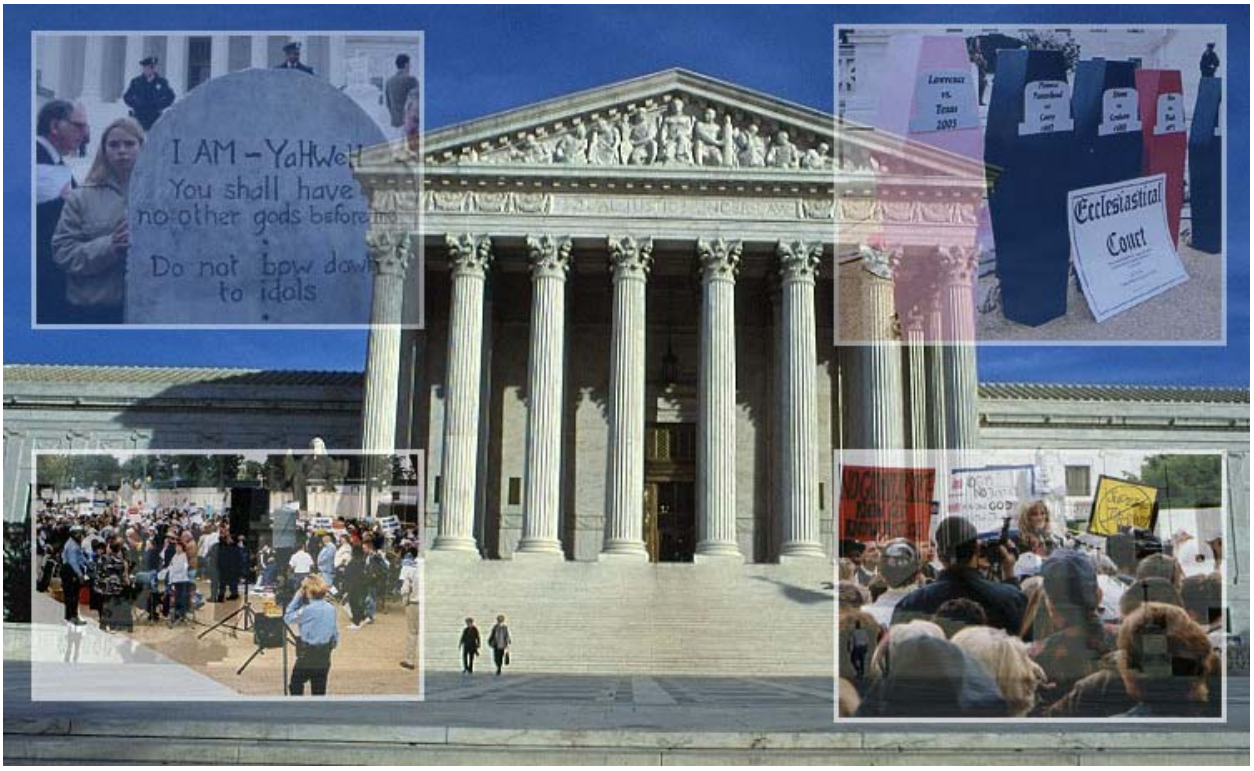
"We the People"



A Mandate or a Motto?

By Janet M. LaRue, Esq.

TABLE OF CONTENTS

"WE THE PEOPLE": A MANDATE OR A MOTTO?

INTRODUCTION

"We the People" ratified the United States Constitution as the supreme law of the land. The Constitution separates the legislative, executive and judicial power into three separate co-equal branches, so that, as President John Adams emphasized, "it might be a government of laws, and not of men."

Article V of the Constitution provides the process by which the Constitution may be amended. That process does not permit the judiciary to do so by issuing rulings that contradict the Constitution or by creating "constitutional" rights that do not exist in the Constitution. When that happens, as can be seen in some of this year's Supreme Court decisions, it is a government of men and not of laws. Consequently, "We the People" ceases to be a mandate and is reduced to a mere motto bereft of meaning.

Recent polls indicate that the majority of the public has a favorable impression of the Supreme Court. A majority of those polled disagree with two of the biggest decisions issued by the Court this term, permitting race to be a factor in a college admission policy and overturning a Texas law that prohibited same-sex sodomy.

The polling also includes a very disturbing response. The majority of Americans (54 percent) want the Court to "consider changing times and current realities" in making decisions, and only 39 percent want the Court to "consider the original intentions of the authors of the Constitution."

The "original intentions of the authors of the Constitution" are revealed in the *text* of the Constitution, not in "changing times and current realities." When the Court decides cases based on changing times and current realities rather than the text of the Constitution, it acts as a legislature rather than a court and violates the Constitution.

A Fox News/Opinion Dynamics Poll conducted June 30-July 1, 2003, asked registered voters nationwide some questions about the Supreme Court:

"In general, do you think the United States Supreme Court is in touch with what is going on in the country, or not?"

In Touch: 51% Not in Touch: 38% Not Sure: 11%

"Do you think the United States Supreme Court is generally too liberal, too conservative, or about right in its decisions?"

Too Liberal: 30% Too Conservative: 20% About Right: 37% Not Sure: 13%

"Recently, the Supreme Court made some widely publicized rulings. Based on what you know about the decisions, please tell me whether you approve or disapprove of how the court ruled, or if you don't know enough to say. Do you approve or disapprove of the Supreme Court's decision":

"Allowing an applicant's race to be a factor in college admission procedures":

Approve: 24% Disapprove: 63% Not Sure: 13%

"Overturning the Texas law that prohibited gay sex":

Approve: 40% Disapprove: 44% Not Sure: 16%

"Which one of the current Supreme Court Justices do you most admire or agree with?"

	Percent
Sandra Day O'Connor:	11
Antonin Scalia:	6
Clarence Thomas	5
Ruth Bader Ginsburg	3
Anthony M. Kennedy	2
William H. Rehnquist	2
Stephen G. Breyer:	1
David Souter:	—
John Paul Stevens:	—
Other names	2
Don't know any names	68

A Quinnipiac University Poll conducted February 26-March 3, 2003, of 1,448 adults nationwide asked the following questions:

	All	**Republicans**	**Democrats**	**Independents**
"Do you approve or disapprove of the way the United States Supreme Court is handling its job?"				
Approve:	56	70	46	54
Disapprove:	28	17	35	30
Don't know:	17	13	19	15
"Which comes closer to your point of view? (A) In making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution. OR, (B) In making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution."				
Only Constitution's authors:	39	48	32	38
Current realities:	54	47	59	56
Don't know:	7	5	8	6
"Do you think the Supreme Court is too liberal, too conservative, or about right?"				
Too liberal:	19	29	12	17
Too conservative:	26	12	37	27

About right:	46	51	39	48
Don't know:	10	8	12	7

"When the president chooses a Supreme Court nominee, should the president only consider that person's legal qualifications and background, or should the president also consider how that nominee might vote on major issues the Supreme Court decides?"

Qualifications, background:	59	56	60	62
How nominee might vote:	34	38	33	32
Don't know:	7	6	7	6

A Gallup Poll conducted September 5-8, 2002, of 1,004 adults nationwide asked the following question:

"Do you approve or disapprove of the way the Supreme Court is handling its job?"

	Approve	**Disapprove**	**No Opinion**
9/02:	60	29	11
9/01:	58	28	14
6/01:	62	25	13
1/01:	59	34	7
9/00:	62	29	9

"*We the People"* is not a meaningless motto. It is a mandate expressing how *we* choose to be governed. Consider that mandate in light of the response to this polling question:

"Which comes closer to your point of view? (A) In making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution. OR, (B) In making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution."

Only Constitution's authors:	39	48	32	38
Current realities:	54	47	59	56
Don't know:	7	5	8	6

The responses to the above question indicate that the majority thinks that the Supreme Court should decide cases based on "changing times and current realities in applying the principles of the Constitution" rather than "the original intentions of the authors of the Constitution." Whether or not the respondents realize it or not, they are expressing the opinion that Supreme Court justices should act like legislators rather than judges. And like it or not, they are subscribing to the theory of a "living" Constitution.

The claim is heard repeatedly that the Constitution is a "living document" that can change as times and values change. True. The Constitution *can* change – when "We the People" decide it should and enact a constitutional amendment as the Constitution permits under Article V.
That is not what people mean when they speak of a "living Constitution," however. The changes they refer to occur in the search "for greater freedom," which they find through the judicial

process rather than the legislative process. These arbitrary and unconstitutional "amendments" to the law of the land are generally made by five or more justices of the Supreme Court who decided the cases in this book. This past year, many of those changes hinged on the will of only one justice: Sandra Day O'Connor.

We present these analyses of some of the Supreme Court's decisions this past term, and ask that you keep these questions in mind as you read them: Is the judgment supported by the text of the Constitution? Is it an interpretation of law or the creation of law? If it is a creation of law, the right of "We the People" to govern ourselves has been reduced from a mandate for governing to a meaningless motto.

