

## **FEDERAL COURTS LAW REVIEW -- 1999 Fed. Cts. L. Rev. 3**

JUSTICE AT THE JUNCTURE:

A First Look at the Final Term of the Supreme Court in this Millennium (October Term, 1999)

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### **Abstract**

The number of potential blockbuster cases on the Supreme Court's docket for October Term, 1999 is notable, especially in light of the overall small number of cases in which review has been granted. The Court will review at least two cases involving federalism, the area of the Rehnquist Court's most dramatic changes in constitutional law, as well as cases in criminal procedure, habeas corpus, First Amendment issues, civil rights, and the meaning of key statutory provisions. This article highlights these cases, points up their significance in light of previous developments, and discusses their potentially enormous impact.

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### **1. INTRODUCTION**

An exceptional number of potential blockbuster cases are already on the docket of the Supreme Court for October Term, 1999. In the first few months of its new Term, the Court will hear oral arguments in cases involving important issues concerning federalism, criminal procedure, habeas corpus, the First Amendment, civil rights, and the meaning of several key statutory provisions.

The number of likely significant cases already on the docket is notable, especially in light of the overall small number of cases in which the Court has granted review. Before it adjourned

in June, the Court had granted review in just 26 cases for next Term's docket. A year ago in June, it had granted review in 31 cases for the 1998 Term, in which it ultimately rendered 75 decisions. Two years ago, the Court had granted review in 46 cases before its June recess and ultimately decided 91 cases. Three years ago, review had been granted in 45 cases, and the Court handed down 89 decisions that Term. Thus, having just 26 cases on the docket for the coming Term is truly remarkable. Although the quantity of cases is comparatively small, their likely qualitative significance is enormous.

## **2. FEDERALISM**

Without a doubt, the Rehnquist Court's most dramatic changes in constitutional law have been in the area of federalism. Over the past decade, the court has narrowed the scope of Congress's power under the commerce clause<sup>2</sup> and section five of the Fourteenth Amendment;<sup>3</sup> used the Tenth Amendment<sup>4</sup> to limit Congress's ability to regulate state governments; and created significant barriers to suing state governments to enforce federal laws. Last Term, for example, the Court held in [Alden v. Maine](#)<sup>5</sup> that state governments may not be sued in state courts without their consent. On the same day, in [Florida Prepaid Postsecondary Expense Board v. College Savings Bank](#),<sup>6</sup> the Court ruled that the Eleventh Amendment<sup>7</sup> bars suits against states in federal court for patent infringement. These decisions are radical in their approval of complete preclusion of all jurisdiction for those with federal claims; the [Alden](#) probation officers suing for overtime pay under the federal Fair Labor Standards Act<sup>8</sup> and the College Savings Bank seeking to recover for patent infringement are precluded from access to any judicial forum.

Two cases already on the docket for next Term concern the scope of states' protection from suit. In [Kimel v. Florida Board of Regents](#),<sup>9</sup> the Court will consider whether a state can be

sued in federal court for violating the federal Age Discrimination in Employment Act (ADEA).<sup>10</sup> The specific legal question is whether Congress adopted the ADEA under section five of the Fourteenth Amendment, in which case the state can be sued in federal court for violating the statute, or under Congress's commerce clause authority, in which case the Eleventh Amendment bars the suit. The Court will again need to confront the question of the scope of Congressional authority under section five of the Fourteenth Amendment.

If states cannot be sued in federal court to enforce the ADEA, no forum will be available to enforce this important federal law against the states, since the Court's earlier ruling in Alden v. Maine<sup>11</sup> held that states cannot be sued in state court without their consent. The Court's decision in Kimel is likely to affect enforcement of other federal civil rights laws as well, such as the Americans with Disabilities Act.<sup>12</sup>

Also on the docket for next Term is Vermont Agency of Natural Resources v. United States ex rel. Stevens,<sup>13</sup> which raises the question of whether a state can be sued in federal court in a *qui tam* action brought in the name of the United States government. The federal False Claims Act<sup>14</sup> allows individuals to sue on behalf of the United States to recover money that was allegedly lost due to fraud. The Court has long held that the Eleventh Amendment does not bar suit against a state by the United States.<sup>15</sup> The Court will decide whether the same rule applies when a person sues a state in the name of the United States.

