ACLU SUMMARY

of the

2002 SUPREME COURT TERM

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Major Civil Liberties Decisions

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FIRST AMENDMENT

A. Freedom of Speech and Association

In *Virginia v. Black*, 71 U.S.L.W. 4263 (April 7, 2003)(7-2), the Court reviewed a Virginia statute that contained two critical provisions: the first made it a crime to burn a cross with intent to intimidate; the second stated that the burning of a cross was *prima facie* evidence of intent to intimidate. Writing for a five person majority, Justice O'Connor concluded that the first provision was a constitutional prohibition on unprotected threats, but then concluded on behalf of only four members of the Court that the second provision could not be sustained because it unconstitutionally jeopardized protected speech. Justice Scalia agreed with Justice O'Connor that the first provision was valid but, contrary to the plurality, felt that the second provision could be construed to preserve its constitutionality. Justice Souter, writing for three members of the Court, agreed with the plurality that the convictions in this case could not stand but for a different reason. In his view, the first provision represented a form of content discrimination that is unconstitutional under *R.A.V. v. City of St. Paul*, 505 U.S. 738 (2001). Accordingly, he found it unnecessary to address the statutory presumption directly (although strongly intimating that it was likewise unconstitutional). Justice Thomas would have upheld the entire statute on the theory that it regulated conduct, not speech. In sum, six Justices held that a state could criminalize cross burning with an intent to intimidate; four Justices held that a presumption of intimidation was unconstitutional (with three other Justices probably in agreement although they did not actually reach that question in this case). The ACLU of Virginia represented the defendants challenging the statute.

In *Illinois v. Telemarketing Associates*, 71 U.S.L.W. 4341 (May 5, 2003)(9-0), the Court once again considered the constitutional limits on state regulation of for-profit fundraisers hired to raise money for nonprofit organizations. Writing for the Court, Justice Ginsburg reaffirmed the principle of prior cases that the state may not place a fixed limit on fundraising expenses nor require the fundraiser to divulge the size of its fee at the outset of any solicitation. But, she also stressed that the First Amendment does not shield affirmative misrepresentations that amount to fraud. In this case, the Court noted, the state's complaint alleged that the telemarketing firm had intentionally misled potential contributors to a Vietnam Veterans organization by informing that "a significant amount of each dollar donated would be paid" to the charity for charitable purposes when that was not true. On that basis, the Court ruled that the case could go forward.

In *Federal Election Comm'n v. Beaumont*, 71 U.S.L.W. 4451 (June 16, 2003)(7-2), the Court ruled that the First Amendment does not require the government to exempt nonprofit advocacy organizations from the general restriction on corporate campaign contributions. Writing for the majority, Justice Souter acknowledged that nonprofit advocacy organizations had previously been granted a First Amendment exemption from the general ban on corporate campaign expenditures in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), but distinguished that case by noting that the government had broader authority to regulate contributions than to regulate expenditures. In explaining the government's interest in barring corporate contributions, even by nonprofit advocacy organizations, Justice Souter stressed that possibility that they could be used to circumvent the limits on individual contributions.

In *Virginia v. Hicks*, 71 U.S.L.W. 4441 (June 16, 2003)(9-0), the Court rejected a facial overbreadth challenge to a public housing policy in Richmond that authorized housing officials to bar any visitor who did not have "a legitimate business or social purpose," and to prosecute for trespass any barred visitor who returned. Writing for the Court, Justice Scalia stressed that the trespass policy was not targeted at speech and the defendant was not engaging in speech when he was arrested. Under these circumstances, Justice Scalia noted, an overbreadth challenge will "rarely, if ever" succeed. The Court remanded the case without considering other possible constitutional challenges, including whether the grounds of this particular public housing development should be treated as a public forum, which was the principal focus of the ACLU's *amicus* brief.

In *United States v. American Library Ass'n,* 71 U.S.L.W. 4465 (June 23, 2003)(6-3), the Court upheld the right of Congress to insist that public libraries install Internet filters on their computers as a condition of receiving federal funds. The plurality opinion, written by Chief Justice Rehnquist, concluded that the lower court had improperly analogized library Internet access to a public forum. In his view, the use of Internet filters is not an act of censorship but simply another means by which a library can determine the scope of its collection, even though he conceded that the filters are not a very precise method of screening material that is harmful to minors and that the same goal could be accomplished through other means. Because he did not view the filters themselves as unconstitutional, he saw no constitutional problem in a statute that required their use as a condition of funding. The two swing votes were provided by Justices Kennedy and Breyer, each of whom wrote separate concurrences stressing that the statute had only a minimal impact on the First Amendment rights of adults because it permitted any adult to ask that the filter be turned off or that a particular site be unblocked for any reason or no reason. Given that option, Justice Kennedy suggested that "there is little to this case." The ACLU was counsel for one of two groups of plaintiffs that challenged the constitutionality of the Children's Internet Protection Act.