For our "Trivial Pursuit" fans:

For the 2002-03 term, the Court issued rulings in 73 cases, which is a low for recent years.

In 15 cases, the decision was 5-4.

Justice O'Connor was in the majority in each of the 5-4 votes.

In six of the 15 decisions, the majority comprised Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas (the "conservative majority").

In four of the 15 cases, the majority comprised Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Sandra Day O'Connor.

The court was unanimous in 31 decisions.

Scalia and Thomas disagreed with each other the fewest times: four. Thomas and Breyer disagreed with each other most often: 31.

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY V. DOE

123 S. Ct. 1160 (2003)

FACTS: Connecticut's "Megan's Law" requires all "persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses, and felonies committed for a sexual purpose" to register with the Connecticut Department of Public Safety (DPS). Conn. Gen. Stat. §§ 54-251, 54-252, 54-254 (2001). DPS collects personal information including the offender's name, address, photograph and a DNA sample, and requires the offender to notify DPS of any change in residence. DPS compiles the information into a sex offender registry on an Internet Web site; this Web site is available to the public in certain state offices. Doe was a convicted sex offender who was required to register with the database. He sued, claiming that because he was not a "dangerous sexual offender," it was a violation of his 14th Amendment Due Process right to include him in this database without giving him a hearing to establish whether he posed a current danger. *Doe,* 123 S. Ct. at 1163.

ISSUE: Whether Connecticut's sex offender registration law violates the 14th Amendment by requiring convicted sex offenders to register with the database without giving them a hearing to determine if they pose a current danger.

PROCEDURAL HISTORY: The district court granted respondent Doe summary judgment and permanently enjoined the statute's provisions about public disclosure. The Second Circuit affirmed, holding that the disclosure deprived respondent of a liberty interest and violated due process because offenders were not given a hearing to determine if they were dangerous.

HOLDING: The Supreme Court reversed the judgment of the lower courts. The Court held that plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the state's sex offender registration law.

JUDGES: Chief Justice Rehnquist delivered the opinion of the Court, in which Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg and Stephen Breyer joined. Justice Antonin Scalia filed a concurring opinion. Justice David Souter filed a concurring opinion in which Justice Ruth Bader Ginsburg joined. Justice John Paul Stevens filed an opinion concurring in the judgment.

ANALYSIS: The Court found that the Connecticut law required *all convicted sex offenders* to register with the database. There was no condition that only "dangerous" sex offenders must register; the requirement was based on conviction alone. Therefore, because Doe was a convicted sex offender, it was irrelevant whether or not he posed a current danger, at least with regard to the registry. The Court held that "due Process does not provide him with a right to a hearing to establish a fact that is not material under the Connecticut statute." *Id*. at 1164.

In his concurrence, Justice Scalia expressed an excellent analogy to illustrate this point. Because "Megan's Law" does not require a finding that the convicted sex offender is dangerous as a requirement for the registry, a "convicted sex offender has no more right to additional 'process' enabling him to establish that he is not dangerous than . . . a 15-year-old has a right to 'process' to establish that he is a safe driver." *Id*. at 1165.

Justice Souter wrote a concurring opinion to note that while this claim might have failed, that did not immunize the statute from other constitutional challenges, such as under the Equal Protection Clause.

EWING V. CALIFORNIA

123 S. Ct. 1179 (2003)

FACTS: While on parole from a nine-year prison sentence, Gary Albert Ewing stole three golf clubs worth about $1200 from a California store. He was charged with felony grand theft in excess of $400, a "wobbler" offense, which permits the court to reduce the charge to a misdemeanor. Ewing had previously been convicted of four serious or violent felonies. This qualified him to be sentenced under California's "Three Strikes and You're Out" statute. In order to avoid a lifetime sentence, Ewing asked the court to exercise its discretion and either (1) reduce his charge for the stolen golf clubs to a misdemeanor, or (2) reduce one of his prior felony

convictions to a misdemeanor for purposes of sentencing in this case. After review of the facts and Ewing's criminal record, the court declined to reduce any charges. The judge sentenced Ewing under the three strikes law to 25 years to life, with no possibility of parole for 25 years. Ewing claimed the sentence was "grossly disproportionate" and violated the Eighth Amendment's prohibition of cruel and unusual punishment under the U.S. Constitution.

ISSUE: "Whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the State's 'Three Strikes and You're Out' law." *Ewing v. Cal*., 155 L. Ed. 2d. 113 (2003).

PROCEDURAL HISTORY: The California Court of Appeal rejected Ewing's claim that the punishment was grossly disproportionate and a violation of the Eighth Amendment because recidivist statutes like the three strikes law serve the "legitimate goal of deterring and incapacitating repeat offenders." [Internal quotation marks omitted.] *Id*. at 117. The Supreme Court of California denied Ewing's petition for review. The U.S. Supreme Court granted *certiorari* and affirmed.

HOLDING: "Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments." *Id*. at 123.

JUDGES: Justice Sandra Day O'Connor announced the judgment of the Court and delivered a plurality opinion in which Justice Anthony Kennedy and Chief Justice William Rehnquist joined. Justices Antonin Scalia and Clarence Thomas wrote concurring opinions and joined in the judgment of the Court. Justice John Paul Stevens wrote a dissent in which Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer joined. Justice Breyer wrote a dissent in which Justices Stevens, Souter and Ginsburg joined.

ANALYSIS: The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend VIII.

There were two issues in this case. First, whether a proportionality principle guided Eighth Amendment claims; second, whether, in this case the punishment was disproportionate and therefore a violation of the Eighth Amendment.

The first section of Justice O'Connor's opinion was devoted to justifying the use of the proportionality principle in noncapital cases, based on previous Supreme Court cases. She concluded that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence … [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id*. at 119. The dissenting justices likewise agreed that that proportionality applied to all Eighth Amendment cases, stating that, based on the Amendment's text, "The Eighth Amendment directs judges to exercise their wise judgement in assessing the proportionality of all forms of punishment." *Id*. at 125.

Having established their use of proportionality, the plurality went on to consider the merits of the case. Ewing claimed that being sentenced to 25 years to life for "shoplifting three golf clubs"

was an unconstitutionally disproportionate punishment. *Id*. at 122. In weighing the gravity of the offense with the harshness of the penalty, however, the plurality noted that his crime was actually felony grand theft, not merely "shoplifting three golf clubs." *Id* at 122. They also noted that the severe sentence was not based solely on that crime, but also, as required by the three strikes law, on his criminal history, which included four prior serious or violent felonies. Taking into consideration the seriousness of this crime combined with his history of serious offenses, the plurality did not see the punishment as disproportionate.

The plurality also recognized that its job was to defer to the judgment of the legislature in promoting a legitimate state interest. Here, California had a legitimate interest in protecting public safety. The purpose of the three strikes statute is to protect the public from repeat offenders of violent and serious felonies by deterring or incapacitating those criminals. Nothing in the Eighth Amendment prohibited that legislative decision.

Justices Scalia and Thomas raised the issue of proportionality in their concurring opinions. Neither read the Eighth Amendment as containing a "guarantee against disproportionate sentences." *Id.* at 124. In addition to proportionality not being in the text of the Eighth Amendment, neither saw the principle as one the judiciary could intelligently apply, because proportionality dealt only with the state's interest in retribution for crimes. Proportionality had no relationship to the state interests of deterring crime, rehabilitating criminals or incapacitating criminals, which were equally important state interests used in determining sentencing guidelines.

Justice Breyer's dissent argued that Ewing's punishment was grossly disproportionate and therefore cruel and unusual punishment. He compared this case to the Court's prior Eighth Amendment cases, and concluded that the length of the sentence is this case fell much closer to a sentence found unconstitutional than one found constitutional. However, in doing so, Breyer did not analyze the situation as a felony grand theft by an offender with a lengthy criminal record – he viewed Ewing as imprisoned for stealing three golf clubs. Breyer also compared the length of the sentence given here to the length of sentences given for more serious crimes, such as murder or arson causing great bodily injury; however, his example prison terms were prior to enactment of the three strikes law and/or were for nonrecidivist crimes. He did make comparisons to federal recidivist sentencing guidelines, noting that Ewing's sentence would have been reserved for more serious crimes under the federal statute, and that Ewing would not have qualified under the federal three strikes law. However, as Ewing was included under the California three strikes law and as California is not required to have the same laws as the federal government, it is hard to see that as determinative.

In analyzing California's interests, Breyer rejected that sentencing Ewing under the three strikes statute is justifiable on administrative, deterrent, or rehabilitative grounds. In addressing the incapacitation rationale, he separated property crimes from serious and violent crimes, because many types of property crimes are included under the three strikes statute. He basically concluded that serious property crimes should not qualify for three strikes sentencing.

