PEOPLE FOR THE AMERICAN WAY FOUNDATION

COURTING DISASTER

UPDATE: 2000- 2001

At the close of its 2000-01 term, the Supreme Court remains narrowly divided on a number of issues that are extremely important to the rights of all Americans. Out of 87 decisions by the Court this term, more than 33% (30) were decided by 5-4 or 6-3 margins. Many of these narrow rulings concerned fundamental questions such as civil rights, privacy, federalism and "states' rights," religious liberty, freedom of expression, immigrants' rights and campaign finance.

The Court's rulings this term reinforce the central conclusion reached by People For the American Way Foundation in its *Courting Disaster* report last year: the already very conservative Supreme Court is just one or two new justices away from curtailing or abolishing fundamental rights that millions of Americans take for granted. The age of the current justices and the unusually long interval of more than seven years since the last Court vacancy make it almost certain that President George W. Bush will have the opportunity to make more than one Supreme Court nomination. If moderate nominees are chosen and confirmed, key precedents protecting Americans' rights and liberties are more likely to be preserved and some of the excesses of the current Court with respect to such issues as federalism can be mitigated. If justices in the mold of Antonin Scalia and Clarence Thomas are nominated to the Court, which President Bush has indicated is his intention, America would literally be courting disaster.

This report updates last year's *Courting Disaster* by examining the decisions issued by the Court since late May 2000, when that report was published, focusing on the Court's rulings this term and including several post-publication rulings that came at the very end of the 1999-2000 term. It reviews the Court's decisions in the areas of civil rights and discrimination; federalism and congressional authority; privacy rights and reproductive freedom; religious liberty and church-state separation; free expression; immigrants' rights; environmental and worker protection; campaign finance; and access to justice. It focuses particularly on the closely divided rulings in which the addition to the Court of one or two more justices like Scalia and Thomas would seriously endanger Americans' rights and freedoms.

1. CIVIL RIGHTS AND DISCRIMINATION

The Supreme Court's decisions this term on civil rights and discrimination underscore the importance of who fills the next vacancies on the Court. In two crucial 5-4 decisions this term, one more vote with Scalia and Thomas would have reversed the result in key rulings on redistricting and on the reach of federal civil rights laws. In several other cases, Scalia and Thomas helped form narrow majorities that restricted civil rights and that would be cemented by another vote like theirs on the Court.

In *Hunt v. Cromartie*, the question before the Court was whether a congressional district drawn by a state legislature was the result of unconstitutional racial gerrymandering. A 5-4 majority ruled that the district was not unconstitutionally drawn and rejected Scalia's and Thomas' extreme view that race can never be taken into account in redistricting. Citing a previous opinion written by Justice O'Connor, the majority held that when "racial identification is highly correlated with political affiliation," evidence of the district's shape, its splitting of towns and counties, and its high African American population cannot, as a matter of law, by itself support a finding that race was improperly the predominant factor in drawing the district. The majority explained that the Constitution does not oblige a state legislature "to avoid creating districts that turn out to be heavily, even majority, minority." The legislators' only obligation is not to create

such districts for "predominantly racial, as opposed to political or traditional, districting motivations." Justice O'Connor, who had aligned herself with Rehnquist, Thomas, Scalia, and Kennedy in earlier cases, provided the determining vote for the majority in this case. Justice Thomas, joined by Scalia, Rehnquist, and Kennedy, strongly dissented.

A second important 5-4 ruling came in *Brentwood Academy v. Tennessee Secondary School Athletic Association*. The question in this case was whether action by a not-for-profit athletic association that regulates interscholastic sports among public and private high schools in Tennessee, comprises mostly public schools, and has public school officials pervasively entwined in its structure, constitutes "state action" for purposes of federal civil rights laws. The majority ruled that such an association's action was, indeed, state action. The dissent, written by Justice Thomas and joined by Rehnquist, Scalia, and Kennedy, would have construed the doctrine of state action much more narrowly and would have severely limited the reach of federal civil rights laws.

