FEDERALISM & SEPARATION OF POWERS
2003 UPDATE: FIRST QUARTER

EXECUTIVE & LEGISLATIVE ACTIONS

The Judicial Nomination Battle Continues

It is not news that Senate Democrats have taken the judicial nomination battle to all new levels by filibustering the nomination of Miguel Estrada. They claim that Mr. Estrada has refused to provide information they need to evaluate his nomination, though opponents of the filibuster observe that Mr. Estrada has offered to meet personally with any Senator who wishes to do so. They maintain that copies of memos that Mr. Estrada wrote while in the Office of the Solicitor General are needed, though such a release has been opposed by a bipartisan group of ex-Solicitors General. (*See* http://www.usdoj.gov/olp/solicitorsletter.pdf.) To date, several votes for cloture have been taken; 44 Senators still refuse to allow the nomination to proceed to an up-or-down vote on the Senate floor.

Similar controversy may arise as the Senate takes up the nomination of Justice Priscilla Owen. Democratic Senators have failed to explicitly threaten a filibuster, but Senator Tom Daschle noted "very, very deep concerns about the nomination of Priscilla Owen." When asked if any number of hours of debate on the nomination would satisfy Democrats, Senator Harry Reid stated that "[t]here is not a number in the universe that would be sufficient." Charles Hurt, *Senate GOP Seeks to End Deadlock on Judge*, WASH. TIMES, Apr. 9, 2003, at A4. Filibusters of other nominees have been threatened, but Democrats have apparently not yet decided which filibusters to follow through on. *See* Paul Kane, *Senate Democrats Still Undecided on Strategy Over Judicial Nominations*, ROLL CALL, Apr. 2, 2003.

More information on this issue can be found on the Federalist Society's website: http://www.fed-soc.org/judicialnominations.htm.

Federal Limits on Medical Malpractice Awards

The President and the House have expressed support for federal liability caps on medical malpractice awards. The House passed a bill early in the year, but the legislation has stalled in the Senate. *See* Marcia Coyle, *Uncertainty Surrounds Federal Med-Mal Bill: Senators in Both Parties Need to Work Out Issues*, TEX. LAWYER, Apr. 14, 2003, at 34. The House Bill, H.R. 5, caps non-economic damages at $250,000 and punitive damages at $250,000 or twice the economic damages, whichever is greater. H.R. 5 would allow states to instead set their own caps, if desired. The Senate Bill, S.B. 607, does not allow states to set their own caps. Some Republicans have expressed federalism concerns regarding this legislation, maintaining that states should instead decide for themselves whether to impose these limits.

Federal Regulation of the "Subprime" Mortgage-Lending Market

Representative Bob Ney of Ohio has introduced legislation that would establish national standards for the "subprime" mortgage-lending market, which serves home buyers with difficulty obtaining credit. The Congressman wants to "ensure that 'feel-good' state laws don't backfire by driving away lenders and drying up subprime credit." Opponents of the measure state that these standards should be left to the states to implement, and they note that Rep. Ney's bill would weaken laws already on the books in some states. *See* Kelly K. Spors, *Subprime Bill Aims to Mute State Laws: Republicans Proposal to Police Predatory Lending Would Set Weaker National Standards*, WALL ST. J., Feb. 14, 2003, at A4. The bill is H.R. 833, and it has been referred to the Subcommittee on Housing and Community Opportunity of the House Committee on Financial Services.

Also of Interest

- The Federalism & Separation of Powers group will host a Federalism Mini-Conference on Thursday, May 1, 2003 in Atlanta, Georgia. For more details, please see: http://www.fed-soc.org/events/federalism/promo.htm

- *Law: Federalism's Edge*, *available at* http://216.134.209.51/~crank/archives/001016.php (discussing "Federalism's Edge: the point at which an exercise of state power . . . infringes on the right to self-government of the citizens of the other states"). [Thanks to *The Volokh Conspiracy*, http://volokh.blogspot.com/, for first noticing this website.]