GRATZ V. BOLLINGER

123 S. Ct. 2411 (2003)

FACTS: The petitioners, Gratz and Hamacher, both Caucasian, had applied for admission to the University of Michigan College of Literature, Science, and the Arts (LSA). Both had credentials falling within the qualified range for admission, but not high enough to be offered admission upon first review of their applications. Ultimately, both applications were rejected. The University of Michigan admission standards required that an applicant accumulate 100 points through various factors to qualify for admission; it awarded 20 such points to anyone who was African American, Hispanic or Native American. If the petitioners had been members of one of these racial minorities, they would have been admitted to the University. The petitioners filed a class action, alleging that by using race as an admissions factor, the University violated their equal protection rights under the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. §§ 1981, 1983 and 2000d, and the Civil Rights Act of 1964.

ISSUE: "Whether 'the University of Michigan's use of racial preferences in undergraduate admissions violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 … or 42 U.S.C. § 1981.'" *Gratz v. Bollinger*, 123 S. Ct. 2411, 2417 (2003).

PROCEDURAL HISTORY: The district court concluded that achieving a racially and ethnically diverse student body was a compelling government interest and that the method the undergraduate program at the University of Michigan chose to meet this interest was narrowly tailored to achieve that interest. The plaintiffs appealed the case to U.S. Court of Appeals for the Sixth Circuit and arguments were heard on the same day as the affirmative action case against the University's law school, *Grutter v. Bollinger*. Although the Sixth Circuit issued a decision upholding the Law School's admission policy, it never issued a decision about the undergraduate case. Both cases were granted *certiorari* by the Supreme Court and the oral arguments were presented on the same day.

HOLDING: "[B]ecause the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment" and "Title VI and 42 U.S.C. § 1981." *Id*. at 2430. The Court reversed the district court's decision to grant summary judgment to the University with respect to liability and remanded the case for proceedings consistent with the opinion.

JUDGES: Chief Justice William Rehnquist delivered the opinion of the Court, in which Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas joined. Justice O'Connor also filed a concurring opinion, in which Justice Stephen Breyer joined in part. Justices Thomas and Breyer also filed concurring opinions. Justice John Paul Stevens filed a dissenting opinion in which Justice David Souter joined. Justice Souter filed a dissenting opinion in which Justice Ruth Bader Ginsburg joined as to Part II. Justice Ginsburg filed a dissent in which Justice Souter joined and which Justice Breyer joined as to Part I.

ANALYSIS: Because the issue dealt with racial discrimination, the University needed to show that there was a compelling government interest for engaging in discrimination, and that its admissions policy was as narrowly tailored as possible to meet that compelling interest.

Chief Justice Rehnquist agreed that diversity of the student body for purposes of enhancing the educational experience did constitute a compelling state interest. The majority determined, however, that the admissions policy was not narrowly tailored to meet that interest because the policy did not comply with *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the Court's landmark affirmative action ruling. There the Court held that preferring members of a particular racial or ethnic group, simply because they were members of that group, was impermissible as "discrimination for its own sake." *Id. Bakke* did allow membership in a racial group to count as a "plus." *Id.* at 317.

The Court, however,

> emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program … described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. *Gratz*, 123 S. Ct. at 2428.

The Michigan undergraduate admissions policy, however, did not look at each individual applicant to see how that individual would increase diversity. Instead, it awarded every member of one of the specified minorities one-fifth of the points necessary for admission, "making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant." *Id*. at 2428.

The University argued that there was the possibility for individual consideration of applicants, because certain files that did not automatically qualify for admission were flagged to be reviewed by an Admissions Review Committee. These files were examined individually. However, this did not alleviate the majority's concerns with the program because "it is undisputed that such consideration is the exception and not the rule in the operation of the LSA's admissions program," *Id*. at 2429, and because "this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a 'plus' that makes race a decisive factor." *Id*. at 2430.

Justice O'Connor's concurrence primarily explained why she voted against this policy but upheld the Law School's policy in *Grutter*. Her concern with the undergraduate program was that the use of "automatic, predetermined point allocations … ensures that diversity contributions of applicants cannot be individually assessed." *Gratz,* 123 S. Ct. at 2432. She said that this policy was in "sharp contrast" to the Law School policy, praising it for allowing admissions officers to make "nuanced judgments" with regard to individual applicants to ensure the diversity of each incoming class. *Id*. at 2432.

Justice Stevens dissented because he did not believe either petitioner had standing to claim the injunctive relief they were seeking. He agreed that the petitioners could have sought damages for

their own denial of admission as freshmen. However, because neither was seeking to re-apply to the University as a freshman, Stevens said they did not qualify to request an injunction against the undergraduate admissions use of race for freshman applicants or to represent a class of people including freshmen applicant rejections who were seeking injunctive relief.

Justice Souter also dissented, agreeing that there was no standing to bring the claim; he also addressed the merits of the case, however. He wrote that *Grutter* reaffirms "the permissibility of individualized consideration of race to achieve a diversity of students," *Id*. at 2439, while *Bakke* "rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class." *Id*. at 2440. He reasoned that because this was not a quota and because factors other than race were used to compete for seats, he would have allowed the program because it is "closer to what *Grutter* approves than to what *Bakke* condemns." *Id*. at 2440.

In her dissent, Justice Ginsburg focused on remedies for past discrimination:

> [W]e are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools. … [A]s I see it, government decision makers may properly distinguish between policies of exclusion and inclusion. … Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated. *Id*. at 2243-44.

GRUTTER V. BOLLINGER

123 S. Ct. 2325 (2003)

FACTS: Petitioner Barbara Grutter, a Caucasian woman, applied to the University of Michigan Law School and was rejected. She alleged her application was rejected because the Law School's admissions policy used race as a "predominant" factor in admissions decisions. The Law School's admissions policy considered the applicant's grades and LSAT score, but also included consideration of "soft" variables, one of which was membership in a historically discriminated-against minority group, which included African Americans, Hispanics and Native Americans. The law school claimed the purpose of this was to enroll a "critical mass of [underrepresented] minority students … to ensure their ability to make unique contributions to the character of the Law School." [Internal quotation marks and citations omitted.]

ISSUE: Whether diversity is a compelling interest that can justify the use of race in selecting applicants for admission to public universities.

PROCEDURAL HISTORY: The district court determined that the Law School's interest in a diverse student body was not compelling because (1) that interest had not been recognized as compelling in the prior Supreme Court case, *Regents of University of California v. Bakke*, and (2) it is not a remedy for past discrimination. The district court also found that even if it were a compelling interest, the Law School had not narrowly tailored its use of race to achieve that interest. It granted declaratory relief and an injunction to prevent the Law School from using race as a factor in admissions decisions. The Court of Appeals for the Sixth Circuit reversed the district court's decision and vacated the injunction, holding that diversity had been established as

a compelling state interest in Justice Powell's concurring opinion in *Bakke*. (Powell had concurred in the judgment but not in the rationale of the plurality opinion in *Bakke*.) The Sixth Circuit also held that the policy was narrowly tailored because race was nothing more than a "potential 'plus'" factor in the policy.

HOLDING: "The Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause."

JUDGES: Justice Sandra Day O'Connor delivered the opinion of the Court, in which Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer joined. Justice Ginsburg also filed a concurring opinion, in which Justice Breyer joined. Chief Justice William Rehnquist filed a dissenting opinion, in which Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas joined. Justice Kennedy filed a dissenting opinion. Justice Scalia filed an opinion concurring in part and dissenting in part. Justice Thomas filed an opinion concurring in part and dissenting in part, in which Justice Scalia joined as to Parts I-VII.

ANALYSIS: In 1989, Justice O'Connor spoke strongly about the negative impact racial preferencing programs would have on our society:

> The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. *Richmond v. JA Croson Co*., 488 U.S. 469, 505-06 (1989).

Apparently, Justice O'Connor now thinks that would not happen in a higher education setting, or that society has completely moved beyond those concerns in the last 14 years. O'Connor was the deciding vote to uphold the use of race as a factor in the law school admissions policy. O'Connor analyzed the Michigan policy under the precedent of *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

Bakke was an unclear precedent because six different justices wrote opinions. Justice Powell's opinion was generally looked to because he provided the fifth vote for the narrow holding. Powell said that race could be used to further "the attainment of a diverse student body," *Bakke*, 348 U.S. at 311, but that race could be "only one element in a range of factors" universities looked at in determining admission. Powell found it important that each individual's contribution to the diversity of the student body be examined on the basis of a variety of factors. He also said the use of quotas was unconstitutional. If a school employed a racially discriminatory policy, that policy had to be examined using strict scrutiny analysis.

Under Bakke, the majority accepted that a "diverse educational experience" was a compelling interest for the university. The Law School's specific claimed interest here was in having a "critical mass" of minority students. In his dissent, Justice Rehnquist synthesized how various school administrators had explained what they meant by this idea of critical mass:

> [A] sufficient number of underrepresented minority students to achieve several objectives: To ensure that these minority students do not feel isolated or like

> spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the benefits of diversity depend; and to challenge all students to think critically and re-examine stereotypes. *Grutter* at 2366.