On the other hand, the Court in *Alexander v. Sandoval* dealt a sharp blow to civil rights. In a 5-4 decision written by Justice Scalia, the Court severely limited the reach of Title VI of the Civil Rights Act of 1964 by holding that individuals may not sue federally funded state agencies to remedy policies that are alleged to have a discriminatory effect on minorities, even though governing federal regulations under Title VI specifically prohibit such policies. Under the Court's ruling, individuals may sue only when the discrimination is alleged to have been intentional. A strongly worded dissent by Justice Stevens, joined by Souter, Ginsburg, and Breyer, called the majority's decision "unfounded in our precedent and hostile to decades of settled expectations."

Tuan Anh Nguyen v. Immigration and Naturalization Service was brought as an equal protection challenge to a federal law that imposed different rules for "attainment of citizenship by children born abroad and out of wedlock depending upon whether the one parent with American citizenship is the mother or the father." In another 5-4 ruling, the Court rejected this challenge, upholding rules that make citizenship automatic for children born abroad to American mothers (as long as the mothers have resided in the

United States for a continuous period of one year), but impose additional burdens in the case of children born abroad to American fathers. Justice O'Connor dissented from this ruling, joined by Justices Ginsburg, Souter and Breyer. In her dissent, Justice O'Connor took the majority to task, not only for failing to confront but also for condoning stereotypical notions about mothers and fathers as well as about "male irresponsibility." The dissent called the majority's decision "a deviation from the line of cases in which [the Court has] vigilantly applied heightened scrutiny" to sex-based classifications in determining whether a constitutional violation has occurred. Scalia and Thomas, on the other hand, indicated in their concurrence that they would have gone even further than the other justices in the majority, stating that the Court lacked the power to provide the relief requested by the petitioners (American citizenship for the child) under any circumstances.

Scalia's and Thomas' extreme views regarding congressional efforts to ensure equal opportunity for all Americans were illustrated this term by their dissent in *PGA Tour, Inc. v. Martin*. In that case, the other seven members of the Court ruled that the Americans with Disabilities Act requires the PGA Tour to allow a disabled professional golfer whose disability prevents him from walking a golf course to use a golf cart during tournaments. Scalia's and Thomas's narrow view of the pertinent provision of the ADA, expressed in the dissent written by Scalia, would preclude the statute's application in such a situation.

In *Saucier v. Katz*, which concerned allegations of excessive force by a police officer against a demonstrator, Scalia and Thomas were part of the Court majority (6 justices) holding that in a civil action brought against the officer by the demonstrator for violation of his Fourth Amendment rights, the question of whether the officer has qualified immunity from suit is separate from the question of whether the Constitution was violated, giving police additional protection in such suits. According to this two-step inquiry, an officer who uses force that is objectively unreasonable under the circumstances, *i.e.*, excessive force, in the mistaken belief that use of such force was lawful, could still have qualified immunity if the mistake was reasonable under the

circumstances. While Justices Ginsburg, Stevens, and Breyer concurred in the Court's judgment that the officer under the facts of this particular case did have qualified immunity and that the suit against him should have been dismissed**,** they disagreed with the use of a two-step inquiry. In their opinion, if an officer used objectively unreasonable force, there can be no qualified immunity. The ruling could thus make it more difficult for those who claim they were victimized by police abuse to vindicate their rights.

Two decisions decided by narrow majorities at the end of the Court's 1999-2000 term, after *Courting Disaster* was published, restricted civil rights. In *Reno v. Bossier Parish School Board,* a 5-4 ruling, the Court held that Section 5 of the Voting Rights Act does not apply to voting-related changes undertaken with even blatantly discriminatory intent unless they demonstrably harm minority votes. And in *Boy Scouts of America v. Dale,* a 5-4 majority ruled that a New Jersey civil rights law could not protect gays from discrimination by the Boy Scouts. This decision could be applied in the future to weaken other civil rights laws. Scalia and Thomas were in the majority in both of these 5-4 decisions.

