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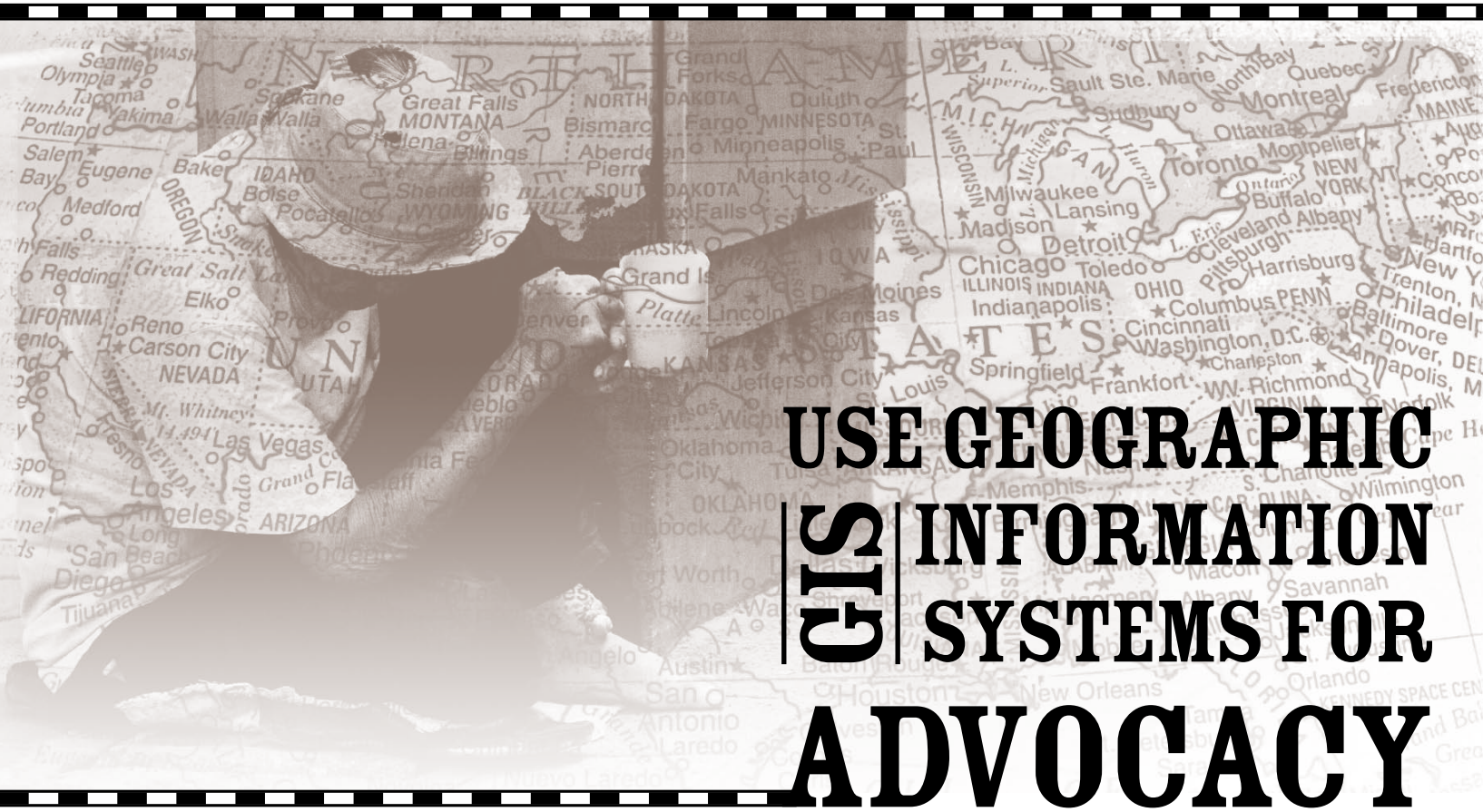

USE GEOGRAPHIC INFORMATION SYSTEMS (GIS) FOR ADVOCACY

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The Supreme Court's 2007–2008 Term: Relatively Quiet on the Access Front

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For aficionados of the U.S. Supreme Court's federal access decisions (and, of course, our annual article attempting to parse those decisions), the 2007–2008 Term was a disappointing one indeed. Instead of the myriad of standing, mootness, and other jurisprudential holdings intended to keep whining plaintiffs from their day in federal court, the Court seemed to focus on the merits of significant issues. As a consequence, the number of relevant adverse decisions is decidedly down, and, strangely, the Court actually expanded access in some discrete respects.[1]

Whether this is the beginning of a trend will only become apparent in the future. That the Court has run out of ways to restrict access seems unlikely, but the paucity of analyses in this area may suggest that the Court has temporarily hit a roadblock. In any event, we offer our annual potpourri of Court decisions loosely grouped under the rubric of federal access.[2]

Über Deference and *Stare Decisis* ("Ersatz," Regular, and Implicit)

Several of this Term's decisions should open the doors of the federal courthouse a little wider for civil rights plaintiffs. In the first of these decisions, discussed below, a seven-justice majority essentially allowed the Equal Employment Opportunity Commission (EEOC) to dictate how it should determine when a complainant had filed a "charge" with the agency. In other cases involving civil rights, the Court employed *stare decisis*—in at least one instance quite creatively—to protect claims of discriminatory retaliation by employers.

In *Federal Express Corporation* v. *Holowecki* a group of fourteen former and current FedEx employees over the age of 40 alleged that two company "performance" programs were "veiled attempts to force older workers out of the company before they would be

[1]In particular, in several decisions the U.S. Supreme Court seemed to go out of its institutional way to encourage civil rights litigants (see *infra* under the heading "*Über* Deference and *Stare Decisis* ("Ersatz," Regular, and Implicit)"). If such a thing is possible, these decisions may represent a belated apology in response to the overwhelmingly negative reaction of the legal community and the public in general to the previous Term's travesty of *Ledbetter v. Goodyear Tire and Rubber Company*, 127 S. Ct. 2162 (2007) (see Jane Perkins et al., *The Supreme Court's 2006-2007 Term: The Shift to the Right Takes Shape*, 41 Clearinghouse Review 442, 451–53 (Nov.–Dec. 2007)).

