COURTING DISASTER

An Update Examining the 2001-2002 Term

The Supreme Court's 2001-2002 Term was a troubling one for civil rights and civil liberties. In cases concerning school vouchers and church-state separation, the rights of disabled Americans, "federalism" and states' rights, and the privacy rights of students, the Court significantly restricted civil and constitutional rights and federal authority. The Court decided a number of these cases by narrow 5-4 rulings in which Justices Scalia and Thomas played a critical role in helping push the Court in a restrictive direction.

In addition, the Court rejected by narrow margins a number of efforts by Scalia and Thomas to push the Court in an even more dangerous direction with respect to such issues as the ability of government to protect the environment, civil rights, and patients' rights. Although this report discusses the Court's non-criminal cases, adding more Justices like Scalia or Thomas to the Court would have a substantial impact on criminal law as well, as illustrated by the Court's 6-3 decision in *Atkins v. Virginia*, 2002 WL 1338045 (2002), that executing the mentally retarded is unconstitutional, contrary to the views of Scalia and Thomas.

This Term's decisions reconfirm that the Supreme Court remains narrowly and deeply divided on a large number of issues important to the rights of all Americans. This highlights the importance of who is nominated to fill the next vacancy on the Court, which has not seen a vacancy since 1994, the longest period in American history since 1823. In 2000, then-presidential-candidate George W. Bush stated that, if elected, he would seek to appoint Justices like Scalia and Thomas in filling Supreme Court vacancies. The Court's decisions in 2001-2002 reinforce the conclusion of People For the American Way Foundation two years ago: adding more justices like Scalia and Thomas to the Court would be courting disaster for the rights of all Americans. As documented in the original *Courting Disaster*, the result could be to overturn more than 100 Supreme Court precedents protecting civil and constitutional rights.

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1. Civil Rights and Discrimination

The Supreme Court's record on civil rights was mixed but largely negative in 2001-2002. In a number of decisions, particularly several dealing with the Americans with Disabilities Act (ADA), the Court significantly restricted civil rights protections, threatening millions of disabled and other Americans. In several cases, the Court upheld important civil rights protections. With few exceptions, Justices Scalia and Thomas consistently led the Court in restricting civil rights, and dissented from rulings favorable to victims of discrimination. Adding more Justices like Scalia and Thomas to the Court would further jeopardize civil rights protections.

For example, in *U.S. Airways, Inc. v. Barnett,* 122 S.Ct. 1516 (2002), the Court limited ADA protections by ruling, 5-4, that in most circumstances, a company need not alter its seniority system to accommodate an employee with a disability. Writing for the Court majority, Justice Breyer explained that a disabled worker could overcome the presumption in favor of a seniority system if he or she could demonstrate "special circumstances." Justices Scalia and Thomas dissented, arguing that under no circumstances should a company be required to disregard a seniority system to accommodate a disabled worker. This would have weakened even further the protections accorded to disabled Americans. Justices Souter and Ginsburg dissented in favor of an interpretation of the ADA that would have required an employer in the circumstances of this case to demonstrate that disregarding its seniority system in order to accommodate a disabled employee would have worked an "undue hardship."

The Court issued three unanimous rulings limiting the protections and reach of the ADA. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 122 S.Ct. 681 (2002), the Court adopted a restrictive standard for determining whether someone is disabled within the meaning of the ADA. The Court held that an individual who claims that his or her impairment substantially limits the "major life activity" of "performing manual tasks" is considered disabled under the ADA only if the impairment "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives," as distinct from being limited in performing specific tasks crucial to a job. Thus, the Court ruled that a person whose carpal tunnel syndrome and other impairments prevented her from performing certain manual tasks, including those important to her job, could not as matter of law be considered disabled under the ADA because such tasks are not of

central importance to most people's daily lives. In *Barnes v. Gorman*, 122 S.Ct. 2097 (2002), the Court ruled that punitive damages may not be awarded in a private lawsuit brought under the ADA or the Rehabilitation Act of 1973. Although all nine members of the Court agreed with this ruling, three of them concurred only in the judgment, stating that Justice Scalia's opinion for the Court (joined by Justice Thomas) was needlessly "expansive" and had "potentially far-reaching consequences that go well beyond the issues briefed and argued in this case," such as precluding punitive damages in suits brought under other Spending Clause statutes. In *Chevron U.S.A. v. Echazabal*, 122 S.Ct. 2045 (2002), the Court held that under the ADA, an employer can refuse to hire a person whose disability on the job would pose a direct threat to his or her health, even if the person is willing to perform the job.