Eldred v. Ashcroft, 71 U.S.L.W. 4052 (Jan. 15, 2003)(7-2) -- *see* summary on p. 13.

FOURTH AMENDMENT

In *Kaupp v. Texas*, 71 U.S.L.W. 3696 (May 5, 2003)(9-0), the Court summarily reversed a Texas murder conviction. In a *per curiam* opinion, the Court held that a 17 year old teenager who was removed from his bed in the middle of the night by deputy sheriffs and then transported in handcuffs to police headquarters had been arrested within the meaning of the Fourth Amendment even though he responded "okay" when the police said he had to go. Because the police conceded that they lacked probable cause for the arrest, the Court concluded that the defendant's subsequent confession had to suppressed as fruit of the poisonous tree and that the taint of the unlawful arrest was not purged by subsequent *Miranda* warnings. As the Court explained, "*Miranda* warnings, *alone* and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Id*. at 3697 (citations omitted).

FIFTH AMENDMENT

A. Self-incrimination

In *Chavez v. Martinez*, 71 U.S.L.W. 4387 (May 27, 2003), the Court issued a splintered opinion discussing the available remedies when the police are alleged to have elicited compelled statements from a suspect, who is then never tried. Six members of the Court (in separate opinions by Justices Thomas and Souter) ruled that the mere fact of compulsory interrogation, without more, does not violate the Fifth Amendment. All nine members of the Court agreed that the use of torture or other interrogation tactics that shock the conscience would violate the Due Process Clause. Three members of the Court (Justices Thomas, Rehnquist, and Scalia) felt that the evidence in the record was inadequate to establish a Due Process violation. Three other members of the Court (Justices Kennedy, Stevens, and Ginsburg) felt that a Due Process violation has been adequately proved. Since neither side commanded a majority, the latter group joined with Justices Souter and Breyer to order a remand for further proceedings on the due process issue. The ACLU filed an *amicus* brief urging the Court to recognize both a Fifth Amendment and a Due Process violation on the facts presented.

B. Takings

In *Brown v. Legal Foundation of Washington*, 71 U.S.L.W. 4221 (March 25, 2003)(5-4), the Court upheld the constitutionality of IOLTA accounts which are used by all 50 states to subsidize legal services programs, against a challenge under the Takings Clause. Five years ago, in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), that client funds held in IOLTA accounts remain the property of the client. But writing for the majority in this case, Justice Stevens concluded that "just compensation" was not required because client funds cannot be deposited in IOLTA accounts under the governing rules unless the net interest they would earn (gross interest minus administrative costs) is zero. As Justice Stevens succinctly explained, "just compensation for a net loss of zero is zero." *Id.* at 4227 n.11.

C. Double Jeopardy

Sattazahn v. Pennsylvania, 71 U.S. L.W. 4027 (Jan. 14 2003)(5-4) --*see* summary on p. 4.

SIXTH AMENDMENT

A. Right to Counsel

In *Wiggins v. Smith*, 71 U.S.L.W. 4560 (June 26, 2003)(7-2), the Court held that defense counsel in this capital case had not adequately investigated potential mitigating evidence and that, accordingly, counsel's failure to introduce mitigating evidence at the sentencing phase could not be justified as a reasonable tactical decision. In granting the petition for a writ of habeas corpus, Justice O'Connor explained for the majority that the state courts had unreasonably applied well-established federal law by focusing on whether the decision to forego a mitigation defense was justifiable in the abstract, rather than the ancillary question of whether it was properly informed by a sufficient investigation of the facts.

EIGHTH AMENDMENT

In *Ewing v. California*, 71 U.S.L.W. 4167 (March 5, 2003)(5-4), the Court held that California's 3-strikes law was not unconstitutional as applied to a defendant who received a 25 year sentence for stealing three golf clubs worth approximately $1,200 dollars. The Court's plurality opinion, written by Justice O'Connor, acknowledged that the Eighth Amendment forbids punishments that are grossly disproportionate to the crime. (Justices Scalia and Thomas did not accept even this proposition.) Justice O'Connor nevertheless concluded that Ewing's sentence was not grossly disproportionate given his prior criminal record. She also emphasized that the legislative judgment about appropriate punishment was entitled to deference. The principal dissent was written by Justice Breyer, who pointed out that the 25 year sentence in this case was longer than the sentence that Ewing would have received in any other state for the same conduct, and longer than the sentence he would have received in California for any other conduct except premeditated murder.

Lockyer v. Andrade, 71 U.S.L.W. 4161 (March 5, 2003)(5-4) – *see* summary at p. 11.