If the Court allows such suits, it opens the door to a way for Congress to circumvent the Court's recent rulings limiting suits against state governments. Congress could pass laws authorizing the United States to sue on behalf of individuals harmed by state governments, such as where a state is alleged to infringe a person's patent, and Congress also could authorize the

individual to bring a *qui tam* action in the name of the United States. On the other hand, if the court refuses to allow such suits against state governments, it may in the process narrow the ability of the United States to sue state governments.

[Condon v. Reno](#),<sup>16</sup> also on the Court's docket, involves another aspect of federalism: Congress' directives to a state. The Court will consider whether the Driver's Privacy Protection Act<sup>17</sup> violates the Tenth Amendment in prohibiting a state Department of Motor Vehicles (DMV) from releasing private information, such as drivers' addresses and social security numbers. Senator Barbara Boxer proposed the law after Robert Bardo stalked and murdered actress Rebecca Schaeffer by getting her address from the California DMV. The legislative history of the bill indicates that it is especially important in protecting women from being stalked in domestic violence situations and in protecting abortion providers who are stalked after anti-abortion extremists obtain their home addresses by tracking down their license plate numbers. The Court will decide whether the federal command to state governments violates the Tenth Amendment.

Also likely on the horizon for the Court is the issue of whether the federal Violence Against Women Act<sup>18</sup> is a constitutional exercise of Congress's power. In [Brzonkala v. Virginia Polytechnic Institute and State University et al.](#),<sup>19</sup> the Fourth Circuit declared the act unconstitutional and a petition for review was filed on June 30, 1999. If the Court grants review in [Brzonkala](#), it will have the opportunity to further clarify the scope of congressional authority under the commerce clause and under section five of the Fourteenth Amendment.

### **3. CRIMINAL PROCEDURE**

Is running away from a police officer sufficient to justify an investigatory stop of the person? That is the inquiry before the Court in [People v. Wardlow](#).<sup>20</sup> Sam Wardlow was standing

near a building in a high crime area and began running away when he saw a police car approach. Solely on the basis of the suspicion created by Wardlow's flight, the police officers chased him down, performed an investigatory stop and frisk, and found a .38 caliber revolver containing five rounds of ammunition. Wardlow was convicted of unlawful possession of a weapon and sentenced to two years in prison. The issue is whether the police search violated the Fourth Amendment because the only ground for suspicion was the flight itself.

In [Portuando v. Agard](#),<sup>21</sup> the Court will decide whether the Constitution prohibits a prosecutor from commenting on the fact that a defendant who testified at trial had heard the testimony of other witnesses. The Court previously held in [Griffin v. California](#),<sup>22</sup> that a prosecutor may not comment on the defendant's failure to testify and that no adverse inference can be drawn from a defendant's invocation of the privilege against self-incrimination. [Portuando](#), in contrast, involves a criminal defendant who did testify. The prosecutor attacked the defendant's testimony on the grounds that he had heard the testimony of other witnesses and shaped his own accordingly. The Second Circuit held that the prosecutor's actions violated [Griffin](#) and the Supreme Court granted review.

The Court has several cases on the docket that concern rights on appeal in criminal cases. In [Martinez v. California Court of Appeal](#),<sup>23</sup> the Supreme Court will address the right of criminal defendants to represent themselves on direct appeal of a conviction. The Court has held that criminal defendants have a right to *pro se* representation at trial,<sup>24</sup> but does this extend to the appeal?

In another case coming from California, [Smith v. Robbins](#),<sup>25</sup> the Court will take up the appropriate procedure for an attorney to follow in filing a brief in a criminal appeal where there

are no apparent meritorious arguments. The specific question is whether a defendant's constitutional rights are violated when an attorney files a brief simply stating the facts and indicating an availability to brief any issues raised by the court.

In [Roe v. Ortega](#),<sup>26</sup> the Court will consider whether trial counsel has a duty under the Sixth Amendment<sup>27</sup> to file a notice of appeal following a guilty plea if the defendant has not so requested, particularly if the defendant has been advised of his appeal rights. The Ninth Circuit held that it was ineffective assistance of counsel for the lawyer not to file the appeal, since the client had not consented to waive it. Further, the Court held that this was not a new rule, thus permitting it to be raised on habeas corpus.

