FEDERAL COURTS LAW REVIEW -- 2000 Fed. Cts. L. Rev. 1

JUSTICE AT THE JUNCTURE II: A First Look at the Final Term of the Supreme Court in this Millennium (October Term, 1999)

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Abstract

[a.1] In an earlier article, Professor Chemerinsky highlighted the issues in the cases in which the Supreme Court had granted certiorari for the October Term, 1999. Since that article was published, the Court has granted review in other cases, many of great significance. As in the previous article, Professor Chemerinsky highlights the cases and discusses their importance in light of previous developments. Again, he concludes that few Supreme Court Terms have had so many potential blockbuster cases in so many different areas of the law.

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Dr. Chermerinsky wishes to thank Alexis Lury for her excellent research assistance.

This article was edited by Ira P. Robbins, Barnard T. Welsh Scholar and Professor of Law and Justice, American University, Washington College of Law, and by Douglas M. Todd, Law Clerk to the Honorable Sam A. Joyner, N.D. Oklahoma.

1. INTRODUCTION

[1.1] The Supreme Court s docket is filled with an exceptional number of potential blockbuster decisions. In every area, from federalism to criminal procedure, from the First Amendment to foreign policy, the Court will be deciding cases that are likely to be extremely important. In twenty years as a law professor, I never have seen a Term that contains so many cases of such probable significance. In September, I wrote an article for the *Federal Courts Law Review* summarizing the cases in which review had been granted before the Supreme Court adjourned in June 1999.[1] This article describes many of the important cases in which certiorari has been granted since September. I expect that the Court will grant review in several additional cases in early January 2000, and that this will complete the docket for the October 1999 Term. All of these cases will be decided before the end of June 2000.

2. FEDERALISM

[2.1] The Rehnquist Court has dramatically changed the law in this area by narrowing the scope of Congress power, by reviving the Tenth Amendment as a limit on federal authority, and by protecting state governments from suit in federal and state court. In my previous article, I described several important cases now pending before the Supreme Court concerning the Tenth and Eleventh Amendments.

[2.2] In *Reno v. Condon*,[2] the Court will decide whether the federal Driver s Privacy Protection Act,[3] which prohibits state department of motor vehicles from releasing private information, infringes state sovereignty and the Tenth Amendment. In *Kimel v. Florida Board of Regents*,[4] the Court will decide whether state governments can be sued in federal court for violating the Age Discrimination in Employment Act.[5] In *Vermont Agency of Natural Resources v. United States*,[6] the Court will examine whether a state can be sued in a qui tam action brought by a private person in the name of the United States government. Shortly before oral argument in November, the

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1. Erwin Chemerinsky, *Justice at the Juncture: A First Look at the Final Term of the Supreme Court in this Millennium* (October Term, 1999), 1999 FED. CTS. L. REV. 3 (Dec. 1999) <http://www.fclr.org/1999fedctslrev3.htm>.

2. 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

3. 18 U.S.C. §§ 2721-2725.

4. 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).

5. 29 U.S.C. § 621-634.

6. 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999).

Court also asked for briefing on the issue of whether the federal False Claims Act[7] is unconstitutional in according private individuals standing to bring such claims.

[2.3] Since September, the Court granted review in two other cases concerning the scope of Congress powers. In *United States v. Morrison*,[8] the Court will consider the constitutionality of the provisions of the Violence Against Women Act,[9] that create a federal civil cause of action for victims of gender-motivated violence. A student at Virginia Polytechnic Institute and State University brought suit under the Act after allegedly being raped by several football players. The United States Court of Appeals for the Fourth Circuit, in an en banc decision, held that the Act s authorization for civil suit is unconstitutional because it exceeds the scope of Congress power. The Fourth Circuit ruled that Congress could not constitutionally enact the statutory provision under the Commerce Clause because the law did not regulate commercial activity and gender-motivated violence has only an indirect effect on the national economy. The Fourth Circuit also concluded that the law exceeds the scope of Congress power under section five of the Fourteenth Amendment in light of *City of Boerne v. Flores*.[10]