[2]We do not dispute its importance, but we deem as beyond the scope of this article the Term's ultimate access case, *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008), in which the Court held that the procedures enacted by Congress for alleged "enemy combatants" held at Guantanamo Bay "are not an adequate and effective substitute for habeas corpus."

entitled to receive retirement benefits" and constituted unlawful age discrimination proscribed by the Age Discrimination in Employment Act (ADEA).[3]

The district court dismissed the action, with respect to one of the plaintiffs, on the ground that she had failed, prior to filing suit, to submit a valid "charge" of age discrimination to the EEOC.[4] Although the plaintiff had not filed an EEOC "Form 5" (a formal charge form), she had timely submitted to the EEOC a "Form 238 Intake Questionnaire," along with a six-page, signed affidavit describing the employer's alleged age discrimination in substantial detail.[5]

After the court of appeals reversed and determined that plaintiff's filing was sufficient, the Supreme Court granted certiorari to consider the elements of an administrative charge under the ADEA.[6] In the Court's opinion by Justice Kennedy, the Court had little difficulty in ultimately ruling that the plaintiff's filing constituted a sufficient prelitigation charge of age discrimination. Its analysis and conclusion, however, were largely driven by the position of the EEOC itself, which filed an *amicus* brief in support of the plaintiff.[7]

Although the ADEA provides that no civil action may be commenced "until sixty days after a charge alleging unlawful discrimination has been filed with [the EEOC]," the statute includes no definition of the term "charge."[8] Regulations promulgated by the EEOC specify certain *information* that a charge "should" contain: the names, addresses, and telephone numbers of the charging party and the charged entity; a statement of facts describing the discriminatory act; the number of employees of the charged employer; and a statement indicating whether the charging party has initiated state proceedings.[9] Acknowledging the minimalist nature of these requirements, the Court then accepted the EEOC's long-standing position that "the regulations identify procedures for filing a charge, but do not state the full contents a charge document must contain."[10] The Court thus accorded *Auer* deference to the agency's interpretation of the scope of its own regulations.[11]

Having accepted the EEOC's position that a complete description of an adequate charge could not be found in the agency's own regulations, the Court looked again to the EEOC. It invoked deference under the venerable but less deferential "*Skidmore*" standard for "guidance" in interpreting the term within the context of the ADEA statute itself.[12] The EEOC had developed a consistent understanding of the term "charge," through various informal and internal "directives" and "policy statements," constituting in the Court's view "a body of experience and informed judgment" that, under *Skidmore*, was entitled to "a measure of respect" from the Court.[13] The Court ultimately adopted the agency's definition:

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[3]*Federal Express Corporation v. Holowecki*, 128 S. Ct. 1147, 1153 (2008); 29 U.S.C. §§ 621 *et seq.*

[4]*Federal Express*, 128 S. Ct. at 1153.

[5]*Id.*

[6]*Id.*

[7]*Id.* at 1155, 1159.

[8]29 U.S.C. § 626(d).

[9]*Federal Express*, 128 S. Ct. at 1154 (citing 29 C.F.R. § 1626.8(a) (2007)).

[10]*Id.* at 1155.

[11]*Id.* (citing *Auer* v. *Robbins*, 519 U.S. 452 (1977)). *Auer* sets out a highly deferential standard of review to an agency's interpretation of its own regulation (519 U.S. at 461).

[12]*Id.* at 1156 (citing *Skidmore v. Swift*, 323 U.S. 134 (1944)).

[13]*Id.* The Court noted that, given the informality of the agency's interpretive statements, they were not entitled to full deference under *Chevron USA Incorporated v. Natural Resources Defense Council Incorporated*, 467 U.S. 837 (1984) (*id.*).

> In addition to the information required by the regulations … if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee.[14]

Finally having a definition of the term "charge," the Court was left with the task of determining if the plaintiff's EEOC filing in this case satisfied that definition. For the third time, the majority looked to the EEOC for the answer: "The question is whether the filing here meets that test. The agency says it does, and we agree."[15] In the Court's view, the plaintiff's request in her affidavit that the EEOC "please force Federal Express to end their age discrimination plan" was "properly construed as a request for the agency to act," and therefore her filing satisfied all the necessary elements of a charge.[16]

Justice Thomas's dissent, joined by Justice Scalia, argued that the plaintiff's filing did not fit *his* definition of a charge, that is, "a writing that objectively indicates an intent to initiate the agency's enforcement processes."[17] The EEOC, he noted, has jurisdiction to undertake a wide variety of precharge actions, including interviewing, counseling, and other informal "remedial processes," all of which "are designed to protect the employee's rights" but which do not initiate the formal enforcement processes triggered by a charge.[18] The dissent attacked the majority's criteria for defining a "charge" as "utterly vague" and "of little use in future cases."[19] But the dissent's fundamental problem was with the remarkable degree of deference that the Court accorded to the agency's position in this case: "Today the Court decides that a 'charge' of age discrimination under the [ADEA] is whatever the [EEOC] says it is."[20]

In *CBOCS West Incorporated v. Humphries* the Court approved an expanded interpretation of the protective scope of 42 U.S.C. § 1981, the Civil War–era "equal contract rights" statute, to include claims of discriminatory "retaliation."[21] The plaintiff was an African American who alleged that defendant employer fired him both because of racial bias and because he complained that the termination of another African American employee was race-based.[22] He contended that his termination violated both Title VII of the Civil Rights Act (42 U.S.C. §§ 2000e *et seq.*) and the antiretaliation protections of Section 1981, which provides that "all persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts … as is enjoyed by white citizens."[23] Although the district court and court of appeals rejected plaintiff's "direct" discrimination claims under Title VII and Section 1981, the appellate court, reversing the district court's ruling that Section 1981 does not

[14] *Id*. at 1157–58.

[15] *Id*. at 1159. The Court approved the Equal Employment Opportunity Commission (EEOC) conclusion as a reasonable exercise of its authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces (*id*.).

[16] *Id*. at 1159–60.

[17] *Id*. at 1162 (Thomas, J., dissenting).

[18] *Id*. at 1164 (Thomas, J., dissenting). The dissent also objected, as did the employer, that the result reached by the majority will deprive the employer of its Age Discrimination in Employment Act (ADEA) right to engage in an agency-supervised conciliation process prior to litigation (*id*. at 1168 (Thomas, J., dissenting)).

[19] *Id*. (Thomas, J., dissenting). Justice Kennedy's majority opinion expressly cautioned that its analysis under the ADEA rules would not necessarily be applicable to similar enforcement schemes overseen by the EEOC under different civil rights statutes (*id*. at 1153).

[20] *Id*. at 1161 (Thomas, J., dissenting).