SUPREME COURT 2002-2003 TERM

The following cases, each with federalism or separation of powers implications, were decided by the Court since January 2003. AEI's Federalism Project also maintains a website that contains information on currently pending and recently decided federalism cases. Several of the cases discussed below are also discussed on AEI's website: http://www.federalismproject.org/masterpages/supremecourt.

Pierce County v. Guillen, 123 S. Ct. 720, 537 U.S. ___ (2003), *available at* 2003 U.S. LEXIS 747.
Cert. Granted: Apr. 29, 2002. Oral Argument: Nov. 4, 2002. Decided: Jan. 14, 2003.

The Hazard Elimination Program ("Section 152") was established by Congress to provide states with funds for road hazard improvement projects. Participating states are required to conduct surveys of public roads, identify hazardous conditions, and assign priorities to needed repairs. To encourage an honest evaluation of road conditions, a federal law ("Section 409") made various provisions to restrict the release of this information to the public. The issues in *Guillen* arise from litigation surrounding a fatal car accident in Pierce County, Washington, and the plaintiffs' attempts to obtain data about road conditions through Washington's Public Disclosure Act ("PDA"), despite claims that the data is protected by Section 409. The Washington Supreme Court determined that Section 409 "purported to protect from disclosure any documents prepared for state and local purposes, so long as those documents were also collected for [Section 152] purposes." *Id.* at 727. Based on this interpretation, the court held that Section 409 "violates [the "Constitution's] federalist design . . . insofar as it makes state and local traffic and accident materials and data nondiscoverable . . . , simply because they are *also* 'collected' and used for federal purposes."[1] The Supreme Court reversed and remanded in part.[2] Justice Thomas delivered the opinion for an unanimous Court.

Justice Thomas first addressed the scope of Section 409. He held that Section 409 protects information "actually compiled *or* collected for [Section 152] purposes, but does not protect information that was originally compiled or collected for purposes unrelated to [Section 152] and that is currently held by the agencies that compiled or collected it.[3] *Id.* at 730. In other words, if one agency compiles the information, but another later "collects" it for Section 152 purposes, it will be privileged in the hands of the latter agency, but not the first. *Id.* Justice Thomas explained, "[S]tatutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth." *Id.* However, if "'Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'" *Id.* (citation omitted). Of the possible interpretations of the original statute together with a 1995 amendment, this one is the most narrow reading that also gives effect to the amendment. *Id.* at 730-31.

Turning to the constitutional question, Justice Thomas noted that Congress has authority under the Commerce Clause "'to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.'" *Id.* at 731 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)). Section 409 can rationally be seen as legislation "aimed at

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1. Guillen v. Pierce County, 31 P.3d 628, 633 (Wash. 2001). The Court added, "We hold that only materials and data originally *created* for the statutorily identified federal purposes are lawfully covered by the federal privilege." *Id.*

2. The Court determined that it did not have jurisdiction with regard to a separate tort action also before the Court. Pierce County v. Guillen, 123 S. Ct. 720, 728 (2003).

3. Petitioner argued that a document prepared by one agency for purposes unrelated to Section 152 will become protected under Section 409 if and when it is requested by another agency for Section 152 purposes, regardless of which agency it is later requested from. *Id.* at 729. Respondents argued that Section 409 protects only materials created by an agency responsible for seeking funding under Section 152. *Id.* at 730. The United States filed a brief interpreting Section 409 in the third manner adopted by the Court. *Id.*

improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce." *Id.* at 732. Given states' reluctance to collect needed information prior to the adoption of Section 409, "Congress could reasonably believe" that adopting Section 409 "would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads." *Id.* at 731-32. Section 409, Justice Thomas concluded, is a valid exercise of congressional power under the Commerce Clause. *Id.* at 732.

