Section 5: Federalism

Institute of Bill of Rights Law at The College of William & Mary School of Law

Repository Citation
https://scholarship.law.wm.edu/preview/169

Copyright c 2005 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/preview
V. FEDERALISM

In This Section

New Case: 04-623 Gonzales v. Oregon

Synopsis and Question Presented p. 234

“Justices to Hear Case on Oregon’s Suicide Law”
David G. Savage p. 242

“Court Rejects Ashcroft; Backs Suicide Law”
Henry Weinstein p. 244

“Oregon’s Right to Decide”
Erwin Chemerinsky and Judith Daar p. 248

“False Federalism”
Wesley J. Smith p. 250

“Why Ashcroft is Wrong on Assisted Suicide”
Nelson Lund p. 252

New Case: 04-885 Central Virginia Community College v. Katz

Synopsis and Question Presented p. 254

Hood v. Tennessee Student Assistance Corp. p. 255

“Justices to Rule on Immunity of States in Bankruptcy Suits”
Linda Greenhouse p. 265

“Supreme Court Will Hear Virginia Case Regarding State Immunity From Bankruptcy”
Matt Busse p. 267

“Wallace’s Goes to Supreme Court”
Terry Brennan p. 269

“Tenn. Student v. Hood, 124 S. Ct. 1905”
National Law Journal p. 271

New Case: 04-1203 United States v. Georgia

Synopsis and Question Presented p. 272
Miller v. King

“Justices to Decide if Disabled Inmates May Sue States for Damages”
Linda Greenhouse

“Recent Petition from the SG”
Kevin Russell

“Disabled People Can Sue States Over Access, High Court Rules”
David G. Savage

“Attorney Hopes High Court Will Clarify Intent Regarding Title II Lawsuits”
Disability Compliance Bulletin

“Disabled Inmate Jail First of Its Kind”
Associated Press

Federalism Status Report

“The Court’s Faux Federalism: A Year at the Supreme Court (2004)”
Ramesh Ponnuru

“A Deeply Rooted Revolution”
Herman Schwartz

“The Rehnquist Court and Its Imperiled States' Rights Legacy”
Linda Greenhouse
Gonzales v. Oregon

(04-623)

Ruling Below: (Gonzales v. Oregon, 368 F.3d 1118 (9th Cir. 2004); cert granted 125 S.Ct. 1299, 161 L.Ed.2d 104, 73 USLW 3298, 73 USLW 3481, 73 USLW 3494 (Feb 22, 2005) (No. 04-623)).

Appellees, the State of Oregon and others, challenged the Ashcroft Directive, published at 66 Fed. Reg. 56,607, because it criminalized conduct specifically authorized by Oregon’s Death with Dignity Act. The court held that the Ashcroft Directive was unlawful and unenforceable because it violated the plain language of the Controlled Substances Act (CSA), because it contravened Congress’ express legislative intent, and overstepped the bounds of the U.S. Attorney General’s statutory authority. The court found that the CSA was enacted to combat drug abuse. The court further found that to the extent that the CSA authorized the federal government to make decisions regarding the practice of medicine, those decisions were delegated to the Secretary of Health and Human Services, not to the Attorney General.

Question Presented: Whether the Attorney General has permissibly construed the Controlled Substances Act, 21 U.S.C. 801 et seq., and its implementing regulations to prohibit the distribution of federally controlled substances for the purpose of facilitating an individual’s suicide, regardless of a state law purporting to authorize such distribution.
petitions for review are granted.

***

The Ashcroft Directive purports to interpret and implement the CSA, which Congress enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The stated purpose of the CSA is "to provide increased research into, and prevention of, drug abuse and drug dependence . . . and to strengthen existing law enforcement authority in the field of drug abuse." This legislation is designed to deal in comprehensive fashion with the growing menace of drug abuse in the United States[.""]

***

In 1984, Congress amended the CSA to give broader authority to the Attorney General. The Attorney General is now authorized to revoke a physician's prescription privileges upon his determination that the physician has "committed such acts as would render his registration . . . inconsistent with the public interest[.""] 21 U.S.C. § 824(a)(4). When determining which acts are inconsistent with the public interest, the Attorney General must consider the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority;

(2) The applicant's expertise in dispensing . . . controlled substances;

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances;

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances;

(5) Such other conduct which may threaten the public health and safety.

Although this provision gives the Attorney General new discretion over the registration of health care practitioners, Congress explained that "the amendment would continue to give deference to the opinions of State licensing authorities, since their recommendations are the first of the factors to be considered[.""] S. Rep. No. 98-225, at 267 (1984).

Against this backdrop of federal regulation, in 1994, the State of Oregon enacted by ballot measure the country's first law authorizing physician-assisted suicide. Oregon's Death With Dignity Act authorizes physicians to prescribe lethal doses of controlled substances to terminally ill Oregon residents according to procedures designed to protect vulnerable patients and ensure that their decisions are reasoned and voluntary. Oregon voters reaffirmed their support for the Death With Dignity Act on November 4, 1997, by defeating a ballot measure that sought to repeal the law.

Soon thereafter, several members of Congress, including then-Senator John Ashcroft, urged then-Attorney General Janet Reno to declare that physician assisted suicide violated the CSA. She declined to do so. In a letter dated January 5, 1998, Attorney General Reno explained that the CSA was not "intended to displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice." She concluded that "the CSA does not authorize [the Drug Enforcement Administration ("DEA") to prosecute, or to revoke DEA registration of,
a physician who has assisted in a suicide in compliance with Oregon law.”

With a change of administrations came a change of perspectives. On November 9, 2001, newly appointed Attorney General John Ashcroft reversed the position of his predecessor and issued the Directive at issue here. The Ashcroft Directive proclaims that physician assisted suicide serves no “legitimate medical purpose” under 21 C.F.R. § 1306.04 and that specific conduct authorized by Oregon’s Death With Dignity Act “may render [a practitioner’s] registration . . . inconsistent with the public interest” and therefore subject to possible suspension or revocation.” The Directive specifically targets health care practitioners in Oregon and instructs the DEA to enforce this determination “regardless of whether state law authorizes or permits such conduct by practitioners.”

To be perfectly clear, we take no position on the merits or morality of physician assisted suicide. We express no opinion on whether the practice is inconsistent with the public interest or constitutes illegitimate medical care. This case is simply about who gets to decide. All parties agree that the question before us is whether Congress authorized the Attorney General to determine that physician assisted suicide violates the CSA. We hold that the Attorney General lacked Congress’ requisite authorization. The Ashcroft Directive violates the “clear statement” rule, contradicts the plain language of the CSA, and contravenes the express intent of Congress.

We begin with instructions from the Supreme Court that the “earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide” belongs among state lawmakers. Washington v. Glucksberg, 521 U.S. 702, 735, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997). In Glucksberg, Justice O’Connor emphasized that “states are presently undertaking extensive and serious evaluation of physician assisted suicide. . . . In such circumstances, the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the ‘laboratory’ of the States . . . in the first instance.”

[Unless Congress’ authorization is “unmistakably clear,” the Attorney General may not exercise control over an area of law traditionally reserved for state authority, such as regulation of medical care.]

The Ashcroft Directive is invalid because Congress has provided no indication—much less an “unmistakably clear” indication—that it intended to authorize the Attorney General to regulate the practice of physician assisted suicide. By attempting to regulate physician assisted suicide, the Ashcroft Directive invokes the outer limits of Congress’ power by encroaching on state authority to regulate medical practice. [. . .]

The Ashcroft Directive not only lacks clear congressional authority, it also violates the plain language of the CSA. We hold that the Directive exceeds the scope of federal authority under the CSA, misconstrues the Attorney General’s role under the statute, and fails to follow explicit instructions for revoking physician prescription privileges.

The CSA expressly limits federal authority under the Act to the “field of drug abuse.” Contrary to the Attorney General’s characterization, physician assisted suicide is not a form of drug “abuse” that Congress intended the CSA to cover. Physician assisted suicide is an unrelated, general medical practice to be regulated by state lawmakers in the first instance. Glucksberg,
521 U.S. at 735, 737 (O'Connor, J., concurring).

***

The Attorney General misreads the CSA when he concludes that he may evaluate the public interest "based on any of the five factors identified in the statute." OLC Memo at 3 (emphasis added). The CSA clearly provides that all five public interest factors "shall be considered."

***

In sum, the CSA was enacted to combat drug abuse. To the extent that it authorizes the federal government to make decisions regarding the practice of medicine, those decisions are delegated to the Secretary of Heath and Human Services, not to the Attorney General. The Attorney General's unilateral attempt to regulate general medical practices historically entrusted to state lawmakers interferes with the democratic debate about physician-assisted suicide and far exceeds the scope of his authority under federal law. We therefore hold that the Ashcroft Directive is invalid and may not be enforced.

The petitions for review are GRANTED. The injunction previously entered by the district court is ORDERED continued in full force and effect as the injunction of this court.

DISSENT: WALLACE, Senior Circuit Judge, dissenting:

As my colleagues in the majority suggest, this case is not about the ethics or public policy implications of physician-assisted suicide. Setting aside the public policy aspects of physician-assisted suicide that evoke passionate feelings, this case involves a single legal question: is the Attorney General's interpretation of 21 C.F.R. § 1306.04(a) entitled to deference? Because our past decisions command deference to the Attorney General's interpretive rule, I would deny the petition for review on the merits.

***

Petitioners argue first that deference to the Ashcroft Directive is not warranted because the Attorney General did not satisfy the APA's notice-and-comment rulemaking procedures. See 5 U.S.C. § 553 (requiring that agencies give "interested persons" notice of proposed rules and "an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation"). The United States counters that the APA does not require notice and comment here, because the Ashcroft Directive is an interpretive rule, not a legislative rule. If the Ashcroft Directive is "genuinely an interpretive rule, it is valid despite the absence of notice and comment procedures."

We distinguish interpretive and legislative rules by asking (1) whether, absent the rule, there would be an inadequate legislative basis for an enforcement action; (2) whether the agency "explicitly invoked its general legislative authority"; and (3) whether "the rule effectively amends a prior legislative rule." ld. "If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule."

The Ashcroft Directive does not bear any of these three hallmarks of a legislative rule. First, even absent the Ashcroft Directive, the Attorney General could bring an
enforcement action because the Controlled Substances Act itself prohibits distributing a controlled substance without a prescription, 21 U.S.C. § 829(a), and preexisting Department of Justice regulations declare that “[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose,” 21 C.F.R. § 1306.04(a). Second, the Attorney General did not expressly invoke his statutory authority to “promulgate . . . any [legislative rules] . . . which he may deem necessary and appropriate for the efficient execution of his functions under” the Controlled Substances Act. Third, although the Ashcroft Directive contradicts former-Attorney General Reno’s 1998 statement, the Ashcroft Directive is not inconsistent with any legislative rule.

The Ashcroft Directive does not purport to “create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress.” Instead, like other interpretive rules, the Ashcroft Directive is “essentially hortatory and instructional,” clarifying what the Controlled Substances Act means when applied to a narrowly defined situation. Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984); see also Hemp, 333 F.3d at 1087 (explaining that interpretive rules “explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule”). Thus, General Ashcroft’s failure to give Petitioners advance notice and an opportunity to comment does not invalidate the Ashcroft Directive.

The majority asserts that the Attorney General lacks authority to decide whether physician-assisted suicide is consistent with “the public interest” and a “legitimate medical practice” under the Controlled Substances Act and its implementing regulations because Congress intended to preserve the states’ traditional authority to make these determinations. This argument ignores the Controlled Substances Act’s text and controlling Supreme Court decisions.

[It is axiomatic that the meaning of federal law is a federal question. . . .] State law may be relevant to certain provisions of the Controlled Substances Act, see, e.g., 21 U.S.C. § 823(f) (instructing the Attorney General to consider state-law violations when deciding whether a physician’s registration would be contrary to the public interest), but nothing in the Controlled Substances Act plainly evinces a congressional intent to define “the public interest” solely according to state law. On the contrary, section 823 instructs the Attorney General to identify acts “inconsistent with the public interest” by reference to a variety of sources, including a physician’s federal conviction record, compliance with “Federal . . . laws relating to controlled substances,” and “other conduct which may threaten public health and safety.” Id. The majority’s contention that the Attorney General cannot suspend or revoke a physician’s registration without state authorization ignores Mississippi Band’s “plain indication” rule and contravenes Congress’s clearly expressed intent.

The majority also cites Washington v. Glucksberg, 521 U.S. 702, 735, 737, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997) (O’Connor, J., concurring), for the position that the Attorney General must defer to the Oregon Act because “physician-assisted suicide is an unrelated, general medical practice to be regulated by the States in the first instance.” Glucksberg, however, addressed states’ authority to prohibit physician-assisted suicide in the absence of federal regulation; the case did not answer the question whether Congress may exercise its Commerce Clause power to
deny physicians access to controlled substances for physician-assisted suicide. Rather than place federalism limitations on the federal government's authority to restrict physician-assisted suicide, Justice O'Connor's concurring opinion stressed that "there is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill . . . individuals . . . and the State's interests in protecting those who might seek to end life mistakenly or under pressure." Id. at 737. Simply put, courts should defer to the political process instead of interposing hasty constitutional constraints.

Glucksberg does not require the Attorney General to interpret the Controlled Substances Act and its implementing regulations according to state standards of professional conduct. Rather, the Supreme Court's decision stands for the broader proposition that federal courts generally should keep their distance, allowing the political process to decide whether and how to regulate physician-assisted suicide. The majority's shortsighted decision to declare the Ashcroft Directive invalid has precisely the opposite effect.

* * *

Finally, the majority argues that the Ashcroft Directive exceeds the Attorney General's statutory authority because Congress has not clearly authorized the Attorney General to upset the delicate balance between federal regulation of controlled substances and state control of medical practices. As support for this conclusion, the majority invokes the Supreme Court's recent analysis in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 148 L. Ed. 2d 576 (2001):

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

Solid Waste's clear statement rule is based upon understandable and significant federalism concerns, the importance of which I do not doubt. The question we must ask ourselves, however, is whether this canon of statutory interpretation applies to the case before us.

* * *

Turning to the specific issue raised here—whether the prescription or dispensation of controlled substances to assist suicide substantially affects interstate commerce—we base our assessment on four factors:

1) whether the statute in question regulates commerce or any sort of economic enterprise; 2) whether the statute contains any express jurisdictional element which might limit its reach to a discrete set of cases; 3) whether the statute or its legislative history contains express congressional findings that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated.

The Ashcroft Directive clearly satisfies
McCoy's first and the last criteria. The Ashcroft Directive regulates economic transactions: physicians generally prescribe and dispense controlled substances for a fee. There is no indication here, as there was in Raich with regards to medicinal marijuana, that drug-induced physician-assisted suicide does "not involve [the] sale, exchange, or distribution" of controlled substances. Raich, 352 F.3d at 1229. The link between these transactions and their effect on interstate commerce is not attenuated simply because relatively few Oregonians use controlled substances for assisted suicide. We evaluate whether an activity's link to interstate commerce is attenuated by assessing whether its effect on interstate commerce is sufficiently direct, Solid Waste, 531 U.S. at 195; McCoy, 323 F.3d at 1123-24, and we assess individual provisions as "parts of a wider regulatory scheme" (i.e., the Controlled Substances Act), which regulates a field of drug-related activity that has "a 'substantial affect' on interstate commerce," Tisor, 96 F.3d at 375. Here Congress naturally and directly reduces the amount of a controlled substance that flows through the interstate channels when it prohibits the substance's distribution for a particular use. Thus, the link between drug prescriptions and interstate commerce is sufficiently direct and substantial even if the drugs ultimately are used in intrastate activities such as physician-assisted suicide and the activities' disaggregated effect on interstate commerce is small.

* * *

Having demonstrated the fallacies of the foregoing challenges to the Ashcroft Directive, I now consider what standard of review this court should apply when assessing the Ashcroft Directive's validity. The degree of deference we accord an interpretive rule depends upon whether the rule construes a statute or an agency regulation.

If the Ashcroft Directive represents a statutory interpretation, it enjoys deference as defined in Skidmore v. Swift & Co., 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161 (1944). Omohundro v. United States, 300 F.3d 1065, 1067-68 (9th Cir. 2002). Under Skidmore, "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at 140. Especially relevant under Skidmore is the fact that the Ashcroft Directive reverses the agency's earlier interpretation. [...]

If the Ashcroft Directive interprets an agency regulation, rather than the Controlled Substances Act itself, we must accord it "substantial deference." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994). Under this highly deferential standard, our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. [...] * * *

In my view, the Ashcroft Directive constitutes an interpretation of a regulation rather than a statutory interpretation. The Ashcroft Directive's single interpretive act is to "determine that assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 C.F.R. § 1306.04 (2001)." Ashcroft Directive, 66 Fed. Reg. at 56,608. The Petitioners point to General Ashcroft's
warning that prescribing a controlled substance to assist suicide may render a physician’s registration subject to suspension or revocation under section 824(a)(4). This statement was not an interpretation of the Controlled Substances Act, however, but an explanation of the logical consequences flowing from General Ashcroft’s interpretation of 21 C.F.R. § 1306.04. If assisting suicide is not a “legitimate medical purpose,” the direct result is that a physician cannot prescribe controlled substances for this purpose without violating Controlled Substances Act section 829 and thereby risking suspension or revocation of their registration under sections 823 and 824.

***

Although I am convinced of the merits of my legal argument, I admit that even if I persuaded one of my colleagues to join me, my opinion would not be a final chapter. Those who are uneasy with my position (as I assume Petitioners will be) should see its limited grasp. The Ashcroft Directive constitutes a final agency action, but it surely will not be the last word on physician-assisted suicide. The Ashcroft Directive does not spell the end of the public’s “earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide,” Glucksberg, 521 U.S. at 735, nor does it halt states’ extensive and serious evaluation of physician-assisted suicide and other related issues,” Glucksberg, 521 U.S. at 736, 737 (O’Connor, J., concurring). State legislators may supplement the Ashcroft Directive’s sanctions, and they may authorize alternative methods for assisting suicide that do not involve the prescription of controlled substances.

