Civil Rights and Civil Liberties in the Supreme Court's 2002-2003 Term

The Supreme Court's 2002-2003 Term underlined the importance of future nominations to the Court. The justices remain narrowly divided on a number of key issues concerning civil and constitutional rights, and came within one or two votes of adopting extreme positions advanced by Justices Thomas and Scalia in several important cases. These included the Court's 5-4 decisions upholding affirmative action and a key method used to finance legal aid for the poor, as well as 6-3 rulings upholding the Family and Medical Leave Act as applied to state employees and striking down Texas' anti-gay sodomy law.

Although these decisions represented important victories, overall the Court reached mixed results in 2002-03 on civil rights and civil liberties. It narrowly approved affirmative action as used in law school admissions at the University of Michigan, but struck down the University's undergraduate admissions affirmative action plan. The Court upheld a restrictive federal law mandating filters on the Internet in public libraries, but did so only based on the understanding that adults can "opt out" of mandatory filtering. It issued important decisions protecting gays and lesbians and preventing job discrimination victims from facing difficult barriers in proving their cases, but also limited the scope of the Americans with Disabilities Act. This report summarizes the Court's key decisions this term on civil rights, civil liberties, and other non-criminal law subjects in our *Courting Disaster* report, an updated version of which will be released during the week of June 30.

Looking ahead to 2003-04, the Court is already scheduled to hear a number of important and controversial cases. These include a challenge to the McCain-Feingold campaign finance law, a case concerning the validity of a key part of the Americans with Disabilities Act, and a case that far right advocates are hoping will invalidate state constitutional provisions that provide more protection against religious school voucher plans than the federal Establishment Clause. PFAW Foundation will be participating in a number of these and other cases before the Court next term.

Federalism and States' Rights

In two cases, the Court rejected efforts to further restrict federal authority in the name of "federalism." In *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), the Court held 6-3 that State employees may sue for money damages in federal court if a State employer violates their rights under the federal Family Medical Leave Act's (FMLA) family-care provision. The Court explained that Congress may subject states to such liability in federal court if it makes its intention to abrogate Eleventh Amendment immunity "unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment." 123 S. Ct. at 1977. In an opinion by Chief Justice Rehnquist, the majority opinion held that FMLA clearly states Congress' intent to abrogate 11th Amendment

immunity, and that FMLA was an appropriate use of Congress' Section 5 enforcement power. Based on "the persistence of… unconstitutional discrimination by the States," the majority stated, Congress was justified in passing FMLA as "prophylactic Section 5 legislation," *id.* at 1979, and the remedy chosen by Congress, the FMLA's family-care provision, is congruent and proportional to the violation targeted. Justices Stevens, Souter, Breyer, and Kennedy concurred, making clear that they continue to disagree with the narrow framework for evaluating federal laws requiring state compliance as articulated by Rehnquist. Justice Kennedy, joined by Justices Thomas and Scalia, dissented, claiming that the "Court is unable to show that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits." *Id*. at 1987. (PFAWF filed an *amicus* brief in this case.)

Jinks v. Richland County concerned a federal law (28 U.S.C. §1367(d)) preserving a claimant's ability to later file a state lawsuit when federal and state claims are involved in the same federal lawsuit and the state claims are dismissed from the federal litigation. In a divided opinion, the Court had previously held that this "tolling rule" does not apply to claims against state governments. The question in *Jinks* was whether counties should also be exempt from the rule, since they are created by states. The Court rejected this effort to expand "sovereign immunity" to municipalities, and unanimously ruled that the application of the tolling rule to counties is constitutional.

