

Coming Up: October Term 2003

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Following the Supreme Court's dramatic decisions this June, including the *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), affirmative action cases and the *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), decision striking down a state sodomy law, the Court's docket for the October 2003 Term appears less likely to result in quite as many high-profile and groundbreaking decisions. Nonetheless, the Court has before it several cases raising significant legal issues, particularly the challenge to the new campaign finance statute and an important case involving the discriminatory funding of educational scholarships based on religion. Moreover, additional grants in the course of the Term could result in further significant cases.

Campaign Finance

In September, the Court will hear argument in eleven cases consolidated with *McConnell v. FEC*, No. 02-1784, involving challenges to the constitutionality of the Bipartisan Campaign Reform Act (BCRA).¹ The most significant provisions of the statute are those imposing stringent new limitations on "soft money" contributions to, and expenditures by, participants in the political process, and those imposing broad new restraints upon issue advocacy before elections. Both of those categories of regulation imposed by the BCRA dramatically change the rules governing the financing of elections and raise the most fundamental constitutional concerns.

The BCRA's ban on political parties' receipt and use of "soft" money, that is, any money outside of the narrowly defined federal

¹The author is cocounsel for the Republican National Committee, which is challenging the constitutionality of the statute in this case. Although the argument will be held in September 2003, technically at the end of the October 2002 Term, the decision will be issued during the October 2003 Term.

“hard” money regulations, is significantly different from the sorts of campaign finance regulations upheld by the Court in *Buckley v. Valeo*, 425 U.S. 946 (1976), and other cases. Whereas the previous cases primarily involved limits on contributions to political *candidates*, the BCRA’s soft-money ban drastically limits contributions to, and independent *spending* by, political *parties* that do not hold office and cannot themselves be subject to political corruption. The Court has recognized that parties, like individuals, enjoy the basic First Amendment right to participate in the political process. Yet BCRA prevents national political parties from spending money on grassroots voter mobilization at the state and local levels, which is the essence of the democratic process and which has been the parties’ traditional function throughout our history. The fact that this spending limitation is stated as a restriction on the *source* of money that can be spent, rather than the *amount*, is of no moment, since the Court has recognized that such source restrictions have the same draconian effect on political participation as a straightforward expenditure ceiling. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

Moreover, the government’s primary justification for the soft-money ban, the rationale of preventing political corruption, has significant weaknesses. The Supreme Court has already held that “soft money” contributions to political parties have, “at best,” an “attenuated” link to the appearance of corruption. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996). It is difficult to see why, as presupposed by the BCRA regime, a \$2,000 contribution to a political candidate (which remains legal) would be *less* corrupting than an identical donation to the candidate’s political party (which the BCRA makes unlawful), particularly given that the candidate will not receive, or even be aware of, the money given to the party. BCRA is particularly overbroad with respect to state and local elections because, for example, the Act makes it a felony for the national political parties to even solicit money for local mayor’s races, or for state parties to spend unregulated money on state or local candidates or for voter mobilization or even ballot initiatives. This effort to close an alleged “loophole” for state electoral activity is wholly unsupported by any evidence that such grassroots politics has ever “appeared” to “corrupt” any *federal* candidate.

The BCRA's soft-money ban is also subject to a significant Equal Protection challenge. The statute's rigorous soft-money restrictions apply to political parties but not to similarly situated interest groups. For example, the BCRA restricts parties, but not other interest groups such as Emily's List or the League of Conservation Voters, from raising or spending soft money to engage in nonfederal activities, from engaging in generic campaign activities like "get out the vote" drives, and from other significant political activities. Thus, BCRA is premised on the inherently contradictory notions that it is corrupting for a political party to spend "special interest" money but not corrupting for the special interest group itself to spend the same money *directly* for the same purpose. BCRA's discrimination in favor of special interest groups in this fashion is ironic in light of its stated goal of eliminating undue special interest influence over federal candidates.

The issue advocacy provisions of the BCRA are subject to similarly serious First Amendment challenges. Here, Congress has passed a law prohibiting unions and corporations from sponsoring ads criticizing (or supporting or *mentioning*) candidates for Congress. Needless to say, restrictions on the expression of ideas in core political debates cut at the heart of the Free Speech Clause. And the Court has struck restrictions on expenditures made independently of candidates except where they expressly advocate the election or defeat of a specifically identified candidate. Since corporations have First Amendment rights, particularly nonprofit corporation groups focusing on issues, it is difficult to perceive any legitimate, much less compelling, government interest in so limiting political speech.