More to my point, the Ashcroft Directive is not even an immutable expression of federal policy. A change in presidential administrations or a shift in the current President or Attorney General’s perspective might precipitate the Ashcroft Directive’s rescission. Certainly, Congress is free to enact legislation limiting or counteracting the Ashcroft Directive’s effects. Although opinions differ over the propriety of assisted suicide, I fully subscribe to Justice O’Connor’s canny observation that there is simply “no reason to think that the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the [government]’s interests in protecting those who might seek to end life mistakenly or under pressure.” Id. In short, we should trust the democratic process.
The Supreme Court agreed Tuesday to hear the Bush administration's challenge to the nation's only right-to-die law, setting the stage for a showdown over whether states may permit doctors to prescribe drugs intended to end patients' lives.

The justices will decide whether Oregon's Death With Dignity Act violates federal drug-control laws. The case will be argued during the court's fall term.

Oregon's voters have approved the right-to-die measure twice. In 1994, the law passed 51% to 49%, but never went into effect because of a court ruling. In 1997, voters rejected an effort to repeal the law, endorsing it 60% to 40%.

The law extends a right to die only to capable adults who are diagnosed as "suffering from a terminal disease" that is likely to take their lives within six months. A second doctor must confirm that the patient is dying, acting voluntarily and competent to choose to end his or her life. Only then may a doctor prescribe lethal medication.

Hundreds of patients have consulted doctors and obtained lethal medication in the seven years since the law took effect, supporters of the law said; 171 have followed through.

"Many patients are comforted by having the medication that gives them the choice to hasten their death, but it is used rarely," said Kathryn L. Tucker, legal director for Compassion in Dying, the Portland, Ore., group that sponsored the law.

Traditionally, states regulate the practice of medicine and license physicians to work within their borders.

In 1998, conservatives in Congress, led by Rep. Henry J. Hyde (R-Ill.), urged federal action to block Oregon's law. But then-Atty. Gen. Janet Reno refused to intervene, determining that Oregon had set stringent rules to assure that only mentally competent terminally ill patients could obtain the medication.

But in November 2001, Atty. Gen. John Ashcroft said he would seek to punish doctors who prescribed the medication to dying patients, regardless of the wishes of Oregon's voters.

"I hereby determine that assisting suicide is not a legitimate medical purpose," Ashcroft said. Doctors who did so would be in violation of the federal Controlled Substances Act, he said, and would have their right to prescribe medicine suspended or revoked.

Ashcroft's order set in motion the legal battle to be heard by the Supreme Court.

When Oregon Atty. Gen. Hardy Myers, several patients and others challenged Ashcroft, a federal judge in Portland blocked the order from taking effect. Ashcroft appealed, and the U.S. 9th Circuit Court ruled last year that the attorney general had exceeded his authority.

The federal drug control law "was enacted to combat drug abuse," wrote Judge Richard
Tallman.

"The attorney general's unilateral attempt to regulate general medical practices historically entrusted to state lawmakers interferes with the democratic debate about physician-assisted suicide and far exceeds the scope of his authority."

Tallman's opinion included a subtle jab at Ashcroft. He wrote that the attorney general was seeking to "alter the usual constitutional balance between the states and the federal government," quoting a 1991 Supreme Court ruling in Gregory vs. Ashcroft.

In that ruling, Ashcroft—then the governor of Missouri—won a victory for states' rights by arguing that state judges could be subjected to a mandatory state retirement law, despite a federal law that barred such retirements. The high court agreed with Ashcroft that states historically had controlled their judiciaries. Adopting that theme in the right-to-die case, Tallman said control of medical practice had been historically within the powers of the state.

On Nov. 10, the day he announced his resignation from the Bush Cabinet, Ashcroft asked the Supreme Court to reverse the 9th Circuit ruling. He accused the appeals court of "misconstruing and dramatically expanding the scope" of the Gregory vs. Ashcroft decision in a way that "threatens to undermine federal authority."

It takes the votes of at least four of the nine justices to hear an appeal; in a one-line order Tuesday, the court announced it had voted to hear the case—renamed Gonzales vs. Oregon, now that Alberto R. Gonzales is U.S. attorney general.

Opponents of the Oregon law applauded the court's decision.

"The court has an opportunity to ensure that patients receive truly compassionate care and pain relief by limiting physicians' use of narcotics for healing—not death," said Dr. David Stevens, executive director of the 17,000-member Christian Medical Assn.

Oregon officials and leaders of the right-to-die movement said they were disappointed that the high court had intervened. They noted that voters had approved the law twice, and that two lower courts had upheld it.

"This is an opportunity for the Death With Dignity law to win at the highest level, to finally be validated on a national stage," said Eli D. Stutsman, a Portland lawyer who helped draft the legislation and now represents a physician and a pharmacist who challenged Ashcroft's order. "We are confident that states' rights and the rights of the terminally ill will carry the day."

Eight years ago, the Supreme Court took up the right-to-die issue, but in a different context. A judge in Seattle and the 9th Circuit had ruled that dying patients had a constitutional right to end their lives with the help of a doctor, despite a Washington state law that made assisted suicide illegal.

The Supreme Court unanimously reversed the 9th Circuit—saying there was no such constitutional right, but adding that the decision on physician-assisted suicide should be left to the states, not judges.

"Throughout the nation, Americans are engaged in an earnest and profound debate about the morality, legality and practicality of physician-assisted suicide," Chief Justice William H. Rehnquist said. "Our holding permits this debate to continue, as it should in a democratic society."
On Tuesday, lawyers for Compassion in Dying cited the high court's 1997 statement as a reason to uphold the Oregon law.

"The court invited the states to grapple with the issue of physician aid in dying," Tucker, the group's legal director, said. "Oregon has done so for seven years, and serves as a model for other states."

Legislation based on the Oregon law was introduced in the California Assembly last week. The Vermont Legislature is considering a similar proposal.

The court is not likely to rule on the issue until early next year.

If the Bush administration wins, the decision would all but void Oregon's law and prevent other states from adopting similar measures. If Oregon prevails, it could encourage other states or their voters to seek passage of similar laws.
Atty. Gen. John Ashcroft lost a major round Wednesday in his attempt to block Oregon’s assisted-suicide law, as a federal appeals court panel ruled that his efforts exceeded his authority.

Since Oregon’s so-called Death With Dignity law went into effect in 1997, 171 people—most of them with cancer—have used the law to hasten their deaths, according to the state’s Department of Health Services.

Ashcroft, who began campaigning against Oregon’s law when he was a U.S. senator from Missouri, tried to block it in November 2001 by issuing an order aimed at doctors. The order said physicians who dispensed lethal barbiturates to patients under Oregon’s law would be violating the federal statute designed to restrict narcotics trafficking and illegal diversion of drugs.

Under that policy, the Justice Department would have been able to go to court to strip doctors who assisted in suicides of their right to prescribe medicine.

That effort by Ashcroft “far exceeds the scope of his authority under federal law,” Judge Richard A. Tallman wrote in the opinion for the U.S. 9th Circuit Court of Appeals in San Francisco.

Ashcroft’s “unilateral attempt to regulate general medical practices historically entrusted to state lawmakers interferes with the democratic debate about physician-assisted suicide” and is “unlawful and unenforceable,” Tallman wrote.

The 9th Circuit is known for its liberal opinions and has frequently been reversed by the U.S. Supreme Court on high-profile issues.

But in this case Tallman, a former federal prosecutor appointed to the court by President Clinton, is generally considered one of the appeals court’s more conservative members.

Moreover, the Supreme Court considered assisted-suicide cases from two states in the late 1990s, ultimately upholding Oregon’s right to enact its law, so the justices may have little desire to revisit the issue, legal analysts said.

In one of those cases, the high court said that “the earnest and profound debate” around the country “about the morality, legality and practicality of physician-assisted suicide” should be left to state lawmakers.

Oregon is the only state to have enacted a physician-assisted suicide law. Many others, including California, ban the practice.

In order to invoke the law and obtain the lethal barbiturates, a patient must demonstrate to two physicians that he has no more than six months to live. Doctors have to be convinced that a patient is mentally competent to make the decision, and the patient must administer the medicine to himself.

“By criminalizing medical practices specifically authorized under Oregon law,
the Ashcroft directive interferes with Oregon's authority to regulate medical care within its borders,” Tallman wrote.

“The Ashcroft directive not only lacks clear congressional authority, it also violates the plain language of the Controlled Substances Act,” he wrote.

“We express no opinion on whether the practice is inconsistent with the public interest or constitutes illegitimate medical care,” Tallman wrote, referring to assisted suicides. “This case is simply about who gets to decide,” he added, noting that the law had been approved twice by Oregon voters, in 1994 and 1997.

Tallman was joined in the 2-1 opinion by Judge Donald Lay.

The dissenting judge, J. Clifford Wallace, said the court should have accorded “substantial deference” to Ashcroft’s conclusion that physician-assisted suicide did not serve a “legitimate medical purpose.”

Ashcroft had the authority to take the action he did, and “Congress is free to enact legislation limiting or counteracting” the attorney general’s order if it disapproves, Wallace wrote.

Justice Department spokesman Charles Miller said department attorneys were reviewing the decision and would not immediately comment.

Even some legal scholars who are ordinarily in tune with Ashcroft’s positions said they thought the attorney general was on shaky legal ground.

“As someone who often approves of the work of the attorney general and who also thinks assisted suicide is morally indefensible, I understand John Ashcroft’s motivations to intervene in this matter,” said Douglas Kmiec of Pepperdine Law School.

“Yet, on the law, his regulatory intervention was more questionable,” he added. “The Supreme Court rightly held that the issue of assisted suicide is one to be debated and resolved at the state level, and Congress did not clearly provide otherwise in the Controlled Substances Act.”

The ruling was hailed by Oregon officials as well as patients who support the law.

Don James, a 78-year-old retired schoolteacher from Portland who was one of the plaintiffs challenging Ashcroft’s order, said he was delighted with the ruling.

James, who has prostate cancer and is confined to a wheelchair, said he was on heavy medication though he was not yet terminally ill.

“I’m not in a hurry to die. I want to stay active as long as I can,” he said. “I’m not sure what I will do when that moment comes, but I wanted the option” of hastening death.

James, a registered Republican, added, “I resent that Ashcroft meddled in our affairs in this democracy to try to deprive us of something we want.”

George Eighmey, executive director of the Oregon chapter of Compassion in Dying, the organization that led the battle to get the suicide law enacted, also praised the ruling.

“I believe today’s decision by the 9th Circuit has been a huge victory for Oregon and for all Oregonians who believe in end-of-life choices,” he said. “We hope the message is
received by Atty. Gen. Ashcroft that it is time for him to keep his hands off Oregon’s law and Oregonians.”

But N. Gregory Hamilton, a doctor from Portland and the former president of Physicians for Compassionate Care, an organization opposed to the Oregon law, denounced the ruling.

“It’s amazing that a federal court would allow any state to nullify federal regulatory authority and federal law,” he said. “If Oregon is allowed to exempt itself from federal law about the misuse of controlled substances for the purposes of overdosing patients, what is to stop any state from exempting itself from other important federal regulations and laws?”

Oregon Right to Life officials also criticized the decision and expressed hope that Ashcroft would appeal further.

Gayle Atteberry, executive director of the group, called the ruling a tragedy.

Some patients who become eligible for the lethal barbiturates “are then abandoned to depression instead of receiving the help they need,” she said.

Arthur Caplan, director of the Center for Bioethics at the University of Pennsylvania, said, however, that abuses foreseen by the law’s opponents had not occurred in Oregon.

The suicide law has not been used as often as predicted, in part because Oregon’s doctors and nurses have done a good job on end-of-life palliative care, he said.

After voters passed the law, Ashcroft was among several members of Congress who urged then-Atty. Gen. Janet Reno to take action against physicians who applied it. In 1998, Reno said such action was unwarranted. Ashcroft reversed that decision when he became attorney general.

The next day, U.S. District Judge Robert E. Jones in Portland issued a temporary restraining order blocking the Ashcroft directive.

“To allow an attorney general—an appointed executive whose tenure depends entirely on whatever administration occupies the White House—to determine the legitimacy of a particular medical practice . . . would be unprecedented,” Jones, an appointee of President Reagan, wrote a few months later in an opinion making the restraining order permanent.

The Justice Department appealed, setting the stage for Wednesday’s ruling.
The U.S. Supreme Court now has before it an important opportunity to make clear that state governments have the authority to enact death-with-dignity laws.

Efforts to pass laws allowing physician-assisted suicide for terminally ill patients have been mounted from Hawaii to Maine, though Oregon remains the lone state with an active Death With Dignity Act.

Since taking office in 2001, members of the Bush administration have worked to dismantle the Oregon law, signaling to other states that similar enactments are highly unwelcome. The Supreme Court should reject the ill-advised attempt by the federal government to prevent such state laws.

In 1994, Oregon voters approved an initiative to allow physician-assisted suicide. Oregon's act authorizes physicians to prescribe lethal doses of controlled substances to terminally ill residents according to procedures designed to protect vulnerable patients and ensure that their decisions are reasoned and voluntary. In 1997, voters rejected an initiative that would have repealed this law, reaffirming their desire to access compassionate care at the end of life.

There were several efforts to try to have Congress, by statute, pre-empt the law by prohibiting the use of prescription drugs in physician-assisted suicides. Each of these attempts at federal legislation failed.

Being unable to stop Oregon's law by legislation, opponents took another approach: they asked then-Attorney General Janet Reno to announce that doctors who participate in physician-assisted suicide would lose their ability to write prescriptions. The federal Controlled Substances Act authorizes the attorney general to revoke a physician's ability to prescribe medication if it's determined the physician has "committed such acts as would render his registration . . . inconsistent with the public interest."

The law, enacted in 1970 as part of the "war on drugs," was clearly about giving the federal government the authority to stop doctors who were fueling illegal drug transactions by writing large numbers of prescriptions for controlled substances.

Reno refused this request and explained that the federal government had no authority to overturn Oregon's choice. She emphasized that regulation of physicians was historically left to state governments and that the federal statute could not be stretched to take away a state's power to allow physician-assisted suicide.

This is clearly correct as a matter of federal law, and especially as a matter of federalism. But upon becoming attorney general, John Ashcroft issued a directive that sought to stop physician-assisted suicide in Oregon by criminalizing medical procedures specifically authorized by state law.

The Ashcroft Directive proclaims that physician-assisted suicide serves no "legitimate medical purpose" and that the federal government could revoke the power to issue prescriptions for any Oregon doctor who assists a dying patient, "regardless of whether
state law . . . permits such conduct by practitioners."

Both a federal district court in Oregon and the U.S. Court of Appeals for the Ninth Circuit ruled against the attorney general and held that the federal government had no authority to stop Oregon's Death with Dignity Act. The courts explained that the federal statute relied on by the attorney general did not permit intrusion into a state's authority to regulate medical care within its borders. On Feb. 22, the Supreme Court announced it would review the case.

The court must use this opportunity to affirm the authority of state governments to choose for themselves whether to allow physician-assisted suicide for terminally ill patients. The Ashcroft Directive has the federal government, through fiat by the attorney general, taking over an area—regulating the practice of medicine—that always has been left to the states. Conservatives have throughout American history proclaimed the importance of federalism and states' rights. Now is the time for the Supreme Court to be true to that commitment to states' rights and uphold the law adopted by Oregon's voters.

The Oregon experience shows the many positive developments that come from recognizing the fundamental personal right to choose the manner of one's death. In its seven-year history, the law has been activated by a scant 171 people, a fraction of the eligible Oregonians who have passed this world. But myriad personal accounts reveal that the act has comforted thousands of irreversibly ill patients who found the safety net of physician assistance a tempering force against impending death. Moreover, the law's presence has been linked with advances in palliative, comfort and hospice care, all essential allies on the journey home.

No choice is more deeply personal or more profoundly important than whether to live in pain or die in peace. We have seen terminally ill individuals in great pain begging to have a physician help end their suffering. That should be the right of every person, a right the federal government has no moral or legal authority to usurp.
Does Oregon have the constitutional right to force the United States government to permit state doctors to assist patient suicides with federally controlled substances (narcotics)? Or is the federal government entitled under the Controlled Substances Act (CSA) to prevent these federally regulated drugs from being prescribed for lethal use regardless of state law? The Supreme Court will tell us soon in *Gonzales v. Oregon*, a case that will not only influence the course of the euthanasia and assisted-suicide debate, but will also profoundly impact the delicate balance of power between "states rights" and the overarching sovereignty of the federal government.

So far, court decisions have favored Oregon. Most recently, the Ninth Circuit Court of Appeals ruled that Oregon's right to regulate medical practice within its borders prevents the federal government from punishing state doctors who prescribe federally controlled substances to end their terminally ill patients' lives. Under this view, the federal government can punish doctors who prescribe lethal doses of controlled substances for use in assisted suicide in states where the act is illegal. But punishing Oregon doctors would violate the principle of federalism because assisted suicide has been explicitly made a proper medical practice under Oregon law.

I have argued previously in NRO that it is actually the other way around—that Oregon is violating the principle of federalism by seeking to prevent the federal government from pursuing its own legitimate public policy. Now, this view has been substantially supported in the just-announced *Gonzales v. Raich*, in which the Supreme Court ruled 6-3 that the federal government is entitled to enforce the CSA's proscription of the use of marijuana—even though California permits the drug to be possessed legally for medicinal purposes; even though the marijuana in question was clearly being used by California residents for such medicinal purposes; and even though the marijuana was unquestionably home-grown and exclusively used for in-home consumption.

Most of the issues dealt with in *Raich* involved arcane interpretations of the interstate commerce clause, a matter now unlikely to be crucial in deciding *Gonzales v. Oregon*. But the majority opinion, written (surprisingly) by Justice John Paul Stevens, also invoked the Constitution's Supremacy Clause as "unambiguously" providing "that if there is any conflict between federal and state law, federal law shall prevail."

