FEDERALISM & SEPARATION OF POWERS
2003 UPDATE: THIRD QUARTER

EXECUTIVE & LEGISLATIVE ACTIONS

The Judicial Nomination Fight Continues

On September 4, 2003, Miguel Estrada withdrew his nomination to the D.C. Circuit Court of Appeals—more than 2 years after President Bush submitted his nomination to the Senate. Democrats immediately declared victory and promised to filibuster more of the President's nominees. Two additional nominees, Justice Priscilla Owen and Attorney General William Pryor, are already being filibustered. Filibusters of additional judges, including Judge Carolyn Kuhl and Justice Janice Brown seem likely.

- For a suggestion that the President should make recess appointments to overcome filibusters, see Kate O'Beirne, *The Joy of Recess: An Idea for Countering Democratic Filibustering*, NAT'L REV., Oct. 13, 2003, at 19.

- **For more information:**
  - Jay Bryant, *The Estrada Filibuster*, TOWNHALL.COM, Sept. 5, 2003, *at* http://www.townhall.com/columnists/GuestColumns/Bryant20030905.shtml.
  - *Squandering Miguel Estrada*, CHI. TRIB., Sept. 7, 2003, at 8, *available at* http://pqasb.pqarchiver.com/chicagotribune/index.html?ts=1065806299.
  - Charles Hurt, *Senate GOP Fuzzy on Tactics to Handle Judicial Filibusters*, WASH. TIMES, Sept. 7, 2003, at A6, *available at* http://washingtontimes.com/national/20030906-110354-5673r.htm.
  - Paul Greenberg, *The Borking of Miguel Estrada*, TOWNHALL.COM, Sept. 9, 2003, *at* http://www.townhall.com/columnists/paulgreenberg/pg20030909.shtml.
  - Emmett Tyrrell, *Miguel Estrada—Next Stop Supreme Court*, TOWNHALL.COM, Sept. 11, 2003, *at* http://www.townhall.com/columnists/emmetttyrrell/et20030911.shtml.
  - Mario Diaz-Balart, *Post-Estrada ramifications*, WASH. TIMES, Sept. 17, 2003, at A18, *available at* http://washingtontimes.com/commentary/20030916-090254-3841r.htm.

Do Not Call List

A federal district court has held that the Do Not Call List is a violation of telemarketers' free speech rights. Is the court upholding the Constitution, or is it substituting its own judgment for the will of the people, as expressed through overwhelming support for the policy from Congress? Although the list was struck down as unconstitutional, the Tenth Circuit granted a stay on the order until oral arguments before the federal appeals court on November 10, 2003. The Justice Department has intervened in the case and will argue that the list is constitutional.

- **For more information:**
  - Robert A. Levy**,** *Turn the Ringer Off*, NAT'L REV. ONLINE, Oct. 2, 2003, *at* http://www.nationalreview.com/comment/levy200310020827.asp.
  - James Gattuso, Heritage Foundation, *Fixing the Do Not Call List: Do Not Exempt*, FOXNEWS.COM, Oct. 6, 2003, at http://www.foxnews.com/story/0,2933,99281,00.html.
  - Geoffrey Colvin, *America Hangs Up On Telemarketers*, FORTUNE, Oct. 13, 2003, at 58, *available at* http://www.fortune.com/fortune/valuedriven ("We need to appreciate the magnitude of what has happened. America's stampede to zap telemarketers is a true grassroots movement, and a huge one.").

Separation of Powers at the State Level

The dispute over redistricting in Texas raised many separation of powers issues at the state level. Can the Governor force legislators to attend a special session? Can the courts authorize Texas Rangers to

pursue missing Senators or Representatives across state borders, arrest them, and bring them back to Austin? Can fleeing legislators force the Governor or Lt. Governor to obtain preclearance under the Voting Rights Act before the legislature considers redistricting under modified voting rules? Can a court overturn fines assessed against the fleeing legislators by their fellow Senators? Should the President mediate in the dispute, simply because the issues arise in his home state? Ultimately, three lawsuits were filed: one in state district court, one in the Texas Supreme Court, and one in a federal district court in Laredo. The courts refused to get involved.