[21] *CBOCS West Incorporated v. Humphries*, 128 S. Ct. 1951, 1954–55 (2008).

[22] *Id*. at 1954.

[23] *Id*.

encompass retaliation claims, remanded the Section 1981 retaliation claim for trial.[24] The Supreme Court granted certiorari to review that legal question.[25]

In the majority decision authored by Justice Breyer, the Court held that Section 1981 encompassed claims by individuals who suffered retaliation in their employment because they sought to assist other employees who suffered race-based discrimination.[26] At the outset, the Court explained that "our conclusion rests in significant part upon principles of *stare decisis*," relying on its decades-old decision in *Sullivan v. Little Hunting Park Incorporated*.[27]

Sullivan arose under 42 U.S.C. § 1982, a Section 1981 companion statute prohibiting racial discrimination with respect to rights related to the ownership of property, including the inheritance, purchase, lease, sale, and conveyance of real and personal property.[28] The case was brought by a white shareholder of a corporation that owned a private park; the shareholder was expelled from the corporation for protesting the corporation's refusal to approve an assignment of ownership rights to an African American.[29] The Court held that Section 1982 encompassed claims of retaliation against those who sought "to vindicate the rights of minorities protected by § 1982."[30]

After reviewing the holding in *Sullivan*, Justice Breyer observed that "the Court has long construed §§ 1981 and 1982 alike, because it has recognized the sister statutes' common language, origin, and purposes," which constituted "an immediately post–Civil War legislative effort to guarantee the newly freed slaves the same rights that white citizens enjoy."[31] Not surprisingly, noted the Court, after *Sullivan* the federal appeals courts unanimously concluded that Section 1981 also encompassed retaliation claims.[32]

This consistent judicial construction of Section 1981 was dramatically disrupted by the Court's 1989 decision in *Patterson v. McLean Credit Corporation*.[33] *Patterson* "significantly limited" the scope of Section 1981 to preclude its applicability to any conduct by an employer after the contract relation had been established, including breach of the terms of the contract or 'imposition of discriminatory working conditions.'[34] *Patterson* thus rejected the Section 1981 claim of an African American employee "who charged that her employer had violated her employment contract by harassing her and failing to promote her, all because of her race."[35] Justice Breyer noted that since discriminatory retaliation claims inevitably would arise *after* the formation of the employment contract, "*Patterson*'s holding … seems in practice to have foreclosed [Section 1981] retaliation claims."[36]

The limiting effect of *Patterson* was short-lived, however, because "Congress weighed in on the matter, [and] passed the Civil Rights Act of 1991 … with the

[24] *Id.* (citing 474 F.3d 387 (7th Cir. 2007)).

[25] *Humphries*, 128 S. Ct. 30 (2007).

[26] *Id.* at 1954.

[27] *Id.* at 1955 (citing *Sullivan v. Little Hunting Park Incorporated*, 396 U.S. 229 (1969)).

[28] *Id.* (citing 42 U.S.C. § 1982 (2007)).

[29] *Id.* (citing *Sullivan*, 396 U.S. at 237).

[30] *Id.*

[31] *Humphries*, 128 S. Ct. at 1956 (citing inter alia *Runyon v. McCrary*, 427 U.S. 160, 173 (1976)).

[32] *Id.*

[33] *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

[34] *Humphries*, 128 S. Ct. at 1956 (citing *Patterson,* 491 U.S. at 177).

[35] *Id.*

[36] *Id.*, 128 S. Ct. at 1956–57.

design to supersede *Patterson*."[37] Congress amended Section 1981 by adding a new subsection, which brought "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship within its purview."[38] Justice Breyer also cited legislative history expressly providing that the amendment would "restore the right to sue for … retaliatory conduct."[39]

The *Humphries* majority thus summarized its analysis as follows:

> The upshot is this: (1) in 1969, *Sullivan* … recognized that § 1982 encompasses a retaliation action; (2) this Court has long interpreted §§ 1981 and 1982 alike; (3) in 1989 *Patterson*, without mention of retaliation, narrowed § 1981 by excluding from its scope … post-contract formation conduct, but in 1991, Congress enacted legislation that superseded *Patterson* and explicitly defined the scope of § 1981 to include post-contract formation conduct; and (4) since 1991, the lower courts have uniformly interpreted § 1981 as encompassing retaliation actions.[40]

Accordingly the Court held that 42 U.S.C. § 1981 encompassed "claims of retaliation."[41]

In his dissent, Justice Thomas restated his and Justice Scalia's position in an ongoing debate within the Court over the proper analytical approach to statutory interpretation; the dissent argued that the majority's interpretation "has no basis in the text of § 1981."[42] In their view the statute's intent was to proscribe discrimination based on the *status* of race, and the statute did not provide a remedy for the *conduct* of retaliation.[43] Revisiting a theme from other recent decisions, the dissent took issue with the majority for "disregarding the fundamental distinction between status-based discrimination, and conduct-based retaliation."[44] The dissent dismissed the majority's invocation of *Sullivan* as a "retreat behind the fig leaf of ersatz *stare decisis*" and asserted that *Sullivan* was really just "a third party standing case" and that, to the extent *Sullivan* actually held that Section 1982 encompassed retaliation claims, it was wrongly decided.[45]

Undaunted by the numerous circuit court decisions since 1991 that unanimously supported the majority's conclusion, the dissenters chided the Court for its implicit deference to an interpretation simply because that interpretation was "uniformly held by the courts of appeals" and offered its own blunt assessment of that precedent: "The lower courts were [all] wrong."[46]

Stare decisis also figured in several other decisions. The most interesting of these—if not one especially helpful to litigants with discrimination claims—is *John R. Sand and Gravel Company. v. United States*, in which the company claimed a mining lease of land that was affected by various Environmental Protection Agency activities, including fence building.[47] The sand

[37] *Id.* at 1957 (citing 42 U.S.C. § 1981 (1991)).

[38] *Id.* (quoting 42 U.S.C. § 1981(b) (1991)).

[39] *Id.* (citing House of Representatives Report Number 102-40, pt. 1, at 93 n.92 (1991)).

[40] *Id.* at 1957–58.

[41] *Id.* at 1961.

[42] *Id.* at 1963 (Thomas, J., dissenting).

[43] *Id.* at 1961–63 (Thomas, J., dissenting).

[44] *Id.* at 1964 (Thomas, J., dissenting).

[45] *Id.* at 1967–68 (Thomas, J., dissenting).

[46] *Id.* at 1969 (Thomas, J., dissenting).