As applied in *Raich*, this means that the federal government is entitled to enforce federal law against medical marijuana users even in the face of contrary state laws, a ruling clearly applicable to the assisted-suicide controversy. And if the Court found this to be true for medical marijuana—which, after all, involves mere symptom relief—it hardly seems likely that it would reach a drastically different conclusion regarding the prescription of more potent controlled substances with the intent to kill.

True, marijuana has been determined by Congress to have no legitimate uses, while
the controlled substances used in assisted suicide do have proper medical uses, such as aiding sleep or controlling pain. But this should be a factual distinction without a legal difference in deciding the assisted-suicide case since Congress expressly delegated the task of determining what medical uses and under what circumstances controlled substances could be put to the attorney general. Indeed, the Oregon case began when the state sued to prevent former attorney general John Ashcroft from enforcing his decision to preclude the use of federally controlled substances in assisted suicide.

What about the oft-made argument that the states are the test tubes of democracy, and therefore Oregon's decision to legalize assisted suicide should be allowed to proceed unfettered by a contrary federal public policy? Justice O'Connor accepted this argument with great enthusiasm in the final section of her dissent, opining that while she would not have personally supported legalizing medical marijuana, the majority ruling stifled "an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently" than the federal policy.

If the Court accepts this view, Oregon will prevail. But this is unlikely. Justice O'Connor was the lone voice arguing the test-tube-of-democracy theory. Indeed, her two fellow Raich dissenters, William Rehnquist and Clarence Thomas, specifically did not join in this section of her opinion. (Thomas, in an individual dissent, did allude to states deciding for themselves "how to safeguard the health and welfare of their citizens." But by not signing on to O'Connor's more broadly stated views, he seems to have limited his dissent in this regard to the unusual factual context of the Raich case, which involved the growing of a mere six marijuana plants.)

Gonzales v. Raich, alongside the earlier unanimous Ashcroft v. Oakland Cannabis Buyer's Cooperative, points clearly in the direction (barring a technical defect in the federal government's approach) to the Supreme Court's strongly affirming a federal right to proscribe the use of federally controlled substances in assisted suicide unfettered by state laws to the contrary. That would be a proper federalist result. If so, come this time next year, assisted suicide will remain fully legal in Oregon—just as medical marijuana remains legal in California—but doctors there will have to find other ways to hasten the deaths of patients than prescribing controlled substances. Such an outstanding outcome would not only protect the vulnerable, but also send a clarion societal message that killing is not a legitimate medical act.
Alone among the American states, Oregon has legalized physician-assisted suicide. This step was thoroughly debated and solemnly taken by the voters of Oregon not once but twice. In 1994, a narrow majority approved the policy in a formal referendum, and a much larger majority rejected a repeal initiative three years later.

But now, in a ruling issued last November 9, Attorney General John Ashcroft has reversed a decision of his predecessor, Janet Reno, and decided that Oregon doctors may no longer use federally regulated drugs to assist their patients in committing suicide. This decision raises important and troubling questions. Although I support the goal of discouraging physician-assisted suicide, I also believe that Ashcroft is pursuing that goal in a way that may undermine a fundamental constitutional principle.

To see why the Attorney General’s approach to the problem is questionable, we need to begin with a closer look at the problem itself. In my view, the people of Oregon made a serious mistake in legalizing assisted suicide. Much of the current enthusiasm for this practice is driven by a perfectly understandable yearning for patient autonomy and by an equally understandable reluctance to let the frequently arrogant medical profession force us to endure degrading, technologically extended deaths. Unfortunately, the legalization of assisted suicide is also a big step down a road that will finally reduce patient autonomy rather than enhance it.

We need not go down this road. The fear that obsessive doctors will inflict a demeaning death by means of high-tech “heroic measures” is entirely legitimate, but no patient need consent to unwanted medical treatments, and directives given in advance can guard against their use on those who are unconscious. And if doctors are too often ignoring “do not resuscitate” orders, as they may be, the answer is hardly to give them a new power that can easily be used to substitute their judgment for their patients’ as to whether a life is worth living. Yet this is exactly the power that the people of Oregon have decided to give their physicians.

Three principal benefits arise from leaving the states to deal with local concerns. First, a multiplicity of jurisdictions creates choices that enable citizens to achieve the mix of policies that most closely satisfies their individual wants and needs. Second, and closely related, federalism promotes competition among jurisdictions: state governments that commit serious errors in satisfying their residents’ preferences incur the costs of emigration (and immigration forgone) by the taxpayers who make government possible. Finally, the allocation of political power to the state level inhibits the ability of national government to shift costs and benefits from one place to another, and thus to create incentives for pork-barrel policies whose costs exceed their benefits.

People can and do have different preferences
about this issue, which are presumably based on their differing assessments of the risks and benefits to themselves and those they care about. Convinced though I am that the risks of allowing physician-assisted suicide outweigh the benefits, it would be silly to pretend that no benefits exist, and presumptuous to suppose that I might not be wrong. Nor is it easy to see why Oregon and other state governments should be considered less capable than the federal government of settling on appropriate policies in the light of new experience and information, including new developments in medicine and the medical profession.

When the Supreme Court wisely declined to create a constitutional right to assisted suicide, Justice Sandra Day O'Connor pointed out that in this area there was no obvious need for judicial intrusion:

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the state's interests in protecting those who might seek to end life mistakenly or under pressure.

For the very same reason, there is no obvious need for the federal government to interfere with Oregon's experiment.

That is hardly to say there will be no bad effects from Oregon's new policy. To the contrary, vulnerable people will likely be pressured to end their lives prematurely; others will become more distrustful of doctors, and perhaps less willing to submit to treatment. Some physicians will take another big step away from their proper role as healers and comforters, and will become increasingly corrupted by the very different role of deciding whose lives are worth living. Euthanasia of nonconsenting victims is also entirely possible.

As bad as these effects may be, however, they will be visited almost entirely on Oregonians, and will not threaten the citizens of other states. Nor will Oregon's policy necessarily spread to other states. Every state in the union remains free to outlaw physician-assisted suicide and to enforce its laws as vigorously as it sees fit.

***
Bernard Katz is supervising the bankruptcy of Wallace's Bookstores, which operated a chain on college campuses. The chain claims to be owed money by the state colleges involved in this suit. The colleges raised the defense of state sovereign immunity. The United States District Court for the Eastern District of Kentucky was affirmed by the Sixth Circuit in following Hood v. Tennessee Student Assistance Corporation, 319 F.3d 755 (6th Cir. 2003), which held that the Bankruptcy Clause of the United States Constitution gives Congress the authority to abrogate state sovereign immunity.

Note: Hood v. Tennessee Student Assistance Corporation contains the reasoning relevant to this case. An excerpt follows on pages 255 - 264.

Question Presented: May Congress use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity?

Bernard KATZ, Appellee,  
v.  
CENTRAL VIRGINIA COMMUNITY COLLEGE, Appellants

United States Court of Appeals  
for the Sixth Circuit

Decided August 4, 2004  
[Unpublished]

OPINION:

PER CURIAM. Appellants, four state-supported institutions of higher education in Virginia, brought this suit for the purpose of challenging this court's decision in Hood v. Tennessee Student Assistance Corporation, 319 F.3d 755 (6th Cir. 2003) (holding that the Article I Bankruptcy Clause grants Congress the authority to abrogate states' sovereign immunity), aff'd on other grounds, 539 U.S. 986, 124 S. Ct. 45, 156 L. Ed. 2d 703 (2004). The district court, finding that appellants raised the very arguments that this court rejected in Hood, affirmed the orders of the bankruptcy court. Because we are bound to follow a decision of a prior panel, see Moltan Co. v. Eagle-Picher Indus., Inc., 55 F.3d 1171, 1176 (6th Cir. 1995) ("We cannot overturn the prior published decision of another panel and are therefore bound by these previous decisions.") and because the parties agree that Hood applies here, we affirm the judgment of the district court.
Pamela L. HOOD, Appellee,

v.

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Appellant

United States Court of Appeals for the Sixth Circuit

Decided February 3, 2003

319 F.3d 755

[Excerpt: Some citations and footnotes omitted]

OPINION: KAREN NELSON MOORE, Circuit Judge.

The Tennessee Student Assistance Corporation ("TSAC") appeals from the Bankruptcy Appellate Panel's decision denying TSAC's motion to dismiss for lack of jurisdiction. After receiving a discharge in her Chapter 7 bankruptcy proceedings, plaintiff Pamela Hood filed for a hardship discharge of her student loans and named TSAC in the complaint. The bankruptcy court denied TSAC's motion to dismiss, holding that Congress acted pursuant to a valid grant of constitutional authority when it abrogated the states' sovereign immunity in 11 U.S.C. § 106(a). A unanimous Bankruptcy Appellate Panel affirmed that decision. TSAC now appeals, arguing that the Constitution's Bankruptcy Clause, Art. I, sec. 8, does not give Congress the power to abrogate states' sovereign immunity in 11 U.S.C. § 106(a). Applying the analysis that the Supreme Court set forth in Seminole Tribe, we conclude that Article I, section 8 of the Constitution gives Congress the power to abrogate states' sovereign immunity. Accordingly, we AFFIRM and REMAND.

I. BACKGROUND

On June 4, 1999, Pamela Hood received a discharge on her no-asset Chapter 7 bankruptcy petition. Because 11 U.S.C. § 523(a)(8) prohibits discharge of student debts held by governmental bodies except upon showing of "an undue hardship," on September 14 of that year Hood filed an adversary proceeding for a hardship discharge of her student loans. TSAC, whom Hood had named as a defendant, moved to dismiss the complaint on the grounds of sovereign immunity. The Bankruptcy Court for the Western District of Tennessee denied the motion to dismiss, holding that Congress acted pursuant to a valid grant of constitutional authority when it abrogated the states' sovereign immunity in 11 U.S.C. § 106(a).

A unanimous Bankruptcy Appellate Panel affirmed and ruled that "as a part of the plan of the Constitutional Convention, the States ceded to Congress their sovereignty over bankruptcy discharge matters." Hood v. Tennessee Student Assistance Corp. (In re Hood), 262 B.R. 412, 413 (B.A.P. 6th Cir. 2001). Although the panel acknowledged that Seminole Tribe of Florida v. Florida, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), could be interpreted as precluding Congress from ever abrogating states' sovereign immunity under any of its Article I powers, the panel interpreted The Federalist No. 81 and No. 32 to distinguish bankruptcy, along with naturalization, from the rest of the Article I powers. See Hood, 262 B.R. at 417-419. The panel noted that,
with respect to bankruptcy and naturalization, the Constitution granted Congress the power to establish "uniform Laws," U.S. Const. Art. I, § 8, cl. 4 (emphasis added), not mere laws. Hood, 262 B.R. at 417. According to the panel, The Federalist No. 32 shows that Congress's power to make uniform laws required states to surrender their own power to make such laws and thus an important degree of their sovereignty. Id. at 418-19. Because limits on sovereignty are by their very nature limits on sovereign immunity, the panel concluded that Congress's power to make laws on bankruptcy carries with it the power to abrogate states' sovereign immunity. Id. at 418-19. Having received the benefit of a special adversary proceeding that makes it more difficult for debtors to discharge their student loan debts, TSAC here seeks to exploit that benefit by asserting its sovereign immunity and preventing discharge altogether. In other words, TSAC asks if it can have its cake and eat it, too. We conclude that it cannot.

The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI. This bar to federal jurisdiction also extends to suits against a state by its own citizens. See Hans v. Louisiana, 134 U.S. 1, 10, 33 L. Ed. 842, 10 S. Ct. 504 (1890). Thus private suits against states may proceed only if the state waives its sovereign immunity or if Congress, acting pursuant to a valid constitutional authority, abrogates the state's sovereign immunity.

** B. Abrogation of Sovereign Immunity**

1. The Seminole Tribe Framework

began with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996). In *Seminole Tribe*, the Court ruled that the Indian Commerce Clause, which authorizes Congress to "regulate Commerce . . . with the Indian Tribes," U.S. Const., Art. I, § 8, cl. 3, does not grant Congress the power to abrogate state sovereign immunity. See *Seminole Tribe*, 517 U.S. at 47. The Court in *Seminole Tribe* first ruled that Congress had adequately expressed its intent to abrogate the states' immunity from suit. See id at 56. In the second part of its inquiry, however, the Court ruled that in attempting to abrogate state sovereign immunity, Congress had exceeded its constitutional power. Looking to *The Federalist* and other statements of the Framers, the Court determined that state sovereign immunity was an essential element of the Constitution's original structure. See id. at 69-71. Accordingly, the Court held that "the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73. The Court applied a similar two-step, historical analysis in *Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999), wherein it extended *Seminole Tribe* to limit Congress's powers with respect to suits in state court as well.

Five circuit courts have concluded that under *Seminole Tribe*, Congress may not validly abrogate state sovereign immunity relying on its Bankruptcy Clause powers. These circuits have relied primarily on *Seminole Tribe*'s broad language barring Congress from abrogating state sovereign immunity pursuant to its Article I powers. However, neither *Seminole Tribe* nor any of the Supreme Court's other recent sovereign immunity cases address Congress's Bankruptcy Clause powers as understood in the plan of the Convention. We engage in the *Seminole Tribe* analysis, and we conclude that the text of the Constitution and other evidence of the Framers' intent demonstrate that under the Bankruptcy Clause of Article I, section 8, Congress has the power to abrogate state sovereign immunity.

The *Seminole Tribe* inquiry must proceed in two parts. First, the Supreme Court requires that "to abrogate the States' Eleventh Amendment immunity from suit in federal court . . . Congress must make its intention 'unmistakably clear in the language of the statute.'" There is no question here that Congress has done so. *Section 106(a) of the Bankruptcy Code* states that, "notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . [section] 523." 11 U.S.C. § 106(a)(1). Subsection (a)(2) then sets forth the degree to which sovereign immunity is abrogated for actions involving § 523: "The court may hear and determine any issue arising with respect to the application of such sections to governmental units." 11 U.S.C. § 106(a)(2). This is "a clear legislative statement." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991).

Second, and more difficult, is the question whether Congress's attempt to abrogate state sovereign immunity was pursuant to sufficient authority. The statute at issue here was adopted pursuant to Congress's power under Article I, section 8 of the Constitution "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." If Congress cannot abrogate sovereign immunity under this provision, the statute is invalid and Hood's suit is barred. The Supreme Court has instructed that,
when determining whether Congress may abrogate state sovereign immunity, courts are to look at the original structure of the Constitution. See Alden, 527 U.S. at 713 ("Immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional amendments."). The Eleventh Amendment will neither undermine nor bolster any conclusion regarding the purposes of the Convention, because that amendment sought only to restore, not change, the structure established at the Convention that was apparently distorted by the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 1 L. Ed. 440, 2 Dall. 419 (1793). Alden, 527 U.S. at 722-23.

2. The Constitution's Text

Beginning with the Constitution's text, Article I gives Congress the power to make "uniform" laws over only two issues: bankruptcy and naturalization. Granting the federal government the power to make uniform laws is, at least to some extent, inconsistent with states retaining the power to make laws over that issue. The Supreme Court noted the importance of the uniformity provision early on:

    The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is, perhaps, incompatible with state legislation, on that part of the subject to which the acts of congress may extend.


It is worth discussing what the uniformity provision is not. The "uniformity" provision is not, as the Fifth Circuit suggests in In re Fernandez, "a requirement of geographic uniformity' and nothing more." In re Fernandez, 123 F.3d at 244 (quoting Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 172, 91 L. Ed. 162, 67 S. Ct. 237 (1946) (Frankfurter, J., concurring)). As an initial matter, this language from Justice Frankfurter's concurring opinion in Vanston was inconsistent with the majority opinion in that case. Justice Frankfurter reasoned in Vanston that the creditors' claim was invalid under state law, so there was nothing for the bankruptcy court to enforce; as long Congress treated all claims created under state law uniformly, regardless of the state, the uniformity requirement had been satisfied. See Vanston, 329 U.S. at 172-73 (Frankfurter, J., concurring). However, the majority in Vanston found no reason to inquire whether state law had created any valid claim, because the asserted claim was inconsistent with federal bankruptcy policies and thus could not be asserted—regardless of its status under state law. See Vanston, 329 U.S. at 163-64. On the majority's reasoning, federal courts must do more than treat state laws uniformly; federal courts must enforce federal bankruptcy law. If Vanston is any guide as to what uniformity requires, then uniformity requires much more than Justice Frankfurter's concurrence suggests.

Nor, as the following discussion demonstrates, does Article I, section 8 reflect a mere congressional policy favoring
uniformity across state borders. Unlike *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 119 S. Ct. 2199 (1999), in which the Supreme Court found that a legislative preference for uniformity could not override a constitutional prohibition on the abrogation of state sovereign immunity, this case involves the question whether a constitutional uniformity requirement itself authorizes Congress to abrogate state sovereign immunity.

3. The Framers' Understanding of the Bankruptcy Power

As it was initially understood, the Bankruptcy Clause represented the states' total grant of their power to legislate on bankruptcy. In order for laws to be uniform, the laws must be the same everywhere. That uniformity would be unattainable if states could pass their own laws. Alexander Hamilton stated that the federal government had "exclusive jurisdiction" where the Constitution granted Congress the power to make uniform laws. "This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could be no UNIFORM RULE." *The Federalist No. 32*, at 155 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). The earliest cases similarly interpreted the grant of power as exclusive, noting that laws could be uniform only if a single agent were issuing them. Associate Justice Bushrod Washington, sitting as Circuit Justice, reasoned this way in *Golden v. Prince*, 3 Wash. C. C. 313, 10 F. Cas. 542, F. Cas. No. 5509 (C.C.D. Pa. 1814), writing, "That the exercise of the power to pass bankrupt and naturalization laws by the state governments, is incompatible with the grant of a power to congress to pass uniform laws on the same subjects, is obvious, from the consideration that the former would be dissimilar and frequently contradictory; whereas the systems are directed to be uniform, which can only be rendered so by the exclusive power in one body to form them." *Id.* at 545.