DEATH PENALTY

In *Sattazahn v. Pennsylvania*, 71 U.S. L.W. 4027 (Jan. 14 2003)(5-4), the Court concluded that a defendant convicted of murder and sentenced to life imprisonment could be resentenced to death after a retrial without violating double jeopardy depending on the reason for the initial life sentence. In this case, the life sentence was imposed by operation of state law because the initial jury had deadlocked on the death penalty. According to Justice Scalia, who wrote the majority opinion, the failure of the first jury to reach a verdict on the death penalty negated any claim by the defendant that he had been acquitted of the statutory factors necessary to impose the death penalty. Under those circumstances, he concluded, double jeopardy does not apply. On the other hand, a majority of the Court does seem to believe that double jeopardy would prohibit imposition of the death penalty upon retrial if the initial jury had voted against the death penalty rather than being deadlocked on the question.

Miller-El v. Cockrell, 71 U.S.L.W. 4095 (Feb. 25, 2003)(8-1) – *see* summary on p. 10.

Wiggins v. Smith, 71 U.S.L.W. 4560 (June 26, 2003)(7-2) – *see* summary on p. 3.

ELEVENTH AMENDMENT

Nevada Dep't of Human Resources v. Hibbs, 71 U.S.L.W. 4375 (May 27, 2003)(6-3) – *see* summary on p. 9.

COMMERCE CLAUSE

Pierce County v. Guillen, 71 U.S.L.W. 4035 (Jan. 14, 2003)(9-0) – *see* summary on p. 13.

EX POST FACTO

In *Smith v. Doe,* 71 U.S.L.W. 4182 (March 5, 2003)(6-3), the Court ruled that the registration and disclosure requirements in Alaska's Megan's Law do not violate the Ex Post Facto Clause when applied to convictions that predate the Act's enactment. Writing for the majority, Justice Kennedy concluded that the Act had a legitimate regulatory purposed in protecting the public from potentially recidivist sex offenders and that the effect of the Act was not so clearly punitive to outweigh the state's non-punitive intent. The ACLU filed an *amicus* brief arguing that the Act's punitive effect rendered it unconstitutional under the Ex Post Facto Clause.

In *Stogner v. California*, 71 U.S.L.W. 4588 (June 26, 2003)(5-4), the Court struck down a California statute that allowed the state to prosecute sex-related child abuse crimes after the statute of limitations had expired if the prosecution is brought within one year of the victim's report to the police and if there is independent evidence corroborating the victim's allegations. Writing for the majority, Justice Breyer explained that challenged law "threatens the kinds of harm that . . . the Ex Post Facto Clause seeks to avoid." *Id*. at 4589.

EQUAL PROTECTION

In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 71 U.S.L.W. 4213 (March 25, 2003)(9-0), the Court unanimously rejected an equal protection challenge to a decision by city officials to submit a previously approved zoning permit for low income housing to a voter referendum. Writing for the Court, Justice O'Connor noted that the referendum process was initiated pursuant to generally applicable charter provisions and any discriminatory motives that might be ascribed to the voters cannot be attributed to city officials who merely followed the city charter. In rejecting plaintiffs' claim, however, Justice O'Connor noted that voter intent might be relevant in another case if city officials were accused of implementing a discriminatory referendum rather than merely allowing it to come to a vote (and hence delaying construction in this case). Finally, the Court concluded that there was no violation of substantive due process on these facts.

In *Fitzgerald v. Racing Ass'n of Central Iowa*, 71 U.S.L.W. 4438 (June 9, 2003)(9-0), the Court unanimously upheld a state law that established 20% as the maximum tax rate for slot machines on riverboats and 36% as the maximum tax rate for slot machines at racetracks. As Justice Breyer noted for the Court, "the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide." *Id.* at 4439.

In *Grutter v. Bollinger*, 71 U.S.L.W. 4498 (June 23, 2003)(5-4), the Court upheld both the principle of affirmative action in higher education and the specific admissions program at the University of Michigan Law School. Writing for the majority, Justice O'Connor's broadly worded opinion "endorse[d] Justice Powell's view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 4502. She then ruled that the law school's use of race was narrowly tailored to achieve this interest because it was one only one factor among many that the university considered in building a diverse class. Stressing the flexibility offered by the law schools' plan, she specifically rejected

the percentage plans advocated by the Bush Administration as a supposedly race-neutral alternative, noting that such plans "preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 4507. Finally, she cautioned that affirmative action plans should not be regarded as permanent but must end when the need for them ends, which she hypothesized might be in 25 years (the amount of time that has elapsed since *Bakke* was decided). The ACLU joined an *amicus* brief urging the Court to reaffirm the constitutional validity of affirmative action.

