

# SALT EQUALIZER

Volume 2003, Issue 3

Society of American Law Teachers

August 2003

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## SALT EQUALIZER

The *SALT Equalizer* is a publication of the Society of American Law Teachers and is published quarterly.

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## Co-Presidents' Column

Paula C. Johnson, Syracuse University College of Law, and  
Michael Rooke-Ley, Seattle University School of Law (visiting 2003–04)



Greetings, once again, from your bi-coastal co-presidents—Michael in Eugene, Oregon, and Paula in Syracuse, New York. As we write to you during these first days of August, we find ourselves reflecting on SALT's accomplishments with considerable pride. Yet, as we look ahead, we feel as if we can ill-afford a moment's rest.

All of us are gratified—and enormously relieved—by the Supreme Court's decision in *Grutter v. Bollinger*. There is, of course, no issue more central to the work of SALT than affirmative action in law school admissions. In 1976, SALT filed an amicus brief in *Bakke*, and, a generation later in 2003, an amicus brief in *Grutter*. In addition, so many of you, as SALT members, spoke out in various ways through the media, building momentum as oral arguments drew near. Our half-page ad in The Washington Post was widely-read and well-received, and SALT's press conference and participation in the Washington, D.C., rally on April 1st demonstrated, once again, SALT's commitment to activism beyond the ivory tower. (See commentary on the *Grutter* decision starting on page 7.)

We were also deeply heartened by the Court's decision in *Lawrence v. Texas*. The teaching of—and living with—*Bowers v. Hardwick*, year after year since 1986, has been a personally painful experience for us all, and Justice Kennedy's eloquence lifted a huge burden and provided an occasion for some celebration. As you are well aware, SALT signed on to an amicus brief in *Lawrence*, and SALT members, individually and as part of our committee, have been long-standing leaders in the struggles for equality and justice facing gay and lesbian communities. (See commentary on the *Lawrence* opinion starting on page 2.)

These victories will be short-lived unless we remain vigilant. We know all too well, for instance, that the Bush Administration and its conservative supporters are seeking to avenge these “losses” through nominees to the federal bench, including, perhaps, the Supreme Court itself. Thus, the work of our Judicial Nominations committee, chaired by Bob Dinerstein (American University), is of dire importance. We urge you to join the committee or to offer your expertise on an ad hoc basis. (See news of the committee's work starting on page 25.)

Further, having been provided a veritable blueprint by Justice Scalia in *Grutter*, anti-affirmative action activists are planning the next assaults on diversity and fairness in higher education. Through our monitoring efforts, we must ensure that the Court's recognition of the importance of diversity and equal opportunity in higher education are achieved by our institutions.

*Presidents' Column continued on page 2*



## Presidents' Column:

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Similarly, the backlash against the *Lawrence* opinion and against gains toward greater societal inclusion by the LGBT community must be countered by coalition efforts that recognize the importance of equality and fairness for all persons, irrespective of sexuality.

SALT's work continues on many other fronts, as well. First Monday, October 6th, is not far off, and we ask you to plan

*"[W]e find ourselves reflecting on SALT's accomplishments with considerable pride. Yet, as we look ahead, we feel as if we can ill-afford a moment's rest."*

public interest/social justice-oriented events on your campus. Feel free to contact our First Monday committee chair, Tayyab Mahmud (visiting at Seattle University), for assistance. Also, we are moving ahead with our diversity survey, as an alternative to the poisonous rankings in U.S. News & World Report; with our proposals for alternatives to conventional bar exams; with our critique of the law school admission process; and with our efforts to challenge the Solomon Amendment.

The opportunity for us to work with the SALT membership remains enormously rewarding. As an all-volunteer organization, our continuing effectiveness depends on your willingness to join a committee, offer fund-raising suggestions, or contribute financially. Remember: SALT is the progressive voice in legal education. Your active support ensures that we will be heard.

## Commentary on *Lawrence v. Texas*

### Putting *Lawrence v. Texas* to Work

Marc R. Poirier, Seton Hall University School of Law

*Lawrence v. Texas* is a wonderful and—to me—unexpected victory. It overturns the Texas same-sex only sodomy law, not on a narrow Equal Protection ground as some had predicted, but in a broad holding finding a constitutional privacy right to consensual sexual activity in intimate relations in private locations. By overruling *Bowers v. Hardwick* in the way it does, *Lawrence* removes a tremendous stigma from gays and lesbians throughout the country. Even though sodomy laws were rarely enforced, they were often invoked to brand gays and lesbians as potential criminals in contexts running from adoption to discrimination in employment. The amicus brief in *Lawrence* that SALT signed addressed just this issue of cultural shift as a basis for overturning *Bowers*. *Lawrence* affects the whole country, not just the thirteen states that still had sodomy laws, as a cultural marker of an ongoing change, an increasing acceptance of homosexuality as a normal variant of human sexual and affectional activity.

Many legal, political and social victories over the past few years have brought us to this point. The larger instrument of change here is visibility. Decades of standing up to vicious stereotypes and insisting on fair treatment—at first by a few courageous individuals, often at great personal sacrifice—has shifted cultural norms. A Supreme Court opinion acknowledging this change is extraordinarily important, especially given the

Court's opposite position in *Bowers* just seventeen years ago.

Even in areas that are not doctrinally related, *Lawrence* is likely to serve as an agent of further change.

Leading advocacy organizations like Lambda Legal Defense and Education Fund and the American Civil Liberties Union's Lesbian and Gay Rights Project have already promulgated post-*Lawrence* agendas, seeking to capitalize on its momentum. *Lawrence* is also triggering a vigorous reaction from the religious right. It sees *Lawrence* as a threat to traditional marriage and family structure, and another indication of the decline of morality in our society. Calls have gone out for a federal constitutional amendment to "protect" opposite sex marriage, and for a renewed effort to overturn *Roe v. Wade*. The libertarian right, which opposed the Texas sodomy law on the general principle of limited government, now claims *Lawrence* as its own victory, a different position from that of the religious right, but one also out of alignment with progressive causes.

The *Lawrence* decision on privacy is doctrinally limited in subtle but important ways. The privacy right protected seems to involve sexual activity in a context of binary intimacy, primarily in the home. We could also identify these as "decisional," "relational," and "zonal" privacy interests, following the amicus brief filed on behalf of international human rights groups, with Mary Robinson as the lead plaintiff. One might question whether *Lawrence* is altogether clear about a constitutional right to casual sex (not intimate) or sex involving more than two people (not binary, perhaps not intimate), although it seems likely that *Lawrence* will be read to prohibit criminalizing adult consensual sexual activity that occurs within the walls of the home.

Poirier continued on page 4



## It Ain't Just About Sex

Elvia Arriola, Northern Illinois University College of Law

Right after the Supreme Court decided on June 26, 2003, that my consensual sexual acts as a lesbian aren't the government's business, I asked two friends what they thought of the amazing landmark decision in *Lawrence v. Texas*. One said, "I don't trust it. . . . Someone will just come back with some way of getting at us through different means." Another said it was "wonderful . . . . It'll have a positive impact in other areas of gay people's lives." For those of us who have followed the direction of the law since the devastating blow in *Bowers v. Hardwick*, which rejected the notion of a fundamental right to homosexual sodomy, *Lawrence* comes full circle to the obviously right result. But maybe that result is one that the nation wasn't ready for in 1986, when *Bowers* was decided. I wonder, though, what makes us more ready now? Is it just the end product of a long campaign that had so many mixed results following *Bowers*—from the military's "Don't Ask, Don't Tell" policy, to the recognition of marriage rights by Hawaii, to a backlash with the federal Defense of Marriage Act (DOMA), to a civil union law in Vermont but several mini-state DOMAs, to the ongoing struggle by universities to hang on to their federal funds when they try to keep the homophobic military from interviewing their students? Is it a promise or something to deflect our attention away from more serious threats to our civil liberties (e.g., the PATRIOT Act) raised by the fallout of 9-11?

At a time when the separation of church and state is being continually challenged, this decision affirms the right to say that the government can't tell me what to believe about what's moral or not in sex; it can't tell me whom to love or whom to marry; it must stay out of my bedroom unless what I'm doing isn't consensual and may injure someone who is a minor or who can't consent. Along with the affirmative action decision in *Grutter v. Bollinger*, these decisions tell me the work of the progressive is long, arduous, unpredictable. It gives me a little faith in the system just when I'm tired of grinding my teeth from the latest anti-terrorist measures being announced by the Department of Justice. But I need to tell my friends that the distrust of one and the optimism of the other are both realistic.

*Arriola continued on page 6*

## Commentary on *Lawrence v. Texas*

### Understanding Law's Exclusionary Power

Joan W. Howarth, Boyd School of Law,  
University of Nevada, Las Vegas

My difficulty taking in *Lawrence* taught me something about the exclusionary power of law. Even as I read the breaking newswire story that *Lawrence* had overruled *Bowers*, I had no capacity to believe it. A few minutes later, even as I read Justice Kennedy's repudiation of *Bowers* and cried tears of relief, some very primitive instinct toward self-protection had my brain racing to consider every possible scenario in which this could be an elaborate hoax. This profound and irrational wariness surprised and unsettled me. I had taught *Bowers* countless times, assigned papers on "How *Bowers* changed my life," assigned Michael Hardwick's oral history, shown a Michael Hardwick video in class, and considered myself relentless in refusing to minimize the bigotry and pain of *Bowers*. But I did not understand how much *Bowers* had gotten to me, and how central it has been to my very personal understanding of law's exclusionary power, until I found myself unable to trust that it was really gone. Now I think about *McCleskey v. Kemp*, which accommodated systemic racism in the imposition of the death penalty. *McCleskey* and *Bowers* were both landmark 5-4 decisions in which Justice Powell provided the swing vote and then reportedly expressed doubts after leaving the bench. I wonder what it will take to overrule *McCleskey*, and I understand more deeply how powerful the repudiation of *McCleskey* could be.

### A Bottom Line Victory

Pat Cain, University of Iowa College of Law

Kennedy's decision in *Lawrence* explicitly overruled *Bowers v. Hardwick*. I view that as a major victory. While Kennedy was not clear about the exact content of the "liberty" interest at stake in the case (e.g., he does not call it a right to privacy), he was perfectly clear that criminal laws banning intimate sexual relationships between consenting adults in private are unconstitutional. That is the bottom line. This opinion is the final proof that those GLB rights activists who supported Kennedy's nomination so many years ago had the right instincts.

### How Far We've Come

Art Leonard, New York Law School

I am particularly struck by the ironic justice of this historic opinion being written by Justice Anthony M. Kennedy, Jr., who was appointed to the seat vacated by Lewis F. Powell, Jr., who cast the deciding vote against us in *Bowers v. Hardwick* 17 years ago. That everybody involved with the case expected a victory—the only things in doubt being which theory the Court would use and how big the majority would be—shows how far the lesbian and gay rights movement has come in the intervening years. On to bigger things!!!



## Commentary on *Lawrence v. Texas*

Poirier:

▼ *continued from page 2*

*Lawrence* does not answer clearly whether there is a right to sexual activity in places not quite so private, e.g., in a car, at a music festival, in the woods, on the beach, in a sex club (not physically as private as a home, not intimate, perhaps not binary). The idea of semi-private sexual activity has not achieved the same cultural acceptance as the intimate sex in the home protected by *Lawrence*, and probably makes most Americans uncomfortable. It is of concern nevertheless because most arrests of gay men for sexual activity are brought under public indecency and lewd conduct statutes, and these arrests are likely to continue after *Lawrence*. Among the other issues unaddressed by *Lawrence* are the rights of transgendered/transsexual folk (no sexual activity, no intimacy, not limited to home).

Justice Scalia's dissent, like the conservative positions it reflects, claims that if a state is not allowed to make laws based on its own moral determinations, then laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity will also fall. Elsewhere he adds child pornography to the list. Much of this is hot air. While masturbation and fornication among consenting adults in private are now probably constitutionally protected, the other categories may or may not be reached by *Lawrence*, for reasons varying from lack of intimacy (prostitution is commercial, therefore arguably not intimate) to governmental definition of a conferred status (bigamy laws protect marriage) to

police power authority to prohibit activities deemed to be harmful to the community or to individuals. The distinction between harm and mere moral opprobrium is not always certain, though, and is sure to be the subject of future cases and law review articles.

Doctrinally, it is interesting that Justice Kennedy's majority opinion in *Lawrence* rejects a view of Due Process liberty rights as rooted in long tradition.