College Scholarships for Religious Studies

Locke v. Davey, No. 01-1315, raises some very interesting issues relating to the unconstitutional conditions doctrine and the Free Exercise Clause. The case involves a challenge to a Washington state statute that prohibits any awards of public scholarships to students studying theology at either public or private institutions. The Ninth Circuit held that the Washington law violated theology students' Free Exercise rights by facially discriminating against them.

The Washington statute would appear to be quite vulnerable to the constitutional challenge the Court will consider. In its previous cases under the Free Exercise Clause, the Court has generally

declined to draw distinctions between the withholding of funding and other sorts of burdens imposed on religious exercise. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963), held that a state cannot deny unemployment *compensation* based on a religious refusal to work on Saturdays. However difficult it may be to reconcile *Employment Division v. Smith*, 496 U.S. 913 (1990), with *Sherbert* in other respects, *Smith* too applied normal free-exercise analysis to the withholding of funding involved there. Moreover, the Court has held that states cannot discriminate in funding on the basis of religious viewpoint. Thus, *Rosenberger v. Rector & Visitors, Univ. of Va.*, 515 U.S. 819 (1995), held that a denial of funds to a student organization publishing a Christian newspaper was unconstitutional viewpoint discrimination. Together, these principles would seem to cast serious doubt on the propriety of the funding distinction drawn by the Washington statute in this case.

Locke will also present the Court with the opportunity, following *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Ohio school vouchers case, to move somewhat toward reconciling its historically disparate approaches to the First Amendment religion clauses. *Zelman*, of course, held that states are *permitted* under the Establishment Clause to fund religious education on a neutral, evenhanded basis. Just as the criterion of “neutrality” has played an increasingly important role in the Court’s Establishment Clause jurisprudence, *Smith* seemed to establish neutrality as the touchstone for Free Exercise analysis. Thus, invalidating the sort of religious discrimination embodied in the Washington statute would help establish a harmonious interpretation of the Religion Clauses.

Eleventh Amendment

The Court has granted review in two significant cases involving the states’ sovereign immunity. *Frew v. Hawkins*, No. 02-628, raises an issue of great practical importance involving the scope of sovereign immunity in the context of enforcing consent decrees. The plaintiff in *Frew* filed suit against Texas for alleged violations of a federal Medicaid program. The parties entered a consent decree, which the district court approved. The first issue is whether state officials waived their sovereign immunity by urging the district court to adopt the consent decree, which was based on federal law and

which provides that the court will supervise the state official for compliance.

The second, and potentially more significant, issue involves whether the Eleventh Amendment precludes a district court from enforcing a consent decree entered by state officials that is not directed to remedying a violation of a federal right that can be the subject of a lawsuit under 42 U.S.C. § 1983. The Court's ruling on this issue could have a significant impact on the enforcement of consent decrees entered by states, particularly in prison and desegregation cases in which elaborate consent decrees often dictate detailed funding and operational requirements for state facilities. The states have a strong interest in cabining the scope of such decrees to provisions actually directed to remedying violations of identified rights.

In *Tennessee v. Lane*, No. 02-1667, the Court will decide whether Title II of the Americans with Disabilities Act (ADA) validly abrogates the states' sovereign immunity from private damages claims. The Court held in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), that Title I of the ADA is not a valid exercise of the congressional power to enforce the Fourteenth Amendment and thus does not validly abrogate the states' sovereign immunity. In *Lane*, two plaintiffs sued Tennessee, claiming that they were denied access to courthouses due to lack of accommodation of their physical disabilities. Although the circuits have split as to whether the reasoning of *Garrett* extends to Title II, there would be little reason to expect the Court to rule that Title II is valid Enforcement Clause legislation while Title I is not. The congressional findings supporting the two titles do differ somewhat at the margins, but the essential conclusions of *Garrett* would appear to apply with equal force to Title II.

