

October Term 2002

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Although almost any case before the Supreme Court has the potential to broach vital questions that shape our republic, some invite the Court to address the first principles of the matter. Already, the upcoming October Term 2002 promises to keep our interest piqued and our appetites whetted with a number of cases involving important constitutional issues. Our preview begins with the First Amendment—well represented by disputes involving topics ranging from cross burning to copyright extensions.

Cross Burning

In *Virginia v. Black*, No. 01-1107, the Court will consider whether a statute that prohibits cross burning with the intent to intimidate violates the First Amendment. The case is the latest in a line of challenges to popular laws banning unpopular speech, such as the flag-burning and cross-burning statutes reviewed, respectively, in *Texas v. Johnson*, 491 U.S. 397 (1989), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The Supreme Court of Virginia struck down the statute in *Black* because government may not discriminate based on content or viewpoint when regulating speech, even if the same speech could be regulated on other, neutral, grounds. That the Virginia law applied only to burning a cross, and not to other intimidating pyrotechnics, demonstrated to the court that the law discriminated, and intended to discriminate, based on the disfavored content of the symbolic speech. That the statute also presumed an intent to intimidate from the act of cross burning alone simply confirmed the court's view. Court watchers should stay tuned to see whether the justices will toe the constitutional line and strike down a popular state law, or draw a different line in the face of hateful speech that few would relish defending, even if only on principle.

Anti-Abortion Protests

In the consolidated cases of *Scheidler v. NOW, Inc.*, and *Operation Rescue v. NOW, Inc.*, Nos. 01-1118 and 01-1119, the Supreme Court will be interpreting the Racketeer Influenced and Corrupt Organizations (RICO) Act and the Hobbs Act as applied to anti-abortion protests. (The Hobbs Act makes it a federal offense to commit robbery or extortion in a manner that obstructs interstate commerce.) Given the context and past cases in this area, the First Amendment likely will be a substantial consideration in shaping the Court's interpretations. But aside from First Amendment concerns, there are other interesting questions: Is injunctive relief available under RICO's civil remedy provisions? Can political protest in the form of sit-ins and demonstrations that obstruct access to abortion clinics be characterized as "extortion" of the "property" right to give and receive services at such clinics?

The balance between the ability to speak when, where, and in a way the speech will be most effective, and the ability of citizens to engage in lawful activities without undue harassment or intimidation, involves a difficult clash of two fundamental aspects of freedom. That clash arises whenever there are issues that inspire strong public views. During the civil rights movement, RICO and the Hobbs Act might have been applied to sit-ins and demonstrations at segregated lunch-counters, or to demonstrators protesting federally ordered integration of schools. Today the fight is over abortion; tomorrow it could be animal experiments, AIDS research, or the teaching of the Koran. The freedom to do what you will within the law, and the freedom of others to protest what you do, will remain in constant tension. How the Supreme Court reconciles that tension promises to be controversial.

Copyrights

In *Eldred v. Ashcroft*, No. 01-618, the Court will take up the interrelation between the First Amendment and the Copyright Clause. In assessing whether a law extending the terms of existing and future copyrights is "categorically immune" from First Amendment challenge, the Court will have an opportunity to determine whether Article I copyright powers are subject to the same First Amendment limitations as are all other Article I powers. Prior Supreme Court cases have correctly recognized that certain speech-preserving

aspects of the existing copyright laws and jurisprudence generally allowed such laws to survive First Amendment scrutiny. Yet those cases have sometimes been interpreted as giving copyright laws a free pass under the First Amendment, regardless of their content. In *Eldred*, the Court will consider an amendment to the copyright laws that makes them significantly more speech restrictive while providing only uncertain incentives for the creation of new writings. The Court will decide how the First Amendment applies to such speech-restrictive exercises of congressional power.