The majority determined that attaining this critical mass for a diverse educational experience was a legitimate interest and consistent with Justice Powell's opinion from *Bakke*.

The majority next said that the way the Law School used race in the admissions process was narrowly tailored to this interest and consistent with *Bakke*. They said critical mass was different from a quota because it did not "impose a fixed number or percentage which must be attained, or which cannot be exceeded . . . and insulate the individual from comparison with all other candidates for the available seats." *Id.* at 2342. The majority also thought it was important that the Law school "awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity," as did the undergraduate program struck down in *Gratz v. Bollinger*. *Id.* at 2343. Additionally, although admissions officials reviewed "daily reports" about the racial makeup of the incoming class as the admissions period drew to a close, the majority accepted at face value the testimony of admissions officers that they "never gave race any more or less weight based on the information contained in these reports." *Id.* For these reasons, the majority claimed the plan provided for appropriate attention to individual characteristics of applicants for diversity contributions, not just a categorical "bonus" for race, and thus could be upheld.

One of several concerns the dissenting justices had was that nothing in the Law School's admissions policy said it was working toward ending the use of race as soon as possible. Again, the majority simply deferred to the Law School, saying "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." *Id.* at 2346. However, the majority imposed its own sunset provision into the policy, saying, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 2347.

Justice Ginsburg wrote a concurrence, basically agreeing with the Court, but obliquely saying she did not want the 25-year cap, saying, "One may hope, but not firmly forecast, that over the next generations' span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Id.* at 2365.

In his dissent, Chief Justice Rehnquist stated, "Although the Court recites the language of . . . strict scrutiny analysis, its application of that review is unprecedented in its deference." As mentioned above, the Court deferred (1) to the Law School's judgment that a diverse student body was "essential to its educational mission" and held that a diverse student body was a compelling state interest; *Id.* at 2339; and (2) to administrators' statements that race was not considered − even though those officials reviewed daily reports of the racial makeup of the entering class; and (3) to the Law School's statement that it wanted to use race-neutral admissions and would end the use of race as soon as possible.

Although Justice Rehnquist agreed with the Court that racial distinctions could be permissible under some circumstances, he strongly disagreed that the Michigan Law School's policy was narrowly tailored to the interest it claimed. Although the Law School claimed it was trying to

achieve a "critical mass" of minority students, "Its actual program bears no relation to this asserted goal. Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing." *Id.* at 2365.

Rehnquist focused on two critical points to demonstrate that the Law School's goal of "critical mass" was fraudulent. First, the Law School claimed it was seeking to accumulate a "critical mass" of *each* underrepresented minority group, but the numbers of students admitted from each group varied dramatically; this raised the question of how a "critical mass" could be so different for each group. For example from 1995 through 2000, of the students admitted, "between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic." *Id.* at 2366. As Rehnquist put it, "One would have to believe that the objectives of 'critical mass' offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans." *Id.* at 2367. This problem is more dramatically demonstrated in that, during this same time period, "enrollment of Native American students dropped to as low as *three* such students. Any assertion that such a small group constituted a 'critical mass' of Native Americans is simply absurd." *Id.*

Second, Rehnquist focused on the correlation between the percentage of each minority group in the applicant pool and the percentage of applicants admitted from each minority group. This correlation was "far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'" *Id.* at 2368. For example, in 1995, 9.7 percent of applicants were African-American and 9.4 percent of admission offers were made to African-Americans; 5.1 percent of applicants were Hispanic and 5 percent% of admission offers were made to Hispanics; and 1.2 percent of applicants were Native American, with 1.1 percent of admission offers made to Native-Americans.

> *The tight correlation between the percentage of applicants and admittees of a given race, therefore, must result from careful race based planning by the Law School. It suggests a formula for admission . . . that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool. Id.* at 2369. [Italics in original.]

Justice Kennedy wrote a separate dissent, in which he stated he agreed with Justice Rehnquist and then went on to address additional concerns. He based his refusal to join the majority in upholding the admissions policy because it applied only one requirement from *Bakke*, while ignoring the second requirement that strict scrutiny be used in judicial review:

> [T]he Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard. *Id.* at 2370.
>
> If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. … For these reasons, though I reiterate my approval of giving

> appropriate consideration to race in this one context, I must dissent in the present case. *Id.* at 2373.

In his lengthy dissent, Justice Thomas noted:

> No one would argue that a university could set up a lower general admission standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admission standard and grant exemptions to favored races. *Id.* at 2350.

He also objected that the interest the university claimed did not rise to the level of what prior cases had deemed a "compelling state interest" to justify racial preferencing. *Id.* at 2351. There had only been two circumstances found to justify racial discrimination: (1) national security concerns, and (2) governmental effort to remedy past governmental discrimination. *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). A diverse student body did not seem to rise to the level of importance of those interests.

Additionally, Thomas explained that higher-education Affirmative Action policies did not truly help minorities, but merely presented that illusion because the "Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education." This "underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged." *Id.* at 2353.

LAWRENCE V. TEXAS

123 S. Ct. 2472 (2003)

FACTS: Responding to a reported weapons disturbance in a private residence, Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner, engaging in a sexual act. Petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in oral or anal sex.

ISSUES: Whether Petitioners' criminal convictions under the Texas law violate the Fourteenth Amendment guarantee of equal protection of laws. Whether Petitioners' criminal convictions violate their vital interests in liberty and privacy protected by the Due Process Clause of the 14th Amendment. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that there is no fundamental constitutional right to engage in homosexual sodomy), should be overruled.

PROCEDURAL HISTORY: Petitioners pleaded *nolo contendre* (no contest) to charges of violating the Texas statute and reserved their rights to appeal their convictions. The Court of Appeals for the Texas Fourteenth District upheld the statute against constitutional challenges citing the Supreme Court's decision in *Bowers*. Petitioners filed a writ of *certiorari* to the Supreme Court, which was granted.

HOLDING: The Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause of the 14th Amendment. Six

justices held the statute unconstitutional, finding it "furthers no legitimate state interest" and resolutely rejected "morality" as a rational basis for the law. Five held that it violates liberty and privacy under the 14th Amendment, and also reversed *Bowers.*

JUDGES: Justice Anthony Kennedy delivered the opinion of the Court, in which Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer joined. Justice Sandra Day O'Connor filed an opinion concurring in the judgment. Justice Antonin Scalia filed a dissenting opinion in which Chief Justice William Rehnquist and Justice Clarence Thomas joined. Justice Thomas filed a dissenting opinion.

ANALYSIS: Justice Kennedy began by reviewing the Court's holding in *Bowers* in light of its landmark rulings in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) (parental rights in upbringing of children), and *Meyer v. Nebraska,* 262 U.S. 390 (1923) (parental rights). Kennedy said "the most pertinent beginning point is our decision in *Griswold v. Connecticut,*" 381 U.S. 479 (1965). *Lawrence* at 2476.

Kennedy acknowledged that, in *Griswold*, "The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom." Id. at 485.

From there, Kennedy cited *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating statute prohibiting sale of contraceptives to unmarried heterosexuals). Kennedy concluded, "After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." *Id.* at 2477.

All of which led to *Roe v. Wade,* 410 U.S. 113 (1973), which Kennedy said "recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Id.* at 2477.

Next, came *Carey v. Population Services Int'l,* 431 U.S. 678 (1977) (invalidating a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age). Kennedy concluded:

> Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*. *Id.*

Kennedy concluded, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent." *Id.* at 2484. Kennedy briefly addressed *stare decisis* ("to stand by that which was decided") and declared it is not "an inexorable command." *Id*. at 2474.

In reversing *Bowers*, the majority did not reject expressly *Bowers*' holding that homosexual sodomy is not a fundamental constitutional right—a point not lost on the dissenters. Kennedy wrote:

> [B]owers discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. *Id.* at 2478.

Despite the fact that current and former justices and chief justices of the Court, including Holmes, Brandeis, Black, Douglas, Brennan, Warren and Burger, have generally and historically upheld morality as a rational basis for a criminal statute, the majority held: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Id.* at 2483.

In *Romer v. Evans,* Kennedy imputed animus to the people of Colorado as their sole reason for enacting Amendment 2, a state constitutional amendment prohibiting state or local legislation granting civil rights status based on sexual orientation. Similarly, the majority and O'Connor ascribe bigotry to the Texas Legislature for enacting its statute.

Texas criminalized opposite-sex and same-sex sodomy until 1973. As CWA's *amicus* brief in *Lawrence* argues, decriminalizing opposite-sex sodomy was likely based on the Court's rulings in *Eisenstadt v. Baird* in 1972, granting an equal protection right to unmarried heterosexuals to procure contraceptives, and *Griswold v. Connecticut,* protecting marital intimacy. Retaining a law prohibiting same-sex sodomy does not prove animus toward homosexuals.

