CIVIL RIGHTS AND CIVIL LIBERTIES IN THE SUPREME COURT'S 2004- 2005 TERM

June 29, 2005

The Supreme Court decided a number of important cases concerning civil rights and civil liberties in its 2004-2005 term. Overall, the Court protected key civil rights and liberties, and disappointed those seeking to expand property rights and limit Congress' power – often by narrow margins – though some narrow decisions regarding access to justice and immigrant rights were disappointing. In fact, many of the key rulings, discussed in further detail below, were decided by narrow margins of 5-4 (or 5-3 due to the absence of Chief Justice Rehnquist), emphasizing the significance of future vacancies on the Supreme Court. Important examples include:

- a decision that people retaliated against for complaining about illegal sex discrimination can sue under federal law;
- a holding that government posting of the Ten Commandments in a court house in order to promote religion is unconstitutional;
- a ruling that federal courts will generally not second-guess governmental decisions to use eminent domain power to acquire private property for public purposes;
- a decision that job practices that have the effect of discriminating based on age violate federal law;
- a holding that foreign-flagged cruise ships in U.S. waters must abide by the Americans with Disabilities Act.

Several critical cases raising criminal law issues were also decided by 5-4 margins. In *Roper v. Simmons*, 125 S. Ct. 1183 (2005), the Court proscribed the use of the juvenile death penalty, holding that the Eighth Amendment's prohibition of cruel and unusual punishment, as applied to the states through the Fourteenth Amendment, forbids the execution of people who were younger than eighteen years old when they committed their crimes. In *United States v. Booker*, 125 S. Ct. 738 (2005), the Court held that the mandatory federal sentencing guidelines were unconstitutional, and should be considered advisory only. With important cases on reproductive rights and the application of the Americans with Disabilities Act already pending on the Court's docket, more closely divided decisions can be expected in 2005-2006.

This report summarizes the Court's key decisions this past term on civil rights, civil liberties and other non-criminal law subjects discussed in our *Courting Disaster* 2005 report, which was released in early June.

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Civil Rights/Voting Rights

In *Jackson v. Birmingham Bd. of Educ*., 125 S. Ct. 1497 (2005), the Court held 5-4 that there is a private right of action under Title IX of the Education Amendments of 1972 for victims of retaliation based on complaints about gender discrimination. Title IX prohibits sex discrimination in educational programs and activities receiving federal funds. The case was brought by a girls' basketball coach who received negative evaluations and was eventually removed as coach after he complained that the girls' team did not receive equal funding or access to equipment and facilities compared to the boys' team. 125 S. Ct. at 1503. Justice O'Connor delivered the opinion of the Court, which Justices Stevens, Ginsburg, Souter and Breyer joined. The Court stated that retaliation for complaining about sex discrimination is a form of intentional sex discrimination encompassed by Title IX's private cause of action. *Id.* at 1504. The majority explained that remedying discrimination depends on private reporting, and the aims of Title IX would be thwarted if people complaining about sex discrimination were not protected from retaliation. *Id.* at 1508. Justice Thomas filed a dissenting opinion, which Chief Justice Rehnquist and Justices Scalia and Kennedy joined.

In an employment discrimination case, *Smith v. City of Jackson*, 125 S.Ct.1536 (2005), the Court held that disparate impact cases can be brought under the Age Discrimination in Employment Act (ADEA). A number of police officers sued the city after all officers were given pay raises in an attempt to bring their salaries into line with the regional averages. *Id.* at 1539. Officers with less than five years seniority were given larger raises than those with more than five years seniority. *Id.* Most officers over forty years old had more than five years seniority, and received proportionately smaller raises. *Id.* These officers sued on the basis that the policy had a discriminatory or disparate impact on older officers. *Id.*

Eight members of the Court voted to affirm the lower court decision dismissing the officers' case, but disagreed as to whether disparate impact was a legitimate basis for recovery under the ADEA. Justice Stevens, joined by Justices Ginsburg, Souter and Breyer, wrote the plurality opinion. Because the language of the ADEA is nearly identical to that of Title VII, the plurality stated that Congress must have meant for the text to have the same meaning. *Id.* at 1541. They also pointed to the purposes and the text of the ADEA as focusing on the effects of discrimination, not the intent of the actors. *Id.* They further argued that the EEOC regulations have consistently interpreted the ADEA as allowing disparate impact claims. *Id.* at 1544. Justice Scalia concurred on the basis that the Court should defer to the EEOC's guidelines recognizing disparate impact claims under the ADEA, but disagreed regarding Congress' intent and the text of the ADEA. *Id.* at 1546-47.