On the other hand, in a 6-3 decision, *Equal Employment Opportunity Commission v. Waffle House, Inc*., 122 S.Ct. 754 (2002), a divided Court held that the statutory authority of the Equal Employment Opportunity Commission to sue an employer for violating the ADA and seek monetary and other relief for a victimized employee includes the situation in which the employee has signed an agreement with the employer requiring arbitration of all employment disputes. Chief Justice Rehnquist and Justices Thomas and Scalia dissented, and would have denied the EEOC this important means of combating discrimination against Americans with disabilities in such circumstances. Since many employers, like the employer in this case, require employees to sign mandatory arbitration agreements as a condition of employment, adding more Justices to the Court like Scalia and Thomas would threaten this important means of enforcing the ADA, and potentially other discrimination laws as well.

Although the Court avoided making a decision on affirmative action in *Adarand Constructors, Inc. v. Mineta*, 122 S.Ct. 511 (2001), by dismissing a challenge to Department of Transportation affirmation action rules, the Court did decide a number of other important civil rights related cases. By a five-justice majority, including Scalia and Thomas, the Court in *Hoffman Plastic Compounds v. National Labor Relations Board,* 122 S.Ct. 1275 (2002), held that the National Labor Relations Board could not award backpay to a worker who had been unlawfully fired for participating in union-organizing, because the worker was an undocumented alien who was not authorized to work in this country. Justices Breyer, Stevens, Souter, and Ginsburg vigorously dissented, explaining that the decision would allow significant exploitation of undocumented workers and that the failure to enforce the labor laws would in fact encourage the hiring of illegal workers.

One civil rights case produced a split between Thomas and Scalia. In *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002), Justice Thomas joined Justices Stevens, Souter, Ginsburg, and Breyer in a 5-4 ruling that an employer may be held liable under Title VII for all acts creating a hostile work environment, even if some of those acts occurred outside the statutory period during which a victimized employee must file charges, as long as at least one act contributing to the claim occurred within the filing period. Justice Scalia joined a dissent by Justice O'Connor that would have held that an employee who had unlawfully been subjected to a hostile work environment could not recover damages "for that part of the hostile environment that occurred outside the charge-filing period."

In two unanimous rulings, the Court maintained important procedural safeguards for civil rights litigants. In *Edelman v. Lynchburg College,* 122 S.Ct. 1145 (2002), the Court upheld an EEOC regulation effectively providing that, even after the period allotted for filing a "charge" of employment discrimination under Title VII with the EEOC has expired, the complainant may still amend the charge in order to comply with the "technical" requirement of swearing to or affirming the truth of the charge. In *Swierkiewicz v. Sorema N.A.,* 122 S.Ct. 992 (2002), the Court held that a complaint charging employment discrimination filed in federal court need not contain "specific facts establishing a prima facie case of discrimination," in keeping with procedural rules providing that the purpose of a federal court complaint is simply to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." In so ruling, the Court specifically noted that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits."

2. Federalism and Governmental Authority

In a number of federalism and related decisions this Term, a narrowly divided Court further restricted the authority of the federal government to protect individual rights and the ability of Americans to hold their government accountable. Led by Justices Scalia and Thomas, the Court invoked the Eleventh Amendment, state sovereignty, and other doctrines to insulate state and other government agencies from suits by mistreated citizens. Thomas and Scalia sought to go even further than the Court majority, issuing dissents and concurrences in several key cases that would have further limited the government's ability to protect citizens. And in sharp contrast to their states' rights positions in these cases, Scalia and Thomas would have invalidated state patients' rights laws

on the grounds of federal preemption. Adding more Justices like Scalia and Thomas to the Court would extend even further the harmful results of the Court's federalism and related decisions, and would also make it more difficult for states in certain instances to protect the rights of individual Americans.