In *Gratz v. Bollinger*, 71 U.S.L.W. 4480 (June 23, 2003)(6-3), the Court ruled that the undergraduate school at the University of Michigan had violated equal protection by basing its admissions on a numerical system that assigned 20 extra points to members of under-represented minorities. Although acknowledging that other applicants were granted extra points for other reasons – for example, extra points were also awarded to the children of alumni – the Court nevertheless held that use of race in the undergraduate admissions program lacked the flexibility and individualized consideration that the Constitution required and that the law school program possessed. Chief Justice Rehnquist wrote the plurality opinion. Justices O'Connor and Breyer concurred in the judgment. There were several dissents, including one by Justice Ginsburg who argued that programs of racial inclusion should not be subject to the same strict scrutiny applied to programs of racial exclusion. The ACLU served as co-counsel with other civil rights groups on behalf of African-American and Latino students who intervened in this action to defend the university's use of affirmative action.

DUE PROCESS

A. Procedural Due Process

In *Connecticut Dep't of Public Safety v. Doe*, 71 U.S.L.W. 4158 (March 5, 2003)(9-0), the Court unanimously ruled Connecticut could constitutionally post the names, addresses, and photos of convicted sex offenders on an internet web site without giving individual offenders the opportunity to prove that they did not in fact pose a present danger to the community. Writing for the Court, Chief Justice Rehnquist held that a hearing would be irrelevant because a finding of current dangerousness "is of no consequence under Connecticut's Megan's Law." *Id*. at 4160. Accordingly, the Court rejected the plaintiffs' procedural due process claim. In a concurring opinion, Justices Souter and Ginsburg pointed out that the Court's opinion did not foreclose possible future challenges under substantive due process or the equal protection clause. The ACLU represented plaintiffs in this case.

In *City of Los Angeles v. David*, 71 U.S.L.W. 3720 (May 19, 2003)(9-0), the Court unanimously rejected the due process claim of a motorist who complained that it took 27 days after his car was towed before he was given a hearing to contest the fine. Applying the balancing test of *Mathews v. Eldridge,* 424 U.S. 319 (1976), the Court first noted that only money was at stake. In then concluded, in a *per curiam* opinion, that the delay in providing a hearing was amply justified by administrative needs.

Demore v. Kim, 71 U.S.L.W. 4315 (April 29, 2003)(5-4) – *see* summary on p. 9.

B. Substantive Due Process

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 71 U.S.L.W. 4282 (April 7, 2003)(6-3), the Court reversed a punitive damage award of $145 million in a case in which the jury had awarded $1 million in compensatory damages. Based on the factors announced in *BMW of North America v. Gore*, 517 U.S. 559 (1996), the Court concluded that the punitive award was grossly disproportionate and could not be sustained (in notable contrast to the Court's approach in the 3-strikes case).

In *Sell v. United States*, 71 U.S.L.W. 4456 (June 16, 2003)(6-3), the Court ruled that the state may, under certain limited circumstances, require a criminal defendant to take antipsychotic medication involuntarily in order to render the defendant competent to stand trial for serious but nonviolent crimes. Writing for the majority, Justice Breyer first stressed that the decision whether to administer such medication involuntarily will ordinarily rest on a conclusion that the defendant is a danger to himself or to others. If that is not so, and the only interest the state seeks to further is its interest in bringing the defendant to trial, then the state must demonstrate: (1) that it has an important interest in trying the defendant that will not be adequately served, for example, by confining the defendant in a mental institution; (2) that the medication will make the defendant competent to stand trial without diminishing the defendant's ability to participate in his/her defense; (3) that other, less intrusive treatments will not work as effectively; and (4) that the proposed drug treatment is medically appropriate. The case was remanded because the court of appeals had not addressed each of these factors in its opinion. The dissent, written by Justice Scalia, argued that the medication order was interlocutory and thus unappealable. The ACLU of Eastern Missouri submitted an *amicus* brief arguing against the proposed medication on the basis of many of the issues that Justice Breyer's majority opinion also identified.

City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 71 U.S.L.W. 4213 (March 25, 2003)(9-0) – *see* summary on p. 5.

PRIVACY

In *Lawrence v. Texas*, 71 U.S.L.W. 4574 (June 26, 2003)(6-3), the Court struck down the Texas sodomy statute and overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986). In a historic decision written by Justice Kennedy, the Court held that the government could not regulate the private sexual behavior of consenting adults in the privacy of their own home. "The petitioners are entitled to respect for their private lives," Justice Kennedy wrote. "The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.* at 4580. The majority rejected both the history cited in *Bowers* and its legal conclusion. The majority also rejected the notion that the liberty protected by the Due Process Clause is defined solely by history and tradition. To the contrary, Justice Kennedy noted, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 4580. Justice O'Connor wrote a separate concurring opinion that rested solely on equal protection grounds. Specifically, she concluded that Texas had offered no reason other than moral disapproval to explain why its sodomy law applied only to same-sex couples, and that

moral disapproval standing alone was insufficient to survive even rational basis review. The ACLU, which represented the defendant in *Bowers*, filed an *amicus* brief urging that *Bowers* be overruled.