The *Lawrence* majority did not decide the case on narrower equal protection grounds. Obviously, it would take considerable finesse to strike neutral statutes, and Kennedy admitted that would not achieve the goal: "If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id.* at 2482.

The *Lawrence* rationale extends beyond home, privacy and sex between consenting adults. Kennedy continues:

> And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions. *Id*. at 2475.

After moving "outside the home" and "beyond spatial bounds," Kennedy claims the ruling does not reach "public conduct." *Id.* at 2484. Apparently the astral realm encompasses Mars but not Main Street. The "right" has "transcendent dimensions," but excludes "prostitution." *Id*. But how so once morality is insufficient justification for a law?

Despite the broad rationale expressed, Kennedy explains who and what the holding does not reach:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. It does not mean "the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id*.

"Do not believe it," warns Justice Scalia. *Id.* at 2498.

Kennedy declares, "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." *Id.* at 2478. And Scalia retorts, "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with decisions of this Court." *Id*. at 2498.

The majority, which found sodomy enshrined in liberty, offered its explanation of why the Founders and others disagreed and left anti-sodomy laws in place:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. *Id.* at 2484.

According to Kennedy, the Founders should have included something akin to a disclaimer in the Constitution: "Liberty does not include the infamous crime against nature."

The majority preferred the European Convention on Human Rights and an act of British Parliament to the Founders and their own precedent. To which Scalia responded: "The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court … should not impose foreign moods, fads, or fashions on Americans.'" *Id*. at 2495.

It is hardly surprising that Justice O'Connor, one of the *Bowers* majority, declined to join the *Bowers*-bashing. O'Connor chose equal protection as her reason for striking down the statute despite the fact that the Texas statute is facially neutral. It applies to conduct between two women or two men regardless of their sexual orientation—another point not lost on the dissent.

Justice O'Connor said it's about "dislike and disapproval of homosexuals." *Id* at 1476. And found it "an invitation to subject homosexual persons to discrimination." *Id*. at 2482. She

sidestepped deciding whether a neutral statute violates equal protection. O'Connor said she is "confident" that a law prohibiting both same-sex and opposite-sex sodomy "would not long stand in our democratic society." *Id.*at 2487. However, she and the majority did not allow democracy to run its course here.

The Court chose not to allow the Texas Legislature to retain or repeal its statute. There is no parity between embracing democracy and embracing hate and intolerance. The statute is not the equivalent of antimiscegenation and Jim Crow laws against which the text of the Constitution is rightly invoked to prohibit racial discrimination.

Homosexuals have an equal right to change laws through the legislative process. It perverts the Constitution, however, when courts strike valid legislation by conjuring up constitutional rights based on *Griswold's* "penumbras, formed by emanations from those guarantees that help give life and substance" to *Lawrence's* "manifold possibilities."

As Justice Scalia emphasized: "It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." *Id.* at 2497.

Justice Clarence Thomas wrote in his dissenting opinion that he finds the statute "uncommonly silly," and if he were in the Texas Legislature he would vote to repeal it. Thomas and Chief Justice William Rehnquist joined Justice Antonin Scalia's fiery dissent. Thomas wrote separately to make a supreme point—the duty of a judge under the Constitution:

My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" … And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," … or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions." *Id*. at 2498.

Public health concerns also provided compelling reasons for the Court to have upheld the statute. CWA's brief cited a recent article about a disturbing and deadly trait of homosexual men known as "bug chasers"—men who yearn to become infected with the HIV virus. "The men who want the virus are called 'bug chasers,' and the men who freely give the virus to them are called 'gift givers.' … HIV-infected semen is treated like liquid gold." Gregory A. Freeman, *In Search of Death*, Rolling Stone, February 6, 2003, at 45.

Another closely related high-risk behavior by men who have anal sex with other men provides a compelling reason to criminalize same-sex sodomy. The prevalence and popularity of "barebacking" (unprotected anal sex) greatly increases the risk of HIV and sexually transmitted disease infections. *Matthew Laza, Men Who Want Aids*, The Spectator, February 1, 2003; *Russian Roulette: The Story Behind the Story* (CBS television broadcast, November 21, 2001.).

Consent and privacy do nothing to mitigate the grave risk of such conduct to the persons engaged in the conduct and to the public generally. Even if a statute's deterrence is lessened because it is rarely enforced, that doesn't diminish its pedagogical impact.

CWA's amicus brief in Lawrence is available at: http://www.cwfa.org/images/content/cwa-brief_02-102.pdf

LOCKYER V. ANDRADE

123 S. Ct. 1166 (2003)

FACTS: During November 1995, Leandro Andrade twice stole videotapes, worth a total of $153.54, from a Kmart store in California. Andrade had a long history of criminal activity, including three convictions for first-degree residential burglary and two convictions for transportation of marijuana. For stealing the videos, he was charged with two counts of petty theft with a prior conviction. This charge is considered a "wobbler" because California permits it to be punishable as either a felony or a misdemeanor, at the discretion of the prosecutor and trial judge. *Lockyer v. Andrade*, 123 S. Ct. 1166, 1170 (2003). The prosecutor and judge in this case decided that the two counts of theft should be treated as felonies. Under California's three strikes law, any felony can count as the third strike; Andrade was convicted on both counts, which triggered two applications of the three strikes law. Andrade was sentenced to two consecutive terms of 25 years to life in prison.

After Andrade's appeal of his sentence was rejected, he tried a different tactic: a writ of *habeas corpus*. A writ of *habeas corpus* is used to bring a person before a court. In this context, Andrade was challenging whether his imprisonment was lawful under the U.S. Constitution. The Ninth Circuit evaluated his petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

ISSUE: "Whether the United States Court of Appeals for the Ninth Circuit erred in ruling that the California Court of Appeal's decision affirming Leandro Andrade's two consecutive terms of 25 years to life in prison for a 'third strike' conviction is contrary to, or an unreasonable application of, clearly established federal law as determined by this Court within the meaning of 28 U.S.C. §2254(d)(1)," *Lockyer*, 123 S. Ct. at 1169.

PROCEDURAL HISTORY: The California Court of Appeal affirmed Andrade's sentence and the California Supreme Court denied discretionary review. Andrade then filed a petition for a writ of *habeas corpus* in federal district court. The district court denied the petition, but the U.S. Court of Appeals for the Ninth Circuit granted it and reversed the California Court of Appeal's affirmation of Andrade's sentence. The Supreme Court granted *certiorari* and reversed.

HOLDING: "It was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade's sentence of two consecutive terms of 25 years to life in prison." *Id.* at 1175.

JUDGES: Justice Sandra Day O'Connor delivered the opinion of the Court, in which Chief Justice William Rehnquist, and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas joined. Justice David Souter filed a dissenting opinion in which Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer joined.

ANALYSIS: Any felony can count as the third strike under California's three strikes statute, but most people probably were not expecting videotape theft to be the offense that sent someone to prison for 25 years to life. The law, however, required more than simply testing whether the punishment "felt" excessive for the crime.

The AEDPA required an analysis to determine if a state court decision involved an objectively unreasonable application of a clearly established federal law. Therefore, this case involved two questions. First, what was the clearly established federal law? Second, did the state court use an objectively unreasonable application of the federal law?

First, the Court determined that there was only one piece of clearly established federal law in Eighth Amendment sentencing cases: The "gross disproportionality" principle did apply to the duration of sentences. *Id*. at 1173. Apart from this established principle, the Supreme Court acknowledged that its previous cases in the area of Eighth Amendment disproportionality "had not been a model of clarity." *Id*. at 1173. The majority noted that the contours of the principle were unclear, except that it applied only in "'exceedingly rare' and 'extreme'" cases. *Id*. at 1173 (quoting *Harmelin v. Michigan*, 501 U.S. 957 (1991)) (Kennedy, J., concurring in part and concurring in judgment).

Second, the Court examined whether the state court's ruling involved an unreasonable application of the clearly established gross disproportionality principle.

The Court first examined whether the district court had misidentified the law established in previous Supreme Court cases in this area. The Court found that the California ruling did follow the principles established in prior cases. Although the state court did not rely on the most recent cases, it did rely on an earlier case that had not been overruled. Therefore, the state court's decision was based on valid law.

Since the California court had correctly identified the law, the Supreme Court next examined if the state court had unreasonably applied that law to the facts of Andrade's case. Under AEDPA, an unreasonable application requires more than being "incorrect or erroneous." *Lockyer*, 123 S. Ct. at 1174 (citing *Williams v. Taylor*, 529 U.S. 362, 410, 412 (2000)). It must be "objectively unreasonable." *Id*. at 1174 (citing *Williams v. Taylor*, 529 U.S. 362, 409 (2000)). Therefore, the Ninth Circuit was incorrect when it said the district court's decision was unreasonable only because it found the application to be in "clear error." Because the contours of the gross disproportionality principle are unclear, it was not objectively unreasonable that the California court upheld Andrade's sentence, especially because only the "extraordinary case" is unreasonable. *Id*. at 1175.