The authority was understood to be exclusive because any lesser grant would have defeated the grant's original purpose. The bankruptcy system before 1789 was marked by chaos. Because each state had different laws, the discharge of a Pennsylvanian's debts might have no effect on his debts in Maryland, and the interests of out-of-state creditors could be subordinated to in-state creditors. This system was not only ineffective, in that it did not allow debtors the fresh start that bankruptcy policies seek, but also ripe for manipulation, in that it would give the Pennsylvania creditor an incentive to assign his interest in the debtor's estate to someone in Maryland, making the debtor no better off after bankruptcy than before. However, the justification for the grant of exclusivity was not a mere desire to have one system, but a system that rose above individual states' interests. As Joseph Story noted, there were fears that each state would frame a bankruptcy system that "best suits its own local interests, and pursuits" or that was marked "by undue domestic preferences and favours." 3 Joseph Story, *Commentaries on the Constitution* § § 1102, 1104 (1833), in *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987). Indeed, setting bankruptcy policies on the state level would enable states to favor in-state creditors over similarly-situated out-of-state creditors. By granting the power to Congress exclusively, the Constitution prevented runaway states from defeating bankruptcy's goals.

Although this understanding that the federal
power was exclusive eventually gave way to an acceptance that states could, in the absence of federal legislation, pass laws on bankruptcy; this development in no way undermines the understanding at the time of the Convention that the grant was exclusive. Congress did not pass its first bankruptcy act until 1800, repealed it in 1803, and was unable to enact further legislation until 1841. See David A. Skeel, Jr., Debt’s Dominion: A History of Bankruptcy Law in America 25 (2001). In the absence of a federal bankruptcy code, states were forced to rely on their own structures, and in 1819 the Supreme Court in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 4 L. Ed. 529 (1819), ruled that the Bankruptcy Clause prohibited states from acting only where Congress had already acted. Id. at 193-96. However, the Sturges non-exclusivity interpretation was based less on the original understanding of the Convention than on the necessity of having some system in place when Congress could not enact bankruptcy legislation.

4. The States’ Ceding of Sovereign Immunity

Of course, it is possible that in ceding some sovereignty with the Bankruptcy Clause, the states ceded their legislative powers but not their immunity from suit. As the amici states point out, early Supreme Court decisions that limited states’ powers to legislate did not receive the same hostile reception that the Court’s decision in Chisholm v. Georgia, 2 U.S. (Dall. 419) (1793), which undermined state sovereign immunity, received. This could suggest that the power to legislate and the immunity from suit were distinct aspects of sovereignty in the early Americans’ minds, and that the decision to cede one aspect to the federal government does not by itself imply a surrender of the other. The Federalist suggests that the states shed their immunity from suit along with their power to legislate together when the states agreed to the Bankruptcy Clause’s uniformity provision. Two passages are relevant. In The Federalist No. 81, Hamilton discussed sovereign immunity as follows.

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here.

The Federalist No. 81, at 422 (Alexander Hamilton). The article on taxation, to which Hamilton refers as identifying the circumstances in which states can be said to “alienate” their sovereignty, is The Federalist No. 32.

As the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before
had, and which were not, by that act, **exclusively delegated** to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally **contradictory** and **repugnant**.


The question is whether Hamilton's identification of the uniform powers as examples of categories in which states have ceded sovereignty includes the ceding of immunity from suit. We conclude that *No. 32* does in fact refer to the ceding of sovereign immunity. Hamilton's cross-reference to this discussion in *No. 81*'s discussion of ceding sovereign immunity can only suggest that, in the minds of the Framers, ceding sovereignty by the methods described in *No. 32* implies ceding sovereign immunity as discussed in *No. 81*. There is no other explanation for his cross-reference in *No. 81*. Thus *The Federalist No. 81* and *No. 32* suggest that the states ceded their immunity by granting Congress the power to make uniform laws.

5. The Ratification Debates

Contrary to the *amici* states' suggestion, this interpretation is consistent with the ratification debates. First, although *amici* are correct that those debating the proposed Constitution's merits objected to certain suits against the states, *amici* point to no such objection specifically targeted against enforcing federal bankruptcy laws against the states. Rather, the bulk of the speakers objected to Article III, section 2, which allows suits between a state and citizens of another state. See, *e.g.*, *3 Elliot's Debates* 533 (Jonathan Elliot ed., 2d ed. 1836) (statement of James Madison); *id.* at 543 (statement of Patrick Henry); *id.* at 555-56 (statement of John Marshall); *see also id.* at 527 (statement of George Mason) (objecting to federal jurisdiction over suits between state and foreign state, citizens, or subjects). Although the debaters' relative silence over sovereign immunity and the bankruptcy provision does not necessarily indicate their acquiescence, it does undermine the notion that those ratifying the constitution objected to federal jurisdiction over the states in such cases.

The *amici* states also cite the New York and Rhode Island conventions as conditioning ratification on an understanding that private persons could not sue the states. Like the ratification debates, the ratification resolutions are ambiguous on this front. . . .

Those engaging in the state ratification debates were meticulous in raising their objections clause-by-clause, *see, e.g.*, *3 Elliot's Debates* 543 (statement of Patrick Henry) ("No objection is made to [federal courts'] cognizance of disputes between citizens of the same state."). but none of the debaters objected to subjecting the states to federal suits in bankruptcy. This lack of recorded opposition puts suits in bankruptcy against the states in the same category with other constitutionally-approved limits on sovereign immunity, such as the provisions subjecting states to suit by the federal
government, for example, or to suits between the states. See, e.g., United States v. Texas, 143 U.S. 621, 639-40. 36 L. Ed. 285, 12 S. Ct. 488 (1892); 3 Elliot's Debates 549 (statement of Edmund Pendleton).[.] So although the lack of expressed opposition could reflect a gap in an otherwise careful debate, it could also reflect the ratifiers' acceptance that because a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors, the Bankruptcy Clause must grant Congress the power to abrogate the states' sovereign immunity.

III. CONCLUSION

Much of the evidence regarding the plan of the Convention is ambiguous. However, the Supreme Court has made clear that the best evidence of the Framers' intentions on state sovereignty comes from the text of the Constitution and The Federalist. See, e.g., Printz v. United States, 521 U.S. 898, 918-21, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). Indeed, Seminole Tribe itself relies heavily on The Federalist No. 81. See Seminole Tribe, 517 U.S. at 54, 69, 70 n.13. Here, the Constitution's text and Hamilton's reference in The Federalist No. 32 suggest that, with the Bankruptcy Clause, the states granted Congress the power to abrogate state sovereign immunity. The states' immunity was thus "altered by the plan of the Convention." Alden, 527 U.S. at 713. Congress clearly exercised that power in 11 U.S.C. § 106(a). Accordingly, TSAC is not immune from suit under 11 U.S.C. § 523(a)(8).

This conclusion in no way undermines the dignity of the state as a separate sovereign. This is not an instance in which Congress has enabled private parties to "haul" states into court against their will, see Federal Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 122 S. Ct. 1864, 1874 n.11, 152 L. Ed. 2d 962 (2002), but an instance in which Congress has granted states precisely the protection that they sought. Unlike a traditional lawsuit, in which a state is forced to defend itself against an accusation of wrongdoing, the bankruptcy process "is, shortly speaking, an adjudication of interests claimed in a res." Gardner, 329 U.S. at 574. If the state wishes to assert its interest in the res, it may do so. If it prefers not to, it may decline, and the debtor will still need to convince the bankruptcy court that repayment will constitute an "undue hardship." See 11 U.S.C. § 523(a).

At the Constitutional Convention, the states granted Congress the power to abrogate their sovereign immunity under Article I, section 8. In 11 U.S.C. § 106(a), Congress used that power to grant states a benefit they had sought. We AFFIRM the denial of TSAC's motion to dismiss and REMAND to the bankruptcy court for further proceedings.

CONCUR:

KENNEDY, Circuit Judge, concurring.

Because I conclude that TSAC has waived its sovereign immunity by filing a claim, I concur with the majority of the panel that the bankruptcy court has jurisdiction to hear this adversary proceeding. I cannot join the panel's opinion and I thus concur in the judgment only.

It is well-established that when a state files a proof of claim in a bankruptcy adjudication, "it waives any immunity it otherwise might have had respecting the adjudication of the claim." Gardner v. New Jersey, 329 U.S. 565, 91 L. Ed. 504, 67 S. Ct. 467 (1947).
On November 15, 1999, an authorized agent of Sallie Mae Servicing Corporation, the original holder of Hood's student loan debt, signed an assignment of proof of claim form transferring the debt to TSAC. The actual proof of claim was filed by Sallie Mae in the bankruptcy court on November 29, 1999. The assignment of that proof of claim form was filed one month later, on December 20, 1999. The assignment was effectuated with notice to TSAC and without objection from any party. Although there is no claims docket or claims register in the record, that is only because it is standard practice in that district not to have a claims docket or claims register in a no-asset Chapter 7 bankruptcy and it does not change the fact that a proof of claim was filed.

TSAC's first argument that it was Sallie Mae—not the state—who filed the proof of claim, and Sallie Mae does not have the authority to waive Tennessee's sovereign immunity. Although Sallie Mae filed the proof of claim, it was a proof of claim on a debt owned by TSAC. TSAC had voluntarily undertaken to guarantee Hood's student loans, and accepted assignment of the debt from Sallie Mae. The assignment was made before the filing of the claim. Under these circumstances, I think it is clear that TSAC voluntarily invoked the federal bankruptcy court's jurisdiction and waived its sovereign immunity.

TSAC's second argument (in the alternative) is that filing a proof of claim only constitutes waiver of its immunity from jurisdiction over the normal bankruptcy adjudication, but not for an "undue hardship" proceeding under 11 U.S.C. § 523(a)(8). Although the Supreme Court's decision in Gardner v. New Jersey clearly holds that filing a proof of claim waives a state creditor's sovereign immunity with respect to normal discharge proceedings, TSAC argues that the adversarial proceeding required by federal bankruptcy regulations is separate and distinct from the normal bankruptcy discharge proceeding.

I disagree. The determination of "undue hardship" is inextricably interrelated with the normal discharge proceeding such that the waiver of sovereign immunity in one extends to the other. As the Eighth Circuit noted in In re Rose, "the text of the bankruptcy code makes clear that these procedures are both part of a larger whole; the same section that exempts educational debt from a general discharge establishes the ground of undue hardship as the exception to the exemption." 187 F.3d at 930. The structure of the statutory provision reveals that "undue hardship" is a defense—indeed, the only defense—to the state's general privilege of exempting student loans from normal bankruptcy discharge proceedings.

Moreover, in filing a proof of claim, TSAC attempted to take advantage of the federal bankruptcy court's power to exempt student loans from general discharge proceedings. Further, if there had been assets in the estate, TSAC could have shared in those assets. Having attempted to benefit from the powers of the federal bankruptcy court, it must, therefore, accept the court's power to decide whether the hardship exception protects Hood from the general student loan exemption. See New York v. Irving Trust Co., 288 U.S. 329, 332, 77 L. Ed. 815, 53 S. Ct. 389 (1933) ("If a state desires to participate in the assets of a bankrupt, she must submit to the appropriate requirements by the controlling power.").

Although I agree with the majority that we should not normally reach issues not raised before the bankruptcy court, we have recognized certain exceptions to that rule. In Pinney Dock and Transport Co. v. Penn
Central Corp., 838 F.2d 1445, 1461 (6th Cir. 1988), we held that we may reach an issue if it "is presented with sufficient clarity and completeness" for the court to resolve the issue. The Supreme Court has held that the decision to deviate from the general rule is a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976). Moreover, the Supreme Court has long recognized that we should not decide constitutional questions when their resolution is unnecessary to the outcome of the case. While the issue of waiver was not raised in the bankruptcy court, the facts with respect to the filing of the claim are not in dispute, and the documents relied upon to establish those facts are from the bankruptcy court's records. In this case, the waiver question is presented with sufficient clarity and completeness to resolve the issues before this court without having to reach the complex constitutional questions raised by the parties.
The Supreme Court added a significant new federalism case to its docket for the new term on Tuesday, accepting an appeal filed by the State of Tennessee on whether states are immune from suit under federal bankruptcy law.

States are often brought into federal court in bankruptcy proceedings, not because they themselves are bankrupt but because they are creditors. Most of the 1.5 million people who file for bankruptcy every year owe debts to an agency of state government and seek relief from the obligation to repay those debts, so the case has a highly practical dimension as well as implications for the Supreme Court's continuing reexamination of the balance of power between the federal government and the states.

The underlying dispute in the new case, an effort by a woman who filed for bankruptcy to be freed of the obligation to repay her student loans, is fairly typical of the ways that states find themselves embroiled in bankruptcy proceedings. Under federal law, student loans that are guaranteed by governmental agencies, as many are, are not treated as ordinary debts that can be wiped away in bankruptcy proceedings. Instead, the law requires proof that repaying the loan would produce "an undue hardship."

After receiving relief from her other debts in a bankruptcy filing in 1999, Pamela L. Hood went back to federal bankruptcy court to establish her entitlement to a "hardship discharge" of the $4,169.13 she owed to the Tennessee Student Assistance Corporation, a state agency that had guaranteed her loan. To accomplish that, she had to name the state agency as a defendant in a federal lawsuit. But Tennessee refused to take part in the proceeding, arguing that it was protected by sovereign immunity from the jurisdiction of the bankruptcy court.

Both the bankruptcy court and the United States Court of Appeals for the Sixth Circuit, which sits in Cincinnati, rejected the state's position, in contrast to several other federal appeals courts that have interpreted the Supreme Court's recent rulings on state immunity as extending to bankruptcy proceedings as well.

In its current form, this debate began in 1996, when the Supreme Court ruled in Seminole Tribe v. Florida that Congress lacked the constitutional power to authorize suits by Indian tribes against the states. The majority's theory in that 5-to-4 decision was that the 11th Amendment, which deprives the federal courts of jurisdiction to hear certain suits against states, trumped Article I of the Constitution, which enumerates specific Congressional powers, like the power to regulate interstate commerce.

In a dissenting opinion in the Seminole Tribe case, Justice John Paul Stevens warned that the majority's theory would disable Congress from enforcing federal bankruptcy, copyright and antitrust laws against the states. Chief Justice William H. Rehnquist, the majority opinion's author, took issue with that warning, responding in a footnote that Justice Stevens's "conclusion is exaggerated both in its substance and in its significance." Since then, the bankruptcy
question has produced considerable debate, and it appeared unlikely that the court would be able to avoid confronting it directly.

In this case, Tennessee Student Assistance Corporation v. Hood, No. 02-1606, a group of leading bankruptcy scholars who oppose Tennessee's position nonetheless filed a brief urging the justices to hear the state's appeal in order to resolve the issue. "Assertion of state sovereign immunity is now commonplace in bankruptcy cases and has an enormous impact on the bankruptcy system, debtors, and creditors," the scholars' brief said.

A brief filed on Tennessee's behalf by 48 of the other 49 states—all but New Jersey—said that what was at issue was "a state's ability to control its fisc." There was nothing special about bankruptcy, the states said, that would deprive states of the immunity they enjoyed from laws enacted under the other Congressional powers conveyed by Article I of the Constitution.

In rejecting Tennessee's immunity claim, however, the Sixth Circuit concluded that bankruptcy was in fact special in important respects. The court said that the Constitution's framers thought it was essential to have uniform bankruptcy rules apply on a national level so that states would not set up their own systems to favor in-state creditors. The states understood this, the court said, and knowingly gave up an aspect of their sovereignty when they agreed to ratify a Constitution that gave Congress the power to establish "uniform laws on the subject of bankruptcies throughout the United States."
Apr. 6—The U.S. Supreme Court agreed Monday to hear a case involving Central Virginia Community College and three other state colleges that could ultimately decide whether states are immune from bankruptcy proceedings.

The case, *Central Virginia Community College v. Katz*, stems from the 2001 bankruptcy of Lexington, Ky.-based Wallace's Bookstores Inc., which was founded by former Kentucky Gov. Wallace Wilkinson and operated stores at the schools.

In 2003, Bernard Katz, the liquidating supervisor in charge of paying off the company's creditors, sued the colleges, seeking more than $400,000 he claimed they owed Wallace's plus interest and fees, according to documents filed in Kentucky bankruptcy court.

The colleges asked the bankruptcy court to dismiss the case, saying the U.S. Constitution's 11th Amendment renders states—and state-run colleges—immune from bankruptcy proceedings.

Higher courts rejected the colleges' request, citing a 1994 provision in bankruptcy law passed by the U.S. Congress that they said lifted the states' immunities.

"It's an issue that's enormously important to the states," said William Thro, Virginia's solicitor general, who represents the schools in the case. "What we're talking about here is basically them wanting to get money from the state treasury."

Wallace's Bookstores operated a location at Central Virginia Community College from 1998 until the book company filed for bankruptcy in 2001. It has since been replaced by Barnes & Noble.

Wilkinson filed for personal bankruptcy in 2001 as well. His debts totaled $418.4 million while his company's debts totaled $152.3 million, according to *The Lexington Herald-Leader*.

Wilkinson told creditors in 2001 that before Wallace's filed for bankruptcy protection, the chain was worth as much as $450 million and operated 90 locations in about 25 states, according to *The Cincinnati Enquirer*.

The three Virginia colleges involved in the Supreme Court case besides CVCC are Virginia Military Institute, New River Community College and Blue Ridge Community College.

When Katz sued the four colleges in 2003, the suit claimed the schools owed Wallace's money for unsold books and from "preferential transfers."

Preferential transfers occur when a company pays off some creditors but not others shortly before it declares bankruptcy.

In this case, Wallace's Bookstores paid off some of its debts to the colleges but didn't pay debts to some other creditors, said
Anthony Sammons, an attorney with the law firm Dinsmore and Shohl, LLP, which represents Katz.

Because of bankruptcy laws regarding preferential transfers, that money should have been distributed among all of the book chain's creditors instead, Sammons said.

Therefore, Katz sued the schools, seeking to reclaim the "preferential transfer" money paid to the colleges as well as money owed to the company from unsold goods.