VOTING RIGHTS

In *Branch v. Smith*, 71 U.S.L.W. 4232 (March 31, 2003), the Court resolved a contentious congressional redistricting dispute in Mississippi by unanimously holding that the federal district court properly imposed its own redistricting plan when the state legislature failed to redistrict after the last census and a prior plan adopted by the state courts had not been precleared by the Justice Department. Although the Court divided on the rationale, all nine Justices also agreed that the district court had statutory authority to create new single member districts, thereby rejecting the argument that the only remedy authorized by Congress under the circumstances was to order an at-large congressional election.

In *Georgia v. Ashcroft,* 71 U.S.L.W. 4545 (June 26, 2003)(5-4), the Court ruled that private litigants should be allowed to intervene in Section 5 preclearance actions in appropriate circumstances, that retrogression is the correct standard in a Section 5 case rather than the dilution test applied in Section 2 cases, and that in applying retrogression analysis under Section 5 it is reasonable to take into account the creation of so-called "influence" districts as well as the number of majority-minority districts. This last holding raises the possibility that minority voters may be deprived of the opportunity to elect candidates of their choice in approved districts under Section 5 as long as the state can plausibly argue that minority voters have preserved their electoral "influence." The ACLU submitted an *amicus* brief urging the Court to deny preclearance on the facts of this case.

SECTION 1983

In *Inyo County v. Paiute-Shoshone Indians*, 71 U.S.L.W. 4370 (May 19, 2003)(9-0), the Court ruled that Indian tribes do not qualify as "persons" entitled to sue under § 1983. The Court also strongly suggested, without actually holding, that tribes could not be named as defendants under § 1983 for the same reasons. (Justice Stevens concurred in the judgment on a different rationale.)

IMMIGRANTS' RIGHTS

In *INS v. Ventura*, 71 U.S.L.W. 3314 (Nov. 4, 2002)(9-0), the Court unanimously and summarily ruled that the Ninth Circuit erred in addressing the issue of current country conditions in the context of an asylum claim, rather than remanding the issue to the Board of Immigration Appeals, which had not previously considered it.

In *Demore v. Kim*, 71 U.S.L.W. 4315 (April 29, 2003)(5-4), the Court upheld a statutory scheme that authorizes the mandatory detention of so-called "criminal aliens" pending their final deportation hearings without any need for the government to show on an individualized basis that the detained aliens present either a flight risk or a danger to the community. Quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976), Chief Justice Rehnquist observed: "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 4318. In his dissenting opinion, however,

Justice Souter, described the majority opinion as "devoid of even ostensible justification in fact and at odds with the settled standard of liberty." *Id.* at 4335. Before reaching the merits, a separate six-person majority, including the Chief Justice, upheld the Court's jurisdiction by noting that Congress had not explicitly indicated its intent to bar review of constitutional claims through habeas corpus. The ACLU represented the habeas petitioner in this case.

STATUTORY CIVIL RIGHTS CLAIMS

A. Americans with Disabilities Act

In *Clackamas Gastroenterology Associates v. Wells*, 71 U.S.L.W. 4293 (April 22, 2003) (7-2), the Court clarified the meaning of the term "employee" under the ADA for purposes of determining whether the clinic in this case had 15 employees and was therefore subject to the non-discrimination provisions of the ADA. More specifically, the Court considered whether the four physicians who were the sole shareholders of the clinic corporation in which they also worked were properly classified as employees or owners. While the Court did not ultimately resolve that factual question, it remanded to the lower courts with instructions to focus on the issue of control. If the physicians control the business, they are owners; on the other hand, if they are subject to the firm's control, they should be considered employees.

B. Title VII of the Civil Rights Act of 1964

In *Desert Palace v. Costa*, 71 U.S.L.W. 4434 (June 9, 2003)(9-0), the Court unanimously ruled that a Title VII plaintiff may "demonstrate" the employer's discriminatory motive by relying on either direct or circumstantial evidence in a mixed-motive case. Writing for the Court, Justice Thomas rested his conclusion on the language and structure of the 1991 amendments to Title VII. The ACLU joined an *amicus* brief urging the Court to allow the use of circumstantial evidence in mixed-motive cases.

C. Fair Housing Act

In *Meyer v. Holley*, 71 U.S.L.W. 4081 (Jan. 22, 2002)(9-0), the Court unanimously rejected the claim that a corporate officer, as opposed to the corporation itself, could be held vicariously liable for the discriminatory acts of a corporate employee. Relying on the presumption that tort-like remedies created by Congress are assumed to embody traditional tort rules absent some clear indication to the contrary, Justice Breyer then noted: "A corporate employee typically acts on behalf of the corporation, not its owner or officer." *Id.* at 4083.