Eldred v Ashcroft, 123 S. Ct. 769, 537 U.S. ___ (2003), *available at* 2003 U.S. LEXIS 751.
Cert. Granted Feb. 19, 2002. Oral Argument: Oct. 9, 2002. Decided: Jan. 15, 2003.

In 1998, Congress passed the Copyright Term Extension Act (the CTEA), which extended the term of existing and future copyrights. Petitioners filed a facial challenge to the CTEA, claiming that the retroactive aspects of the bill exceeded Congress' power under the Copyright Clause of the Constitution.[4] The D.C. Circuit affirmed a dismissal by the lower court, ruling that "[w]hatever wisdom or folly the plaintiffs may see in the particular 'limited Times' for which the Congress has set the duration of copyrights, that decision is subject to judicial review only for rationality."[5] The Supreme Court affirmed. Justice Ginsburg delivered the opinion of the Court, in which the Chief Justice, and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas joined. Justices Stevens and Breyer filed dissenting opinions.

Text, history, and precedent, Justice Ginsburg held, support the conclusion that Congress is empowered to "prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future." *Id.* at 778. First, she rebutted petitioners' claim that, although the baseline term in the CTEA "qualifies as a 'limited Time'" for future copyrights, "existing copyrights extended to endure for that same term are not 'limited.'" *Id.* Such a conclusion, she argued, would "read[ ] into the text of the Copyright Clause the command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'" *Id.* Second, "[h]istory reveals an unbroken congressional practice" of granting copyright term extensions "so that all under copyright protection will be governed evenhandedly."[6] *Id.* Third, although the Court has not yet considered this issue in the context of copyrights, previous cases have "found no constitutional barrier to the legislative expansion of existing patents." *Id.* at 780. Last, the CTEA "is a rational enactment," and the Court may not "second-guess" congressional policy judgments. *Id.* at 782-83.

Justice Ginsburg next addressed specific novel arguments of the petitioners. She disagreed that, although the term is *literally* a "limited Time," the consistent extensions "effectively [create] perpetual copyrights."[7] *Id.* at 783. No showing has been made, she argued, that the CTEA is an attempt to "evade or override the 'limited Times' constraint,"[8] nor is there evidence that it "crosses a constitutionally significant threshold'" that previous extensions did not. *Id.* The Justice also dismissed application of the *Feist* principle that "copyright protection is unavailable to 'a narrow category of works in which the creative spark is utterly lacking or [trivial].'" *Id.* at 784 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359 (1991)). *Feist* cannot be extended, she held, to argue that a work, "sufficiently 'original' to qualify for copyright protection in the first instance" is no longer original for purposes of a copyright extension. *Id.* Instead, she held, *Feist* addressed whether a work is "eligible for copyright protection at all." *Id.* She similarly dismissed an argument that the CTEA does not satisfy the preambular language of the Copyright Clause, as Congress had "a rational

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4. The Copyright Clause provides that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Petitioners also claimed that the CTEA violated the First Amendment. Both the D.C. Circuit and the Supreme Court rejected the petitioners' First Amendment claim.

5. Eldred v. Reno, 239 F.3d 372, 380 (D.C. Cir. 2001).

6. Justice Stevens disagreed with the majority's historical analysis. *See* Eldred v Ashcroft, 123 S. Ct. 769, 796 (2003) (Stevens, J., dissenting).

7. Neither of the dissenting Justices directly addressed this issue, but each noted that perpetual copyrights are a possible ramification of the Court's ruling. *See id.* at 800-01 (Stevens, J., dissenting); *see also id.* at 801 (Breyer, J., dissenting).