The Court's boldest "federalism" decision this Term was its 5-4 decision in *Federal Maritime Commission v. South Carolina State Ports Authority,* 122 S.Ct. 1864 (2002), which concerned claims that a state agency had violated federal law. The Court held that state sovereignty bars federal administrative agencies from adjudicating a private party's complaint against a state. The opinion, written by Justice Thomas, significantly expanded the reading of the Eleventh Amendment to apply not only to judicial proceedings, but also to administrative proceedings, which are nowhere mentioned in the text of the Amendment. In his dissent, Justice Breyer sharply criticized the Court's decision, stating that it "threatens to deny the Executive and Legislative Branches of Government the structural flexibility that the Constitution permits and which modern government demands."

In *Raygor v. Regents of University of Minnesota*, 122 S.Ct. 999 (2002), the Court created yet another Eleventh Amendment-related barrier for some civil rights claims. The plaintiffs had filed complaints in federal court against a state university, asserting federal claims under the Age Discrimination in Employment Act and state law claims under the state's anti-discrimination statute. The cases were consolidated. After the federal lawsuit was dismissed on Eleventh Amendment grounds, the plaintiffs re-filed their state law claims in state court. The Court, in a 6-3 decision, with Scalia and Thomas joining the majority, ruled that the state lawsuit should be dismissed because it was filed too late, refusing to apply a federal law that ordinarily suspends state filing deadlines for state claims brought in a federal lawsuit and related to the federal claim.

In a sovereign immunity case involving the federal government, *Correctional Services Corp. v. Malesko,* 122 S.Ct. 515 (2001), a 5-4 Court held that private entities acting under federal authority to carry out a government function, in this case operating a halfway house for the Bureau of Prisons, cannot be held liable for monetary damages for constitutional violations. This was despite the fact that federal officers could have been sued for such damages themselves. Justices Scalia and Thomas joined in the Court's opinion, but also wrote a separate concurring opinion to express an even more restrictive view. Their concurrence argued that the Court's seminal rulings implying a private right

of action under the Constitution against federal officers for monetary damages should be narrowly limited to the "precise circumstances" of those cases.

In a case concerning official immunity, *Hope v. Pelzer*, 2002 WL 1378412 (2002), the Court ruled, 6-3, that an Alabama prison inmate could maintain a civil action for damages under 42 U.S.C. § 1983 against state prison guards for allegedly violating his Eighth Amendment right not to be subjected to cruel and unusual punishment. The plaintiff based his constitutional claim on the charge that prison guards had twice handcuffed him to a "hitching post," including once for a seven-hour period in which he was "given water only once or twice and was given no bathroom breaks." The majority held that, under the facts alleged, "the Eighth Amendment violation is obvious. . . [T]he [guards] knowingly subjected [the prisoner] to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." The majority rejected the guards' claim that they were entitled to summary judgment on the ground that they had qualified immunity, holding that, at the time of the incidents in question and under the facts alleged, "the state of the law . . . gave [the guards] fair warning that their alleged treatment of [the prisoner] was unconstitutional." Justice Thomas wrote a dissent, joined by Rehnquist and Scalia, asserting that "[q]ualified immunity jurisprudence has been turned on its head" by the Court's ruling. The dissenters contended that it was not clear at the time that the guards' alleged conduct violated the Eighth Amendment.

In several cases, the Court majority rejected attempts by Scalia, Thomas, and others to further restrict the power of government to protect its citizens. The so-called "property rights" movement suffered a setback in the 6-3 decision of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002). The Court held that a temporary moratorium on development in the Lake Tahoe Basin was not a *per se* "taking" of property that required compensation under the Constitution. Rehnquist, Scalia and Thomas strongly dissented, and would have held that the temporary moratorium was a "taking" that required the property owners to be compensated. This position was in keeping with their view expressed in prior cases that the Takings Clause should be construed to prevent corporations and developers from having to comply with environmental and other regulations without compensation.