Privacy and Reproductive Freedom

The 2002-03 Term produced a landmark ruling concerning the constitutional rights of gay men and lesbians, *Lawrence v. Texas*, 2003 U.S. LEXIS 5013 (2003). In a 6-3 decision, the Court declared unconstitutional a Texas sodomy law that criminalized private, consensual sex between adults of the same gender. Although Justice O'Connor reached that result under the Equal Protection Clause, explaining that because the law applied only to gay men and lesbians, it "makes homosexuals unequal in the eyes of the law," 2003 U.S. LEXIS 5013 at 41, the majority went further and overruled the Court's infamous 5-4 decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a Georgia sodomy law as applied to gay men and lesbians. In an opinion written by Justice Kennedy and joined by Justices Breyer, Ginsburg, Souter, and Stevens, the majority in *Lawrence* recognized that the Texas law had "far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home," and seeks "to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." *Id.* at 16. The issue was not whether homosexual conduct is immoral, explained the Court, but rather whether a state could enforce a view of morality upon society as a whole. The majority specifically explained that it would be insufficient to base its ruling on the unequal treatment of gay men and lesbians under the Texas law and not examine *Bowers* because, if "protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id*. at 30. The majority concluded that the Court's analysis in *Bowers* was fundamentally flawed, and held that sodomy laws written to apply to all people or only to gay men and lesbians violate privacy rights and liberty interests protected by the Due Process Clause. The majority thus explicitly overruled *Bowers* and declared the Texas statute unconstitutional. In a scathing dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, criticized the majority's treatment of *stare decisis* as well as its refusal to find

that a state has a legitimate interest in promoting "majoritarian sexual morality." *Id.* at 72. Justice Thomas also issued a separate dissent in which he stated that he was not "empowered" to grant any relief to the gay men convicted for violating the Texas law or any similarly situated persons. *Id.* at 83. Two more Justices on the Court aligned with the views of Scalia and Thomas would have upheld the Texas law, would have significantly eroded the right to privacy, and would have placed an enormous obstacle in the road to full equality for gay men and lesbians. (PFAWF filed an *amicus* brief in this case.)

The Court considered one case this term dealing indirectly with reproductive rights. In *Scheidler v. National Organization for Women*, 123 S. Ct. 1057 (2003), the issue was whether aggressive blockades and other activities blocking women's access to abortion clinics could lead to civil liability under the Racketeer Influenced and Corrupt Organizations Act (RICO). The Court held in an 8-1 opinion that such actions did not constitute extortion as defined by the Hobbs Act, since the petitioners did not *acquire* any property, and that RICO thus did not apply. Although NOW argued that there had been a violation of property rights, namely "a woman's right to seek medical services from a clinic, the right of doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear," 123 S. Ct. at 1063, the majority did not agree that this constituted an obtaining of property as required by the Act. In his dissenting opinion, Justice Stevens took a more expansive view of the term "property," found that the actions were extortion, and contended that by narrowly construing "property rights," the majority's holding would benefit "the class of professional criminals whose conduct persuaded Congress that the public needed federal protection from extortion." *Id.* at 1012. (PFAW Foundation filed an *amicus* brief in this case.)

Civil Rights

The 2002-2003 term produced mixed results concerning civil rights, headlined by landmark rulings in a pair of affirmative action cases concerning University of Michigan admissions policies, which again emphasized the significant divisions on the Court on controversial issues and the importance of future nominations. In *Grutter v. Bollinger*, 2003 U.S. LEXIS 4800 (2003), in a narrow 5-4 decision, the majority of the Court upheld the University of Michigan law school's admissions policy and held that promoting educational diversity in higher education is a compelling state interest. The opinion, written by Justice O'Connor and joined by Justices Breyer, Ginsburg, Souter, and Stevens, found that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." 2003 U.S. LEXIS 4800 at 64. The Court found that the policy used by the law school consisted of "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id*. at 53. The plan does not use race unconstitutionally, nor does it unduly harm nonminority applicants, explained the Court. Justices Thomas, Scalia, Rehnquist, and Kennedy dissented from the majority opinion and would have invalidated the law school's admissions policies as an unconstitutional violation of the Fourteenth Amendment. According to Thomas, the law school must effectively choose between its goals of diversity and academic excellence, and "cannot have it both ways." *Id.* at 123-24. Thomas and Scalia also "concurred" in what they claimed was a majority holding that said affirmative action will be deemed unnecessary and unconstitutional

in 25 years, a "holding" not actually contained in Justice O'Connor's opinion and explicitly described as a "hope" and not a holding by Justices Ginsburg and Breyer. Just one more justice in the mold of Scalia or Thomas would have overturned the law school's admissions policy and would have effectively dismantled affirmative action across the country.