All five justices in the majority went on to hold, however, that there were some differences between disparate impact claims under the ADEA and under Title VII. *Id.* at 1537-38. The majority stated that the 1991 Amendments to Title VII, incorporating a more expansive disparate impact doctrine than the Court's jurisprudence at the time, did not apply to the ADEA, and that the Reasonable Factors Other than Age (ROFA) provision of the ADEA, which allows employers to take actions otherwise prohibited when based on reasonable factors other than age, also limited the use of the theory. *Id.* at 1538. It is not enough to show a disparate impact generally, Justice Stevens explained, but the affected workers must point to a particular practice that has caused the disparity. *Id.* The majority found that the officers failed to identify a particular practice and that the City's plan was based on reasonable factors other than age. *Id.* Therefore, the majority held that there was no disparate impact in this particular case. Justice O'Connor, joined by Justices Thomas and Kennedy filed a concurring opinion, but disagreed that disparate impact claims could be brought under the ADEA. Chief Justice Rehnquist did not participate in the decision

Spector v. Norwegian Cruise Line Ltd., 125 S.Ct. 2169 (2005), involved a challenge under Title III of the Americans with Disabilities Act (ADA), which addresses access to public accommodations and public transportation for the disabled. The question was whether foreign-flagged cruise ships operated in United States waters are subject to the requirements of the ADA. In another 5-4 decision, the Court held that they are. Justice Kennedy wrote the opinion for the Court. In parts joined by Justices Stevens, Ginsburg, Souter and Breyer, he explained that cruise ships, while not specifically mentioned in Title III, clearly fall within the law's definitions of public accommodation and public transportation. *Id.* at 2171. He went on to hold that Title III requires the removal of physical barriers that are readily achievable. He stated that factors that should be considered in addition to cost are compliance with international law and shipboard safety. *Id.* at 2180.

The majority disagreed, however, as to whether a foreign-flagged cruise ship would be required to follow Title III if the claim related to the ship's internal affairs since the ADA does not contain a clear statement from Congress indicating that it applies to such matters. Justice Stevens, along with Justices Souter, Kennedy and Thomas, indicated that the ADA would not apply in such circumstances. Justice Ginsburg, joined by Justice Breyer, on the other hand, argued that the ADA should only be limited when it would require cruise ships to violate international law or legal obligations. Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas in part, dissented. He argued that Title III clearly implicates the internal operations of foreign-flagged cruise ships and the ADA should not be interpreted to apply to them. *Id.* at 2188. Justice Thomas agreed with Justice Scalia that Title III does not apply when a cruise ship's internal affairs may be implicated, but agreed with the majority that it was not necessary to invalidate portions of the ADA that do not implicate internal affairs. *Id.* at 2186.

In a 5-3 opinion, in which Chief Justice Rehnquist did not participate, the Court reiterated that racial classifications are always subject to strict scrutiny review. *Johnson v. California,* 125 S. Ct. 1141 (2005). A prisoner sued the California Department of Corrections, challenging an unwritten policy of initially separating new and transferred inmates based on their race in order to prevent gang violence. Justice O'Connor wrote the opinion for the majority, joined by Justices Ginsburg, Souter, Breyer and Kennedy, stating that the reasons for subjecting racial classifications to strict scrutiny were just as applicable in a prison setting. *Id.* at 1147. The Court did not determine whether the policy was narrowly tailored to serve a compelling interest in this situation, and sent the case to the lower courts for that purpose. *Id*. at 1152.

Justice Ginsburg, joined by Justices Souter and Breyer concurred, but stated that racial classifications aimed at remedying discrimination are different than other racial classifications. *Id.* at 1152-53. Justice Stevens dissented, arguing that the CDC's policy violated the Equal Protection Clause no matter what level of scrutiny was applied, and that the Court itself should strike it down. *Id.* at 1153. Justice Thomas, joined by Justice Scalia, also filed a dissent. He argued that the "Constitution has always demanded less within the prison walls," and that the Court should defer to the judgment of prison officials and uphold the policy. *Id*. at 1157.