Justice Souter dissented for two main reasons. First, he said that according to Supreme Court precedent, a 50-year sentence for stealing about $154 of videotapes was grossly disproportionate. The most recent precedent held that life without parole for "uttering a $100 'no account' check" was disproportionate, even though the convict had six prior nonviolent felony convictions. *Lockyer*, 123 S. Ct. at 1176. According to Souter, a 50-year sentence is the "practical equivalence" of life without parole. *Id*. at 1177. Therefore, this sentence must be grossly disproportionate. He neglects to mention that the conviction in the Lockyer case was under a recidivist statute, however.

Second, he said the sentence could be looked at as two 25-year sentences, in which case the second 25-year sentence was unconstitutional. Given that California's goal was incapacitation, and that 25 years was deemed appropriate for the videotape theft given his prior record,

> Andrade did not somehow become twice as dangerous to society when he stole the second handful of videotapes; his dangerousness may justify treating one minor felony as serious and warranting long incapacitation, but a second such felony does not disclose greater danger warranting substantially longer incapacitation. *Id*. at 1178.

Also, Souter stated that he knew "of no jurisdiction that would add 25 years of imprisonment simply to reflect the fact that the two temporally related thefts took place on two separate occasions." *Id*. at 1178. Souter believed this demonstrated that the state court's acceptance of the additional 25 years was objectively unreasonable in terms of the statute, and the *habeas* petition should have been granted.

SCHEIDLER V. NOW

537 U.S. 393, 123 S. Ct. 1057 (2003)

FACTS: This case culminates 13 years of litigation including a prior decision by the Supreme Court in 1994, *NOW v. Scheidler*, 510 U.S. 249. The litigation began in 1986, when respondent National Organization for Women (NOW) sued in the United States District Court for the Northern District of Illinois alleging, among other things, that the pro-life protests at abortion clinics engaged in by petitioner Joseph Scheidler and others violated sections 1962(a), (c), and (d) of the Racketeer Influenced and Corrupt Organizations Act (RICO). They claimed that petitioners, all of whom were associated with the Pro-Life Action Network (PLAN), the alleged racketeering enterprise, were members of a nationwide conspiracy to "shut down" abortion clinics through a pattern of racketeering activity that included acts of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951.

PROCEDURAL HISTORY: After a seven-week trial, the jury concluded that petitioners violated the civil provisions of RICO. The jury also found that petitioners' alleged "pattern of racketeering activity" included 21 violations of the Hobbs Act; 25 violations of state extortion law; 25 instances of attempting or conspiring to commit either federal or state extortion; 23 violations of the Travel Act, 18 U.S.C. § 1952; and 23 instances of attempting to violate the Travel Act. The jury awarded $31,455.64 to respondent, NOW of Delaware, and $54,471.28 to the National Women's Health Organization of Summit, Inc. The damages were tripled as provided by § 1964(c). The District Court also entered a permanent nationwide injunction prohibiting petitioners from obstructing access to the clinics, trespassing on clinic property, damaging clinic property, or using violence or threats of violence against the clinics, their employees, or their patients. *Scheidler* at 123 S. Ct. 1062, 63 (2003).

The U.S. Court of Appeals for the Seventh Circuit held that the things NOW claimed were "obtained" by extortion — the right of women to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their business — were "property" for purposes of the Hobbs Act. The court

also dismissed petitioners' claim that even if "property" were involved, petitioners did not "obtain" that property; they merely forced respondents to part with it. The court held that "'as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.'" *Id*. at 1063 (quoting *U.S. v. Stillo*, 57 F. 3d 553, 559 (7th Cir. 1995)). The court also upheld the issuance of the nationwide injunction, finding that private plaintiffs are entitled to obtain injunctive relief under § 1964(c) of RICO.

ISSUE: First, whether petitioners committed extortion within the meaning of the Hobbs Act, and whether respondents, as private litigants, may obtain an injunction in a civil action under 18 U.S.C. § 1964 (c) of (RICO).

HOLDING: The Court held that petitioners did not commit extortion because they did not "obtain" property from respondents as required by the Hobbs Act. As a result, the other bases or predicate acts of racketeering did not support the jury's conclusion that Scheidler violated RICO. The Court reversed without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO.

JUDGES: Chief Justice William Rehnquist delivered the opinion of the Court, in which Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg and Stephen Breyer joined. Justice Ginsburg filed a concurring opinion, in which Justice Breyer joined. Justice John Paul Stevens filed a dissenting opinion.

ANALYSIS: The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Petitioners claimed that the jury's verdict and the Court of Appeals' decision upholding the verdict represent "a vast and unwarranted expansion of extortion under the Hobbs Act," and that decisions below "read the requirement of 'obtaining' completely out of the statute." *Id.* at 1063.

NOW claimed that petitioners violated the Hobbs Act by "seeking to get control of the use and disposition of respondents' property." *Id.* at 1064. They argued that "because the right to control the use and disposition of an asset is property, petitioners, who interfered with, and in some instances completely disrupted, the ability of the clinics to function, obtained or attempted to obtain respondents' property." *Id.*

The Solicitor General of the United States filed an *amicus* brief in support of NOW on the issue of extortion under the Hobbs Act. The government's brief argued:

> [W]here the property at issue is a business' *intangible* right to exercise exclusive control over the use of its assets, [a] defendant obtains that property by obtaining control over the use of those assets. (Brief for United States as *Amicus Curiae* 22.) Although the Government acknowledges that the jury's finding of extortion may have been improperly based on the conclusion that petitioners deprived respondents of a liberty interest, n.5 it maintains that under its theory of liability, petitioners committed extortion. *Id*.

After a discussion of the history of extortion law under which Congress enacted the Hobbs Act, the Court determined that the Act requires both the wrongful deprivation and acquisition of another's property:

> Most importantly, we have construed the extortion provision of the Hobbs Act at issue in this case to require not only the deprivation but also the acquisition of property. See, *e.g.*, *Enmons, supra,* at 400. (Extortion under the Hobbs Act requires a "'wrongful' *taking* of … property") [Emphasis included in original]. With this understanding of the Hobbs Act's requirement that a person must "obtain" property from another party to commit extortion, we turn to the facts of these cases.

The Court found that there was no dispute "in these cases that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights. Likewise, petitioners' counsel readily acknowledged at oral argument that aspects of his clients' conduct were criminal." *Id*. at 1065. However, the Court reasoned, that "Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. *Id*. at 1066.

The Court reasoned that whatever the outer boundaries of extortion under the Hobbs Act may be, "the effort to characterize petitioners' actions here as an 'obtaining of property from' respondents is well beyond them. Such a result would be an unwarranted expansion of the meaning of that phrase." *Id*.

The Court also determined that coercion and extortion are separate crimes and that coercion is not an included offense under the Hobbs Act.

The Court concluded:

> Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed. The 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion.
>
> Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated. We therefore need not address the second question presented -- whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964. *Id*. at 1069.

In her concurring opinion, Justice Ginsburg expressed concern that, the Seventh Circuit's opinion gave "undue breadth" to RICO, which would adversely affect other cases pursued under RICO, namely "the civil rights sit-ins." *Id.*

In his dissenting opinion, Justice Stevens characterized the majority opinion as "murky." *Id*. at 1069. Stevens eliminated the crucial distinction between wrongly depriving another of a property right and the second component of extortion, obtaining the right:

> In sum, where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act. *Id*. at 1070.

CWA filed an *amicus* brief in this case, which set forth arguments that are the same as those adopted by the Court in its opinion.

SMITH V. DOE

123 S. Ct. 1140 (2003)

FACTS: John Doe I and John Doe II were convicted of sexual abuse of a minor. Both were released from prison in 1990 and completed sex offender rehabilitation programs. In 1994, Alaska enacted the Alaska Sex Offender Registration Act (Act), which applied retroactively. It requires any "sex offender or child kidnapper who is physically present in the state" to register with law enforcement and provide identifying information. *Smith v. Doe*, 123 S. Ct. 1140,1145 (2003) (citing Alaska Sex Offender Registration Act, 1994 Alaska Sess. Laws 41). Some of the information, such as the offender's name, address, photograph and crime for which he was convicted, is made available to the public. The respondents, and the wife of John Doe I, brought this suit, claiming that application of the Act to them violated the *Ex Post Facto* Clause of the U.S. Constitution, U.S. Const. art 1 §10 cl. 1, and the Due Process Clause of the Fourteenth Amendment.

ISSUE: Whether the registration requirement of the Alaska Sex Offender Registration Act is a retroactive punishment, and therefore is prohibited by the *Ex Post Facto* Clause of the U.S. Constitution.

PROCEDURAL HISTORY: The district court granted summary judgment for the petitioners. The U.S. Court of Appeals for the Ninth Circuit held that the state legislature had intended the act to be nonpunitive, but that in application, the Act was punitive. Therefore, the Ninth Circuit held that the Act did violate the *Ex Post Facto* Clause. The Supreme Court reversed.