In the companion case concerning the admission policy at the undergraduate college, *Gratz v. Bollinger*, 2003 U.S. LEXIS 4801 (2003), the Court ruled in a 6-3 decision that the policy was unconstitutional under the Fourteenth Amendment. Chief Justice Rehnquist delivered the majority opinion, which was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. They ruled that the admissions policy used at the college did not adequately provide for individualized consideration of applicants, but rather automatically assigned 20 points to any underrepresented minority who applied for admission. Justice Breyer concurred in the judgment of the Court but did not join in the majority opinion. Justices Stevens, Souter, and Ginsburg dissented, arguing that the students who brought the case did not have standing to bring the lawsuit. Reaching the merits of the case, Justices Souter and Ginsburg would have found the plan to be constitutional, contending that its admissions decisions did include individualized consideration of a wide variety of personal attributes, and that it did not improperly use race, particularly in light of the importance of preventing the perpetuation of the effects of past discrimination and segregation. (PFAWF filed an *amicus* brief in both affirmative action cases.)

The Court decided two cases concerning Section 5 of the Voting Rights Act. In a 5-4 decision, the Court vacated a ruling of a three-judge court in the District of Columbia that had found Georgia's redistricting plan to be retrogressive and thus not suitable for pre-clearance under Section 5. Section 5 requires jurisdictions like Georgia with a prior history of voting-related discrimination to prove that proposed voting changes do not have a "retrogressive" effect on the voting power of minority voters. In *Georgia v. Ashcroft*, 2003 U.S. LEXIS 5012 (2003), Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy, concluded that the district court failed to consider several important criteria in determining that a proposed Georgia redistricting plan, which altered the number of black-majority districts, was retrogressive. The majority found that the plan was designed to "'unpack' the minority voters from a few districts to increase blacks' effective exercise of the electoral franchise in more districts," and thus there was a high probability, explained the Court, that the plan was not retrogressive in its overall impact. 2003 U.S. LEXIS 5012 at 51. The Court remanded the case for reconsideration in light of the criteria set forth by the majority. Justices Souter, Breyer, Ginsburg, and Stevens dissented, arguing that the "majority unmoors §5 from any practical and administrable conception of minority influence that would rule out retrogression in a transition from majority-minority districts, and mistakes the significance of the evidence supporting the District Court's decision." *Id.* at 59. Georgia did not meet its burden of proving that its redistricting plan did not retrogressively impact minority voters, argued the dissent, and the district court thus correctly denied pre-clearance.

In an important Mississippi redistricting case involving competing redistricting plans approved by state and federal courts, the Court in *Branch v. Smith*, 123 S. Ct. 1429 (2003), upheld the federal court-approved plan because the state did not obtain timely pre-clearance from the Department of Justice or the D.C. district court as required under Section 5 of the Voting Rights Act. While recognizing that reapportionment is a state responsibility, the Court held that a federal court may act if a state legislature does not act within the required time. Furthermore,

seven Justices held that the plan drawn by the federal court creating single-member congressional districts was constitutional, interpreting federal statutes to require creation of single-member districts whenever possible. Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Ginsburg, further suggested that a 1941 law calling for the use of at-large elections should apply only when the state legislature and the state or federal courts have not provided for redistricting pursuant to the provision in the law requiring single-member districts. Justices O'Connor and Thomas partially dissented, suggesting that federal law should be interpreted to require the use of at-large elections until the state legislature completes redistricting, so that the district court should have ordered the use of at-large elections for the entire state congressional delegation.

The Supreme Court decided several cases concerning federal laws on job and housing discrimination. In a unanimous opinion, the Court held that direct evidence is not required in order to prove discrimination in a "mixed-motive" case under Title VII of the Civil Rights Act. In *Desert Palace v. Costa*, 2003 U.S. LEXIS 4422 (2003), in an opinion delivered by Justice Thomas, the Court affirmed the judgment of the Ninth Circuit Court of Appeals, which had held that a plaintiff alleging that sex discrimination was a motivating factor in an employer's treatment of her was not required to present direct evidence of discriminatory motive when the employer provided a nondiscriminatory reason for its action. Instead, a plaintiff need only "present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" 2003 U.S. LEXIS 4422 at 21. This evidence may be direct or circumstantial. The Court's unanimous holding carries out the intent of Congress in the Civil Rights Act of 1991 and eliminates a barrier that has faced workers in some lower courts in proving discrimination on the basis of race, color, sex, religion, or national origin.