The Court held 6-3 in *Clingman v. Beaver,* 125 S. Ct. 2029 (2005), that refusing to allow all registered voters to participate in a primary election does not violate the First Amendment. The Libertarian Party wanted all voters to be allowed to vote in its Oklahoma primary election, but Oklahoma law only allowed independents and the voters affiliated with a particular political party to vote in that party's primary. *Id.* at 2034. The Court's opinion, written by Justice Thomas and joined in full by Chief Justice Rehnquist and Justices Scalia and Kennedy, held that the restriction did not violate the voters' or the party's right to freedom of political association. *Id.* at 2036-37. They acknowledged that regulations that impose severe burdens on political association must be narrowly tailored to

achieve a compelling state interest, but found that the burden in this case was not substantial. *Id*. at 2035. Justice O'Connor and Justice Breyer concurred in part, but considered the associational rights implicated in the case more important than recognized by the plurality. *Id.* at 2042. Justice Stevens, joined by Justices Ginsburg and Souter strongly dissented, arguing that the Court's decision minimized citizens' right to vote for whom they wish and the Libertarian Party's right to define its own mission. *Id*. at 2047.

States' Rights/Federalism

In *Granholm v. Heald*, 125 S. Ct. 1885 (2005), the Court held 5-4 that state regulatory schemes that allowed in-state, but not out-of-state, wineries to make direct sales to consumers violated the Commerce Clause of the Constitution. Justice Kennedy wrote the majority opinion, which Justices Scalia, Souter, Breyer and Ginsburg joined. Justice Stevens dissented, joined by Justice O'Connor, arguing that the Twenty-First Amendment, giving the states power to regulate alcohol, altered the Commerce Clause assessment in regard to alcohol. *Id.* at 1908. Justice Thomas, joined by Chief Justice Rehnquist and Justices Stevens and O'Connor, also filed a dissenting opinion. He argued that the Twenty-First Amendment, as well as the Webb-Kenyon Act, removed any Commerce Clause barriers to state regulation of liquor. *Id.* at 1909-10.

In *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), the Court addressed the issue of whether the federal government can regulate medical marijuana grown and used by an individual, or given to that individual free of charge, and never moving in interstate commerce. The respondents in the case, women who rely on cannabis treatment under California's Compassionate Use Act, challenged the Controlled Substances Act (CSA) control of local, private production and consumption of marijuana for medical use. *Id.* at 2200-01. The Court held 6-3 that the CSA, including aspects of it that reach purely intrastate transactions, is a valid exercise of Congress' power under the Commerce Clause. The majority opinion was written by Justice Stevens and joined by Justices Kennedy, Souter, Breyer and Ginsburg.

The majority stated that case law establishes Congress' power to regulate purely local activities that have a "substantial effect on interstate commerce." *Id.* at 2205. The holding was based, in large part, on *Wickard v. Filburn*, 317 U.S. 111 (1942), which upheld Congress' authority to regulate the production and consumption of wheat grown for personal use. Stevens indicated that it was likely that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." 125 S. Ct. at 2207. The majority distinguished the *Raich* case from *United States v. Lopez,* 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000), previous cases in which the Court had struck down statutes passed under Congress' Commerce Clause power. Those cases were classified by the *Raich* majority as challenges to statutes in their entirety, whereas in this case, the majority explained, it was conceded that the overall statutory scheme was valid under the Commerce Clause, significantly weakening the challenge in *Raich* to a single application of the statute. 125 S. Ct. at 2209. The Court further stated that the "activities regulated by the CSA are quintessentially economic," unlike the activities in *Lopez* and *Morrison*. *Id.* at 2211. The fact that marijuana was used for medical purposes in accordance with state law did not distinguish it. *Id.* at 2212. Justice Scalia concurred in the judgment, stating that Congress may regulate intrastate activities that do not substantially affect interstate commerce, under the Necessary and Proper Clause, when essential to a comprehensive regulation of interstate commerce. *Id.* at 2216.