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*"Lawrence [is] a cultural marker of an ongoing change, an increasing acceptance of homosexuality as a normal variant of human sexual and affectional activity. [But] SALT and its members need to keep their eyes on the political fallout..."*

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Instead he places emphasis on the traditions of the last fifty years. *Bowers* was wrong when decided, he writes, because it should have noted an emerging recognition that liberty includes protection for adults in deciding how to conduct their activities in their private lives concerning sex. The *Grutter v. Bollinger* majority also recognizes that affirmative action in some forms, while appropriate now, may not be appropriate in twenty-five more years. (See *Grutter* commentary on pages 7–15.) Are we looking at a Court that is willing to be explicit about viewing fundamental constitutional issues through the lens of pragmatism and

evolution of social norms? *Lawrence* also uses human rights decisions from Europe to make its argument about cultural shift, an interesting development that is anathema to conservative members of the Court. Similarly, Justice Ginsburg's concurrence in *Grutter* leads off with a reference to international norms for affirmative action. The parallel in arguments is interesting, especially as reference to international practices or precedents is also anathema to some conservative members of the Court.

The *Lawrence* decision does not address discrimination law directly, although as discussed above it does good work by showing that homosexuality has become more mainstream as a part of American culture in the last fifty years. On discrimination issues, we may see a somewhat ironic flip-flop on the status-conduct argument. After *Bowers* and before *Lawrence*, GLB advocates in various contexts argued that even though same sex sexual activity could be criminalized per *Bowers*, just because an individual self-identified as gay should not permit anyone to assume that s/he was actually engaging in or likely to engage in sexual activity. A distinction was thus drawn between status and conduct. After *Lawrence*, we may see a strategy that seeks to link homosexual status explicitly to sexual conduct. The argument would be that discriminating against GLB individuals is indirectly burdening a protected constitutional right to private sexual activity. Thus, GLB people may seek to be presumed to engage in sexual activity. Presumed conduct would protect openly gay status.

The issue of gay men and lesbians in the military may or may not be affected by the *Lawrence* decision. As of this year, the tenth year of the "Don't Ask, Don't Tell" policy, more than 9000 GLBT servicemembers have been processed out of the military, according to Servicemembers Legal Defense Network, an advocacy group



that does work in this area. A case has already been filed relying on *Lawrence* to challenge the expulsion of a career servicemember on the basis of his homosexuality. But there is a traditional judicial deference to military decisions, and national security may well serve as a trump argument at this particular moment in history. Again, visibility and cultural acceptance in other contexts will probably eventually erode military opposition to openly GLBT people in the military, but it may take another generation, until the career military personnel who were teenagers in the 1980s become commanding officers.

Justice O'Connor wrote a concurring opinion in *Lawrence* based on Equal Protection doctrine. In her view, a state could prohibit sodomy if it wished, but there was no evident reason for Texas to prohibit sodomy between same sex couples and yet allow it between opposite sex couples. O'Connor's opinion holds that mere moral disapproval, like animus, is insufficient to satisfy rational basis review. She thus applies the "rational basis with bite" approach of *Romer v. Evans*. It is worth noting that the day after *Lawrence* came down, the Court granted certiorari and then vacated and remanded the decision in *Limon v. Kansas*, a case in which state law treated consensual sex between same sex teenagers much more harshly than between consenting opposite sex teenagers. The state court opinion in *Limon* cited *Bowers*, but the constitutional challenge was an Equal Protection challenge. It is easy to read too much into a GVR order, but perhaps this is a signal that the lower courts must take seriously the Equal Protection argument not addressed by the majority in *Lawrence*. Equal Protection arguments are likely to be crucial for status issues like marriage/domestic partnership/civil union, which are not linked directly to the privacy right

articulated in *Lawrence*.

The classic question is "What is to be done?" SALT joined one of the amicus briefs in *Lawrence*, and SALT's activity on judicial nominations has included opposition to candidates with

*"We need to consider how SALT can best facilitate the often local activism for change that makes possible larger victories such as Lawrence."*

terrible records on GLBT issues. Generally speaking, though, SALT has typically focused its organizational energies on legal education and legal institutions. Much SALT work in the area of GLBT issues has addressed the enforcement of law school nondiscrimination policies in recruiting, specifically concerning on campus recruiting by the military. That is to say that SALT has focused on law school implementation of the AALS nondiscrimination policy and the challenges posed by the Solomon Amendment. Analysis of *Lawrence* and attention to the follow-up programs being developed in light of *Lawrence* should be part of any law school's GLBT presence, and could fit within the amelioration obligation. Within the specific confines of the law school, GLBT advocacy sometimes finds itself in some conflict with other civil rights work, and SALT would do well to explore how to address coalition work here.

Although Solomon Amendment work is important, it sometimes has the feel of the tangential, a symbolic battle in which the military seeks to commandeer the

## Commentary on *Lawrence v. Texas*

resources of law schools against their will. Litigation that challenges the Solomon Amendment seems likely, and will bring the First Amendment issues to the fore, making the issue seem far less tangential. And a reversal of the military's "Don't ask, don't tell" policy would make the whole issue moot.

More broadly, SALT and its members need to keep their eyes on the political

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## A Letter from Sylvia Law

*Following is the text of a letter sent by New York University School of Law Professor Sylvia A. Law to United States Supreme Court Associate Justice Anthony Kennedy on July 1, 2003.*

Dear Justice Kennedy:

Thank you for your magnificent decision and opinion in *Lawrence v. Texas*.

Your contribution to the complex task of defining the liberty protected by the constitution is as sage and eloquent as any Supreme Court opinion since Justice Harlan's dissent in *Poe v. Ullman*.

Your elucidation of history and its role in constitutional decision making is informed and wise.

Most important, your opinion reflects profound empathy and respect for human dignity.

You will no doubt receive many critical letters. I hope not as many or as nasty as those directed to Justice Blackmun in response to *Roe*. But many of us are deeply grateful to you.

Sincerely,  
Sylvia A. Law



## Commentary on *Lawrence v. Texas*

Arriola:

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When the one who said “wonderful” prefaced her commentary with her understanding of the outrageous facts that led to the appeal—the police barged into the home of two men engaged in sex whose neighbor had made a false 911 call—I briefly educated her on the reality that such incidents occur frequently in the homes and neighborhoods of those who are vulnerable to police abuse because of their class and race, a reality she doesn’t have to think of often as a white lesbian. I’d have to agree with my distrusting friend that *Lawrence* is wonderful but

*“Is Lawrence a promise or something to deflect our attention away from more serious threats to our civil liberties...?”*

it’s only an important step forward and it doesn’t take care of potential backlashes nor does it guarantee against other people abusing the right of privacy in the name of anti-terrorism or other conduct that isn’t queer sex. If *Lawrence* is the *Brown* case for sexual minorities then there is much to applaud, but hard work must follow for the sexual minority community to feel it has won the campaign for its citizenship rights.

We can hope that *Lawrence* will have a domino effect, but how and for whom? I think of how *Lawrence* is a coup for queer sex, but

what does it really do for my friend who, as I write, is recovering from transsexual reconstructive surgery? She suffers mistreatment not necessarily because of her choice in love but just for being “too queer” as a transgender. *Lawrence* covers the issue of sex behind closed doors, but does it really handle the issue of identity-based discrimination, i.e., the impact of sheer prejudice? One would hope that is what Kennedy meant in stating that the penalty under the Texas law was minute, but the stigma is harsh. It’s the impact of being labeled a deviant by one’s society or being treated as a second class citizen just for being different from any dominant majority. O’Connor covered this issue to some extent in focusing on Texas’ not having a problem with sodomy *per se* but only with gay sodomy which, she felt, made the statute illegal on equal protection grounds.

Yet my mixed reactions aside, this is a satisfying result to those of us who have labored as scholars, lawyers and expert witnesses for years to challenge the unfair stereotypes that have led us to lose jobs, homes, child custody, and essential medical treatment. Kennedy’s majority opinion rejected the logic of *Bowers* and its screaming homophobic opinions. Burger’s opinion was stunning then as Scalia’s dissent in *Lawrence* amazes one now. To him it’s about a culture war. I don’t think so. It’s more than that. It’s about those of us who fundamentally disagree with Scalia’s view that this isn’t about liberty rights, or that a life partner choice and the privacy of our bedroom fall into the same category of governmental concerns as making it illegal to work more than 60 hours in a bakery! Scalia may see this opinion as an ushering in of constitutional disorder. I welcome it as a necessary chaos to balance out recent government threats to the Bill of Rights.

Poirier:

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fallout from *Lawrence*. The religious right will push for an ultraconservative Supreme Court appointment and a constitutional amendment around opposite sex marriage. Progressive law professors will need to work in coalition with reproductive rights groups as well as GLBT advocacy groups to counter these conservative demands. And of course, much work remains to be done on the GLBT front: marriage (or perhaps equivalents); adoption and custody; antidiscrimination work, including the military issue, which I see as especially important because it undermines the gender stereotyping of the military; transsexual/transgender issues; issues in schools, including curriculum, the presence of Gay/Straight clubs, and anti-bullying policies. I would also include an expanded scope of privacy protection for some more stigmatized types of sexual activity. Much of this work is at the local or state level. Much of it is not even legal but is about addressing local practices and policies in private institutions like corporations, universities and churches. Visibility is, as ever, at the center of the process of change here. Both the ACLU and Lambda Legal offer websites addressing ways in which individuals can get involved to effect change at the local level. SALT’s hosting of a Solomon Amendment website certainly fits within this approach to facilitating local political action and change. SALT’s members are a busy lot, sometimes even—dare I say—over-committed. We need to consider how SALT can best facilitate the often local activism for change that makes possible larger victories such as *Lawrence*. Such activism on the local level is also what will translate the promise of decisions such as *Lawrence* into further advances in civil rights for us all.



## Rejoice and Refuel: Reflections on *Grutter*

Emily M.S. Houh, University of Cincinnati College of Law

When I first got word of the Supreme Court's ruling in *Grutter v. Bollinger* on that June day, I literally jumped out of my chair in my office, squealed with delight, and began running and jumping down the hallways of our faculty floor, yelling, "They ruled in favor of Michigan! The policy's been upheld! WOO-HOO!" Looking back on it now, perhaps this wasn't the most appropriate way to respond, given that I had been in residence at my new school for only a couple of weeks. I probably should have just calmly e-mailed our faculty listserv about Michigan's victory, as several of my more seasoned colleagues had. But then, it felt really good to be exuberant! When years of individual and collective anxiety, anger, hard work, and coalition building pay off in such a concrete way, why not leap for joy? Never mind that I hadn't yet read the opinion; at that moment, I was ecstatic for one reason alone: We had won!

I say "we" not only as a member of a progressive community that supports affirmative action and, more broadly, the dismantling of white supremacy and sexual subordination; I say "we" also because I am a graduate of the University of Michigan Law School ('96). I graduated a couple years before Ms. Grutter, et al., filed the lawsuit, and had participated in the Law School's Minority Affairs Program ("MAP") as a first-year student. Within our cohort,<sup>1</sup> rumors had always circulated about irate majority students who claimed that we had "exclusive" access to imagined "special perks," as well as of disgruntled majority applicants whose places we had "stolen." As we studied *Bakke*<sup>2</sup> in our constitutional law classes, we wondered collectively if and when the ugly rumors of impending lawsuits challenging the constitutionality of the MAP program and the admissions policy would ever materialize. Only a few years later, of course, the rumors of the admissions lawsuit proved true, and the *Grutter* and *Gratz* complaints were filed in the U.S. District Court for the Eastern District of Michigan, where I was clerking at the time. My stake in the outcome of the Michigan cases, however, grew not only out of a general commitment to social equality and a temporal and physical proximity to the litigation, but also out of my experiences as a law student at Michigan.

During those three years the administration at Michigan saw a great deal of organizing by progressive students: We were African-American, Latino/a, Asian Pacific-American, American Indian, lesbian, gay, and bisexual, straight, and white. We joined and participated with a vengeance in public interest and reading groups, organized conferences and panels, started a journal, and organized to demand curricular changes and diversity in faculty hiring. We fought about strategies, programs, and the ultimate goals of our organizing. We pulled all-nighters doing work that did not involve preparing for class, but taught us to be good strategists and activists. We missed classes in order to meet what we believed were more important deadlines. We did the hard work that is always involved in good coalition activism, and were rewarded with some positive and permanent changes to the institution, incredible and lasting friendships, and a heartfelt sense of collective empowerment and purpose. I am certain that my classmates from Michigan are still driven in their practice, teaching, and writing by the same principles and passions that drove us in law school. Without one another—that is, if the student body had not been as diverse as it had been at the time—I'm not sure where we'd all be or what we'd be doing now. Would we be (even more) jaded and embittered (than we are) about our law school experiences? Would we be burned out by our practice, whether public interest or big firm? Would we have stopped feeling a sense of

## Commentary on *Grutter v. Bollinger*

### Jam Tomorrow and Jam Yesterday:<sup>1</sup> Reflections on *Grutter*, *Gratz*, and the Future of Affirmative Action<sup>2</sup>

SALT Co-President Paula C. Johnson,  
Syracuse University College of Law

When the Supreme Court issued the intensely anticipated decisions in the University of Michigan cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*, many of us who were wary of the Court's position on affirmative action found much to applaud in the Court's opinions. For the first time since *Regents of Univ. of Calif. v. Bakke*, in 1978, the U.S. Supreme Court reaffirmed the constitutionality of race-conscious admissions in higher educational programs. In its ruling, the Court in *Grutter* (5-4) left no doubt that it adopted Justice Powell's pivotal opinion in *Bakke*, in which diversity in higher education was found to constitute a compelling state interest. As Justice O'Connor wrote, "[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."