[2.4] In *Jones v. United States*,[11] the Court will decide whether the federal arson act,[12] which prohibits arson of property used in interstate commerce, is unconstitutional when applied to arson of a private residence. *Morrison* and *Jones* will provide the Supreme Court its first opportunities to revisit its ruling in *United States v. Lopez*,[13] which declared unconstitutional a federal law as exceeding the scope of Congress commerce power for the first time in almost sixty years. A major theme of constitutional law in the 1990s has been limits on Congress power. *Morrison* and *Jones* likely will be very important in clarifying these limits and have implications for challenges to literally dozens of other federal statutes.

[2.5] Another case poses a fascinating federalism issue of first impression to the Supreme Court: Can state and local governments attempt to restrict trade with a foreign country because of its human rights violations? This is the issue in *Natsios v. National Foreign Trade Council*.[14] Massachusetts law prevents the state from entering into contracts with Burma because of its human rights violations. State and local governments have adopted such laws in the past, such as

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7. 31 U.S.C. §§ 3729-3733.

8. 169 F.3d 820 (4th Cir.), *cert. granted*, 120 S. Ct. 11 (1999).

9. 42 U.S.C. § 13981.

10. 521 U.S. 507 (1997).

11. 178 F.3d 479 (7th Cir.), *cert. granted*, 120 S. Ct. 494 (1999).

12. 18 U.S.C. § 844(i).

13. 514 U.S. 549 (1995).

14. 181 F.3d 38 (1st Cir.), *cert. granted*, 120 S. Ct. 525 (1999).

in preventing contracting with companies doing business with South Africa before the end of apartheid.

[2.6] Are these attempts by state and local governments to regulate foreign trade unconstitutional in assuming a power that can be exercised only by the federal government? Will the Rehnquist Court, which has been extremely protective of states rights, allow this exercise of state and local power?

3. CRIMINAL PROCEDURE

A. Fourth Amendment

[3.A.1] There are an exceptional number of important criminal procedure cases on the docket this Term, several of them concerning the Fourth Amendment. In my earlier article, I described what likely will be the most important decision in this area *Illinois v. Wardlow*.[15] The issue before the Court is whether flight from a police officer, by itself, is sufficient to create suspicion to justify a stop and frisk.

[3.A.2] Since September, the Court has granted review in two other Fourth Amendment cases. In *United States v. Bond*,[16] the Court will decide whether it is permissible for police officers to manipulate the contents of a person s luggage to determine its content during a border stop at an immigration checkpoint. The Fifth Circuit found that the officer s conduct was not a search for Fourth Amendment purposes. The court emphasized that the bag had been placed in an overhead luggage bin that was accessible to the general public and that the officer had manipulated all of the bags.

[3.A.3] In *Florida v. J.L.*,[17] the Court will determine whether an anonymous tip that provides a description of a suspect but not a name is sufficient for probable cause. Police officers received a tip that several young males were standing at a particular bus stop and that one was wearing a plaid shirt and carrying a gun. A stop and frisk was done based on the tip and an illegal concealed weapon was found. The Florida Supreme Court ruled that the suppression motion should have been granted because there was no indication that the police independently observed suspicious or illegal conduct.

B. Fifth Amendment

[3.B.1] One of the most closely watched cases of the Term will be *United States v. Dickerson*.[18] In *Dickerson*, the Court is being asked to consider whether Congress can legislatively overrule

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15. 701 N.E.2d 484 (Ill. 1998), *cert. granted*, 119 S. Ct. 1573 (1999).

16. 167 F.3d 225 (5th Cir.), *cert. granted*, 120 S. Ct. 320 (1999).

17. 727 So. 2d 204 (Fla. 1998), *cert. granted*, 120 S. Ct. 395 (1999).

18. 166 F.3d 667 (4th Cir.), *cert. granted*, 120 S. Ct. 578 (1999).