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Thomas, dissented. She began by pointing to the virtue of federalism in allowing states to try novel experiments without impacting

the rest of the country. *Id.* at 2220-21. She disagreed with the majority's suggestion that "federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal." *Id.* at 2222. She also pointed out that the CSA and the California Compassionate Use Act, along with other legislation, recognize that medical and recreational drug use can be regulated differently. *Id.* at 2224. She disagreed with the majority's classification of intrastate cultivation and possession of marijuana for personal use as economic, and as having a substantial impact on interstate commerce. *Id.* at 2224-25. She further disagreed with the majority's understanding of the holding in *Wickard*. *Id.* at 2225. Justice Thomas also filed a separate dissent, stating that "[i]f Congress can regulate this under the Commerce Clause, then it can regulate virtually anything." *Id.* at 2229. He stated that there was no indication that Congress' control of interstate drug trafficking would be thwarted if the CSA did not apply to patients like the respondents, and that Congress had encroached on the states' traditional police powers. *Id.* at 2233. He also disagreed that Congress may regulate "activities that substantially affect interstate commerce" under the Commerce Clause. *Id.* at 2235.

Religious Liberty

VanOrden v. Perry, 2005 U.S. LEXIS 5215 (2005), addressed whether the placement of a six-foot monument of the Ten Commandments, on state grounds between the Texas State Capitol and Texas Supreme Court, violated the Establishment Clause of the First Amendment. The Court held 5-4 that it did not. In a plurality opinion, Chief Justice Rehnquist, joined by Justices Scalia, Thomas and Kennedy, pointed to the fact that the Ten Commandments monument was only one of seventeen monuments and twenty-one historical markers on the Capitol grounds. *Id.* at 7. He also pointed to the fact that suit was not brought until forty years after the monument was erected. *Id.* at 9. He indicated that part of our nation's history was its religious heritage. *Id.* at 20. Based on that, and the conclusion that the Ten Commandments monument was part of a general display and was not overly intrusive, the plurality upheld the constitutionality of the monument. *Id.* at 25-26. Justice Breyer concurred in the result only, disagreeing with much of the plurality's analysis. He relied on the conclusion that the Ten Commandments display in this particular case communicated a secular and historical message, as well as religious, that the forty years that had passed without the monument being challenged was significant, and that a contrary result would encourage disputes concerning the removal of long-standing Ten Commandments depictions from public buildings, contradicting a key purpose of the Establishment Clause. *Id.* at 43-48. Justices Scalia and Thomas also concurred, suggesting that the case would have been easier to decide based on their radical reinterpretations of Establishment Clause jurisprudence, including Thomas' theory that the Clause does not even apply to state and local governments. *Id.* at 28.

Justice Stevens, joined by Justice Ginsburg, dissented. He argued that the monument was not historical or artistic, but only religious, promoting the following of one religious faith, and thereby violated the Establishment Clause. *Id.* at 59. He further argued that, even if the Ten Commandments monument was a valid display of Texas identity, it was likely to make non-believers feel like outsiders, and was not a message that should be endorsed by the state. *Id.* at 71-72. He also distinguished the example given by the plurality of addresses by public figures from a monument erected by the government. *Id.* at 76. Justice Souter also wrote a dissent, joined by Justices Stevens, Ginsburg and O'Connor, explaining that the overall message of the monument was clearly to promote religion.

In *McCreary County v. ACLU of Kentucky,* 2005 U.S. LEXIS 5211 (2005), however, decided the same day as *VanOrden*, the Court decided 5-4 that the placement by two Kentucky counties of framed copies of the Ten Commandments in county courthouses did violate the Establishment Clause. After being ordered to remove the Ten Commandments, the counties had subsequently added a number

of framed secular documents, and claimed that the modified displays as a whole had a secular purpose. Justice Souter, joined by Justices Breyer, Stevens, O'Connor and Ginsburg, wrote the majority opinion, stating that the counties' purpose in presenting the displays was crucial to the determination of whether the Establishment Clause had been violated. He stated that, "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *Id.* at 30. He went on to hold that the Ten Commandments were clearly posted for a religious purpose. *Id.* at 52-53. Justice O'Connor, in addition to joining the majority opinion, also filed a concurring opinion, stating that "respect for religion's special role in society" required a neutral role for government in regards to religion. *Id.* at 69-70.

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, vehemently dissented. He argued that the majority was wrong in stating that government could not favor religion, and that under his view of the Establishment Clause, government should be able to do so. *Id.* at 79-90. He went on to argue that even accepting past precedent, the Ten Commandment display still should have been found constitutional because of the inclusion of a variety of secular documents. *Id.* at 104. The opinions of Justices Souter and O'Connor, along with Justice Stevens' opinion in *VanOrden*, specifically explained the historical and legal flaws in Justice Scalia's version of the Establishment Clause.