Moreover, the Court issued an unequivocal pronouncement on the importance of racial and ethnic diversity in higher education and to the society at large. In this regard, Justice O'Connor stated in *Grutter*, "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." Such strong recognition of the governmental interest in racial and ethnic diversity is a salutary development in the

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*Jam Tomorrow continued on page 11*



## Commentary on *Grutter v. Bollinger*

### Reflections:

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gratitude for and pride in the work of those who came before and after us? Would we have been sapped of the energy and long-term commitment required to engage in social justice activism? A loss in *Grutter* would have meant not only a major setback in the struggle toward sociopolitical equality and justice; it would have meant personal defeat, in the deepest sense. Perhaps that is why I couldn't refrain from running the hallways on that June day.

\* \* \*

Yet, looking back on those law school experiences, I can't help but wonder whether we could have done better. After all, although we had some success, Michigan's very large faculty still includes very few tenured or tenure-track faculty of color, and every year student groups working together at Michigan solicit alumni support as they diligently continue to fight for faculty and curricular diversity. As a Michigan alum, it is deeply satisfying to know that in part because of the *Grutter* decision, student activism will continue to flourish at the University of Michigan Law School, even where this most certainly will translate into students continuing to give hell to the administration and faculty for their own homogeneity. The best example of student activism at Michigan, of course, can be found simply by looking to the *Grutter* litigation itself. Fortunately for all of us, the student intervenors in *Grutter* had the courage to stake their (and our) claims in the litigation, which the Sixth Circuit Court of Appeals permitted, following the district court's initial denial of their motion to intervene. The student intervenors included Michigan

law students, undergraduate students from colleges around the country intending to apply to the Law School, and high school students from various public schools in the city of Detroit. Having grown up in the Detroit suburbs, I can attest to the chronic residential and educational segregation and inequality that continue to plague not only the metropolitan Detroit area. At trial, the student intervenors presented thorough and compelling evidence and testimony about the realities and impact of this segregation and inequality, thus bringing to light what was *really* at stake in a material

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*"We should...continue to feel and express exuberance over the victory won in Grutter, but as we do so, we must be sure to re-fuel for the many battles to come and plan for a time when we can finally go on the offensive."*

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sense for so many: the struggle for racial and educational equality and the importance of integration in that struggle. Proudly, SALT, in an *amicus* brief filed in support of Michigan,<sup>3</sup> also made compelling arguments to the Supreme Court about the effects of residential and educational segregation and inequality in metropolitan Detroit; Justice Ginsburg noted these effects in her concurring opinion.<sup>4</sup> And while the student intervenors were neither credited nor mentioned by the Supreme Court for the extraordinary evidence they placed in the record—evidence that, in part, made the Court's ruling possible given its composition—the spirit of their arguments seems to have

found its way into the majority and concurring opinions.

Indeed, as is probably true for many of us, when I first picked up Justice O'Connor's majority opinion in *Grutter*, I had braced myself for disappointing equivocality, but found myself pleasantly surprised. Although there is certainly room for critique of the opinion and, more broadly, the way in which the "liberal defense of affirmative action"<sup>5</sup> dominated Michigan's arguments and those of many of its supporters, I was struck by sentences in the opinion such as: "Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."<sup>6</sup> Could it be that this really was an O'Connor opinion? Had she at last gained some sense and reason in matters relating to affirmative action? As I read on, it appeared that she had, at least in part.

In distinguishing this case from her other (disastrous) affirmative action opinions, for example, O'Connor had taken to heart the "important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," the public university's "special niche in our constitutional tradition," and the real significance of a public university's First Amendment right to "educational autonomy."<sup>7</sup> It was a relief to know that the Court seemed to understand what academic freedom is actually about: a university's freedom to make its own decisions concerning its goals, programs, and "the selection of its student body."<sup>8</sup> Emphasizing this special educational context, Justice O'Connor, joined by Justices Stevens, Souter, Ginsburg, and Breyer, resolved the controversial issue left



open in *Bakke* of whether diversity is a compelling state interest in the context of public higher education by holding resoundingly that it is.<sup>9</sup> Subsequently, the Court upheld the Law School's admissions policy—which is based on the assemblage of a diverse student body that includes a “critical mass” of students of color—as being narrowly tailored to serve this compelling state interest, and rejected Ms. Grutter's argument that the Law School's use of the “critical mass” concept constituted a functional quota.<sup>10</sup> In so doing, O'Connor considered the “real” and “substantial” educational benefits flowing from a diverse student body. She noted in particular that:

[T]he Law School's admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” . . .

[N]umerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, culture, ideas, and viewpoints. . . .

This court has long recognized that “education . . . is the very foundation of good citizenship.” For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of

one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly opened to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.<sup>11</sup>

While this language is astonishing in some ways, it is not in others. The Court, for example, failed to acknowledge the “not theoretical but real” disparities between whites and people of color in their/our “effective participation . . . in civic life,” which disparities are reflected most significantly in the socioeconomic and political disempowerment and disenfranchisement of communities of color in the United States. Moreover, O'Connor's reference to the United States' economic success in the global marketplace and that success's dependence on diversity (arguments that were made in the *amicus* brief filed in support of the Law School by General Motors and other large, likeminded corporations<sup>12</sup>) stirs some feelings of unease.<sup>13</sup> While the economic and business justifications for diversity might be compelling to many, justifications more firmly and explicitly rooted in principles embodied by notions of substantive equality and anti-subordination struggle would have been even more so.

And what are we to make of the Court's ruling that the Law School's policy of admitting and enrolling a “critical mass” of students of color is a narrowly tailored means by which to achieve the compelling state interest of diversity? On the one hand, Michigan's implementation of the critical

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mass admissions policy can be seen as anti-essentialism theory in practice. Although this was something that Ms. Grutter's lawyers and the district court never quite got a handle on, O'Connor understood the fundamentals of anti-essentialism (though not to a radical extent), even if she did not use the language of critical race feminists:

The Law School does not premise its need for critical mass on “any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. . . .

[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races.<sup>14</sup>

Michigan's reliance on the critical mass concept was well placed not only because it won O'Connor's swing vote, but also because it compelled the Court to concede that in our society today, race still

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### Reflections:

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matters.

On the other hand, the “critical mass” concept did not compel the Court (for it was not designed for this purpose) to reconsider in any meaningful way its neo-conservative dream of the “colorblind society.”<sup>15</sup> Just as troubling are the presumptions underlying the critical mass concept that minority students are valuable first and foremost for the educational benefits they will confer on their majority classmates, and that they have an obligation to confer those benefits in the first place. While it is true that all of us benefit from the breaking down of stereotypes, students of color are far more susceptible to being typed in specific and particularly negative ways by their peers, teachers, and potential employers than are majority students; consequently, they must do more to “diminish the force of such stereotypes” than their majority counterparts. Analogously, and for a long time now, feminists of color engaged in largely white feminist movements have expressed their/our frustration over having to educate white feminists about race, as well as over the expectation that they/we will do so. Is this analogous burden in the law school context a fair one to place on students of color, whether or not they are part of a critical mass? And how will the critical mass theory of admissions affect the future of affirmative action in the educational context? Will we ever be able to get beyond the critical mass, assuming that we want to? The Court says that we have twenty-five years to figure that out. Although, according to Supreme Court jurisprudence, affirmative action programs are to be temporary remedies,<sup>16</sup> it is not clear why O’Connor chose the number

twenty-five, particularly given how slowly we have progressed in the twenty-five years since *Bakke*.

\* \* \*

Ironically, even though Michigan—with the support of scores of other law schools, colleges, and universities<sup>17</sup>—fought and won (for now) the good fight to preserve affirmative action in the context of admissions, it appears that neither the Law School nor most of its peer institutions have been quite as committed to that fight in the context of faculty hiring . . . but that is a topic for another time and forum. Other affirmative action battles continue to loom large before us. In the wake of *Grutter*, for example, University of California Regent Ward Connerly has “joked” (and thus, we should take him quite seriously) that he will bring his anti-affirmative action ballot initiative to Michigan and other states, and our opponents have already committed themselves to bringing new challenges to affirmative action policies that do comply with *Grutter*. On an even more potentially devastating front, Connerly is also behind Proposition 54 in California, which proposes a state constitutional amendment, officially titled the Classification by Race, Ethnicity, Color, or National Origin initiative (also known as, in the clever rhetoric of its proponents, the Racial Privacy Initiative), which would bar state and local agencies from collecting, compiling, or using information about race and ethnicity.<sup>18</sup> We can well imagine the nightmarish consequences of such an initiative passing in California,<sup>19</sup> where so many conservative movements seem to find their legs before going national. And then, of course, there is global war and occupation, which I cannot even begin to discuss in this commentary, for fear of trivializing and oversimplifying the devastating and far-reaching effects of what may turn into a new era of American imperialism. Here, I simply echo Mari Matsuda’s call to make the linkages—in

our teaching, writing, practice, and activism—between war, occupation, and our domestic civil rights struggles. All of this gloom and doom and the accompanying call for perseverance is not to say that we should not continue to feel and express exuberance over the victory won in *Grutter*, but as we do so, we must be sure to re-fuel for the many battles to come and plan for a time when we can finally go on the offensive.

### Endnotes:

<sup>1</sup> This cohort included several classmates who went on to become law professors, such as Guy Uriel-Charles of the University of Minnesota, Jeannine Bell of Indiana University-Bloomington, and Luis Fuentes-Rowher, also of IU-Bloomington.

<sup>2</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>3</sup> The SALT *amicus* brief can be accessed on the SALT website at <http://saltlaw.org/gruttersaltbrief.pdf>, or on the University of Michigan website at [http://www.umich.edu/~urel/admissions/legal/gru\\_amicus-ussc/um/SALT-gru.pdf](http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/SALT-gru.pdf).

<sup>4</sup> *Grutter v. Bollinger*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 2325, 2348 (2003) (Ginsburg, J., concurring) (citing to statistics relating to educational segregation and stating: “[S]chools in predominantly minority communities lag far behind others measured by the educational resources available to them. However strong the public’s desire for improved education systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.” (citations omitted)).

<sup>5</sup> Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001).

<sup>6</sup> *Grutter*, 123 S. Ct. at 2338 (citations omitted).

<sup>7</sup> *Id.* at 2339.

<sup>8</sup> *Id.*

<sup>9</sup> “Today, we hold that the Law School



has a compelling state interest in attaining a diverse student body." *Id.*

<sup>10</sup> *Id.* at 2343.

<sup>11</sup> *Id.* at 2339-41.

<sup>12</sup> A link to the *amicus* brief filed by GM, et al., in support of the Law School can be accessed at [http://www.umich.edu/~urel/admissions/legal/gru\\_amicus-ussc/um/GM-both.pdf](http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/GM-both.pdf).

<sup>13</sup> Thanks to Neil Gotanda for his insightful observations concerning this point, which were posted during a lively discussion of the *Grutter* case that took place on the AALS Minority Lawprofs Listserv shortly after the Court had issued its decision.

<sup>14</sup> *Grutter*, 123 S. Ct. at 2341, 2343.

<sup>15</sup> *Id.* at 2350-65 (Thomas, J., dissenting); see, e.g., *City of Richmond v. Croson*, 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring).

<sup>16</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 510 (1979) (Powell, J., concurring); *United States v. Paradise*, 480 U.S. 149, 171 (1987).

<sup>17</sup> For a complete listing of and links to *amicus* briefs filed in support of the Law School in the *Grutter* case, including several briefs filed on behalf of no fewer than 60 colleges, universities, and law schools, see [http://www.umich.edu/~urel/admissions/legal/gru\\_amicus-ussc/um.html](http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html).

<sup>18</sup> For more information on Proposition 54, see the Coalition for an Informed California website (<http://www.informedcalifornia.org/facts.shtml>) and the Californians for Justice Education Fund website ([http://www.caljustice.org/issues\\_elections.shtml](http://www.caljustice.org/issues_elections.shtml)).