The wrinkle in *Lane* is that the Sixth Circuit held that while Title II does not validly abrogate sovereign immunity as legislation enforcing the Equal Protection Clause, the statute nonetheless is a valid exercise of the power to enforce the Due Process Clause (and hence validly abrogates the states' sovereign immunity on that independent ground). The Sixth Circuit's reliance on due process stemmed from the unique facts of *Lane*, which happened to involve a claimed inability to access to a courthouse. Access to the courts can implicate the Due Process Clause. This analysis is surprising, however, and the Supreme Court may be unlikely to accept it, given

that Title II is not specific to courts, but rather is a general law that happened to be applied to court buildings in the unique context of this case. The Sixth Circuit in effect treated the abrogation inquiry on an “as applied” basis because the due process rationale would not have been available with respect to other Title II claims. This approach appears to be in significant tension with *Garrett* and other recent sovereign immunity cases, which have analyzed whether *statutes* were validly enacted under the Enforcement Clause, an inquiry that does not depend on the facts of the case at hand, and thus appears to rule out case-specific, “as applied” abrogations of sovereign immunity.

***Miranda* Warnings**

The Court will also consider three cases in the upcoming Term involving the effects of violating *Miranda v. Arizona*, 396 U.S. 868 (1969). The Term could well produce the most significant developments in this area since the Court held that *Miranda* survived the enactment of 18 U.S.C. § 3501 in *Dickerson v. United States*, 530 U.S. 428 (2000). Clearly, *Dickerson* has not ended the confusion in the lower courts regarding the scope of, and basis for, the *Miranda* requirements, and the cases that the Court will address this term highlight the continuing uncertainty as to whether *Miranda* is a constitutional requirement under the Fifth Amendment or a policy-based, extraconstitutional prophylactic measure.

In *Missouri v. Seibert*, No. 02-1371, the Court will revisit an issue it decided in *Oregon v. Elstad*, 470 U.S. 298 (1985), which held that waivers of *Miranda* rights can be valid even if the defendant had previously undergone improper questioning without having been given *Miranda* warnings. Seibert was arrested and charged with second-degree murder for participating in setting fire to a mobile home while someone was inside it. Initially, a police officer questioned Seibert without reading her the *Miranda* warnings, but at the beginning of a subsequent session, the officer did give the *Miranda* warnings. After hearing the warnings in the second session, Seibert waived her *Miranda* rights and repeated incriminating statements she had made during the earlier session. The Missouri Supreme Court held that the post-*Miranda* statements should have been suppressed, distinguishing *Elstad* on the ground that the *Miranda* violation in *Seibert* appeared to be a deliberate tactic to elicit a confession.

The Court will address the significance of police officers' tactical use of non-*Miranda* questioning to the rule in *Elstad*. The Missouri Supreme Court's distinction might be difficult to maintain if the *Miranda* right is a constitutional rule under the Fifth Amendment because looking to the subjective motivations of the police officers would move the analysis even further from the text of the Amendment than is authorized under the existing precedents. To the extent that *Miranda* announces a general prophylactic measure, however, the Court might decide that a policy discouraging tactical *Miranda* violations is sufficient to justify the outcome below.

United States v. Patane, No. 02-1183, involves the suppression of physical evidence obtained by police questioning in violation of *Miranda*. Patane was charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). After his arrest, a police detective questioned him without giving the *Miranda* warnings. As a result of this improper questioning, the police were able to retrieve a firearm that the government introduced against Patane at trial. The Tenth Circuit held that the firearm should have been suppressed as the "fruit of the poisonous tree." The Supreme Court will decide whether physical evidence derived from noncoerced questioning without *Miranda* warnings must be suppressed. This case presents the tension between the constitutional and prophylactic strands of the Court's *Miranda* jurisprudence particularly clearly because, if *Miranda* is a constitutional rule, it only protects a testimonial privilege and would not appear to support an exclusionary rule with regard to nontestimonial evidence, regardless of how it is obtained. If *Miranda* is treated as prophylaxis, of course, there is little basis to predict the outcome in *Patane*.