In *Clackamas Gastroenterology Associates v. Wells*, 123 S. Ct. 1673 (2003), the issue was whether four physicians actively engaged in medical practice as shareholders should be considered "employees" for purposes of the Americans with Disabilities Act. By a 7-2 vote, the Court reversed the Ninth Circuit decision that they should be considered employees for purposes of employment discrimination liability, adopted a multi-factor test to help answer the question, and remanded the case. Justices Breyer and Ginsburg argued in dissent that since the doctors were considered employees of a corporation for purposes of state workers compensation and federal pension laws, there was "no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for purposes of federal antidiscimination statutes." 123 S. Ct. at 1682. The result could be to decrease the protection under the ADA available to workers at professional corporations with less than 15 employees.

In *Meyer v. Holley*, 123 S. Ct. 824 (2003), a unanimous Court held that, when a corporate employee discriminates on the basis of race, the Fair Housing Act does not make an officer or owner of the corporation vicariously liable, but rather applies vicarious liability only to the corporation itself. "[T]he Court has assumed that, when Congress creates a tort action, it legislates against a legal background or ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." 123 S. Ct. at 828. Therefore, "in the absence of special circumstances it is the corporation, not its owner or officer, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Id.* at 829.

With respect to a claim brought by the White Mountain Apache Tribe against the federal government for breach of fiduciary duty in the management and improvement of land held in trust for the Tribe, a majority of the Court held that the Court of Federal Claims had jurisdiction over the suit. In *United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126 (2003), the five-Justice majority held that the Indian Tucker Act gives federal courts jurisdiction over Indian tribal claims that "otherwise would be cognizable… if the claimant were not an Indian tribe," but the Act creates no substantive right enforceable against the government for a claim for money damages. 123 S. Ct. at 1132. The dissent, authored by Justice Thomas and joined by Chief Justice Rehnquist, Justices Scalia and Kennedy, accused the majority of fashioning "a new test to determine whether Congress has conferred a substantive right enforceable against the United States in a suit for money damages." *Id.* at 1140. One more Justice on the bench in the mold of Scalia or Thomas would have reversed this decision on the ability to seek monetary relief for claims against the federal government.

In *Chavez v. Martinez*, 123 S. Ct. 1994 (2003), in a fractured opinion about coercive police interrogation without the provision of *Miranda* warnings, a majority of the Court agreed that there was no violation of the constitutional right against self-incrimination where the statements obtained were not used in a criminal prosecution. While Justices Souter and Breyer contended that a violation of this right might occur in certain circumstances when constitutional rights need to be protected, Justices Scalia, Thomas, O'Connor, and Chief Justice Rehnquist maintained that a "violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case." 123 S. Ct. at 2003. Justices Kennedy, Ginsburg, and Stevens strongly dissented from the ruling, holding that the Fifth Amendment creates a present right that is violated once coercive interrogation is conducted. In the second part of the opinion, a majority of the Court (comprised of Justices Breyer, Ginsburg, Kennedy, Souter, and Stevens) found that the interrogated person could file a civil lawsuit against the police based on the claim of deprivation of a liberty interest, and remanded the case for determination of whether Martinez could pursue a claim under 42 U.S.C. §1983 for deprivation of substantive due process. These Justices noted in particular that the coercive police interrogation may be found to have increased Martinez's pain and suffering. Despite the demonstration in the record of persistent questioning while Martinez was in fear for his life while being treated in a hospital emergency room, however, Justice Thomas's opinion, joined by Justices Scalia and Rehnquist, did not find the interrogation to be "egregious" or "conscience-shocking," and claimed that freedom from unwanted questioning was not a fundamental liberty interest protected by the due process clause that would allow a civil lawsuit to vindicate the deprivation of constitutional rights.

Immigrants Rights

The Court held in *Demore v. Hyung Joon Kim*, 123 S. Ct. 1708 (2003), that detention of even lawful aliens who are removable from the country for conviction of one of a specified set of crimes under a federal immigration statute is constitutional and does not violate the Due Process Clause. Five Justices (Chief Justice Rehnquist, Kennedy, O'Connor, Scalia, and Thomas) held that Section 1226(c) of the Immigration and Nationality Act was constitutional. Since the case concerned the "detention of deportable criminal alien[s] *pending their removal proceedings*," (emphasis in original), the five-Justice majority held that "when the government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome

means to accomplish its goal." 123 S. Ct. at 1720. The dissent strongly disagreed, claiming that the majority opinion "forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process." *Id.* at 1727. Justices Scalia, Thomas, and O'Connor would have gone even further than the majority, however, arguing that the federal statute should be interpreted to preclude even habeas corpus challenges raising constitutional claims against the statute itself. This would not only contradict precedent requiring a particularly clear congressional statement of intent to preclude such challenges, but would also leave immigrants much more vulnerable to losing even access to habeas review in federal courts.

