FEDERALISM & SEPARATION OF POWERS
2003 UPDATE: SECOND QUARTER

EXECUTIVE & LEGISLATIVE ACTIONS

The Judicial Nomination Battle (Still) Continues

The Democrats are now filibustering, not one, but two of President Bush's judicial nominees. More filibusters are rumored to be pending. Senate Republicans have taken some action to combat the filibusters. Senator John Cornyn, chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, has convened a hearing on "Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent." Senate Majority Leader Bill Frist has responded to the Democrats' tactics by proposing a change to the Senate filibuster rules for judicial nominees. This measure has been passed by the Senate Rules Committee (all Democrats on the committee were absent for the vote), but the measure has not yet been brought to the Senate floor. *See, e.g.*, http://www.foxnews.com/story/0,2933,90284,00.html. Meanwhile, Democrats are gearing up for what is likely to eventually be an even nastier fight over a Supreme Court Justice nominee. *See e.g.*, http://www.democrats.org/scotus/index.html.

Testimony in Senator Cornyn's subcommittee hearing is available at: http://www.senate.gov/~judiciary/hearing.cfm?id=744. Other hearings by the full Judiciary Committee are available at: http://www.senate.gov/~judiciary/nominations_hearings.cfm. The Federalist Society maintains updates on this issue at: http://www.fed-soc.org/judicialnominations.htm. Other articles of interest can be found at:

- John C. Eastman, *Justice Delayed*, CLAREMONT INST. (May 1, 2003), *at* http://www.claremont.org/projects/jurisprudence/030501eastman.html.
- James L. Swanson, *Minority Rules: Filibustering the Constitution*, CATO INST. (May 6, 2003), *at* http://www.cato.org/dailys/05-06-03-2.html.
- Terry Eastland, *Are Senate Filibusters Warranted?*, WKLY. STANDARD (May 13, 2003), *at* http://www.weeklystandard.com/Content/Public/Articles/000/000/002/677zrgzh.asp.
- John Nowacki, *On Deck: Carolyn Kuhl: Another Exceptional Nominee, Another Target For A Filibuster*, FREE CONGRESS FOUND. (June 3, 2003), *at* http://www.freecongress.org/commentaries/030603JN.asp.
- John Cornyn, *A Broken Tradition*, WASH. TIMES (June 5, 2003), at A21, *available at* http://www.washtimes.com/op-ed/20030604-104138-9833r.htm.

Executive Orders versus the Supreme Court

Several blogs have been spiritedly discussing a controversial statement made by Dick Gephardt on June 23. The Democratic presidential candidate said, "When I'm president, we'll do executive orders to overcome any wrong thing the Supreme Court does tomorrow or any other day." The candidate seems to have realized his mistake, and he has issued a statement clarifying his position. Links to various blog discussions appear below:

- http://www.instapundit.com/archives/010261.php#010261 (includes links to several other blogs).
- http://volokh.com/2003_06_22_volokh_archive.html#105656638758830424 (search down the page for more discussion of the subject).
- http://philcarter.blogspot.com/2003_06_22_philcarter_archive.html#105649465016285978 (includes discussion of Harry Truman's executive orders).

Also of Interest

- **Federalism as a Solution to States' Fiscal Crises?** *See* Michael S. Greve, *Washington and the States: Segregation Now*, AM. ENTERPRISE INST. (May 1, 2003), *available at* http://www.aei.org/publications/pubID.17053/pub_detail.asp.
- **Blaine Amendments v. Federalism?** *See, e.g.*, Richard W. Garnett, *Deciding the Future of Choice*, NAT'L. REV. ONLINE (May 20, 2003), *available at* http://www.nationalreview.com/comment/comment-garnett052003.asp.
- **Failing to reinforce *Lopez?*** The D.C. Circuit recently upheld, on Commerce Clause grounds, portions of the Endangered Species Act. *See* Neely Tucker, *Ruling on Endangered Species Upheld*, WASH. POST, April 3, 2003, at A6, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A14790-2003Apr2&notFound=true; *see also* John Eastman, *Arroyo Toads in Commerce*, CLAREMONT INST. (Apr. 2, 2003), *at* http://www.claremont.org/weblog/000177.html.

SUPREME COURT 2002-2003 TERM

The following cases, each with federalism or separation of powers implications, were decided by the Court since April 2, 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.

