennial redistricting after next year's census without running afoul of the courts. And it represents the clearest acknowledgment so far by the Court's conservatives that the redistricting process cannot be made completely colorblind, because the politicians who draw the lines cannot help but be aware of racial voting patterns.

In past decisions, Thomas and the four other conservative justices have struck down the blatant racial gerrymandering that the Justice Department for years pressured states to adopt in order to create as many majority-black and majority-Hispanic districts as possible.

Now these five justices have joined their four more-liberal colleagues in specifying that the Court will allow states to engage in political gerrymandering even when the results include heavily black or Hispanic districts.

The specific issue before the justices was whether a three-judge lower court in Raleigh had been correct in awarding summary judgment, without having heard detailed evidence on the issue of motive, to white voter- plaintiffs who challenged as an unconstitutional racial gerrymander the current version of North Carolina's much-litigated 12th Congressional District. That district is now 47 percent black.

The Court was unanimous in reversing the lower court and sending the case back, asking the lower court to take more evidence on whether the legislature's primary motive had been to create a strong Democratic district (surrounded by Republican districts), as the state claimed, or to concentrate black voting strength, as the white plaintiffs argued.

Examining Motives

While stressing that there was evidence of both a political and a racial motive, Justice Thomas spelled out the implications of earlier decisions that gerrymandering is unconstitutional only if race is the "predominant" motive:

A jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal

Democrats happen to be black Democrats and even if the state were conscious of that fact. ... Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines, when the evidence also shows a high correlation between race and party preference.

The four more-liberal justices, who have dissented from the earlier decisions holding that racial gerrymandering violates the Constitution, did not sign the Thomas opinion. Rather, they joined in a concurrence by Justice John Paul Stevens stressing the evidence that this was a political gerrymander, not a racial one.

The fate of North Carolina's 12th District -- represented in the House by Melvin Watt, a black Democrat -- remains uncertain. But Justice Thomas' language will help states figure out how to stay on the constitutional side of the line in future redistrictings. This, in turn, may portend a gradual calming of the legal and political turmoil over racial gerrymandering that has raged at least since the 1982 amendments to the Voting Rights Act.

That 1982 legislation was designed to give black and Hispanic voters, who had often been submerged in majority-white districts, more power to elect representatives of their choice. As interpreted in 1986 by the (then more liberal) Supreme Court in Thornburg v. Gingles, the 1982 amendments were widely viewed as requiring the creation of as many majority-black and majority-Hispanic districts as possible, often by drawing districts contorted into odd forms.

Such race-based districting was pushed by a marriage of convenience that united civil rights groups and black and Hispanic politicians seeking safe seats, with conservative white Republicans who stood to win more seats if minority voters were packed into a few districts.

Under both Presidents George Bush and Bill Clinton, the Justice Department also pushed states hard to adopt race-based districting. Powerful objections - that this cure aggravates the underlying disease of racial polarization and racial-bloc voting; that minority voters have less overall clout in both Congress and state legislatures when they are packed into a few districts; and more -- were swept aside.

Then, in 1993, the Supreme Court's five conservatives started pushing back.

In Shaw v. Reno, they denounced efforts to "balkanize us into competing racial factions," and evinced visceral distaste for the "bizarre," serpentine shape that had been drawn to give an earlier version of North Carolina's 12th Congressional District a 53 percent black majority.

Justice Sandra Day O'Connor held for the Court that it was presumptively unconstitutional to create majority-black or majority-Hispanic districts if their shapes were so strange as to evidence an intent "to separate voters into different districts on the basis of race." In sending the case back to the lower court, O'Connor suggested that such a district could be justified only if, in some rare case, it was an indispensable remedy for a violation of the Voting Rights Act.

The Court's new rule against racial gerrymandering put its reading of the Constitution on a collision course with its reading of the Voting Rights Act in Gingles, as that decision had been construed by the Justice Department and many lower courts.

The justices followed through in 1995 and 1996 with three 5-4 decisions striking down majority-black districts as unconstitutional racial gerrymanders. In the first of them, Miller v. Georgia, Justice Anthony Kennedy's opinion denounced "the Justice Department's implicit command that states engage in presumptively unconstitutional race-based districting" in the name of the Voting Rights Act. Kennedy held that judges should subject voting districts to "strict scrutiny" whenever "race was the predominant factor" in drawing them.

Neither Miller nor the two 1996 decisions provided much practical guidance for states that want to draw districts without violating either the Voting Rights Act or the Court's constitutional ban on racial gerrymandering. Hunt v. Cromartie brings a bit more predictability to the scene.

A Path to Accommodation?

This is not to say that Justice Thomas' opinion entirely ends the confusion, or that it portends the emergence of consensus among the Court's conservatives and liberals. But this small step toward clarity could point toward an eventual withering away of the racial gerrymandering litigation that has so roiled the courts and the country since 1993.

This is so in part because the Thomas opinion implicitly suggests a way of accommodating liberals' desire to see significant numbers of black and Hispanic candidates elected with conservatives' distaste for the use of overt racial gerrymandering to achieve that result.

Because African-Americans are among the most loyal of Democrats, the elected officials who draw district lines may often find that the most efficient form of political gerrymandering -- which is to aggregate precincts with the most heavily Democratic (or Republican) voting patterns -- will also create sufficient concentrations of black voters to help elect their chosen candidates, many of whom will also be black.

This does not mean that race-conscious partisan gerrymandering is or should be mere camouflage for racial gerrymandering. A districting plan motivated mainly by political rather than racial considerations will tend to produce more racially integrated, less balkanized districts, often with large black (or Hispanic) pluralities rather than majorities. This will foster the building of cross-racial coalitions -- not a bad thing. Such political gerrymandering is also less likely to send voters the noxious message that they are supposed to cast their ballots along racial lines.

The ultimate goal should be to ensure that black and Hispanic voters have a fair chance of electing their chosen candidates without resorting to racial gerrymanders. As more and more black and Hispanic candidates win elections in majority-white districts, that goal seems ever more achievable. Hunt v. Cromartie brings it closer still.

Last Term:

Aurelia DAVIS, petitioner,
v.
MONROE COUNTY BOARD OF EDUCATION, *et al.*

No. 97-843

Supreme Court of the United States

Decided May 24, 1999

SUPREME COURT RULING GIVES HARASSED STUDENTS A WAY OUT

The Virginian-Pilot (Norfolk, VA)

Friday, July 23, 1999

Jovan Johnson, 757 Correspondent

SHE SAYS he pinned her against a wall. She remembers him licking her neck and biting her on the side of her face. She remembers him putting his hand on her crotch.

But she doesn't remember a teacher, school administrator or guidance counselor stepping in to stop the incident.

The views of this Cox High School rising senior reflect those of other Hampton Roads students who feel schools are not doing enough to prevent or remedy sexual harassment in schools.

However, thanks to a recent Supreme Court ruling, students have a recourse.

In a 5-4 decision, the High Court ruled that because schools have custodial authority over students, a school that receives federal funds can be liable for damages if nothing is done to stop reported incidents of harassment.

The case began in 1992 when a student in Monroe County, Md., reported incidents of harassment from a fifth-grade classmate. LaShonda Davis says school officials did nothing to stop the abuse, which continued daily for five months. She says she even considered suicide.

After her complaints were dismissed by the school board, LaShonda's mother filed suit in circuit court. The case then made its way to the Supreme Court, where justices ruled in favor of LaShonda, now a teen-ager.

Hampton Roads students applaud the ruling.

"Schools are required to provide a certain amount of protection or haven for a student, and this school in particular neglected to do this," said Jeff Bozman, a rising junior at Norfolk Collegiate.

Some area students say they need to become more familiar with sexual harassment policy so they will be able to make better decisions.

Sexual harassment in schools is illegal, a form of sexual discrimination under 1972's Title IX decision. Title IX was exercised in LaShonda's case.

Students understand the importance of the ruling and see it as fair.

Local school divisions say they take sexual harassment seriously. Some include their policies in student handbooks.

"Shortly after the decision, we reiterated to our principals and staff our sexual harassment policy, and that throughout the year, administrators on all levels are reviewing its policy," said Norfolk School Board chairwoman Anita Poston.

Norfolk Senior Deputy City Attorney Daniel R. Hagemeister says, "Administrators, counselors, teachers, faculty members always take these things seriously."

Hagemeister added he will be involved with a forum on sexual harassment scheduled for October in Norfolk.

He says Norfolk schools are committed to preventing sexual harassment, and when an incident does occur, "punitive actions are swift and forthcoming. It is not tolerated."

Yvette Guy, a counselor for the sexual assault counseling group RESPONSE, says she has noticed a disconnect between students and teachers.

"Students see sexual harassment happening in the hallways and classrooms, but they are afraid of turning students in, because they believe they will be called troublemakers or that students will take revenge on them," Guy says. "The problem is that our youth live in a culture where ridicule and intimidation are acceptable to be considered 'cool.' "

She advises students to be more direct with teachers and parents. But teachers must be on the lookout, as well.

"There are things teachers should notice," Guy says, "such as skipping, falling grades, sleeping in class, and loss of interest in activities. Also, decreased feelings of competence and confidence, increased anger and frustration, a drop in work attitude and productivity are other signs."

Representatives from RESPONSE visit schools, churches and community centers.

But groups like RESPONSE can't do everything, Guy says. Teachers have to be trained to handle sexual harassment.

And they need to act as soon as possible.

"Without a system of specially trained counselors in place, the sexual harassment policies of schools in Hampton Roads render themselves ineffective," she says.

COURT ADOPTS STRICT TEST FOR HARASSMENT LIABILITY

Legal Times

Monday, July 12, 1999

Lynne Bernabei

Davis v. Monroe County Board of Education, 119 S. Ct. 1661 (1999), saw a Supreme Court engaged in high-handed policy making and legislative efforts once again. In defining when sexual harassment of students by other students violates Title IX of the Education Amendments of 1972, the Court created a new and onerous standard of liability.

Last term, in Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998), the Court had held that a student sexually harassed by a teacher could recover damages against a school district only if a school official with authority to take corrective action was notified of the harassment and if the official's response amounted to "deliberate indifference." Building on Gebser's deliberate indifference standard, the 5-4 majority in Davis set an exceedingly high standard for students sexually harassed by other students to state an actionable claim against a school district under Title IX.

The standard is so high that it is puzzling why the dissent decries the majority opinion as threatening schools "beset with litigation from every side." It is much more likely that Davis will have the opposite effect-- reducing the number of federal suits brought by sexually harassed or abused students. Indeed, Julie Underwood, general counsel for the National School Board, echoed the sentiments expressed by many school lawyers that it would be "the rare occasion when a school board is found liable in the future."

Title IX prohibits students from being excluded from participation in, being denied the benefits of, or being subjected to discrimination under programs or activities receiving federal funds. Aurelia Davis alleged that the school's deliberate indifference to a male student's persistent sexual advances toward her fifth-grade daughter LaShonda created an intimidating, hostile, offensive, and abusive school environment that violated Title IX. According to the complaint, a male classmate attempted to touch her daughter's breasts and genital area, made vulgar comments, and continuously acted in an offensive and sexually suggestive manner toward LaShonda and other female students. The school officials to whom these incidents were reported allegedly did nothing to stop them. It was only after the boy was charged with and pleaded guilty to sexual battery that the harassment ended. Both the U.S. District Court and the U.S. Court of Appeals for the 11th Circuit, sitting en banc, found that such student-on-student harassment could not provide the basis for damages under Title IX.