Finally, *Fellers v. United States*, No. 02-6320, involves the effect of a *Miranda* violation on the Sixth Amendment right to counsel. Fellers, who was arrested and charged with conspiracy to possess with intent to distribute methamphetamine, made incriminating statements in response to questions without receiving his *Miranda* warnings. After police officers brought Fellers to the jail and informed him of his *Miranda* rights, Fellers waived those rights and repeated statements he had made earlier. Fellers argues that the inculpatory statements made at the jail should be suppressed as improperly elicited because he first spoke to the police before they presented him his *Miranda* rights, and that the failure to administer his *Miranda* warning violated his Sixth Amendment right to counsel because the encounter

constituted a post-indictment interview. The Court will consider (1) whether the police violated Fellers' Sixth Amendment right to counsel, and (2) whether Fellers' post-warning statements should have been suppressed as the fruit of an illegal post-indictment interview outside of the presence of counsel.

Fourth Amendment

The Court has granted certiorari in no fewer than five Fourth Amendment cases so far, an unusually large number for a single Term. The cases will present several close issues relating to the propriety of searches.

In *Indianapolis, Inc. v. Edmond*, 531 U.S. 32 (2000), the Supreme Court held that checkpoint roadblocks for the purpose of nonspecific drug interdiction violated the Fourth Amendment. The Court will return to the issue of checkpoint roadblocks in *Illinois v. Lister*, No. 02-1060, which involves the constitutionality of checkpoints designed to investigate specific offenses. Law enforcement agents set up a checkpoint at the location of a specific automobile accident that had occurred at the same time of day, one week before the roadblock. The agents were trying to solicit information from anyone who may have witnessed the hit-and-run accident. *Lister*, a motorist stopped at the roadblock, was arrested for an unrelated offense, driving under the influence. The Illinois Supreme Court held that the search of *Lister's* vehicle violated the Fourth Amendment in light of *Edmond*. The Court will determine the constitutionality of checkpoint roadblocks for the purpose of investigating specific offenses. The added nexus to a specific criminal investigation might well be sufficient for the Court to distinguish the case from *Edmond*, and to hold that the search of *Lister's* automobile was lawful.

The Supreme Court held in *New York v. Belton*, 453 U.S. 454 (1981), that a police officer may search the passenger compartment of a vehicle as a contemporaneous incident of a lawful arrest of the occupant. In *Arizona v. Gant*, No. 02-1019, the Court will decide whether the rule announced in *Belton* applies when the occupant had no knowledge (either actual or constructive) of the presence of the police officer before leaving the vehicle. *Gant* was arrested on an outstanding warrant after parking his car in a driveway and exiting the vehicle on his own initiative. Police officers thereupon arrested *Gant*, then searched his car, and found contraband. The

Arizona Court of Appeals ruled that this evidence should have been suppressed, and distinguished *Belton* on the ground that Gant lacked any knowledge of the officers' presence before leaving the car. *Gant* thus raises the issue of whether the *Belton* rule that allows incidental searches of automobiles is limited to situations in which the arrest is effected by instructing the defendant to exit the vehicle that is then searched, or whether the mere presence of the vehicle is sufficient to trigger the "contemporaneous incident" exception.

In another, more fact-specific automobile case, *Maryland v. Pringle*, No. 02-809, the Court will clarify the application of the Fourth Amendment in the area of vehicle searches. Pringle was a passenger in the front seat of an automobile when it was stopped by a police officer. The propriety of the stop is not at issue in the case. The officer observed a roll of cash in the glove compartment when the driver opened it to retrieve the vehicle registration, and the officer asked permission to search the car. The driver consented to the search, and the officer discovered cocaine as well as the money he had previously observed. Pringle and the driver of the car disclaimed ownership of the cocaine and money, and the officer arrested both of them. The Court of Appeals of Maryland held that Pringle's arrest was improper, finding no probable cause and no facts sufficient to establish that Pringle had either knowledge or control of the cocaine. The case obviously will have to balance the interests of individuals being arrested for riding in a car in which, unbeknownst to them, illegal substances are present against a rule that prohibits prosecution whenever more than one person is in the car.