Franchise Tax Bd. of Cal. v. Hyatt, 123 S. Ct. 1683, 538 U.S. ___ (2003).
Oral Argument: Feb. 24, 2002. Decided: Apr. 23, 2003.

Gilbert Hyatt moved from California to Nevada in 1991 shortly before receiving substantial fees related to certain patented inventions. After his move, California's Franchise Tax Board commenced an audit against him for 1991-92 state income taxes. The Tax Board's audit determined that Hyatt was a California resident until 1992 and had underpaid state income taxes; it assessed additional taxes and penalties against him. Hyatt protested the assessments formally in California, but also sued the Tax Board in a Nevada district court for intentional torts and negligence allegedly committed during the audit. The Tax Board claimed that sovereign immunity, as well as the Full Faith & Credit Clause, entitled it to a dismissal of the case, as it would be immune from tort liability under California law. Both the district court and the Supreme Court of Nevada denied the Tax Board's motion for dismissal with respect to the intentional torts.[1] The Supreme Court affirmed. Justice O'Connor delivered the opinion for a unanimous Court.

Justice O'Connor explained that the Court's "'[Full Faith and Credit Clause] precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.'" *Id.* at 1687 (citation omitted). While the Clause "'is exacting' with respect to '[a] final judgment . . . rendered by a court' . . . it is less demanding with respect to choice of laws." *Id.* (citation omitted) (first and second alterations in original). The Clause "does not compel "'a state to substitute the statutes of other states for its own statues dealing with a subject matter concerning which it is competent to legislate.'"" *Id.* (citations omitted). Nevada's substantive law may be selected in a "constitutionally permissible manner" if it has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* (citations omitted) (internal quotation marks omitted). Such significant contacts are "manifest in this case." *Id.* at 1688 (citation omitted).

The Tax Board does not dispute these contacts; instead, it urges the Court to adopt a rule requiring a state court to extend full faith and credit to a "sister State's statutorily recaptured sovereign immunity

1. The district court would have heard the negligence claim; however, the Supreme Court of Nevada held that the negligence claim should be dismissed on comity principles.

from suit when a refusal to do so would 'interfere with a State's capacity to fulfill its own sovereign responsibilities.'" *Id.* (citation omitted). Justice O'Connor, applying *Nevada* v. *Hall*,[2] refused to adopt such a rule. First, she stated, *Hall* found that "the Constitution does not confer sovereign immunity on States in the courts of sister States." *Id.* at 1689. This ruling, the Justice held, is left undisturbed since the Tax Board has not requested a reexamination of that ruling. Second, *Hall* found that the Clause does not require a state to apply a sister state's sovereign immunity statutes "where such application would violate [the forum state's] own legitimate public policy." *Id.* In *Hall*, the Court found that "a suit against a State in a sister State's court 'necessarily implicates the power and authority' of both sovereigns." *Id.* The rule desired by the Tax Board in this case "would elevate California's sovereignty interests above those of Nevada," but there is no "principled distinction" between the states' interests in *Hall* and in this case. *Id.* at 1689-90. In sum, Justice O'Connor held, "we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause." *Id.* at 1690.

Pharmaceutical Research & Mfrs. of Am. v. Walsh, 123 S. Ct. 1855, 538 U.S. ___ (2003).
Oral Argument: Jan. 22, 2003. Decided: May 19, 2003.

In May 2000, Maine enacted its Maine Rx Program in an effort to combat high prescription prices. Under the program, residents of Maine may purchase drugs at a discount. This discount is subsidized from a "rebate" account maintained by the State. Funds in the rebate account are obtained from drug manufacturers, who are required to make payments into the fund. Those companies failing to enter into such a rebate agreement are subject to a prior authorization procedure. Pharmaceutical Research and Manufacturers of America (PRMA) filed suit to have the law declared invalid on the grounds that it violates the dormant Commerce Clause and is preempted by the Medicaid statute. The Supreme Court affirmed a reversal of summary judgment. Justice Stevens delivered the opinion of the Court with respect to Parts I, II, III, and VI, in which the Chief Justice and Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined. Justices Souter, Ginsburg, and Breyer joined Parts IV and VII, and Justices Souter and Ginsburg joined Part V. Justice Breyer filed an opinion concurring in part and concurring in the judgment. Justices Scalia and Thomas filed opinions concurring in the judgment. Justice O'Connor filed an opinion concurring in part and dissenting in part, in which the Chief Justice and Justice Kennedy joined.