"That would be $400,000 that could be better spent on roads, or health care, or education or at these various colleges to help these individual students," Thro, the state solicitor general, said.

The bankruptcy court and later the U.S. Court of Appeals for the 6th Circuit, which covers cases in Kentucky where Katz filed suit, rejected the colleges' argument that states are immune from bankruptcy proceedings.

The country's 49 other states have collectively filed a "friend of the court" brief with the Supreme Court supporting Virginia's appeal to the Supreme Court.

Now, the essential issue the Supreme Court must decide is whether states are, in fact, immune from bankruptcy proceedings and whether Congress acted within its authority when it amended the bankruptcy code.

The court will begin hearing arguments in October.
The U.S. Supreme Court has agreed to take up the issue of whether state governments are immune from federal bankruptcy proceedings.

The court will hear arguments in the fall over whether liquidating Wallace's Bookstores Inc. has the right to sue four state-run Virginia colleges.

The four universities petitioned the court to block Wallace's Bookstores from suing them for more than $400,000 as part of its Chapter 7 liquidation.

Wallace's sued the four schools in an effort to collect preference payments, said the liquidating trustee in the case, Bernard Katz of J.H. Cohn LLP in Edison, N.J.

The payments were made to the four colleges because they were the landlords for Wallace's stores on their campuses. The payments were made within 90 days of the company's bankruptcy filing, making them preference payments.

But Katz feels the matter could have wider repercussions. "This case could well extend beyond preference transfers to the issue of what rights states have to protect themselves from actions in federal bankruptcies," he said.

The court agreed to hear Central Virginia Community College v. Katz to resolve a conflict in the federal circuit appellate courts over the issue of sovereign immunity of the states in bankruptcy proceedings, said Jeffrey Morris, the resident scholar at the American Bankruptcy Institute.

The U.S. Court of Appeals for the 6th Circuit last month upheld Wallace's right to sue the state-run schools in an attempt to collect the preference payments, he said.

"It's a constitutional issue of whether the states waived their sovereign immunity when they ceded to Congress the authority to make uniform federal laws on bankruptcy," Morris said. "This could have a major impact because the question becomes whether states are permitted to operate outside the realm of standard debtor-creditor relationships."

A ruling upholding Wallace's ability to sue could have a huge impact on recoveries of preference transfers that extend to state-related claims such as workers' compensation, said debtor counsel, Kim Martin Lewis of Dinsmore & Shohl LLP in Cincinnati. "It could have a great impact, particularly on large Chapter 11 and even Chapter 7 cases, if the states are held to be immune from preference lawsuits."

The Kentucky bankruptcy court supported Wallace's right to sue, as did the U.S. District Court for the Eastern District of Kentucky and the 6th Circuit Appeals Court, which both rejected the colleges' appeal on the grounds of sovereign immunity. The colleges are arguing that the 11th amendment to the U.S. Constitution grants them immunity from bankruptcy proceedings.

The Wallace's estate, meanwhile, argues that Section 106 of the U.S. Bankruptcy Code gives debtors the right to sue states as part of their petitions.
The Supreme Court had agreed to hear a similar case in its last session in an attempt to resolve the conflict of states' rights vis-à-vis the federal bankruptcy code.

The court bypassed the issue, however, when it ruled 7-2 that Pamela Hood's attempt to discharge her student loan with the Tennessee Student Assistance Corp. was not a lawsuit, as TSAC argued, and thus didn't involve the 11th amendment.

The colleges, Central Virginia Community College, Virginia Military Institute, New River Community College and Blue Ridge Community College, owe the Wallace's estate for payments they received, which were primarily for unsold books, Katz said.

The remaining 49 states have collectively filed friend-of-the-court briefs in support of Virginia's appeal.

The case is due to be heard when the court's next session begins in October.

Thomas Wilkinson launched Wallace's Bookstores with a single outlet at the University of Kentucky in Lexington in 1962. The business grew into a national network of 92 college bookstores by the time it filed for Chapter 11 protection on Feb. 28, 2001, with the U.S. Bankruptcy Court for the Eastern District of Kentucky in Lexington.

In the interim, Wilkinson served as Kentucky's governor and was able to parlay his political clout to attract several high-spending investors.

Wendy's International Inc. founder R. David Thomas, for instance, filed a $54 million claim after Wilkinson's empire collapsed in an alleged Ponzi scheme.

Only one major claim has yet to be resolved in the wind-down of Wallace's 4-year-old liquidation, Katz said. That involves a $5 million claim filed by L. Rogers Wells, Wilkinson's finance secretary during his 1987 to 1991 tenure as governor, Katz said.
In a 7-2 decision, the court held that because discharge of student loan liability does not implicate the state's 11th Amendment immunity, the justices need not address the certiorari question of whether Congress has the authority to abrogate sovereign immunity through the U.S. Bankruptcy Code. *Tenn. Student Assistance Corp. v. Hood*, No. 02-1606.

After getting a Chapter 7 discharge, Pamela Hood petitioned the bankruptcy court to reopen her case so that she could add the Tennessee state agency servicing her student loans as a creditor, and commence a discharge-for-undue-hardship proceeding against it. The bankruptcy court denied the agency's motion to dismiss. The 6th Circuit ruled that the U.S. Constitution's bankruptcy clause gave Congress the right to abrogate the states' sovereign immunity.

The justices said that because the bankruptcy court's authority is derived from the debtor, an exercise of the court's in rem jurisdiction to discharge a student loan is not a suit against the state for 11th Amendment purposes. Rehnquist's opinion was joined by Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer. Thomas, joined by Scalia, dissented.
Tony GOODMAN, Plaintiff-Appellant
v.
O.T. RAY, ET AL., Defendants

United States v. Georgia

(04-1203)


Tony Goodman, a state prisoner in Georgia, brought suit against the state and various prison officials for violations of his rights under the Eighth Amendment and Title II of the Americans with Disabilities Act (ADA). Goodman is a paraplegic and is bound to a wheelchair. He claims that the prison is inadequately designed for such a disability, resulting in numerous health and safety problems, stemming largely from his inability to use a toilet or shower without the assistance he claims is often withheld. The District Court granted defendants’ joint motion for summary judgment, finding that claims for damages were prohibited by the Eleventh Amendment. The Court of Appeals for the Eleventh Circuit affirmed. The United States intervened in the case in order to support Goodman’s right to sue under the ADA. As a result, there were two separate petitions for certiorari, one from Goodman (Goodman v. Georgia) and one from the United States (U.S. v Georgia). The cases have been consolidated by the Supreme Court.

Questions Presented:


U.S. v. Georgia: Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to the administration of prison systems.

NOTE: Much of the analysis that will be at issue before the Supreme Court in U.S. v. Georgia was incorporated into Goodman v. Ray by reference to Miller v. King, 384 F.3d 1248 (2004), a similar case decided by the Eleventh Circuit a few days before Goodman. The relevant portions of Miller are excerpted following Goodman v. Ray (pages 279 - 282).
HULL, Circuit Judge:

Plaintiff Tony Goodman, a paraplegic state prisoner, appeals (1) the dismissal of his Eighth-Amendment claims brought under 42 U.S.C. § 1983, and (2) the grant of summary judgment on his disability-discrimination claims brought under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, et seq. ("ADA").

After review and oral argument, we: (1) reverse, in part, the district court's dismissal of Goodman's Eighth-Amendment claims for monetary and injunctive relief under § 1983; (2) reverse the magistrate judge's grant of summary judgment for the defendants on Goodman's ADA claims for injunctive relief; and (3) affirm the grant of summary judgment for all defendants with regard to Goodman's ADA claims for monetary damages under Title II of the ADA. We further order that Goodman be allowed an opportunity to amend and streamline his complaint as to his Eighth-Amendment claims and his ADA claims under Title II for injunctive relief.

I. FACTUAL BACKGROUND

According to the medical evidence in the record, Goodman was involved in an automobile accident in 1992, which left him unable to walk. Goodman is a wheelchair-dependent paraplegic, whose injuries include multiple spinal fractures.

In 1995, Goodman was convicted of aggravated assault, possession of a firearm by a convicted felon, and possession of cocaine with intent to distribute. On June 18, 1996, Goodman was transferred to Georgia State Prison ("GSP"), in Reidsville, Georgia. Goodman's complaint concerns his stay at GSP.

A. Complaint

After filing numerous administrative grievances with prison officials regarding the conditions of confinement at GSP, Goodman filed this federal suit claiming, inter alia, violations of the Eighth Amendment and Title II of the ADA. Goodman's pro se complaint names the following defendants: (1) the Georgia Department of Corrections ("GDOC"); (2) the State of Georgia, [and numerous employees of the prison system, including O.T. Ray, supervisor of guard shifts at GSP] . . . Goodman's complaint alleges, inter alia, that the defendants, in their individual and official capacities, were deliberately indifferent to his (1) serious medical needs and (2) conditions of confinement at GSP, in violation of the Eighth Amendment. Goodman sought monetary damages.

Goodman further claims that the defendants discriminated against him on the basis of his disability in violation of Title II of the ADA. Goodman sought both injunctive relief and monetary damages on his ADA claims.

Because we are reviewing the dismissal of Goodman's Eighth-Amendment claims, we outline the factual allegations in his
complaint, assuming all allegations to be true. Cottone v. Jenne, 326 F.3d 1352, 1357 (11th Cir. 2003) (“In reviewing a complaint, we accept all well-pleaded factual allegations as true and construe the facts in the light most favorable to the plaintiff.”).

B. Conditions at GSP

Goodman is housed in a high/maximum security section of GSP, the K-Building. Prison officials claim that Goodman “was assigned to . . . the Special Management Unit [K-Building] both because of his continuous disruptive conduct and the special requirements associated with his being wheelchair bound.”

Goodman is kept in his “K-1 unit” cell, measuring twelve-feet long by three-feet wide, for twenty-three to twenty-four hours per day. While Goodman has had some disciplinary problems in the past, Goodman’s allegations about the size of his cell appear to be unrelated to disciplinary issues. Instead, this is apparently the size of his cell whether or not he is in disciplinary isolation. According to Goodman, GSP does not provide reasonable accommodations for his paraplegia. Specifically, Goodman claims that the prison “lacks facilities for the disabled for hygiene, drinking and performing body excretion functions” and that GSP “is in a serious state of disrepair and fail[s] to meet minimal health and safety needs of the Plaintiff.”

Beyond the inadequate prison conditions, Goodman claims that he has been denied access to “services, programs, and activities” at GSP by the defendants because of his disability. Specifically, Goodman states that the defendants have discriminated against him, based on his disability, because they have “refused and/or denied and/or excluded him from participation in MH/MR services, programs, and activities of the prison.”

Further, Goodman claims that he “could be more appropriately treated in [a] more integrated community setting,” and that his continued confinement in the “segregated environment” is “unlawful disability-based discrimination.” In this regard, Goodman also contends that the classification procedures for the prison are inadequate because “a substantial number of prisoner[s] . . . are placed in maximum custody, when lesser degrees of custody would suffice.” Goodman states that the classification procedures are inadequate because “there are insufficient staff members to give adequate time to each case, and staff members are inadequately trained.”

Goodman provides numerous examples of the manner in which the prison conditions at GSP are inadequate for the disabled. Specifically, Goodman claims that he is unable to turn his wheelchair around inside of his twelve-foot-by-three-foot cell, and, thus is virtually immobile. Goodman also alleges that he is unable to use his toilet, his bed, or the shower without assistance, and that the GSP prison officials or guards do not provide him with assistance. In fact, according to Goodman, he has been forced to sit in his own bodily waste for long periods of time because none of the guards was willing to assist him.

In his complaint, Goodman also states that he has suffered “long periods of deprivation of basic amenities,” such as “showers, baths, adequate ventilation or heating, recreation, work, medical and MH/MR care, laundry service, cleaning service, and phone service.” Furthermore, Goodman states that he does not have access to the windows of his cell, the wall electrical plugs of his cell,
and that GSP does not have wheelchair-accessible routes or rooms throughout the prison. Goodman also details the programs he has been denied access to, including: counseling services, educational services, college program, vocational training, recreation activities, freedom of movement in the unit and institution, television, phone calls, entertainment, and religious rights.

C. Specific Instances of Injury

According to Goodman, there have been instances in which he was injured trying to use the toilet or the shower because the toilets and the showers do not have supports for disabled prisoners, and the prison staff did not provide him the necessary assistance. For example, Goodman states that on August 26, 1998, he had to “hurl” himself from his wheelchair onto the toilet, and that the toilet seat was not stabilized or secure. When he tried to return to his wheelchair from the toilet, Goodman states that he “slipped and fell onto the floor causing an epileptic seizure, and . . . [he] broke his right toe and crushed his right knee.”

Goodman claims that, on May 12, 1999, he “had a [bowel movement] and urine, on himself,” and that he requested cleaning supplies from “S.M.U. Capt. Mr. Brown, Mr. Smith, and Mr. Hall,” and assistance in cleaning his wheelchair and cell, but all of them refused. He states that he was “forced to live in a cell where the floor was smeared with defecation and urine. . . . He was required to live and sit in his own body waste,” while being refused repeated requests for cleaning supplies and assistance.

Goodman claims that, on May 14, 1999, he “broke his left foot and crushed his left knee,” while trying to transfer himself to the toilet from his wheelchair. Goodman alleges that Captain Brown denied his requests for help cleaning his cell and for medical care.

Goodman also describes how he was harmed in the showering facility at GSP because it was without adequate support for prisoners with disabilities. On April 8, 1998, Goodman states that “C.O. II Whimbly took a toilet seat into the shower for the Plaintiff to sit on while showering, but the toilet seat is not accessible. Plaintiff was trying to transfer from his [wheelchair] to the toilet chair but the toilet seat turned over and he fell to the floor and was hurt at [the] head, neck, [and] left arm.” Goodman also claims that he was denied adequate medical care following this incident.

Goodman further claims that the prison officials have not taken appropriate measures to safely transport inmates with disabilities. Goodman describes one occasion in which he was transferred from GSP to the federal court building in Atlanta, Georgia, in a vehicle that was not equipped for wheelchair-bound passengers. Specifically, Goodman states that on May 5, 1998, he was “forced to ride handcuffed and shackled in the back of a van without seatbelts or restraints,” and that “the seat which he was seated in was not stabiled [sic] or secure.” As a result, Goodman states that he “fell to the floor and lost consciousness several times,” and that he “suffer[ed] injures [sic] and pains at head, neck, back, stomach and legs.” Goodman also states that upon his return, he made a request to Officer Hays, and R. Smith “to see someone from medical . . . but medical refused to see or examine [him].”

***

With regard to these allegations, Goodman
claims that GSP officials—Warden Sikes, Deputy Warden Brady, Supervisor Ray, Dr. Lowry, Dr. Mailloux, Barbara Werth, L. Waters, J. Bradford, J. Paris, and Lynn O. Smith—"had knowledge and notice that [Goodman] was not secured, safe or stabilized in this cell," and that "despite this knowledge of his precarious and perilous placement within the prison cell the above named agents proceeded to house him in a prison cell which was in total disregard of his health, safety and wellbeing."

D. Dismissal of Goodman § 1983 Claims

* * *

With respect to Goodman’s ADA claims, the magistrate judge stated that his suit against GDOC is actually against both the State of Georgia and the GDOC. The magistrate judge pointed out that the ADA applies to services, programs, and activities of "a public entity," making the State of Georgia a proper defendant for Goodman’s ADA claims. Thus, the magistrate judge recommended that the ADA claims be allowed to proceed against the GDOC and that the State of Georgia be joined as a defendant.

Noting that the United States Supreme Court had not addressed the question of whether the application of the ADA to state prisons was a constitutional exercise of Congressional power under the Commerce Clause or under the Fourteenth Amendment, the magistrate judge determined that Goodman’s allegations "arguably stated a colorable claim for relief under 42 U.S.C. § 12131."

On August 20, 1999, the district court, in a one-page order, adopted the magistrate judge’s recommendations and . . . dismissed the ADA claims against all defendants, except for his ADA claims against defendants the GDOC and the State of Georgia. Goodman was not given an opportunity to amend his complaint.

F. Summary Judgment on Goodman’s ADA Claims

Following the dismissal of Goodman’s § 1983 claims, the parties filed cross motions for summary judgment as to his ADA claims . . .

. . . [T]he State of Georgia and the GDOC . . . [argued] that: (1) the State of Georgia had immunity from his ADA claims for monetary damages under the Eleventh Amendment; (2) his ADA claims for injunctive relief were moot; (3) the ADA did not apply to state prisons; (4) his claims failed on the merits; and (5) his claims were foreclosed by the Prison Litigation Reform Act ("PLRA").

On February 10, 2000, the magistrate judge recommended that both motions be denied, determining that: (1) states are not immune to suit brought under the ADA; (2) Goodman’s claim for injunctive relief was not moot despite his transfer; and (3) there were issues of fact. The magistrate judge identified the issues of fact, as follows: (1) whether the defendants reasonably accommodated Goodman’s disability; (2) whether Goodman was a "qualified individual" under the ADA; and (3) whether Goodman’s claim for mental suffering was foreclosed by the PLRA.

On March 6, 2000, the district court adopted the magistrate judge’s report and denied Goodman’s and the defendants’ motions for summary judgment. On June 14, 2001, the parties consented to trial by the magistrate judge. On October 22, 2001, the State of Georgia and the GDOC again moved for
summary judgment based on and due to the then-new Supreme court decision in Board of Trustees of the University of Alabama, et al. v. Garrett, 531 U.S. 356, 121 S. Ct. 955 (2001).

On December 12, 2001, the magistrate judge granted the State of Georgia and the GDOC’s joint motion for summary judgment, determining that Goodman’s claims for monetary damages under the ADA were precluded by the Eleventh Amendment and that his claims for injunctive relief were rendered moot due to his transfer from GSP to Valdosta State Prison.

Goodman appeals the district court’s . . . grant of summary judgment on his ADA claims for monetary damages and injunctive relief.

II. STANDARD OF REVIEW

***

We review the grant of summary judgment de novo, viewing all evidence and factual inferences therefrom in the light most favorable to the non-moving party. Wascura v. City of South Miami, 257 F.3d 1238, 1242 (11th Cir. 2001).