2. FEDERALISM AND CONGRESSIONAL AUTHORITY

This term in *Board of Trustees of Univ. of Alabama v. Garrett,* Scalia and Thomas were part of a narrow 5-4 majority that continued the Court's recent trend toward severely limiting congressional authority and expanding "states' rights." In this case the Court held that Congress had no power to allow disabled employees to sue their state employers in federal court seeking money damages from the state agencies for violating the Americans with Disabilities Act. This ruling followed two similar holdings last term in which the Court, by the same 5-4 majority, extended its prior "states' rights" rulings to civil rights and related legislation. In *Kimel v. Florida Board of Regents,* the Court held that Congress had no power to apply part of federal age discrimination law to the states and precluded older Americans from suing state agencies for damages over violations of the law. In *United States v. Morrison,* the Court struck down the part of the federal Violence Against Women Act that provided a federal remedy for victims of sexual

assault and violence. These decisions underscore the importance of the next Supreme Court justice, who will either reinforce and extend these harmful rulings or move the Court toward restoring Congress' ability to protect individual rights.

The same 5-4 majority, including Scalia and Thomas, strikingly departed in *Bush v. Gore* from the deference otherwise shown to "states' rights," thus effectively determining the outcome of the 2000 presidential election. In *Bush v. Gore*, the majority overturned a Florida Supreme Court decision that had construed state election laws to permit the manual recount of presidential election ballots under the circumstances and procedures set out in the state court's decision. The ruling in *Bush v. Gore* prompted Justice Stevens to write in one of the four dissents issued: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as the impartial guardian in the rule of law." In an earlier 5-4 ruling in this case, the Court stopped Florida's recount until a decision could be reached on the merits. Scalia not only joined the majority but also issued a separate concurrence stating that counting the votes threatened "irreparable harm" to George W. Bush "by casting a cloud upon what he claims to be the legitimacy of his election." In dissent, Justice Stevens, joined by Souter, Ginsburg, and Breyer, responded that "[p]reventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election."

The 5-4 "states' rights" majority, including Scalia and Thomas, again voted to limit state authority in *Lorillard Tobacco Co. v. Reilly*. In that case, the majority ruled that federal law requiring disclosure of cigarette health risks in advertising and prohibiting such ads on television preempted any state laws regulating cigarette advertising, including a Massachusetts law that limited cigarette ads near schools and playgrounds. Justice Stevens' dissent, joined by Justices Ginsburg, Breyer, and Souter, pointed out that the federal law dealt with limited subjects, such as the content of cigarette ads, and that there was no indication that Congress intended to prevent states from dealing with the location of written cigarette ads. The dissent also noted that the majority's ruling was "particularly ironic" in light of its usual concern with federalism

and states' rights and its ruling in 1995 that the federal government lacked the authority to impose a similar limit on dangerous products (guns) near schools. The majority also struck down most of the provisions in the Massachusetts law as applied to cigars and smokeless tobacco on First Amendment grounds, although the same four dissenting justices would have given the state an opportunity at trial to prove that the limits on ads near schools and playgrounds was justified. Justices Stevens, Ginsburg, and Breyer voted to uphold the law's limits on certain forms of indoor advertising. Justice Thomas made clear that he would restrict government limits on commercial advertising in the same way that restrictions on political and artistic expression are limited under the First Amendment.

3. PRIVACY RIGHTS AND REPRODUCTIVE FREEDOM

In three cases this past term, narrow Court majorities acted to preserve the privacy rights of individuals. In *Ferguson v. Charleston*, a 6-3 ruling struck down a government practice that severely harmed the privacy of pregnant women. The Court found unconstitutional a state hospital's policy, developed with the local police, of testing pregnant women without their knowledge or consent for suspected drug use and giving the police the positive test results of women who failed to comply with a drug treatment program so that they could be arrested.