Justice Stevens, in his opinion for the Court, evaluated the claim of PRMA that the Maine Rx Program violates the Commerce Clause. *Id.* at 1870. The claim, he noted, focuses on the effects of the rebate agreements if a drug manufacturer complies with the requirement, either voluntarily or involuntarily. *Id.* PRMA argues, first, that the "rebate requirement constitutes impermissible extraterritorial regulation" and second, that it "discriminates against interstate commerce in order to subsidize in-state retail sales." *Id.* The arguments, Justice Stevens held, are not persuasive. Unlike the price control and price affirmation statutes cited in *Baldwin* v. *G. A. F. Seelig, Inc.*[3] and *Healy v. Beer Institute*,[4] respectively, the Maine Rx statute "'does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices.'" *Id.* at 1871. (citation omitted). Neither does the rule in *West Lynn Creamery, Inc.* v. *Healy*[5] apply. In that case, the Court evaluated an assessment on all milk sold by dealers to Massachusetts retailers. The assessment was then distributed to in-state dairy farmers. The Court found that the order "effectively imposed a tax on out-of-state producers to subsidize production by their in-state competitors." *Id.* The statute was held invalid as it

2. 440 U.S. 410 (1979).

3. 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."), *quoted in* Pharmaceutical Research & Mfrs. of Am. v. Walsh, 123 S. Ct. 1855, 1871 (2003).

4. *See Walsh*, 123 S. Ct. at 1871 (observing that, in *Healy v. Beer Institute*, 491 U.S. 324 (1989), a Massachusetts statute was found to have "the impermissible effect of regulating the price of beer sold in neighboring States").

5. 512 U.S. 186 (1994).

had a "discriminatory effect analogous to a protective tariff that taxes goods imported from neighboring states but does not tax similar products produced locally." *Id.* The Maine Rx Program, however, does "not impose a disparate burden on any competitors" as the *West Lynn Creamery* statute did. *Id.*

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, determined that the question before the Court is "whether the District Court abused its discretion when it entered the preliminary injunction." *Id.* at 1866 (plurality opinion). The Court's answer to this question cannot "finally determine the validity of Maine's Rx Program," as further proceedings could lead to a different result. *Id.* Therefore the question is "whether there is a probability that Maine's program was pre-empted by the mere existence of the federal statute." *Id.* at 1867. The presumption must be that the statute is valid. We ask "whether petitioner has shouldered the burden of overcoming that presumption." *Id.* At this stage, PRMA has not carried this burden. *Id.* at 1871.

Justice Stevens, joined by Justices Souter and Ginsburg, stated that, with regards to PRMA's preemption claim, in order to obtain the injunction entered by the District Court, the "petitioner bore the burden of establishing, by a clear showing, a probability of success on the merits." *Id.* at 1867. PRMA had the burden of showing "that there was no Medicaid-related goal or purpose served by Maine Rx." *Id.* Justice Stevens observed that, if the statute serves Medicaid-related goals on its face, then "it would follow that the District Court's evaluation rested on an erroneous predicate." *Id.* Indeed, he found, several Medicaid-related goals are readily apparent: medical benefits are provided to needy persons, Medicaid expenses are reduced, and patients are protected from inappropriate prescriptions. *Id.* at 1867-68. Despite this finding, under the Medicaid statute, these Medicaid-related purposes would not be sufficient to uphold the program if it also "severely curtail[s]" access to prescription drugs. *Id.* at 1868. However, the States have "'substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in "the best interest of the recipients."'" *Id.* (citation omitted). This "presumption against federal pre-emption of a state statute designed to foster public health has special force when it appears, and the Secretary has not decided to the contrary, that the two governments are pursuing 'common purposes.'" *Id.* at 1869 (internal citations omitted).

Justice Breyer's concurrence disputed the burden that must be met by the petitioner to obtain an injunction from the court. *Id.* at 1871 (Breyer, J., concurring). To prevail, he stated, "petitioner ultimately must demonstrate that Maine's program would 'seriously compromise important federal interests.'" *Id.* at 1872. It can not obtain a preliminary injunction "simply by showing minimal or quite 'modest' harm," particularly when the statute "expressly permits prior authorization programs." *Id.*

Justice Scalia, concurring in the judgment, concluded that petitioner's negative Commerce Clause claim should be rejected because it is "neither facially discriminatory against interstate commerce nor similar to other state action that we have hitherto found invalid on negative-Commerce-Clause grounds." *Id.* at 1873 (Scalia, J., concurring) (internal citation omitted). The preemption claim should be rejected, as petitioner should pursue its remedies under the Medicaid statute before seeking court enforcement. *Id.* at 1874.