Miranda v. Arizona.[19] A law adopted in 1968, 18 U.S.C. § 3501,[20] provides that voluntary confessions are admissible in federal court even without proper administration of Miranda warnings. Every Justice Department since 1968 — in the Nixon, Ford, Carter, Reagan, Bush, and Clinton administrations — has refused to invoke the law because of a belief that it is unconstitutional. In *Dickerson*, a federal district court found that a confession was improperly obtained in a bank robbery case because of improper administration of *Miranda* warnings. The government appealed, arguing that the warnings were properly provided. A conservative public interest group filed an *amicus* brief urging the court to invoke § 3501 and find the confession voluntary and admissible.

[3.B.2] The case raises many important questions. Should the Court even consider the constitutionality of § 3501, since the federal government has chosen not to raise it? Indeed, since the statute is not jurisdictional, does it violate the executive's prosecutorial discretion for the Court to consider an issue the government chooses not to make? If the Court considers the constitutionality of the law, it must decide whether Congress, by statute, can overrule *Miranda*. Chief Justice Earl Warren's majority opinion in *Miranda* said that Congress and the states could eliminate the warnings the Court was requiring if they provided adequate alternatives to ensure that suspects were adequately informed of their rights. Is it constitutional for Congress to overrule *Miranda*, by allowing for the admissibility of all voluntary confessions, without providing any alternative mechanism for informing suspects? The case thus raises important separation of powers issues concerning the ability of Congress to overrule a Supreme Court decision and crucial questions concerning the continuing vitality of the landmark *Miranda* decision.

[3.B.3] The other major Fifth Amendment case before the Court, *United States v. Hubbell*,[21] arises from the Whitewater Special Prosecutor's investigation. The Supreme Court granted review on two questions. One issue concerns whether the Fifth Amendment privilege against self-incrimination protects information previously recorded in voluntarily created documents that a defendant delivers to the government pursuant to an immunized act of production. The other question involves whether a defendant's act of producing ordinary business records constitutes a compelled testimonial communication solely because the government cannot identify the documents with reasonable particularity before they are produced.

4. EIGHTH AMENDMENT

[4.1] In *Bryan v. Moore*,[22] the Court will decide whether death in the electric chair is cruel and unusual punishment in violation of the Eighth Amendment. The petitioner claims that Florida's

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19. 384 U.S. 436 (1966).

20. 18 U.S.C. § 3501.

21. 167 F.3d 552 (D.C. Cir.), *cert. granted*, 120 S. Ct. 320 (1999).

22. *Bryan v. Moore*, 120 S. Ct. 394 (1999) (granting certiorari to an unpublished opinion of the Florida Supreme Court).

electric chair exposes him to physical suffering and degradation in a manner that violates the Constitution, especially in light of reports of malfunctioning of Florida s electric chair during past executions. The Florida Supreme Court rejected the challenge and the United States Supreme Court granted review. Coincidentally, the recent movie, The Green Mile, graphically depicted an improperly administered execution in an electric chair.

5. HABEAS CORPUS

[5.1] Since September, the Court has granted review in two cases posing important questions concerning habeas corpus. In *Edwards v. Carpenter*,[23] the Court will decide whether a federal habeas court is precluded from considering an ineffective assistance of counsel claim as cause for a procedural default when the ineffective assistance claim is itself procedurally defaulted. An Ohio court found that the claim of ineffective of assistance of counsel had been procedurally defaulted. The Sixth Circuit held that this default barred it from being raised on the merits on habeas corpus review, but that it did not preclude it from being used to provide cause to justify hearing a procedurally defaulted claim concerning sufficiency of the evidence.

[5.2] In *Williams v. Taylor*,[24] the Court will consider the availability of evidentiary hearings in habeas proceedings. This is actually the second case on the docket with the title *Williams v. Taylor*, both ironically from the Fourth Circuit. (The other *Williams v. Taylor*,[25] concerns the standard for showing prejudice from counsel s allegedly deficient performance at the sentencing phase.) In the *Williams v. Taylor* that the Court agreed to hear on November 1, 1999, the Court will consider a Fourth Circuit ruling that a habeas petitioner was not entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2)[26] based on claims of a juror s false statements during voir dire and the state s alleged failure to provide exculpatory evidence. The court ruled that the habeas petitioner did not diligently seek to develop the factual basis for those claims in state court and could not show that no reasonable fact-finder would have found him guilty of capital murder.