In the second privacy case, *City of Indianapolis v. Edmond*, the Court ruled 6-3 that the police cannot set up "highway checkpoints" to engage in suspicionless stops of random motorists for the purpose of looking for drugs. Justices Scalia and Thomas dissented in both of these cases, along with Chief Justice Rehnquist, and voted to uphold these intrusive government practices.

The third case, however, brought about an unusual configuration of justices. *Kyllo v. United States* concerned police use of thermal-imaging devices that, when aimed at a home from the outside, can detect relative amounts of heat within the home and can indicate the use inside the home of high-intensity lamps typically used to grow marijuana

indoors. In *Kyllo*, the Court ruled, 5-4, that the aiming of a thermal-imaging device at a person's home by the police from a public street is a "search" within the meaning of the Fourth Amendment and is unconstitutional in the absence of a warrant. Justice Scalia wrote the opinion for the Court, in which Justices Thomas, Souter, Ginsburg, and Breyer joined. Justice Stevens filed a dissenting opinion in which Chief Justice Rehnquist and Justices O'Connor and Kennedy joined. A key to Justice Scalia's opinion in *Kyllo* was his reasoning that, in the absence of this new technology, the information gathered by the police about the interior of the defendant's home could only have been gained by a physical intrusion into the private property of the house itself. Scalia and Thomas were not willing to recognize such privacy interests, however, with respect to pregnant women in *Ferguson* or motorists in *Edmond*.

In another unusual configuration of justices, the Court held in *Atwater v. Lago Vista* that the police may handcuff and arrest, without a warrant, persons accused of minor crimes punishable only by a fine. The Court's opinion was written by Justice Souter for a five-justice majority that also included Chief Justice Rehnquist and Justices Scalia, Thomas and Kennedy. Justice O'Connor was joined in dissent by Justices Stevens, Ginsburg and Breyer.

Late last term, after the publication of *Courting Disaster*, narrow majorities of the Court rejected efforts to undermine abortion rights, with Scalia and Thomas dissenting. In *Stenberg v. Carhart*, a 5-4 majority invalidated Nebraska's so-called partial birth abortion ban because it imposed an undue burden on a woman's right to choose. Only one more justice on the Court like Scalia and Thomas would authorize such statutes, even those that contain no exception for the preservation of a woman's health. Three of the four dissenters (Scalia, Thomas and Rehnquist) would vote to overturn *Roe v. Wade* altogether. And in a 6-3 decision that produced particularly bitter dissents by Justices Scalia and Thomas and by Justice Kennedy, the Court in *Hill v. Colorado* upheld a Colorado law that prevents abortion protesters and others from approaching any nearer than eight feet from people who are within 100 feet of a health care facility without their consent.

4. RELIGIOUS LIBERTY AND CHURCH-STATE SEPARATION

The Court's rulings since the publication of *Courting Disaster* strongly reinforce the conclusion that another justice or two like Scalia and Thomas would radically alter the principle of church-state separation. In *Good News Club v. Milford Central School*, a 6-3 Court majority held, on free speech grounds, that a public elementary school that permitted private groups like the Girl Scouts to use school facilities after school hours could not prohibit an adult-led proselytizing group from conducting religious activities and instruction aimed at elementary school children immediately after school on school premises. Because the case was decided on summary judgment, however, a number of justices suggested that facts relevant to showing an Establishment Clause violation (*e.g.*, that young children in these circumstances would reasonably perceive the religious group as having been endorsed by the school) were not in the record, and that the case should be remanded for development of the factual record. Five of the justices in the majority (Rehnquist, Scalia, Thomas, Kennedy, and O'Connor) disagreed. In an opinion written by Justice Thomas, they took a step toward lowering the wall of separation between church and state by reaching out to decide, even in the absence of such a factual record, that there was no Establishment Clause violation. Justice Breyer, concurring in the Court's "conclusion," would have allowed both parties to develop a factual record. The dissenting justices believed the Court was wrong to decide the Establishment Clause question.