D. Family and Medical Leave Act

In *Nevada Dep't of Human Resources v. Hibbs*, 71 U.S.L.W. 4375 (May 27, 2003)(6-3), the Court ruled that the Eleventh Amendment is not a barrier to private suits by state employees who are denied their right to 12 weeks of unpaid leave to care for a family member under the Family and Medical Leave Act (FMLA). In a broad and surprising opinion by Chief Justice Rehnquist, the Court departed from the pattern of its recent federalism decisions by holding that the FMLA is a proper exercise of congressional power under § 5 of the Fourteenth Amendment because its remedial scheme is congruent and proportional to a documented history of gender

discrimination by state employers. Writing for the Court, Chief Justice Rehnquist first noted that gender discrimination is subject to heightened scrutiny under the Equal Protection Clause and therefore states have less latitude to discriminate on the basis of gender than on the basis of age or disability. Second, he stressed that discrimination in leave programs was widespread and reflected the outmoded stereotype that women are more responsible than man for family care. Finally, he concluded that the decision by Congress to impose a 12-week floor on family leave was a proportional response given the failure of prior laws, including Title VII and the Pregnancy Discrimination Act, to eliminate ongoing inequalities in the workplace. The ACLU joined an *amicus* brief urging the Court to uphold the FMLA.

E. Social Security Act

In *Washington State Dep't of Social and Health Services v. Keffeler*, 71 U.S.L.W. 4110 (Feb. 24, 2003)(9-0), the Court unanimously ruled that federal law permits a state, acting as representative payee, to use a child's Social Security benefits to offset the cost of foster care.

HABEAS CORPUS

In *Woodford v. Viscioti* 71 U.S.L.W. 3315 (Nov. 4, 2002)(9-0), the Court unanimously and summarily reinstated the death penalty in this case, reversing the Ninth Circuit's decision to grant a writ of habeas corpus. Citing 28 U.S.C. § 2254(d), the Court stressed in a *per curiam* opinion that state court rulings are entitled to deference in federal habeas proceedings. After finding that the California Supreme Court had correctly applied the standard for assessing effectiveness of counsel, and that its application of that standard to the facts of this case was not "objectively unreasonable," the Court concluded that the Ninth Circuit had exceeded its authority under the habeas statute by substituting its judgment for the judgment of the state courts.

In *Early v. Packer*, 71 U.S.L.W. 3312 (Nov. 4, 2002)(9-0), the Court unanimously and summarily reversed the Ninth Circuit's decision to grant a writ of habeas corpus in a state murder case. The dispute this time focused on whether the trial judge had improperly coerced a reluctant juror into voting guilty. In a *per curiam* opinion, the Court concluded that the Ninth Circuit had erred in holding that the state courts had acted "contrary" to established federal law in rejecting the defendant's due process challenge. Among other things, the Court pointed out that a state court's failure to cite federal law does not mean that it failed to follow it.

In *Miller-El v. Cockrell*, 71 U.S.L.W.4095 (Feb. 25, 2003)(8-1), the Court ruled that petitioner was improperly denied the right to appeal from the district court's denial of his habeas petition in this death penalty case. Writing for the Court, Justice Kennedy first explained that the standard for granting a certificate of appealability – which is a prerequisite for appeal in a habeas case – is different than the standard for granting ultimate relief. In order to succeed on his claim, a habeas petitioner must establish by clear and convincing evidence that the state court's factual findings are objectively unreasonable. In order to obtain a certificate of appealability, however, the petitioner "need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Id*. at 4097. This threshold standard can be met either by showing that the district court's resolution of the constitutional claims could be debated by reasonable jurists, or that the issues presented by the habeas petition "are adequate to deserve encouragement to proceed

further." *Id*. at 4099. Applying that standard to these facts, Justice Kennedy then concluded that the petitioner had presented enough evidence to raise at least a debatable issue as to whether the prosecutors at his criminal trial engaged in the racially discriminatory use of peremptory challenges during jury selection. The result is likely to increase the number of habeas appeals and bring greater scrutiny to *Batson* claims. It also suggests a growing discomfort with the death penalty process.

In *Clay v. United States*, 71 U.S.L.W. 4155 (March 4, 2003)(9-0), the Court unanimously held that the one year deadline that governs habeas petitions by federal prisoners who do not seek direct Supreme Court review of their convictions runs from the final date on which *certiorari* could have been sought rather than the date on which the mandate issues from the court of appeals. In practical terms, the decision gives prisoners one year and 90 days after the court of appeals judgment to seek postconviction relief rather than one year and 21 days.

In *Lockyer v. Andrade*, 71 U.S.L.W. 4161 (March 5, 2003)(5-4), the Court held that a state court sentence of 50 years in jail for stealing $153 worth of videotapes, imposed under California's 3-strike law, could not be vacated in a federal habeas corpus proceeding regardless of its excessiveness because the federal law on disproportionality was not "clearly established" at the time of sentencing. Given that legal uncertainty, Justice O'Connor ruled that its was not "objectively unreasonable" for the state courts to conclude that Andrade's sentence complied with prevailing Eighth Amendment standards even though it was a harsher standard than any other state or the federal government would have imposed. The ACLU was co-counsel for Andrade.