The Supreme Court reversed, holding that a damages action for student-on-student harassment may lie under Title IX provided that certain conditions are met. The first condition is that the school must be found to be "deliberately indifferent" to the harassment. The Court held that the school had to be on actual notice of the harassment, exercise substantial control over both the harasser and the context in which the known harassment

occurred, and respond to the harassment in a clearly unreasonable manner given the known circumstances. The second requirement is that the plaintiff must show that the harassment is "so severe, pervasive, and objectively offensive, and that it so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities."

RAISING THE BAR

This standard for demonstrating that misconduct in the school context under Title IX rises to the level of actionable sexual harassment is much higher than the standard in the employment context under Title VII. In Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), and Harris v. Forklift Systems Inc., 510 U.S. 17 (1993), the Court held that an employer violates Title VII by creating or tolerating a sexually hostile work environment, defined as an environment that is intimidating, hostile, or offensive on the basis of sex, and that is sufficiently severe or pervasive to alter an employee's working conditions. But under Davis, the misconduct must be severe and pervasive and offensive, and it must rise to a high enough level that it effectively denies a student equal access to educational opportunities. While Meritor and Harris read these terms in the disjunctive, Davis reads them in the conjunctive.

The Davis Court expressly held that it was not "necessary to show physical exclusion to demonstrate that students have been deprived by the action of another student . . . of an educational opportunity on the basis of sex." Taken to its logical conclusion, however, the decision does force a plaintiff to endure a significant amount of harassment to show that she was denied equal access to the school's resources. Courts could easily dismiss cases of highly disturbing harassment on the ground that the conduct was directed against one student only and thus was not pervasive, or on the ground that the harassment was not sufficiently severe because the student persevered under the pressure, attending class every day.

It is hard to understand why the protections afforded to the most vulnerable of our citizens--children in school, who cannot simply opt to go elsewhere-- should be so much weaker than for adults, who in many cases can choose to leave a hostile and dangerous work environment.

As noted, the Davis Court borrowed from Gebser by holding that the school must have actual notice of the harassment and be "deliberately indifferent" to it. In the process of justifying this deliberate indifference standard for teacher-on-student harassment, the Gebser Court analogized the standard to the one used by the Department of Education in administratively enforcing Title IX's requirements. Under that standard, an administrative agency may not initiate enforcement proceedings against a recipient of federal funds until it has advised the appropriate person of the failure to comply with the requirement and determined that compliance could not be secured voluntarily.

The Gebser Court concluded that the implied damages remedy for Title IX should be judicially developed along the same lines. The most closely analogous standard would be deliberate indifference, which the Court reasoned was the judicial equivalent of "an official decision by the recipient not to remedy the violation."

The Court ostensibly supported this high standard by reference to the deliberate indifference standard for Section 1983 claims that allege that

municipalities failed to prevent a deprivation of federal rights. Of course, that standard was itself judicially developed, without reference to the statutory language of Section 1983, for the express purpose of limiting municipal liability.

In addition, it is likely that the Gebser Court actually derived the deliberate indifference standard from an opinion by Chief Judge Richard Posner of the 7th Circuit, dissenting from a denial of rehearing en banc in Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998). In an opinion issued just three months before Gebser, the 7th Circuit found that student-on- student sexual harassment violated Title IX under certain circumstances. Posner recommended the adoption of a deliberate indifference standard of liability because it "would give schools substantial protection against being sued for failing to guess right about the proper management of sexual and related nastiness among their charges."

Posner admitted that Title IX does not contain this or any other standard of liability. All the cases cited by the judge to support his importation of the deliberate indifference standard into Title IX concerned Section 1983 claims, including those against public school districts, not Title IX claims.

One threshold question left unanswered is whether this deliberate indifference standard differs from "reckless indifference." The 3rd Circuit considers deliberate indifference to be synonymous with reckless indifference, reckless disregard, and gross negligence, Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996), while the 9th Circuit rates deliberate indifference as a higher standard of liability than reckless indifference and gross negligence, L.W. v. Grubbs, 92 F.3d 894 (9th Cir. 1996). The Supreme Court, in a more recent Section 1983 case, did not resolve the proliferation or differentiation of these standards, simply stating that deliberate indifference "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Board of County Commissioners v. Brown, 520 U.S. 397 (1997).

It is difficult to reconcile Gebser and Davis with Kolstad v. American Dental Association, 67 U.S.L.W. 4552 (June 22, 1999), decided by the Court only a month after Davis. Kolstad says that punitive damages under Title VII require a showing of "malice or reckless indifference"--not the "deliberate indifference" now required under Title IX to simply prove liability. Yet there is little in Title IX to justify this more onerous standard.

Stripped of its dicta, the Supreme Court's adoption of the deliberate indifference standard in Gebser and Davis seems nothing short of judicial legislation of an extremely high hurdle for students trying to invoke federal civil rights protection for sexual harassment. The Court has provided less protection than that recommended by the Department of Education's Office of Civil Rights in its 1997 "Sexual Harassment Guidance," which said that student-on-student harassment falls within the scope of Title IX. The Court has also provided less protection than did the three circuits that previously held student-on-student sexual harassment actionable under Title IX. Ironically, in cutting back the protection afforded students in public schools, the Court has engaged in the very judicial activism it has long criticized in lower courts that vigorously enforce the civil rights laws.

Lynne Bernabei is a partner at D.C.'s Bernabei & Katz specializing in employment discrimination matters. The author wishes to thank summer associate Gena Wiltsek for her assistance with this article.

Last Term:

Carole KOLSTAD, petitioner
v.
AMERICAN DENTAL ASSOCIATION

No. 98-208

Supreme Court of the United States

Decided, June 22, 1999

RULING WIDENS CRITERIA FOR BIAS SUITS, NARROWS EMPLOYERS' LIABILITY

***The Houston* Chronicle**

Wednesday, June 23, 1999

Steve Lash, Houston* Chronicle *Washington Bureau

WASHINGTON – The Supreme Court, in a ruling that pleased neither management nor labor, made it easier Tuesday both for companies to escape liability for intentional discrimination and for women and minorities to bring lawsuits alleging deliberate bias in the workplace.

In a 5-4 decision, the high court said employers can avoid being assessed punitive damages in bias cases if they can show they made good-faith efforts to comply with Title VII of the 1964 Civil Rights Act, which prohibits job discrimination. These efforts could include having a strong company policy prohibiting harassment and bias, the court said.

As it was advising employers on avoiding liability, the court was relaxing the burden on workers seeking to prove their employers intentionally discriminated against them, a violation of law that could entitle the employees to punitive damages. The justices held that bias victims need only show that an employer recklessly or maliciously violated Title VII.

A lower federal court had placed a much greater burden on discrimination victims, requiring them to prove that the violation of law was "egregious" before they could collect punitive damages.

Justice Sandra Day O'Connor, writing for the majority on the issue of what employers must do, said a company that makes good-faith efforts to comply with the law cannot be found to have acted with malice or reckless indifference to the statute. Permitting employers to be held liable despite strong efforts to comply with Title VII would discourage them from going to the effort and expense of educating their employees, she said.

She was joined in that part of the opinion by Chief Justice William H. Rehnquist, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas.

The dissenters on the issue were Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

O'Connor gained the support of six other justices for the part of her opinion calling for juries to award punitive damages if they find that an employer acted "with malice or with reckless indifference" to an employee's rights under the law. That proof standard, addressing the mental state of the employer, is clearly stated in the statute and is easier to prove than the district court's more onerous demand that employees show the employer acted egregiously, she said. Joining that portion of O'Connor's opinion were Stevens, Scalia, Kennedy, Souter, Ginsburg and Breyer.

Rehnquist, joined by Thomas, dissented, stating that employees are entitled to punitive damages under the law "only for the worst cases of intentional discrimination."

With its decision, the high court revived lobbyist Carole Kolstad's effort to recover punitive damages from her employer, the American Dental Association. A U.S. district court jury in Washington, D.C., found the employer intentionally discriminated against Kolstad when it promoted a man over her to be director of legislative policy.

NEW LIMITS ON PUNITIVE DAMAGES IMPOSED

Legal Times

Monday, July 12, 1999

Debra S. Katz

Ignoring the clear constitutional mandate to avoid judicial legislation, the Supreme Court ended this term by essentially amending statutes that attack discrimination. The Court acted to protect employers from punitive damages liability in Kolstad v. American Dental Association, 67 U.S.L.W. 4552 (June 22, 1999), and public schools from liability in all but the most extreme cases in Davis v. Monroe County Board of Education, 119 S. Ct. 1661 (May 24, 1999). (See accompanying article.) While paying lip service to expanding the rights of the aggrieved, the Court dredged safe harbors found nowhere in either of the laws at issue. In Kolstad, the creation of a "good faith" standard is particularly galling given that neither party addressed the question during the litigation, the American Dental Association expressly disavowed that the question was before the Court, and the facts of the case did not present a basis on which to create such a defense.

Why then is the Court's majority so willing to forget the words of Justice Louis Brandeis that "to supply omissions transcends the judicial function"? The answer is apparent: The majority is unwilling to accept Congress' considered judgment that punitive damages are necessary to strengthen employee rights and aggressively deter employer violations.

In passing the Civil Rights Act of 1991, Congress was clearly frustrated that discrimination continued even though "virtually everyone in America now understands that it is both wrong 'and illegal' to discriminate intentionally." In providing for punitive damages under Title VII of the Civil Rights Act of 1964, Congress sent a clear signal it was serious about ending job discrimination and that one way to do this was to impose financial penalties that would make employers think twice.

But now, instead of reading the express language of Section 1981a to permit punitive damages when a nongovernmental employer discriminates "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," the Court has supplanted its own policy-making judgment. It has adopted extra-statutory standards to make punitive damages unavailable where an employer can demonstrate that discrimination by managerial agents was "contrary to the employer's good-faith efforts to comply with Title VII.' "

After hearing seven days of testimony in Kolstad, the jury concluded that the American Dental Association (ADA) had intentionally discriminated against Carole Kolstad on the basis of her gender by denying her a promotion. The judge refused to instruct the jury on punitive damages, even though the evidence demonstrated that the ADA's violation of Title VII was willful. Specifically, the evidence indicated that Kolstad was the more qualified of two job candidates, and that the decision-makers, who were senior executives, exhibited animus toward women by telling sexually offensive jokes

in staff meetings and in one-on-one sessions with Kolstad and by referring to professional women in such derogatory terms as "bitch" and "battle-axe."

The evidence further supported an inference that the executives not only deliberately refused to consider Kolstad fairly for the promotion, but also manipulated the job requirements and conducted a "sham" selection procedure to conceal their misconduct. For example, the evidence demonstrated that the ADA groomed the preselected male candidate and that the decision-makers interviewed only that man for the position. Kolstad also adduced evidence showing that women were seriously underrepresented in the ADA's upper ranks.

Finally, the court prevented Kolstad from offering evidence concerning the ADA's prior litigation of a gender-discrimination class action. The resulting consent decree in that case expressly forbade the preselection of a candidate in a promotion setting.