In addition to the First Amendment question, *Eldred* will construe the text of the Copyright Clause itself. Article I, Section 8, clause 8 of the Constitution gives Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The U.S. Court of Appeals for the District of Columbia Circuit held, however, that the exercise of Congressional power to extend the terms of existing copyrights need not promote the progress of science. And in any event, said the court, retroactive extensions incidentally encourage preservation of old materials and advance international uniformity in copyright terms. The D.C. Circuit also held that retroactive extensions, even though repeated a number of times, did not violate the "limited Times" requirement of the Copyright Clause. The Supreme Court's interpretation of "promote the Progress" and "limited Times" will test how the Court gives effect to specific enumerations of Congressional power.

Meagan's Laws

Basic principles constraining the government's approach to crime, punishment, and related matters will command considerable attention in two cases that challenge state sex-offender registries adopted through so-called Meagan's laws. One case addresses the nature of "punishment" for purposes of the constitutional prohibition against *ex post facto* laws. The other examines the scope of any due process protections for reputation interests threatened by the dissemination of truthful information by the government.

In *Godfrey v. Doe*, No. 01-729, the Court will consider whether Alaska's publication on the internet of the names and addresses of convicted sex offenders, and the ongoing requirement that offenders report to the state, constitute punishment notwithstanding Alaska's

express public-safety justification for the law. The Ninth Circuit, in an opinion by Judge Stephen Reinhardt, held that Alaska's law imposed punishment and thus violated the *Ex Post Facto* Clause as to persons whose crimes were committed before enactment of the law. Although jurisprudence on the difficult question of what constitutes "punishment" for various purposes under the Constitution is less than satisfying, *Godfrey* is not likely to provide much insight in that area.

What may be more significant, however, is how the Court will treat a related question: Assuming that the government is concerned with both punishment and public safety, may it release information that is truthful, of great public interest, and closely tied to the government's own operation of the criminal justice system? Some might even suggest that the government is *obliged* to provide such information to the public. Indeed, the greater accessibility of the information via the internet enhances rather than detracts from its value. As long as the information is truthful, can secondary consequences caused by its dissemination ever be a basis for suppressing information so closely tied to the operation of the criminal justice system?

A slightly different approach to sex-offender registries is at issue in *Connecticut Department of Public Safety v. Doe*, No. 01-1231. The Supreme Court will consider whether a sex-offender is entitled to an individualized hearing regarding his current dangerousness before being listed in the registry. Rather than treat listing as "punishment," the Second Circuit treated it as deprivation of a liberty interest in the offender's reputation, and thus subject to pre-deprivation due process. The most interesting aspect of this case could be the Supreme Court's analysis of the fundamental concept of liberty, and whether it includes a privacy interest in *minimizing* access to truthful public information—for example, conviction for a sex offense—that carries with it a significant stigma. It will be curious indeed if the Court finds a liberty interest in a favorable reputation that is based on public ignorance, then finds a deprivation of liberty if the dissemination of truthful information undermines that ignorance and hence the favorable reputation.

A further question is whether the government must have a hearing to establish that the inference of dangerousness likely to be drawn by an informed public will be correct. That question raises the troubling prospect of government as suppressor of information out of distrust

that the public will draw the right conclusions. Thus, the First Amendment is a secondary theme in both Meagan's law cases: What rules should apply when the government controls public access to, and therefore use of, valuable information intimately related to the operation of the criminal justice system?

Due Process for Aliens

Demore v. Kim, No. 01-1491, addresses due process considerations in a context not bound up with public information issues. Aliens who are deportable for having committed certain felonies in the United States have been civilly detained, without bail, pending final determination regarding deportation. Does the Due Process Clause require an individualized hearing regarding applicability of the law, presence of danger, or risk of flight before those persons are detained? The Ninth Circuit invalidated the mandatory detention provision of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), as applied to otherwise lawful permanent resident aliens. Because individualized hearings would be constitutionally required for civil detention in virtually any other context, at stake is the Court's commitment to basic tenets of due process for all "persons" — even those who are deportable. We shall soon see whether recent events, sensitivity to security concerns, and the last decade's growing hostility toward aliens will cause due process values to lose ground in favor of congressional authority over immigration.