#### **4. HABEAS CORPUS**

Not surprisingly, the Court again has before it major issues concerning habeas corpus review. In [Slack v. McDaniel](#),<sup>28</sup> the Court will decide what is barred as an impermissible second habeas petition when a first petition was dismissed without prejudice for the failure to exhaust state remedies. Specifically, the case involves a prisoner sentenced to life in prison for second degree murder who filed an initial habeas petition without assistance of counsel. The petition was dismissed for failure to exhaust state court remedies. After presenting the claims in state court, and with a court-appointed attorney, the inmate filed a new habeas petition.

The federal district court, however, ruled that all of the issues that had not been presented in the first petition were barred as abuse of the writ. The Supreme Court must decide whether the bar against successive petitions should apply where there had never been a ruling on any issue on the merits. If the Supreme Court finds that the issues not raised in the first petition cannot be presented in the second, there will be a substantial new obstacle to relief in habeas cases. This

would mean that where a petition is dismissed for failure to exhaust, upon re-filing only those claims in the initial petition can be presented. For inmates who file initial petitions *pro se*, such as in this case, there would often be substantial preclusion.

In [Williams v. Taylor](#),<sup>29</sup> the Court will again consider the standard for ineffective assistance of counsel. Terry Williams was convicted of capital murder by a Virginia jury and sentenced to death. He exhausted his state remedies and then filed a petition for habeas corpus relief which the district court granted on the ground that Williams' trial counsel were ineffective because they failed to present evidence in mitigation of punishment during the sentencing phase of Williams' trial.<sup>30</sup>

The United States Court of Appeals for the Fourth Circuit reversed. The Fourth Circuit ruled that habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.<sup>31</sup> The Fourth Circuit further ruled that relief for ineffective assistance of counsel requires more than meeting the two-part test of [Strickland v. Washington](#)<sup>32</sup> that trial counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the errors the result would have been different. The Fourth Circuit said that for relief a criminal defendant must also demonstrate that the proceeding was unfair or unreliable. [Strickland](#) is widely perceived as a very hard standard for criminal defendant to meet; the Fourth Circuit's approach makes it even more difficult.

Finally, [Fiore v. White](#),<sup>33</sup> presents the fundamental issue of fairness and equal treatment in the criminal justice system. William Fiore was convicted in Pennsylvania state court for operating a hazardous waste treatment facility without a permit. Subsequently, the general manager of Fiore's

business, who had been convicted of identical charges, had his conviction reversed based on a finding that Fiore actually had a permit.

Fiore unsuccessfully sought relief in state court claiming what he was charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts.<sup>34</sup> The federal magistrate judge recommended granting the writ of habeas corpus, and the district court did so. The United States Court of Appeals for the Third Circuit reversed. The court said that Fiore was not entitled to retroactive application of the ruling granted his general manager. Thus, the issue is whether due process and equal protection are violated by letting Fiore's conviction stand in these circumstances.

## **5. FIRST AMENDMENT**

Last Term, the Court decided only two First Amendment cases, significantly fewer than in most years. There are already six First Amendment cases on the docket for the October 1999 Term. Among the issues presented are the constitutionality of state regulation of campaign finance, the constitutionality of compulsory student activity fees, the permissibility of government regulation of sexual speech both at nude dancing clubs and also over cable television, and the constitutionality of government in-kind assistance to parochial schools.

In [Nixon v. Shrink Missouri Government PAC](#),<sup>35</sup> the Court will consider the constitutionality of a Missouri campaign finance law. The Missouri statute restricted contributions to candidates for state-wide office to \$1075, to candidates for state senator to \$525, and to candidates for state representative to \$275. The United States Court of Appeals for the Eighth Circuit declared the law unconstitutional on the ground that the state had not shown a compelling need for such restrictions. The Supreme Court's decision could resolve the fate of



similar laws in California and, indeed, the course of future efforts at campaign finance reform.

In [Southworth v. Grebe](#),<sup>36</sup> the Court will consider whether the First Amendment is violated by a program under which students at public universities must pay mandatory fees that are used, in part, to support organizations that engage in political speech. Virtually all universities require students to pay activity funds that are used to support a wide array of student organizations. Are such programs constitutional so long as the government is being content neutral? Or are the programs unconstitutional whenever money is used to support a cause opposed by the students, a result which would effectively cripple such programs?