6. FIRST AMENDMENT

A. Religion

[6.A.1] Two of the most important cases of the Term will involve the Establishment Clause of the First Amendment. The earlier article described *Mitchell v. Helms*,[27] in which the Court will

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23. 163 F.3d 938 (6th Cir. 1998), *cert. granted*, 120 S. Ct. 444 (1999).

24. 189 F.3d 421 (4th Cir.), *cert. granted*, 120 S. Ct. 395 (1999).

25. 163 F.3d 860 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1355 (1999).

26. 28 U.S.C. § 2254(e)(2).

27. 151 F.3d 347 (5th Cir. 1998), *cert. granted*, 119 S. Ct. 2336 (1999).

decide whether it violates the First Amendment for the government to give instructional equipment to parochial schools.

[6.A.2] In *Doe v. Santa Fe Independent School District*,[28] the Court will decide the constitutionality of a school policy permitting student-initiated, student-led prayers at football games. The United States Court of Appeals for the Fifth Circuit found that the prayers violated the establishment clause and emphasized the government s approval of the prayers through its actions and the presence of school officials. Interestingly, the Court denied review in the case involving the constitutionality of student-delivered prayers at public school graduations, even though there is a split among the circuits on the question.

B. Freedom of Speech

[6.B.1] There are many important cases on the docket concerning freedom of expression. In the previous article, I described several cases that were argued during the first few months of this Term. In *Nixon v. Shrink Missouri Government PAC*,[29] the Court will consider the constitutionality of a state law that imposes strict contribution limits on candidates for state offices. In *Board of Regents of the University of Wisconsin v. Southworth*,[30] the Court will decide the constitutionality of mandatory student activity fees at public universities. In *City of Erie v. Pap s A.M.*,[31] the issue is whether nude dancing is speech protected by the First Amendment.

[6.B.2] In September, the Court granted review in *Hill v. Colorado*.[32] *Hill* asks the Court again to consider the government s ability to regulate abortion protests. In *Madsen v. Women s Health Center*,[33] the Court held that a reasonable fixed buffer zone around the entrance to a clinic is constitutional. In *Schenck v. Pro-Choice Network of Western New York*,[34] the Court again upheld the constitutionality of fixed buffer zones to preserve the ability to enter and exit clinics, but the Court invalidated a floating buffer zone limiting the ability to approach people as they walked from a parking lot to the clinic entrance.

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28. 168 F.3d 806 (5th Cir.), *cert. granted*, 120 S. Ct. 494 (1999).

29. 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).

30. 151 F.3d 717 (7th Cir. 1998), *cert. granted*, 119 S. Ct. 1332 (1999).

31. 719 A.2d 273 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

32. 973 P.2d 1246 (Colo.), *cert. granted*, 120 S. Ct. 10 (1999).

33. 512 U.S. 753 (1994).

34. 519 U.S. 357 (1997).

[6.B.3] In *Hill v. Colorado*, the Court will consider a Colorado law that prohibits approaching without consent within eight feet of a person, who is within 100 feet of a health care facility, for purposes of oral protest, education, or counseling. The Colorado Supreme Court upheld the law as a reasonable time, place, and manner restriction that serves an important purpose and leaves open adequate alternative places for communication.

7. CIVIL PROCEDURE

[7.1] In *Free v. Abbott Laboratories, Inc.*,[35] the Court will resolve an issue that has split the circuits: Does the federal supplemental jurisdiction statute, 28 U.S.C. § 1367,[36] override earlier Supreme Court rulings that each plaintiff must independently meet the amount-in-controversy requirement? In *Zahn v. International Paper Co.*,[37] the Supreme Court held that each member of a federal class action suit must satisfy the requirement. At the time, there was no federal statutory provision concerning supplemental jurisdiction; ancillary and pendent jurisdiction were entirely the result of Supreme Court decisions.