In a third Establishment Clause case, *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), the Court decided whether the Religious Land Use and Institutionalized Persons Act (RLUIPA) violated the First Amendment. Prisoners had brought a suit under RLUIPA to challenge Ohio corrections officials' refusal to accommodate their religious beliefs and practices. In a unanimous decision, written by Justice Ginsburg, the Court held that the RLUIPA did not violate the Establishment Clause and that prisons cannot unduly burden prisoners' religious exercise. *Id.* at 2121. Justice Thomas also filed a concurring opinion to state that, as well as passing constitutional muster under current Establishment Clause jurisprudence, RLUIPA was also constitutional if the Establishment Clause were understood as merely preventing Congress from requiring states to establish a particular religion, as he has argued. *Id.* at 2125.

Free Expression

Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005) addressed a First Amendment challenge to the Beef Promotion and Research Act of 1985. Cattle farmer associations claimed that the act violated their free speech rights by requiring them to subsidize speech with which they disagreed. *Id.* at 2059. The Court held, however, that because the fund went to subsidize the Government's own speech, it was not violative of the First Amendment. *Id.* at 2064. The Court has struck down compelled subsidies on First Amendment grounds, but only when the speech in question was considered private. *Id.* at 2060-61. Justice Scalia delivered the opinion, joined by Chief Justice Rehnquist and Justices Thomas, Breyer and O'Connor. Justice Thomas wrote a concurrence to indicate that if the government were attributing a message to the associations against their will it would likely violate the First Amendment, but he did not find clear evidence that the message in the ads was attributed to the cattle associations in question. *Id.* at 2067. Justice Breyer and Justice Ginsburg wrote separate concurring opinions, arguing that the assessment was a form of economic regulation, not speech. *Id.* at 2067-68.

Justice Souter, joined by Justices Kennedy and Stevens, vehemently dissented. He argued that a subsidized message should only be considered government speech, and thereby exempt from First Amendment challenges, when it is specifically put forth as a message of the government. *Id.* at 2068. Because the beef promotion is not specifically disseminated as a message from the government, he

found that the compelled subsidy violated the First Amendment. *Id.* at 2072. He also found the subsidy in this case problematic because, unlike a general tax shared by the public, certain groups and individuals were particularly burdened in having to fund a message with which they disagreed. *Id.* at 2071.

City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005) dealt with the City's failure to grant a license for a radio tower. The individual denied the license filed a request for an injunction under the Telecommunications Act and an action for damages under 28 U.S.C. § 1983. *Id.* at 1457. The Court held that because the Telecommunications Act provided a judicial remedy to enforce limitations on zoning regulations, § 1983 cannot be utilized to sue for damages. *Id.* at 1462. Justice Scalia wrote the opinion for the majority, joined by Chief Justice Rehnquist and Justices Souter, Thomas, Kennedy, O'Connor, Breyer and Ginsburg. Justice Breyer also filed a concurring opinion, joined by Justices Souter, Ginsburg and O'Connor, to reiterate that the Court must look to Congress' intent in enacting a particular statute; the existence of a judicial remedy does not necessarily preclude relief under § 1983. *Id.* at 1463. Justice Stevens wrote an opinion concurring in the judgment and arguing that the Court must look to all available information to "fill the gap" when Congress enacts a statute creating a right but does not specify whether a plaintiff can recover damages and attorneys' fees. *Id.* He stressed that it is a normal presumption that Congress intended to preserve recovery under § 1983, not preclude it. *Id.* at 1464. He also disagreed with the majority's presumption that the legislative history is irrelevant. *Id.* at 1465.

In *Tory v. Cochran*, 125 S. Ct. 2108 (2005), the Court addressed a challenge to a permanent injunction on speech issued against a man who had repeatedly harassed Johnny Cochran, Jr. in an attempt to get Cochran to pay him to desist. The injunction was issued as a remedy in a defamation action after the defendant indicated that he had no intention of stopping. *Id.* at 2110. He challenged the injunction, which forbade him and others from picketing Cochran's office, displaying signs or making statements about Cochran in any public place, as an unconstitutional prior restraint on free speech under the First Amendment. *Id.* Justice Breyer wrote the 7-2 opinion, joined by Chief Justice Rehnquist and Justices Souter, Ginsburg, Stevens, Kennedy and O'Connor. The Court first held that Johnny Cochran's death did not cause the injunction to expire or make the federal case moot. *Id.* The majority went on to hold, however, that due to Cochran's death, the underlying rationale for the injunction was diminished or eliminated, thereby making the injunction an "overly broad prior restraint upon speech, lacking plausible justification." *Id.* at 2111. They therefore did not address the issue of whether the First Amendment forbids the issuance of a permanent injunction against speech about a living public figure. Justice Thomas, joined by Justice Scalia, dissented and would have dismissed the case without reaching the merits. *Id.* at 2112.