[47] *John R. Sand and Gravel Company v. United States,* 128 S. Ct. 750 (2008).

and gravel company claimed that the activities amounted to an unconstitutional taking of its leasehold rights and filed an action in the Court of Federal Claims.

The federal government initially argued that several of the claims were untimely because they were filed outside the statute of limitations for court-of-claims suits.[48] The government later conceded timeliness, however, and ultimately won on the merits. The company appealed, and, at that point, an *amicus* brief resurrected the statute-of-limitations argument.[49] The Court of Appeals for the Federal Circuit held that the action was untimely.[50] The Supreme Court accepted the case to decide whether a court must consider *sua sponte* the timeliness of a lawsuit filed in the Court of Federal Claims.[51]

While the facts of *John R. Sand and Gravel* certainly do not energize, the debate between the justices in this 7-to-2 decision does. Writing for the majority, Justice Breyer relied on *Kendall v. United States,* a nineteenth-century decision holding a predecessor of the current limitations statute to be "jurisdiction[al]," thus requiring a court to decide the timeliness question regardless of a waiver.[52] The hiccup for the Court, however, was a "mine run" of more recent Court opinions treating similar statutes of limitations as affirmative defenses that defendants—including the government—may waive.[53] The company argued that these recent decisions had overturned the earlier precedent.[54]

The Supreme Court majority did not agree. While these more recent cases involved similar statutes, they did not deal with the exact statute at issue in the case before the Court. Thus "basic principles of *stare decisis*" required that the company's argument be rejected. The Court noted that "*stare decisis* in respect to [sic] statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'"[55] In the conclusion, which Justice Breyer read from the bench, the Court stated that "reexamination of well-settled precedent could … prove harmful" and that

> in most matters it is more important that the applicable rule of law be settled than that it be settled right…. To overturn a decision settling one such matter simply because we might believe that decision is no longer "right" would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainly [sic] for necessary legal stability.[56]

Justices Stevens and Ginsburg dissented. Justice Stevens pointed out that the more recent cases had not only mentioned the earlier precedent but also expressly declined to follow it.[57] Quoting Oliver Wendell Holmes, Justice Stevens found it "'revolting'" that the rule "'simply per-

[48]See 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues").

[49]*John R. Sand and Gravel Company*, 128 S. Ct. at 753.

[50]457 F.3d 1345, 1352 (Fed. Cir. 2006).

[51]*John R. Sand and Gravel Company*, 128 S. Ct. at 753.

[52]*Id.* at 754 (quoting *Kendall v. United States,* 107 U.S. 123, 125–26 (1883)), 756.

[53]*Id.* at 756.

[54]*Id.* at 755. E.g., the company cited *Irwin v. Department of Veterans Affairs*, which, as Justice Breyer acknowledged, "adopted 'a more general rule' to replace our prior ad hoc approach for determining whether a Government-related statute of limitations is subject to equitable tolling—namely, 'that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States" (*id.* (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96 (1990))).

[55]*Id.* at 756 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989)).

[56]*Id.* at 757 (quoting *Burnet v. Coronado Oil and Gas Company,* 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

[57]*Id.* at 758 (Stevens, J., dissenting).

sists from blind imitation of the past.'"[58] Justice Ginsburg predicted that the majority decision would create confusion because it held that the language of the contested statute was "jurisdictional" but implied that the more recent line of cases would govern the interpretation of statutes that had not yet been construed.[59] She warned, "After today's decision, one will need a crystal ball to predict when this Court will reject, and when it will cling to, its prior decisions interpreting legislative texts."[60]

In *Gomez-Perez v. Potter* the Court relied on *stare decisis*—but without mentioning it—in another decision procedurally favoring individual victims of retaliation in the workplace.[61] Gomez-Perez, a 45-year-old postal worker, filed a claim under the ADEA after the U.S. Postal Service refused to transfer her back to her original window-clerk position. A federal employee who is complaining of retaliation may assert a claim under an ADEA provision that requires federal employment decisions to be free from "discrimination based on age," a 6-to-3 majority held.[62]

In *Gomez-Perez* as in *CBOCS West*, the antidiscrimination statute did not expressly recognize claims based on retaliation. The question again boiled down to whether the statutory prohibitions on discrimination should be read to include retaliation. As in *CBOCS West*, the Court went beyond the text of the statute and relied upon the *stare decisis* effect of its prior holdings, principally *Sullivan v. Little Hunting Park Incorporated* and *Jackson v. Birmingham Board of Education*, a 2005 decision that read Title IX of the Civil Rights Act of 1972 to include retaliation claims.[63]

While the reasoning of the two antidiscrimination decisions is quite similar, *Gomez-Perez* contained an added twist. As the postmaster general pointed out, Congress included an ADEA provision that specifically prohibited retaliation against individuals who complained about age discrimination in the private sector. Thus the postmaster argued, there should be a "strong presumption" that the omission of retaliation from the public sector provision was intentional.[64] Refusing to accept this negative implication, the Supreme Court stated, "[N]egative implications raised by disparate provisions are strongest in those instances in which the relevant statutory provisions were considered simultaneously when the language raising the implication was inserted. Here, the two relevant provisions were not considered or enacted together."[65]

In *Gomez-Perez* Justices Thomas and Scalia, who dissented in *CBOCS* (as they had in *Jackson*), were joined in dissent by the Chief Justice. They argued that, since the text of the statute did not prohibit retaliation, there could be no claim for retaliation.[66]

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[58] *Id.* at 759 n.6 (Stevens, J., dissenting) (quoting Holmes, *The Path of the Law*, 10 Harvard Law Review 457, 469 (1897)).

[59] *Id.* at 760–61 (Ginsburg, J., dissenting).

[60] *Id.* at 761 (Ginsburg, J., dissenting).

[61] *Gomez-Perez v. Potter,* 128 S. Ct. 1931 (2008).

[62] *Id.* at 1936 (quoting 29 U.S.C. § 633a(a)).

[63] *Sullivan*, 396 U.S. 229; *Jackson v. Birmingham Board of Education,* 544 U.S. 167 (2005). For a discussion of *Jackson,* see Matthew Diller et al., *Win Some, Lose Some: The Rehnquist Court's Final Chapter on Access to Courts,* 39 Clearinghouse Review, 389, 401–3 (Nov.–Dec. 2005).

[64] *Gomez-Perez*, 128 S. Ct. at 1940.

[65] *Id.* (citation omitted); see *id.* (the public-sector provision was enacted seven years later).