Although he joined in the majority opinion in *Good News Club*, Justice Scalia also wrote a separate concurrence reiterating extreme views about the Establishment Clause. He restated his previously expressed belief that the Establishment Clause cannot ever be violated by private speech in a limited public forum, so long as the boundaries of that forum are drawn neutrally and not to favor religious groups. If adopted by the majority, the *per se* rule that Scalia articulated, giving conclusive weight to neutrality, would open a broad gap in the church-state wall. This rule has never been adopted by a

majority of the Court. Yet, Justices Thomas and Kennedy and Chief Justice Rehnquist seem to agree with it, given their position last term in *Mitchell v. Helms.*

In *Mitchell v. Helms*, a 6-3 majority ruled that government may provide computers, library books, and similar materials to religious schools under the federal Chapter II program. The ruling departed from past precedent by requiring significant evidence that such aid is used for religious purposes in order to be considered unconstitutional. Justices Thomas, Scalia, Rehnquist, and Kennedy, however, would go much further. They claimed that virtually any aid to religious schools is permissible, even if pervasively sectarian schools use it for religious purposes, as long as the material provided is not religious in nature and is provided equally to non-religious schools. Justice O'Connor labeled this a "rule of unprecedented breadth" and five justices rejected it. As a result, contrary to the views of some right-wing advocates, it is likely that the current Court majority remains undecided on the question of school vouchers, which the Court has recently been asked to take up in the Cleveland case. A decision as to whether the Court will hear that case is likely to be issued in October. With the addition of one new justice in the Scalia-Thomas mold, however, it is clear that the Court would approve vouchers as well as even more extensive aid to religious schools.

Further indication that Justices Scalia and Thomas and Chief Justice Rehnquist would endanger key church-state principles is found in their dissent this term from the Court's denial of *certiorari* in *City of Elkhart v. Books*. In that case, the 7th U.S. Circuit Court of Appeals had found that a six-foot high monument containing the Ten Commandments situated on the lawn of a city municipal building had the unconstitutional purpose and effect of advancing religion. That court cited the Supreme Court's *Stone v. Graham* decision, in which the Court recognized that the Ten Commandments "are undeniably a sacred text in the Jewish and Christian faiths" and struck down a state law requiring posting of the Ten Commandments in public school classrooms. The 7th Circuit stated "we do not think it can be said that the Ten Commandments, standing by themselves, can be stripped of their religious, indeed, sacred, significance . . .." Dissenting from the majority's decision not to hear *City of*

Elkhart, Rehnquist, Scalia and Thomas opined that they found the Court's prior decision in *Stone v. Graham* "hardly controlling," and expressed the view that the placement of the monument outside a municipal building housing the local courts and prosecutor "emphasize[d] the foundational role of the Ten Commandments in secular, legal matters."

The dissent from the denial of *certiorari* in *City of Elkhart* provoked an unusual written "statement" from Justice Stevens, who pointed out that the dissenters had completely ignored the fact that "the first two lines of the monument's text appear in significantly larger font than the remainder... Those lines read: 'The TEN COMMANDMENTS – I AM the LORD thy God.'" According to Justice Stevens, "The graphic emphasis placed on those first lines is rather hard to square with the proposition that the monument expresses no particular religious preference."

At the end of the Court's last term, Scalia was joined by Thomas and Rehnquist in dissenting from the Court's decision not to review another appellate ruling dealing with the separation of church and state. The 5th Circuit's decision in *Freiler v. Tangipahoa Parish Board of Education* struck down a school district's anti-evolution disclaimer. Scalia and Rehnquist (Thomas was not yet on the Court) had dissented from the Court's 1987 decision in *Edwards v. Aguillard*, which struck down a state law that prohibited the teaching of evolution unless creationism was also taught. In the dissent from the denial of *certiorari* in *Freiler* Scalia wrote: "In *Edwards v. Aguillard*, we invalidated a statute that required the teaching of creationism whenever evolution was also taught; today we permit a Court of Appeals to push the much beloved secular legend of the Monkey Trial one step further."