<sup>19</sup> For example, according to the Californians for Justice Education Fund, passage of CRECNO will "[e]ndanger the health and safety of all communities; [h]amper . . . efforts to fight the spread of disease; [u]ndermine school reform and educational equity; [and] [a]llow racial profiling to continue." [http://www.caljustice.org/issues\\_elections.shtml](http://www.caljustice.org/issues_elections.shtml).

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ongoing struggle for inclusion throughout American society, including in institutions of higher learning.

Nevertheless, there are questions and areas of concern raised by the Court's opinion which may impact the future of affirmative action and the goal to end racism in American society. These areas are discussed below.

1. First, as an overarching matter, the Court limited the debate on affirmative action to the diversity rationale. This is understandable, of course, as this was the sole basis upon which the University of Michigan justified its admissions programs. The University based its defense on the prerogative of colleges and universities to determine the manner in which the educational mission was accomplished. The exercise of this prerogative included admissions decisions designed to achieve a highly qualified and diverse student body population for the individual and collective educational enterprise. Justice O'Connor accepted this rationale without reservation, and found no contradiction between the University's goal of academic excellence and racial and ethnic diversity. She stated, "[T]he Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified."

Yet, by giving scant attention to the social inequities that generate the need for affirmative action programs in the first instance, the Court virtually absolves governmental and other societal institutions of the responsibility to eradicate racial and economic injustice at the heart

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of disparate and discriminatory treatment in education and throughout American society in a systematic way. Justice O'Connor's recognition of these underlying issues is brief. Finding that a "critical mass" of students of color is not tantamount to a quota system, she notes in *Grutter*:

[D]iminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.

She also observes that racial inequality may account for disparate educational and societal experiences between students of color and white students, noting that "[B]y virtue of our Nation's struggle with racial inequality, [minority students] are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences." However, as the *amicus* brief filed by the Society of American Law Teachers (and briefs filed by intervenors on behalf of students of color) argued, such racial justice concerns warranted fuller direct attention by the Court. As SALT demonstrated in our brief, deliberate governmental policies in the State of Michigan led to residential segregation, discrimination in primary, secondary and higher education, and

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employment discrimination. In addition, the University's reliance on the LSAT, with its cultural, gender, and economic biases, had a disparate impact on minority students seeking admission to the state university. For these reasons, SALT urged the Court to incorporate these salient arguments regarding racial disparity and injustice into its decision.

In large measure, such concerns were ignored, with the notable exception of Justice Ginsburg's concurring opinion. Where Justice O'Connor is indirect, Justice Ginsburg is straightforward:

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. . . . As to public education, data for the years 2000-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. . . . And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. However strong the public's desire for improved education systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.

Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions.

The general absence of the discrimination claims in the Court's opinion helps to further embed factors such as geographical and residential location, status as offspring of alumni, racially segregated and under-resourced secondary schools, availability (or lack thereof) of advanced placement courses, and over-reliance on standardized testing, as non-neutral racially disparate determinants of admission to institutions of higher learning. Inevitably, these issues will be raised in future considerations of affirmative action, so long as disproportionate poverty levels within Native American, Latina/o, African-American, and several Asian-American communities persist. For instance, the Children's Defense Fund (CDF) recently reported that "the number of extremely poor black children is now at its highest level in the 23 years for which such data exist." CDF also noted that extreme poverty has deepened since the implementation of welfare to work requirements enacted in 1996 and that "fewer and fewer otherwise extremely poor children of all races receive cash public assistance. A growing number have no assistance, despite their extreme poverty."

Obviously, high poverty rates within communities of color will have a deleterious impact on learning opportunities at all educational levels. While the Court declined to formally address racial discrimination claims in *Grutter* and *Gratz*, these disparities remain at the heart of why affirmative action is necessary, and why diverse racial and ethnic perspectives are key to understanding, shaping and implementing American law and policy.

2. Another area of concern lies in the primary basis for the split opinions in *Grutter* and *Gratz*, namely the constitutionality of the specific admissions policies in the law school and the undergraduate program. By a 5-4 margin, the Court determined that the admissions policy by the University of Michigan Law School,

which considers race and ethnicity in a nuanced manner, was constitutionally acceptable. As such, race-consciousness is permissible as long as it is conducted in a holistic, nuanced manner, in which the qualifications and attributes of each applicant is compared against those of other individual applicants. However, by a 6-3 margin, with Justice O'Connor joining Chief Justice Rehnquist's majority opinion, the Court found that the University of Michigan undergraduate program's 150 point system, in which 20 points were assigned to minority applicants, was not narrowly tailored and thereby violated the Equal Protection Clause. In this regard, the Court found that the undergraduate policy placed too much emphasis on race in an inflexible, determinative way.

Upon closer consideration, however, it is difficult to find a convincing basis for the Court's distinction between the program upheld in the law school, and that struck down in the undergraduate program. Hence the distinction between a policy that is constitutionally acceptable and that which is not seems to be the difference between the oblique and the obvious consideration of race in university admissions. As Justices Souter and Ginsburg noted in separate dissents in *Gratz*, the undergraduate program contained an objective scale that adhered to the racial "plus factor" system that Justice Powell approved in *Bakke*. By assigning a range of point values to several hard and soft admissions criteria, individual assessments of candidates was conducted and admission was not guaranteed on the basis of race. Thus, it is ironic that the Court rejected the point system in *Gratz*, as the University sought an objective and flexible approach to the admissions decision.

What is particularly troubling about the Court's distinction, however, is the preference for vague consideration of race in admissions, when the Court has



acknowledged the significance of race in American life and educational opportunity. The Court's disapproval of the undergraduate program's clear approach to considering race and other relevant attributes in the admissions decision will make it more difficult to deal with race and racial disparity forthrightly. In contrast, in upholding the law school's policy, the Court perpetuates the minimization and obscure consideration of race and ethnicity in areas where it matters most. This lack of transparency in dealing with racial issues seems to reflect the American public's continual denial of the salience of such matters. Thus, while public opinion polls by Pew, Cornell University and others reveal that a substantial majority of the American public supports affirmative action in theory, many (primarily whites) oppose specific programs that would ensure its effectiveness.

For this reason, the Court's opinion in *Grutter*, while a victory for the recognition of racial and ethnic diversity in higher education, may have the counterproductive effect of upholding the principle of affirmative action while allowing only minimal consideration of race and ethnicity in university admissions. This unfortunate result would serve to further inculcate the underlying racial discrimination that makes affirmative action necessary, especially for the lack of attention to matters of race.

3. In light of the Court's reluctance to expressly acknowledge the persistence of racism and inequity in American social institutions, perhaps the most troubling aspect of the Court's decision in *Grutter* is Justice O'Connor's ostensible establishment of an endpoint for affirmative action in twenty-five years. She stated in the opinion, "We expect that 25 years from now the use of racial preferences will no longer be necessary to further the interest approved today." In a subsequent interview

in the *Chicago Tribune*, Justice O'Connor clarified that her mention of the twenty-five year period was an expression of hope, not a firm deadline. However, opponents of affirmative action have seized upon this time-frame as a constitutional line in the sand.

Justice O'Connor's expressed desire for an end to affirmative action within a generation is consistent with her philosophy of color-blind constitutional analysis and her wish for a nation in which racial and ethnic distinctions no longer exist. As her previous opinions on affirmative action and voting rights indicate, she views continued recognition of race and ethnicity in law as not per se impermissible, but as divisive forces in American society. The erasure of racial, ethnic, and cultural uniqueness is a peculiar aspiration, in my view, and one that ultimately would deprive the nation of the strength, acumen, creativity, and resourcefulness of people from diverse backgrounds who are Americans. Thus, I believe that Justice O'Connor's insistence on a color-blind society is not constitutionally required, nor socially desirable.

4. While advocating a color-blind society, Justice O'Connor nevertheless retains a degree of realism upon recognizing the significance of race and ethnicity in American society and by extension in constitutional analysis. However, her conservative brethren on the Court would reject any attention to race by government as wholly impermissible and violative of the Fourteenth Amendment. In this regard, Justice Thomas's dissent in *Grutter* warrants particular discussion. Justices O'Connor and Thomas share the belief in a color-blind America, albeit from different vantage points. Justice O'Connor believes attention to race to be detrimental to the nation, whereas Justice Thomas believes attention to be detrimental to the putative beneficiary of beneficial racial programs. Justice Thomas invokes his

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racial identity as an African-American and his discomfort with having benefitted from affirmative action as the starting point for his dissenting opinion.

For purposes of arguing against race-based affirmative action, Justice Thomas quotes Frederick Douglass, speaking to abolitionists on January 1, 1865:

[I]n regard to the colored people, there is always more that is benevolent, I perceive than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us . . . I have but one answer from the beginning. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! [Y]our interference is doing him positive injury.

This quote, while representative of Frederick Douglass's views, is quickly revealed as disingenuous as used by Justice Thomas upon recognizing that Douglass's hopes for African-Americans in U.S. society did not materialize. When Frederick Douglass called upon the U.S. government to "leave the negro alone," he spoke two years after the Emancipation Proclamation of January 1, 1863: His was an appeal for fairness, enfranchisement, and full citizenship for African-Americans. But the Nation did not "leave the negro alone." Hence, events before and after the incep-

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tion of the nation, including slavery, segregation, Jim Crow, Black Codes, terrorist marauders, disenfranchisement, land dispossession, and discrimination in education and employment, relegated African-Americans to slavery and near-slavery conditions after the Civil War. So steeped was the nation in racist ideology of Anglo-American superiority and African-American inferiority that Black soldiers were not permitted to serve in the Union forces in the struggle for their own emancipation, and as confederate forces pressed Blacks into service as military slave laborers. When Lincoln finally relented, due in large measure to Douglass's entreaties, Black soldiers served gallantly, under worse conditions and with less pay than their white counterparts.

Thus, while Douglass tirelessly advocated for racial equality, his speech on April 16, 1883, twenty years after the Emancipation Proclamation, expressed his disappointment at the lack of rights accorded to Black citizens, and bears excerpting at length:

Let any man now claim for the negro, or, worse still, let the negro now claim for himself, any right, privilege, or immunity which has hitherto been denied by law or custom, and he will at once open a fountain of bitterness, and call forth overwhelming wrath.

It is his sad lot to live in a land where all presumptions are arrayed against him, unless we accept the presumption of inferiority and worthlessness. If his course is downward, he meets very little resistance, but if upward, his way is disputed at

every turn of the road. If he comes in rags and wretchedness, he answers the public demand for a negro, and provokes no anger, though he may provoke derision, but if he presumes to be a gentleman and a scholar, he is then entirely out of his place. He excites resentment and calls forth stern and bitter opposition. If he offers himself to a builder as a mechanic, to a client as a lawyer, to a patient as a physician, to a university as a professor, or to a department as a clerk, no matter what may be his ability or his attainments, there is a presumption, based upon his color or his previous condition, of incompetency, and if he succeeds at all, he had to do so against this most discouraging presumption.

It is a real calamity, in this country, for any man, guilty or not guilty, to be accused of crime, but it is an incomparably greater calamity for any colored man to be so accused. Justice is often painted with bandaged eyes. She is described in forensic eloquence, as utterly blind to wealth or poverty, high or low, white or black; but a mask of iron, however thick, could never blind American justice, when a black man happens to be on trial. Here, even more than elsewhere, he will find all presumptions of law and evidence against him. It is not so much the business of his enemies to prove him guilty, as it is the business of himself to prove his innocence.

Despite his recognition that the nation had not "left the negro alone," Douglass remained confident in the ability of Americans and the U.S. government to be fair. Yet at the Republican convention of 1876, he asked, "Do you mean to make good to us the promises of your constitution?" The fulfillment of the promises of fairness and full citizenship bespeaks the continuing need for affirmative action.

5. In the short and long run, communities of color also prefer an end to the need for affirmative action. They recognize, however, that affirmative action will no longer be necessary once the entrenched structural inequalities in educational opportunity for children of color cease to exist. Appreciating these preconditions, former Republican Congressman Jack Kemp recently called "shortsighted" his fellow conservatives' efforts to continue to oppose affirmative action after the Court's decision. According to Kemp, "While I agree that ultimately a color-blind society should be our goal, we certainly are not there yet. Blacks were removed from the mainstream economy, denied access to education, job opportunities and access to capital and ownership. Thus, African-Americans have long been denied their full measure of justice under the law, and while great progress has been made, we have a long way to go."