The ADA put on no evidence that its two decision-makers were ignorant of Title VII's requirements, that they had violated an internal equal employment policy instituted in good faith, or that they had any good-faith reason for believing that being a man was a legitimate requirement for the job. Rather, as Justice John Paul Stevens noted in his separate opinion, the ADA resorted to false, pretextual explanations for its refusal to promote Kolstad.

Standards Deviation

A panel of the U.S. Court of Appeals for the D.C. Circuit reversed the lower court's decision denying a punitive damages instruction and rejected the ADA's assertion that punitive damages are available under Title VII only in "extraordinarily egregious" cases. But on rehearing en banc, a narrowly divided D.C. Circuit turned around and sustained the rejection of the punitive damages claim, holding that "before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination." The court said that a defendant must be shown to have engaged in "egregious misconduct" before a jury would be permitted to consider punitive damages.

The Supreme Court granted certiorari to resolve a conflict among the circuit courts concerning the standard of conduct needed to permit a request for punitive damages to go to the jury.

In a 7-2 decision, the Court rejected the "egregious misconduct" standard and held that the "malice or reckless indifference" standard focuses on the defendant's state of mind--not the degree of its misconduct. To be liable in punitive damages, a defendant must be shown to have discriminated "in the face of a perceived risk that its actions will violate federal law." The Court noted that while egregious or outrageous acts support an inference of the requisite "evil motive," the act in question need not have some independently egregious quality to justify punitive damages.

The Court noted that "there will be circumstances where intentional discrimination does not give rise to punitive damages liability." Where an employer is "simply unaware of the relevant prohibition" because the underlying theory of discrimination is "novel or otherwise poorly recognized," or where an employer "discriminates with the distinct belief that its discrimination is lawful" because it satisfies a statutory exception to liability, an employer will escape punitive damages.

Not satisfied with giving employers this escape hatch, the Court by a 5-4 majority created out of whole cloth yet another limitation on punitive damages. While the statute has no such requirement, Kolstad calls for an aggrieved plaintiff not only to demonstrate that the employer acted with malice or reckless indifference to her federally protected rights, but also to offer evidence to "impute liability for punitive damages" to the employer.

After acknowledging that, "in express terms, Congress has directed federal courts to interpret Title VII based on agency principles," the Court refused to adopt common law principles or the Restatement (Second) of Agency or the Restatement (Second) of Torts. These provide that punitive damages are properly awarded against a principal because of an agent's act if: (1) the principal authorized the doing and manner of the act; (2) the agent was unfit, and the principal was reckless in employing him; (3) the agent was employed in a managerial capacity and was acting in the scope of employment; or (4) the principal or his managerial agent ratified or approved the act.

Noting that the Restatement of Agency provides that even intentional torts are within the scope of employment if the conduct "is the kind the agent is employed to perform," "occurs substantially within the authorized time and space limits," and "is actuated, at least in part, by a purpose to serve" the employer, the Court--on strictly policy grounds--rejected application of such a standard. It stated: "On this view, even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a managerial capacity.' " This, the Court concluded, "would reduce the incentive for employers to implement anti-discrimination programs."

Endorsing the amicus argument of the business-sponsored Equal Employment Advisory Council, the Court reasoned that "such a rule would likely exacerbate concerns among employers that Section 1981a's malice 'and reckless indifference' standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions." The majority observed that "dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."

After condemning the "perverse incentives that the Restatement's scope of employment rules create," the Court said it was "compelled to modify these principles to avoid undermining the objectives underlying Title VII." It held: "In a punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII.' " Thus, regardless of the intentional discrimination perpetuated, the egregious nature of the offense, or the harm caused, an employer that has undertaken "good faith" efforts at Title VII compliance thereby "demonstrates that it never acted in reckless disregard of federally protected rights."

In Good Faith

The Court cited D.C. Circuit Judge David Tatel's en banc dissent in support of its good-faith defense. Notably, Tatel referenced objective standards for an employer to meet in order to avoid punitive damages liability. He stated that an employer could properly argue that:

it should not have to pay punitive damages because it had undertaken good faith efforts to comply with Title VII--for example, by hiring staff and managers sensitive to Title VII responsibilities, by requiring effective EEO training, or by developing and using objective hiring and promotion standards.

The Kolstad decision thus seems to indicate that the good-faith exemption is an affirmative defense for which the employer bears the burden of proof, akin to that established in Burlington Industries Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. Boca Raton, 524 U.S. 775 (1998). Given that it is a defense to punitive damages liability, courts should certainly place the burden on employers to prove their entitlement to this defense--not place yet another burden on plaintiffs by requiring them to prove the lack of good faith.

Although Kolstad states that an employer may avoid punitive damages liability only if it can show that it "had been making good faith efforts to enforce an antidiscrimination policy," the majority opinion fails to provide guidance as to how much an employer must actually do to avail itself of this defense. Judge Tatel's cited opinion makes clear that promulgation of a written policy will not be enough. The approach adopted by many lower courts in sending to the jury factual issues concerning the "reasonableness" of the employer's and employee's actions as elements of the Ellerth/Faragher affirmative defense is obviously the preferred course. Like that of reasonableness, the standard of good faith is quintessentially a fact-based, value-laden determination that should be decided by juries, not judges.

Kolstad will necessarily expand the discovery needs of plaintiffs trying to defeat an employer's good-faith defense to punitive damages. Plaintiffs will need to take comprehensive discovery about the employer's reasons for promulgating EEO policies and its bona fides in implementing and enforcing them. For example, in Cadena v. The Pacesetter Corp., 30 F. Supp. 2d 1333 (D. Kan. 1998), the court found that while the employer's sexual harassment policy looked reasonable, related memorandums revealed a disdain for the 1991 Civil Rights Act and "mocked the right of female employees to be free from sexual harassment."

An employer's recklessness may certainly be proven by expressions of hostility to or resentment of civil rights laws. So too may it be proven by evidence of a pervasive or lengthy pattern of discriminatory behavior, and by improper or nonresponsive reactions to complaints of discrimination. If the employer invokes a good-faith defense, it should not be able to prevent the admission of prior bad acts evidence related to Title VII compliance. Indeed, an employer's entire EEO record should become admissible. In Kolstad, the ADA's record, including the consent decree, should presumably be admissible during the punitive damages trial.

However appropriately courts may handle this new good faith defense, fundamentally Kolstad flies in the face of the clear language of Section 1981a and congressional intent in enacting a punitive damages provision. The legislative history demonstrates that Congress chose to protect the interest of businesses by capping damages, not by narrowing the standard for punitive damages liability or providing safe harbors for employers. Because Kolstad was a case of statutory construction, Congress' judgment should have controlled--not the Supreme Court's view of the best way to "incentivize" employers to comply with the law.

Debra S. Katz is a partner in D.C.'s Bernabei & Katz specializing in employment discrimination matters.

Last Term:

Karen SUTTON and Kimberly HINTON, petitioners
v.
United Air Lines, Inc.

No. 97-1943

Supreme Court of the United States

Decided June 22, 1999

JUSTICES RAISE BAR TO QUALIFY AS DISABLED

***Austin* American-Statesman**

Wednesday, June 23, 1999

Joan Biskupic

WASHINGTON – The Supreme Court significantly curtailed the scope of a federal law designed to protect disabled workers from discrimination Tuesday. By a 7-2 vote, the justices ruled that the Americans With Disabilities Act does not cover people whose disabilities can be sufficiently corrected with medicine, eyeglasses or other measures.

In their broadest look at the ADA to date, the justices decided four disabilities cases, the most important being a pair of rulings that would prevent millions of people from seeking coverage under the landmark 1990 law. The highly anticipated rulings could profoundly affect people with a range of impairments -- from diabetes and hypertension to severe nearsightedness and hearing loss -- who are able to function in society with the help of medicines or aids but whose impairments may still make employers consider them ineligible for certain jobs.

"These decisions create the absurd result of a person being disabled enough to be fired from a job, but not disabled enough to challenge the firing," said Georgetown University law professor Chai Feldblum, who helped draft the statute and who was one of several advocates who said they would ask Congress to change the law.

The rulings represent a substantial win for employers, who praised the court's decision to limit who is covered by the statute. "Employers make reasonable accommodations for employees who are truly disabled," said Steve Bokat, general counsel at the U.S. Chamber of Commerce, "but they should not have to relax necessary standards for employees who have common and easily correctable ailments."

The disability cases were closely followed by workers, businesses, civil rights advocates and the Clinton

administration, which had urged the justices to interpret the law in a broad manner.

By identical votes of 7-2 in a pair of cases -- one involving two nearsighted pilots and the other a mechanic with high blood pressure -- the court ruled that when judges assess whether a worker pressing a disability-bias suit qualifies as "disabled" under the law, they must take into account any measures that lessen the worker's impairment.

By a unanimous vote in Albertson's vs. Kirkingburg, the justices ruled that employers who set job qualifications based on federal safety standards are not required to dispense with those standards when a worker -- in this case, a truck driver blind in one eye -- obtains a waiver from the federal agency.

Also, by a 6-3 vote, the court ruled that states must place certain people with mental disabilities in community homes rather than hospitals.

Enacted after years of effort, the Americans with Disabilities Act was meant to open jobs and public spaces to the nation's then-estimated 43 million disabled people. The law defines a "disability" as a "physical or mental impairment that substantially limits one or more . . . major life activities." On Tuesday, the court addressed the most fundamental question of how to determine who is and is not disabled.

The main ruling dealt with twin sisters from Spokane, Wash., Karen Sutton and Kimberly Hinton, who were turned down for pilot jobs at United Air Lines because of their extreme nearsightedness, failing the airline's minimum requirement for uncorrected visual acuity of 20/100. When they sued under the ADA, judges said the law did not cover people who can correct their disabilities -- in this case, with glasses -- and get along as well as most other people.

Tuesday, the Supreme Court agreed, rejecting the position of the U.S. Equal Employment Opportunity Commission and the majority of federal appeals courts.

"Looking at the Act as a whole," Justice Sandra Day O'Connor wrote for the majority, "it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures -- both positive and negative -- must be taken into account when judging whether that person is 'substantially limited' in a major life activity."

O'Connor noted that Congress had written in the law that "some 43 million Americans have one or more physical or mental disabilities" and argued that if the law were intended to cover all those with common, correctable impairments such as nearsightedness, that figure would have been far larger.

But the majority also emphasized that whether a person has a disability is an individual question and that some people who have prosthetic limbs or other corrective devices could still be considered "disabled" because of a substantial limitation of their life activities.

O'Connor was joined by Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas and Ruth Bader Ginsburg in Sutton v. United Air Lines , as well as in the ruling involving a mechanic with hypertension, Murphy v. United Parcel Service.

Dissenting in both cases were Justices John Paul Stevens and Stephen Breyer. In a statement written by Stevens, they said, "To be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly construction."

Roy Englert, who represented United, said he was pleased with the court's ruling, which was cheered by other employers as well. Human resources lawyer Ted Gies said the court provided important "clarification" about who is covered by the ADA and its decision will help to reduce ADA lawsuits. "Most people would say," Gies said, "that the biggest human resource and legal challenge is the ADA."

But Michael Greene, a lawyer for the American Diabetes Association, said the ruling puts people who take medicine to function in society in a difficult position. "You're damned if you don't medicate, but you're damned if you do, because you lose your legal rights," Greene said, adding that sometimes impaired persons who can do the job might nonetheless seek special accommodations or extra time off for medical care.