8. Justice Breyer argued: "[Congress] may have sought to test the Constitution's limits. After all, the statute was named after a Member of Congress, who . . . 'wanted the term of copyright protection to last forever.'" *Id.* at 808 (Breyer, J., dissenting) (citation omitted).

basis" for concluding that the CTEA "'promotes the Progress of Science.'" *Id.* at 785. The Justice disagreed that extending a copyright without additional consideration "bestows an unpaid-for benefit on copyright holders . . . in violation of the *quid pro quo* requirement." *Id.* at 786. Given legislative history on this subject, authors "would reasonably comprehend [as part of the bargain], . . . a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time." *Id.* Furthermore, "patents and copyrights do not entail the same exchange," and "our references to a *quid pro quo* typically appear in the patent context." *Id.* at 787. Last, Justice Ginsburg held, "heightened judicial review of such extensions," as requested by petitioners, is not appropriate. *Id.* at 788. In sum, she held, the CTEA is a permissible exercise of congressional power under the Copyright Clause. *Id.*

Justice Stevens' dissent emphasized the dual constitutional purpose behind the Copyright Clause. The first purpose is to "encourage the creativity of 'Authors and Inventors.'" *Id.* at 791 (Stevens, J., dissenting). Second, is "ultimate purpose of promoting the 'Progress of Science and useful Arts' by guaranteeing that those innovations will enter the public domain as soon as the period of exclusivity expires." *Id.* He continued, "The issuance of a patent is appropriately regarded as a *quid pro quo*—the grant of a limited right for the inventor's disclosure and subsequent contribution to the public domain." *Id.* at 792. He concluded, "[Neither purpose] is served by retroactively increasing the inventor's compensation for a completed invention." *Id.* at 792. Serving these purposes, he added, is required for "copyrights as well as patents." *Id.* at 793. Justice Breyer's dissent, in contrast, emphasized that "the Constitution is a single document, that it contains both a Copyright Clause and a First Amendment, and that the two are related." *Id.* at 801 (Breyer, J., dissenting). Something more than a rational basis test, he opined, is required to review the CTEA. He explained, "I would review plausible claims that a copyright statute seriously, and unjustifiably, restricts the dissemination of speech somewhat more carefully . . . . [I would] recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression." *Id.* at 802.

Scheidler v. NOW, 123 S. Ct. 1057, 537 U.S. ___ (2003), *available at* 2003 U.S. LEXIS 1738.
Cert. Granted: Apr. 22, 2002. Oral Argument: Dec. 4, 2002. Decided: Feb. 26, 2003.

The litigation in *Scheidler* involves multiple claims against several pro-life defendants. Respondents alleged that petitioners violated RICO by conspiring to "shut down" abortion clinics through "a pattern of racketeering activity" that included acts of extortion in violation of the Hobbs Act. *Id.* at 1062. The Seventh Circuit affirmed a jury finding for the respondents, rejecting petitioners' contentions that the intangible property in dispute, i.e., a woman's "right" to seek clinic services, is not "property" for purposes of the Hobbs Act and that such intangible property was not "obtained" for purposes of the act. *Id.* at 1063. The Supreme Court reversed. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer joined. Justice Ginsburg filed a separate concurring opinion, in which Justice Breyer joined. Justice Stevens filed a dissenting opinion.

The Chief Justice held that it would be "well beyond" the meaning of the Hobbs Act to characterize petitioners' actions as "obtaining" property from respondents. *Id.* at 1064. The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). At common law, the Chief Justice explained, extortion was a crime committed by a public official. *Scheidler*, 123 S. Ct. at 1064. The Hobbs Act explicitly expanded this definition to include private individuals, but it retained the requirement that property be "obtained"—requiring "not only the deprivation but also the acquisition of property." *Id.* at 1064-65. A finding of extortion in this case, the Chief Justice stated, "would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.* at 1066. Furthermore, such a holding would interfere with a separate crime that had been explicitly excluded from the Hobbs Act—the crime of coercion. *Id.* at 1066-67. He concluded, since "petitioners did not obtain or attempt to obtain property from respondents" there is no basis for a finding of extortion under the Hobbs Act.[9] *Id.* at 1068. Last, the Chief Justice addressed the separate state law extortion offenses, a separate RICO predicate offense. In order to meet the RICO requirements, he held, the state offense "must be capable of being generically classified as extortionate." *Id.* The Chief Justice continued, "where as here the Model Penal Code and a majority of States recognize the crime of extortion as requiring a party to obtain or to seek to obtain property, as the Hobbs Act requires, the state extortion offense for purposes of RICO must have a similar requirement." Because petitioners did not obtain respondents' property, "both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed." *Id.* at 1069.