In a critical decision involving patients' rights, and by the narrowest of margins, the Court in *Rush Prudential HMO, Inc. v. Moran*, 122 S.Ct. 2151 (2002), upheld a state law providing that recipients of health care coverage by a Health Maintenance Organization under an employee benefit plan have the right to an independent medical review of the denial of a covered service when there is a dispute between the patient's primary care provider and the HMO regarding the "medical necessity" of that service. In a 5-4 ruling, the Court rejected an HMO's claim that the state law was preempted by ERISA, a federal statute. Although Justices Scalia and Thomas have been part of the 5-4 Court majority in a number of recent decisions upholding states' rights and blocking the enforcement of federal laws protecting the rights of individual Americans, Thomas in this case wrote the dissent, joined by Scalia, Rehnquist, and Kennedy, which would have invalidated the progressive state law on the ground of federal preemption. Forty-two states and the District of Columbia reportedly have patients' rights laws similar to the one at issue in this case. Adding just one more Justice like Scalia or Thomas to the Court would have a significant impact on the ability of states to protect the rights of ordinary Americans when it comes to health care decisions by HMOs.

In several other decisions, the Court rejected Eleventh Amendment arguments without dissent. These included *Lapides v. University of Georgia Board of Regents*, 122 S.Ct. 1640 (2002), in which the Court held that a state waives its Eleventh Amendment immunity when it voluntarily removes a case from state court to federal court, and *Verizon Maryland, Inc. v. Public Service Commission of MD,* 122 S.Ct. 1753 (2002), in which the Court held that a telecommunications company can bring suit in federal court against state utility commissioners in their official capacities to secure prospective relief concerning an order of the commission that allegedly violated the 1996 Telecommunications Act.

In a decision that effectively denied Utah's bid for another congressional seat following the 2000 census and preserved a new seat for North Carolina, the Court in *Utah v. Evans*, 122 S.Ct. 2191 (2002), upheld the Census Bureau's use of a methodology called "hot-deck imputation" to fill in gaps in information or resolve conflicts about a housing unit when the actual information cannot otherwise be determined. Under this methodology, the Bureau imputes the relevant information based on the known information for a similar housing unit nearby. The Court held that this form of "imputation" violates neither a federal census law prohibition against "the statistical method known as 'sampling,' " nor the Census Clause of the Constitution, which requires an "actual Enumeration." Four Justices, including Thomas and Scalia, dissented from the ruling for a variety of reasons.

Ironically, Justice Thomas, who formed part of the five-Justice majority that effectively determined the outcome of the 2000 presidential election, dissented on the ground that "imputation" is unconstitutional and leaves "the basis of our representative government vulnerable to political manipulation."

3. Privacy Rights and Reproductive Freedom

Although the Court decided no cases concerning reproductive freedom this Term, the Court did rule in several important cases that addressed the growing concerns over the privacy rights of students in schools, and in each case ruled against the claims brought by students.

In a 5-4 ruling in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 2002 WL 1378649, the Court upheld a public school district policy requiring all middle and high school students to consent to drug testing in order to participate in any extracurricular activity, including "Future Farmers of America, Future Homemakers of America, [and] band . . . ." In an opinion written by Justice Thomas and joined by Rehnquist, Scalia, Kennedy, and Breyer, the Court rejected claims that the policy was a significant invasion of students' privacy that violated the Fourth Amendment's prohibition against unreasonable searches and seizures, holding that the policy "reasonably serves the School District's important interest in detecting and preventing drug use among its students . . ." In the opinion of the dissenting Justices, Ginsburg, Stevens, O'Connor, and Souter, the drug testing program "is not reasonable, it is capricious, even perverse: [the] policy targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects." The potential implications of the Court's decision on students' privacy rights are vast, since schools presumably have an interest "in detecting and preventing drug use" among all students, not merely those participating in extracurricular activities. The ruling may also have implications beyond the school setting, given the majority's embrace of suspicionless drug testing and its reference to "the nationwide epidemic of drug use."

In *Gonzaga University v. Doe*, 122 S.Ct. 2268 (2002), the Court ruled, 7-2, with Justices Scalia and Thomas in the majority, that a student has no right to bring a lawsuit for damages against a private university that disclosed personal information about him without his consent. The student based his lawsuit on the Family Educational Rights and Privacy Act of 1974 (FERPA), which provides that federal funds shall not be made available to any educational institution that "has a

policy or practice of permitting the release of [a student's] education records (or personally identifiable information contained therein)" without consent. In a ruling that could have implications for other spending legislation, the Court held that FERPA's nondisclosure provisions do not give private parties enforceable rights.