PARSING DISABILITY LAW
Court's ADA Rulings Are Tough on Plaintiffs

New York Law Journal

Thursday, July 1, 1999

Lisa I. Fried

THE U.S. SUPREME COURT's rulings last week clarifying who is disabled under the Americans with Disabilities Act are being hailed as a victory for employers and a devastating blow to impaired employees.

Management attorneys say the Court's narrowing of the definition of a disability to conditions that are not medically correctable will reduce the number of frivolous suits filed under the ADA and make it easier for employers to beat those claims. Plaintiffs' attorneys say the Supreme Court has cut the heart out of the ADA, giving employers a green light to discriminate against those with treatable conditions, such as epilepsy, cancer and diabetes.

Attorneys on both sides said future litigation in the lower courts will focus on whether a plaintiff has fully corrected a condition, since the High Court did not clearly define that issue. Furthermore, many predict the stringent nature of the ruling will prompt more plaintiffs to seek relief under state laws that provide broader protection than does the ADA.

The Scope of the ADA

The ADA prohibits employers from discriminating against an individual on the basis of a disability. The 1990 statute, which went into effect in 1992, does not clearly define a protected disability. Under the statute, a person is disabled if he or she possesses a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

On June 22, the Court provided some clarity, ruling in a trio of cases that individuals who use medication, medical devices or other measures to fully correct their impairments are not disabled and thus not protected by the ADA. The disability must be present and actual, the Court said.

Employment attorneys on both sides say the 7-2 ruling in Sutton v. United Air Lines Inc., 97-1943, which the High Court also followed in Albertson's Inc. v. Kirkingburg, 98-591, and Murphy v. United Parcel Service, 97-1992, will have a dramatic effect on disability discrimination claims.

Contact Lenses

In Sutton v. United Air Lines, two near-sighted twin pilots sued a commercial airline that failed to hire them based on their vision impairment. The Court ruled in favor of the employer, finding that the pilots were not disabled under the ADA because the use of contact lenses or glasses improved their vision perfectly.

"A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity," the Court said.

In limiting the class of disabled individuals protected by the ADA, the

Court looked to the plain language of the statute. In the majority opinion in Sutton, Justice Sandra O'Connor wrote, "Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently -- not potentially or hypothetically -- substantially limited in order to demonstrate a disability."

However, Justice O'Connor added, the ADA does protect individuals who are still substantially limited in a major life activity after taking medication or using a medical device, reiterating the statute's requirement that the determination of a disability be made on a case-by-case basis.

The ADA does not define major life activity, but Equal Employment Opportunity Commission regulations define it to include working, seeing, hearing, speaking, breathing, learning, caring for one's self, walking and performing manual tasks.

In the Sutton case, the plaintiffs had argued that they were substantially limited in the major life activity of working, since United Airlines failed to hire them.

However, the Court said that plaintiffs making such arguments must prove that despite the fact that they possess the requisite skills, their impairment precludes them from being considered for a broad class of jobs.

Since in this case, the pilots could be employed by other airlines that do not impose the same vision requirement on pilots, they are not substantially limited in working and not covered by the statute, the Court said.

"These three Supreme Court decisions will have a considerable impact on ADA cases," said John Canoni, a partner with Nixon, Hargrave, Devans & Doyle, who represents employers. "The federal courthouse doors are no longer wide open to individuals with physical or mental impairments that are corrected by medications or other measures."

This more stringent definition of disability should reduce the number of cases brought on the federal level and in states such as Massachusetts, New Hampshire and Rhode Island, whose anti-discrimination laws mirror the ADA definition, attorneys said.

And many attorneys predict that when plaintiffs do initiate suits under the ADA, employers will be even more likely to receive summary judgment.

Last year, plaintiffs brought 408 cases under the ADA, according to the American Bar Association. In total, 297 cases reached a final resolution, with employers prevailing 94 percent of the time.

"Employers are much more successful in these cases because a lot of these cases are brought by folks who are not really disabled but who have a temporary injury," said Ira Rosenstein, a partner with the New York office of Orrick, Herrington & Sutcliffe, who represents employers. "Those cases trivialize the cases brought by people who have true disabilities and need the protection of the Act," he said.

Indeed, many employment attorneys believe that the Supreme Court's decision reflects its desire to slash the number of frivolous ADA suits. While lawyers on both sides concede this is valuable, plaintiffs' attorneys say the Court went too far.

"The Court has thrown the baby out with the bath water," said Adam Klein, a partner with Levy Davis Maher & Klein, who represents plaintiffs. "The facts of the Sutton case have now led to a parsing down of the ADA to the point that only

those people who are traditionally disabled, those who are in a wheelchair, deaf or blind, are covered," Mr. Klein continued.

"I am concerned that these decisions may discourage lawyers from bringing the really good cases," added plaintiffs' attorney Jonathan Ben-Asher, a partner with Beranbaum Menken Ben-Asher & Fishel. "I don't think Congress intended to remove a huge number of people from ADA coverage because they are trying to function as best as they can on the job."

Unanswered Questions

Furthermore, the ruling leave unanswered what type of conditions are fully correctable. "While vision is clearly correctable with glasses, what about a cancer patient who undergoes chemotherapy and may be in remission or a person with dyslexia who has taught himself to overcome it?" asked Mr. Rosenstein.

The ruling also affirmed parts of the ADA that protect employers. For example, the statute does not require employers to hire a disabled individual if that person cannot perform the essential job functions. Some attorneys believe that Sutton took that concept a step further, empowering employers to use broad discretion in determining whether an individual is qualified for the job.

The Sutton Court said that the ADA allows employers to favor some physical attributes over others and establish physical criteria for job requirements. "An employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment -- such as one's height, build or singing voice -- are preferable to others, just as it is free to decide that some limiting, but not substantially limiting impairments make individuals less than ideally suited for a job," Justice O'Connor wrote.

This part of the decision will give employers' ammunition to argue that any medical condition of an employee will disqualify the person based on the physical job requirements, said Mr. Klein. This runs contrary to the purpose of the statute, he said, which is to prevent employers from making employment decisions based solely on stereotypical thinking.

Added James Carr, chairman of the ABA's commission on mental and physical disability law, "It is a dangerous comment that could open the door to people making employment decisions based on inappropriate criterion."

State and Local Laws

Given the tougher road plaintiffs face under the ADA, those based in states such as New York, New Jersey and Connecticut, which define disability more broadly than does the federal law, will look to state law for relief. Many plaintiffs' attorneys already add claims under state and local laws to their ADA suits brought in federal court. Attorneys said that more will likely do so or instead bring cases in state court.

In New York, the state's Executive Law and New York City's Administrative Code give disabled plaintiffs more protection against discrimination than does the ADA.

Neither the city law nor the state law require an individual to have a disability that is substantially limiting. Rather, @ 292 (21a) of the Executive Law defines a disability as a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions, which prevents the exercise of a normal bodily function or is demonstrable by medically accepted

techniques. Claims can also be brought if others regard the individual as disabled, or if the employee has a record of his or her impairment.

Section 8-102 (16) of the city's Administrative Code defines a disability as any physical, medical, mental or psychological impairment, or a history or record of such impairment.

In New York City, plaintiffs' attorneys who do not bring disability discrimination claims under federal, state and city law will be committing malpractice, said one attorney.

Last Term:

Tommy OLMSTEAD, *et al.*, petitioners
v.
L. C., *et al.*

No. 98-536

Supreme Court of the United States

Decided June 22, 1999

JUSTICES REJECT "UNNECESSARY SEGREGATION" OF MENTALLY DISABLED AT STATE HOSPITALS

***Los Angeles* Times**

Wednesday, June 23, 1999

David G. Savage, Times Staff Writer

In a landmark victory for people with mental disabilities, the Supreme Court ruled Tuesday that patients in state mental hospitals have a right to leave these institutions and move to small, community homes whenever they and their doctors think they are ready to do so.

The "unnecessary segregation of persons with mental disabilities" is a form of discrimination outlawed by the Americans With Disabilities Act, the court said on a 6-3 vote.

Tuesday's ruling does not mean that most patients in these hospitals will be leaving soon, or perhaps ever. For many psychiatric problems, a hospital is the best and most appropriate setting, the court said. During the 1970s, officials erred by closing too many facilities and sending troubled patients out into the streets with no care or supervision.

The focus of the decision was on those patients who could be cared for just as well in a community home rather than in a large institution.

Some advocates said the ruling means the end of the "Nurse Ratchet method," referring to the dominating, steely-eyed villain in the fictional mental institution featured in the movie "One Flew Over the Cuckoo's Nest."

Before 1955, more than 500,000 patients were housed in mental hospitals across the nation. Once considered a progressive form of treatment, these hospitals were scorned as prisons for patients in recent decades. These days, only an estimated 75,000 beds remain in state facilities for those with mental impairments.

The court's ruling Tuesday stemmed from a case in Georgia, where state

officials maintained that they had the authority to decide which form of treatment was better, even when their own doctors preferred the community homes.

Their policy was challenged by two mentally retarded women, Lois Curtis and Elaine Wilson, who hoped to leave the Georgia Regional Hospital in Atlanta. Doctors at the facility agreed that they were ready to move to a community home but hospital officials balked.

"The institution was not for me," Wilson said in a telephone interview. "All you do is eat and sleep." After moving to a community home during the course of litigation, Wilson said that she became active in programs that taught her to cook and to care for herself.

A federal judge in Atlanta ruled for the two women, as did the U.S. Court of Appeals. Georgia's director of human resources, Tommy Olmstead, appealed on states' rights grounds.

For disability-rights activists, the case was hailed as the "Brown vs. Board of Education decision" for the disabled, a reference to the 1954 ruling that outlawed racial segregation in public schools.

In California, a coalition representing 24 groups statewide that help persons with disabilities called the ruling "a milestone for the independent-living movement."

Justice Ruth Bader Ginsberg wrote the majority opinion in the case (Olmstead vs. L.C., 98-536). Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas dissented.

STATES LIMITED ON INSTITUTIONALIZATION

The New York Times

Wednesday, June 23, 1999

Linda Greenhouse

Isolating people with disabilities in big state institutions when there is no medical reason for their confinement is a form of discrimination that violates Federal disabilities law, the Supreme Court ruled today.

The 6-to-3 decision, in a case brought against the State of Georgia by two women with mental impairment, was a substantial victory for a disabilities rights movement that has looked to the Americans With Disabilities Act of 1990 as a tool for breaking down institutional walls that separate people with serious mental and physical problems from the larger community.

The ruling affirmed, in most respects, a decision last year by the Federal appeals court in Atlanta, which held that states have a duty under the 1990 law to provide care in group homes when medically appropriate. In 1994, the Federal appeals court in Philadelphia, in the only other appellate decision on the subject, reached the same result.

The Supreme Court's decision six months ago to hear Georgia's appeal in this case alarmed advocates for people with disabilities, who feared that the Court might steer the law in the opposite direction and reverse the nationwide trend toward deinstitutionalization. An unusually vigorous grass-roots campaign sprang up around the case, leading 15 of the 22 states that had originally supported Georgia to disavow the state's position in the Supreme Court.