Court documents in the Laredo case are available here: http://www.txs.uscourts.gov/cgi-bin/notablecases/notablecases.pl?action=chome&caseno=5:03-CV-113. Democratic press releases are available here: http://www.txdemocrats.org/index.asp?menu=news&page=tdpPress. Republican information is available here: http://www.texasgop.org/features/redistricting.php.

- **For more information:**
  - Kris Axtman, *Texas Duel Highlights Separation of Powers*, CHRISTIAN SCI.-MONITOR, Aug. 11, 2003, *available at* http://www.csmonitor.com/2003/0811/p02s02-uspo.html.

Also of Interest

- Richard Lessner, *Judicial Tyranny*, WASH. TIMES, Aug. 10, 2003, *available at* http://www.washtimes.com/commentary/20030809-110415-3918r.htm (arguing that recent court rulings reflect the fact that "our American system of separated powers, checks and balances, is seriously out of balance").

SUPREME COURT 2003-2004 TERM

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.

Virginia v. Maryland, No. 129, Original.
Leave to File Bill of Complaint Granted: May 30, 2000. Argument scheduled: Oct. 7, 2003.

For more than 200 years, Maryland and Virginia have argued over their respective rights to the Potomac River. The disputes stem from a boundary dispute that predated the birth of the country. This case is the latest in that series of disputes. In 1996, Virginia's Fairfax County Water Authority sought permits from Maryland for construction of a water intake structure extending from the Virginia shore into the Potomac at a location above its tidal reach. It was unable to get a permit in a timely manner, and it sought leave to file a Bill of Complaint in the Supreme Court of the United States. The Court granted Virginia's motion on May 30, 2000, and referred the matter to a Special Master on October 10, 2000. The Special Master issued a recommendation in favor of Virginia.

The Compact of 1785, the Black-Jenkins Award of 1877, and the Potomac River Compact of 1958 (the "Agreements") are the controlling documents in the dispute. Virginia contends that the Agreements give it the right to use the Potomac and to construct improvements appurtenant to the Virginia shore without obtaining a permit from Maryland. Maryland argues instead that Virginia's rights do not extend beyond the tidal reach of the river and that it can regulate Virginia's improvements and withdrawal of water from the River. Maryland has also asserted the affirmative defense of acquiescence.

The questions before the Court are:

1. Do the rights granted to Virginia pursuant to Clause IV of the Black-Jenkins Award of 1877, Article VII of the Compact of 1785, and Article VII, Section 1, of the Potomac River Compact of 1958, apply upstream of the tidal portion of the Potomac River?

2. Do Maryland's interstate compact obligations preclude it from requiring that Virginia, its governmental subdivisions and its citizens apply to Maryland for a waterway construction permit in order to build improvements appurtenant to their properties on the Virginia shore of the Potomac River?

3. Do Maryland's interstate compact obligations preclude it from requiring that Virginia, its governmental subdivisions and its citizens apply to Maryland for a water appropriation permit in order to withdraw water from the Potomac River?[1]

Frew v. Hawkins, No. 02-628.
Cert. Granted: March 10, 2003. Argument scheduled: Oct. 7, 2003.

Plaintiffs filed suit against the State of Texas and several state officials, alleging that defendants had failed to provide indigent children in Texas with certain early and periodic screening, diagnostic, and treatment services (EPSDT) mandated under the federal Medicaid Act. They sought injunctive relief under 42 U.S.C. § 1983 and obtained certification of a class of indigent children. A consent decree was agreed to by the parties in 1996. It ordered the state defendants to implement certain procedures related to their EPSDT program, and it contemplated continuing oversight by the district court. In 1998, plaintiffs filed a motion to enforce the consent decree, alleging that defendants had failed to comply with certain requirements. The defendants objected to the court's jurisdiction under 42 U.S.C. § 1983, citing the Eleventh Amendment. The district court found that the consent decree had been violated and was enforceable and directed that a plan for corrective action be submitted. The defendants appealed the decision and a supplemental motion regarding dental services to the Fifth Circuit.