***

IV. ADA CLAIM FOR INJUNCTIVE RELIEF

We first affirm the magistrate judge’s grant of summary judgment to all the defendants on Goodman’s ADA claims for monetary damages as barred by the Eleventh Amendment. Miller v. King, No. 02-13348, slip. op. at __. The magistrate judge, however, erred in determining that Goodman’s ADA claims for injunctive relief under Title II were moot for the following reasons.

It is true that “[t]he general rule is that a prisoner’s transfer or release from a jail moots his individual claim for declaratory and injunctive relief.” McKinnon v. Talladega Co., 745 F.2d 1360, 1363 (11th Cir. 1984) (citation omitted). The “capable of repetition, yet evading review” doctrine provides an exception to the general rule of mootness. That doctrine requires “a reasonable expectation that the same complaining party would be subjected to the same action again.” Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 349 (1975). In Preiser v. Newkirk, 422 U.S. 395, 402-03, 95 S. Ct. 2330, 2334-35 (1975), the Supreme Court concluded that the “capable of repetition, yet evading review” doctrine would not apply in prison transfer cases if the likelihood of re-transfer was remote and speculative.

Since the filing of his lawsuit in 1999, Goodman has been transferred nine times . . . . [T]his Court continues to list Goodman’s address as GSP, given that we have received status-report requests from Goodman at GSP as recently as April 21, 2004.

What is certain is that Goodman is either at GSP or the likelihood of his eventual transfer back to GSP is far from remote or speculative. Consequently, we conclude that the “capable of repetition, yet evading review” doctrine applies in this case and that Goodman’s claims for injunctive relief under Title II of the ADA are not moot.

Therefore, this case is remanded to the district court to consider Goodman’s claims for injunctive relief under Title II of the ADA. Because Goodman is already amending his complaint for the purposes of his § 1983 action, Goodman may also take
this opportunity to present a clearer picture of his allegations for injunctive relief under Title II of the ADA. See Miller, No. 02-13348, slip op. at—(outlining the requirements for stating a claim under Title II of the ADA). Furthermore, the proper defendants on Goodman’s ADA claims for injunctive relief should be Warden Sikes and Commissioner Garner, in their official capacities, not the State of Georgia or the GDOC. See Miller, No. 02-13348, slip op. at ___.

V. CONCLUSION

* * *

With respect to Goodman’s ADA claims, we affirm the magistrate judge’s grant of summary judgment as to Goodman’s claims for monetary relief under Title II of the ADA against all defendants, but vacate the grant of summary judgment on Goodman’s claims for injunctive relief under Title II of the ADA. The proper defendants on Goodman’s ADA claims for injunctive relief are Warden Sikes and Commissioner Garner (or the current Commissioner), in their official capacities.

VACATED, REVERSED, and REMANDED, in part;

AFFIRMED, in part.
C. ADA Monetary Damages Claims

On appeal, Miller also argues that the magistrate judge erred in granting summary judgment for defendants on Miller's ADA claims for monetary damages. As explained above, the ADA applies to state prisons, and Miller is entitled to prove his ADA claims for injunctive relief against defendant Warden Sikes in his official capacity. Regarding Miller's ADA claims for monetary damages, however, this case presents the formidable legal question of whether Congress constitutionally abrogated the Eleventh Amendment in Title II of the ADA.

* * *

Neither the Supreme Court nor this Court, however, has yet addressed the precise issue in this case: whether States can be sued for monetary damages for violations of Title II of the ADA, as applied in the prison context.

2. Eleventh-Amendment Analysis

As a general rule, the Eleventh Amendment grants States immunity to suits brought by private citizens in federal court. The Supreme Court has recognized that Congress can abrogate that sovereign immunity where (1) Congress "unequivocally expressed its intent to abrogate" the States' sovereign immunity in the statute at issue, and (2) "Congress acted pursuant to a valid grant of constitutional authority." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73, 120 S. Ct. 631, 640, 145 L. Ed. 2d 522 (2000). The ADA plainly states that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State Court . . . for a violation of" the ADA. 42 U.S.C. § 12202. Accordingly, the first requirement—a clear intention to abrogate Eleventh-Amendment immunity—is satisfied. See *Lane*, 124 S. Ct. at 1985. As to the second requirement, the ADA invokes "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce. . ." 42 U.S.C. § 12101(b)(4). However, the Supreme Court has clarified that Congress may not abrogate the States' Eleventh-Amendment immunity for monetary-damages suits based on its Article I commerce power. *Garrett*, 531 U.S. at
364, 121 S. Ct. at 962; Kimel, 528 U.S. at 79, 120 S. Ct. at 643. The paramount question, then, is whether Congress's intended abrogation of the States' Eleventh-Amendment immunity in Title II of the ADA was a valid exercise of its remedial powers under § 5 of the Fourteenth Amendment.

***

In determining whether Congress has acted within the scope of its § 5 power to abrogate States' sovereign immunity, the Supreme Court applies the three-part "congruence and proportionality" test first established in Boerne, 521 U.S. at 520, 117 S. Ct. at 2164. In applying the Boerne test, a court must: (1) identify "with some precision the scope of the constitutional right at issue," Board of Trustees v. Garrett, 531 U.S. 356, 365, 121 S. Ct. 955, 963, 148 L. Ed. 2d 866 (2001); (2) determine whether Congress identified a history and pattern of unconstitutional conduct by the States, and (3) if so, analyze whether the statute is an appropriate, congruent and proportional response to that history and pattern of unconstitutional treatment. Garrett, 531 U.S. at 374, 121 S. Ct. at 968; see Boerne, 521 U.S. at 520, 117 S. Ct. at 2164.

***

The Supreme Court in Lane concluded that Title II of the ADA was enacted in response to a history and pattern of constitutional violations by the States, thereby satisfying Boerne's step-two inquiry.

***

In the first step of the Boerne/Lane analysis, we identify the scope of the constitutional right at issue. Both Miller and the defendants agree that the only right at issue in this particular case is Miller's Eighth-Amendment right to be free from cruel and unusual punishment.

The second step requires us to determine whether Title II was enacted in response to a history and pattern of constitutional violations by the States. Although the defendants argue there is insufficient evidence of disability discrimination in prisons, we conclude that this step-two inquiry under Title II already has been decided by the Supreme Court in Lane. As previously discussed, in applying the second step of the Boerne test, the Supreme Court in Lane considered evidence of disability discrimination in the administration of public services and programs generally, rather than focusing only on discrimination in the context of access to the courts, and concluded that Title II in its entirety satisfies Boerne's step-two requirement that it be enacted in response to a history and pattern of States' constitutional violations. Id. at 1992. We are bound by that conclusion as to step two.

We now proceed to the third and final step of the Boerne/Lane inquiry. This Court must decide if Title II of the ADA, as applied to claims rooted in the Eighth Amendment, is an appropriate § 5 response to the above-described history and pattern of unconstitutional treatment. Lane, 124 S. Ct. at 1992. Given Lane, we accepted at step two that Title II was enacted in response to a history and pattern of disability discrimination in the administration of public services and programs generally. To give meaning to the Supreme Court's context-by-context analytical approach, however, we must consider, in step three, the history of discrimination not generally but specifically in the prison context, and the scope of the Eighth-Amendment constitutional right, and determine whether the remedy afforded by Title II is congruent
and proportional to its historical backdrop and to the object of enforcing the Eighth-Amendment right to be free from cruel and unusual punishment. *Lane*, 124 S. Ct. at 1993. To meet this congruence-and-proportionality test, legislation must be tailored to remedy or prevent the demonstrated unconstitutional conduct. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639, 119 S. Ct. 2199, 2207, 144 L. Ed. 2d 575 (1999).

We recognize that § 5 authorizes Congress to deter Eighth-Amendment violations by prohibiting "a somewhat broader swath of conduct" than that prohibited by the Eighth Amendment and by proscribing "facially constitutional conduct[ ] in order to prevent and deter unconstitutional conduct." *Lane*, 124 S. Ct. at 1985 (internal quotation marks and citations omitted). Congress's remedial and preventive measures, however, may not go so far as to work a substantive change in the governing Eighth-Amendment law. *Lane*, 124 S. Ct. at 1986 (stating that Congress's remedial and preventive measures "may not work a 'substantive change in the governing law'" (quoting *Boerne*, 521 U.S. at 519, 117 S. Ct. at 2164)). In other words, § 5 does not place in the hands of Congress a tool to rewrite the Bill of Rights. Instead, when Congress enacts § 5 prophylactic legislation, there must be "proportionality or congruence between the means adopted and the legitimate end to be achieved." *Boerne*, 521 U.S. at 533, 117 S. Ct. at 2171.

... Even if a documented history of disability discrimination specifically in the prison context justifies application of some congressional prophylactic legislation to state prisons, what makes this case radically different from *Lane* is the limited nature of the constitutional right at issue and how Title II, as applied to prisons, would substantively and materially rewrite the Eighth Amendment. In this case, we focus on the limited nature of the Eighth-Amendment right because in *Lane*, the Supreme Court's conclusion that Title II's remedy is congruent and proportional in the access-to-courts context relied heavily upon the nature of the constitutional right in issue and the States' expansive due-process obligation to provide individuals with access to the courts. It was on that basis that the Supreme Court concluded that the Title II-imposed duty to accommodate is "perfectly consistent with the well-established due process principle that, within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts." *Lane*, 124 S. Ct. at 1994 (internal quotation marks and citation omitted).

This robust, positive due-process obligation of the States to provide meaningful and expansive court access is in stark contrast with the States' Eighth-Amendment, negative obligation to abstain from "cruel and unusual punishment," a markedly narrow restriction on prison administrative conduct. In the prison context, the States historically have wielded far-reaching discretion in their treatment of inmates, confined only by the limited Eighth-Amendment requirement that such treatment not be "cruel and unusual punishment." The Eighth Amendment has no effect on most prison services, programs, and activities, such as educational, recreational, and job-training programs. Rather, the Eighth Amendment is limited to punishment, and "cruel and unusual" punishment at that. In other words, the Eighth Amendment imposes a narrow restriction—"cruel and unusual"—on only a limited sphere of prison administrative conduct—"punishment." As explained above, even as to that punishment sphere,
negligence or gross negligence does not satisfy the *Eighth-Amendment* standard. *Cottrell*, 85 F.3d at 1490. Instead, a prisoner alleging an *Eighth-Amendment* violation confronts an exacting burden of showing that the prison official wantonly and willfully inflicted pain on the inmate. *Chandler*, 2004 U.S. App. LEXIS 16246, *Slip Op.* at 3368-69. The *Eighth Amendment* regulates only a small slice of prison administrative conduct.

Title II of the ADA, on the other hand, purports to proscribe the exclusion of a "qualified," disabled prisoner from participation in any "services, programs, or activities" of a public entity. Title II is not tailored to provide prophylactic protection of the *Eighth-Amendment* right; instead, it applies to any service, program, or activity provided by the prison, whether educational, recreational, job-training, work in prison industries, drug and alcohol counseling, or a myriad of other prison services, programs, and activities not affected by the *Eighth Amendment*. Although we recognize Congress's power to proscribe facially constitutional conduct, Title II does not merely proscribe a "somewhat broader swath of conduct" than the *Eighth Amendment*, but prohibits a different swath of conduct that is far broader and even totally unrelated to the *Eighth Amendment* in many instances. In short, Title II prohibits far more state conduct and in many more areas of prison administration than conceivably necessary to enforce the *Eighth Amendment*'s ban on cruel and unusual punishment. Indeed, Title II addresses all prison services, programs, and activities—and goes well beyond the basic, humane necessities guaranteed by the *Eighth Amendment*—to disabled prisoners.

Accordingly, we conclude that Title II's affirmative duty to accommodate qualified, disabled prisoners is markedly different than, and cannot be said to be "perfectly consistent with," traditional protections afforded by the *Eighth Amendment*. A requirement of reasonable accommodations for a qualified, disabled prisoner in the prison's educational, recreational, and job-training programs, for example, bears no permissible prophylactic relationship to deterring or remedying violations of disabled prisoners' right to be free from cruel and unusual punishment. Rather, Title II of the ADA, as applied in the *Eighth-Amendment* context to state prisons, fails to meet the requirement of proportionality and congruence.

... Simply put, to uphold Title II's application to state prisons would allow Congress to "rewrite" the *Eighth-Amendment* law. See *Garrett*, 531 U.S. at 374, 121 S. Ct. at 968. Therefore, Title II of the ADA, as applied in this prison case, does not validly abrogate the States' sovereign immunity and cannot be enforced against the State of Georgia or the GDOC in a suit for monetary damages.
The Supreme Court agreed on Monday to decide whether state prison inmates who suffer discrimination on account of disabilities could sue for damages under a federal law, the Americans With Disabilities Act.

The case, to be argued during the court's next term, will be the latest chapter in the court's long-running re-examination of the constitutional balance between the federal government and the states.

When Congress enacted the disabilities law in 1990, it applied the law to the states and included a statement of its intention to open the states to lawsuits for damages. Under the 11th Amendment, states enjoy immunity from damage suits in federal court, unless Congress explicitly states its intention to abrogate the immunity and invokes a proper constitutional basis for doing so.

Over the past 10 years, the Supreme Court has constricted Congressional discretion in this area.

The new case, *United States v. Georgia*, No. 04-1203, concerns Title II of the law, which prohibits state and local governments from discriminating on the basis of disability in the provision of public services or programs. The Supreme Court ruled in 1998 that prisons fall within the definition of a public program.

But that decision did not address the constitutional issue that this case presents: whether Congress had the authority to open the states to damage suits by prisoners. The United States Court of Appeals for the 11th Circuit said Congress did not, ruling in a case brought by a Georgia prisoner who is a paraplegic and uses a wheelchair.

The inmate, Tony Goodman, claimed that he could not maneuver his wheelchair in his small cell, to which he is confined for 23 to 24 hours a day.

As a result, Mr. Goodman argued in a lawsuit that he filed on his own behalf, he is deprived of access to a toilet and a shower, as well as to his bed. The suit said guards leave him sitting in his own waste rather than assist him. He claimed in the suit that the conditions violate the Eighth Amendment's prohibition on cruel and unusual punishment.

The federal government entered the case to defend Mr. Goodman's right to bring the lawsuit. Mr. Goodman, now represented by a former solicitor general, Drew S. Days III, of the law firm of Morrison & Foerster, also filed his own appeal of the 11th Circuit's ruling, which the Supreme Court also accepted in granting the government's appeal.

In issuing its opinion last September, the appeals court did not explain its reasoning, relying instead on its decision in a separate prisoner case that it had issued several days earlier. In that case, *Miller v. King*, the appeals court explained why it viewed the issue as not governed by a recent Supreme Court ruling that found Congress had
properly opened the states to lawsuits under Title II for depriving people with disabilities of access to courtrooms.

In drawing a distinction between that case and the prison case, the 11th Circuit said the Eighth Amendment did not provide an adequate basis for Congress to breach the states' immunity. The "robust, positive due-process obligation of the states to provide meaningful and expansive court access is in stark contrast with the states' Eighth Amendment, negative obligation to abstain from 'cruel and unusual punishment,'" the appeals court said.
On March 9, the Solicitor General filed a petition for certiorari in *United States v. Georgia*, No. 04-1203, a potential follow up case to Last Term’s *Tennessee v. Lane*. The petition seeks review of the Eleventh Circuit’s determination that Congress lacked the constitutional authority to abrogate States’ sovereign immunity to prisoner lawsuits claiming violations of Title II of the Americans with Disabilities Act (ADA). Given that there is now a 2-1 split on that question, and the fact that the United States is seeking review, it seems likely that the Court will grant the petition for next Term.

Title II of the ADA prohibits disability discrimination in the “services, programs or activities of a public entity,” which the Court held in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), encompasses disability discrimination in prisons. However, the Court held open whether, so construed, Title II was a constitutional exercise of Congress’ authority to enforce the Fourteenth Amendment. That question arose in this case when Georgia moved to dismiss Title II claims brought by Tony Goodman, a Georgia inmate confined to a wheelchair due to spinal injuries. Goodman alleges that because of his disability, he is kept in the maximum security wing of the prison and left in his 12-by-3-foot cell for 23-24 hours a day. And because the cell is not wheelchair accessible, he cannot turn his chair around in his cell and cannot access the toilet without assistance, which is frequently denied. Goodman also alleges that because of accessibility problems, he has been denied access to religious services and the prison law library, as well as other prison programs.

The State asserted that regardless of whether or not the prison was in compliance with the ADA, Goodman could not sue the State because Congress lacked the constitutional authority to abrogate the State’s sovereign immunity to private suits under Title II. Because the Supreme Court has held that Congress may only abrogate a State’s sovereign immunity pursuant to a valid exercise of its authority to enforce the Fourteenth Amendment, the question became whether Title II is valid Fourteenth Amendment legislation—one of the questions left open in *Yeskey*.

In answering that question, the Eleventh Circuit and other courts have looked to two prior Supreme Court cases that considered whether Congress constitutionally abrogated sovereign immunity under the ADA. In *University of Alabama v. Garrett*, a five-member majority of the Court held that Title I of the ADA—which applies to employment—was not valid Fourteenth Amendment legislation. The Court noted that Title I prohibits far more conduct than would be held unconstitutional under the rational basis test applied to disability discrimination under the Equal Protection Clause. And the Court found that there was no history of pervasive State violations of the constitutional rights of disabled employees that would justify broad prophylactic legislation.
On the other hand, when faced with an actual challenge to Title II itself, the Court held in *Tennessee v. Lane* that Title II is valid Fourteenth Amendment legislation, at least as applied to require accessibility in judicial services. Plaintiffs in *Lane* sued the state over the inaccessibility of county courthouses to people in wheelchairs. The State argued that the reasoning of *Garrett* applied equally to Title II, but a majority of the Court (the dissenters from *Garrett* plus Justice O'Connor), held otherwise. The Court held that there was ample evidence that people with disabilities were frequently subject to unconstitutional and otherwise unequal treatment in the administration of public services, justifying prophylactic legislation addressing government programs (even if there was no such history supporting prophylactic legislation relating to government employment).