Next year, the nation will commemorate the landmark Supreme Court decision in *Brown v. Board of Education* (1954). In *Brown*, a unanimous Supreme Court declared racial segregation in primary and secondary public schools to be inherently unequal, and thereby unconstitutional. We need only acknowledge our national shortcomings in realizing the promise of *Brown* fifty years later as we contemplate the implications of Justice O'Connor's suggested time limitation for affirmative action in twenty-five years. Indeed, the Harvard Civil Rights Project has revealed that racial segregation in K-12 schools is greater than it was thirty years ago. HCRP attributes this retrogressive phenomenon to white flight, increases in enrollment by Black, Latino, and Asian students, racially segregated housing patterns and other forms of housing discrimination, and the termination of court-ordered desegregation decrees.

Surely, all agree with Justice O'Connor that "[a]ccess to legal education (and thus the legal profession) must be inclusive of



talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.” However, if higher education is to remain accessible to all so that the benefits of equality and diversity are achieved, affirmative action cannot be terminated by arbitrary date-setting. Justice Ginsburg best expressed this reality in her clear-eyed concurrence in *Grutter*, stating: “[F]rom today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”

About an earlier era, historian Eric Foner has written, “From the enforcement of the rights of citizens to the stubborn problems of economic and racial justice, the issues central to Reconstruction are as old as the American republic, and as contemporary as the inequities that still afflict our society.” Apropos the current discussion, unless and until the nation demonstrates the will and commits the necessary resources to end racial inequity and injustice, affirmative action will remain necessary. In the absence of such commitment, yesterday will look very much like today, and today will look very much like tomorrow — *jam yesterday, jam tomorrow*. The Supreme Court’s decision in *Grutter*, in which it recognizes the signal value of diversity in educational and national institutions, provides the American public a powerful incentive to make the promises of democracy a reality for all citizens.

#### Endnotes:

<sup>1</sup> Lewis Carroll, *Through the Looking Glass*.

<sup>2</sup> This commentary originally appeared in the *Jurist*, an online legal journal. In the version of the essay printed here, footnotes and citations have been omitted.

## Supreme Court Roundup

Alicia Alvarez, DePaul University College of Law

The Supreme Court decided a number of significant cases this term in addition to *Grutter* and *Lawrence*. (See pages 2–14 for reaction to those decisions.)

In *Demore v. Kim*, the Court ruled that mandatory detention of a legal permanent resident during deportation proceedings is a constitutionally valid aspect of the process, even where there has been no finding that the alien is unlikely to appear for deportation proceedings. Section 1226(c) of the Immigration and Nationality Act, which requires detention pending a removal proceeding for aliens convicted of certain crimes, does not violate due process, the Court determined. On a positive note, the Court found that Section 1226(e) does not deprive the federal courts of jurisdiction to grant habeas relief. The Court distinguished *Zadvydas*, which it decided in 2001.

In a troubling voting rights decision, *Georgia v. Ashcroft*, the Court ruled on Georgia’s State Senate districting plan. The majority (Justices O’Connor, Rehnquist, Scalia, Kennedy and Thomas) reversed and remanded the District Court’s finding that the plan violated Section 5 of the Voting Rights Act and was therefore not entitled to preclearance. The Court found that the District Court did not consider all relevant factors when it examined whether the plan resulted in the retrogression of black voters’ effective exercise of the electoral franchise. The diminution of a minority group’s effective exercise of the electoral franchise violates Section 5 only if the state cannot show that the gains in the plan as a whole offset the loss in particular districts, the Court said. The courts must consider “all relevant circumstances” including the minority voters’ ability to elect their candidate of choice (an important but not a dispositive or exclusive factor), the extent of the minority group’s opportunity to participate in the political process (including “influence” districts), and the feasibility of creating a nonretrogressive plan. The Court found that Section 5 gives states flexibility, allowing them to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority groups. The District Court focused too narrowly on three districts, the Court decided, and improperly rejected evidence that the legislators representing the majority-minority districts supported the plan and that the state decided that the best way to maximize black voting strength was to unpack the high concentration of minority voters in the majority-minority districts.

The Court ruled in *Brown v. Legal Foundation of Washington* that interest on lawyers’ trust accounts (IOLTA) programs do not involve a regulatory taking. A law requiring that the interest on those funds be transferred to a different owner for a legitimate public use could be a *per se* taking requiring the payment of “just compensation.” However, because just compensation is measured by the owner’s pecuniary loss, which was zero in this case, the Court held that there was no violation of the just compensation clause.

The Court remanded *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, a case dealing with tribal sovereignty and state jurisdiction. The Bishop Paiute Tribe in California filed an action seeking declaratory and injunctive relief to establish that state law was preempted to the extent that it purported to authorize seizure of tribal records. The Tribe sought relief under Section 1983, alleging that the District Attorney’s office had violated the Fourth and Fourteenth Amendments when it obtained and executed a search warrant for some of the Tribe’s Gaming Corporation’s employment records. The Court found that the Tribe cannot sue under Section 1983 since it is not a “person” or “citizen.” It remanded for consideration of the jurisdictional question of whether any prescription of federal common law enables the Tribe to maintain an action for injunctive and declaratory relief establishing its sovereign right to be free from state criminal processes.

*Supreme Court continued on page 16*



## Supreme Court:

▼ continued from page 15

In *United States v. American Library Association*, the Court upheld the Children's Internet Protection Act, which forbids public libraries from receiving federal assistance for Internet access unless they install software to block obscene or pornographic images and prevent minors from accessing material harmful to them. The Court found the Act does not violate the patrons' First Amendment rights, and is a valid exercise of Congress' spending power. The Act does not impose an unconstitutional condition on libraries, the Court determined, and Internet access in public libraries is not a public forum. Further, the Court found, any concerns about constitutional difficulties posed by the erroneous blocking of innocuous sites were dispelled by the ease with which library patrons can request that filtering software be disabled.

*Scheidler v. NOW* was a class action lawsuit alleging that the defendants, individuals and organizations that oppose legal abortion, had violated RICO by for engaging in a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activities that included extortion in violation of the Hobbs Act. The jury found in favor of the plaintiffs and awarded damages; the District Court entered a nationwide injunction. The Supreme Court reversed, finding that the defendants had not committed extortion within the meaning of the Hobbs Act because they did not "obtain" property from the plaintiffs. While the defendants' activities deprived the plaintiffs of their ability to exercise their property right to legal abortions, said the Court, that deprivation did not constitute extortion within the meaning of the Hobbs Act since extortion requires both deprivation and acquisition of property. The defendants did not receive something of value that they could exercise, transfer or sell.

Among the many cases in the criminal law area, the Court ruled in a favor of a capital murder defendant who brought an

ineffective assistance of counsel claim. Writing for the majority in *Wiggins v. Smith*, Justice O'Connor found that trial counsel had rendered ineffective assistance by failing to investigate and present mitigating evidence of the defendant's dysfunctional background, including severe physical and sexual abuse he had suffered at the hands of his mother and in foster care. The decision not to expand the investigation beyond the presenting investigation report and the City Department of Social Services records fell short of prevailing professional standards, which included the preparation of a social history report. The Court found a reasonable probability that a jury confronted with evidence of the defendant's alcoholic absentee mother, physical torment, sexual molestation, repeated rapes while in foster care, homelessness, and diminished mental capacity would have returned a different verdict, especially since he had no prior convictions.

Justice Scalia, joined by Rehnquist, O'Connor, Kennedy, and Thomas, found in *Sattazahn v. Pennsylvania* no double-jeopardy bar to the state seeking the death penalty on retrial when the defendant had been sentenced to life imprisonment in the first trial. Under Pennsylvania law, the verdict in the penalty phase of capital proceedings must be death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or one or more aggravating circumstances outweighing any mitigating circumstances, but it must be life imprisonment in all other instances. The court may discharge a jury if it determines that the jury will not unanimously agree on the sentence, but the court must then enter a life sentence. The defendant was sentenced to life after the judge discharged the jurors when they reported that they were deadlocked 9-3 for life imprisonment. On appeal, the court reversed the murder conviction and remanded for a new trial. At the second trial, the jury imposed a death sentence. The Court found that the double jeopardy clause applies to capital sentencing proceedings that "have the hallmarks of the

trial on guilt or innocence." However, it said, the relevant inquiry here was whether life sentence in the first trial was an "acquittal" that was based on findings that the defendant was legally entitled to a life sentence because the government had failed to prove one or more aggravating circumstances beyond a reasonable doubt. The Court said that the life sentence was not an "acquittal" because the jury in the first trial deadlocked without making any findings with respect to the alleged aggravating circumstances, and because the judge had no discretion to do anything but enter a life sentence after the jury deadlocked.

In *Overton v. Bazzetta*, an opinion with no dissents, the Court found that Michigan's restrictions on prison visits did not violate the First, Eighth or Fourteenth Amendments. The state's Department of Corrections allows inmates to receive visits only from qualified clergy, attorneys on business, and persons placed on an approved list, which may include an unlimited number of immediate family members and ten others. A minor child may visit only if s/he is the child, stepchild, grandchild or sibling of the inmate, and is accompanied by a family member of the child or inmate, or by the child's legal guardian. No former prisoner may visit unless s/he is an immediate family member of the inmate and the warden approves. Prisoners who commit two substance abuse violations may receive only clergy and attorneys, but may apply for reinstatement of privileges after two years. The Court held that these regulations satisfy the four factors used to decide whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: First, it found, the regulations bear a rational relationship to legitimate penological interest. Second, the inmates have alternative means of exercising their asserted right of association (letters and telephone). Third, accommodating the right would have a considerable impact on the guards, other inmates, prison resources and the safety of other prisoners. Finally, all alternatives have a more than *de minimus* cost.



## Nancy and Paula's Excellent Adventure: The First Running of the Princess Cycling Tour

SALT Co-President Paula C. Johnson, Syracuse University College of Law,  
and Nancy K. Ota, Albany Law School

*I've got a mule, her name is Sal,  
Fifteen years on the Erie Canal.  
She's a good ol' worker and a good ol' pal,  
Fifteen years on the Erie Canal.  
We've hauled some barges in our day,  
Filled with lumber, coal, and hay,  
And ev'ry inch of the way we know  
From Albany to Buffalo  
— The Erie Canal Song*



On Sunday, July 13, the Princess Tour—Paula Johnson, Nancy Ota, Laura Shore, and Delores Walters—breezed under the green and white balloon arch signaling the completion of the summer 2003 bike ride along the Erie Canal Towpath. We had completed the week-long 400-mile tour from Buffalo to Albany, NY, tested our physical endurance, enjoyed hours of laughter, and helped raise money to

support SALT's justice work. Not bad for eight days! Come along, and we'll tell you the story of our adventure.

### How we got started

With Albany and Syracuse located just a couple of hours from each other on the New York State Thruway, we (Nancy and Paula) frequently talked about getting together just for fun. We also talked about our interest in cycling, and how we should explore our local parts of the Erie Canal Towpath bike trail when we visited each other. We hadn't been very successful at getting together apart from law school or conference functions, though, until this summer. Thus, last spring, we became very excited when we saw the announcement for the Fifth Annual Bike Ride Across New York, a 400-mile, eight-day bicycle tour from Buffalo to Albany, New York, along the historic Erie Canal. Eureka! We jumped at the chance and got our partners Laura and Delores involved, too. We all signed onto the ride as soon as they began taking names.

Never leaving our social justice instincts far behind, we also thought there must be some way that our physical prowess also could benefit SALT. As SALT's newest and most ambitious public interest effort, we decided to lend our bodies to raise money for the Norman Dorsen Fund. We thought that enthusiastic (and sympathetic!) SALT members would pledge contributions to support us on the ride and to help the Dorsen Fund. We were correct on both counts, as many SALT members gave us warm send-offs and many others pledged amounts for the Dorsen Fund as we set out to complete the 400 mile trek.



*Cycling continued on page 18*



## Cycling:

▼ *continued from page 17*

SALT Co-President Michael Rooke-Ley, Dorsen Fund chairperson Sylvia Law, and Sylvia's assistant Leslie Jenkins took care of the pledge drive. The four of us simply had to take care of trip logistics and getting our bodies ready for the ride. Easy. Well, maybe not so easy. Our schedules were hectic, and winter seemed to hang on forever and spring was cooler than usual, so it was difficult to take training rides consistently. But we were determined and stayed in contact with each other by phone or e-mail to see how we were doing with training. When the weather finally turned warm enough, we were off the stationary bikes and riding outside several times a week. Close to the tour date we cycled 50 miles in a day, which was the average daily mileage during the trip. We were on our way!

The tour was very well organized. It was sponsored by the New York Parks and Conservation Association (NYPCA), the New York State Canal Corporation, and several corporate contributors. It included breakfasts, dinners, daily refreshment stops stocked with fruit, snacks and beverages, baggage transport, sag wagon, daily maps and cue sheets, marked routes, lectures and stops at historic sites, welcomes by officials and civic volunteers in small towns and villages, masseuses for body repair, and mechanics for bike repair.