The Fifth Circuit found that the district court had erroneously failed to consider whether the alleged violation of the consent decree constitutes a statutory violation of the Medicaid Act remediable under § 1983. Instead, the district court focused solely on the language in the consent decree. A court cannot remedy a violation of a provision in a consent decree, the Fifth Circuit found, unless plaintiffs also demonstrate that the violation is a violation of a federal right. This plaintiffs cannot do. Last, plaintiffs cannot argue a waiver of Eleventh Amendment immunity. Such waivers may only be found where they are "'unequivocally expressed.'" Simply signing this decree was not such an unequivocal waiver.

The plaintiffs appealed the Fifth Circuit holding, and the Supreme Court granted cert on March 10, 2003. The questions presented are:

1. Do State officials waive Eleventh Amendment immunity by urging the district court to adopt a consent decree when the decree is based on federal law and specifically provides for the district court's ongoing supervision of the officials' decree compliance?

2. Does the Eleventh Amendment bar a district court from enforcing a consent decree entered into by State officials unless the plaintiffs show that the "decree violation is also a violation of a federal right" remediable under § 1983?[2]

Locke v. Davey, No. 02-1315.
Cert. Granted: May 19, 2003. Argument scheduled: Dec. 2, 2003.

Davey, a student in Washington, was awarded a Promise Scholarship through a state program. The scholarship is offered to students qualified by virtue of their grades, family income, and attendance at an accredited college. Davey lost the scholarship when he declared his major to be Pastoral Ministries. He filed suit, claiming that the state's action violated the religion clauses of the First Amendment and his federal and state constitutional rights to freedom of speech and equal protection. Washington contends that it did not prohibit Davey from pursuing religious studies. It merely refused to fund such studies since

1. Motion for Leave to File Bill of Complaint, Brief in Support of Motion and Bill of Complaint at i, *Virginia v. Maryland* (No. 129).

2. Brief for Petitioners at i, *Frew v. Hawkins* (No. 02-628).

its Constitution prohibits the funding of religious instruction. The district court upheld the state program, and Davey appealed to the Ninth Circuit.

The Ninth Circuit held that the policy lacks neutrality on its face. The scholarship is available to all students meeting generally applicable criteria, unless they major in a religious course of study. The classification facially discriminates on the basis of religion; therefore, it must survive strict scrutiny to be valid. The state's interest in avoiding conflict with its own constitution or laws is not a compelling reason to withhold scholarship funds. Washington's interest is less than compelling. It does not directly fund religious establishments. It gives money to students who use money for a variety of food, housing and other educational purposes. Funding of religion is indirect at best. The state policy denying scholarships solely because a student pursues a degree in theology is a violation of the student's free exercise of religion.

The state defendants appealed the Ninth Circuit's decision. The Supreme Court granted cert on May 19, 2003. The question presented is:

> The Washington Constitution provides that no public money shall be appropriated or applied to religious instruction. Following this constitutional command, Washington does not grant college scholarships to otherwise eligible students who are pursuing a degree in theology. Does the Free Exercise Clause of the First Amendment of the United States Constitution require the state to fund religious instruction, if it provides college scholarships for secular instruction?[3]

Tenn. Student Assistance Corp. v. Hood, No. 02-1606.
Cert. Granted: Sept. 30, 2003. Argument not yet scheduled.