Double Jeopardy

The Double Jeopardy Clause is at issue in *Sattazahn v. Pennsylvania*, No. 01-7574, which involves a defendant who obtains a retrial after his conviction is overturned on appeal. The Court will decide whether the failure of a jury to impose the death penalty, and the resulting imposition of a mandatory life sentence as required by statute, bars a subsequent attempt to impose the death penalty. The larger principle is whether government should have the authority to threaten defendants with greater punishment than it was able to obtain in a first trial as a means of deterring appeals that could lead to retrial. Possibly, the Supreme Court will treat the death penalty as different from other types of sentencing. As a result, the Court could limit any potential one-way ratchet of punishment to death-penalty cases while allowing greater sentences on retrial in other cases.

Excessive Punishment

In recent years, the Eighth Amendment restriction against cruel and unusual punishment has received considerable attention in the death-penalty context. But in the coming term, two consolidated cases involve the Eighth Amendment as applied to non-capital sentencing. *Lockyer v. Andrade*, No. 01-1127, from the Ninth Circuit, and *Ewing v. California*, No. 01-6978, from the California Court of Appeals, challenge California's "three strikes" law mandating 25-year-to-life sentences for third and subsequent felony convictions. The Supreme Court will consider whether such sentences are grossly disproportional to third offenses that would otherwise be misdemeanors. The case may well highlight the inevitable tension between judicial deference to the political branches on substantive matters, and restraint on government authority imposed by the Eighth Amendment. The method by which the Court gives content to the substantive requirement of proportionality will speak as much to the fundamental relationship among courts, legislatures, and the Constitution as to the concept of cruel and unusual punishment.

The issue of proportionality also arises next term in the civil context. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289, the Supreme Court will consider whether punitive damages 145 times the amount of compensatory damages, based on conduct outside the jurisdiction and unrelated to the plaintiff, violate the Due Process Clause of the Fourteenth Amendment. While the case seems unlikely to alter fundamentally the due process balancing test applied to punitive damages, it does implicate interesting and basic issues of punishment versus compensation. Moreover, the case may illuminate constitutional treatment of deterrence as an objective of both civil and criminal law. There is some irony in contrasting the *State Farm* case, which treats intentionally "punitive" damages as civil phenomena, with the Meagan's law cases, which inquire whether the government's release of truthful information about sex-offenders to the public for the express purpose of public safety constitutes criminal punishment.

State Sovereign Immunity

Another group of cases to be heard by the Court concerns a variety of other limitations on government authority and the allocation of authority between different elements of government.

In *Nevada Department of Human Resources v. Hibbs*, No. 01-1368, the Court once again will address the interplay of state sovereign immunity and congressional authority under Section 5 of the Fourteenth Amendment. The broad principle of state sovereign immunity as a limit on federal authority has been addressed frequently by the Supreme Court over the last several terms. Although this case is the first in the sovereign immunity series that tests gender-based legislation, it probably will not break new ground on that score. Instead, the case could offer an interesting treatment of Fourteenth Amendment equal protection principles and the degree to which Congress can, under Section 5, legislate against conduct that would not itself rise to the level of an equal protection violation.

The federal government's claim, accepted by the court below, was that the Family and Medical Leave Act was remedial legislation seeking to prevent gender discrimination by ensuring leave on a gender-neutral basis. But the Act goes far beyond requiring gender-neutral leave policies, and includes prohibitions against state conduct that would not remotely violate the Fourteenth Amendment. Thus, the decision below seems to test the limit on claims of prophylactic legislation under Section 5. Because the appellate decision comes from a Ninth Circuit panel that included Judge Reinhardt, odds-makers are likely to favor the petitioner.