Although the Court's history discussion in *Lane* surveyed Title II in all its applications, the Court ultimately pulled back and decided the case on narrower grounds, holding that Title II was valid prophylactic legislation as applied to access to judicial services. Among other things, the Court noted that in this context, Title II often enforces constitutional rights that are subject to heightened scrutiny, such as the rights of criminal defendants to attend their own trials.

Many have criticized *Lane* and *Garrett* as inconsistent with one another. The fact that only Justice O'Connor was in the majority of both *Garrett* and *Lane* has created substantial uncertainty whether *Lane*'s emphasis on the pervasive history of disability discrimination in public service will be sufficient to sustain Title II even in contexts where "fundamental rights" are not implicated.

That question is presently being hashed out in the lower courts as they attempt to apply *Lane*'s "as applied" analysis to other contexts. Perhaps not surprisingly (given the number of prisoner lawsuits generally), the first post-*Lane* cases to percolate to the courts of appeals have been prison cases. (Other cases working their way through the courts concern Title II's application to education, institutionalization and licensing).

Three Circuits have now addressed the question in the prison context, two holding the ADA abrogation unconstitutional and one holding it valid. The Eleventh Circuit's decision in *Georgia* was joined yesterday by the Third Circuit's decision in *Cochran v. Pinchak*. On the other side of the split, the Ninth Circuit in *Phiffer v. Columbia River Corr. Inst.*, confronted the issue on a remand from the Supreme Court for reconsideration after *Lane*. The Ninth Circuit declined, however, to revisit prior circuit precedent that had held that Title II is valid Fourteenth Amendment legislation in all its applications.

The opinions in these three cases have made clear that there is some substantial disagreement and confusion about how to employ *Lane*'s "as applied" analysis in other areas. In the prison context, Title II implicates a number of constitutional rights, including the Equal Protection Clause, Eighth Amendment, Due Process Clause, First Amendment right to Free Exercise of Religion, etc. In its briefs, the United States has been arguing that courts of appeals must determine the validity of Title II as applied to prisons generally, taking into account all of the constitutional rights involved. However, in both *Goodman* and *Cochran*, the courts refused to consider whether Title II validly enforced rights not directly at issue in the case before it. Thus, the
Eleventh Circuit only considered Title II’s relationship to the Eighth Amendment, while the Third Circuit only considered Title II’s enforcement of the Equal Protection Clause. The Ninth Circuit, on the other hand, inexplicably refused to engage in any “as-applied” analysis at all.

In his Georgia petition, the SG points to this confusion over the “as applied” analysis as a reason for the Court to grant certiorari sooner rather than later, since the methods employed in these early prison cases will inevitably be applied in subsequent cases in other contexts as well.

If the Court agrees, it will have three petitions to choose from. In addition to the Government’s petition in Georgia, Goodman himself is seeking cert., No. 04-1236, represented by former Solicitor General Drew Days and Prof. Sam Bagenstos, one of the attorneys from Lane. The State of Oregon also filed a petition in Phiffer, No. 04-947. The Court is likely to consider all three petitions simultaneously, after the responses are filed in each case in late March and early April.
“Disabled People Can Sue States Over Access, High Court Rules”

Los Angeles Times
May 18, 2004
David G. Savage

The Supreme Court on Monday narrowly held that states were subject to the provisions of the Americans With Disabilities Act, ruling that they could be sued for excluding disabled people from courthouses or voting booths or denying them crucial public services.

The 5-4 decision—which rejected a claim of states' rights—turned on the Constitution's demand that states not deny people "the equal protection of the laws." It came on the 50th anniversary of the court's decision in Brown vs. Board of Education, which used the same constitutional provision to overturn state-sanctioned racial segregation.

The five justices in the majority said Monday that a state's "pattern of unequal treatment" of people with disabilities, like a state's discrimination against blacks, violated the Constitution. Victims of such discrimination may sue the state, the court said.

The four dissenting justices said states have a "sovereign immunity" that shields them from such claims.

The decision arose from a rural Tennessee courthouse that had no ramps or elevators to its second-floor hearing rooms, and the high court's ruling will put new pressure on public officials to provide full access to disabled individuals. This could mean providing sign-language interpreters for those who are deaf or making sure that disabled people can travel freely on public buses and trains.

The practical effect of the decision in California and other states is not clear. Since the 1970s, federal law has required public buildings to accommodate those with disabilities. Schools, colleges, libraries and courthouses have installed ramps and elevators. But in some areas, particularly in rural communities, older buildings have not been renovated.

"Today's decision is a huge win at a critical time for millions of Americans with disabilities," said Ira Burnim, legal director at the Bazelon Center for Mental Health Law in Washington. It "narrowly rejected a radical reinterpretation of states' rights that would have robbed millions of a vital means of protecting their civil rights."

Jennifer Mathis, an attorney with the same disability rights group, said: "Accessibility means many things. It is not just about getting in the front door."

However, for George Lane, the issue was getting in the front door.

In 1996, he was summoned to appear at the Polk County, Tenn., courthouse on a misdemeanor driving charge resulting from an accident that put him in a wheelchair. When he arrived at the courthouse, he learned the hearing was on the second floor.

To get to the hearing, he had to crawl up two flights of stairs. When he was called back for a second appearance, he refused and was arrested for failing to appear. He then sued Tennessee under the Americans With...
Disabilities Act, contending that the state had failed to make "reasonable modifications" to 25 county courthouses to aid people in wheelchairs. He was joined by Beverly Jones, a disabled court reporter, who said she had missed out on assignments because she could not get to some courtrooms.

Their case became a test of whether the disabilities act could be enforced against the states.

When President George H.W. Bush signed the act into law in 1990, it was hailed as a landmark in providing full equality for people with disabilities. It prohibited employers, school, colleges and public agencies from discriminating against people with severe physical or mental impairments, and it required them to take reasonable steps to accommodate the disabled.

But in recent years, there had been doubts about whether this federal mandate could be enforced.

In a series of 5-4 rulings, the high court's conservative majority said states had a "sovereign immunity" shielding them from certain federal laws, including the disabilities act.

Three years ago, for example, the court ruled that disabled state employees could not sue their agencies for discrimination under the act if they were fired or demoted because of their impairments.

The states could "quite hardheadedly—and hardheartedly—hold to job qualification requirements that do not make allowance for the disabled," Chief Justice William H. Rehnquist wrote in the case, involving a nurse at an Alabama state hospital who was demoted after treatment for breast cancer.

Relying on that precedent, Tennessee's lawyers argued that the states also should be shielded from the part of the law that required them to open their buildings and services to disabled individuals. A high court ruling in Tennessee's favor would have all but voided the act's application to state agencies.

But Bush administration lawyers joined Lane's side in arguing that the mandate to open facilities to disabled people could be upheld as a civil-rights enforcement measure under the 14th Amendment. That post-Civil War measure says Congress may "enforce, by appropriate legislation," basic civil rights against violations by the states.

That argument prevailed in Tennessee vs. Lane, thanks to a crucial shift by Justice Sandra Day O'Connor. She abandoned her conservative colleagues who support states' rights and voted with the court's liberal bloc to uphold the disability rights claims whenever "fundamental rights" are at stake.

Justice John Paul Stevens, speaking for the court, said Congress had enacted the law "against a backdrop of pervasive unequal treatment" against the disabled, "including systematic deprivation of fundamental rights." But he stopped short of saying states can be sued in all circumstances—including, for example, by disabled prisoners.

Instead, he said, the law stands whenever a "fundamental right" such as voting or access to the courts is at issue.


The four dissenters, led by Rehnquist, said they would have voided the entire law.
Constitutional rights for the disabled are "quite limited," Rehnquist said. The Constitution "permits a state to classify on the basis of disability so long as it has a rational basis for doing so," he said, including a desire to save money.

Rehnquist was joined by Justices Clarence Thomas, Antonin Scalia and Anthony M. Kennedy.

Despite the narrowness of the ruling, disability-rights advocates were relieved.

"Today's decision is a welcome reversal of the Rehnquist court's onslaught on disability rights, but this fight is not over," said Andrew J. Imparato, president of the American Assn. of People With Disabilities. "Four justices still do not understand the connection between Brown vs. Board of Education, the Constitution's protection of individual rights and the right to be present at your own trial if you use a wheelchair."

Lane's lawsuit against Tennessee has been on hold since 1998, and his lawyer, William J. Brown, said Monday that Lane was eager to pursue his claim.

"He went through two humiliating and painful experiences. We are grateful that the court has sent a clear signal that the states can no longer hide behind their claims of immunity," Brown said. "This is an important and dramatic statement, and it's appropriate it comes on the day we celebrate the anniversary of Brown vs. Board of Education."
"Attorney Hopes High Court Will Clarify Intent Regarding Title II Lawsuits"

Disability Compliance Bulletin
June 9, 2005

Was the U.S. Supreme Court's expansion of the right to sue states under Title II of ADA in Tennessee v. Lane, 28 NDLR 65 (U.S. 2004), an aberration or the start of a shift in disability law?

The answer could come as early as the High Court's next session, according to attorney Seth Galanter of Morrison & Foerster in Washington D.C.

Galanter is one of the team of lawyers preparing to convince the Justices that state prisoners with disabilities have the same fundamental right to sue states as disabled citizens seeking access to court services, the driving issue in Lane.

The case on which Galanter is working, in collaboration with former U.S. Solicitor General Drew S. Days III and others is United States v. Georgia, petition for cert. granted (U.S. 05/16/05) (No. 04-1203). The lawsuit is on appeal from the 11th U.S. Circuit Court of Appeals.

"I very much think that this is an appropriate case to test the scope of Congress's authority to enforce the ADA, and the Bill of Rights as a whole," said Galanter. "The facts of this case really convey the types of discrimination that Congress was trying to target when it passed the ADA 15 years ago."

In Lane, the High Court ruled that Title II of the ADA, as applied specifically to cases implicating the fundamental right of access to the courts, is a valid exercise of Congress's enforcement powers under the 14th Amendment. In this case the 11th Circuit held that Title II does not abrogate state sovereign immunity for suits by state prisoners alleging discriminations in state-operated prisons.

Inmate Tony Goodman claims that because the Georgia State Prison in Reidsville, Ga., is not equipped for people in wheelchairs, he has been denied access to basic state services at the facility for more than seven years.

"We contend the situation was unlawful and the violations of Title II are ongoing," Galanter said. "Goodman continues to be denied access to the kinds of services other, nondisabled prisoners receive, and in fact he still spends many nights sleeping in his wheelchair because he cannot transfer in and out of it without assistance which is not forthcoming."

Galanter said his firm took on the case because it believed a fundamental right was in jeopardy and because after several years of litigation, no sign of redress for Goodman was in sight.

"Our basic question for the Justices is this: Did you really mean to carve out an exception for Title II lawsuits related to court access and leave virtually all other government services immune to litigation for money damages?" Galanter said.

"If so, please explain the rationale, because we're already seeing a split develop among the Circuits in how to interpret Lane," he added.
Galanter said the changes Goodman's suit seeks to prison policies, procedures and practices are "simple things that aren't going to cost a lot of money, but are necessary for him to receive even the minimal level of treatment all prisoners are entitled to."

He said he expects several advocacy groups for the disabled to file amicus curiae briefs with the High Court by the June 30 deadline.
LEXINGTON, Okla.—Construction is expected to begin within the next few weeks on a $5 million, 262-bed facility for disabled inmates on the grounds of the Joseph Harp Correctional Institution in Lexington.

Officials with the Oklahoma Department of Corrections say the long wait for the facility will be worth it, if they can manage to find the money to staff it.

Charlie Groves, DOC project manager, said the decision to build the unit was reached after the state commissioned a study that showed a critical need for a facility for elderly inmates and prisoners with severe physical limitations.

"Our cells aren't made for the physically handicapped," Groves said. "The original concept with this facility was to make it into a medical facility but the direction was changed over the years."

The male-only facility will join the other 40 buildings on the medium security institution property.

Though the unit will feature American Disabilities Act accommodations such as wider door frames and ramps, Groves said it will be "just like any other holding facility" and have an outside area for exercise, a dining hall and prison beds.

"These people aren't going to be bedridden or terminally ill," Groves said.

Joseph Harp warden Mike Addison said the facility will save the state money by concentrating physically disabled inmates. Additionally, 12 able-bodied inmates will be housed at the new facility to assist the disabled in getting from rooms to dining halls and common areas, Groves said.

"We are really looking forward to it. Of course, it's new so we'll learn as we go along, but there are a lot of people who are needing this and a lot that are currently farmed out to other facilities that won't have to be now," Addison said.

The flip side, Addison said, is that while the state is funding the construction of the facility, that doesn't mean they will provide the funding to staff it.

"It's an extra 262 inmates, and that will put the population around 1,400," Addison said. "And right now it's looking like our (current) staff will be the ones in charge of it. We are carrying a 21 percent vacancy rate. We're down 60-plus staff members where we normally would be already."
Status Report on Federalism

“The Court’s Faux Federalism: A Year at the Supreme Court (2004)”

Ramesh Ponnuru

Speaking soon after the end of the 2002 Supreme Court term, Justice Ruth Bader Ginsburg said, “Federalism this term was the dog that did not bark.” The expression traces back to the Sherlock Holmes story “The Adventure of Silver Blaze,” where the dog’s silence provides evidence about a theft. Have the justices carted off the Rehnquist Court’s federalism revolution while we weren’t looking? The states did not fare well in the Court’s last term. The case most widely taken as a defeat was Nevada Department of Human Resources v. Hibbs, in which a six-justice majority led by Chief Justice William Rehnquist ruled that Congress had the power to subject state governments to lawsuits under the Family and Medical Leave Act. The states might have thought this would be an easy win, based on previous Court rulings restricting the ability of Congress to authorize lawsuits against state governments. The majority found, however, that the Family and Medical Leave Act was meant to combat an “invalid gender stereotype” (specifically, the view that mothers are more likely than fathers to stay home to take care of their children, which we all know is a ludicrous folk belief based on no underlying reality). As such, the act fell within the scope of Congress’s power, under section five of the Fourteenth Amendment, to enforce the egalitarian requirements of that amendment on the states. This reasoning would doubtless have come as a surprise to most of the congressmen and senators who voted for the act, who thought they were merely mandating a popular benefit rather than striking a blow for feminism.

Franchise Tax Board of California v. Hyatt was the next most prominent federalism case that went badly for the states. Hyatt had left California for the friendlier tax climate of Nevada. The California tax authorities pursued him there, allegedly committing torts against Hyatt in both states. Hyatt sued, and the Nevada Supreme Court found that the suit should proceed under Nevada law. California, backed by most state attorneys general, protested that Nevada’s courts had to give weight to California law. The U.S. Supreme Court turned back the AGs, affirming the Nevada court’s decision.

State Farm Mutual Automobile Insurance Co. v. Campbell was another nationalist win: The Supreme Court restricted state courts’ ability to impose punitive damages. Hillside Dairy v. Lyons reaffirmed the “dormant commerce clause”: State governments may be barred from interfering with interstate commerce even when Congress has not explicitly acted to bar them. In Pierce County v. Guillen, Congress was allowed to order state courts (as well as federal courts) not to accept certain kinds of evidence. This order was designed to restrain litigation that would adversely affect interstate commerce, and was thus held to be a legitimate exercise of Congress’s commerce-clause powers. In American Insurance Association v. Garamendi, the Court said that a presidential agreement with a foreign country could pre-empt state law—even if the agreement itself does not say that it pre-empts state law, and even if there is no formal agreement at all.
There were a few cases on the other side of the ledger. The Court's decisions regarding affirmative action granted states some autonomy in setting the admissions policies at state universities: The Court neither required nor prohibited preferential affirmative action. In *Pharmaceutical Research and Manufacturers of America v. Maine*, the Court upheld a Maine program that pressured drugmakers to hold prices down. *Kentucky Association of Health Plans v. Miller* read federal law to allow states more freedom to regulate health insurance. In *Sprietsma v. Mercury Marine*, the Court rejected a claim that federal regulation preempted state lawsuits. As barks go, these were rather quiet.

It would go too far to say that the 2002 term means that the federalist revolution is over. The near-landmark decisions associated with that revolution have neither been overruled nor rendered dead letters; the Court has left itself the freedom to invalidate future congressional acts for trampling on the states. The Court has not retreated entirely from the "clear statement" rule announced a decade ago: To pre-empt state law, Congress has to say that's what it's doing. It could even be argued that the 2002 term represented a continuation, or rather a consolidation, of the federalist revolution: By signaling that this revolution would not go too far, the swing justices were trying to get the nationalist judges to make their peace with it.

But perhaps the federalist revolution is neither ending nor being consolidated. There is a third alternative: There never was a federalist revolution—or, at least, the revolution was never what it was cracked up to be.

***

III. HITTING A WALL

For all the fears the Court's federalist turn inspired, there was a natural limit to how far it could go. Three constraints were bound to affect the Court eventually. In 2002-2003, the Court ran into all three of them.

The first constraint is a straightforward political one: The Court cannot implement a federalism agenda that is seen as rolling back either the New Deal or civil rights in any serious way. Moreover, the Court has no interest in doing so—perhaps in part because key justices do not want their federalist turn to be interpreted as an attack on the New Deal or civil rights. Obviously, however, this limit means that a vast range of federal action will be untouched by the Court's federalism.

The Court is not going to get back into the business of distinguishing between intrastate and interstate commerce, and invalidating congressional regulation of the former; it left that field for good in the 1930s. It is not going to distinguish "commerce among the states" from manufacture. Most federal economic regulation will be upheld.

This reluctance to go too far politically may explain why the Court did what it did in *Hibbs*. *Morrison* implicated civil rights at least as much as *Hibbs* did, of course, but only in a symbolic way. *Hibbs* involved an intersection of an alleged civil-rights concern and a federally-mandated economic benefit. That may have been too much for the Court to threaten. If the distinction between *Hibbs* and *Morrison* is hard to ascertain, however, it is less difficult to see what separates it from the other sovereign immunity cases. The Court is willing to protect states from lawsuits in federal court—unless those lawsuits allege particular kinds of state discrimination.