The case involved a 1995 lawsuit filed on behalf of Lois Curtis and Elaine Wilson, both of them mentally retarded and mentally ill, who sought state care outside the Georgia Regional Hospital, where they had lived off and on for years. Both remained in the hospital for several years after state doctors had concluded that they could be more appropriately cared for in small group homes.

In some respects, the decision today was the Court's first rather than last word on the subject, and it may require more cases to clarify the full dimensions of the ruling. Justice Ruth Bader Ginsburg's majority opinion held that states' obligation to care for people in small, neighborhood-based settings was limited to some degree by available resources. States are not required to close their big hospitals -- which, the Court emphasized, may still be appropriate for some people -- or to create group home programs that they do not now have. (In fact, though, every state now has such a program.)

The decision interpreted a regulation that requires states to make "reasonable modifications" in their programs to avoid discriminating against people with disabilities, while at the same time providing that states need not make "fundamental" alterations.

Justice Ginsburg said that if a state "were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable

pace not controlled by the state's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met."

That interpretation did not give the states enough leeway to satisfy the three dissenting Justices. Justice Clarence Thomas, joined in a dissenting opinion by Chief Justice William H. Rehnquist and Justice Antonin Scalia, said the decision imposed "significant federalism costs" and failed to "respect the states' historical role as the dominant authority responsible for providing services to individuals with disabilities."

Justice Thomas predicted that states would "now be forced to defend themselves in Federal court every time resources prevent the immediate placement of a qualified individual." He said that rather than addressing discrimination in any conventional sense, the majority was imposing its own "standard of care."

The majority opinion was joined by Justices Sandra Day O'Connor, David H. Souter, John Paul Stevens and Stephen G. Breyer. Justice Anthony M. Kennedy concurred in a separate opinion, noting that "the depopulation of state mental hospitals has its dark side" and warning that the decision should not be interpreted "to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision." Justice Breyer also signed that part of Justice Kennedy's opinion.

While the decision, Olmstead v. L.C., No. 98-536, referred throughout to mental disabilities, the ruling also applies to the states' obligations to people with serious physical disabilities.

The decision interpreted Title II of the disabilities act, which prohibits state and local governments from discriminating against people or excluding them from programs "by reason of" their disabilities. A regulation issued by the Attorney General at Congress's direction, after the law's adoption, provides that "a public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," with "integrated setting" defined as "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."

Georgia argued that the two mentally impaired women involved in the case did not come within the disabilities law's protection because they had not been subjected to discrimination, which the state defined as unequal treatment. Justice Ginsburg said today that in the context of the Federal law, "unjustified isolation, we hold, is properly regarded as discrimination based on disability."

"Institutional placement of persons who can handle and benefit from community setting perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," Justice Ginsburg continued. She added that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement and cultural enrichment."

One of the two plaintiffs lives today in a three-person group home, and the other lives in her own apartment, with supportive services.

Ira Burnim, the legal director of the Bazelon Center for Mental Health Law, an organization here that coordinated Supreme Court briefs on the women's behalf, praised the decision. "This is the first time the Court has announced that

needless institutionalization is a form of discrimination," he said in an interview, adding that the disabilities rights movement had been working toward this goal for 30 years.

RICE v. CAYETANO

"Vote Here. Hawaiians ONLY": Special Purpose Elections by Race

Matthew Curtis *

In *Rice v. Cayetano*, "native Hawaiians" compare themselves to American Indians, and a native Hawaiian lacking the required ethnicity complains that he is being treated as a second class citizen. Rice, who was born in Hawaii and whose ancestors were in Hawaii prior to 1893, filed suit against the State of Hawaii when he was denied the opportunity to vote in a special election for trustees of the Office of Hawaiian Affairs. The OHA administers a public trust fund (derived largely from profits generated by publicly held land) for the benefit of native Hawaiians. By statutory definition, Rice does not have the required percentage of "native Hawaiian" blood to be permitted to vote in the election – nor could he have stood for election as a trustee of the fund. Congress established the public trust fund when it annexed Hawaii in 1893. Upon attaining statehood in 1959, Congress directed that a portion of the trust fund would be devoted to "the betterment of the conditions of native Hawaiians."

In his suit, Rice claims that he has been denied his constitutional rights under the Fourteenth and Fifteenth Amendments. The Court of Appeals for the Ninth Circuit rejected Rice's claim. Judge Rymer of the Ninth Circuit concluded that the racial requirement was essentially a legal or political distinction rather than a racial one because it was *rationally* related to the purpose of the trust fund. Judge Rymer reasoned that those who have a stake in the fund should be the ones to whom the trustees of the fund are responsible. Claiming the issue had not been raised by Rice, Judge Rymer did not address the question whether the entire program was unconstitutional under the Fourteenth or Fifteenth Amendments.

Although noting that race was a distinguishing factor in *Rice v. Cayetano*, Judge Rymer cited *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719 (1973). In *Salyer*, Justice Rehnquist, writing for the majority, upheld a "special purpose" election for management of water storage districts in which only landowners were permitted to vote. Rehnquist found the exclusion permissible because the landowners alone had a stake in the election and the districts lacked "normal governmental authority." Judge Rymer concluded that *Salyer* was persuasive and supported the Ninth Circuit's position in *Rice*.

Judge Rymer downplayed any differences between the status of "native Hawaiians" and American Indians – "they aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution." American Indians have used the special status accorded them by Congress to obtain various benefits including mineral rights and compensation for the use of Indian land. Thus, any comparison to American Indians strengthens the "native Hawaiian's" legal and political positions. However, Judge Rymer overlooked the significant fact that American Indian tribes were recognized as sovereign by various treaties, while "native Hawaiians" never entered into a treaty with the government. Therefore, the Supreme Court will likely reject the comparison. Consequently, if the Court rules against the

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"native Hawaiians," it seems unlikely that there will be any impact on any Bureau of Indian Affairs' programs.

However, *Rice v. Cayetano* may hold greater implications for affirmative action programs where race is accorded a special status or is the basis of preferential treatment. Rice relied on the Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), in arguing that the Ninth Circuit must apply the strict scrutiny test to the OHA election. In *Adarand*, a majority of the Court concluded that strict scrutiny must be applied whether the race classification at issue is "remedial" or "benign." (Strict scrutiny requires a compelling governmental interest and a narrowly tailored remedy) Thus, *Rice v. Cayetano* may provide the Court an opportunity to reinvigorate its holding in *Adarand* and further limit "remedial" race-based preferences.

98-818 Rice v. Cayetano

Ruling below (9th Cir., 146 F.3d 1075):

Neither equal protection clause nor 15th Amendment bars restricting participation in elections for trustees of Office of Hawaiian Affairs – who administer public trust funds set aside for betterment of "native Hawaiians" and "Hawaiians," i.e., descendants of aboriginal people who inhabited Hawaii in 1778 and thereafter – to only those voters who meet blood quantum requirement for native Hawaiian or Hawaiian, who constitute only group with stake in trust and funds administered by OHA trustees, who have no general governmental powers and perform no general governmental functions.

Question presented: Did court of appeals err in holding that 14th and 15th Amendments permit adoption of explicit racial classification that restricts right to vote in statewide elections for state officials?

Harold F. RICE, Appellant
v.
Benjamin J. CAYETANO, Governor of the State of Hawai'i, et al., Appellees

United States Court of Appeals
for the Ninth Circuit

Decided June 22, 1998

RYMER, Circuit Judge.

Hawaii holds special elections for trustees of the Office of Hawaiian Affairs (OHA), who must be Hawaiian and who administer public trust funds set aside for the betterment of "native Hawaiians" and "Hawaiians," in which only people who meet the blood quantum requirement for "native Hawaiian" or "Hawaiian" may vote.[1] There is a long history behind the use and structure of the public lands trust for the benefit of descendants of the original races inhabiting the Hawaiian Islands, none of which is challenged in this appeal. Rather, we must decide only whether Hawaii may limit those who vote in special trustee elections to those for whose benefit the trust was established.

Harold F. Rice, who is caucasian and not a beneficiary of the trusts administered by OHA's trustees, appeals the district court's summary judgment in favor of Benjamin J. Cayetano, Governor of Hawaii, upholding the voter qualification in a published opinion. (footnote ommitted) *Rice v. Cayetano*, 963 F.Supp. 1547 (D.Haw.1997). We agree that the franchise for choosing trustees in special elections may be limited to Hawaiians, because Hawaiians are the only group with a stake in the trust and the funds that OHA trustees administer. They have the right to vote as such, not just because they are Hawaiian. For this reason, neither the Fifteenth Amendment nor the Equal Protection Clause precludes Hawaii from restricting the voting for trustees to Hawaiians and excluding all others. Therefore, as we have jurisdiction under 28 U.S.C. § 1291, we affirm.[2]

[1] "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii," and "native Hawaiian" means "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw.Rev.Stat. § 10-2.

[2] Although neither party addresses standing, it is a threshold question that we must consider even if not raised in the district court or on appeal. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990); *McMichael v. County of Napa*, 709 F.2d 1268, 1269 (9th Cir.1983). While

I

A

Some history is helpful by way of background. (footnote ommitted)

Hawaii was an independent kingdom from 1810 until 1893 when it was overthrown and replaced by a provisional government (the Republic of Hawaii) that sought annexation to the United States. The United States accepted the cession of sovereignty of Hawaii in the Annexation Act of 1898. 30 Stat. 750 (1898). As a result, roughly 1,800,000 acres of crown, government, and public lands were ceded to the United States. The Annexation Act provided, however, that all revenues from the public lands were to "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* The Organic Act, passed in 1900, established the Territory of Hawaii and confirmed that the public lands ceded to the United States would remain in the possession of the government of the Territory for public works and other public purposes. Organic Act § 91, 31 Stat. 141 (1900), reprinted in, 1 Haw.Rev.Stat. at 84 (1993).

In 1920, the Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1921), reprinted in, 1 Haw.Rev.Stat. at 191 (1993), set aside some 200,000 acres of public lands as "available lands" for nominal price leases to "native Hawaiians." HHCA § 203. The term "native Hawaiian" was defined to mean "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(7). HHCA responded to the fact that the number of full-blooded Hawaiians was decreasing and that the Hawaiian race required rehabilitation by being returned to the land. H.R.Rep. No. 839, 66th Cong., 2nd Sess. at 4 (1920). Accordingly, it specified that the trust was to be administered on behalf of the native Hawaiian beneficiaries of the Act. HHCA § 101(c).

Hawaii was admitted to the union as a state in 1959. Admission Act of March 18, 1959, Pub.L. No. 86-3, 73 Stat. 4, reprinted in, 1 Haw.Rev.Stat. at 90 (1993). In connection with admission, Hawaii agreed as a compact with the United States to adopt the HHCA, including its definition of native Hawaiians, as part of the state Constitution. Admission Act § 4. Article XII, § 1 of the Hawaii Constitution accomplished this. Further, the Admission Act provided that public lands held by the United States that were granted or conveyed to Hawaii pursuant to § 5(b) were to be held by Hawaii as a public trust for five purposes, one of which is "the betterment of the conditions of native Hawaiians."[3] Admission Act §

Rice may have only a generalized interest in the affairs of OHA and its trustees, he appears to be an adequately injured party as a caucasian resident of Hawaii who allegedly is denied the right to vote on racial grounds in a statewide election. *See, e.g., Baker v. Carr*, 369 U.S. 186, 206-08 (1962) (asserted injury to fundamental right to vote deemed a sufficient personal stake to support standing).