"Dormant" Commerce Clause

The application of the "dormant" Commerce Clause to a state program that indirectly exacts a price rebate from out-of-state prescription drug manufacturers is at issue in *Pharmaceutical Research & Manufacturers of America v. Concannon*, No. 01-188. The program effectively creates a means for individuals to purchase prescription drugs collectively, with the state then negotiating a rebate that is funneled back to each individual purchaser. As a direct bargaining agent, the state does more than authorize and oversee a private buyer's cooperative. That raises interesting economic questions, which probably have more to do with the peculiarities of antitrust policy than with the dormant Commerce Clause. If the Court wanted to tackle first principles in this case, it might revisit the very existence of its dormant Commerce Clause jurisprudence and consider leaving this whole area to Congress under the "active" Commerce Clause. But such reconsideration is unlikely. More likely, the Court will

undertake an economic analysis of the state's involvement in negotiating indirect rebates on behalf of private purchasers. How does that involvement impact competition and free markets? Would a federal court be treading on state sovereignty if it rejected a program based on economic considerations not tied to a specific constitutional or congressional command?

Takings

Washington Legal Foundation v. Legal Foundation of Washington, No. 01-1325, is the latest phase of a Takings Clause challenge to a state "IOLTA" statute—Interest on Lawyers' Trust Accounts. State IOLTA programs channel client funds—small sums and large sums held for short periods of time—into designated interest-bearing trust accounts. The interest is then funneled through a judicially created legal foundation to various "public interest" legal firms. Fundamental property right principles ought to make this a straightforward case, since the state has asserted control over the equitable interest of client property without consent or just compensation. But the Supreme Court's takings jurisprudence has often followed a more complicated *ad hoc* approach. Because the property taken is money, rather than land, the Court may treat the case as one involving a regulatory rather than a physical taking. If so, the outcome is unpredictable.

Congressional Elections

A last case that raises an interesting, if not quite fundamental, issue is *Branch v. Smith*, No. 01-1437 (to be heard together with *Smith v. Branch*, No. 01-1596). The Supreme Court will consider the interpretation of Article I, Section 4, of the Constitution, which provides that the times, places, and manners of congressional elections "shall be prescribed in each State by the Legislature thereof." The immediate question for the Court is whether a congressional redistricting plan imposed by a state court under authority of its general jurisdiction, rather than pursuant to an express legislative delegation of authority, violates the constitutional requirement that the state "Legislature" prescribe such matters. That somewhat quirky constitutional issue seems less a matter of overarching principle than of adherence to constitutional details. Still, it should elicit

greater attention due to the role of a related constitutional provision (Article II, Section 1) in the *Bush v. Gore* dust-up of two terms ago.

Future Cases

Finally, three cases not yet on the docket have reasonable chances of being accepted for the coming term. Each raises a significant constitutional issue: affirmative action, commercial speech, and campaign finance, respectively.

The pending petition in *Grutter v. Bollinger*, No. 02-241, will give the Court the opportunity, avoided several times previously, to revisit the question of affirmative action and the role that race can play in state law school admissions. With the contentiousness and emotions surrounding that issue, it may be too much to expect a completely principled resolution, but some incremental progress and greater clarity would surely be welcomed.

In the expected petition for review of *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), the Court may get the chance to clarify whether commercial speech should be regarded differently under the First Amendment from all other protected speech. While it would be welcome if the Court retreated from its questionable denigration of commercial speech, it may not have to go very far in that direction to resolve this peculiar case: The speech subject to restriction under state law was Nike's public defense of its business practices against public criticism. Many legal scholars scoff at the categorization of such speech as commercial speech in the first place.

Last, but not least, the 500-pound gorilla sitting in the lower courts is the collection of sweeping challenges to the Bipartisan Campaign Reform Act (BCRA) of 2002. Although the group of challenges will be subject, by statute, to direct appeals to the Supreme Court, argument before a three-judge panel of the District Court is not scheduled until December. Thus, the appeal may not make it onto the coming term's docket. Whether heard during the coming term or the next, the BCRA challenges will involve fundamental principles of free speech and democratic government. One can only trust that the Supreme Court will be more sensitive to the First Amendment than was Congress.