In *Woodford v. Garceau*, 71 U.S.L.W. 4217 (March 25, 2003)(6-3), the Court ruled, in an opinion by Justice Thomas, that a habeas petition filed after AEDPA went into effect is governed by that Act's more stringent rules for reviewing state court convictions, even if the petitioner (a death row inmate in this case) had successfully sought appointed counsel and a stay of execution prior to AEDPA's effective date.

In *Massaro v. United States*, 71 U.S.L.W. 4310 (April 23, 2003)(9-0), the Court unanimously held, in an opinion written by Justice Kennedy that "failure to raise an ineffective-assistance-of-counsel claim on direct appeal [from a federal conviction] does not bar the claim from being brought in a later, appropriate proceeding" under 28 U.S.C. § 2255. The Court stressed that it was departing from the usual rules of procedural default because appellate courts are often not the best forum to consider ineffective-assistance-of-counsel claims in the first instance since they must rely on a trial record that will often be silent on such critical issues as whether defense counsel's acts or omissions reflected a reasonable trial strategy. Notably, the Court's opinion did not address whether its newly announced rule would also apply when a state defendant raises an ineffective-assistance-of-counsel claim for the first time in a federal habeas proceeding.

In *Price v. Vincent*, 71 U.S.L.W. 4351 (May 19, 2003)(9-0), the Court unanimously ruled that the state courts in this case had not unreasonably applied existing law when they rejected defendant's double jeopardy claim, and therefore the defendant was not entitled to a writ of habeas corpus even if the Supreme Court would have reached a different conclusion on the same facts.

Wiggins v. Smith, 71 U.S.L.W. 4560 (June 26, 2003)(7-2) – *see* summary on p. 3.

PRISONERS' RIGHTS

In *Overton v. Bazzetta*, 71 U.S.L.W. 4445 (June 16, 2003)(9-0), the Court unanimously upheld a series of visitation restrictions that the State of Michigan had imposed on its inmates. In particular, Michigan limited the total number of visitors that any inmate could receive beyond his or her immediate family, prohibited visits by children who were not immediate family members, and allowed the state to terminate visits of even family members for inmates who had twice violated the prison's substance abuse rules. Stressing the need for deference to prison officials and applying the relaxed standard of review announced in *Turner v. Safley*, 482 U.S. 78 (1987), the Court ruled that each of the challenged regulations was rationally related to a legitimate penological goal. Writing for the majority, Justice Kennedy did leave open the possibility of an as-applied challenge if it became clear that the state was routinely denying applications for the reinstatement of visitation rights, thus effectively creating a permanent ban for certain inmates. In a separate concurring opinion, Justices Scalia and Thomas suggested that the state could impose any restrictions it chose on its convicted prisoners so long as the restrictions did not violate the Eighth Amendment. The ACLU submitted an *amicus* brief arguing that the challenged restrictions in this case were in fact inconsistent with legitimate penological goals, and thus unconstitutional.

FEDERAL CRIMINAL LAW

In *United States v. Jimenez Recio*, 71 U.S.L.W. 4076 (Jan. 21, 2003)(9-0), the Court unanimously ruled that a criminal conspiracy can continue even after the government has frustrated its ultimate objective. Writing for the Court, Justice Breyer therefore held that the prosecution is under no obligation in a drug conspiracy case to show that a defendant joined the conspiracy before the drugs were in fact seized by the government.

In *Scheidler v. National Organization for Women*, 71 U.S.L.W. 4116 (Feb. 26, 2003)(8-1), the Court ruled that the abortion clinic protestors who were sued in this case could not be found liable under RICO because their protest activities did not constitute extortion, which was the alleged predicate for RICO liability. The decision rested entirely on statutory rather than constitutional grounds, presumably because the lower courts had found that the specific protests at issue were unprotected by the First Amendment. As a matter of statutory construction, however, Chief Justice Rehnquist concluded that even if the protestors had been successful in their effort to shut down the clinics through the use or threat of force, they would not have "obtained" any property from the clinics as a result, and that "obtaining" property through unlawful means is an essential element of the crime of extortion. In a separate concurrence, Justices Ginsburg and Breyer noted that a more expansive interpretation of the extortion statute could have been applied to at least some civil rights sit-ins. *Id.* at 4121. Both the majority and the concurrence also referred to the Freedom of Access to Clinic Entrances Act of 1994 as a more targeted response to the problem of clinic blockades.