[66] *Gomez-Perez*, 128 S. Ct. at 1945–48 (Roberts, C.J., dissenting); see *CBOCS*, 128 S. Ct. at 1962–68 (Thomas, J., dissenting). In this Term, the Court either mentioned or discussed *stare decisis* in a number of other cases. E.g., in *Sprint Communications Company v. APCC Services Incorporated*, 128 S. Ct. 2531, 2536–42 (2008), a five-justice majority began its discussion with seventeenth-century England and accumulated "history and precedents" to hold that an assignee of a legal claim for money owed has standing to pursue the claim in federal court, even when the assignee had promised to remit all the proceeds of the litigation to the assignor. In dissent, Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, contended that the ruling was a "flat contravention" of the case or controversy requirements for Article III standing because the assignees had "nothing to gain from their suit" (*id.* at 2549 (Roberts, C.J., dissenting)).

Preemption

Since the Supreme Court's 1996 decision in *Seminole Tribe*, Court observers have cited an increasing emphasis on federalism as one of the major trends in the Court's jurisprudence.[67] As one group of perceptive commentators put it, "[t]he Court's growing solicitude for the states as sovereigns constitutes one of the most significant developments over the past decade."[68] In 2007–2008 the Court shifted gears from a focus on state sovereign immunity to the scope of federal preemption, and it appears to have embarked on a strong reassertion of the supremacy of federal law over states. Thus, in 1999, the Court stressed the role of the states as "joint participants in the governance of the Nation."[69] This Term, however, the Court found four state laws preempted by federal statutes, indicating a willingness to trump state regulation in situations where a federal statutory scheme dealt with similar subject matter.[70]

In *Chamber of Commerce v. Brown* the Court struck down a California law that prohibited employers from using state funds to promote or deter union organizing.[71] In a 7-to-2 decision the Court found the California law to be preempted by the National Labor Relations Act (NLRA) because the state statute regulated a zone of activity that the federal law had reserved for private market activity.[72] Because the NLRA plainly permits employers to take positions on unionization, the crux of the case turned on how the Court viewed that the California law was not cast as regulating private conduct but only as a condition of state funding. Brushing aside the cases holding that restrictions on federal funding cannot be equated with government regulation in the First Amendment context, the Court held that California's law "indirectly regulated" employer conduct and thus conflicted with the NLRA.[73] For a state to use its spending power "to advance an interest that … frustrates the comprehensive federal scheme established by [the NLRA]" was not permissible, the Court concluded.[74] Justices Breyer and Ginsburg dissented.[75]

In *Rowe v. New Hampshire Motor Transport Association* the Court struck down a Maine statute regulating the shipment of tobacco products in Maine.[76] The Maine law required tobacco retailers to use only shippers that employed a "recipient verification" service confirming that the individual who receives the tobacco product was eligible to purchase tobacco.[77] The Maine law also forebade a person from transporting tobacco products unless either the sender or recipient held a license. The law deemed shippers to know that they were transporting tobacco if the package was marked as such or if the recipient's name appeared on a

[67]See *Seminole Tribe of Florida v. Florida*, 517 U.S. 54 (1996).

[68]Jane Perkins et al., *Beyond* Bush v. Gore*: Highlights from the Supreme Court's 2000–2001 Decisions Concerning Access to the Courts*, 35 Clearinghouse Review 373 (Nov.–Dec. 2001).

[69]*Alden v. Maine*, 527 U.S. 706, 748 (1999).

[70]See *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Rowe v. New Hampshire Motor Transport Association*, 128 S. Ct. 989 (2008); *Riegel v. Medtronic*, 128 S. Ct. 999 (2008); *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008). All but *Brown* were decided on one day, February 20, 2008, which is now known in certain select circles as "Preemption Wednesday."

[71]*Brown*, 128 S. Ct. at 2408.

[72]*Id*. at 2412.

[73]See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (restrictions on speech of federally funded family planning providers do not violate the First Amendment); *Brown*, 128 S. Ct. at 2415.

[74]*Id*. at 2417.

[75]*Id*. at 2419 (Breyer, J., dissenting). The dissent stressed that California's law did not prohibit any conduct by employers but rather reflected a determination that the state did not want to pay for employer speech (*id*.).

[76]*Rowe*, 128 S. Ct. 989.

[77]*Id*. at 993–94. In essence the law required the carrier to verify that the recipient is the individual to whom the package is addressed and is of legal age to buy tobacco products.

list of unlicensed dealers maintained by Maine's attorney general.[78]

In a unanimous decision the Court found these two legal requirements preempted by the Motor Carrier Act of 1980, as amended in 1994.[79] The federal statute prohibits states from enacting or enforcing any law "related to a price, route or service of any motor carrier … with respect to the transportation of property."[80] The Court found the Maine law to be related to motor carrier "services" in a manner that was not remote or incidental because it required carriers to offer a service that the market did not provide and that they would prefer not to offer.[81] As in the *Brown* case, the Court found that the state's requirements conflicted with a federal determination to leave market forces unfettered by regulation.[82] The Court dismissed the contention that Maine sought to regulate the activity of tobacco-product senders, rather than carriers, because regulation of service purchasers was tantamount to regulation of service providers.[83]

The Court rejected Maine's argument that the importance of preventing tobacco use by minors justified the statute. The Court found no "public health" exemption from the federal law's preemption provision and declined to embark on distinguishing between economic and health regulations.[84] The Court did, however, caution that truckers were not exempt from all state health regulation and noted that this state law was expressly targeted at shipping and was not a regulation governing the public generally.[85]

In *Riegel v. Medtronic* the Court held that the Medical Device Amendments of 1976 (MDA) preempted state tort litigation over the safety of the Evergreen balloon catheter, a product used to perform cardiac angioplasty.[86] The MDA provides that states may not establish or continue in effect any requirement "which is different from or in addition to any requirement applicable under this chapter to the device and … which relates to the safety or effectiveness of the device."[87] The Food and Drug Administration (FDA) had specifically approved the Evergreen balloon catheter before it was marketed.

The Court first concluded that the FDA's preapproval process established the safety requirements for the particular product. It then held that state products liability law, as developed through common-law tort litigation, constituted "requirements" that were potentially different from or in addition to those established by the FDA. That these "requirements" were established post hoc by juries through the award of damages did not, in the Court's view, make them less subject to preemption than state statutes or administrative codes regulating medical devices ex ante.[88] While the Court acknowledged that the MDA permitted state tort remedies for violations of state requirements that paralleled federal safety standards, the plaintiffs in *Riegel* did not present their state claims

[78] *Id.* at 994.