295
Specifically, lawsuits are allowed to combat discrimination against groups that the Court itself has identified as “suspect classes”: women, racial minorities, and (weirdly enough) railroads. When states enact laws that discriminate against these classes, the Court subjects those laws to “strict scrutiny” and will generally invalidate them. Evidently, the Court will also subject lawsuits concerning state discrimination against other classes—e.g., the old and the disabled—to what might be called a kind of strict scrutiny. In *Kimel v. Florida Board of Regents* (2000), states were held to be immune from lawsuits under the Age Discrimination in Employment Act even when Congress was found to have sought to abrogate their immunity. In *Board of Trustees of the University of Alabama v. Garrett* (2001), states received immunity from Americans with Disabilities Act lawsuits, too. The rule that women and racial minorities can sue and other groups can’t is, in my view, the most plausible reading of *Hibbs*.

The second constraint is the Court’s own confusion about what federalism is. The Court’s federalism cases are replete with references to the “dignity,” “status,” and “interests” of states. The states are, in this view, an interest group with a special claim on kind treatment from the federal government. But this is not the only way to conceive of federalism. Federalism could be about dividing governmental responsibilities and ensuring political accountability, and there is much in the writing of the Founders to indicate that these imperatives were on their minds. Insisting on a federalism of this sort could—would—place limits on state governments and lead to results they would find most undignified. You could call it a federalism for citizens rather than states. Or, perhaps, a libertarian federalism.

Finally, the federalist turn faces a third powerful constraint: The Court’s unwillingness to police the boundaries of federalism against itself. We forget, sometimes, when we speak of the Supreme Court’s restricting or expanding what government can do, that the Court is itself part of the federal government. For the Supreme Court to protect the states from the federal government, it must not only restrain Congress (and the president). It must restrain itself. It must reduce its own power. This it has shown no interest in doing.

As has often been noted, none of the landmark Warren and Burger Court individual rights cases, most of which undermined state autonomy, have been overturned. What may be more important is the reason for the Court’s reluctance to revisit these issues. There is some evidence that the Court’s is motivated by a concern for its own institutional authority as much as for legal stability. The Court has said as much in one high-profile case, *Planned Parenthood v. Casey*, the 1992 case reaffirming the “central holding” of *Roe v. Wade* (1973).

The *Casey* Court begins by noting the scandal of disagreement:

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as amicus curiae, the United States, as it has done in five other cases in the last decade, again

***

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as amicus curiae, the United States, as it has done in five other cases in the last decade, again
asks us to overrule Roe.

***

An intolerance for national division, for conflict, is not the most promising of mindsets for the agents of a federalist revolution to have. Nor is the sense that our national identity is as fragile as the Casey plurality believes it to be. To the extent that Roe itself generated fierce political conflict, the Court has started an “implosive cycle”: The Court’s centralizing moves produce conflict, which then justify further assertions of the Court’s national authority.

***

The great federalist case of the 2002 term was thus not Hibbs but Lawrence v. Texas. State laws against sodomy were dying off, as they should have been. But the Court was not willing to wait. Instead, it issued an expansive ruling about liberty “in its spatial and more transcendent dimensions.” Nobody was sure what to make of that phrase, or agree on the implications of the ruling for other policy issues. But it is clear that the decision was not good news for social conservatives, even those who held no brief for sodomy laws themselves. Once again, the Court has taken sides in the culture wars—and taken the same side.

***

The Supreme Court may very well impose more marginal restrictions on congressional power against the states in the 2003 term and in terms to come. (It will always be possible to distinguish away Hibbs when the Court has the inclination to do so. The Court can just manipulate the level of deference to Congress to reach the desired result.) The sovereign-immunity doctrine may expand. But after two decades, we have an answer to one question. Is the Supreme Court likely to lead a revival of the federalism contemplated by the Founders? The answer is no. That dog will not bark again.
From their earliest days on the Supreme Court, Chief Justice William Rehnquist and retiring Justice Sandra Day O'Connor have worked to restrict the federal government's authority to manage the national economy and to strengthen individual rights. With the aid of Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas, they have enjoyed remarkable success. Scholars concurred that a federalism "revolution" had rewritten constitutional law.

But in three recent decisions—Nevada v. Hibbs (2003), Tennessee v. Lane (2004), and Gonzales v. Raich (2005)—the states' rights argument lost and federal statutes were upheld. Suddenly, some observers concluded that what seemed to be a revolution was only a "boomlet [that] has fizzled," as Michael Greve of the conservative American Enterprise Institute put it. The Raich case in particular was called a "disaster" by the Cato Institute's Roger Pilon, another outspoken assailant of federal power. All this led the New York Times' respected Supreme Court reporter, Linda Greenhouse, to speculate that "What had seemed until very recently to be a legacy in the making, now appears evanescent, perhaps even illusory."

Hardly. With youthful replacements for O'Connor and Rehnquist, who will possibly retire soon (and possibly even more high court appointments for President George W. Bush), the federalism revolution is probably as safe today as it ever was—and probably safer. A few split decisions can hardly reverse 15 years of rulings.

Usually in the majority since the 1990s, Rehnquist and O'Connor steadily trained their sights on the social welfare and civil rights lawmaking that began with the New Deal and continued into the 1970s and even the 1980s. (Only in the area of women's rights did O'Connor consistently defect.) Their broad and deep federalism legacy produced key changes in how we understand the 11th Amendment, Section 5 of the 14th Amendment, the 10th Amendment, and the commerce clause.

Shielding the States

The earliest federalism victory for Rehnquist came in an 11th Amendment case more than three decades ago.

The 11th Amendment provides in its entirety: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." For years, there had been little litigation involving the amendment.

Then in Edelman v. Jordan (1974), the newly appointed Justice Rehnquist put together a 5-4 majority to hold that states' immunity from suits in federal courts barred aged, blind, and disabled Social Security recipients from suing individual state officials for past benefits wrongly withheld by the state. In response to the late Justice Thurgood Marshall's contention that the states had impliedly waived their immunity...
by participating in the federal Social Security program, Rehnquist declared that such a waiver could be based only on the "most express language . . . or overwhelming implications from the text" of the statute. This was followed by another 5-4 decision in which Rehnquist joined, Atascadero State Hospital v. Scanlon (1985), reaffirming the "clear statement" doctrine.

Today, both the prohibition on damages suits for past wrongs and the clear-statement doctrine are established 11th Amendment law and in no jeopardy.

Twenty-two years after Edelman, in Seminole Tribe of Florida v. Florida(1996), now Chief Justice Rehnquist achieved one of his most significant 11th Amendment triumphs: the establishment of a sweeping state immunity from virtually all private suits to which the states had not consented. Ranging far beyond the text of the amendment, Rehnquist wrote that state sovereign immunity barred all attempts by Congress to allow suits against a state—except to enforce Section 5 of the 14th Amendment or unless the state waived its immunity.

Subsequent decisions have abandoned any link to the constitutional text, ultimately barring federally authorized suits—even in state courts—in Alden v. Maine (1999). In all of these, O'Connor was part of the narrow 5-4 majority.

Undue Process

The newly appointed Justice Rehnquist also struck quickly at Section 5 of the 14th Amendment, although his first effort failed.

Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." It had been read as a broad grant of congressional power to enforce Section 1 provisions of the 14th Amendment stating: "[N]or 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."

In Hutto v. Finney (1978), Rehnquist wrote to urge that Section 5 be limited to equal protection cases and not apply to all rights "incorporated" in the 14th Amendment through the due process clause. Back then, he was in dissent.

It took almost 20 years, but the assault on Section 5 ultimately succeeded. The change began with City of Boerne v. Flores (1997), a case in which the Court, speaking through Kennedy, ruled that Congress' Section 5 power was limited to creating remedies that are "congruent" and "proportionate" to the "remedial or preventive object."

What that meant soon became clear. In a rapid-fire series of 5-4 decisions over the next few years, the Court struck down private suits against state agencies provided for under the Patent Remedy Act (1999), the Age Discrimination in Employment Act (2000), the Violence Against Women Act (2000), and Title I of the Americans with Disabilities Act (2001). In three opinions written by Rehnquist and one by O'Connor, the Court read Section 5 as an increasingly limited exception to the 11th Amendment restriction on Congress' power to authorize suits. In the Violence Against Women Act case, the chief justice even held that the Section 5 exception does not apply in situations where a state wrongfully failed to act—although nothing in Section 5 draws a distinction between acts and failures to act.

No one should expect that the Court, having
gone that far on Section 5, will change its mind easily.

They See 'Policies'

The Court once described the 10th Amendment as simply a "truism." It states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." But Rehnquist and O'Connor found real limits reflected in that language.

The first victory came in 1976, in National League of Cities v. Usery. In a 5-4 decision, Rehnquist wrote that while the amendment had no substantive content, it set forth a general constitutional "policy," which in this case barred the federal government from requiring states to observe the minimum-wage and maximum-hour requirements of the Fair Labor Standards Act.


But the ghost of National League of Cities continued to hover over the justices' work. In New York v. United States (1992), O'Connor wrote to prevent the federal government from "commandeering" state and local officials to enforce a federal statute on nuclear waste. Though she did not rely directly on National League of Cities or on the text of the 10th Amendment, which she conceded to be "essentially a tautology," O'Connor's reasoning paralleled that of the 1976 decision: She discovered an amorphous nontextual "policy" that was "confirmed" in the 10th Amendment—namely, the "federal structure" of the Constitution.

Five years later, Scalia followed with an even broader decision in Printz v. United States (1997), striking down an obligation imposed by the federal Brady law requiring local law enforcement officials to assist in preventing illegal gun sales as unconstitutional "commandeering."

Shrinking Commerce

The 10th, 11th, and 14th amendments are all key to the federalism revolution, but the battle that has probably received the most attention has been fought over the commerce clause. The first strike against Congress' power "to regulate Commerce"—a very difficult target given the history of the last century—was made in Lopez v. United States (1995). An opinion by Rehnquist nullified a federal law restricting the possession of guns near schools on the grounds that it had no substantial nexus with interstate commerce.

The heavier blow, however, came in another Rehnquist opinion, United States v. Morrison (2000), which blocked Congress from using the commerce clause to reach noneconomic transactions regardless of their impact on interstate commerce. A year later, he wrote again for the Court in Solid Waste Agency of Northern Cork County v. U.S. Army Corps of Engineers (2001), to come to a restrictive interpretation of the Clean Water Act that was required to "avoid significant constitutional [i.e., commerce
clause] questions."

Once, a broad commerce clause easily undergirded much of Congress' work. Today, that work is threatened by a line of precedent firmly establishing a narrower reading.

The Legacy Is Safe

Indeed, few of the rulings that make up the federalism revolution are likely to fall anytime soon. And the three more-recent decisions upholding federal power don't undercut that. All three cases were relatively simple to decide and did not deviate much from the doctrines developed in the earlier cases.

Both Nevada v. Hibbs and Tennessee v. Lane involved interests to which the Court has given special protection. Hibbs, which upheld the Family and Medical Leave Act under Congress' Section 5 power, was a gender case. Both Rehnquist and O'Connor had indicated earlier that race and gender discrimination fell safely within Section 5's coverage, and the chief justice had shown himself to be sympathetic on gender discrimination in the Virginia Military Institute case, United States v. Virginia (1996). Rehnquist himself wrote for the majority in Hibbs, joined by O'Connor.

Lane, also a Section 5 case, was brought under Title II of the ADA to ensure that the disabled had access to courthouses, which the Court described as a "basic right" warranting scrutiny at least as rigorous as gender discrimination. It is not clear how much further Kennedy, who joined the four liberals, will go in enforcing the ADA against state authorities in other contexts.

And despite the states' rights argument, few observers had seriously expected the government to lose Gonzales v. Raich, which involved federal drug law enforcement. Both Kennedy and Scalia joined the majority.

In other words, the federalism revolution is very much alive. The Court's current federalism doctrines will likely be extended and expanded in the coming years—with or without Rehnquist. Judging by Bush's own views and those of his appellate court nominees, O'Connor's successor will probably be an even more consistently right-wing vote than she has been. We may soon be witnessing a truly radical constitutional revolution, and not just in federalism.
Will the Rehnquist Court's federalism revolution outlast the Rehnquist Court?

If Chief Justice William H. Rehnquist retires this summer, as appears likely, the court's ruling last week that federal drug law trumps states on the use of medical marijuana will be its last word on federal-state relations during his tenure.

A hallmark of the Rehnquist Court has been a re-examination of the country's most basic constitutional arrangements, resulting in decisions that demanded a new respect for the sovereignty of the states and placed corresponding restrictions on the powers of Congress.

But what had seemed until very recently to be a legacy in the making now appears evanescent, perhaps even illusory. Those who thought they were witnessing a revolution were last week using very different words.

"The federalism boomlet has fizzled," said Michael S. Greve of the American Enterprise Institute, a conservative research organization here. Mr. Greve directs the group's federalism project, dedicated to "rehabilitating a constitutional federalism."

The outcome of the marijuana case had been expected. The 2003 decision by a federal appeals court in San Francisco that Congress lacked constitutional authority over marijuana, grown for noncommercial purposes, that did not cross state lines had appeared ripe for overruling. A unanimous reversal in the case, Gonzales v. Raich, would have signified only that the combatants in the federalism wars were waiting for a more fruitful battleground.

But the decision was a hard-fought 6 to 3, with the chief justice in dissent along with two of his allies in the federalism cases, Justices Sandra Day O'Connor and Clarence Thomas. Clearly, the justices had treated Gonzales v. Raich as a major federalism battleground, and just as clearly, the chief justice had lost.

And where were the other two members of his usual 5-to-4 majority? Justice Anthony M. Kennedy joined the majority opinion without explanation. Justice Antonin Scalia did explain himself, at length, in terms that gave little comfort to those who viewed the outcome with dismay.

"A fair-weather federalist," was how Roger Pilon, director of the libertarian Cato Institute's Center for Constitutional Studies, described Justice Scalia. Asked for his response to the decision, Mr. Pilon exclaimed: "A disaster."

The full measure of what was at stake, and what was lost, was provided by Justice O'Connor's dissenting opinion. It was a cri de coeur from a justice whose commitment to the federalism agenda had led her five years ago to vote with the majority to strike down a central portion of the Violence Against Women Act, which authorized victims of crimes "motivated by gender" to sue their attackers in federal court. Intrastate activity that was not essentially economic was beyond Congress's reach.
under the Commerce Clause, Chief Justice Rehnquist wrote for the 5-to-4 majority in United States v. Morrison.

The marijuana decision, Justice O'Connor said in her dissent, was "irreconcilable" with the Violence Against Women Act ruling and with United States v. Lopez, a 1995 case that overturned a federal law prohibiting the possession of guns near schools. The Lopez case "makes clear that possession is not itself commercial activity," Justice O'Connor said, and for the court to now deem the possession of marijuana within Congress's authority "threatens to sweep all of productive human activity into federal regulatory reach."

It was a complaint the majority barely deigned to answer. "We need not determine," Justice John Paul Stevens said in the majority opinion, whether the cultivation and use of marijuana for medical purposes, "taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Clearly it did, he said, adding: "That the regulation ensnares some purely intrastate activity is of no moment."

For the 85-year-old Justice Stevens, a vigorous dissenter from the Rehnquist federalism decisions, it was a moment to savor—and not the only recent one. In some of the most important cases of the past three terms, on affirmative action, gay rights, the juvenile death penalty and a federalism decision a year ago that rejected state immunity under the Americans With Disabilities Act for inaccessible courthouses, he has managed to pull together and hold a majority.

"Stevens is at the peak of his effectiveness," Professor Thomas W. Merrill of Columbia Law School, a former deputy solicitor

Was the federalism revolution ever real and, if so, what happened to it?

It was a revolution, but a flawed one, in Professor Merrill's view, "a revolution of convenience" rather than deep conviction on the part of all five. "They wanted to make a difference, to leave a legacy. It was something that all five could rationalize themselves into going along with. But once things started to get on difficult territory, it started to fall apart."

In a law review article he published two years ago, entitled "The Making of the Second Rehnquist Court," Professor Merrill proposed that among the five, Justice Scalia's commitment to Rehnquist-style federalism was the weakest, the product of a strategic choice by the justice to ally himself with the four others for the sake of being on a winning team after concluding that he was unlikely to make headway with his agenda on abortion, religion, and other social issues.

Professor Mark V. Tushnet of Georgetown University Law Center, the author of a new book, A Court Divided: The Rehnquist Court and the Future of Constitutional Law, said that the earlier decisions had "brought the justices to a threshold that was far away when Rehnquist joined the court." And now, he said, "they have to decide whether to stay where they are, or continue on, or retreat."

The marijuana case "does not necessarily mean a retreat," he said. "It was an easy case, a case at the heart of national regulatory authority."

Professor Tushnet said a more telling case would be a challenge to the application of the
Endangered Species Act to a species without commercial utility, found only within one state.

Such a case is on the court's calendar, awaiting the justices' decision whether to hear it. The question in *GDF Realty Investments v. Norton* is whether Congress has authority to apply the Endangered Species Act to require protection of six species of cave-dwelling insects that live in caves west of Austin, Tex.

Other cases awaiting action by the court question federal authority over homemade machine guns and over the possession of child pornography. In these two, federal appeals courts ruled against the government, citing the authority of the Supreme Court's Lopez and Morrison decisions. How much of that authority remains is now the question.

"The court was never clear about what it wanted to accomplish or how the revolution would play itself out when the first modest steps bumped up against entrenched political structures," said Mr. Greve of the American Enterprise Institute.

Like Mr. Greve, other scholars have wondered whether the court was actually engaged with anything more than "symbolic federalism" that did not actually threaten federal policies that affected many people.

"The court never reached a stable equilibrium, and now we are in a period of very robust national commitments, domestic as well as foreign." Ultimately he said, "it is a revolution that has found no takers."