FEDERAL CIVIL PROCEDURE

In *Jinks v. Richland County*, 71 U.S.L.W.4301 (April 22, 2003)(9-0), the Court upheld the constitutionality of 28 U.S.C. § 1367(d), which provides an automatic 30 day tolling period to permit state law claims to be refiled in stated court if the federal court where they were initially filed declines to exercise supplemental jurisdiction. Writing for a unanimous Court, Justice Scalia first held that the tolling provision was a "necessary and proper" exercise of the federal government's Article I power to establish the lower federal courts. He then concluded that the tolling provision could be applied without violating state sovereignty even if the defendants were local government officials, distinguishing *Raygor v. University of Minnesota*, 534 U.S. 533 (2002), which had held that the tolling provisions of § 1367(d) did not apply to state law claims against state defendants because of Eleventh Amendment concerns.

EVIDENCE

In *Pierce County v. Guillen*, 71 U.S.L.W. 4035 (Jan. 14, 2003)(9-0), a unanimous Court construed a provision of the Hazard Elimination Program enacted by Congress, which was designed to encourage states to identify hazardous road by making it a condition of federal funding, and by further providing that information compiled or collected by the state as part of its safety survey would not be admissible in any state or federal proceeding. Invoking the presumption in favor of narrowly defined privileges, Justice Thomas distinguished between material collected or compiled by the reporting state agency, and material collected or compiled by other state agencies (such as the sheriff's office) and still remaining in its custody. According to Justice Thomas, the evidentiary privilege does not apply to the latter category. Moreover, he concluded, Congress had properly exercised its powers under the Commerce Clause in defining the scope of the evidentiary privilege because of the obvious national interest in maintaining the safety of the nation's roads as an important medium of interstate commerce.

COPYRIGHT

In *Eldred v. Ashcroft*, 71 U.S.L.W. 4052 (Jan. 15, 2003)(7-2), the Court held that the 1998 Copyright Term Extension Act (CTEA), which extended the term for both existing and future copyrights by 20 years, did not violate either the Copyright Clause or the First Amendment. Writing for the Court, Justice Ginsburg noted that while the Copyright Clause prohibits perpetual copyrights, the question of what constitutes an appropriately "limited" copyright term under the Constitution is primarily a judgment for Congress to make. In addition, she observed, Congress had applied each of its earlier copyright laws, beginning in 1790, to existing as well as future copyrights. She then concluded that the challenged copyright term of life plus 70 years was rationally related to the government's legitimate interest in harmonizing American copyright law with European copyright law. Finally, she held that the 1998 law did not violate the First Amendment since copyright doctrine contains its own First Amendment safeguards (including the fair use doctrine and the concept that ideas cannot be copyrighted) that adequately protect a system of free expression.

JURISDICTION

In *Syngenta Crop Protection, Inc. v. Henson*, 71 U.S.L.W. 4001 (Nov. 5, 2002)(9-0), the Court unanimously held that neither the All Writs Act nor the doctrine of ancillary jurisdiction can be the basis for removing a state court action to federal court, even if the claim is that the state court action will intefere with pending federal court orders in a related litigation. Writing for the majority, Chief Justice Rehnquist pointed out that the removal statute, 28 U.S.C. § 1441, requires an independent basis for federal jurisdiction and that the All Writs Act, which speaks of orders issued "in aid of" jurisdiction, does not provide jurisdiction that is otherwise lacking.

In *United States v. Bean*, 71 U.S.L.W. 4017 (Dec. 10, 2002)(9-0), a unanimous Court ruled that the federal courts lack jurisdiction to grant a convicted felon permission to carry firearms, despite the general statutory prohibition, unless the felon's petition for an exemption has first been denied by the Bureau of Alcohol, Tobacco and Firearms. Writing for the Court, Justice Thomas concluded that ATF's failure to act, which in this case was mandated by an appropriations bar enacted by Congress, is not enough to create jurisdiction. In contrast to the APA, which expressly refers to an agency's "failure to act," the governing jurisdictional statute in this case refers only to an appeal from an agency denial.

In *Roell v. Withrow*, 71 U.S.L.W. 4336 (April 29, 2003)(5-4), the Court held that a party that has not consented in writing to trial before a magistrate judge can nevertheless be deemed to have consented by implication if the party in fact participates in the trial before the magistrate judge without objection.

In *Breuer v. Jim's Concrete of Brevard, Inc.*, 71 U.S.L.W. 4367 (May 19, 2003)(9-0), the Court unanimously held that the language of the Fair Labor Standards Act (FLSA), which permits FLSA claims to be brought in either state or federal court, does not bar a defendant from removing a claim initially brought in state court to federal court.

In *Nguyen v. United States,* 71 U.S.L.W. 4428 (June 9, 2003)(5-4), the Court ruled that the Ninth Circuit panel that affirmed defendant's conviction had been improperly constituted because it included a territorial judge sitting by designation, who was appointed pursuant to Article IV rather than Article III. The dissent agreed that only Article III judges could rule on federal appeals but differed with the majority on whether the objection had been waived in this case.