Justice Ginsburg's concurring opinion emphasized that "[RICO] has already 'evolved into something quite different from the original conception of its enactors,' warranting 'concerns over the consequences of an unbridled reading of the statute.'" *Id.* at 1069 (Ginsburg, J., concurring) (citations omitted). The majority is "rightly reluctant," she concluded, to "endors[e] the expansive definition of 'extortion' adopted by the Seventh Circuit." *Id.* Justice Stevens' dissent, in contrast, focused on the "expansive construction" that should be given to the term "property." *Id.* at 1070 (Stevens, J., dissenting). "Property," he noted, "encompasses the intangible right to exercise exclusive control over the lawful use of business assets." *Id.* He continued, the "commonsense reading" of the statute is that the "use of violence or threats of violence to persuade the owner of a business to surrender control of such an intangible [property] right is an appropriation of control embraced by the term 'obtaining.'" *Id.*

Cook County v. United States, 123 S. Ct. 1239, 537 U.S. ___ (2003), *available at* 2003 U.S. LEXIS 1957.
Cert. Granted June 28, 2002. Oral Argument: Jan. 14, 2003. Decided March 10, 2003.

A former employee of Cook County, Illinois, sued the county under the federal False Claims Act ("FCA"). The plaintiff filed a *qui tam* action on behalf of the United States to recover funds that she claimed were fraudulently obtained by the County in its administration of a drug treatment program. The County sought dismissal, arguing that it is not a "person" subject to liability under the FCA. The District Court initially denied the motion, but reconsidered following the Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000) (holding that states are not "persons" subject to *qui tam* actions under the FCA). The District Court then dismissed the case, holding that a "County, like a State, could not be subjected to treble damages." *Id.* at 1243. The Seventh Circuit reversed, finding that the County is a "person" under the FCA and "subject to the same penalties as other defendants," including treble damages.[10] The Supreme Court affirmed. Justice Souter delivered the opinion for a unanimous Court.

Justice Souter observed that the meaning of the term "person" in the FCA has remained unchanged since the statute was first passed in 1863. *Id.* at 1243-44. The County, he noted, concedes that private corporations were included in the term at the time the FCA was passed, but argues that municipal corporations "were not so understood until six years later," when *Cowles* v. *Mercer County,* 74 U.S. (7 Wall.) 118 (1869), was decided. *Id.* at 1244. *Cowles*, Justice Souter argued, merely announced an understanding already in place. *Id.* The Justice rebutted arguments that "person," as used in the FCA, was intended to be used in a more limited sense. First, references in the original enactment to persons "in" (or "not in") "'the land or naval forces of the United States,'" do not limit the definition of the term. *Id.* at 1245. Such an interpretation would exclude private, as well as municipal, corporations—a result that not even the County supports. Similarly, references to criminal liability do not exempt municipalities. Justice Souter noted, "Municipalities may not be susceptible to every statutory penalty, but that is no reason to exempt them from remedies that sensibly apply." *Id.* Second, Justice Souter noted that, although the FCA was written to prevent a specific type of fraud not engaged in by municipalities, "in no way does it affect the fact that Congress wrote expansively, meaning 'to reach all types of fraud . . . that might result in financial loss to the Government.'" *Id.* at 1246 (citation omitted).

9. The Chief Justice added, "'When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'" Scheidler v. NOW, 123 S. Ct. 1057, 1068 (2003) (citation omitted).

10. *See* United States *ex rel.* Chandler v. Cook County, 277 F.3d 969, 980-81 (7th Cir. 2002).