Justice Thomas, concurring in the judgment, argued that further proceedings would not reveal merit to petitioner's claim, as theorized by the plurality. He explained that the Medicaid statute "represents a delicate balance Congress struck between competing interests—care and cost, mandates and flexibility, oversight and discretion." *Id.* at 1874 (Thomas, J., concurring). Given this complexity and the "broad grant of discretion to States to impose prior authorization," there is no "credible conflict between Maine Rx and the Medicaid Act." *Id.* at 1875. Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,*[6] petitioner must "show that the Medicaid Act is unambiguous or, in other words, that Congress 'has directly spoken

6. 467 U.S. 837 (1984).

to the precise question at issue.'" *Id.* at 1877. This showing cannot be made.[7] The Commerce Clause "challenge is easily met, because 'the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.'" *Id.* at 1878 (citation omitted).

Justice O'Connor, dissenting in part and concurring in part, found that the District Court was justified in issuing a preliminary injunction. The Court must "'determine whether state regulation is consistent with the structure and purpose' of the federal statutory scheme 'as a whole.'" *Id.* at 1879 (O'Connor, J., dissenting) (citation omitted). Under the statute, prior authorization may serve a Medicaid purpose by "'safeguarding against unnecessary utilization and assuring that payments are consistent with efficiency, economy and quality of care.'" *Id.* (citation omitted). Therefore, a State may use prior authorization to reduce Medicaid costs, but it may not use prior authorization to generate revenue for unrelated purposes. *Id.*

Inyo County v. Paiute-Shoshone Indians, 123 S. Ct. 1887, 538 U.S. ___ (2003).
Oral Argument: March 31, 2003. Decided: May 19, 2003.

Bishop Paiute Tribe is a federally-recognized tribe. It operates the Bishop Paiute Gaming Corporation, which operates the Paiute Palace Casino on the Tribe's reservation. Early in 2000, as part of a welfare fraud investigation, Inyo County officials submitted a request to the Tribe for the release of the payroll records of three casino employees. When the Tribe would not release the records, the County obtained and executed a search warrant. The Tribe filed suit for injunctive relief and claimed compensatory damages under 42 U.S.C. § 1983.[8] The district court granted the County's motion to dismiss, but the Ninth Circuit reversed in part, holding that the County had violated the Tribe's sovereign immunity. The Supreme Court vacated and remanded the decision. Justice Ginsburg delivered the opinion of the Court, in which the Chief Justice and Justices O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer joined. Justice Stevens filed an opinion concurring in the judgment.

The first question to be addressed, Justice Ginsburg stated, is "whether the Tribe's complaint is actionable under § 1983."[9] *Id.* at 1892. In considering this question, the "pivotal" issue is whether the Tribe "qualifies *as a claimant*—a 'person within the jurisdiction' of the United States—under § 1983." *Id.* at 1892 (citation omitted). Justice Ginsburg held that "qualification of a sovereign as a 'person' who may maintain a particular claim for relief depends not 'upon a bare analysis of the word "person."'" *Id.* at 1893 (citation omitted). It depends "on the 'legislative environment' in which the word appears." *Id.* (citation omitted). Justice Ginsburg explained, "Section 1983 was designed to secure private rights against government encroachment not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation." *Id.* at 1894 (internal citation omitted). A person "complaining of a Fourth Amendment violation would be a 'person' qualified to sue under § 1983," while that same person "would have no right to immunity from an appropriately executed search warrant based on probable cause." *Id.* Therefore, Justice Ginsburg concluded, "the Tribe may not sue under § 1983 to vindicate the sovereign right it here

7. To the contrary, Justice Thomas observed, "Obstacle pre-emption's very premise is that Congress has not expressly displaced state law, and thus not 'directly spoken' to the pre-emption question. Therefore, where an agency is charged with administering a federal statute as the Secretary is here, *Chevron* imposes a perhaps-insurmountable barrier to a claim of obstacle pre-emption." *Walsh*, 123 S. Ct. at 1871 (Thomas, J., concurring).