Following completion of her Chapter 7 bankruptcy proceedings in 1999, Hood filed a separate adversary proceeding for a hardship discharge from her student loans. The separate proceeding was necessary under 11 U.S.C. § 523(a)(8), which prohibits discharge of student debt held by governmental bodies without a showing of "undue hardship." Tennessee Student Assistant Corporation (TSAC) was named as a defendant in the adversary proceeding. TSAC moved to dismiss on grounds of sovereign immunity. The Bankruptcy Court denied the motion, 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).[4] A unanimous bankruptcy appellate panel affirmed and TSAC appealed to the Sixth Circuit.

Private suits, the Sixth Circuit noted, can only proceed if the state waives its sovereign immunity or if Congress, acting pursuant to a valid constitutional authority, abrogates the state's sovereign immunity. Congress has made its intention unmistakably clear in the language of the statute. It claims its authority for acting as it did from the Article I, section 8 of the Constitution, which gives Congress the power to make "uniform" laws over bankruptcy. The text of the Constitution and language in *The Federalist Nos. 81* and *32* suggest that the states shed their immunity from suit along with their power to legislate when the states agreed to the Bankruptcy Clause's uniformity provision. The states' immunity was thus "'altered by the plan of the Convention,'" and Congress clearly exercised power granted to it when it abrogated the states' sovereign immunity in 11 U.S.C. § 106(a). *See* Hood v. Tenn. Student Assistance Corp. (in Re Hood), 319 F.3d 755, 767 (6th Cir. 2003). Accordingly, TSAC is not immune from suit under 11 U.S.C. § 523(a)(8).

TSAC appealed the Sixth Circuit holding, and the Supreme Court granted cert on September 30, 2003. The question presented is:

> Whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause of Article I, U.S. Const., art. I, § 8, cl.4.[5]

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3. Brief for Petitioners at i, *Locke v. Davey* (No. 02-1315).

4. Section 106(a) states: "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."

5. Petition for a Writ of Certiorari at i, *Tenn. Student Assistance Corp. v. Hood* (No. 02-1606)

Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist, No. 02-1343.
Cert. Granted: June 9, 2003. Argument not yet scheduled.

The Clean Air Act ("CAA") authorizes the EPA to establish and enforce national ambient air quality standards ("NAAQS") for certain pollutants. Section 209(a) of the Act expressly preempts all state regulation of motor vehicle emissions, but California enjoys a statutory exemption, if certain requirements are met. The California state legislature authorized the South Coast Air Quality Management District ("SCAQMD") to adopt rules mandating that when local operators of fleets purchase or replace their vehicles, that they acquire only those vehicles designated by SCAQMD. Engine Manufacturer Association ("EMA") and others filed suit against SCAQMD, seeking declaratory and injunctive relief and claiming that the fleet rules violate sections 209 and 177 of the CAA and are preempted. The lower courts granted summary judgment to SCAQMD. The Ninth Circuit affirmed.

EMA argues that the fleet rules constitute "standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines" in violation of § 209 of the CAA. However, state regulations should be presumed valid when a state exercises its local police powers, the courts held. Contrary to EMA's assertion, the Rules regulate the purchase and leasing, not the sale, of vehicles by the fleet operators. The Rules impose no new emission requirements on vehicle manufacturers, nor do they limit the manufacture or sale of a new vehicle or attempt to create a new standard for the manufacture or sale of a motor vehicle in California. Plaintiffs may continue to manufacture and sell any otherwise certified vehicle in California. The same rationale holds true for those states "opting-in" to California standards under section 177 of the CAA. The CAA authorizes two types of vehicles in this country: federal vehicles and California vehicles. The fleet rules do not burden manufacturers with the requirement of creating a "third vehicle." Instead, purchasers are merely required to choose from a subset of previously certified vehicles.

EMA appealed the Ninth Circuit's decision. The Supreme Court granted cert on June 9, 2003. The question presented is:

> Whether local government regulations prohibiting the purchase of new motor vehicles with specified emission characteristics--which are otherwise approved for sale by state and federal regulators—are preempted by Section 209(a) of the Clean Air Act, which expressly preempts any state or local "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).[6]

Tennessee v. Lane, No. 02-1667.
Cert. Granted: June 23, 2003. Argument not yet scheduled.