In light of this organization, there were only a few other logistics to address, primarily transportation to Buffalo and housing accommodations during the ride. Delores and Paula met Nancy and Laura in Albany. We all drove to Buffalo in a rented van that we carefully dismantled to accommodate our bikes and luggage (Delores had shipped her bike to Buffalo

from Cincinnati). After getting to Buffalo, the most important decision we had to make was where to sleep—or more accurately, where not to sleep. Most cyclists set up camp at prearranged sites at local colleges, high schools, and municipal parks on the trip. Very early, we decided against camping, however. Instead we opted for local B&Bs, hotels, motels, and dormitories that were listed as housing alternatives. This meant arranging taxis at the end of the day and in the morning back to the breakfast site. This wasn't as difficult as it seemed it might be, and we were very grateful for mattresses, some really good meals, some time away from the larger group, and a wonderful time together. We especially appreciated the hotels and dorms on the nights it rained hard. With our daily drop-offs and pickups, our moniker was born: We were dubbed "the princess tour."







### A little history goes a long way

Groundbreaking for the Erie Canal took place on July 4, 1817. It began as the political project of Governor DeWitt Clinton—"Clinton's Folly." Almost no professional engineers were involved in the project. Built at a cost of \$7 million, the Canal was completed in 1825. It was called the "Eighth Wonder of the World," for as one commentator described, "They have built the longest canal, in the least time, with the least experience, for the least money, and to the greatest public benefit."

The Erie Canal opened the American West to commerce and travel, bringing financial prosperity and social change across New York and the United States. The inland waterway facilitated trade from the Mississippi to the Atlantic Ocean. The original canal featured 18 aqueducts, 83 locks, and a rise of 568 feet from the Hudson River to Lake Erie. From an overland trip that previously took four to six weeks, the canal cut travel down to five to seven days. Due to its financial success,

the canal was enlarged four times between 1836 and 1862. Towns grew along the canal route, and many Western and Central New York locations remain linked to their canal beginnings and maintain originals or replicas of the buildings, stores, and other facilities that supported canal traffic.

Although financially successful, the canal was very costly in terms of human lives. Thousands of Irish immigrants were employed to dig the canal by hand, and many succumbed to malaria and related diseases. Further, as a 1990 National Geographic article recounts, "Forgotten people include immigrant laborers who worked on the canal, lived under inhumane conditions, and died without rousing much concern. Thousands of homeless people, escaped slaves, and other outcasts roamed the canal looking for work."

In the 1950s, the canal lost business to autos, trucks, pipelines, railroads, and the St. Lawrence Seaway. With its future uncertain, the canal began to deteriorate.

In modern times, prospects were further dimmed by the steady decline of the industrial base of Western and Central New York, leaving many low- and moderately-skilled workers without viable employment opportunities. However, many of the canal towns are building on their history as the path to a resurgent future. In 1983, New Yorkers voted to restore the canal system for recreational use, irrigation, wildlife habitat, hydroelectric power, pleasure boats and small commercial vessels.

Much of the awesome geographical beauty of New York remains the same, except that which was altered to construct the canal. Links to the past and present are ever-evident. Along the Mohawk River, for instance, Hiawatha united competing tribes into the Iroquois Confederacy in 1600. The Iroquois Confederacy became a model for U.S. democracy, and Indians in New York continue to assert their cultural heritage and influence throughout the state. Major abolitionist activity took place along the Erie Canal. Enslaved

*Cycling continued on page 20*



## Cycling:

▼ *continued from page 19*

African-Americans risked all for freedom, and citizens in Syracuse and other canal cities defied the Fugitive Slave Act and refused to return enslaved African-Americans to the South. Also, the women's rights movement burgeoned in Seneca Falls, eventually spreading across the state and the nation. Thus, the bike tour along the Erie Canal was an opportunity to slow down and appreciate New York's historical, cultural, and physical landscape.

### That depends on what your definition of "flat" is

The tour was billed as a "ride," not a "race." Clearly, though, everyone had different goals and expectations for embarking on the trip. For some it was starting, for others it was finishing. Speed was the goal for some riders, while others sought consistent pacing. Some, like the

man who celebrated the second anniversary after his heart attack by riding the tour, were just happy to be alive. All of us were happy to be there. Individually and together we pedaled, pushed, groaned and grunted our way across New York on our bicycles.

While we shared housing and meals most nights, we never felt cramped or imposed upon. This was good because we quickly realized the differences in our circadian rhythms. Delores and Nancy were early risers; Laura and Paula were dedicated sleepers. Nancy and Laura were usually on their bikes earlier than Paula and Delores. We typically saw each other at breakfast, along the trail, at rest stops, and at the end of the day's ride. So there was a good mix of being together and also hanging out with others on the tour.

There were over 400 riders on the tour. It was a wide-ranging group of folks of all ages, sizes, physical abilities, geographical backgrounds, and cycling experience. Many were veterans of long-distance bike

rides, while others, like us, were cycling enthusiasts but neophytes at long tours. Gender balance seemed pretty equal, but there wasn't much racial or ethnic diversity—our group provided most of that. The gay and lesbian community was well represented, and there were many family configurations. There were LGBT and straight couples, mothers and sons, fathers and daughters, straight and LGBT parents with infants and toddlers, and grandparents with grandchildren.

On this trip, the most prominent diversity was reflected in the vehicle of choice. Here, there was an eclectic assortment of bicycle types to match the assorted riders. There were racing bikes, touring bikes, mountain bikes, and hybrids. There were folding bikes! There were tandems and recumbents, and tandem recumbents. There were bikes with children in tow or child seats in front. Some rode with loaded panniers, while others carried only water bottles and snacks.







Local people were fascinated by our gang of riders. When we rode on city streets, people stopped and watched the seemingly endless trail of cyclists. In local restaurants, people asked about the tour and us, and talked at length about themselves, their towns, and what we could expect during that portion of the trip. Our interactions with local folks were almost entirely positive, although there were nasty brushes with aggressive drivers. One night a friendly cab driver suggested a sightseeing tip and offered to take us to the town's bar strip. But our raucous laughter in the taxi—without alcohol—convinced him that we didn't need to visit the bars and he recommended taking us directly to our hotel. Talking about the events of the day and watching the weather channel became our favorite entertainment!

We generally rode for six to eight hours a day, in all conceivable weather and road conditions. Heavy rains the night before

made the next day either torrid or brisk. We also had our share of mishaps on the bikes. Delores and Nancy each had two flats. One rider set a tour record of four flats in one day on the same tire; we tried to stay away from him! The extreme heat bothered Delores; Laura had an allergic reaction to insect repellent; Paula experienced hand numbness and a sore knee; and Nancy deserved a medal for persevering despite having torn a ligament in her hand during a training ride before the trip and taking a hard spill on wet railroad tracks during the trip. Undeterred, we rode through these discomforts.

We grouched a bit about the terrain. The tour booklet had stated, "There are a few rolling hills and two long, gradual climbs in the Mohawk Valley." In fact, there were numerous steep hills, including several successive long climbs in the Mohawk Valley. In this regard, Friday was the most challenging day of the tour, as we

rode through head winds, heavy rain, and long winding roads. It also was a 70-mile day, the end of which required riding up a perpendicular road to reach dinner at the campground. With just two days left, Friday's travails generated the first serious talk of quitting by some of the riders. A few folks opted for the sag wagon, but most of us cycled on, wind, rain, hills and all.

Magnificent vistas compensated for any difficulties along the route. Zooming downhill had the incomparable feeling of flight and freedom. No matter what the place or pace, it was better to be on a bike. Traveling by bicycle awakened all of our senses, and we took stock after the trip. Here is our list of some of the best and worst:

#### **Laura**

*Best smell*—Strawberry fields in Amish country

*Worst smell*—The EconoLodge in

*Cycling continued on page 22*



## Cycling:

▼ *continued from page 21*

Canajoharie ("like a combination of bug spray, mildew, sour milk, and stinky feet")

### Nancy

*Best sound*—Crowd's applause under balloons at the end of the ride in Albany

*Worst sound*—Helmet (on head)

hitting pavement after a fall

### Delores

*Worst taste*—Gatorade

*Best taste*—Gatorade

### Paula

*Best sight*—Lush green farmland in Amish country

*Worst sight*—Assorted animal roadkill

### Nancy

*Worst touch*—Skin scraping pavement

### Delores

*Best touch*—The whirlpool

### Laura

*Best touch*—Peddling and downshifting

### Paula

*Best touch*—Any mattress any night

during the tour

### Nancy

*Worst overall*—Hills on Rt. 5S out of Little Falls (Mohawk Valley)

### Laura

*Best overall*—Finishing ahead of the paint guy marking directions on the road, and not thinking about work

### Delores

*Best overall*—Barbeque after Friday ride

### Paula

*Best Overall*—Time on the bike and spending time with the "princesses"

## I can't believe I rode the whole thing!

From July 6 to 13, we traveled the following schedule:

Sunday, July 6: Buffalo to Medina (50 miles)

Monday, July 7: Medina to Pittsford (60 miles)

Tuesday, July 8: Pittsford to Waterloo (60 miles)

Wednesday, July 9: Waterloo/Seneca Falls to Syracuse (50 miles)

Thursday, July 10: Syracuse to Rome (50 miles)

Friday, July 11: Rome to Canajoharie (70 miles)

Saturday, July 12: Canajoharie to Schenectady (50 miles)

Sunday, July 13: Schenectady to Albany (30 miles)

The final day of the ride was a beautiful summer day. We also enjoyed some of the easiest terrain; it was mostly downhill or level and smooth. We cruised through the finish line with energy to spare. We felt tremendous joy and accomplishment at completing the trek. We were further gratified to know that our trip benefitted SALT's work. Our final mileage exceeded 400 miles, and thanks to SALT members, we raised nearly \$5,000 for the Dorsen Fund. We thank everyone who encouraged us on the ride, and everyone who contributed to the Dorsen Fund.

Look out for cyclists; we may come to a town near you!









## Committee News

### Bar Exam Committee Plans October Conference

*Eileen Kaufman, Touro Law Center*

The Bar Exam Committee is planning a mini-conference for October 11, 2003, at the University of Minnesota Law School, to coincide with SALT's next Board of Governors' meeting. SALT held its first bar exam conference in San Francisco in 1999, entitled "Re-examining the Bar Examination," which focused on a critique of the current bar examination. The October 11, 2003, conference, "Reconceiving the Bar Examination: Exploring Alternative Licensing Mechanisms," moves from a critique of the bar exam to a more activist agenda that focuses on alternatives to the bar exam and strategies for adopting more effective licensing approaches.

The morning session will feature speakers describing alternative licensing

approaches, including Canada's post-graduate skills training, Arizona's "Americorps" proposal and Kris Glen's public service alternative. The session will also explore the formulation of performance-based evaluations. SALT is particularly interested in hearing from clinicians and others who have successfully developed and utilized portfolios of competencies and performance-based evaluations and who have ideas about incorporating these approaches in licensing proposals (please contact Eileen Kaufman at [eileenk@tourolaw.edu](mailto:eileenk@tourolaw.edu)). The afternoon session will focus on reform efforts in several jurisdictions in which alternatives to the bar exam are currently being discussed.

In related news, Georgia State University is planning a symposium entitled "Rethinking the Licensing of New Attorneys – An Exploration of Alternatives to the Bar Exam." The Symposium will be held on January 29, 2004, and will result in a special issue of the Georgia State University Law Review devoted to articles exploring in detail the practical questions raised by proposals for alternative methods for licensing lawyers.

### SALT Salary Survey: Where Have All the Numbers Gone?

*Howard A. Glickstein, Touro Law Center*

SALT has been publishing a Salary Survey for over a quarter of a century. The Survey was undertaken as a means of providing information to those contemplating entering law teaching; those already in teaching; and law school and university administrators. There is usually great demand for copies of each year's Survey, including requests from the press. The Survey serves an extremely useful purpose. I am disappointed that the number of schools cooperating in the Survey has declined in recent years.

For many years, the Section of Legal Education, as part of its annual questionnaire, requested salary data. Unlike most of the other data collected, the salary data was "confidential." Only law school deans who consented to abide by the confidentiality restrictions received copies of the completed survey. Law schools that did not provide their salary data did not receive information about the other law schools. One of the issues at stake when the Justice Department sued the American Bar Association, alleging that the accreditation process violated the antitrust laws, was the collection and dissemination of salary data. As part of the consent decree ending the litigation, the ABA agreed to discontinue the collection of salary data. The Justice Department made clear that nothing would prevent a private organization from collecting salary data.