HOLDING: "The Act is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause." *Smith*, 123 S. Ct. at 1154.

JUDGES: Justice Anthony Kennedy delivered the opinion of the Court, in which Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas joined. Justice Clarence Thomas filed a concurring opinion. Justice David Souter filed an opinion concurring in judgment. Justice John Paul Stevens filed a dissenting opinion. Justice Ruth Bader Ginsburg filed a dissenting opinion in which Justice Stephen Breyer joined.

ANALYSIS: In 1994, 7-year-old Megan Kanka was sexually assaulted and murdered by a neighbor who, unbeknownst to Megan's family, was a convicted sex offender. This crime led to the enactment of laws throughout the country requiring convicted sex offenders to register with databases that are available for community members to read. Today, every state, the District of Columbia, and the federal government have all enacted some version of "Megan's Law" to protect children from sexual predators. Alaska's law, under attack here, was enacted in 1994.

John Doe I and II claimed that because they were convicted and released before the Act was passed, applying its conditions to them violated the *Ex Post Facto* Clause of the U.S. Constitution, Art I § 10 cl. 1. The clause prohibits laws that retroactively criminalize and punish actions committed before the law is effective.

This claim had great significance. While Alaska would be able to require offenders to register if they were convicted after 1994, sexual predators convicted before 1994 would be allowed to live in Alaska without registering. This would mean families would have no way of learning that someone in close proximity to their children had been convicted of sex crimes, if those crimes occurred before 1994. This is very troubling, because sex offenders have "frightening and high" rates of repeat offenses. *McKune v. Lile*, 536 U.S. 24, 34 (2002). Additionally, most of their repeat offenses do not occur during the first few years following release from prison, but may occur even 20 years later. *Smith*, 123 S. Ct. at 1153 (citing R. Prentky, R. Knight, and A. Lee, U.S. Dept. of Justice, National Institute of Justice, Child Sexual Molestation: Research Issues 14 (1997)).

The question before the Court was whether the Act was criminal or civil in nature. If criminal, the statute would violate the *Ex Post Facto* Clause. If the statute's intent was civil regulation, a further analysis must determine if the "statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil" (internal marks omitted). *Smith v. Doe*, 123 S. Ct. 1140, 1147 (2003) (quoting *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980)). Only the "clearest proof" would be sufficient to override the legislature's stated intent that a statute has a civil regulatory purpose. *Smith*, 123 S. Ct. at 1147 (citing *Hudson* v. *United States*, 522 U.S. 93, 100 (1997) (quoting *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980)).

The Court first determined that the text and structure of the Act showed that on its face, it provided for civil regulation rather than punishment. The purpose of the Act was public safety—a very valid concern considering that sex offenders have the highest percentage of repeat offenses. Although John Doe I and II tried to argue that public safety is a purpose of the criminal justice system, the Court determined that just because an objective can be shared by criminal and civil systems does not mean the Act provides punishment. Likewise, although portions of the Act were contained in Alaska's criminal code, such as judges instructing convicts about the Act's registration requirements, the Court determined that did not make the Act punitive.
The Court next analyzed whether the Act was punitive when it was applied to criminals. Two main issues arose: (1) If the registry were a type of shaming punishment, like those from colonial America, and (2) if requiring convicted persons to update the registry whenever they changed their appearance, or at least 4 times a year, was an "affirmative disability." *Smith*, 123 S.Ct at 1151.

Shaming punishments from early America involved, for example, the public labeling or branding of a criminal and possible expulsion from the community. The point was that everyone in the community would know of the crime whenever they saw the criminal, and that it would not be easy for the criminal to join a new community because of the visible mark. The Court determined that the registration and public notice requirements differed from shaming punishments because (1) there was no face-to-face shaming between the convict and the public, and (2) the convict did not walk around wearing his registry information—individuals must seek the information. The Court saw the process as more analogous to visiting an archive than forcing the criminal to wear a badge of shame. However, dissenting justices thought "placement of the registrant's face on a Web page under the label 'Registered Sex Offender,' calls to mind shaming punishments." *Id.* at 1159.

Another contested point concerned the updating requirements for the registry. Convicts must notify the registry whenever they change their appearance or move, and contact the registry four times a year even if they don't change. Are these requirements an affirmative disability? The Court reasoned they were not, because the convict did not have to update the registry in person. The dissent said that it was a disability and that it was like parole or probation. However, the majority said this was not like probation or parole because offenders' actions are not restricted. They can do whatever they want; they just have to notify the government. Offenders also are free to leave Alaska and no longer have to update the registry.

Justices Ginsburg and Breyer were most disturbed that the Act did not provide for "the possibility of rehabilitation." *Id.* at 1160. They would have shortened or eliminated the length of time offenders had to remain on the registry upon rehabilitation or physical incapacitation. However, despite their concern for the offender who "currently poses no threat," *Id.* at 1160, (1) most offenders do not repeat their offenses within the first few years, but instead many years later, and (2) the law was designed to protect the public—not to first protect the offenders and then the public.

Justice Thomas concurred to say that most of the analysis that occurred was unnecessary, because only the statute's text and structure needed to be examined. If the legislature's intent was not punitive, that was enough; problems in application meant the law would have been applied wrongly, not that it violated the *Ex Post Facto* Clause.

STOGNER V. CALIFORNIA

123 S. Ct. 2446 (2003)

FACTS: California enacted a statute of limitations for sex-related crimes against children that permitted prosecution if begun within one year of the victim's report to police and if there is credible evidence to support the charges. This statute also applied to offenses for which the statute of limitations, previously three years, had already expired. In 1998, a grand jury indicted Stogner for abusing his two daughters between 1955 and 1973. The daughters did not report the abuse until they were adults because of fear of their father and denial about the abuse. Stogner moved to have the complaint against him dismissed as a violation of the *Ex Post Facto* Clause of the U.S. Constitution.

ISSUE: Whether a law that permits resurrection of otherwise time-barred criminal prosecutions, which was enacted after the original time limits had expired, violates the *Ex Post Facto* Clause of the U.S. Constitution.

PROCEDURAL HISTORY: The trial court held that the revival of prosecution that was previously barred by the statute of limitations violated the *Ex Post Facto* Clause. The California Court of Appeal reversed. The Supreme Court affirmed.

HOLDING: "A law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution." *Stogner* at 12447.

JUDGES: Justice Stephen Breyer delivered the opinion of the Court, in which Justices John Paul Stevens, Sandra Day O'Connor, David Souter, and Ruth Bader Ginsburg joined. Justice Anthony Kennedy wrote the dissent, in which Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas joined.

ANALYSIS: The majority reasoned that even if Stogner had escaped prosecution for molesting his daughters, it is unconstitutional to prosecute him after the applicable statute of limitations had expired.

The U.S. Constitution prohibits Congress and the states from enforcing e*x post facto*—after-the-fact—laws. Stogner argued that because the California statute was passed after the statute of limitations for his crime had expired, and it allowed him to be prosecuted for acts he was not liable for until the new law was enacted, it was a violation of the *Ex Post Facto* Clause.

The majority agreed. The Court said that the law fell into the second category of *ex post facto* laws defined 200 years ago by Justice Chase, which includes "[e]very law that aggravates a crime, or makes it greater than it was, when committed." *Id*. at 2450. However, as the dissent points out and the reader might have noticed, allowing prosecution of a crime does not seem to do this.

The majority reasoned that, despite what Justice Chase *wrote*, what he *meant* was to include "punishments, where the party was not, by law, liable to any punishment." *Id*. This was one of several statements from the English Parliament that Chase referenced, but the "majority scarcely refers to the authoritative language Justice Chase used"—his primary definition, which says nothing of the kind. *Id.* at 2465. The Parliament-based interpretation also renders Chase's creation of other categories of *ex post facto* laws completely unnecessary. The dissent also mentions that the California statute is very similar to the suspension of the statute of limitations for civil offenses against minors, which is permissible to "protec[t] minors during the period when they are unable to protect themselves." *Id.* at 2471. Quoting C. Corman, Limitation of Actions § 10.2.1, p. 104 (1991):

> The difference between suspension and reactivation is so slight that it is fictional for the Court to say, in the given context, the new policy somehow alters the magnitude of the crime. … It is the commission of the then-unlawful act that the State now seeks to punish.

> The gravity of the crime is left unchanged by altering a statute of limitations of which the actor was likely not at all aware. *Id.*

The majority was also concerned about the "manifestly unjust and oppressive" retroactive effects this would have on often-confessed child molesters. *Id*. at 2449. This would deprive offenders of "fair warning" and subject them to prosecution after they thought they could discard evidence that would demonstrate their innocence. *Id.* at 2450. The majority did not explain why an innocent person, who would have no reason to expect charges, would keep evidence to demonstrate their innocence of those specific charges.

In addition to disagreement with the majority's interpretation of the definitions of *ex post facto* laws, the dissent expressed concern that the interests of child molesters seemed to be protected above the interests of victims.