Last, Justice Souter addressed the alternative claim that punitive damages may not be assessed against a municipality unless expressly authorized by statute. In 1986, the FCA was amended to allow treble damages. This change, Justice Souter noted, "turn[ed] what had been a 'remedial' provision into an 'essentially punitive' one." *Id.* (citation omitted). This punitive character provides a reason "not to read 'person' to include a State," but it does not necessarily show "congressional intent to repeal implicitly the existing definition of that word, which included municipalities." *Id.* (citation omitted). He additionally noted that the FCA's damages have a "compensatory side, serving remedial purposes," which lessens the "force [of any punitive impact] in arguing against municipal liability." *Id.* at 1246-47. Furthermore, statutory interpretation disfavors "'repeals by implication.'" *Id.* at 1248 (citation omitted). It is unlikely that the 1986 amendments "wordlessly redefined 'person' to exclude municipalities," particularly given the stated purpose of the 1986 amendments: "[T]o make the FCA a 'more useful tool against fraud in modern times.'" Justice Souter concluded, "It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims." *Id.*

Kentucky Ass'n of Health Plans v. Miller, 123 S. Ct. 1471, 537 U.S. ___ (2003), *available at* 2003 U.S. LEXIS 2710. *Cert. Granted June 28, 2002. Oral Argument: Jan. 14, 2003. Decided: April 2, 2003.*

In 1994, the Kentucky state legislature enacted the Kentucky Health Care Reform Act, which contained an "any willing provider" provision.[11] Later, in 1996, an "any willing provider" provision was also added for chiropractors.[12] Plaintiffs, seven HMOs, filed a suit for injunctive relief, claiming that both provisions are preempted by ERISA. The district court granted defendant's motion for summary judgment, concluding that the provisions are saved from preemption because they "regulate insurance" under ERISA's savings clause.[13] The Sixth Circuit affirmed the decision of the lower court. The Supreme Court affirmed the Sixth Circuit. Justice Scalia delivered the opinion for a unanimous Court.

Justice Scalia noted that the first step in determining whether statutes are saved from preemption is to "ascertain whether they are 'laws . . . which regulate insurance' under § 1144(b)(2)(A)." *Id.* at *9. In order to fall under ERISA's savings clause, he held, a "state law must be 'specifically directed toward' the insurance industry." *Id.* In addition, "insurers must be regulated 'with respect to their insurance practices,'" because § 1144(b)(2)(A) "saves laws that regulate *insurance*, not insurers." *Id.* (citation omitted). Kentucky's laws satisfy these requirements. First, the statutes are "specifically directed toward" insurers, despite the contention of petitioners that "they regulate not only the insurance industry but also [providers]." *Id.* at *10. The Justice observed, "It is of course true that as a *consequence* of Kentucky's AWP laws, entities outside the insurance industry . . . will be unable to enter into certain agreements with Kentucky insurers," but the statutes do not, by their terms, impose "any prohibitions or requirements on health-care providers." *Id.* at *10-11. He concluded, "Regulations 'directed toward' certain entities will almost always disable other entities from doing, with the regulated entities, what the regulations forbid; this does not suffice to place such regulation outside the scope of ERISA's savings clause." *Id.* at *12. Second, Justice Scalia rebutted the contention that the insurers are not regulated "with respect to an insurance practice" because the statutes "focus upon the relationship between an insurer and *third-party providers*," rather than controlling "the actual terms of insurance policies." *Id.* at *13. Petitioners' argument, the Justice noted, relies upon a case analyzing § 2(b) of the McCarran-Ferguson Act. *Id.* ERISA's savings clause, however, is not concerned (as is the McCarran-Ferguson

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11. The statute provided: "Health care benefit plans shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and is willing to meet the terms and conditions for participation established by the health benefit plan." KY. REV. STAT. ANN. § 304.17A-110(3) (Banks-Baldwin 1995).