In *Groh v. Ramirez*, No. 02-811, the Court will address two issues arising from executing a deficient search warrant related to the "good faith" exception to the exclusionary rule. Police officers executed a warrant to search a home, but the warrant mistakenly printed the description of the home in the space provided for identifying the items to be seized. The homeowner sued the officers, and the Ninth Circuit ruled that the officer in charge of the operation was not entitled to qualified immunity from the suit because he had an obligation to proofread the warrant before executing it. The Supreme Court will review the qualified immunity issue, and will also determine whether the warrant stated in sufficient detail the places to be searched and the items to be seized pursuant to the Fourth Amendment particularity requirement. Whatever the virtues of the "exclusionary rule" in deterring police *misconduct*, applying it to "failures

to proofread” would not seem to really protect *serious* Fourth Amendment rights and would further convert criminal prosecution into a game of judicial “gotcha.” The Ninth Circuit’s recent Supreme Court track record suggests that the chances of affirmance here are less than robust.

The Court will consider in *United States v. Banks*, No. 02-473, whether law enforcement officers violated either the Fourth Amendment or the “knock-and-announce” statute, 18 U.S.C. § 3109, when they forcibly entered an apartment approximately twenty seconds after knocking on the front door and announcing their presence. The statute requires that officers wait a reasonable period before forcibly entering a residence when executing a search warrant and specifically stipulates that an officer may forcibly enter into a home to execute the search warrant if he is refused admittance after the officer has announced his authority and his purpose. The Ninth Circuit held that the conduct of the officers violated both the Constitution and the statute and required suppression of the evidence, observing that no occupant of the house had denied the officers admission and that there were no exigent circumstances.

Freedom of Information Act

In *Office of Independent Counsel v. Favish*, No. 09-954, the Supreme Court will consider exemption 7(C) of the Freedom of Information Act (FOIA), which exempts from disclosure records or information collected for law enforcement purposes if their disclosure could constitute an invasion of privacy. Exemption 7(C) requires courts to weigh the public interest in requested documents against the intrusion on privacy that disclosure could be expected to cause. Favish submitted a FOIA request to the Office of Independent Counsel requesting photographs related to the death of former Deputy White House Counsel Vincent Foster. The Ninth Circuit affirmed the district court’s conclusion that the materials fell under exemption 7(C), and thus did not need to be disclosed. The Court will consider whether the Foster materials were properly withheld on the grounds that autopsy pictures would seem to invade one’s privacy.

Future Cases

Predicting future grants is difficult, but the most significant cases of a Term often include some in which the Court granted certiorari during the course of the Term. Indeed, both *Lawrence* and *Grutter*,

arguably the most important cases of the 2002 Term, were taken by the Court during the Term. Several cases in which the Supreme Court has not yet granted certiorari raise issues that might warrant the Court's attention.

In *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003), the Drug Enforcement Agency (DEA) recruited Mexican citizens to kidnap a Mexican national and bring him to the United States to face charges stemming from his alleged involvement in the kidnapping of a DEA agent. Alvarez was eventually acquitted and later brought suit, inter alia, under the Federal Tort Claims Act (FTCA) and the Alien Tort Claims Act (ATCA), asserting that his abduction was a violation of his civil rights. The Ninth Circuit held that the alleged extraterritorial tortious conduct by Mexican citizens gave rise to a civil claim under U.S. law, and that the complaint stated a violation to the law of nations, a predicate to federal court jurisdiction under the ATCA. The case presents the certiorari-worthy issue of whether the ATCA creates a private right of action for torts committed (anywhere in the world) in violation of customary international law. This decision could have ramifications for American corporations, which are increasingly being sued in the United States for "participating" in a foreign country's "torts" against foreign citizens.

In *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), the Ninth Circuit held unconstitutional the application of a federal child pornography statute, 18 U.S.C. § 2252, to noncommercial possession of such materials wholly within a single state, even if the pornography was created with materials that traveled interstate. McCoy was charged with possession of pornographic photographs of herself with her underage daughter, but was not alleged to have engaged in commercial activity with regard to the materials. The Ninth Circuit, in an opinion written by Judge Stephen Reinhardt (an unlikely champion of federalism principles), applied *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), to hold that an application of the statute to McCoy's conduct exceeded Congress's lawmaking power under the Commerce Clause. The case could provide another opportunity for the Court to address the scope of the congressional commerce power, an area of significant development in recent years. A negative decision could invalidate a number of other federal statutes, which justify regulating wholly intrastate activity exclusively on the grounds that materials relevant to the activity traveled between states.