San Diego v. John Roe, 125 S. Ct. 521 (2004), involved a police officer who was fired from his job for selling pornographic videos of himself in a police uniform on the internet. He challenged his termination as a violation of his First Amendment free speech rights. *Id.* at 523. The Supreme Court, in a *per curiam* opinion, held that the Police Department's interest in restricting the official's activity outside of work was substantial, and that his activities were detrimental to the mission and functions of the Department. *Id.* at 526.

Access to Justice and Due Process

In a 6-3 ruling, the Supreme Court held in *Kowalski v. Tesmer*, 125 S. Ct. 564 (2004), that appellate attorneys on the roster for assignment to indigent defendants did not have standing to challenge a Michigan statute that prohibited the appointment of appellate counsel for most poor people who plead guilty. In an opinion by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia,

Kennedy, Thomas and Breyer, the Court held that the attorneys did not have third-party standing to challenge the Michigan statute, because "they have no relationship at all" with their potential indigent clients, and lacking an attorney when a criminal defendant challenges the constitutionality of the statute is not "the type of hindrance necessary to allow another to assert the indigent defendants' rights." *Id.* at 568-69. The majority also accused the attorneys of "short-circuit[ing] the State's adjudication of this constitutional question" by bringing the case in federal court rather than "attend[ing] state court and assist[ing]" indigent defenders who had ongoing state criminal proceedings. *Id.* at 569. Justice Thomas wrote a separate concurrence, in which he criticized the Court's prior precedent as "generously" and "broadly" awarding third-party standing, stating that "[i]t is doubtful whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others." *Id.* at 571.

In a dissent, Justice Ginsberg, who was joined by Justices Stevens and Souter, argued that there is "scant room for doubt that [the attorneys] have shown both injury in fact, and the requisite close relation to indigent defendants who seek the assistance of counsel to appeal from plea-based convictions." *Id.* at 572. The attorneys would be directly injured by the Michigan statute, she explained, because it drastically reduces the number of indigent appellants they could represent, thereby causing the attorneys to earn less money. *Id.* The dissent criticized the majority's argument that the attorneys "have no relationship at all" with potential clients, noting that several third-party standing cases have relied on potential or prospective relationships. *Id.* The dissent further criticized the majority's suggestion that the attorneys wait until indigent defendants challenged the statute in state court, arguing that the attorneys sought prospective relief from the statute ever taking effect "[i]n order to protect the rights of *all* indigent defendants." *Id.* at 575.

In a case that could have an important impact on civil rights and civil liberties litigation, the Court held 8-0 (with Chief Justice Rehnquist not participating) that the portion of a settlement paid to the attorney as a contingent fee in an employment discrimination case must be declared as income by the plaintiff. *Comm'r v. Banks*, 125 S. Ct. 826 (2005). The Court declined to address how this holding would apply to statutory attorneys' fees awarded by courts. *Id.* at 834.

In *Castle Rock v. Gonzales,* 2005 U.S. LEXIS 5214 (2005), the Court addressed the issue of whether the holder of a restraining order had a due process property right under the Due Process Clause of the Fourteenth Amendment in being protected from harm, and whether she could bring suit against the city when its failure to enforce the restraining order resulted in the murder of her three children. The Court had previously held in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), that the state is not liable for failing to protect individuals in its care from harm, except in very rare circumstances, but the Court had not addressed the issue of whether the Fourteenth Amendment's Due Process Clause would be a basis for such a claim. The Court held 7-2, in an opinion by Justice Scalia, that such a claim had no basis in this case. Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the Court had framed the issues too broadly and that Colorado law had created a property interest in having the restraining order enforced in this case. He further argued that the Court should have deferred to the lower courts or to the Colorado Supreme Court in interpreting Colorado law.