Free Expression and the First Amendment

The Court decided several First Amendment cases in 2002-03, mostly ruling against First Amendment claims. In *United States v. American Library Association,* 2003 U.S. LEXIS 4799 (2003), the Supreme Court held that the Children's Internet Protection Act (CIPA) did not unconstitutionally violate the First Amendment protection of freedom of speech, and thus did not exceed Congress's powers under the Spending Clause. A plurality opinion written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, and Thomas flatly rejected the idea that Internet access at public libraries represented a public forum and that restrictions on such access must be subjected to heightened scrutiny. Since libraries can exclude pornographic materials from their written collections, explained the Court, "Congress could reasonably impose a parallel limitation on its Internet assistance programs." 2003 U.S. LEXIS 4799 at 32. While concurring in the judgment, Justice Kennedy made clear that his vote was contingent on the government's representation that under the law, an adult can have the filtering removed; if the capacity of libraries to unblock the filters is substantially burdened, Kennedy explained, the Act may be subjected to an "as-applied" challenge. Justice Breyer also concurred in the judgment, suggesting a more stringent standard than the plurality that he believed was met, also largely because of adults' ability under the law to have filters removed. Justices Stevens, Souter, and Ginsburg dissented, finding that the restraint on constitutionally protected speech that is necessarily filtered from public libraries' Internet access through the CIPA requirements violated First Amendment free speech rights. In their view, the law forced libraries into the equivalent of buying an encyclopedia and then tearing out some of its pages. Although the decision clearly harms First Amendment rights, the damage would have been even worse if at least two Justices in the majority had not emphasized the importance of adults' ability to remove filters and if the minimal standard of review suggested by the plurality had been adopted by the majority. Rather than ending litigation in this area, the decision may well give rise to future "as applied" challenges to CIPA. (PFAWF was co-counsel in this case.)

In *Virginia v. Black*, 123 S. Ct. 1536 (2003), the majority of the Court ruled that states may ban cross burnings carried out with the intent to intimidate, but that a part of Virginia's cross burning statute was unconstitutional. In a divided opinion, the Court found that a provision in Virginia's cross burning statute that states that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons" is unconstitutionally broad, as it "permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense" and does not distinguish between cross burnings conducted to intimidate as opposed to express political or other views. 123 S. Ct. at 1550. While concurring in part, Justice Scalia, joined by Justice Thomas, dissented with respect to the invalidation of

Virginia's statute, finding that the burning of a cross "is sufficient, at least until the defendant has come forward with rebuttal evidence, to create a jury issue with respect to the intent element of the offense." *Id.* at 1554. In a separate dissenting opinion, Justice Thomas contended that the Virginia legislation regulates *conduct*, not *expression*, and it is therefore not in any way a violation of the First Amendment to ban cross burning and to presume an intent to intimidate. Thomas' and Scalia's views thus take a narrow view of the scope of the free expression guarantee of the First Amendment. Justices Souter, Kennedy, and Ginsburg took the opposing view, claiming that the Virginia statute makes an unconstitutional "content-based distinction within the category of punishable intimidating or threatening expression," which ultimately "skews the statute toward suppressing ideas," *Id.* at 1559, 1562, and that the entire statute violates the First Amendment. (PFAWF filed an *amicus* brief in this case.)

Eldred v. Ashcroft, 123 S. Ct. 769 (2003), concerned the validity of the Constitution's Copyright Term Extension Act (CTEA), which extended both new and existing copyrights for an additional 20 years under the First Amendment and the "limited time" provision in the Copyright Clause. In a 7-2 opinion, the majority ruled that Congress acted within its constitutional authority when it extended the term of years covered by copyright laws for both pre-existing and newly-created works. "History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime." 123 S. Ct. at 778. In addition, the majority stated, the Court properly defers to Congress with respect to copyright laws based on the authority invested in the legislative branch through the Copyright Clause. The Court also rejected petitioners' First Amendment claims, holding that copyright law contains "its own speech-protective purposes and safeguards…. Indeed, copyright's purpose is to *promote* the creation and publication of free expression." (*Id.* at 788, emphasis in original). Justice Stevens and Justice Breyer dissented from the opinion, contending that Congress may not properly extend the life of a copyright beyond its expiration date, that the Act's extension makes the copyright terms "virtually perpetual," and that the CTEA falls beyond the constitutional limits of the Copyright Clause.

