Federalism & Separation of Powers: Supreme Court 2002-2003 Term*

By Tara Ross

Sprietsma v. Mercury Marine, 123 S. Ct. 518, 537 U.S. 51 (2002). *Decided: Dec. 3, 2002.*

In 1995, Jeanne Sprietsma was killed when she fell from a motor boat and was struck by its propeller blades—the boat had not been equipped with a propeller guard. Sprietsma's husband filed a wrongful death suit against the manufacturer of the boat, alleging that it was defectively designed because it did not include the guard. The Illinois Supreme Court affirmed a lower court dismissal of the case, holding that the Federal Boat Safety Act of 1971 (FBSA) preempted Sprietsma's state common-law tort claims. The Supreme Court unanimously reversed the decision.

The Court held that the FBSA's preemption clause "is most naturally read as not encompassing common-law claims." 123 S. Ct. at 526. The clause provides that a state "'may not establish . . . a law or regulation . . . that is not identical to a regulation prescribed under [the FBSA].'" *Id.* at 524 (citation omitted). The wording of the pre-emption clause, the Court added, "indicate[s] that Congress pre-empted only positive enactments." *Id.* at 526. The FBSA's savings clause reinforces this interpretation of the statute. It states that compliance with the FBSA "does not relieve a person from liability at common law or under State law." *Id.* at 524 (citation omitted). The Court also rejected respondent's assertion that the common-law claims were preempted by a Coast Guard decision not to regulate propeller guards. Instead, the Court noted, the Coast Guard's actions (or lack thereof) merely emphasized "the lack of any 'universally acceptable' propeller guard for 'all modes of boat operation.'" *Id.* at 528. Last, the Court held that the common-law claims are not "implicitly pre-empted by the entire statute." *Id.* at 527. In contrast to other statutes that have been held to preempt state law, the "the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies." *Id.* at 529.

Pierce County v. Guillen, 123 S. Ct. 720, 537 U.S. 129 (2003). *Decided: Jan. 14, 2003.*

The Hazard Elimination Program ("Section 152") was established by Congress to provide states with funds for road hazard improvement projects. Participating states are required to conduct surveys of public roads, identify hazardous conditions, and assign priorities to needed repairs. To encourage an honest evaluation of road conditions, a federal law ("Section 409") made various provisions to restrict the release of this information to the public. The issues in *Guillen* arise from litigation surrounding a fatal car accident in Pierce County, Washington, and the plaintiffs' attempts to obtain data about road conditions through Washington's Public Disclosure Act ("PDA"), despite claims that the data is protected by Section 409. The Washington Supreme Court determined that Section 409 "purported to protect from disclosure any documents prepared for state and local purposes, so long as those documents were also collected for [Section 152] purposes." 123 S. Ct. at 727. Based on this interpretation, the court held that Section 409 "violates [the "Constitution's] federalist design . . . insofar as it makes state and local traffic and accident materials and data nondiscoverable . . . , simply because they are *also* 'collected' and used for federal purposes."[1] The Supreme Court reversed and remanded in part.[2] Justice Thomas delivered the opinion for an unanimous Court.

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

Turning to the constitutional question, Justice Thomas noted that Congress has authority under the Commerce Clause "'to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.'" *Id.* at 731 (citation omitted). Section 409 can rationally be seen as legislation "aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce." *Id.* at 732. Given states' reluctance to collect needed information prior to the adoption of Section 409, "Congress could reasonably believe" that adopting Section 409 "would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads." *Id.* at 731-32. Section 409, Justice Thomas concluded, is a valid exercise of congressional power under the Commerce Clause.