Immigrants' Rights

The Supreme Court had previously held in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that the Attorney General (and not the Secretary of Homeland Security) has the discretion to detain those aliens admitted into the United States and subsequently ordered removed only as long as removal was "reasonably foreseeable." *Id.* at 699. The *Zadvydas* court held that six months is the presumptive

period during which detention of an alien is reasonably necessary, and that the detention of an admitted alien when there is "no significant likelihood of removal in the reasonably foreseeable future," *id.* at 701, would have serious constitutional implications. In *Clark v. Martinez*, 125 S. Ct. 716 (2005) a 7-2 majority extended the holding in *Zadvydas* to apply to inadmissible aliens as well, holding that the Secretary of Homeland Security may not continue to detain an inadmissible alien when there is no significant likelihood of removal. In an opinion authored by Justice Scalia, the majority noted that "the statutory text provides for no distinction between admitted and nonadmitted aliens." *Id.* at 723. Justice Thomas wrote a dissent, which was joined by Chief Justice Rehnquist, arguing that the Court's holding in *Clark* could not be reconciled with its holding in *Zadvydas*, and that even if *Clark* and *Zadvydas* could be reconciled, "*Zadvydas* was wrongly decided and should be overruled." *Id.* at 728.

Justice Scalia also authored the 5-4 majority opinion, which was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, in *Jama v. Immigration and Customs Enforcement,* 125 S. Ct. 694 (2005). In this case, a Somalian citizen whose refugee status was terminated and who was ordered removed "declined to designate a country to which he preferred to be removed" and he was subsequently ordered removed to Somalia. *Id.* at 698. The alien challenged the designation, alleging that the government could not remove him to Somalia, because Somalia had no functioning government that could consent to his removal. *Id.* At issue was the procedure by which the Secretary of Homeland Security designates the country to which the alien will be removed. The statute "describes six countries with various connections to an alien … as well as the choice of last resort, 'another country whose government will accept the alien into that country.'" *Id.* at 699. The specific question in this case was whether the first six choices are also subject to the condition of acceptance that the choice of last resort clearly is. *Id.* at 700. The majority of the Court held that they are not, and that an alien ordered removed may be removed "to a country without the explicit, advance consent of that country's government." *Id.* at 697. Justice Souter wrote a dissenting opinion, joined by Justices Stevens, Ginsberg, and Breyer, in which he contended that the provision was properly read as requiring consent from the government of the designated country before removal is ordered to that country. *Id.* at 711.

In *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004) the Court held unanimously that DUI offenses that do not require proof of intent, thereby reaching individuals who are only negligent, do not constitute "crimes of violence" and that perpetrators of such crimes cannot be deported under section 237 of the Immigration and Nationality Act.

Access to Information

In *MGM Studios v. Grokster,* 2005 U.S. LEXIS 5212 (2005), the Court addressed whether Grokster was liable for providing file sharing software online, which is allegedly utilized in 90% of cases to illegally share copyrighted music and other materials. In an opinion written by Justice Souter, the Court unanimously held that a party that distributes a device with the "object of promoting its use to infringe copyright" could be found liable for the resulting copyright infringement of third parties. *Id.* at 10. The case was remanded for a determination of Grokster's intent in providing the software. *Id.* at 49. Justice Ginsburg, joined by Chief Justice Rehnquist and Justice Kennedy, wrote a concurrence to point out that evidence that the majority of Grokster's revenue came from the illegally shared files was sufficient to require a trial as to intent. *Id.* at 59-60. Justice Breyer, joined by Justices O'Connor and Stevens, also concurred, expressing disagreement with Justice Ginsburg's concurrence.

In *National Cable and Telecomm. Ass'n v. Brand X Internet Services,* 2005 U.S. LEXIS 5018 (2005), the issue was whether internet services provided via cable connections by cable companies should be classified as "information services" or "telecommunications services." Providers of

"information services" are subject to less stringent regulations than providers of "telecommunication services," and the Federal Communications Commission (FCC) had classified cable modem services as "information services." Other internet service providers challenged the classification. Justice Thomas delivered the 6-3 opinion, joined by Chief Justice Rehnquist and Justices, Breyer, Stevens, Kennedy and O'Connor. The majority concluded that the Court should defer to the FCC's regulations, and that the FCC's interpretation was lawful and reasonable under the Telecommunications Act. Justice Scalia, joined by Justices Ginsburg and Souter, dissented, arguing that the FCC had "attempted to concoct 'a whole new regime of regulation (or of free-market competition)' under the guise of statutory construction." *Id.* at 68.