Plaintiffs contend that they are unable to access the second floors of many county courthouses in the state because the buildings do not comply with Title II of the American with Disabilities Act ("ADA"). They sued the State of Tennessee, which filed a motion to dismiss, citing its immunity under the Eleventh Amendment. The district court denied the motion. The Sixth Circuit affirmed. Upon rehearing, a panel of the Sixth Circuit again affirmed the district court holding.

The Sixth Circuit noted that the Eleventh Amendment bars claims under Title II based on equal protection violations; however, it held, Congress may abrogate this immunity with respect to due process claims. This conclusion is reached by looking to the Supreme Court holding in *Board of Trustees v. Garrett*. The Due Process Clause protects the right of access to the courts. Parties in both criminal and civil cases have a due process right to be present in the courtroom and to meaningfully participate in their cases unless exclusion furthers an important governmental interest. It was reasonable for Congress to conclude that it needed to enact legislation preventing states from unduly burdening constitutional rights, including the right of access to the courts. Those with disabilities should not find themselves without access to courtrooms in which their cases are being tried. Tennessee claims that the violations alleged are not due

6. Brief for the Petitioners at i, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.* (No. 02-1343).

process violations. The court appropriately refused to dismiss the case until a factual record on this point could be developed and addressed.

Tennessee appealed the Sixth Circuit's decision. The Supreme Court granted cert on June 23, 2003. The question presented is:

> Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), exceeds Congress' authority under section 5 of the Fourteenth Amendment, thereby failing validly to abrogate the States' Eleventh Amendment immunity from private damages claims.[7]

Nixon v. Missouri Municipal League, 02-1238.
Cert. Granted: June 23, 2003. Argument not yet scheduled.

The Telecommunications Act of 1996 (the "Act") was enacted to facilitate competition in the telecommunications industry, and it provides for "removals of barriers to entry" in order to accomplish this purpose. Missouri passed a statute prohibiting political subdivisions from "provid[ing] or offer[ing] for sale . . . a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required." MO. REV. STAT. § 392.410(7). Various Missouri municipalities petitioned for review by the Federal Communication Commission ("FCC"). The Commission found that the Missouri statute does not violate the Act. The municipalities appealed.

The Eighth Circuit found that two plain-language standards apply. First, agency determinations are reviewed under the clear statement rule of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). If congressional intent is clear from the plain language of the statute, then a contrary agency interpretation is not given deference. Similarly, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), held that a plain statement is required when Congress intends to preempt an area within the traditional sovereignty of the states. In this case, the dispute hinges on whether municipalities are included in the phrase "any entity" in Section 253 of the act. Since the term is not defined, the ordinary meaning "accurately expresses the legislative purpose." Mo. Mun. League v. FCC, 299 F.3d 949, 953 (8th Cir. 2002). Municipalities fall within the ordinary definition, and Congress gave the term expansive scope by its use of the word "any"; therefore, the phrase includes municipalities. Since congressional intent is clear for purposes of the *Gregory* rule, it also satisfies *Chevron*.

The State of Missouri, Southwestern Bell, the United States, and the FCC each appealed the Eighth Circuit's decision. The Supreme Court granted cert on June 23, 2003 and consolidated the cases. The question presented is:

> Whether 47 U.S.C. 253(a), which provides that "no State * * * regulation * * * may prohibit * * * the ability of any entity to provide any interstate or intrastate telecommunications service," preempts a state law prohibiting political subdivisions of the State from offering telecommunications service to the public.[8]

7. Brief for the Petitioners at i, *Tennessee v. Lane* (No. 02-1667).
8. Brief for the Federal Petitioners at i, *Nixon v. Missouri Municipal League* (No. 02-1238).