8. The Tribe sought injunctive relief to "vindicate its status as a sovereign immune from state processes under federal law, and to establish that state law was preempted to the extent that it purported to authorize seizure of tribal records." Inyo County v. Paiute-Shoshone Indians, 123 S. Ct. 1887, 1891 (2003). In addition to its § 1983 claim, it asserted jurisdiction under the "federal common law of Indian affairs." *Id.*

9. 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

claims." *Id.* Absent the § 1983 foundation for its suit,[10] it "is unclear what federal law, if any, the Tribe's case 'arises under.'" *Id.* The case is therefore remanded for resolution of the jurisdictional issue.

Justice Stevens concurred in the judgment, but found that a Tribe is a "'person' who may sue under 42 U.S.C. § 1983." *Id.* (Stevens, J., concurring). Instead, the Tribe's complaint was faulty because it did not state a cause of action under § 1983. The County's "alleged infringement of the Tribe's sovereign prerogatives did not deprive the Tribe of 'rights, privileges, or immunities secured by the Constitution and laws' within the meaning of § 1983." *Id.* The warrant was valid. The Tribe instead seems to be arguing that "as a sovereign, it should be accorded a special immunity that private casinos do not enjoy." *Id.* at 1895. Section 1983 was not enacted to handle this "sort of claim to special privileges, which is based entirely on the Tribe's sovereign status." *Id.*

Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 538 U.S. ___ (2003).
Oral Argument: Jan. 15, 2003. Decided: May 27, 2003.

Hibbs brought suit against the Nevada Department of Human Resources and others alleging violations of the Family and Medical Leave Act of 1993 (FMLA). The district court granted summary judgment to the defendants, based partially upon a finding that the claim was barred by Nevada's Eleventh Amendment sovereign immunity.[11] The Ninth Circuit reversed the district court holding, finding that FMLA contains a "sufficiently clear expression of congressional intent to abrogate state sovereign immunity" and that this congressional exercise of power is valid under Section 5 of the Fourteenth Amendment.[12] The Supreme Court affirmed. The Chief Justice delivered the opinion of the Court, in which Justices O'Connor, Souter, Ginsburg, and Breyer joined. Justice Souter filed a concurring opinion, in which Justices Ginsburg and Breyer joined. Justice Stevens filed an opinion concurring in the judgment. Justice Scalia filed a dissenting opinion. Justice Kennedy filed a dissenting opinion in which Justices Scalia and Thomas joined.

Congress, the Chief Justice began, may abrogate a state's sovereign immunity "if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Id.* at 1977. Since the "clarity of Congress' intent here is not fairly debatable," the Court must determine only whether the statute is valid under the Fourteenth Amendment. *Id.* Under Section Five, Congress may enforce the substantive guarantees of Section One, including equal protection of the laws. This authority includes more than the ability merely to "proscribe conduct that we have held unconstitutional." *Id.* Congress may also "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Id.* The Chief Justice noted, however, that such legislation may not reach "beyond the scope of § 1's actual guarantees." *Id.* It must be "an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.'" *Id.* (citation omitted). The two are distinguished through application of the *City of Boerne* test: Section Five legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 1978 (citation omitted).

The Chief Justice reviewed evidence presented to Congress at the time FMLA was enacted. *Id.* at 1978-79. The evidence, he observed, indicates that "States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits." *Id.* at 1979. Although the dissent cites the existence of state family leave policies, many of these were limited. *Id.* at 1980. Congress could "reasonably conclude" that they were insufficient and seek to enact its own remedy. *Id.* at 1981. "In

10. The Tribe's claim under the "federal common law of Indian affairs" was quickly dismissed as unclear. *Inyo County*, 123 S. Ct. at 1894 ("But the Tribe has not explained, and neither the District Court nor the Court of Appeals appears to have carefully considered, what prescription of federal common law enables a tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state criminal processes.").

11. *See* Hibbs v. HDM Dep't of Human Res., 273 F.3d 844, 849 (9th Cir. 2001).

12. *See id.* at 853, 871.

sum," the Chief Justice held, "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."[13] *Id.* This congressional remedy "is 'congruent and proportional to the targeted violation.'" *Id.* at 1982 (citation omitted). The alternative, a statute mandating gender equality in family leave provisions, "would not have achieved Congress' remedial object," as states could simply have refused to give employees any family leave at all. *Id.* at 1983. Because FMLA is "narrowly targeted" and limits which employees are entitled to take advantage of the leave provisions, the Chief Justice concluded, it is "congruent and proportional to its remedial object, and can 'be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Id.* at 1983-84 (citation omitted).