Eldred v Ashcroft, 123 S. Ct. 769, 537 U.S. 186 (2003). *Decided: Jan. 15, 2003.*

In 1998, Congress passed the Copyright Term Extension Act (the CTEA), which extended the term of existing and future copyrights. Petitioners filed a facial challenge to the CTEA, claiming that the retroactive aspects of the bill exceeded Congress' power under the Copyright Clause of the Constitution.[3] The D.C. Circuit affirmed a dismissal by the lower court,

ruling that "[w]hatever wisdom or folly the plaintiffs may see in the particular 'limited Times' for which the Congress has set the duration of copyrights, that decision is subject to judicial review only for rationality."[4] The Supreme Court affirmed. Justice Ginsburg delivered the opinion of the Court, in which the Chief Justice, and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas joined. Justices Stevens and Breyer filed dissenting opinions.

Text, history, and precedent, Justice Ginsburg held, support the conclusion that Congress is empowered to "prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future." 123 S. Ct. at 778. First, she rebutted petitioners' claim that, although the baseline term in the CTEA "qualifies as a 'limited Time'" for future copyrights, "existing copyrights extended to endure for that same term are not 'limited.'" *Id.* Such a conclusion, she argued, would "read[ ] into the text of the Copyright Clause the command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'" *Id.* Second, "[h]istory reveals an unbroken congressional practice" of granting copyright term extensions "so that all under copyright protection will be governed evenhandedly." *Id.* Third, although the Court has not yet considered this issue in the context of copyrights, previous cases have "found no constitutional barrier to the legislative expansion of existing patents." *Id.* at 780. Last, the CTEA "is a rational enactment," and the Court may not "second-guess" congressional policy judgments. *Id.* at 782-83.

Justice Ginsburg next addressed specific novel arguments of the petitioners. She disagreed that, although the term is *literally* a "limited Time," the consistent extensions "effectively [create] perpetual copyrights." *Id*. at 783. No showing has been made, she argued, that the CTEA is an attempt to "evade or override the 'limited Times' constraint," nor is there evidence that it "crosses a constitutionally significant threshold'" that previous extensions did not. *Id.* The Justice also dismissed application of the *Feist* principle that "copyright protection is unavailable to 'a narrow category of works in which the creative spark is utterly lacking or [trivial].'" *Id.* at 784 (citation omitted). *Feist*, she held, addressed whether a work is "eligible for copyright protection at all." *Id.* Next, the CTEA does satisfy the preambular language of the Copyright Clause, as Congress had "a rational basis" for concluding that the CTEA "'promotes the Progress of Science.'" *Id.* at 785. The Justice disagreed that extending a copyright without additional consideration "bestows an unpaid-for benefit on copyright holders . . . in violation of the *quid pro quo* requirement." *Id.* at 786. Given legislative history on this subject, authors "would reasonably comprehend [as part of the bargain], . . . a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time." *Id.* In sum, she held, the CTEA is a permissible exercise of congressional power under the Copyright Clause.

Cook County v. United States *ex rel.* Chandler, 123 S. Ct. 1239, 538 U.S. ___ (2003). *Decided Mar. 10, 2003.*

A former employee of Cook County, Illinois, sued the county under the federal False Claims Act ("FCA"). The plaintiff filed a *qui tam* action on behalf of the United States to recover funds that she claimed were fraudulently obtained by the County in its administration of a drug treatment program. The County sought dismissal, arguing that it is not a "person" subject to liability under the FCA. The District Court initially denied the motion, but reconsidered following the Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[5] The District Court then dismissed the case, holding that a "County, like a State, could not be subjected to treble damages." *Id.* at 1243. The Seventh Circuit reversed, finding that the County is a "person" under the FCA and "subject to the same penalties as other defendants," including treble damages.[6] The Supreme Court affirmed. Justice Souter delivered the opinion for a unanimous Court.