[79] 49 U.S.C. § 14501(c)(1).

[80] *Id.*

[81] *Rowe*, 128 S. Ct. at 995.

[82] *Id.* at 996.

[83] *Id.*

[84] *Id.* at 996–97.

[85] *Id.* at 997–98. Justice Ginsburg clearly had qualms about the result. Her concurrence noted that the decision created a regulatory gap in which states are free to ban the sale of cigarettes to minors but lack the regulatory tools to thwart the distribution of tobacco to minors (*id.* at 998–99 (Ginsburg, J., concurring)).

[86] *Riegel*, 128 S. Ct. at 999.

[87] 21 U.S.C. § 360k(a).

[88] *Riegel*, 128 S. Ct. at 1008.

as merely paralleling federal requirements.[89]

Justice Ginsburg, the sole dissenter, argued that the Court should not lightly conclude that Congress intended to preempt state court tort remedies.[90] She pointed out that when the MDA was enacted no one suggested that it would preempt state tort law, despite the fact that medical-device cases had received much recent attention; moreover, the FDA had long taken the position that the MDA did not preempt such suits.[91] She also noted that the FDA's new position in favor of preemption first appeared in an *amicus* brief in *Riegel* itself.[92]

While Justice Ginsburg dissented in *Brown* and *Riegel* and was concerned about the result in *Rowe*, she wrote for an 8-to-1 majority in *Preston v. Ferrer*.[93] In *Preston* the Court held that the Federal Arbitration Act preempted California law granting the state's Labor commissioner exclusive jurisdiction over disputes with talent agents.

The case involved a dispute between television's "Judge Alex" and Arnold Preston, a lawyer who provided services under contract to the "Judge," and this led Preston to invoke the contract's arbitration clause.[94] Ferrer countered by petitioning the California Department of Labor to declare the contract void because Preston had functioned as an unlicensed talent agent and by suing in state court for a declaration that the dispute was not subject to arbitration.[95] Finding that the state agency had exclusive jurisdiction to determine whether Ferrer had indeed acted as a talent agent, or whether he was merely a "personal manager," in which case the matter would be subject to arbitration, the state court system granted Ferrer's request.[96] The state courts distinguished the Supreme Court's decision in *Buckeye Check Cashing Company v. Cardegna*, which held that, when parties agreed to arbitrate all disputes, questions over the applicability of arbitration should be resolved by an arbitrator rather than a court.[97]

In the Supreme Court, Ferrer trimmed his sails, arguing that the California law should be viewed as mandating an administrative exhaustion requirement prior to arbitration.[98] The Court, however, declined the invitation to distinguish between judicial and administrative proceedings and concluded that an arbitrator, rather than the Department of Labor, should determine whether Preston's claim was subject to arbitration.[99]

The specifics of the Court's four preemption decisions are less striking than their cumulative impact. In an era of devolution, states have responded by enacting new waves of progressive health, safety, and environmental regulation. This Term's decisions suggest that expansive readings of federal preemption can create significant barriers to state innova-

[89]How any verdict under state tort law finding the device to be defective or unsafe would not, under the Court's opinion, amount to an "additional" rather than a "parallel" requirement is hard to see since the FDA had approved the safety of the specific device at issue in the case (*id*. at 1011 (Stevens, J., concurring in part and in the judgment)).

[90]*Riegel*, 128 S. Ct. at 1013 (Ginsburg, J., dissenting).

[91]*Id.* at 1014, 1016 (Ginsburg, J., dissenting).

[92]*Id*. at 1016 n. 8 (Ginsburg, J., dissenting).

[93]*Preston*, 128 S. Ct. at 978 (2008).

[94]*Id.* at 981–82.

[95]*Id*.

[96]*Id.*

[97]*Buckeye Check Cashing Company v. Cardegna*, 546 U.S. 440 (2006).

[98]*Preston*, 128 S. Ct. at 985–86. This approach created the rare circumstance of a party arguing for his obligation to exhaust while the opponent argued the contrary.

[99]*Id*. at 986–87. The Court distinguished its decision *EEOC v. Waffle House Incorporated* in 534 U.S. 279 (2002) (arbitration agreements do not bar the EEOC from pursuing enforcement actions in its own name, and the U.S. Department of Labor in this instance functions not as an advocate but as an adjudicator).

tion. Significantly the Bush Administration, weighing in, supported preemption in three of the four cases—*Riegel*, *Brown*, and *Rowe*—as part of an apparent movement to employ preemption to thwart state regulation.[100] Another showdown on this effort is expected in the upcoming Term when the Court hears *Wyeth v. Levine*, in which the Court will decide whether state tort law is preempted by the FDA's procedure for approving the labeling of prescription drugs.[101]

Claim Preclusion

In *Taylor v. Sturgell* the Court unanimously rejected reliance on "virtual representation" as a basis for claim preclusion.[102] The idea of "virtual representation" had been developed by a number of the circuits as an exception to the requirement that an individual must be a party to a case in order to be bound by its judgment.[103]

In *Taylor* the lower courts found that the plaintiff's Freedom of Information Act (FOIA) case was barred by the judgment in a lawsuit that was brought by his friend and that had challenged the Federal Aviation Administration (FAA) refusal to disclose the identical information.[104] The lower courts concluded that Taylor's friend had an "identity of interests" and a relationship sufficient to support a finding that Taylor had been virtually represented in the first case.[105] That the same lawyer represented both plaintiffs and that the two men were "close associates" was sufficient for preclusion to attach, the D.C. Circuit concluded, although there was no evidence that Taylor had participated in the first case or had brought suit at the behest of his friend.[106]

In reversing the D.C. Circuit, the Court reiterated the baseline rule that one cannot be bound by the judgment in a lawsuit in which one was not a party.[107] The several exceptions to this principle largely turn on the existence of a legal relationship between the party in the second case and someone who was a party to the first case, but, as the Court noted, the exceptions also include situations involving members of certified classes in class action litigation, individuals who had actual control over the first case, and a proxy or agent for a party in the first case bringing the second case. The Court declined the invitation to add another exception where there was a "close relationship" to be determined by a "fact-driven" and "equitable" inquiry.[108]

The Court noted that the D.C. Circuit's approach could create a kind of loose common-law class action, where absentees were held to be precluded without the formal protections accorded to members of classes under Rule 23.[109] The Court rejected the FAA's suggestion that preclusion should apply more broadly in "public law" litigation since each individual's stake in the case was broadly shared by others. The Court concluded that principles of *stare decisis* served to

[100]See Caroline E. Meyer, *Rules Would Limit Lawsuits: U.S. Agencies Seek to Preempt States*, Washington Post (Feb. 16, 2006) (agencies are increasingly using rule-making to expand preemptive effect of federal statutes).