Economic and Environmental Regulation/Takings

In a unanimous decision written by Justice O'Connor, the Court held in *Lingle v. Chevron U.S.A., Inc.,* 125 S. Ct. 2074 (2005) that the rule articulated in *Agins* v. *City of Tiburon*, 447 U.S. 255, (1980), that government regulation "effects a taking if [such regulation] does not substantially advance legitimate state interests" was not the appropriate test to evaluate the impact of government regulations. Chevron brought the case after the Hawaii legislature enacted a law that imposed restrictions on the ownership and leasing of gas stations by oil companies. 125 S. Ct. at 2079. Most important, the act limited the amount of rent that an oil company could charge. *Id.* at 2078. The District Court held that the act constituted an unconstitutional taking because it failed to "substantially advance any legitimate state interest," and the Ninth Circuit affirmed. *Id.* at 2080. The Court held that, rather than focusing on the rationale of the regulation in question, it was necessary to look at the impact on the private property and whether that impact was significant in order to determine whether a "taking" requiring compensation has occurred. *Id.* at 2083-84.

In *Kelo v. City of New London*, 2005 U.S. LEXIS 5011 (2005), the Court decided that local governments may condemn private property for the sole purpose of "economic development" that may increase tax revenues and improve the local economy. The Fort Trumbull community of New London, Connecticut was targeted for economic revitalization and the city worked with the private New London Development Corporation to develop a plan for the land in question. After some homeowners refused to sell their land, the city used its eminent domain power to condemn the land. The landowners then brought suit challenging the condemnations. In an opinion by Justice Stevens, joined by Justices Kennedy, Breyer, Souter and Ginsburg, the Court held that this was a legitimate use of the city's eminent domain power. Although indicating that the city would not be able to take property from one private party simply for the benefit of another private party, the court held that because the property was condemned under a carefully orchestrated development plan, it was within the city's power to take it. *Id.* at 15. Stevens indicated that property need not be condemned for public or general use in order to qualify as a "public purpose." *Id.* at 17. He went on to state that the Court should defer to the legislature in determining the appropriate use of the eminent domain power. *Id.* at 24. Justice Kennedy wrote a concurring opinion to make clear that "a court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* at 39. He indicated that the trial court's extensive inquiry was sufficient to show that the public benefit was not solely incidental in this case. *Id.* at 40.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissented. She disagreed with the majority's indication that a "public purpose" could satisfy the public use clause of the Fifth Amendment. She stated that, "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded -- *i.e.*, given to an owner who will use it in a way that the legislature deems more

beneficial to the public -- in the process." *Id.* at 45. She indicated that a judicial check on legislative decisions was crucial to limiting the eminent domain power. *Id.* at 51. She would limit the government's power to take land for private development to instances in which the land itself is a danger to the public, thereby meeting the public use requirement. *Id.* at 56. Justice Thomas also wrote a separate dissent.

In *San Remo Hotel v. San Francisco,* 2005 U.S. LEXIS 4848 (2005), the Court addressed the issue of whether a federal takings claim was barred due to resolution of the case in state court based on state law. Due to a severe shortage of housing for elderly, disabled and low-income residents, the city instituted a fee for anyone converting housing from residential to tourist use. Owners of the hotel sued claiming that the fee was a "taking" under the Fifth Amendment. *Id.* at 8. After being required to take their case to state court and losing under the California Constitution, the owners' federal claim was rejected under issue preclusion principles. *Id.* All nine justices agreed that the owners could not bring the federal claim, but differed on the reason. Justice Stevens wrote the opinion for the Court, joined by Justices Scalia, Souter, Ginsburg and Breyer, holding that full faith and credit considerations barred relitigation of the federal "takings" claim issue. *Id.* at 46. Chief Justice Rehnquist, joined by Justices Kennedy, O'Connor and Thomas, wrote an opinion concurring in the judgment. He expressed disagreement with past Supreme Court precedent and with the implications of the majority's holding that federal courts would be unavailable to plaintiffs advancing federal "takings" claims because of the requirement that compensation first be sought in state court. *Id.* at 51-54.