In *Owasso Independent School District v. Falvo*, 122 S.Ct. 934 (2002), the Court held that the practice of having students grade each other's work does not violate the Family Educational Rights and Privacy Act. The Court stopped short of deciding "the broader question whether grades on individual student assignments, once they are turned in to teachers, are protected by the Act." Justice Scalia wrote an opinion concurring only in the judgment of the Court and stating his disagreement with what he described as the Court's suggestion that education records protected by FERPA include "only those documents kept in some central repository at the school."

4. Religious Liberty and Church-State Separation

In its most important church-state ruling in years, the Court in *Zelman v. Simmons-Harris*, 2002 WL 1378554 (2002), by a 5-4 vote upheld the Cleveland voucher program under which public funds are used to send students to private schools, the overwhelming majority of which are religious. In an opinion by Chief Justice Rehnquist, joined by Scalia, Thomas, Kennedy, and O'Connor, the Court significantly weakened the wall of separation between church and state, giving its blessing to a program in which public funds are provided to religious schools on an unrestricted basis, where they may be used for any purpose whatsoever, including religious indoctrination, the purchase of religious books, the salaries of clergy, and the construction of places of worship. According to the majority, the voucher program passes constitutional muster because it is a "neutral" program and public funds flow to religious schools only as the result of the "private choice" of parents. Justice Thomas, in addition to joining the majority opinion, wrote a concurring opinion in which he took the even more extreme position of suggesting that the Establishment Clause should not be applied to the states by incorporation into the Fourteenth Amendment, at least not to the extent it applies to the federal government, asserting that there is "wisdom [in] allowing States greater latitude in dealing with matters of religion and education . . . ." Expressly invoking *Brown v. Board of Education*, Justice Thomas further claimed that this case presented an example of "urban children [having] been forced into a system that continually fails them." Justice O'Connor wrote a concurring opinion in which she

attempted to minimize the Court's ruling, claiming that the decision did not "signal a major departure from the Court's prior Establishment Clause jurisprudence."

Justices Souter, Stevens, Breyer and Ginsburg vigorously dissented, explaining that the Court's decision violated fundamental objectives of the Establishment Clause, including protecting Americans from being compelled to support religion. In an opinion written by Justice Souter, the four dissenters also expressed concern that the Court's decision will be harmful to religion as government reasonably seeks accountability for the money it provides to religious institutions and imposes restrictions on the institutions accepting those funds. Souter's dissent cited examples from the Ohio voucher law itself, including the requirement that participating religious schools not "discriminate on the basis of religion." As in the Court's 5-4 federalism decisions, the dissenters did not accept the legitimacy of the Court's ruling, expressly stating their hope "that a future Court will reconsider today's dramatic departure from basic Establishment Clause principle."

The Court's 5-4 split in this case underscores the precarious status of church-state separation in this country, and plainly has implications for government funding of religion beyond the school voucher context. The addition of another Justice like Scalia or Thomas to the Court would further weaken the fundamental principles that protect freedom of conscience and religious liberty for all Americans.

5. Free Expression and Censorship

Supreme Court cases on freedom of expression yielded mixed results in 2001-2002. The Court majority invalidated one congressional effort concerning Internet related speech on First Amendment grounds, and cast significant doubt on another. In several cases, the Court upheld municipal authority to restrict speech activities, while striking down a restrictive municipal ordinance in another. The Court was narrowly divided in a number of these free speech cases.

In one important Internet related case, *Ashcroft v. The Free Speech Coalition,* 122 S.Ct. 1389 (2002), a divided Court struck down two sections of the Child Pornography Prevention Act of 1996 that prohibited the visual depiction of sexually explicit images that "appear" to show minors or that are presented in a manner that "conveys the impression" that they show minors, but that are actually produced without using real children, sometimes through computer-generated images. The Court found these provisions to be fatally overbroad since they banned material that was neither obscene

nor produced by the exploitation of actual children, and abridged "the freedom to engage in a substantial amount of lawful speech." The Court flatly rejected the government's suggestion that "protected speech may be banned as a means to ban unprotected speech," observing that such an argument "turns the First Amendment upside down." Chief Justice Rehnquist and Justice Scalia dissented and would have upheld the law in full. Justice O'Connor would have upheld the ban on pornographic depictions that "appeared" to be of minors as long as it was "not applied to youthful-adult pornography." Although Justice Thomas concurred in the judgment, he expressed a willingness to uphold a ban on virtual child pornography in the future if technology makes it impossible to prove whether "certain pornographic images are of real children" and the regulation "contains an appropriate affirmative defense or some other narrowly drawn restriction."