In a unanimous opinion delivered by Justice Scalia, the Court held in *Virginia v. Hicks*, 2003 U.S. LEXIS 4782 (2003) that the trespass policy of the Richmond Redevelopment and Housing Authority (RRHA) was not facially invalid under the overbreadth doctrine of the First Amendment. Pursuing orders from the city of Richmond to privatize the streets surrounding a low-income housing development, RRHA enacted a policy authorizing the city police to serve notice "to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a *legitimate business or social purpose* for being on the premises," and further permitted the police to arrest any such individual who returns to the property after having been served the notice. 2003 U.S. LEXIS 4782 at 5-6. In order to be found facially invalid, explained the Court, a law must be shown to punish a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 9. The Court found that this standard had not been met.

Finally, the Court decided not to decide *Nike v. Kasky*, a case concerning the extent to which the First Amendment protects information disseminated by Nike regarding its labor practices. The Court decided in a *per curiam* opinion to dismiss the writ of certiorari as improvidently granted,

choosing to wait until a final judgment was reached in a lower court rather than attempting to address the important First Amendment issues presented without a fully developed record. Justices Kennedy, Breyer, and O'Connor dissented from this dismissal.

Campaign Finance

In a decision concerning direct contributions by a nonprofit advocacy corporation to candidates in federal elections, seven Justices held in *Federal Election Commission v. Beaumont*, 2003 U.S. LEXIS 4595 (2003) that the regulations of the Federal Election Commission, which ban direct contributions by a nonprofit corporations, did not violate the First Amendment and thus were constitutional. The Court recognized that the basis for the ban was to protect the public from the potentially harmful influences of corporate dollars aimed at federal campaigns. The Court explained that for almost one hundred years, federal law has prohibited corporate contributions to federal candidates in order to ensure integrity throughout the political process, and to prevent corruption and the appearance of corruption by keeping corporate earnings from becoming political "war chests." In light of the risks of corruption and negative influence posed by corporate contributions and corporations' special state-created advantages, the Court stated, congressional judgment to regulate such giving "warrants considerable deference" and is reflective of a permissible assessment of the dangers that corporations pose to the electoral process. 2003 U.S. LEXIS 4595 at 21. Nonprofit advocacy corporations pose a similar risk of corruption as for-profit companies, the majority explained, as they too benefit from 'state-created advantages.' Thus, a ban on such direct contributions is constitutionally valid. The majority opinion stated that when assessing challenges to contribution limits under the First Amendment, the appropriate level of scrutiny has been relatively low since "contributions lie closer to the edges than to the core of political expression." *Id*. at 29. Thus, a contribution limit "passes muster if it satisfies the lesser demand of being 'closely drawn' to match a 'sufficiently important interest." *Id*. at 30. Since the ban on nonprofit advocacy corporations meets this standard, the majority held, the limitation is constitutional. Justice Kennedy concurred in the judgment. Justice Thomas, joined by Justice Scalia, dissented from the majority opinion, arguing that strict scrutiny should be applied to campaign contribution limits, and that the prohibitions on nonprofit corporation contributions, as with other contribution limits, are not narrowly tailored to any compelling state interest. This decision may provide a partial preview as to how the Justices will evaluate parts of the McCain-Feingold law next term.

Access to Justice

In a very important 5-4 ruling, the Supreme Court narrowly held in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003) that use of Interest on Lawyer's Trust Accounts (IOLTA's) to help pay for legal services for the needy is not an improper regulatory taking of property without just compensation. The majority opinion held that the "just compensation required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain," 123 S. Ct. at 1419, and that the actual loss in property was zero. The dissenting opinion, authored by Justice Scalia and joined by Justices Thomas, Rehnquist, and Kennedy, accused the majority of crafting a "robin hood" concept of the Fifth Amendment's Compensation Clause, purposefully allowing the taking of wealth from those who own it in order to provide for the needy, although they failed to acknowledge that the fair market value of what was "taken" in this case was zero, since the funds would not have generated any interest if they

had not been invested in the IOLTA accounts in the first place. Nonetheless, one more vote for Scalia's dissent would have invalidated the use of IOLTA funds to help finance legal services for the poor.