[3] Section 5(f) provides that the lands granted to the State of Hawaii by the Admission Act, together with proceeds and income, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act,

5(f). The other four purposes pertain to the public generally. (footnote ommitted)

As it happens, no benefits actually went to native Hawaiians until the state constitution was amended in 1978 to establish the Office of Hawaiian Affairs. OHA was created to hold title to § 5(b) property (except for HHCA "available lands," which are separately administered by the Department of Hawaiian Home Lands) in trust and manage it for native Hawaiians and Hawaiians.[4] Haw. Const. art. XII, § 5. OHA administers for native Hawaiians a pro rata share (now twenty per cent) of the public lands trust that was created under § 5(f) of the Admission Act.[5] *See* Haw. Con. art. XII, §§ 4, 6; Haw.Rev.Stat. §§ 10-3(1), 10-13.5. It also administers appropriated funds for Hawaiians. Haw.Rev.Stat. § 10-3(2). Pursuant to the constitution and statutes enacted to implement it, OHA is governed by a board of trustees whose members must be Hawaiian and who are elected in special elections by qualified voters who are Hawaiian. Haw.Rev.Stat. §§ 13D-1, 13D-2, 13D-3(b)(1), 13D-4.

B

Rice was born and has always lived in Hawaii. While he traces his ancestry to two members of the legislature of the Kingdom of Hawaii, prior to the Revolution of 1893, Rice is caucasian and is not within the statutory definition of Hawaiian or native Hawaiian. *See* Haw.Rev.Stat. § 10-2.

In March 1996, Rice applied to vote in the August 1996 election for trustees of OHA. The registration form contained the following declaration: "I am also Hawaiian and desire to register to vote in OHA elections." Rice crossed off the phrase "am also Hawaiian and" and marked "yes" on the application. He is otherwise a qualified voter, but his application was denied since he is not Hawaiian.

Rice brought this action pursuant to 42 U.S.C. § 1983 challenging his exclusion from voting for OHA trustees on the grounds that conditioning eligibility on being Hawaiian violates the Voting Rights Act of 1965 as amended (42 U.S.C. §§ 1971 et seq.), (footnote ommitted) 42 U.S.C. § 1981, and the Fourteenth and Fifteenth Amendments of the United States Constitution. The district court concluded that the method of electing OHA trustees meets constitutional standards for the essential reason that the

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1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Admission Act, § 5(f).

[4] The purposes of OHA are the betterment of conditions of native Hawaiians and Hawaiians, serving as the principal agency responsible for the performance, development, and coordination of programs for native Hawaiians and Hawaiians, assessing policies of other agencies impacting on native Hawaiians and Hawaiians, and applying for, receiving, and disbursing grants for native Hawaiian and Hawaiian programs and services. Haw.Rev.Stat. § 10-3.

[5] The other four purposes for the § 5(f) trust have no allocated pro rata percentage, nor is the remaining revenue administered by OHA..

restriction on the right to vote is not based upon race, but upon a recognition of the unique status of native Hawaiians that bears a rational connection to Hawaii's trust obligations. In any event, the court noted, OHA performs no truly governmental functions and "is carefully constrained by its overall purpose to work for the betterment of Hawaiians." 963 F.Supp. at 1558. Having already disposed of other claims, the court entered summary judgment. Rice timely appealed.

II

Rice complains about the "extraordinary" authority and discretion that OHA, which is a state agency, is given to provide government services to a segment of the population defined exclusively by race, funded by a twenty percent share of revenues from the public lands trust which may lawfully be applied for the benefit of all people of the state without regard to race, and run by trustees who are voted into office by an electorate apportioned on a purely racial basis. He submits that the racial restriction on the right to vote violates the Fifteenth Amendment because it conditions the right to vote in statewide elections for trustees on membership in the Hawaiian race. It violates the Fourteenth Amendment, according to Rice, because this classification by race, and the corresponding racial restriction on the franchise, fails the test of strict scrutiny which must be applied to all distinctions based on race under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). * * *

Hawaii, on the other hand, emphasizes that neither the definition of native Hawaiians or Hawaiians, nor the designation of specific public lands for their benefit, nor OHA, nor its purposes, is at issue. That being so, it contends, the limitation of the right to vote for OHA trustees to Hawaiians and native Hawaiians is not a racial classification, but a legal one based on who are beneficiaries of the trusts in a special purpose, disproportionate impact election of the sort described in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). In any event, Hawaii points out, it did not intentionally discriminate on the basis of race because the genesis of the whole structure was Congress's requirement that the new state of Hawaii accept the definition of native Hawaiian in the HHCA and accede to the purposes of the § 5(f) trust which include, in part, betterment of the conditions of native Hawaiians. Finally, the state submits, its classification survives rational basis review (which is the appropriate standard) under *Morton v. Mancari*, 417 U.S. 535 (1974), because the federal government and the state of Hawaii have the same special relationship with and owe the same unique obligation to native Hawaiians as the federal government does to Indian tribes.

Rice counters Hawaii's argument that the right to vote merely reflects the legal status of native Hawaiians and Hawaiians by pointing out that the legal status of being a beneficiary of the OHA trusts is based only on race. That may be so, but the constitutionality of the racial classification that underlies the trusts and OHA is not challenged in this case.[6] This

[6] In this connection, we note that the scholarly work upon which Rice relies--and others that we have read--focuses on the underlying arrangement and its constitutionality, not on the voting rights provision at issue here. *See* Stuart M. Benjamin, Equal Protection and the Special Relationship,

means that we must accept the trusts and their administrative structure as we find them, and assume that both are lawful.[7]

If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to hold title to, and manage, property set aside in trust or appropriated exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a board of trustees whose members are Hawaiian, it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, (footnote ommitted) should be the group to decide who the trustees ought to be. Put another way, the voting restriction is not primarily racial, but legal or political. Thus, we conclude that Rice's argument fails under both the Fourteenth and Fifteenth Amendments for essentially the same reasons.

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106 Yale L.J. 537 (1996); *see also* Jon Van Dyke, The Constitutionality of the Office of Hawaiian Affairs, 7 U. Haw. L.Rev. 63 (1985).

[7] We express no opinion on the constitutionality of the underlying trust structure, or of OHA's purposes, because we are not called upon to determine the constitutionality of any of the racial classifications in the HHCA or the Admission Act or the Hawaii Constitution or the statutes establishing OHA--except for the one provision in Article XII, Section 5 of the Constitution and Haw.Rev.Stat. § 13D-3, limiting the right to vote for OHA trustees, that are directly challenged here.

A

Specifically with respect to the Fifteenth Amendment, (footnote ommitted) Rice maintains that Hawaii has created a racially pure voting bloc which states cannot do for any reason under *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Moreover, he points out, the Fifteenth Amendment is self-executing and absolute on its face. Since the voter qualification is expressly racial, and absolutely denies the right to vote to all races except the Hawaiian race, Rice contends that it violates the plain meaning of the Fifteenth Amendment without need for further inquiry. *Shaw v. Reno*, 509 U.S. 630 (1993).

Rice is, of course, quite right that the Hawaii Constitution and Haw.Rev.Stat. § 13D-3 contain a racial classification on their face. The Hawaii Constitution provides in Article XII, section 5: "There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law." And § 13D-3, implementing it, provides that: "No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian." Haw.Rev.Stat. § 13D-3(b).

Yet restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for. As the district court explained in detail, 963 F.Supp. at 1556-57, the vote is for the limited purpose of electing trustees who have no general governmental powers and perform no general governmental purposes.[8] The voting restriction itself

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[8] OHA trustees have power to manage proceeds and income from whatever

applies only at a special election to elect members of the OHA board; (footnote ommitted) in general elections, all persons generally qualified to vote may vote. In these respects the trustee elections are like the special purpose elections upheld in *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719 (1973) and *Ball v. James*, 451 U.S. 355 (1981). In both cases, the system for electing directors of special purpose water districts limited voting eligibility to landowners on a proportional basis, excluding others in the district. The Court concluded that by virtue of their limited purpose, including the districts' lack of normal governmental authority, and the disproportionate effect of their activities on landowners as a group, the districts' electoral scheme comported with the Fourteenth Amendment and did not run afoul of the popular election requirements set out in *Reynolds v. Sims*, 377 U.S. 533 (1964). Thus, elections may be held for special purposes and voter qualifications that might otherwise be invalid may survive when they limit eligible voters to those who are disproportionately affected and the government agency does not perform fundamentally governmental functions.

Rice nevertheless asks us to dismiss the *Salyer* rationale entirely on account of OHA's authority over funds that include a twenty percent share of revenues from the ceded lands trust; the similarity between what OHA does for its beneficiaries and what the state otherwise does generally for all citizens without regard to race; and the fact that OHA activities are of vital concern to all citizens of Hawaii. But we cannot set *Salyer* aside altogether, for Rice's points reflect frustration with OHA--which is something we can do nothing about in this case. Whether or not the frustration--or OHA--is justified, the fact remains that public lands and funds have long since been committed in trust, and continue to be allocated in part, for the purpose of benefiting the Hawaiian peoples; they are the only peoples legally interested in how those funds are handled; and for them to decide who should administer the trust does not seem exceptionable under *Salyer* except for the fact, which we recognize, that the qualification has to do with race instead of ownership of land, as in *Salyer*. For this reason we do not regard *Salyer* as dispositive, but we cannot say that it has no applicability whatever.

Nor may we ignore the reality that the voting restriction for trustees is rooted in

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source for native Hawaiians and Hawaiians, including § 5(f) revenue; to exercise control over property set aside to OHA for native Hawaiians and Hawaiians; to handle money and property on behalf of OHA; to formulate policy relating to the affairs of native Hawaiians and Hawaiians; to provide grants for pilot projects; and to make available technical and financial assistance and advisory services for native Hawaiian and Hawaiian programs. Haw.Rev.Stat. § 10-5. The duties of the board are similarly channeled. They are to develop a master plan for native Hawaiians and Hawaiians; to assist in development of other agencies' plans for native Hawaiian and Hawaiian programs and services; to maintain an inventory of, and act as clearinghouse for, programs for native Hawaiians and Hawaiians; to keep other agencies informed about native Hawaiian and Hawaiian programs; and to conduct research, develop models for programs, apply for and administer federal funds and promote the establishment of agencies to serve native Hawaiians and Hawaiians. Haw.Rev.Stat. § 10-6.

historical concern for the Hawaiian race, going back at least to the Hawaiian Homes Commission Act of 1920, carried through statehood when Hawaii acknowledged a trust obligation toward native Hawaiians as a condition of admission to the union, and on to 1993, when Congress passed a Joint Resolution "apologiz[ing] to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination." Pub.L. 103-150, 107 Stat. 1510 (1993). In this sense, the special treatment of Hawaiians and native Hawaiians reflected in establishment of trusts for their benefit, and the creation of OHA to administer them, is similar to the special treatment of Indians that the Supreme Court approved in *Morton v. Mancari*, 417 U.S. 535 (1974). As we said of *Mancari* in *Alaska Chapter, Associated Gen. Contractors v. Pierce*, 694 F.2d 1162 (9th Cir.1982), preferential treatment that is grounded in the government's unique obligation toward Indians is a political rather than a racial classification, even though racial criteria may be used in defining eligibility. *Id.* at 1168 n. 10. While we recognize that *Mancari* is distinguishable because Hawaiians are not exactly like Indians (for example, they aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution), (footnote ommitted) and we do not regard either *Mancari* or *Pierce* as controlling,[9] both indicate that we are not compelled to invalidate the voting restriction simply because it appears to be race-based without also considering the unique trust relationship that gave rise to it.