[101]See *Wyeth v. Levine*, 128 S. Ct. 1118 (2008). The United States has filed a brief in *Wyeth* in support of preemption.

[102]*Taylor v. Sturgell*, 128 S. Ct. 2161 (2008).

[103]See, e.g., *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996); *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005). Several circuits recognized virtual representation as a basis for preclusion only when there was a legal relationship between a party in the first case and the party precluded in the second case (see, e.g., *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978); *EEOC v. Pemco Aeroplex Incorporated*, 383 F.3d 1280, 1289 (11th Cir. 2004)).

[104]*Taylor v. Blakely*, 490 F.3d 965 (D.C. Cir. 2007), rev'd, 128 S. Ct. 2161 (2008).

[105]*Id.*

[106]Taylor and the prior plaintiff Herrick are both antique aircraft enthusiasts who had sought release of technical documents relating to a military aircraft built in the 1930s. The Federal Aviation Administration withheld the documents after the manufacturer claimed that they contained trade secrets.

[107]*Taylor*, 128 S. Ct. at 2171 (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)).

[108]*Id.* at 2175.

[109]*Id.* at 2176.

limit vexatious litigation and that "'the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others."[110]

It is gratifying to know that, because of *Taylor*, we need not be concerned about being bound by the judgments in litigation conducted by our friends—even friends who share quirky enthusiasms and hobbies.

Market Rates for Paralegals' Work

In *Richlin Security Service Company v. Chertoff* the Court rejected the government's contention that the work of paralegals should be compensated under the Equal Access to Justice Act (EAJA) only at the cost to the attorney.[111] In a unanimous decision authored by Justice Alito, the Court methodically went through the government's serial arguments—statutory, case law, policy, legislative history, and a hoary canon of construction—to conclude that market rates are the appropriate benchmark for the reimbursement of paralegals' work.[112]

This is not the place for a careful parsing of the relevant language of the EAJA; a summary will do.[113] The Court began simply by noting that, "[s]ince § 504(b)(1)(A) awards fees at 'prevailing market rates,' a straightforward reading of the statute leads to the conclusion that Richlin was entitled to recover fees for the paralegal services it purchased at the market rate for such services."[114] The rest of the decision is a refutation of the government's attempt to read that language differently.

First, Justice Alito rejected the government's contention that Section 504(b)(1)(A) distinguishes between the rates of reimbursement for "fees" and "other expenses," with the former billed at market rates while the latter would be reimbursable only at "reasonable cost."[115] Then the Court observed that, even assuming that such a distinction existed, "it would hardly follow that amounts billed for paralegal services should be classified as 'expenses' rather than as 'fees'.... Surely paralegals are more analogous to attorneys, experts, and agents than to studies, analyses, reports, tests, and projects."[116] Finally, "even if we agreed that EAJA limited a prevailing party's recovery for paralegal fees to 'reasonable cost,' it certainly would not follow that the cost should be measured from the perspective of the party's attorney."[117]

Having dispensed with the government's statutory analysis, the Court went on, in an exercise of caution, to repudiate the government's other arguments. First, the Court analyzed its decision in *Missouri v. Jenkins*, which evaluated fees awarded

[110] *Id*. at 2178 (quoting D. Shapiro, Civil Procedure: Preclusion in Civil Actions 97 (2001)).

[111] *Richlin Security Service v. Chertoff*, 128 S. Ct. 2007 (2008).

[112] *Id*. at 2011–19. Justice Thomas did not join those portions of the decision dealing with case law, policy, and legislative history, while Justice Scalia declined to join the legislative history section (*id*. at 2010 n.*). All nine Justices were in agreement on the statutory analysis and on the canon of construction requiring a strict reading of a waiver of sovereign immunity not being applicable to this case (see *infra* under the heading "Statutory Construction" for a separate discussion of this last part of the decision).

[113] The Court was actually interpreting that portion of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1), that applies to fees for work before a federal agency. As the Court noted, "[v]irtually identical fee-shifting provisions apply to actions by or against the Government in federal court. See 28 U.S.C. §§ 2412(a)(1), (d)(2)(A)" (*Richlin Security Service*, 128 S. Ct. at 2012 n.3). Oddly, although the Court described the issue presented as "whether the [EAJA], 5 U.S.C. § 504(a)(1) (2006 ed.) and 28 U.S.C. § 2412(d)(1)(A) (2000 ed.), allows a prevailing party ... to recover fees for paralegal services at the market rate," it later declined to state unequivocally that the decision also applied to Section 2412(d)(1)(A): "We assume without deciding that the reasoning of our opinion would extend equally to §§ 504 and 2412. We confine our discussion to § 504" (*Richlin Security Service*, 128 S. Ct. at 2010, 2012 n.3). That any court would not find the decision directly on point in the Section 2412(d) context is difficult to imagine despite this refusal to declare definitively that the decision applies as well to Section 2412(d).

[114] *Id*. at 2012.

[115] *Id*.

[116] *Id*. at 2013.

[117] *Id*. (footnote omitted).

under 42 U.S.C. § 1988, and concluded that the Court's holding there, that the term "attorney's fees" included fees for paralegal services, was equally applicable to the EAJA.[118] Accordingly, "[s]ince § 504 [of the EAJA] generally provides for recovery of attorney's fees at 'prevailing market rates,' it follows that fees for paralegal services must be recoverable at prevailing market rates as well."[119]

Second, the Court categorically rejected the government's argument that the legislative history somehow supported its position: "[T]he legislative history does not even address the question presented, much less answer it in the Government's favor."[120]

Third, Justice Alito found unpersuasive the government's policy rationale—that the result would cap attorney's rates and paralegal rates at the same amount, thus "encourag[ing] litigants to shift an inefficient amount of attorney work to paralegals"—for the text of the statute "shows that Congress was untroubled by the very distortion that the Government seeks to prevent."[121]

The Cross-Appeal Requirement

In the context of a criminal case, the Court restated a hard-and-fast rule that is equally applicable in the civil context.[122] Although the holding is not surprising, it does unequivocally state what most lawyers had already assumed: without a cross-appeal, an appellee cannot emerge from an appeal better off than it went in.