Two cases on the docket concern governmental regulation of sexual speech. In [United States v. Playboy Entertainment Group, Inc.](#),<sup>37</sup> the Court will consider the constitutionality of a provision of the Communications Decency Act of 1996 which regulates sexually explicit material over cable television. The law concerns signal bleed — the partial reception of sexually explicit material in the houses of non-subscribers. The law requires that sexual images either be fully scrambled or be channeled in a manner so that they are not likely to be accessible to minors. A three-judge federal district court found that the effect of the law was to limit sexual programming to the hours between 10:00 p.m. and 6:00 a.m.

The circuit court concluded that strict scrutiny was appropriate because the government law was a content-based regulation of speech. The court accepted the government's argument that the law served the compelling purpose of protecting children, but it found the law unconstitutional because it was not the least restrictive alternative. The Supreme Court, in part, will need to decide whether strict scrutiny is the appropriate test in evaluating government regulation of sexually explicit, but not obscene, speech.

Erie, Pa. v. Pap s A.M.,<sup>38</sup> renews the Court s interest in the constitutionality of a government ban on nude dancing. In 1991, the Supreme Court decided Barnes v. Glen Theater, Inc.,<sup>39</sup> a 5-4 decision without a majority opinion, which found that the government could constitutionally ban nude dancing. Subsequently, the Supreme Court of Pennsylvania concluded that erotic dancing is protected by the First Amendment and found that Barnes was factually distinguishable. For example, unlike in Barnes, the Pennsylvania court found that the Erie ordinance was impermissibly motivated by a desire to stop nude dancing.

Finally, in Los Angeles Police Department v. United Reporting Publishing Corp.,<sup>40</sup> the Court will again visit the issue of commercial speech, although in an unusual context. Los Angeles has a policy of releasing the names and addresses of recently arrested individuals to the media, but not selling the information to commercial purchasers. The Ninth Circuit found that the law was an unconstitutional restriction of commercial speech. The Court will need to consider an issue it has often ducked: what is commercial speech? The Court, also, will need to decide whether there can be restrictions on commercial sales of information that are released for free to others.

Finally, with regard to the First Amendment, the Court has one case on the docket concerning the religion clauses. In a potentially very significant case involving the establishment clause, Mitchell v. Helms,<sup>41</sup> the Court will consider whether the First Amendment is violated when the government gives items such as computers and software to parochial schools. Ultimately, the issue before the court is how to draw the line between permissible and impermissible aid to religious schools. The answer could be crucial in determining the constitutionality of voucher programs that can be used to pay for parochial school education.

## 6. CIVIL RIGHTS

[Rice v. Cayentano](#),<sup>42</sup> presents the interesting issue of the constitutionality of a Hawaii law that permits only Hawaiians to vote for trustees of a trust that was established to benefit residents of Hawaii. Harold F. Rice, the plaintiff, is a Caucasian male who was denied voter registration status for Office of Hawaiian Affairs (OHA) elections because he is not Hawaiian or native Hawaiian. He, however, has been a resident of Hawaii his entire life and can trace his ancestry in Hawaii to before 1893. Rice contends that his exclusion from being able to vote for trustees because he is not descended from native Hawaiians is an impermissible racial classification.

The United States Court of Appeals for the Ninth Circuit upheld the restriction to those of Hawaiian descent on the ground that the voting restriction is not primary racial, but legal or political.<sup>43</sup> The Ninth Circuit ruled that it is reasonable for the state to rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be.<sup>44</sup> The Supreme Court must decide whether such restrictions for the special elections violate the Constitution.

In [United Brotherhood of Carpenters v. Anderson](#),<sup>45</sup> the Court will decide whether the prohibition of discrimination in private contracts, contained in 42 U.S.C. § 1981, applies to discrimination against aliens. Linden D. Anderson sued, claiming that he was fired from his position with the United Brotherhood of Carpenters and Joiners because he was not a United States citizen. The district court dismissed the claim on the ground that § 1981 does not prohibit alienage discrimination by private actors. The Second Circuit reversed and the Supreme Court granted review.