Justice Kennedy's dissent agreed that Congress may not "define the substantive content of the Equal Protection Clause; it may only shape the remedies warranted by the violations of that guarantee." *Id.* at 1986 (Kennedy, J., dissenting.) However, the Justice warned, "[t]his [dual] requirement has special force in the context of the Eleventh Amendment," and the Court should show "far more caution" before it finds the FMLA to be a "congruent and proportional remedy to an identified pattern of discrimination." *Id.* The Court, he stated, failed to show that FMLA combats gender-based discrimination.[14] *Id.* at 1987-89. To the contrary, the Justice argued, "the States appear to have been ahead of Congress in providing gender-neutral family leave benefits." *Id.* at 1989. Even if there had been discrimination, the remedy offered in FMLA is not a "congruent and proportional" remedy—instead, it is an entitlement program. *Id.* at 1992. A "congruent remedy," Justice Kennedy noted, need only ensure that benefits "are available to men and women on an equal basis." *Id.* It need not impose "across the board" twelve-week minimum leave requirements. *Id.* Congress may consider this the best public policy solution; however, failure to follow the scheme should not be deemed "unconstitutional conduct" causing the states to be liable for private monetary damages. *Id.*

Lawrence v. Texas, 123 S. Ct. ___, 539 U.S. ___ (2003), *available at* 2003 U.S. LEXIS 5013.
Oral Argument: March 26, 2003. Decided: June 26, 2003.

Two police officers were dispatched to a residence in Houston, Texas, in response to a report of a weapons disturbance. The police officers entered the residence to find petitioners engaged in a sexual act. The petitioners were charged under Texas Penal Code § 21.06(a), making it a crime to engage in "deviate sexual intercourse with another individual of the same sex." *Id.* at *9. The Texas state courts rejected petitioners' contention that the statute violated their rights under the Fourteenth Amendment.[15] The Supreme Court reversed and remanded. Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice O'Connor filed a concurring opinion.[16] Justice Scalia filed a dissenting opinion, in which the Chief Justice and Justice Thomas joined. Justice Thomas also filed a separate, dissenting opinion.[17]

Justice Kennedy determined that the question before the Court is whether petitioners "were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the

13. The opposite result was reached in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). In those cases, the Chief Justice explained, "the § 5 legislation under review responded to a purported tendency of state officials to make age- or disability-based distinctions." Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1981 (2003). Such schemes are reviewed under the rational basis test. This case involves a gender-based distinction, requiring review under a heightened level of scrutiny. *Id.* at 1981-82.

14. The evidence of discrimination considered by Congress, Justice Kennedy argued, concerned private or federal discrimination, not discrimination by state employers. *Hibbs*, 123 S. Ct. at 1987-89 (Kennedy, J., dissenting).

15. Claims were considered under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Petitioners also claimed the statute violated a provision in the Texas Constitution.

16. Justice O'Connor's concurrence found the statute unconstitutional under the Equal Protection Clause. The Justice refused to join in overturning *Bowers v. Hardwick*. Lawrence v. Texas, 2003 U.S. LEXIS 5013, at *37 (O'Connor, J., concurring).

17. Justice Thomas' dissent noted that "the law before the Court today 'is . . . uncommonly silly.'" *Id.* at *82 (Thomas, J., dissenting) (citation omitted). Yet, he stated, he acts not as a "member of the Texas Legislature," but "as a member of this Court." *Id.* at *83. As such, he is "not empowered to help petitioners and others similarly situated." *Id.*

Fourteenth Amendment to the Constitution." *Id.* at *11. The Court in *Bowers v. Hardwick*,[18] the previous case on this subject, failed to "appreciate the extent of the liberty at stake." *Id.* at *16. Instead, Justice Kennedy stated, the Court "demean[ed]" the claim of the petitioners by misstating it as merely "whether there is a fundamental right to engage in consensual sodomy." *Id.* at *16-17. The *Bowers* Court, he continued, justified its holding by addressing the "ancient roots" against such conduct. *Id.* at *17. However, the Justice held, this history was "overstated" by the Court. *Id.* at *23. Homosexual conduct has been condemned for centuries, but much of this condemnation is based upon "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id.* The question here, however, is whether the state may "enforce these views . . . through operation of the criminal law." *Id.* at *24. *Bowers* failed to acknowledge the "emerging recognition" that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at *24-25. Instead, the *Bowers* precedent "demeans the lives of homosexual persons" and allows the "stigma" of criminal conduct to be imposed upon homosexual relations. *Id.* at *31. Further, *Bowers* has been the subject of "substantial and continuing" criticism, both domestically and abroad. *Id.* at *32.