The vehicle for this resolution was an Eighth Circuit panel's decision to augment a sentence after rejecting the defendant's contentions that the sentence should be reduced.[123] Although the district court had made a clear error in its sentencing, and the government noted in its appellate brief that the sentence should have been fifteen years longer, the government had not filed a cross-appeal.[124] Nevertheless, the court of appeals concluded that it could exercise its discretion to correct the lower court's error on the court of appeals' own initiative.[125]

Writing for the six-Justice majority, Justice Ginsburg began by restating the rule that had already been characterized as "'inveterate and certain'": "it takes a cross-appeal to justify a remedy in favor of an appellee."[126] She then proceeded to explain the rationale for maintaining that rule. Declining to resolve whether the rule is "jurisdictional" or "a rule of practice," the majority discussed both rules of criminal procedure and the common-law doctrine of the "plain-error exception." Never, the Court explained, had it "applied plain-error doctrine to the detriment of a petitioning party."[127]

The Court also relied on the Federal Rules of Appellate Procedure, which dictate the filing of a notice of appeal and set firm deadlines for that filing.[128] These

[118]*Id*. at 2014–15 (discussing *Missouri v. Jenkins*, 491 U.S. 274 (1989)).

[119]*Id*. at 2014.

[120]*Id*. at 2015.

[121]*Id*. at 2018.

[122]*Greenlaw v. United States*, 128 S. Ct. 2559 (2008).

[123]*Carter v. United States*, 481 F.3d 601, 608–9 (8th Cir. 2007), vacated and remanded sub nom. *Greenlaw v. United States*, 128 S. Ct. 2559 (2008).

[124]*Greenlaw*, 128 S. Ct. at 2563.

[125]*Carter*, 481 F.3d at 608–9.

[126]*Greenlaw*, 128 S. Ct. at 2564 (quoting in part *Morley Construction Company v. Maryland Casualty Company*, 300 U.S. 185, 191 (1937)).

[127]*Id*. at 2566.

[128]*Id*. at 2569 (citing Federal Rules of Appellate Procedure 3(a)(1), 4(b)(1)(B)(ii), 4(b)(4), and 26(b)).

requirements ensure "fair notice and finality": "[t]he strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal."[129]

Justice Alito's dissent, on behalf of himself and Justices Stevens and Breyer, determined that "the cross-appeal requirement is best characterized as a rule of practice."[130] He also opined that the closest parallel was the rule allowing an appellate court, in extraordinary circumstances, to address an argument not raised by the parties.[131] With these as his analytical premises, Justice Alito concluded that "the interest of the public and the Judiciary in correcting grossly prejudicial errors of law may sometimes outweigh other interests normally furthered by fidelity to our adversarial tradition."[132] He declined to specify, however, when it would be appropriate for an appellate court to step in, and he noted only that he "would grant them substantial latitude" to take that action.[133]

The bottom line is that nothing changed. Nevertheless, *Greenlaw* enshrines the cross-appeal requirement as dictating that an appellee must file a cross-appeal to improve on his position from the trial court.

Statutory Construction

In its decision determining that the EAJA required payment for paralegal work based on market rates, the Court also repudiated the government's attempt to "seek[ ] shelter in a canon of construction."[134] The government argued that the EAJA should be strictly construed because it was a waiver of sovereign immunity, but the Court rejected that canon as irrelevant to the issue before it. Noting that it had always applied that canon in tandem with other tools of construction, Justice Alito's opinion employs language that could be worth quoting in future litigation: "The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction."[135] Since there was no ambiguity in the case before it, "[t]here is no need to resort to the sovereign immunity canon."[136]

■ ■ ■

As we facetiously state in our introductory paragraphs, the latest Term's decisions suggest less enthusiasm by the Court for its traditional effort to block access to federal court by noncorporate litigants. We can only hope that this retreat is not temporary.

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[129]*Id.* The Court reiterated, however, another traditional rule of appellate practice that favors the appellee: "An appellee or respondent may defend the judgment below on a ground not earlier aired" (*id.* at 2567 n.5 (citation omitted)).

[130]*Id.* at 2572 (Alito, J., dissenting).

[131]*Id.* at 2575 (Alito, J., dissenting).

[132]*Id.* (Alito, J., dissenting).

[133]*Id.* (Alito, J., dissenting). The difficulty of applying such an amorphous standard is demonstrated in this very case by the fact that Justice Breyer, although he agreed with Justice Alito on the proper legal analysis, concurred in the judgment because "the court [of appeals] abused its discretion in sua sponte increasing petitioner's sentence. Our precedent precludes the creation of an exception to the cross-appeal requirement based solely on the obviousness of the lower court's error" (*id.* at 2571 (Breyer, J., concurring in judgment)).

[134]*Richlin Security Service Company v. Chertoff*, 128 S. Ct. 2007, 2019 (2008); see *supra* under the heading "Market Rates for Paralegals' Work" for a discussion of the rest of the *Richlin* decision.

[135]*Id.*

[136]*Id.*

COMMENTS?

Fill out the comment form at http://tinyurl.com/Jan-FebCRSurvey. Thank you.

—The Editors

A possible development to the contrary, however, is the Roberts Court's increasing emphasis on as-applied challenges over facial challenges. As a recent article in the ABA JOURNAL indicated, the Court issued, this past Term, three decisions in which it rejected facial challenges but suggested that targeted attacks on specific aspects of a statute might be acceptable.[137] The three decisions came in the context of voting requirements and capital punishment methodologies, but the prospect of applying the antifacial challenge analyses in other contexts as well should not be ruled out.

Another opportunity to limit plaintiffs' claims is presented by a case that is before the Court for resolution in the 2008–2009 Term. *Fitzgerald v. Barnstable School Committee* questions the determination of some circuits to preclude sex discrimination claims under 42 U.S.C. § 1983 for alleged violations of the equal protection clause when the plaintiff also challenges the same behavior under a federal nondiscrimination statute.[138]

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[137]David G. Savage, *About Face: A Tool of the Civil Rights Movement Is Increasingly Unwelcome in Federal Court*, ABA JOURNAL, July 2008, at 21. The decisions discussed are *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Baze v. Rees*, 128 S. Ct. 1520 (2008); and *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008).

[138]*Fitzgerald v. Barnstable School Committee*, 504 F.3d 165 (1st Cir. 2007), petition for certiorari granted, 128 S. Ct. 2903 (2008).

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