In another dissent late last term from a divided decision protecting religious liberty, Scalia, Thomas and Rehnquist voiced their extreme views on church-state separation. In *Santa Fe Independent School District v. Doe*, a 6-3 Court majority held that a Texas public school district's practice of opening high school football games with captive audience "student-led" prayer was unconstitutional. The majority rejected the demand of dissenters Scalia, Thomas and Rehnquist that the Court overturn or ignore its

landmark 1971 *Lemon v. Kurtzman* ruling, as well as the dissent's charge that the majority showed "hostility" towards religion.

5. FREE EXPRESSION

In two cases decided this term by narrow majorities, in which Scalia and Thomas dissented, the Court acted to protect free expression. In a 5-4 decision in *Legal Services Corporation v. Velazquez*, the Court ruled unconstitutional the restrictions in annual federal appropriations acts that since 1996 have prohibited Legal Services Corporation funding of any organization that represents clients in challenges to welfare laws. These restrictions effectively prevented Legal Services attorneys from representing indigent clients in cases involving the validity of welfare reform laws or from raising legal arguments they otherwise would have raised on behalf of welfare clients. The Court held that these restrictions constituted an impermissible restraint on private speech. Justice Scalia dissented in an opinion joined by Thomas, Rehnquist and O'Connor, taking the position that the LSC program was not a regulatory program but was, rather, a federal subsidy program; that subsidies do not directly restrict speech; and that the restrictions neither prevented anyone from speaking nor coerced anyone to change speech. If, as Scalia suggested, upholding the restrictions would mean that "fewer statutory challenges to welfare laws will be presented to the courts because of the unavailability of free legal services for that purpose," Scalia and those who joined his dissent answered "So what?" One more justice on the Court voting like Scalia and Thomas would not only severely harm Legal Services clients, but also vastly increase government's ability to censor any speech that it helps to fund.

In *Bartnicki v. Vopper*, a 6-3 majority of the Court ruled that the First Amendment protects the disclosure of illegally intercepted cell phone conversations about a matter of public concern when such disclosure is made by someone who did not participate in the interception, even though he or she knew or had reason to know that the interception was unlawful. In so ruling, the Court determined that with respect to the discussion of a matter of public concern, a speaker's privacy interest in his or her conversations is

outweighed by the First Amendment interest in the publication of matters of public importance. Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

Late last term, Scalia and Thomas were divided in one First Amendment case, *United States v. Playboy Entertainment Group, Inc*. In that case, the Court struck down a federal law that unnecessarily restricted cablecasts in an effort to stop "signal bleed" of restricted, sexually oriented programming. The case was litigated on the assumption that the programming at issue was not obscene, and the majority found the restriction to be a direct, content-based assault on protected speech. Justice Thomas concurred in the Court's opinion on the assumption that the programming was not obscene, in which case he agreed that the programming constituted protected speech. Justice Scalia, however, not only joined a dissent written by Justice Breyer that would have upheld the statute based on a compelling governmental interest in protecting children from the programming in question, but also wrote a separate dissent. In that dissent, Scalia opined that Congress was free to enact the statute because, in his view, even though the programming might not be obscene, it was marketed as sex and for the purposes of its prurient appeal. Thus, according to Scalia, the statute regulated "the business of obscenity" although the speech in question was not obscene. Such a view, if adopted by a majority on the Court, would dramatically increase the power of government to regulate speech.