[7.2] In 1991, a federal supplemental jurisdiction statute was adopted. Section 1367 now controls supplemental jurisdiction in federal courts. The Fifth Circuit ruled that this provision effectively overrules *Zahn* and federal court jurisdiction based on diversity jurisdiction is allowed over unnamed class members who do not meet the amount in controversy requirement. With the split among the circuits, the Supreme Court s grant of review is not surprising.

8. DUE PROCESS AND EQUAL PROTECTION

[8.1] In *Troxel v. Granville*,[38] the Court will consider the constitutionality of state laws according grandparents rights to visitation. The case has tragic facts, as it involves the suicide of the father of two young daughters. Their mother allowed the girls to continue to visit with their paternal grandparents for a year. The mother then ended the visitation and the grandparents sued pursuant to a Washington law. Although the grandparents prevailed at the trial court level, the Washington Supreme Court ruled the law and its application unconstitutional as infringing the constitutional right of parents to control the upbringing of their children.

[8.2] The case raises many difficult and fascinating questions. What is the constitutional protection for a parent s right to control the upbringing of a child; for example, what level of scrutiny should be used? Is there any constitutional protection for grandparents rights? Even if not, does the state have a sufficiently important interest in safeguarding grandparents rights to justify protecting their rights to visitation over parental objections?

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35. 176 F.3d 298 (5th Cir.), *cert. granted*, 120 S. Ct. 525 (1999).

36. 28 U.S.C. § 1367.

37. 414 U.S. 291 (1973).

38. 969 P.2d 21 (Wash.), *cert. granted*, 120 S. Ct. 11 (1999).

[8.3] In another interesting and likely significant case, the Court will decide whether a person can bring an equal protection claim based on discrimination against a class of one. In *Village of Willowbrook v. Olech*,[39] the Court will consider a person s claim that he was discriminated against by a city in receiving water service in retaliation for a prior lawsuit against the city. The plaintiff does not claim to have been discriminated against based on any suspect classification, such as race or gender, but instead solely as a matter of retaliation. The Seventh Circuit ruled that the plaintiff stated a claim under the Equal Protection Clause and the Supreme Court has granted review.

9. PRISON LITIGATION REFORM ACT

[9.1] Does the provision of the Prison Litigation Reform Act that requires an automatic stay of injunctive relief concerning prison conditions violate separation of powers? This is the issue before the Court in *Duckworth v. French*.[40] The Prison Litigation Reform Act, 18 U.S.C. § 3626,[41] provides for the termination of prospective federal court orders concerning prison conditions after two years. A federal court can continue the earlier orders by making written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation. [42] Additionally, the Act provides that, thirty days after a government request to end prospective relief, a stay of the prospective relief shall be entered and last until the court decides the issue.

[9.2] The United States Court of Appeals for the Seventh Circuit ruled that this provision violates separation of powers because it is a federal statute overturning a remedy imposed by a federal court for a constitutional violation. Earlier, the Sixth Circuit avoided this constitutional issue in *Hadix v. Johnson*,[43] by finding that the stay provision was discretionary and not mandatory. The Seventh Circuit, however, found that the stay provision was obligatory and concluded that it violated separation of powers. Notably, the only issue before the Supreme Court is the constitutionality of the mandatory stay provision and not the broader issue of the constitutionality of the Prison Litigation Reform Act or its lifting of prospective relief after two years.

10. CONCLUSION

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39. 160 F.3d 386 (7th Cir. 1998), *cert. granted*, 120 S. Ct. 10 (1999).

40. 178 F.3d 437 (7th Cir.), *cert. granted*, 120 S. Ct. 578 (1999).

41. 18 U.S.C. § 3626.

42. 18 U.S.C. § 3626(b)(3).

43. 144 F.3d 925 (6th Cir. 1998).

[10.1] The Supreme Court again this Term will decide only about seventy-five cases, about half the number that it decided in the average Term a decade ago. Yet, few Terms have had so many potential blockbuster cases in so many different areas of the law. It truly promises to be an amazing Term.