Other Constitutional Issues

In the 2002-2003 term, the Court ruled on a pair of cases that addressed two different states' sex offender registration laws, holding in each case for the state. In *Connecticut Department of Public Safety v. Doe*, 123 S. Ct. 1160 (2003), a unanimous judgment of the Court agreed that Connecticut's Megan's Law did not violate procedural due process by making available to the public information about convicted sex offenders regardless of their level of dangerousness. The Court stated that mere injury to reputation is not a deprivation of a liberty interest, and Connecticut's statute applies regardless of a convicted offender's risk of repeating the offense. Thus, there was no lack of procedural due process based on a failure to determine the dangerousness of the offender. In his concurring opinion, Justice Scalia stated that "[a]bsent a claim… that the liberty interest in question is so fundamental as to implicate so-called 'substantive' due process, a properly enacted law can eliminate it." 123 S. Ct. at 1165.

In *Smith v. Doe*, 123 S. Ct. 1140 (2003), a splintered Court held that the Alaska Sex Offender Registration Act (ASORA) did not violate the Constitution's *ex post facto* clause in its retroactive application to all sex offenders within the state of Alaska, since the Act was deemed by the majority to be nonpunitive. Five Justices held that the statute was a civil regulatory scheme, and nothing on the face of the legislation stated otherwise. Furthermore, the majority, comprised of Justices Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist, found that as applied, the statute was not "so punitive either in purpose or effect" as to negate the intention of the State to deem it civil. 123 S. Ct. at 1147. Justice Souter concurred in the judgment, stating that while the civil and punitive elements were "in rough equipoise," the scale was tipped in favor of civil intent since state laws are afforded a presumption of constitutionality. *Id.* at 1156. Justices Stevens, Ginsburg, and Breyer dissented from the majority judgment, finding that the statute had clear and far-reaching punitive effects and thus violated the *ex post facto* clause in its retroactive application.

State Farm Mutual Automobile Insurance Co. v. Campbell, 123 S. Ct. 1513 (2003), provided the Court with another opportunity to rule on the issue of excessive punitive damage awards under the Due Process Clause. Faced with a lower court decision awarding compensatory damages in the amount of $1 million and punitive damages in the amount of $145 million, six Justices held that these punitive damages were so excessive as to violate the Due Process Clause. Since punitive damages pose a risk of arbitrary deprivation of property, the majority explained, courts reviewing such awards should consider a variety of factors in order to ensure that such damage awards are justified. Such factors include the degree of reprehensibility of the defendant's misconduct, the disparity between the actual or potential harm suffered by the plaintiff and the punitive award, and the difference between the punitive award and the civil penalties imposed in similar cases. The majority ruled that an analysis of those factors in this case demonstrated that $145 million in punitive damages was excessive and that a much lower level of punitive damages would have accomplished the legitimate objectives of the state in deterring such conduct. In a dissenting opinion, Justice Ginsburg claimed that the award of punitive damages was a matter traditionally determined by the states and that the propriety of such damages should

not be adjudged by federal courts. Justices Scalia and Thomas also dissented, arguing that the Constitution does not constrain the size of punitive damage awards.