Justice Souter observed that the meaning of the term "person" in the FCA has remained unchanged since the statute was first passed in 1863. *Id.* at 1243-44. The County, he noted, concedes that private corporations were included in the term at the time the FCA was passed, but argues that municipal corporations "were not so understood until six years later," when *Cowles* v. *Mercer County*,[7] was decided. *Id.* at 1244. *Cowles*, Justice Souter argued, merely announced an understanding already in place. The Justice first rebutted several textual arguments that "person," as used in the FCA, was intended to be used in a more limited sense. Second, Justice Souter noted that, although the FCA was written to prevent a specific type of fraud not engaged in by municipalities, "in no way does it affect the fact that Congress wrote expansively, meaning 'to reach all types of fraud . . . that might result in financial loss to the Government.'" *Id.* at 1246 (citation omitted). Last, Justice Souter addressed the alternative claim that punitive damages may not be assessed against a municipality unless expressly authorized by statute. In 1986, the FCA was amended to allow treble damages. This change, Justice Souter noted, "turn[ed] what had been a 'remedial' provision into an 'essentially punitive' one." *Id.* (citation omitted). This punitive character provides a reason "not to read 'person' to include a State," but it does not necessarily show "congressional intent to repeal implicitly the existing definition of that word, which included municipalities." *Id.* He additionally noted that the FCA's damages have a "compensatory side, serving remedial purposes," which lessens the "force [of any punitive impact] in arguing against municipal liability." *Id.* at 1246-47. Finally, statutory interpretation disfavors "'repeals by implication.'" *Id.* at 1248 (citation omitted).

Kentucky Ass'n of Health Plans v. Miller, 123 S. Ct. 1471, 538 U.S. ___ (2003). *Decided: Apr. 2, 2003.*

In 1994, the Kentucky state legislature enacted the Kentucky Health Care Reform Act, which contained an "any willing provider" provision.[8] Later, in 1996, an "any willing provider" provision was also added for chiropractors.[9] Plaintiffs,

seven HMOs, filed a suit for injunctive relief, claiming that both provisions are preempted by ERISA. The district court granted defendant's motion for summary judgment, concluding that the provisions are saved from preemption because they "regulate insurance" under ERISA's savings clause.[10] The Sixth Circuit affirmed the decision of the lower court. The Supreme Court affirmed the Sixth Circuit. Justice Scalia delivered the opinion for a unanimous Court.

Justice Scalia noted that the first step in determining whether statutes are saved from preemption is to "ascertain whether they are 'laws . . . which regulate insurance' under § 1144(b)(2)(A)." *Id.* at 1475 (alteration in original). In order to fall under ERISA's savings clause, he held, a "state law must be 'specifically directed toward' the insurance industry." *Id.* In addition, "insurers must be regulated 'with respect to their insurance practices,'" because § 1144(b)(2)(A) "saves laws that regulate *insurance*, not insurers." *Id.* (citation omitted). The Kentucky statutes are "specifically directed toward" insurers, despite the contention of petitioners that "they regulate not only the insurance industry but also [providers]." *Id.* The Justice observed, "Regulations 'directed toward' certain entities will almost always disable other entities from doing, with the regulated entities, what the regulations forbid; this does not suffice to place such regulation outside the scope of ERISA's savings clause." *Id.* at 1476. Second, Justice Scalia rebutted the contention that the insurers are not regulated "with respect to an insurance practice" because the statutes "focus upon the relationship between an insurer and *third-party providers*," rather than controlling "the actual terms of insurance policies." *Id*. Petitioners' argument, the Justice noted, relies upon a case analyzing § 2(b) of the McCarran-Ferguson Act; however, "ERISA's savings clause . . . is not concerned (as is the McCarran-Ferguson Act provision) with how to characterize *conduct* undertaken by private actors, but with how to characterize *state laws* in regard to what they 'regulate.'" *Id.* at 1476-77. In this case, Kentucky's laws "regulate" insurance "by imposing conditions on the right to engage in the business of insurance." *Id.* at 1477. In order to be covered by the savings clause, Justice Scalia added, the conditions "must also substantially affect the risk pooling arrangement between the insurer and the insured . . . . Otherwise, any state law aimed at insurance companies could be deemed a law that 'regulates insurance.'" *Id*.