12. The statute provides: "A health benefit plan that includes chiropractic benefits shall: . . . (2) Permit any licensed chiropractor who agrees to abide by the terms, conditions, reimbursement rates, and standards of quality of the health benefit plan to serve as a participating primary chiropractic provider to any person covered by the plan." KY. REV. STAT. ANN. § 304.17A-171(2) (Banks-Baldwin 1999).

13. Ky. Ass'n of Health Plans, Inc. v. Nichols, 227 F.3d 352 (6th Cir. 2000). The sections were repealed by the Kentucky legislature effective July 1, 1999; however, the Sixth Circuit determined that the appeal was not moot as the repealed provisions had been replaced with the same requirements in a new statute. The new "any willing provider" provision is located at KY. REV. STAT. ANN. § 304.17A-270 (Banks-Baldwin 1999).

Act provision) with how to characterize *conduct* undertaken by private actors, but with how to characterize *state laws* in regard to what they 'regulate.'" *Id.* In this case, Kentucky's laws "regulate" insurance "by imposing conditions on the right to engage in the business of insurance." *Id.* at *14. In order to be covered by the savings clause, Justice Scalia added, the conditions "must also substantially affect the risk pooling arrangement between the insurer and the insured. . . . Otherwise, any state law aimed at insurance companies could be deemed a law that 'regulates insurance.'" *Id.* at *15.

Justice Scalia concluded, "Our prior decisions construing § 1144(b)(2)(A) have relied, to varying degrees, on our cases interpreting §§ 2(a) and 2(b) of the McCarran-Ferguson Act"; however, "[w]e believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance . . . [and] added little to the relevant analysis." *Id.* at *17. He continued, "We have never held that the McCarran-Ferguson factors are an essential component of the § 1144(b)(2)(A) inquiry," but, instead, they "were only 'checking points' to be used after determining whether the state law regulates insurance from a 'common-sense' understanding." *Id.* at *20-21. He continued, "Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a 'law . . . which regulates insurance' under § 1144(b)(2)(A), it must satisfy two requirements. . . . [First, it] must be specifically directed toward entities engaged in insurance. . . . . [Second, it] must substantially affect the risk pooling arrangement between the insurer and the insured." *Id.* at 21 (citations omitted). Since Kentucky's law satisfies each of these requirements, Justice Scalia held, it is not preempted by ERISA. *Id.*

Cases Yet to Be Decided This Term

Brief summaries of these cases can be found in the Third and Fourth Quarters Update, 2002: http://www.fed-soc.org/Publications/practicegroupnewsletters/federalism/FedSep4Q2002.pdf. Medical Board of California v. Michael J. Hason, No. 02-479, also discussed in the prior update, was dismissed on April 7, 2003.

- Nev. Dep't of Human Res. v. Hibbs, No. 01-1368.
  Cert. Granted: June 24, 2002. Oral Argument: Jan. 15, 2003.

- Pharmaceutical Research & Mfrs. of Am. v. Concannon, No. 01-188.
  Cert. Granted June 28, 2002. Oral Argument: Jan. 22, 2003.

- Franchise Tax Bd. of Cal. v. Hyatt, No. 02-42.
  Cert. Granted Oct. 15, 2002. Oral Argument: Feb. 24, 2002.

- Inyo County, et al. v. Paiute-Shoshone Indians, No. 02-281.
  Cert. Granted Dec. 2, 2002. Oral Argument: March 31, 2003.

Also of Interest

- United States v. McCoy, 2003 U.S. App. LEXIS 5378 (9th Cir. 2003) (holding that 18 U.S.C. § 2252(a)(4)(B), which regulates child pornography, "is unconstitutional as applied to simple intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution, or for any economic or commercial use, including the exchange of the prohibited material for other prohibited material"); *see also* Jason Hoppin, *9th Circuit: Feds Can't Try Child Porn Case,* THE RECORDER (Mar. 21, 2003), *at* http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1046833607281&t=LawArticle.