Rights of Workers and Consumers

Pharmaceutical Research and Manufacturers of America v. Walsh, 123 S. Ct. 1855 (2003) presented the Court with a case concerning the rights of workers and consumers, as well as the rights of states, in light of federal Medicaid legislation. In a highly fragmented ruling with no majority rationale, the Court upheld the reversal of an injunction against a Maine prescription drug rebate program that had been attacked as unconstitutional on both preemption and Commerce Clause grounds. Justices Stevens, Souter, and Ginsburg explained that the challengers were required to show that there were no Medicaid-related goals in the state's program in order to demonstrate that the injunction issued against the program was in fact valid, and that Maine's program had several acceptable Medicaid-related goals. Furthermore, "Maine's interest in protecting the health of its uninsured residents also provides a plainly permissible justification for a prior authorization requirement that is assumed to have only a minimal impact on Medicaid recipients' access to prescription drugs." 123 S. Ct. at 1869. And since there is a strong presumption against preemption when a state acts to foster public health, especially when it appears that the federal and state governments are pursuing a common purpose, these Justices upheld the constitutionality of Maine's statute. Joined by Justice Breyer, these Justices also found that the Maine Act did not violate the Commerce Clause. Justices Scalia and Thomas concurred in the judgment of the Court, but not in its rationale. They contended that the negative Commerce Clause has "no foundation in the text of the Constitution," and thus it should not be extended beyond its previous use. *Id.* at 1873. This extreme view could support the imposition of state barriers on interstate commerce, thereby further expanding state power at the expense of the people. The three dissenting Justices, O'Connor, Kennedy, and Chief Justice Rehnquist, found that the Maine program did not have any "Medicaid-related purpose, and it is not tailored to have such an effect." *Id.* at 1878. Thus, the dissent would have upheld the injunction against the implementation of the drug rebate program.

In *Barnhart v. Peabody Coal Co.*, 123 S. Ct. 748 (2003), a six-Justice majority ruled in favor of workers' rights. Under the Coal Industry Retiree Health Benefit Act of 1992, the Commissioner of Social Security is empowered to assign to operating companies or related entities those coal industry retirees who are eligible for benefits under the Act, and such companies shall be responsible for funding the retirement benefits of the beneficiary, if necessary. The majority of the Court held that assignments made by the Commissioner beyond the deadline provided for in the statute were valid. The Court has never construed a provision that the government shall act within a specified time, without more, as a jurisdictional limit precluding later action, the majority explained, and if the legislation does not specify a consequence for noncompliance with a deadline, federal courts should not impose their own sanctions in most cases. Furthermore, since the Act was implemented to provide benefits to the greatest number of recipients possible, the majority stated, the reasonable interpretation is that assignments beyond the deadline were valid. Justice Scalia, joined by Justices O'Connor and Thomas, dissented, alleging that empowering the Commissioner with the ability to assign coal miners to signatory operators beyond the deadline is "irreconcilable with the text and structure of the Coal Industry Retiree Health Benefit Act… and finds no support in our precedents." 123 S. Ct. at 762. These Justices

would thus have limited the number of benefit recipients for which coal companies are responsible under the Act by their restrictive construction of the deadline provision, which could affect as many as 10,000 coal industry retirees.

In a 7-2 opinion, the Court held in *Beneficial National Bank v. Anderson*, 123 S. Ct. 2058 (2003) that an action filed in state court claiming a violation of usury laws could be removed to federal court because it arises under federal law based on the National Bank Act. Because the state law claim was considered preempted by the federal bank law, the majority explained, the claim is considered to have arisen under federal law. The Court has consistently construed the National Bank Act as "providing an exclusive federal cause of action for usury against national banks," the majority stated, and the case was thus removable from state to federal court. 123 S. Ct. at 2064. Justices Scalia and Thomas dissented, claiming that the majority opinion finds little support in either precedent or law. In their opinion, preemption of a state-law claim does not justify removal, but rather requires that a state court completely dismiss the case. Scalia and Thomas would thus have left consumers who bring a usury claim in federal court with a dismissed case and no remedy for a usury violation.

In *American Insurance Association v. Garamendi*, 2003 U.S. LEXIS 4797 (2003), the Court held in a 5-4 ruling that California's Holocaust Victim Insurance Relief Act of 1999 was preempted by conduct of the Executive Branch in matters of foreign relations. Justice Souter delivered the opinion of the Court, in which Justices Breyer, Kennedy, O'Connor, and Chief Justice Rehnquist joined. These Justices stated that "the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" 2003 U.S. LEXIS 4797 at 34. The majority found that California's requirement of insurance companies' disclosure of policies sold to people in Europe between 1920-1945 was in substantial conflict with federal executive policies that exist between the United States and Germany. The majority also suggested that there was a relatively weak state interest in this disclosure policy and that vindication of the claims of Holocaust survivors was a matter traditionally left to the federal government. Justices Ginsburg, Stevens, Scalia, and Thomas dissented, arguing that there was no federal policy that expressly preempted the disclosure requirements in the California Act, and that the Act should therefore have been upheld.