In *Ashcroft v. American Civil Liberties Union,* 122 S.Ct. 1700 (2002), the Court this Term also considered the constitutionality of the federal Child Online Protection Act (COPA), which criminalizes communications made for commercial purposes that are distributed on the World Wide Web, that are available to minors, and that include material deemed "harmful to minors." In an 8-1 ruling in which Justice Thomas wrote the opinion of the Court, the Court reversed an appellate court and ruled that the law's reliance on "community standards" to determine what material is harmful to minors does not by itself render COPA unconstitutional. Nevertheless, at least five Justices, not including Thomas or Scalia, suggested that COPA may well violate the First Amendment by improperly restricting adult use of the Internet. The Court left in effect an injunction prohibiting the federal government from enforcing COPA pending a lower court ruling on the other First Amendment objections to the law.

Scalia and Thomas were part of a 5-4 majority in *City of Los Angeles v. Alameda Books, Inc.,* 122 S.Ct. 1728 (2002), which ruled in favor of Los Angeles in connection with a city zoning ordinance that restricted free speech by prohibiting the establishment of more than one adult entertainment business in the same building. Justice Scalia not only joined the plurality opinion, but also wrote a separate concurrence in which he stated that "[t]he Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." The four dissenting Justices believed the ordinance was effectively a content-based regulation and that the regulation was not justified by the city's evidence. In *Thomas v. Chicago Park District,* 122 S.Ct. 775 (2002), all nine members of the Court upheld another municipal restriction on speech, ruling that an ordinance requiring individuals to obtain a permit to conduct

large scale events in public parks was a content-neutral, time, place, and manner restriction that provided adequate standards to guide officials' decisions.

In another 5-4 decision, *Thompson v. Western States Medical Center,* 122 S.Ct. 1497 (2002), Thomas and Scalia joined the majority in holding that a provision of the Food and Drug Administration Modernization Act of 1997 violated the First Amendment. The provision exempted "compounded drugs" – typically medications not available commercially and mixed by a pharmacist – from the FDA's standard drug approval requirements as long as the providers of the compounded drugs abided by certain restrictions, including the requirement that they not advertise or promote them and that any prescription for them be "unsolicited." The Court held that this ban on commercial speech did not survive constitutional scrutiny because the government had not demonstrated that the regulation directly advanced a substantial governmental interest using the least restrictive means necessary. Justice Thomas concurred and suggested that even broader protection should be given to such commercial speech. The dissenting Justices would have held that the advertising restriction directly and permissibly advanced the government's important safety objective of confining "the sale of untested, compounded, drugs to where they are medically needed," and expressed a concern that the Court had "seriously undervalue[d] the importance of the Government's interest in protecting the health and safety of the American public."

In an 8-1 ruling with only Chief Justice Rehnquist dissenting, the Court in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 122 S.Ct. 2080 (2002), struck down a local ordinance that prohibited "canvassers" from going door-to-door without first registering with the mayor and obtaining a permit that contained the solicitor's name, and that required the "canvasser" to display the permit upon demand. Although the suit was brought by the Jehovah's Witnesses, the Court noted that the ordinance applied broadly not only to religious proselytizing but also to "anonymous political speech and the distribution of handbills." The Court's opinion, written by Justice Stevens, found it "offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." Justices Scalia and Thomas concurred only in the Court's judgment, issuing a separate opinion to point out that they did not agree with a number of the reasons for the majority's decision to strike down the ordinance.