Since the ABA stopped collecting salary data, there has been a steady decline in the response to our Survey. Some law schools claim that, as long as they compiled the data for the ABA, they did not mind furnishing it to us. (It is difficult to believe that some law schools no longer maintain faculty salary data.) Some law schools might have felt some pressure to

### Filler Fund Committee Seeks Nominations

*Chris Iijima, William S. Richardson School of Law, University of Hawai'i*

There have been a number of informal discussions recently about how best to fund and implement the Filler Fund, named as a memorial to Stuart (a beloved law teacher and SALT treasurer) and Ellen Filler. The \$2,200 in funds to pay for a student to work during the summer with a social justice organization have come predominantly from the SALT treasury (\$2,000) and have been supplemented by the Fund. Last year, a decision was made to not award a summer stipend, in part to allow the Fund to build and in even greater part to reorganize and redefine how to continue with it. In these last months of increasing financial pressure for SALT, there has been some initial talk of trying to find ways in which the Fund could become more self-sufficient.

In the meantime, there is an expectation that we will again award another grant this year and we are soliciting from our members names of worthy organizations to which we could send a summer grant to hire a law student.

Nominations should be sent to Chris Iijima ([ijimac@hawaii.edu](mailto:ijimac@hawaii.edu)) and come with a description of the group and its relationship to SALT's commitment to social justice, its need, and its ability to supervise. The group should be law-related but the grant is not restricted to direct legal service work.



release salary data to the ABA. Most feel less urgency to respond to a request from SALT.

We have tried to confront the non-response problem in a number of ways. First, we have asked SALT members to put pressure on their deans to respond to the Salary Survey (a list of non-responding schools appears at the end of this column). Second, we have asked SALT members at non-responding schools to see if they could obtain data and furnish it to us. (At one non-responding school, the dean was outraged when a faculty member provided us with salary data that the dean had declined to disclose. I assume that the dean's face turned red when I informed him that the faculty member obtained the salary data from the provost of the university and had not stolen it from the dean's desk drawer.)

We especially reminded faculty members at public institutions, where salary data generally is made public, that with a little bit of research they probably could find the information for us. Finally, we have tried to do some internet research on our own, with limited success.

Once again, I urge all SALT members to do what they can to encourage their schools to furnish us with salary data or to take some time to see if they can uncover the salary data on their own. The reluctance of law schools to disclose salary data is just another example of the special privileges to which law schools and their faculties feel entitled. There are few job classifications for which salary data is kept confidential. We know the salaries of government officials, of judges, of many lawyers in major law firms, of athletes, of movie stars, and of scores of other professionals and non-professionals. I may be missing something, but if the Mets know what the Yankees are paying their players, why shouldn't Columbia know what stars at NYU get paid, and vice versa? I guess law schools and law faculties are just different.

### Schools that have not responded to the SALT salary survey:

Alabama	George Mason
American University	George
Arizona	Washington
Barry	Georgetown
Baylor	Harvard
Boston College	Hofstra
Boston University	Howard
Brigham Young	Illinois
Brooklyn	Indiana (Bloomington)
Cal Western	JAG
Case Western Reserve	Kansas
Catholic-DC	Kentucky
Chicago	Lewis & Clark
Chicago-Kent	Loyola (Chicago)
Cincinnati	Loyola (Los Angeles)
Columbia	Maine
Cornell	McGeorge
Cumberland (Samford)	Miami
DePaul	Minnesota
Detroit-Mercy	New England
Duke	New York Law
Fordham	NYU
Franklin Pierce	North Carolina Central
	Northwestern

### Committee News

Notre Dame	Thomas Jefferson
Pace	Tulane
Pennsylvania	UC Berkeley
Pepperdine	UC Davis
Quinnipiac	UCLA
Richmond	Utah
Roger Williams	Vanderbilt
St. John's	Villanova
Saint Louis	Virginia
St. Mary's	Wake Forest
San Diego	Washington and Lee
San Francisco	Washington (St. Louis)
Santa Clara	Western State
South Carolina	Whittier
Southern California	Widener
Southern Methodist	William & Mary
Southwestern	Willamette
Stanford	Wisconsin
SUNY Buffalo	Yale
Stetson	
Temple	

## Judicial Nominations: The Hits Just Keep On Coming

*Bob Dinerstein, American University, Washington College of Law*

The good news-bad news story of the Bush Administration's judicial nominations goes on, and SALT continues to play both a public and behind-the-scenes role in bringing to the attention of key actors the extremist views of so many of these nominees.

First, the good news, such as it is. As of this writing (late July), Senate Democrats continue to filibuster successfully against two of the Administration's problematic nominees: Miguel Estrada, a nominee for the U.S. Court of Appeals for the District of Columbia, and Justice Priscilla Owen, a nominee for the U.S. Court of Appeals for the Fifth Circuit. The Senate has rejected cloture on Estrada five times (most recently on May 6, 2003) and on Owen once (on May 1, 2003). As you know from previous reports in the Equalizer, SALT, both organizationally and through individual members, has actively opposed both nominees.

Another bit of good news is what did not happen this summer—the retirement of any current Supreme Court Justice. While it is not completely out of the question for a Justice to retire after the end of the term, the speculation that one or possibly two Justices would announce their retirements by June 30 turned out to be inaccurate. In light of the nature of its nominees to the district and circuit courts, there is little reason to think that the Bush Administration would have appointed someone within the mainstream to the vacant slot(s). Because of the relationship between Supreme Court nominations and presidential electoral

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## Committee News

### SALT Awards Dinner Date Set; Award Nominees Sought

*Bob Dinerstein, American University,  
Washington College of Law*

This year's SALT Annual Awards Dinner will take place in conjunction with the AALS annual meeting in Atlanta on Monday evening, January 5 (reception starts at 7:00 p.m.; dinner starts at 7:30 p.m.).

Because of the way the calendar falls this year, the AALS schedule is somewhat different from that of recent years. Instead of going from Thursday to Sunday, the conference goes from Saturday to Tuesday. After polling the Board, the Committee concluded that having the dinner on Monday evening, the traditional point in the conference if not the traditional day of the week, presented the fewest conflicts for attendance at the dinner. Our informal survey of law schools revealed that most schools will not be starting classes on that Monday, so conflict with external schedules should be minimized. As of this writing, we have not yet identified a location for the dinner, but we have a lead on a place to hold the event.

The Committee is responsible for recommending to the Board of Directors recipients for two important awards. The SALT Teaching Award is an annual award given for special contributions to the teaching mission of the legal academy. Last year's winners were long-time SALT stalwarts Chuck Lawrence and Mari Matsuda of Georgetown University Law Center. Prior recent winners have included Sylvia Law, Marjorie Schultz, Tony Amsterdam, Jim Jones, Haywood Burns, Barbara Aldave and Trina Grillo. The Award has been given every year since 1976 (the

first winner was David Cavers) and twice has gone to an institution (CUNY Law School and University of Wisconsin Law School) rather than to an individual.

The second award is the SALT Human Rights Award. This award, which is not necessarily given every year, recognizes the extraordinary work of an individual or organization in advancing the principles of equality and equal access to legal education, the legal profession and legal services. This award was created in 1997 after the death of Shanara Gilbert, who died in South Africa (in the same bus accident as Haywood Burns) while forging connections between clinical legal education and human rights advocacy in that country. Last year, the award went to anti-death penalty advocates Stephen Bright, Director of the Southern Center for Human Rights, and Bryan Stevenson, Executive Director of the Equal Justice Initiative of Alabama. Previous recipients of the award have been Dr. Jesse Stone, Jr., Congressman Barney Frank and Ibrahim Gassama.

In recent years, an important part of the dinner (and the fund-raising necessary to defray its costs while keeping the cost to attendees down) has been the program and the advertisements that law schools, individual or groups of law faculty, and others have taken out in support of SALT or the award winners. We would like to make a special effort this year to increase the number of advertisements, and we encourage you and your law schools to participate. And remember, you and your law school can show your support for our awardees even if they are not from your own institution. You will be receiving more information on the listserv regarding how to purchase an advertisement, the cost, and other logistics.

Nominations—which should be received by Friday, September 26, 2003—for either or both awards should be submitted to either of the Committee's Co-Chairs,

who can be reached as follows:

Margalynne Armstrong,  
Associate Professor  
Santa Clara University School of Law  
500 El Camino Real  
Santa Clara, CA 95053  
(408) 554-4778 (o)  
(408) 554-4426 (fax)  
marmstrong@scu.edu

Robert Dinerstein  
Professor and Associate Dean  
for Academic Affairs  
American University,  
Washington College of Law  
4801 Massachusetts Avenue, N.W.  
Washington, D.C. 20016  
(202) 274-4141 (o)  
(202) 274-4015 (fax)  
rdiners@wcl.american.edu

While not a formal part of the nomination process, a letter or e-mail in support of the nominee would assist the Committee in making its recommendations to the Board. Thanks for your help.

### Judicial:

▼ *continued from page 25*

politics, even if there is a vacancy on the Court one year from now it is not at all clear that the Administration would be able to fill the slot prior to the election. So, at least for now, the Court may not be any worse for the foreseeable future. It is a measure of our current political predicament that retention of a Court as conservative as this one (*Grutter, Lawrence, and Hibbs* notwithstanding) is seen as a positive development.

A final bit of good news is that, thus far, Republican efforts to change the rules on filibustering nominations and other nomination procedures have been unsuccessful. Again, the irony of people in favor of civil rights being thankful for the



filibuster is quite striking.

On to the bad news. One Bush nominee to the federal bench is worse than the next, and despite the efforts of numerous organizations and individuals, a number of very conservative activists, with strong anti-progressive records, have been confirmed for judgeships. Since our last report, the Senate has confirmed such troubling nominees as Deborah Cook and Jeffrey Sutton (both for the Sixth Circuit) and John Roberts (for the D.C. Circuit). The Senate Judiciary Committee has voted to send to the Senate floor Judge Carolyn Kuhl (for the Ninth Circuit) and Alabama Attorney General William Pryor (for the Eleventh Circuit; see below). The President also has continued to nominate (or indicated his intention to do so) a number of extremely conservative individuals to important judgeships, including Deputy Secretary of Health and Human Services Claude Allen (Fourth Circuit), and, for the D.C. Circuit, Justice Janice Rogers Brown of the California Supreme Court (where, among other things, she wrote the opinion upholding a broad interpretation of California's anti-affirmative action Proposition 209) and Brett Kavanaugh (a key assistant to Independent Counsel Kenneth Starr, and Assistant White House counsel, with a major role in advocating the Bush judicial nominations).

On July 23, the Senate Judiciary Committee, on a straight party-line 10-9 vote, voted to send William Pryor's nomination to the Senate floor. Pryor may be the most extreme Bush judicial nominee thus far. Despite allegations from a staff member that the Republican Attorneys General Association, which Pryor helped to form, arranged for sitting state attorneys-general to solicit corporate executives in their states for campaign contributions (a fact that Pryor denied at his confirmation hearing), the Judiciary Committee saw fit to report out the nomination.

The SALT Board approved a letter of opposition to Pryor's nomination, which was delivered to the Senate Judiciary Committee before its consideration of the Pryor nomination. (See the letter on page 28.) In addition, we e-mailed SALT members from law schools in Pennsylvania to ask them to contact Senator Arlen Specter (R-PA), a member of the Judiciary Committee reported to be "on the fence" regarding the nomination, to express their opposition to Pryor's nomination.

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*"[D]espite the efforts of numerous organizations and individuals, a number of very conservative activists, with strong anti-progressive records, have been confirmed for judgeships."*

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tion. A number of SALT members sent such messages of opposition to Senator Specter. While he voted to report out the nomination, Specter indicated that he had not yet decided how he would vote if the nomination comes to a vote on the Senate floor. There are strong indications that the Democrats will filibuster the Pryor nomination if it is brought up for a vote, unless they conclude that there are enough Republican defectors to yield victory on a straight up-and-down vote.

[Editor's note: After this article was submitted for publication, the author sent the following e-mail to the SALT Board on July 31, 2003: "The Senate failed to override a filibuster today on the nomination of William Pryor. The vote was 53-47 for Pryor (Democrats Nelson from Nebraska and Miller from Georgia were the

## Committee News

only Democrats to vote for him), 7 votes short of the 60 needed for cloture. I believe this means that Specter voted for the nomination—so much for his voting for Pryor in committee but not being committed to voting for him on the floor. The Senate also has failed to invoke cloture for a seventh time for the Estrada nomination (5 votes short) and for the third time for the Owen nomination. The Republicans plan to bring up Carolyn Kuhl (9th Circuit) for a floor vote tomorrow. Then, mercifully, they are on recess until Labor Day."]