## 7. FEDERAL STATUTES

The Term s docket includes at least two cases involving the interpretation of federal statutes. In [Food and Drug Administration v. Brown and Williamson Tobacco Corp.](#),<sup>46</sup> the Court will consider whether the Food and Drug Administration (FDA) has the statutory ability to regulate tobacco products. The Fourth Circuit declared invalid FDA regulation of the sale and distribution to children of cigarettes and smokeless tobacco products. The FDA s authority in this realm has obvious political as well as practical significance.

In [Rotella v. Wood](#),<sup>47</sup> the Court will address an issue that has divided the circuits: when does a cause of action accrue, for statute of limitations purposes under the Racketeer Influenced and Corrupt Organizations Act (RICO)? RICO s widespread use, including in business litigation, makes this case practically quite important.

## 8. CONCLUSION

These, of course, are just some of the key cases already on the docket for next Term. Another 50 or so probably will be added. Based on the issues now pending, and those likely to be on the docket, the October 1999 Term could be a memorable and significant way to open the next millennium.

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1. Sydney M. Irmis Professor of Public Interest Law, Legal ethics, and Political Science, University of Southern California. I want to thank Alexis Lury for her excellent research assistance.
  2. U.S. Const. 1, 8, cl.3: The Congress shall have Power. . .To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.
  3. U. S. Const. Amend 14, 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. U. S. Const. Amend 10: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
5. 527 U.S. \_\_\_, 119 S. Ct. 2240 (1999).
6. 527 U.S. \_\_\_, 119 S. Ct. 2199 (1999).
7. U. S. Const. Amend. 11: The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
8. 29 U.S.C. § 201 *et seq.*
9. 139 F.3d 426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).
10. 29 U.S.C. § 621 *et seq.*
11. See note 5.
12. Americans with Disabilities Act of 1990, 42 U.S.C. § 12132.
13. 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391.
14. 31 U.S.C. § 3729 *et seq.*
15. See e.g., Monaco v. Mississippi, 292 U.S. 313, 329 (1934).
16. 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).
17. 18 U.S.C. §§ 2721-2725.
18. Violence Against Women Act of 1994, 108 Stat. 1916, 42 U.S.C. § 13931 *et seq.*
19. 169 F.3d 820 (4th Cir. 1999), *cert. pending*.
20. 183 Ill.2d 306, 701 N.E. 2d 484 (1998), *cert. granted*, 119 S. Ct. 1573 (1999).
21. 117 F.3d 696 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 1248 (1999).
22. 380 U.S. 609 (1965).
23. Unpublished opinion, *cert. granted*, 119 S. Ct. 1453 (1999).
24. Faretta v. California, 422 U.S. 806 (1975).
25. 152 F.3d 1062 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 1139 (1999).

26. 160 F.3d 534 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 1574 (1999).
27. U.S.C.A. Const. Amend. 6: In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.
28. Unpublished opinion (9th Cir. 1998), *cert. granted*, 119 S. Ct. 2025 (1999).
29. 163 F.3d 860 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1355 (1999).
30. 163 F.3d 860, 862.
31. 163 F.3d 860, 895.
32. 466 U.S. 668 (1984).
33. 149 F.3d 221 (3d Cir. 1998), *cert. granted*, 119 S. Ct. 1332 (1999).
34. 149 F.3d at 223.
35. 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).
36. 151 F.3d 717 (7th Cir. 1998), *cert. granted*, 119 S. Ct. 1332 (1999).
37. 30 F. Supp. 2d 702 (Del. 1998), *probable juris. noted*, 119 S.Ct. 2365 (1999).
38. 719 A.2d 273 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).
39. 501 U.S. 560 (1991).
40. 146 F.3d 1133 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).
41. 151 F.3d 347 (5th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3643 (June 15 1999).
42. 146 F.3d 1075 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 1248 (1999).
43. 146 F.3d at 1079.
44. Id.
45. 156 F.3d 167 (2d. Cir. 1998), *cert. granted*, 119 S. Ct. 1495 (1999).
46. 153 F.3d 155 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1495 (1999).
47. 147 F.3d 438 (5th Cir. 1998), *cert. granted*, 119 S. Ct. 1139 (1999).