Justice Scalia concluded, "Our prior decisions construing § 1144(b)(2)(A) have relied, to varying degrees, on our cases interpreting §§ 2(a) and 2(b) of the McCarran-Ferguson Act"; however, "[w]e believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance . . . [and] added little to the relevant analysis." *Id.* at 1478. He continued, "Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a 'law . . . which regulates insurance' under § 1144(b)(2)(A), it must satisfy two requirements. . . . [First, it] must be specifically directed toward entities engaged in insurance. . . . . [Second, it] must substantially affect the risk pooling arrangement between the insurer and the insured." *Id.* at 1479 (first alteration in original). Since Kentucky's law satisfies each of these requirements, Justice Scalia held, it is not preempted by ERISA.

Franchise Tax Bd. of Cal. v. Hyatt, 123 S. Ct. 1683, 538 U.S. ___ (2003). ***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. 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 statutes 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 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*,[11] 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.

Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 538 U.S. ___ (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.[12] The Ninth Circuit reversed the district court holding. 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 the ability to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Id.* Such legislation, however, 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. 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. Congress could "reasonably conclude" that existing state leave policies were insufficient and seek to enact its own remedy. *Id.* at 1981. The remedy enacted, the Chief Justice found, 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 "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.[13] 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.

Lawrence v. Texas, 123 S. Ct. 2472, 539 U.S. ___ (2003). *Decided: June 26, 2003.*

Two police officers were dispatched to a residence in Houston, Texas, in response to a reported 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 2476. The Texas state courts rejected petitioners' contention that the statute violated their rights under the Fourteenth Amendment.[14] 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. Justice Scalia filed a dissenting opinion, in which the Chief Justice and Justice Thomas joined. Justice Thomas also filed a separate, dissenting opinion.

The question before the Court, Justice Kennedy stated, 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 Fourteenth Amendment." *Id. Bowers v. Hardwick*[15] failed to "appreciate the extent of the liberty at stake." *Id.* at 2478. 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.* The *Bowers* Court, he continued, justified its holding by addressing the "ancient roots" against such conduct, but it "overstated" this history. *Id.* at 2478, 2480. 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.* at 2480. The question here, however, is whether the state may "enforce these views . . . through operation of the criminal law." *Id. 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.* Further, *Bowers* has been the subject of "substantial and continuing" criticism, both domestically and abroad. *Id.* at 2483. *Bowers v. Hardwick* is overruled.

Justice Scalia's dissenting opinion noted that the Texas statute "undoubtedly imposes constraints on liberty." *Id.* at 2491 (Scalia, J., dissenting). 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.* (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.* at 2492 (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. 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 2494. Rather than address this point, Justice Scalia continued, the Court rests its holding on a "contention that there is no rational basis for [the Texas] law." *Id.* at 2495. 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 incest, bestiality, and obscenity." *Id.* (internal citation omitted). As *Bowers* held, this is a "legitimate state interest." *Id.* The Court's holding to the contrary "effectively decrees the end of all morals legislation." *Id.*

Footnotes

***** Includes summaries of several of the Court's primary federalism cases for the 2002-2003 term. More thorough case summaries (along with summaries of cases, concurrences, and dissents not included here) are also available in the practice group's quarterly updates, available at: http://www.fed-soc.org/Publications/practicegroupnewsletters/federalism/federalism.htm.

[1] *Guillen v. Pierce County*, 31 P.3d 628, 633 (Wash. 2001).

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

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

[4] *Eldred v. Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001).

[5] 529 U.S. 765 (2000) (holding that states are not "persons" subject to qui tam actions under the FCA).

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

[7] 74 U.S. (7 Wall.) 118 (1869).

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

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

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

[11] 440 U.S. 410 (1979).

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

[13] 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).

[14] 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.

[15] 478 U.S. 186 (1986).