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**The Supreme Court's Federalism Decisions for the 2003 Term:  
Yet Another Try at Clarifying Sovereign Immunity Doctrine**

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The 2003 term produced three sovereign immunity decisions of special interest to federal courts professors. In *Frew v. Hawkins*, the Court's unsurprising opinion on the enforceability of consent decrees against state officials also contains language on the scope of the doctrine of *Ex Parte Young*. *Tennessee v. Hood* visits but does not resolve the question of Congressional power to abrogate sovereign immunity under the Bankruptcy Clause. The eagerly awaited decision in *Tennessee v. Lane* once again confirms the importance of Justice O'Connor's vote. Beyond that, *Lane* may obfuscate rather than clarify the evolving doctrine on the power of Congress to abrogate state sovereign immunity under the Fourteenth Amendment. The following is a summary of each of these cases.

*Frew v. Hawkins*, 540 US \_\_; 124 S. Ct 899 (2004) (the doctrine of *Ex Parte Young*)

Reversing the 5th circuit court of appeals, the Court, in a unanimous opinion by Justice Kennedy, held that when state officials who are sued in federal court enter into a consent decree to settle the case by agreeing to certain actions, subsequent suits to enforce the decree do not violate the Eleventh Amendment.

The consent decree in *Frew* resolved a suit against the state of Texas for violating a condition of state participation in Medicaid, that the state carry out a program of early periodic screening, diagnosis, and treatment. The consent decree ordered a comprehensive plan for implementing the required program, a plan that was much more specific than the statutory mandate itself. The Fifth Circuit found that the violations of the decree were not violations of the federal statute, and that in the absence of a violation of federal law, the District Court lacked jurisdiction to remedy the violations. This holding brought the Fifth Circuit into conflict with the Second and Seventh Circuits.

In the Supreme Court, the State's argument rested on both *Ex Parte Young*, 209 US 123 (1908), and *Pennhurst v. Halderman*, 465 US 89 (1981). These cases, the State argued, created only a narrow exception to Eleventh Amendment immunity based on the need to enforce federal law. Since the consent decree swept more broadly than the federal statute in question, enforcement of the consent decree would improperly expand the reach of the *Young* exception. The Court rejected this argument, finding, under *Firefighters v. Cleveland*, 478 US 501 (1986), that since the decree was a federal court order, springing from a dispute arising under federal law, the decree furthered the objectives of federal law. The Court found *Hutto v. Finney*, 437 US 678 (1978), to be the more relevant Eleventh Amendment precedent, analogizing the proceedings to enforce the decree in this case to the award of attorney fees in *Finney*.

As a practical matter, a contrary result would have created serious disincentives to settlement in cases against states or state officials.

*Tennessee Student Assistance Corp. v. Hood*, 540 U.S. \_\_; 124 S. Ct 1905 (2004) (abroga-

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tion; bankruptcy)

In *Hood*, a bankruptcy court discharged certain defaulted student loans. The creditor, Tennessee Student Assistance Corporation, a state agency, argued that it had sovereign immunity, and thus that the bankruptcy court could not extinguish its rights. The Supreme Court held that a discharge of debts by a bankruptcy court is not an action against the state for purposes of sovereign immunity. The action is in fact against the bankrupt estate, *in rem*, and not against affected creditors. The Court declined to reach the question whether Congress could abrogate a bankruptcy court's exercise of personal jurisdiction over a state. Justice Thomas, joined by Justice Scalia, wrote a dissenting opinion arguing that the Court should have reached this question and resolved it against the power of Congress, under the Bankruptcy Clause, to abrogate sovereign immunity. (Hood did not argue that Congress had that power under Section 5 of the Fourteenth Amendment.)

*Tennessee v. Lane*, 540 U.S. \_\_; 124 S. Ct. 1978 (2004) (abrogation; ADA)

The Court upheld the power of Congress to subject the states to monetary liability under Title II of the ADA, which requires the states to provide reasonable accommodations to allow disabled persons otherwise eligible to participate fully in public services, programs, or activities.

In the aftermath of the Court's decision in *Board of Trustees of Alabama v. Garrett*, 531 U.S. 356 (2001), holding that the Eleventh Amendment bars private damages actions against a state for violation of Title I of the ADA (prohibiting employment discrimination against the disabled), *Lane*, on the reach of Title II, was anticipated with great interest. Although both cases were 5-4 decisions, with Justice O'Connor providing the crucial fifth vote in each, *Lane* went the other way, permitting the action against the state to go forward.

George Lane was a paraplegic charged with a crime in Tennessee. He was required to appear in court on the second floor of the county courthouse, which had no elevator. He refused to be carried up out of fear that he was so heavy he would be dropped, and he crawled up the courthouse steps. At his second hearing, he refused to crawl. He was thus arrested for failing to appear at the hearing. He defended on the ground that the state should have given him an elevator to provide reasonable access to courts, under the ADA.

The Court's recent line of closely divided decisions has narrowly limited the power of Congress to abrogate state immunity. In the wake of *Seminole Tribe of Florida v. Florida*, (517 U.S. 44 (1996), Article I power may be unavailable. Congress's power to abrogate state immunity may be limited to statutes adopted pursuant to Section Five of the Fourteenth Amendment. The intersection of *Seminole Tribe* with *City of Boerne v. Flores*, 521 US 507 (1997), has come to mean that even under its Section 5 power, Congress may abrogate sovereign immunity only to the extent its statutory remedy is congruent and proportional to known violations of a constitutional right.

This standard has proved elusive in several cases. Last term, in *Nevada Dept. of Human Resources v. Hibbs*, 538 US 721 (2003), the Court held the *Boerne* test satisfied, and sustained the family care leave provision of the Family and Medical Leave Act of 1993, in an action against a state agency, as a valid exercise of the Section 5 power. *Hibbs*, unlike *Lane* or *Garrett*, involved gender, a suspect classification placing a higher burden of justification upon the defendant state, which might allow Congress broader latitude to abrogate state immunity.

Another noticeable difference between these cases was the Court's approach to the Congressional record. The *Lane* Court was significantly more willing than was the *Garrett* Court to aggregate instances of state discrimination with instances of local governmental discrimi-

nation, as well as instances of various types of discrimination against the disabled, in order to establish a pattern. Unfortunately, the difference in method went unacknowledged.<sup>2</sup> Another possible distinction concerns this Court's solicitude for access to the courts (as in, for example, *Velazquez v. Legal Services Corporation*, 532 U.S. 903 (2001)).

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<sup>2</sup> Shameless plug: for discussion of *Garrett's* methodology, see Susan Bandes, *Fear and Degradation in Alabama: The Emotional Subtext of University of Alabama v. Garrett*, 5 U. PA. J. CONST. L. 520 (2003).