Accordingly, even though there is little authority to guide application of the Fifteenth Amendment in a case such as this, we are persuaded that no violation exists. The Fifteenth Amendment "squarely prohibits racially-based denials of the right to vote," Laurence H. Tribe, American Constitutional Law, at 335 n. 2 (2d ed.1988), and renders inoperative any provision of a state constitution that restricts the right to suffrage to members of a particular race, *see Neal v. Delaware*, 103 U.S. 370, 389 (1881), but this isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis. Further, the voter qualification at issue here-- albeit clearly racial on its face--does not exclude those who ever had, now have, or ever can have any interest in the outcome of the special election for trustees (at least not unless and until the whole trust scheme and administrative structure is invalidated). Under these circumstances, to permit only Hawaiians to vote in special elections for trustees of a trust that we must presume was lawfully established for their benefit does not deny non- Hawaiians the right to vote in any meaningful sense. The special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity. *Cf.*, *e.g.*, *Lane v. Wilson*, 307 U.S. 268 (1939) (striking down, under the Fifteenth

[9] Although we questioned *Mancari*'s continuing vitality in light of *Adarand* in *Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir.1997), and Rice believes *Adarand* trumps both, we are bound by Supreme Court authority and our own precedent until overruled, which neither *Mancari* nor *Pierce* has been.

Amendment, procedural hurdles to registering to vote in general elections); *Smith v. Allwright*, 321 U.S. 649 (1944) (state cannot set racial qualifications for primary because the right to vote in a primary is like the right to vote in a general election). Nor does the limitation in these circumstances suggest that voting eligibility was designed to exclude persons who would otherwise be interested in OHA's affairs. *Cf., e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (gerrymandering city boundary to deny a vote to African-Americans who lived in the city and otherwise would have had the right to vote in municipal elections, without any countervailing municipal function the scheme was designed to further). Rather, it reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and "a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." (footnote ommitted) The challenged part of Hawaii law was not contrived to keep non-Hawaiians from voting in general, or in any respect pertinent to their legal interests. Therefore, we cannot say that Rice's right to vote has been denied or abridged in violation of the Fifteenth Amendment.

B

Regardless, Rice argues, the racial restriction on the right to vote for OHA trustees violates the Fourteenth Amendment (footnote ommitted) even if the Fifteenth Amendment isn't applicable. Shaw indicates that racial classifications on the face of a statute are immediately suspect, he emphasizes, and the classification here cannot survive for lack of any compelling justification under *Adarand.*

We obviously agree that there is a racial classification on the face of § 13D-3, and that it is suspect as such; but we disagree for the reasons we have already explained that it is primarily racial in context. Nor is the eligibility requirement, strictly speaking, a preference of the sort that concerned the Court in *Adarand.* Instead, it is more like the limitation of voting to landowners in *Salyer.* We have no trouble understanding why Hawaii would want the people who have an interest in the trust to vote for trustees, and it is rational for the state to make this decision in light of its trust responsibilities for Hawaiians and native Hawaiians. *See Mancari*, 417 U.S. 535; *Pierce*, 694 F.2d 1162. However, even if the voting restriction must be subjected to strict judicial scrutiny because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there--which is not challenged in this appeal. Thus, the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust, and the restriction on voter eligibility is precisely tailored to the perceived value that a board "chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644.

Given the fact that only Hawaiians and native Hawaiians are trust beneficiaries, there is no race-neutral way to accord only those who have a legal interest in management of trust assets a say in electing trustees except to do so according to the statutory definition by

blood quantum which makes the beneficiaries the same as the voters. We therefore conclude that because Hawaiians and native Hawaiians have the right to vote as such, not just because they are Hawaiian, that the Equal Protection Clause does not preclude Hawaii from restricting the voting for trustees to Hawaiians and excluding all others.

* * *

AFFIRMED.

SUPREME COURT ROUNDUP
Justices to Weigh Race Barrier in Hawaiian Voting

The New York Times

Tuesday, March 23, 1999

Linda Greenhouse

In a case that mixes history, race and evolving constitutional doctrine, the Supreme Court agreed today to decide whether Hawaii may continue to deny anyone who is not descended from the original Hawaiians the right to vote for the leadership of an agency that administers tens of millions of dollars in public money.

The agency is the Office of Hawaiian Affairs, set up under the state's Constitution in 1978 to oversee trust funds, for which most revenue comes from former royal Hawaiian lands. The office's nine trustees, who must themselves be descendants of the native Hawaiians, are charged with spending the money on education, social welfare and other programs to benefit native Hawaiians.

Harold F. Rice is a native Hawaiian, in the sense that he was born in the islands to which his great-great-grandparents moved in the 19th century. But this is not what the state Constitution means by Hawaiian, a term that signifies not place of birth but race.

When Mr. Rice, a Cornell-educated rancher and polo player from the town of Kamuela, in a remote corner of Hawaii's Big Island, went to vote three years ago in the statewide election for Office of Hawaiian Affairs trustees, he was turned away.

He sued the state under the 15th Amendment, one of the amendments adopted after the Civil War to guarantee that the freed slaves would have the right to vote. It provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

He lost in both the Federal District Court in Honolulu and in the United States Court of Appeals for the Ninth Circuit in San Francisco, where a panel of three judges wrote last June that the racial voting restriction was "rooted in historical concern for the Hawaiian race" and justified "because Hawaiians are the only group with a stake in the trust" and in the money that the trustees administer.

That explanation did not satisfy Mr. Rice, and the question now is whether it will satisfy the Supreme Court. Theodore B. Olson, a well-connected Washington lawyer recruited for the Supreme Court appeal by Mr. Rice's lawyer in Kamuela, John W. Goemans, told the Justices that the appeals court's decision ratified "a broad and patently offensive regime of racially segregated voting in the state of Hawaii."

Clearly, the case, Rice v. Cayetano, No. 98-818, got the Court's attention, provoking an unusually prolonged debate among the Justices over whether to hear the appeal.

Before today's announcement, the case had been under active consideration at the Justices' weekly, closed-door

conferences since the beginning of the year, suggesting that it was subject to a degree of vetting far greater than the typical case at this early stage, where the question is not how to decide a case but whether to hear it at all. The case will be argued in October.

If the Justices perceive this case as something of a hot potato, that is understandable. While no other state program resembles Hawaii's, the case raises far broader questions about making race a condition of eligibility for public benefits.

While it is certainly possible to structure a narrow decision specific to Hawaii, as the Ninth Circuit did, it is also possible to turn this case into a battleground of the ongoing affirmative action wars. A series of recent Supreme Court opinions have subjected government programs that offer special benefits on the basis of race to the same rigorous constitutional scrutiny, no matter which race is the beneficiary.

Another interesting element in the case is a 1973 Supreme Court opinion on which the appeals court based a substantial part of its analysis. That case, Salyer Land Co. v. Tulare Lake District, upheld a California law that gave land owners, and no one else, the right to vote for the management of water storage districts.

These were "special purpose" elections in which property owners had by far the greatest stake, then-Associate Justice William H. Rehnquist wrote for the majority. Three liberal Justices, William O. Douglas, William J. Brennan Jr. and Thurgood Marshall, vigorously dissented, on the ground that renters, sharecroppers and other nonowners could be injured by mismanagement of the water supply, and "all should have a say."

There were also these other developments today as the Court returned from a two-week recess.

Professors' Workload

The Court upheld an Ohio law that both required state universities to set standards for the amount of time professors should devote to classroom teaching and took the question of professors' workload off the table as a subject for collective bargaining.

The 8-to-1 decision overturned a ruling by the Ohio Supreme Court, which held that the 1993 state law violated the professors' constitutional right to equal protection because no other public employees were barred from negotiating with the state over their workload. Ohio appealed the ruling.

The Court's unsigned opinion today, from which only Justice John Paul Stevens dissented, said the state law was a straightforward economic regulation that was constitutional as long as it had a rational basis. The state's goal was "to increase the time spent by faculty in the classroom," the opinion said, adding that the law "was an entirely rational step to accomplish this objective."

Justice Stevens objected that the Court should not have issued a decision without full briefing and argument. The Justices had never formally granted review in the case, Central State University v. American Association of University Professors, No. 98-1071. Justice Stevens said that while he had not reached a conclusion, the Court's analysis was "mechanistic" and ignored the issues of academic freedom that were present in the case.

Justice Stevens also added a sly observation. "While surveying the flood of law reviews that cross my desk," he said, "I have sometimes wondered

whether law professors have any time to spend teaching their students about the law."

A majority of Ohio's legislators evidently had "a similar reaction," he added.

Violence Against Women

Without comment, the Court turned down a constitutional challenge to a provision of a Federal law, the Violence Against Women Act, that makes it a Federal crime to cross state lines for the purpose of injuring a "spouse or intimate partner."

The appeal was brought by the first woman to be convicted under the 1994 law, a Russian immigrant who was convicted and sentenced to life in prison for conspiring in the murder of her estranged husband, Yakov Gluzman. Mr. Gluzman, also an immigrant from Russia, was a successful medical researcher when his wife, Rita Gluzman, and a cousin traveled from New Jersey to New York to kill him in his apartment in Pearl River.

Mrs. Gluzman's appeal, Gluzman v. United States, No. 98-1326, argued that Congress lacked constitutional authority to turn a crime of domestic violence into a Federal offense. The lower Federal courts had rejected that challenge.

The Justices are likely to have another chance to consider the issue. Earlier this month, the Federal appeals court in Richmond declared another provision of the Violence Against Women Act unconstitutional, and a Supreme Court appeal is planned in that case, Brzonkala v. Virginia Polytechnic Institute.

Prosecutor's Comment

The Court accepted an appeal by New York State from a ruling that a Queens prosecutor violated a defendant's constitutional rights by telling the jury that the defendant had derived a "big advantage" from sitting through the testimony of witnesses at his rape trial. The implication of the comment was that the defendant, Ray Agard, had thus been able to tailor his own testimony to what had gone before.

The United States Court of Appeals for the Second Circuit had granted Mr. Agard's petition for a writ of habeas corpus on the ground that the comment in effect had compromised his right to attend his own trial. In its appeal, Portuondo v. Agard, No. 98-1170, the state asked the Justices to resolve what it said was widespread confusion over the propriety of prosecutors' comments on defendants' conduct or demeanor in the courtroom.

Sibling Adoption

Without comment, the Court turned down an appeal filed on behalf of a 4-year-old foster child who was separated from his 6-year-old sister for eventual adoption by an aunt. The children's parents had been found unfit, and a Massachusetts court approved a request by an aunt in New Jersey to rear him. The appeal, Hugo P. v. George P., No. 98-7565, argued that the custody order separating the siblings violated the boy's constitutional right to "family integrity."