Justice Stevens' dissent in *Bowers* stated, "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'" *Id.* at *35 (citation omitted). Moreover, "'individual decisions by married persons . . . are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. . . . [T]his protection extends to intimate choices by unmarried as well as married persons.'" *Id.* Justice Stevens' opinion should have controlled at the time of *Bowers*, Justice Kennedy held. *Bowers v. Hardwick* is overruled. Justice Kennedy concluded, "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at *36-37.

Justice Scalia's dissenting opinion[19] noted that the Texas statute "undoubtedly imposes constraints on liberty." *Id.* at *60. However, the Justice stated, the Fourteenth Amendment "*expressly allows* States to deprive their citizens of 'liberty,' *so long as 'due process of law' is provided*." *Id.* at *61 (citation omitted). The substantive due process doctrine holds that the "Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* The Court has held that "*only* fundamental rights qualify for this so-called 'heightened scrutiny' protection—that is, rights which are "'deeply rooted in this Nation's history and tradition.'"" *Id.* (citations omitted). In contrast, "[a]ll other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest." *Id.* at *62. *Bowers* concluded that homosexual sodomy does not implicate this type of fundamental right. Nothing in this case, Justice Scalia observed, has contradicted the finding in *Bowers*. To the contrary, the Court relies upon "'laws and traditions in the past half century'" reflecting "'*an emerging awareness*'" regarding this issue. *Id.* at *69. Obviously, Justice Scalia stated, an "'emerging awareness' is by definition not 'deeply rooted in this Nation's history and traditions.'" *Id.* at *70. Rather than address this point, Justice Scalia continued, the Court rests its holding on a "contention that there is no rational basis for [this] law." *Id.* at *71. Texas sought to "further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable'—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult

18. 478 U.S. 186 (1986).

19. The dissent began by noting the inconsistent application of stare decisis by the Court. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Justice Scalia noted, "*stare decisis* meant preservation of judicially invented abortion rights," and *Roe v. Wade* was upheld for all the reasons that *Bowers* is struck down in this case. Lawrence v. Texas, 2003 U.S. LEXIS 5013, at *51 (Scalia, J., dissenting). Justice Scalia concluded that the approach taken to *stare decisis* in this case should invite the Court to also overrule *Roe v. Wade*. *Id.* at *52.

incest, bestiality, and obscenity." *Id.* at *71-72 (internal citation omitted). As *Bowers* held, this is a "legitimate state interest." *Id.* at *72. The Court's holding to the contrary "effectively decrees the end of all morals legislation." *Id.* If the "promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review." *Id.*

Instead, Justice Scalia concluded, the outcome of this case is best explained as the result of a Court that "has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." *Id.* at *77. If a group feels that certain social mores should be changed, it "has the right to persuade its fellow citizens that its view of such matters is the best." *Id.* at *79. However, "persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else." *Id.* The steps taken by Texas are "well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' [created] by a Court that is impatient of democratic change." *Id.* at *79-80. Last, Justice Scalia observed, "One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action." *Id.* at *80. It does not. The Court cannot stop with this step. Further steps, such as court-mandated approval of homosexual marriage, will inevitably follow.

Also of Interest

- **Citizens Bank v. Alafabco, 123 S. Ct. 2037, 539 U.S. ___ (2003) (per curiam)** (affirming that the "parties' debt-restructuring agreement is 'a contract evidencing a transaction involving commerce' within the meaning of the Federal Arbitration Act (FAA)" and stating that the Alabama Supreme Court had misread *United States v. Lopez*).

- **Hillside Dairy, Inc. v. Lyons, 123 S. Ct. 2142, 539 U.S. ___ (2003)** (holding that the Federal Agriculture and Reform Act of 1996 "does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge" and the state appellate court erred in dismissing the case based on the statute).

- **Am. Ins. Ass'n v. Garamendi, 123 S. Ct. ___, 539 U.S. ___ (2003), *available at* 2003 U.S. LEXIS 4797** (finding that California's Holocaust Victim Insurance Relief Act of 1999 "interferes with the National Government's conduct of foreign relations" and is therefore preempted).