In a 5-4 decision, the Court in *Republican Party of Minnesota v. White*, 2002 WL 1378604 (2002), struck down on free speech grounds a judicial conduct rule of the Minnesota Supreme Court prohibiting candidates for elective judicial office from "announcing their views on disputed legal and political issues." In an opinion written by Justice Scalia and joined by Rehnquist, Thomas, O'Connor, and Kennedy, the Court concluded that the rule (called "the announce clause") was a content-based prohibition that burdened a category of speech "that is at the core of our First Amendment freedoms – speech about the qualifications of candidates for public office." Applying strict scrutiny, the Court held that the rule was invalid because it was not narrowly tailored to serve a compelling state interest. Justice Scalia used his majority decision to take a swipe at the American Bar Association, which originated the "announce clause." According to Scalia, there is an "obvious tension" between Minnesota's constitutional requirement that judges be elected, and the "announce clause," which "places most subjects of interest to the voters off limits." Scalia found this "perhaps unsurprising," since the ABA "has long been an opponent of judicial elections." Justices Ginsburg, Stevens, Souter, and Breyer dissented, drawing a distinction between candidates for judicial office and other elected officials. They would have held that the First Amendment did not prevent Minnesota "from furthering its interest in judicial integrity through this precisely targeted speech restriction."

6. Consumer and Worker Protection

During this past Term, Justices Scalia and Thomas provided the decisive votes in two narrowly divided rulings favorable to employers. In *Ragsdale v. Wolverine World Wide, Inc.*, 122 S.Ct. 1155 (2002), a 5-4 Court, with Thomas and Scalia joining the majority, invalidated a Labor Department regulation concerning implementation of the Family and Medical Leave Act (FMLA), which entitles employees to 12 weeks of unpaid leave in a one-year period for the family and medical-leave purposes specified in the Act. The regulation required an employer to give an employee individualized written notice that a particular absence would be considered leave under the FMLA. If such notice were not given, the leave would not count against the employee's FMLA entitlement to 12 weeks of leave, with the result that, as a penalty for noncompliance, the employer could be required to give an employee additional leave beyond the amount provided in the Act. The Court majority did not believe that the Secretary of Labor had the authority to require employers to give employees more than the 12 weeks of leave specified in the Act. The Court therefore held that the regulation was contrary to the Act and outside the Secretary's authority. The dissenting Justices

discussed the importance of individualized notice to employees that particular leave is protected under the FMLA, would have held that the Secretary of Labor had the authority to require employers to provide such individualized notice, and concluded that nothing in the Act "constrains the Secretary's ability to secure compliance with that requirement by refusing to count the leave against the employer's statutory obligation . . .."

The Court's ruling in *Barnhart v. Sigmon Coal Co., Inc*., 122 S.Ct. 941 (2002), concerned federal legislation intended to protect health care benefits for retired coal industry workers, the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act). In this case, the Court held, 6-3, that the Coal Act does not permit the Commissioner of Social Security to assign liability for retired coal miners' health care benefits to a company that is the successor-in-interest to the business of another coal operator. Justice Scalia joined the majority opinion, which was written by Justice Thomas. The dissenting Justices decried the "absurd results" of the majority's opinion, contending that it was an illogical interpretation of the Coal Act and contrary to the intent of Congress.

Justices Scalia and Thomas were on opposite sides of the Court's ruling in *Wisconsin Department of Health and Family Services v. Blumer*, 122 S.Ct. 962 (2002), in which the Court considered whether a state's Medicaid eligibility rules conflicted with the Medicare Catastrophic Coverage Act, a federal law that seeks to prevent an individual from becoming impoverished when his or her spouse requires institutionalization for health reasons. The Court's 6-3 decision upheld a methodology used by Wisconsin – and most states – to determine Medicaid eligibility that tends to have the effect of forcing married couples to spend down more of their savings in order for the institutionalized spouse to be eligible for benefits than the methodology employed by other states. The dissent would have held Wisconsin's methodology to be invalid under the Act. While Justice Thomas joined the majority in *Blumer*, Justice Scalia dissented.

In a unanimous decision, *Department of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230 (2002), the Court held that, pursuant to the Anti-Drug Abuse Act of 1988, a local public housing authority could lawfully evict a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, about the activity. The decision was criticized by some observers as unfairly harmful to innocent low-income tenants.