Thanks to our friends at the Alliance for Justice's Independent Judiciary Project (and the very helpful e-mails from Kendra-Sue Derby, Director of Field Operations for the Alliance), the SALT Judicial Nominations Committee is able to monitor these nominations closely. It is particularly important that SALT weigh in against nominations where the nominee has taken a stance inimical to legal, social and political issues close to SALT's heart (and about which SALT members have special expertise). We easily could justify opposing virtually every one of the Bush Administration's nominees, but limited time (and a desire to focus on *the* most problematic nominees) counsels against such a scatter-shot approach. The Committee welcomes your input on judicial nominees and any assistance, including drafting of positions in opposition to some or all of a nominee's views, that you are in a position to provide. In addition, as Senators tend to be more responsive to their constituents (even law professors!) than other individuals or groups, we urge you to respond to our requests to contact your Senators when a particular nominee or pending vote warrants it.



## Committee News

*Following is the text of a letter sent on behalf of the SALT Board by Co-Presidents Michael Rooke-Ley and Paula Johnson to the Senate Judiciary Committee on July 16, 2003.*

Dear Senators Hatch and Leahy:

On behalf of the Society of American Law Teachers ("SALT"), the largest organization of law professors in the United States, representing over 800 law professors from over 150 law schools, we write to express our strong opposition to the nomination of William H. Pryor, Jr., to a seat on the United States Court of Appeals for the Eleventh Circuit.

In our judgment, Attorney General Pryor is an extreme advocate of a "turn-back-the clock" form of federalism that threatens to undermine the basic constitutional rights of, among others, children, women, people with disabilities, gays and lesbians, and senior citizens. Through the positions he has taken in various cases, both in representing the State of Alabama as a party and as an *amicus curiae*, he has shown insensitivity to such basic constitutional rights as the right to privacy, the separation of church and state, the Commerce Clause, and the Eighth Amendment. He also has expressed hostility to such important congressional enactments as the Clean Water Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VI of the Civil Rights Act of 1964, and the Violence Against Women Act. When linked to his well-documented intemperateness, his positions belie his claim that, if confirmed, he will simply follow the applicable law, ignoring the values he obviously holds dear.

Attorney General Pryor has made active use of the *amicus curiae* brief to

propagate his extreme positions. He filed a brief in the recent Supreme Court case of *Lawrence v. Texas*, 2003 U.S. Lexis 5013 (June 23, 2003), which struck down Texas's sodomy statute. In the brief, he argued that reversal of the lower-court decision (which the Supreme Court in fact did) would entail protection for "prostitution, adultery, necrophilia, bestiality, possession of child pornography and even incest and pedophilia. . . ." He filed the lone state *amicus curiae* brief to argue for a weakening of the Clean Water Act in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (2001). He filed a brief unsuccessfully opposing recognition of the Family and Medical Leave Act as a valid exercise of congressional power under Section 5 of the Fourteenth Amendment in the recent case of *Nevada Dep't of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003). He also filed a brief in *Atkins v. Virginia*, 536 U.S. 304 (2002), against recognition of mental retardation as a disqualifying condition for application of the death penalty under the Eighth Amendment. Once again, the Supreme Court ruled against the position he advocated.

Mr. Pryor has sought to participate in various challenges to the constitutionality of Title II of the Americans with Disabilities Act ("ADA"), which proscribes discrimination on the basis of disability in state and local programs. He has filed *amicus curiae* briefs in two cases challenging the constitutionality of Title II, *Yeskey v. Pennsylvania*, 524 U.S. 206 (1998) (where the Court rejected his view), and *Medical Bd. of California Hason*, No. 02-479, *cert. dismissed*, 173 S. Ct. 1779 (2003). The issue of Title II's continuing validity remains very alive as the Supreme Court has granted *certiorari* in another Title II case to be heard next term, *Tennessee v. Lane*, No. 02-1667, *cert. granted*, 2003 U.S. Lexis 4818 (June 23, 2003).

In cases where the Court has adopted the result Attorney General Pryor's *amicus curiae* briefs have sought, his positions suggest his hostility to key pieces of federal legislation. For example, he filed the only *amicus curiae* brief on behalf of a state against the constitutionality of the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598 (2000). He also filed a brief in opposition to the constitutionality of the Age Discrimination in Employment Act, *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

Attorney General Pryor has called *Roe v. Wade* "the worst abomination of constitutional law in our history." He has supported the judicial display of the Ten Commandments in the courtroom and the invocation of Christian prayers before the impaneling of juries. He has defended Alabama's practice of tying inmates to hitching posts for long periods of time, a practice the Supreme Court called "degrading and dangerous" and "obvious[ly] cruel." *Hope v. Pelzer*, 122 S. Ct. 2508 (2002). He has praised the extremist decision of *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549 (E.D. Mich. 2001), *rev'd in relevant part*, 289 F.3d 852 (6<sup>th</sup> Cir.), *cert. denied*, 154 L. Ed. 2d 516 (2002), a case where the district court would have held that congressional legislation passed pursuant to the Spending Power is not the "supreme law of the land" for purposes of the Supremacy Clause. He argued unsuccessfully for vacating a consent decree (entered into by his predecessor) in a case concerning the care and custody of foster children in Alabama despite the fact that the state had not complied with the decree. *R.C. v. Nachman*, 969 F. Supp. 682 (M.D. Ala. 1997). Apparently unconcerned about whether his position would harm vulnerable children in the state's care, he noted, "My job is to make sure that the state of Alabama isn't run by federal courts. . . . My job isn't to come here and help children."



Attorney General Pryor's litigation positions have had consequences far beyond his desire to protect Alabama's interests as he sees them. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S.356 (2001), he successfully argued that Title I of the ADA was not a constitutional exercise of Congress's power under Section 5 of the Fourteenth Amendment, and thus could not override the state's Eleventh Amendment immunity from damage actions brought by individuals. This decision has significantly hamstrung the reach and effectiveness of the ADA. On remand for consideration of whether plaintiffs could pursue a claim under Section 504 of the Rehabilitation Act, the Attorney General argued that the state had not knowingly waived its Eleventh Amendment immunity in accepting federal funds, and hence could not be sued under this statute either, a position that the district court accepted. (The case is once again on appeal.) The inescapable conclusion is that Attorney General Pryor believes the federal govern-

ment has virtually no role to play in enforcement of well-established principles of non-discrimination on the basis of disability.

The Attorney General's zealotry is not limited to trenching upon the rights of people with disabilities. He was responsible for litigating *Alexander v. Sandoval*, 532 U.S. 275 (2001), which limited the relief available to plaintiffs suing under Title VI of the Civil Rights Act of 1964. *Sandoval's* conclusion that the Title VI regulations cannot address disparate impact is a major blow to civil rights enforcement.

As law professors, we would be the last people to criticize lawyers for zealous advocacy of their clients' causes, even if we disagreed with those clients' positions. But Attorney General Pryor's views go well beyond those necessary to represent his client zealously. He has sought out, and staked out, a position as the prime defender of an extraordinarily limited view of federal power that would have the effect of undoing legal developments that date not only from the New Deal but from the

## Committee News

time of Reconstruction. His views should be particularly troubling for members of Congress who have played key roles in sponsoring the various pieces of legislation he has opposed with such vehemence. Mr. Pryor is entitled to his views, and the people of Alabama, if they choose to do so, are entitled to re-elect him to public office. But the Senate Judiciary Committee should exercise its advise and consent power to keep those views from being foisted on litigants in the United States Court of Appeals for the Eleventh Circuit and on the broader body politic. We urge the Committee in the strongest possible terms to reject this nomination.

Sincerely,  
Michael Rooke-Ley  
Paula C. Johnson

Co-Presidents  
Society of American Law Teachers

## Finally...A Textbook on Social Justice

SALT Co-President Michael Rooke-Ley, Seattle University School of Law (visiting 2003-04)

Given the years—dare I say decades—of talk and more talk among SALT members at our conferences and workshops about the need for “social justice” materials, about course development, about curricular reform, about providing something we can really work with . . . well, it's time for some celebration and recognition.

Within the conventional, brown, hard covers of Thomson West, you will find the extraordinary work of SALT Board member Marnie Mahoney (Miami), John Calmore (North Carolina), and former SALT Co-President Stephanie Wildman (Santa

Clara), entitled “Cases and Materials on Social Justice: Professionals, Communities, and Law.”

As the authors observe, “[m]embers of the legal academy—in classrooms and clinics—have sought to teach about social justice in law schools because students want to know how they can work with the people who most need them.” With this comprehensive and wide-ranging 1100-page volume, we have been given just the tool we need to teach and inspire a new generation of lawyers to work with marginalized, subordinated and underrepresented clients and causes.

Nearly 150 contributors—including many of you—have brought varied experiences and perspectives from practice, the academy and the bench. Reading so many excerpts from so many different

authors could be daunting, confusing and frustrating were it not for the careful and thoughtful commentaries (“Notes and Questions”), which so effectively tie the materials together.

Here is a casebook that is already being used enthusiastically for large first-year courses on law, values and social justice; for small, upper-division electives on public interest lawyering; or simply as an invaluable resource for the rest of us who may wish to cherry-pick pieces and chapters for all that we do.

Ask Stephanie (swildman@scu.edu), Marnie (mmahoney@law.miami.edu), or John (jcalmore@email.unc.edu) to send you their 14-page Table of Contents. It's quite a tour de force. You'll be impressed.



## Rooke-Ley Rallies Political Activists

*The following excerpts are from a speech that SALT Co-President Michael Rooke-Ley gave to a gathering of 400 political activists in Eugene, Oregon on July 20, 2003.*

The folks who have come together tonight are dedicated activists, who have worked for so many years to bring out the best in America. These are patriots who know the difference between community-building and empire-building.

These days, in our state capitol as well as our nation's capitol, our social priorities have been turned upside down. While precious lives are lost and billions are spent for a war we don't want, Oregonians in need have become increasingly desperate in the face of drastic social service cutbacks; our system of justice has been forced to close one door after another; and our kids' school year—already the shortest in the nation—is shortened even further. Over-worked teachers face classes that are much too large; programs are being cut right and left; my own kids don't have textbooks to take home anymore. . . .

Here in Oregon and across America, we need jobs. We don't need NAFTA or the WTO—we need industry here and trade treaties abroad which respect workers' rights, human rights and the environment. . . .

We need a new direction. We need candidates for public office who are willing to speak out on these issues.

While we are deeply gratified by two recent Supreme Court decisions regarding affirmative action and regarding the right of privacy for the gay and lesbian communities, we know that the Bush Administration and its conservative base are gearing up to avenge those losses through their nominees to the federal bench. These are

lifetime appointments, so the time to fight these battles is now. . . . We need judges who believe in the principles of justice and equality, who respect choice, and who reflect the diversity of America. . . .

On the international front, the progressive community recognizes that the Bush Administration is simply "out of control." Time after time, this Administra-

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*"Time after time, [the Bush] administration has displayed an arrogance, an adolescent pugnacity, that is not just embarrassing, but truly damaging on a global scale. With its Wild West rhetoric and blatant disinterest in nurturing a community of nations, it has fostered a level of resentment and hatred for America unparalleled in our lifetime. In the words of our home-made protest signs, this 'mad cowboy disease' could kill us all."*

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tion has displayed an arrogance, an adolescent pugnacity, that is not just embarrassing, but truly damaging on a global scale. With its Wild West rhetoric

and blatant disinterest in nurturing a community of nations, it has fostered a level of resentment and hatred for America unparalleled in our lifetime. In the words of our home-made protest signs, this "mad cowboy disease could kill us all."

People all over the world have suffered at the hands of this Administration. Let us count the ways:

- rejection of the Kyoto Accords;
- absence from the Durban Conference on Human Rights;
- rejection of the Biological and Chemical Weapons Convention;
- unilateral termination of the ABM Treaty with Russia;
- active opposition to the creation of the International Criminal Court;
- promulgation of a "pre-emption" doctrine, justifying military intervention whenever we wish and setting a horrifying precedent for rogue nations of the world;
- the Anglo-American invasion of Iraq, sold on the basis of exaggerations and fabrications and without U.N. authorization; and now
- the awarding of massive re-building contracts to the likes of Bechtel and Halliburton.

This is an outrage—a scandal of enormous proportions. . . . And, yes, we need a new direction. . . .

Finally, let's remind ourselves that this is a community which has gone on record in opposition to the PATRIOT Act, thanks to the work of so many of you seated here tonight. Our work must continue, spreading the word to communities across the nation about the insanity of sacrificing our civil liberties in the name of security.

There is, I'm afraid, no rest for the weary. The political times have never been worse, the stakes have never been higher. We must meet the challenge and reclaim the very best of America.



## Norman Dorsen Fellowship

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