WHEN RACE DETERMINES WHO GETS TO VOTE

The Christian Science Monitor

Tuesday, April 6, 1999

Alex Salkever, Special to The Christian Science Monitor

To native Hawaiians, the Office of Hawaiian Affairs is a crucial part of the state's effort to right past wrongs. To at least one of Hawaii's other residents, it's creating new ones.

The Office of Hawaiian Affairs (OHA) manages more than $ 300 million of public money and administers a variety of social programs. But its trustees are elected in a vote open only to native Hawaiians.

Sixth-generation Hawaii resident Harold Rice says this practice is discriminatory and unconstitutional, so he's suing the state. After years of appeals, the United States Supreme Court recently agreed to hear the case.

If it sides with the disgruntled Big Island rancher when it takes up the case later this year, the ruling could have a profound impact on the rights of native groups both here and on the mainland.

"If the court reverses, it could raise fundamental questions about the ability of any native group to govern itself," says Jon Van Dyke, a University of Hawaii law professor who has represented OHA on the case.

For native Hawaiians, the case is a crucial step in their long road toward sovereignty. Their status with the federal government has been vague for decades.

Unlike other indigenous groups in the US, native Hawaiians have never had a claims court to address their grievances, and special provisions to set up reservations or include Hawaiians in Bureau of Indian Affairs (BIA) social programs were never made.

In addition, Hawaiians never entered into any treaties with the federal government - a legal platform that Indian groups have used to gain compensation or access to natural resources.

Many native Hawaiians say this case will help them redress some of these inequalities. "The No. 1 issue with this lawsuit is whether or not Hawaiians are considered to have political status," says OHA trustee Clayton Hee. If the court sides with OHA, "the next logical step is for the Hawaiians ... to establish their sovereign rights before the US Congress. Every facet that is enjoyed by other native peoples should be enjoyed by Hawaiians."

Such logic is only fair, OHA supporters add, because native Hawaiians - who make up as much as 20 percent of the state's population - share many of the same troubles as their mainland indigenous counterparts. High rates of poverty, mortality, drug abuse, and imprisonment make them the most troubled ethnic group in Hawaii.

OHA was set up in 1978 to help alleviate some of these problems. It was also intended to return some of the power stripped from native Hawaiians when the Kingdom of Hawaii was overthrown by a US-backed group of white merchants and missionaries in 1893.

During the past two decades, millions of dollars have poured into OHA coffers from the state general fund and from

revenues on "ceded lands," lands held in trust by the state for the benefit native Hawaiians and the general public. Under state law, native Hawaiians are entitled to 20 percent of the revenues. Negotiations are currently under way to determine the extent of additional state obligations to OHA, which could range as high as $ 1 billion.

OHA'S access to this money is what has upset Mr. Rice. If OHA can spend state money, then everyone in the state should have a say in how it's spent, he says.

"Mr. Rice contends that he was denied the right to vote in an election held by the State of Hawaii to elect individuals who would make decisions concerning public resources in Hawaii, and he was denied the right to vote based on his race or national origin," says Theodore Olson, Rice's attorney. "The courts never said that the people who moved into Utah and settled Utah can deny equal rights and privileges to people who moved in afterwards."

Rice's attorney asserts that, unlike Indian tribes, native Hawaiians are not sovereign political entities, but ancestral residents. Thus, OHA elections that exclude Hawaii residents violate the 14th and 15th Amendments, which promise equal protection under the law and the right to vote regardless of race.

But the state and the native Hawaiians note that a 1974 United States Supreme Court ruling allows the BIA to give hiring preferences to native Americans because the BIA's job is to serve and improve the status of native Americans.

"Because the native people have their own resources and their own trust assets, they should be allowed to govern these assets themselves," says Professor Van Dyke.

The fact is, though, the Supreme Court has consistently ruled against indigenous groups during the 1990s.

Justices Clarence Thomas and Antonin Scalia are opponents of preferential treatment of virtually any type. And with the pendulum swinging against affirmative-action programs, there is a chance that the Supreme Court could revise its 1974 ruling, upending the legal bulwarks that have been used to build programs for native Americans.

AN AMERICAN RACE LAW

The New York Post

Tuesday, May 25, 1999

Michael Meyers

IS Hawaii still part of the United States, or some outpost where non-"indigenous" people are second-class citizens?

The case is headed to the U.S. Supreme Court. It centers on Harold Rice, a Hawaiian who went to vote in a statewide election - and was turned away. A state law (and a 1978 amendment to the state's Constitution) disqualified him from voting because, as a white man, he is not a "native Hawaiian."

No matter that Rice is Hawaiian, whose ancestors served in the Hawaiian Legislature before annexation. Because his blood is not 50 percent "Hawaiian," the law deems him not to be a red-blooded native and therefore he's ineligible to vote in a statewide, government-administered election over a matter that involves a trust for the benefit of "real" Hawaiians.

Blood tests for voting? There's more to this outrage. Any Hawaiian - white, black, yellow, brown - who can't trace his or her roots to the land before 1778 (when "Westerner" Captain Cook arrived in the islands) is, well, unauthentic. Only sufficiently-blooded Hawaiians may vote for the trustees of the state Office of Hawaiian Affairs, all of whom must be "Hawaiian" as well.

For the benefit of the indigenous population, the office administers lands ceded back to Hawaii and the funds derived therefrom. (It also disburses monies from the state's general coffers.) These reparations, say the politically correct in Hawaii, are due to the people whose land (then under the control of a monarchy) the United States stole.

The twist is in how a federal district court and an appeals court managed to uphold this race test: They decided that the category "Hawaiian" was not a racial classification at all but a political classification: Hawaii, the courts claim, is treating native Hawaiians like American Indian tribes (who do have special constitutional protection).

No federal law, and nothing in the U.S. Constitution, designates native Hawaiians as Indians. The judges just made it up. In so doing, they've functionally repealed (for that statewide election) the 14th and 15th Amendments, which are plain and unequivocal in guaranteeing every American citizen the equal protection of the laws and the right not to be discriminated against in voting on the grounds of their race."

Last Saturday, the Executive Board of the American Civil Liberties Union chose not to file a brief on the side of the "native Hawaiians." That decision was achieved by the ACLU's savvy and politically courageous president, Nadine Strossen. But the motion failed on a tie vote - signaling the power of bad law and confused thinking about race in this showdown.

By imposing a racial test in the name of protecting the interests of native Hawaiians, Hawaii exposes a contempt for American-style constitutional rights and "Western" thinking that borders on

official racial separatism and secessionist fever.

History divides. Yes, lands were stolen from natives, just as other peoples were stolen from their native land. But we're all here now, together, for better and worse, enjoying the blessings of freedom and equality as we have decreed it in our federal Constitution.

Harold Rice is one American who won't let race divide his state and our nation. If Hawaiians are lucky, our Supreme Court will strike down their racial voting scheme, and give Mr. Rice back his standing and heritage as a full-blooded Hawaiian and American citizen.

RESURGENT RACISM IN HAWAII?

The Washington Times

Tuesday, March 30, 1999

Bruce Fein

Chief Justice of the United States Harlan Fiske Stone sermonized in Hirabiyashi vs. United States (1943) that, "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." It is a sermon too readily forgotten, even with the graphic reminder of Kosovo and a burgeoning of other ethnic conflicts fueled by generations of discrimination.

The case of Rice vs. Cayetano, pending in the United States Supreme Court, is worrisome on that score. Underlying the dispute is Hawaii's dedication of public largesse on "native Hawaiians" and "Hawaiians" to the exclusion of its other citizens. Reminiscent of Nazi Germany's Nuremburg laws, Hawaiian is defined as "any descendent of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Native Hawaiians are defined as "any descendent of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778...."

The Republic of Hawaii sought annexation to the United States, which accepted the overture in the Annexation Act of 1898. It provided that revenues from 1.8 million acres of land ceded to the United States would be devoted solely to educational and other public purposes on behalf of all Hawaiian Island residents. The Organic Act of 1900 transferred the lands to the territorial government of Hawaii for public works and for other public purposes.

In 1920, however, racism crept into the law with the Hawaiian Homes Commission Act. It set aside 200,000 acres of public lands for leasing at nominal rents to "any descendent of not less than one-half part of the blood of races inhabiting the Hawaiian Islands previous to 1778." Its inspiration was a plunging number of full-blooded Hawaiians and a racially stereotypical belief that the Hawaiian race needed rehabilitation by a return to the land.

Hawaiian statehood arrived with the 1959 Admission Act. It stipulated that public lands held by the United States conveyed to Hawaii pursuant to section 5(b) were to be held in trust for fivefold purposes, including "the betterment of conditions of native Hawaiians." In 1978, Hawaii established the Office of Hawaiian Affairs to hold 20 percent of section 5(b) property in trust for native Hawaiians and Hawaiians. Caucasians who pay taxes and otherwise assume the burdens of citizenship need not apply. OHA is governed by a board of trustees whose members must be Hawaiian and who are elected solely by Hawaiian voters. Caucasians are blacklisted because of the happenstance of ancestry.

It would seem that the OHA and its race-based beneficiaries flagrantly violate Chief Justice Stone's teaching that government distinctions that pivot on

ancestry are odious to a free people. They are instantly suspect under the Fourteenth and Fifteenth Amendments to the United States Constitution. The exaltation of Hawaiians and native Hawaiians by the OHA might be justified if calculated to overcome past discrimination, but no such findings have been made either by Congress, Hawaii or any court. It is racism for the sake of racism political correctness inclined to glorify aboriginal peoples and aboriginal life at work.

Harold F. Rice, a caucasian excluded from voting for the OHA board, challenged the constitutionality of Hawaii's race-based voting register. The Fifteenth Amendment prohibits racial discrimination in the franchise, and the Fourteenth Amendment enjoins the same result by dint of its equal protection clause. The United States Court of Appeals for the Ninth Circuit, however, rebuffed Mr. Rice's attack. Writing for a panel of three, Judge Pamela Ann Rhymer insisted that since the OHA board dedicated public resources only to Hawaiian and native Hawaiian beneficiaries, there was nothing wayward about excluding all others from voting for its members. According to Judge Rhymer, caucasians hold no interest in how public funds are employed for the betterment of Hawaiians and native Hawaiians. Moreover, the jurist maintained, the United States apologized in 1993 for the participation of its citizens and agents in the overthrow of the non-democratic Kingdom of Hawaii in 1893, five years before it was annexed.

Both reasons are wrongheaded. Caucasian citizens of Hawaii may be intensely concerned with the operations of the OHA, for instance, whether it promotes assimilation or separate identities for Hawaiians or native Hawaiians through housing, education or cultural events. They might be rightly concerned, like Ben Franklin, that if we do not all hang together, then assuredly we will all hang separately. Similarly, childless citizens are entitled to vote in school board elections without discrimination because the future of the nation rests on the education of its youth.

Finally, to anchor Hawaii's racial discrimination on a perceived historical injustice in 1893 would be like Yugoslav President Slobodan Milosevic justifying Serb discrimination against Kosovars because of the Serb's misfortune at the hands of the Ottoman Turks in the 1389 Battle of Kosovo. Walking even an inch down that road of historical grievances is miles too far, and the United States Supreme Court should loudly say so.

Bruce Fein is a lawyer and free-lance writer specializing in legal issues.