When the criminal has taken distinct advantage of the tender years and perilous position of a fearful victim, it is the victim's lasting hurt, not the perpetrator's fictional reliance, that the law should count the higher. The victims whose cause is now before the Court have at last overcome shame and the desire to repress these painful memories. They have reported the crimes so that the violators are brought to justice and harm to others is prevented. The Court now tells the victims their decision to come forward is in vain. *Id*. at 2471.

UNITED STATES V. AMERICAN LIBRARY ASSOCIATION

123 S. Ct. 2297 (2003)

FACTS: Congress provides two forms of funding to help public libraries provide Internet access to their patrons: (1) the E-rate program, which provides a discount for Internet access for qualifying libraries, and (2) the Libraries Services and Technologies Act (LSTA) grants to help libraries pay for computer systems and telecommunications technologies. Congress learned, however, that patrons of all ages were using library Internet access to search for illegal pornography; other patrons were exposed to pornography on the computer screens and at printers. In 1998, Congress enacted the Children's Internet Protection Act (CIPA) to withhold E-rate and LSTA funding from libraries unless the libraries use blocking technology on their computers to prevent patrons from accessing illegal pornographic images. The CIPA permits libraries to unblock a wrongly blocked Web site and to disable the filter for patrons while doing "bona fide research" or "other lawful purpose." 20 U.S.C. § 245(h)(6)(D). The American Library Association (ALA) and the ACLU filed suit on behalf of various library associations, librarians, library patrons and Web site publishers claiming that the CIPA caused libraries to violate the First Amendment rights of library patrons and Internet content providers.

ISSUE: By requiring libraries to use filtering technologies on computers with Internet access to qualify for federal funds, does the Children's Internet Protection Act unconstitutionally inhibit free speech?

PROCEDURAL HISTORY: After a trial, the United States District Court for the Eastern District of Pennsylvania ruled that CIPA was unconstitutional on its face and enjoined

congressional agencies from withholding federal funds to libraries that failed to comply with CIPA's requirements. The District Court reasoned that because Internet use in a public library is for public self-expression, such access was a "public forum" such as a sidewalk or park. *Am. Library Ass'n.,* 123 S. Ct. 2297, 2303 (2003). Therefore, content-based restrictions on information would be subject to strict scrutiny analysis. The District Court held that while the government has a compelling interest "in preventing the dissemination of obscenity, child pornography, or … material harmful to minors," the use of filtering technology was not narrowly tailored to meet that interest. *Id*. at 2303. The CIPA provided for an expedited appeal to the U.S. Supreme Court.

HOLDING: By a vote of 6-3, the Supreme Court reversed the district court and upheld the CIPA. The Court held, "Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Nor does CIPA impose an unconstitutional condition on public libraries." *Id.* at 2309.

JUDGES: Chief Justice William Rehnquist delivered the opinion of the Court, in which Justices Sandra Day O'Connor, Antonin Scalia and Clarence Thomas joined; Justices Anthony Kennedy and Stephen Breyer filed opinions concurring in judgment. Justice John Paul Stevens filed a dissenting opinion. Justice David Souter filed a dissenting opinion in which Justice Ruth Bader Guinsburg joined.

ANALYSIS: CIPA's purpose was to address the problems that unfiltered Internet access had created in public libraries. Patrons of all ages were using library computers with Internet access to view pornography, including illegal child pornography. Children viewed these images, adults engaged in inappropriate and illegal conduct around children, and librarians worked in hostile environments.

Despite these problems, the ALA said that libraries could not be made to use filtering software on their computers because it would amount to censorship when nonpornographic material was mistakenly blocked. This "overblocking" was a major issue in the District Court's decision that CIPA was unconstitutional. *United States v. Am. Library Ass'n*, 123 S. Ct. at 2312.

Writing for the majority, Rehnquist quickly dismissed concerns about overblocking, because the CIPA permits librarians to unblock erroneously blocked Web sites or turn off filters for patrons who are engaged in bona fide research. While opponents claimed that embarrassment would prevent patrons from asking librarians for help, Rehnquist noted that the Constitution does not protect a right to find information embarrassment-free at public libraries.

In his concurrence, Justice Kennedy agreed that the minimal inconvenience caused by overblocking did not make CIPA unconstitutional:

> The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face. *Id*. at 2310.

The ALA also argued that Internet filters in libraries violated the free speech rights of Web site publishers. The Court, however, said that libraries offer resources for educational and research purposes for members of their community, not for Web publishers to have their works seen. "A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak." *Id*. at 2305.

Concurring in the judgment, Justice Breyer proposed a "proper fit" analysis, balancing the harm to speech interests against the justifications for the statute and the available alternatives to see if they were reasonably proportional. *Id*. at 2311. He did express concern that the filters do not perfectly filter only inappropriate materials. However, because there was no clearly superior alternative and because of the statute's exception to allow access to wrongly blocked legitimate Web sites, he concluded CIPA is not a disproportionate response to the government's interest in protecting minors from harmful material and is therefore constitutional.

Justices Stevens, Souter and Ginsburg dissented because they concluded that the "overblocking" of nonpornographic information impermissibly barred free speech. Stevens also noted concerns about "underblocking." *Id*. at 2313. Underblocking refers to the inability of filtering software to block every single pornographic image on the Internet. Because of this, Stevens claimed filtering would not solve the problems occurring in libraries.
As library administrator Jane Hatch said, however, filters "may not be 100 percent, but what's 100 percent effective anyway? Eighty percent is better than zero." Alicia Henrikson, *Library Filtering – Holton Legislator Cheers Supreme Court Ruling*, The Topeka Capital-Journal, June 26, 2003, at A1.

CWA's amicus brief, which was cited in footnote 1. of the Court's opinion, is available at: http://www.cwfa.org/images/content/cipa-brief.pdf

GLOSSARY OF TERMS

ISSUE: The question or questions the Court must answer in order to make a decision.

PROCEDURAL HISTORY: How the case proceeded through the lower courts and what was decided before it arrived at the Supreme Court.

HOLDING: What the Supreme Court ruled in the case.

ANALYSIS: The Court applies the law to the facts to answer the issue. It includes the Court's reasoning for holding as it did. The analysis in this publication also includes comments by the author of the article.

***CERTIORARI*:** The Court's grant of *certiorari* means that it exercised its discretion to review the decision of the court below. When the Court refuses to grant *cert*. in a case, the holding by the court below remains unchanged.

FACIAL CHALLENGE: This means that a party to the lawsuit is arguing that the law at issue is invalid on its face and may not be enforced.

AS APPLIED CHALLENGE: This means that a party to the lawsuit is arguing that the law at issue is unconstitutional as applied to them. Some cases include both facial and as applied challenges.

AFFIRMED: This means that the Court agreed with the ruling by the lower court.

REVERSED: This means that the Court reversed the ruling of the lower court.

CONCUR: A justice agrees with the holding but for a different reason. It can also mean that a justice agrees with the judgment and reasoning but writes separately to make an additional comment.

MAJORITY: Five or more justices agree to the holding in the case.

DISSENT: A justice or justices disagree with the holding and may write a dissenting opinion to express his or her reasons.

REMANDED: This means that the Court sent the case back to the lower court with instructions on how to proceed.

CONTRIBUTING AUTHORS

Janet M. LaRue, Esq., is Chief Counsel at Concerned Women for America and Director of the Legal Studies Department. From 1998-2002, she served as Senior Director of Legal Studies for the Family Research Council. From 1992-1998, she was Senior Counsel for the National Law Center for Children and Families. Prior to that, she was Special Counsel with the Western Center for Law and Religious Freedom. She has also practiced criminal and juvenile law. She received her juris doctor degree, *summa cum laude,* from Trinity International University School of Law, and is a member of the California Bar. She has testified before Congress and numerous state and local legislatures regarding pornography, sexually oriented businesses and child safety bills. She has authored several *amicus curiae* briefs in the U.S. Supreme Court, federal and state appellate courts on numerous constitutional issues. As a nationally recognized expert in pornography law, she has assisted legislators and law enforcement agencies in regulating sexually oriented businesses and prosecuting obscenity and child pornography cases. Two law schools, major newspapers and magazines have published her writings. She recently co-authored a book, titled *Protecting Your Child in an X-Rated World*, released by Tyndale House in April 2002. She appears regularly in the national media, including appearances on NBC's *Today Show*, the CBS *Early Show*, Fox NEWS, ABC News, CNN, MSNBC, CNBC, Court TV and *The O'Reilly Factor*.

Kelley A. Shields attends Georgetown University Law Center in Washington, D.C. At Georgetown, she is a member of the Moot Court team, serves as treasurer for the Christian Legal Society and is a student representative to the Clerkships Committee. She received her bachelor's degree, *summa cum laude* in Economics and Communication, from the University of Kentucky in 2001. She interned with CWA in the Legal Studies Department during Summer 2003 in conjunction with the Blackstone Legal Fellowship of the Alliance Defense Fund.