6. IMMIGRANTS' RIGHTS

In a 5-4 ruling in *Immigration and Naturalization Service v. St. Cyr*, the Court rejected the government's argument that it could automatically deport lawfully admitted immigrants who had pleaded guilty to certain crimes before strict new provisions of federal immigration laws took effect in 1997. These provisions, enacted in 1996, made legal aliens who have been convicted of certain crimes ineligible to seek a discretionary waiver of deportation. In *St. Cyr*, the narrow Court majority held that these new rules could not be applied retroactively. An important part of the Court's opinion also rejected

the government's claim that the new immigration laws had stripped the federal courts of jurisdiction to decide whether legal immigrants were eligible for discretionary relief from deportation in these circumstances. Justice Scalia dissented in an opinion joined by Thomas and Rehnquist, and in part by O'Connor. All of the dissenters would have held that the new laws deprived the courts of the jurisdiction to hear the case, and lamented what Scalia called the "opportunities for delay-inducing judicial review" being afforded to "criminal aliens." Just one additional vote in accord with Scalia and Thomas would make it much more difficult for immigrants to challenge in court other deportation policies adopted by the government.

In another 5-4 ruling, the Court held in *Zadvydas v. Davis* that federal immigration law does not permit the government to keep an alien who is under a final order of removal from this country in jail indefinitely, even though no other country will accept that person. Justice Kennedy dissented in an opinion joined by Scalia, Thomas, and Rehnquist, claiming that federal law places no limit on the length of time for which the government can incarcerate removable aliens. Scalia and Thomas, however, would go even further, disagreeing with Kennedy and Rehnquist that the Constitution might require the release of removable aliens from custody in certain circumstances (*e.g.*, because the person is not a flight risk or presents no danger to the community). Scalia and Thomas issued a separate dissent, maintaining that an incarcerated alien subject to a final order of removal has no constitutional right to be released from custody under any circumstance, and that there are no situations in which a court could order that person's release from custody. Another justice on the Court like Scalia and Thomas would authorize the government to incarcerate deportable aliens forever if no other country would agree to admit them.

7. ENVIRONMENTAL AND WORKER PROTECTION

In *Circuit City Stores v. Adams*, a 5-4 majority of the Court, including Scalia and Thomas, narrowly construed the exemption clause in the Federal Arbitration Act, which means that most employment contracts will fall within the scope of the Act. As a result

of this decision, many employers will be able to require their employees, as a condition of employment, to arbitrate any claims arising out of their employment, rather than file suit. Employees often lack the bargaining power to reject these arbitration clauses, and will be required, as the price of having a job, to give up their legal right to sue if they become the victims of employment discrimination or have other claims against their employer. A bill has been introduced in Congress that would effectively overrule the Court's decision.

In a 5-4 decision in *Palazzolo v. Rhode Island*, the Court majority, including Scalia and Thomas, held that a property owner who acquired the property *after* the state had adopted environmental regulations applicable to the property and was thus deemed to have notice of those regulations nonetheless could seek compensation from the state for the loss caused by the state's "taking" of that property. While Justice O'Connor wrote a separate concurrence to make clear her belief that the timing of a regulation's enactment relative to when the owner acquired title was still relevant to a takings claim, Justice Scalia wrote his own separate concurrence in order to state his vehement disagreement with that position. According to Scalia, the fact that a restriction "existed at the time the purchaser took title" should have "no bearing upon" whether there was a taking. For various reasons, the four dissenting justices, Stevens, Ginsburg, Souter, and Breyer, would not have allowed the property owner to pursue his claims against the state. Three of them (Ginsburg, Souter, and Breyer) agreed with Justice O'Connor that an owner's acquisition of property after the enactment of environmental regulations could, at a minimum, impair the new owner's ability to seek compensation for a taking, while Justice Stevens would have barred such a claim entirely.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, a 5-4 majority that included Scalia and Thomas ruled that the provision of the Clean Water Act giving the Army Corps of Engineers authority to regulate the dredging and filling of "navigable waters" cannot be construed to extend federal authority over non-navigable, isolated intrastate waters (such as ponds) even though they provide a habitat for migratory birds. In so ruling, the Court overturned a 15-year-old

environmental regulation of the Corps of Engineers commonly known as "the Migratory Bird Rule." The Court sidestepped the question of whether the Clean Water Act, if construed to authorize the Migratory Bird Rule, would exceed Congress' power under the Commerce Clause, a question pertinent to the narrow Court majority's recent trend toward limiting congressional authority in favor of "states' rights." The majority opinion alluded to the federalism question, however, stating that to uphold the authority claimed by the Corps of Engineers over isolated waters "would result in a significant impingement of the States' traditional and primary power over land and water use." Justice Stevens, Souter, Ginsburg, and Breyer dissented, stating that the Migratory Bird Rule was a "manifestly reasonable" interpretation of the Clean Water Act that should be given deference by the Court. The dissent called the majority's decision "an unfortunate step that needlessly weakens our principal safeguard against toxic water."

8. CAMPAIGN FINANCE

One decision this term has illustrated how important the next new justice on the Supreme Court will be to the future of campaign finance reform. In a 5-4 ruling, the Court held in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* that federal law can limit a political party's expenditures that are coordinated with a candidate. The majority held that these limits are constitutionally permissible because they minimize the ability to circumvent limitations that the Court has previously upheld on political contributions to candidates. Justice Thomas dissented, joined by Scalia, Kennedy, and Rehnquist, claiming that limiting coordinated spending by political parties violates the parties' free speech rights. Thomas, Scalia, and Kennedy, however, would go even further, and reiterated their previously expressed desire to overrule *Buckley v. Valeo*, which upheld limits on political contributions by individuals. The position taken by Scalia and Thomas in this most recent case reinforces the conclusion reached in *Courting Disaster* that a Court with just one or two more justices like Scalia and Thomas would make meaningful campaign finance reform impossible.

9. ACCESS TO JUSTICE

In *Buckhannon Board and Care Home Inc. v. West Virginia Dept. of Health and Human Resources*, a 5-4 Court majority that included Scalia and Thomas dealt a harsh blow to victims of civil rights violations and to other claimants in cases in which a successful plaintiff may recover attorneys' fees. The majority ruled that a plaintiff is a "prevailing party" and may recover such fees only if the plaintiff has been awarded relief by a court, not if the plaintiff achieved the desired result by producing a settlement or other out-of-court change in the defendant's conduct. This decision effectively put an end to the "catalyst theory," which had been the law in every federal circuit that had considered the issue except for the 4th U.S. Circuit Court of Appeals. Under that theory, a plaintiff was considered a prevailing party, and thus entitled to fees, if the plaintiff could show that the plaintiff's lawsuit was the "catalyst" for changing the defendant's conduct. The majority opinion, written by Chief Justice Rehnquist, provoked a harsh dissent by Justice Ginsburg in which Justices Breyer, Stevens and Souter joined. In that dissent, Justice Ginsburg stated that the Court's "constricted definition of 'prevailing party,' and consequent rejection of the 'catalyst theory,' [would] impede access to the court for the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general."

Although Justices Scalia and Thomas joined the majority opinion in its entirety, they also issued a separate concurrence, written by Scalia, in which they expressed the preference for a rule that sometimes denies attorneys' fees "to the plaintiff with a solid case whose adversary slinks away on the eve of judgment" over one that "sometimes rewards the plaintiff with a phony claim." The latter rule, they wrote, would cause the law to be an instrument of wrong by "exacting the payment of attorney's fees to the *extortionist*" (emphasis added), apparently the manner in which they view some civil rights plaintiffs. They went even further, stating that since "monetary settlements and consent decrees can be *extorted* as well" (emphasis added), they now had "doubt" about even continuing the existing rule permitting attorneys' fees to be awarded to plaintiffs who achieve relief through court-approved settlements and consent decrees. Were that

extreme view to command a majority of the Court, the impact on victims of discrimination and other claimants, and on the judicial system itself, would be even greater. Indeed, there would be little incentive for plaintiffs to settle cases, resulting in needlessly protracted litigation.