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Supreme Court's Year in Review

California and Ninth Circuit cases among most controversial in the court's 2010-11 term, explains Ben Feuer.

Ben Feuer

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The U.S. Supreme Court's most recent term — October Term 2010, or OT10 to court watchers — concluded in the last week of June with a flurry of divided opinions on heated issues, from the First Amendment, to campaign finance reform, to class actions. Several of these cases, and indeed many of the most controversial cases this term, arrived at the Supreme Court from California and the Ninth Circuit U.S. Court of Appeals. Whether that's because the West continues to push the forefront of legal and political innovation, or because its judges and politicians routinely step dangerously far outside the national mainstream, is a question of ongoing debate. What's clear is that, for one reason or another, California and the Ninth Circuit continue to be key foci of the court's attention.

FIRST AMENDMENT: FREE SPEECH

On the free speech front, one of the first cases argued this term was also one of the last decided: *Brown v. Entertainment Merchants Association*, 11 C.D.O.S. 7874, in which the court held a 2005 California statute banning the sale of violent video games to minors violates the First Amendment. The law made it a crime to sell video games to minors in which "an image of a human being" could be killed, maimed, or assaulted in a way that appeals to a "deviant or morbid interest," but the Ninth Circuit found the statute unconstitutionally burdened speech. The Supreme Court affirmed in a 7-2 vote, holding that video games are entitled to the same First Amendment protections as other traditional media. Thus, the court explained, governmental restrictions based on the content of video games must be narrow and designed only to serve a compelling state interest — and the California statute, which relied on questionable psychological studies purporting to show a connection between violence in video games and violent behavior among children, met neither requirement. Importantly, the court refused to grant violent speech the same status as obscene speech, which is not subject to First Amendment protections; the court held that obscene speech is purely sexual and cannot be extended to include violence. Justice Stephen Breyer's dissent, however, asked why a state may ban the sale to minors of images of a barely nude woman, while it cannot ban the sale of images showing horrific acts of violence toward that woman.

Another major free speech case out of the Ninth Circuit, *Arizona Free Enterprise Club PAC v. Bennett*, 11 C.D.O.S. 7920, weighed Arizona's election financing law, which was designed to "level the playing field" between political candidates who are independently wealthy and those who are not. The Arizona regime gave candidates who accepted public funding an initial outlay of financing, and additional funds equal to the spending of privately funded candidates and independent advocacy groups. The Ninth Circuit found the statute to be a permissible campaign finance regulation, but the Supreme Court reversed 5-4. The court held the Arizona scheme violated the First Amendment by substantially burdening the political speech of privately funded candidates, because for every dollar such a candidate spent, the state gave her opponent a dollar. This effectively penalized the candidate for exercising her constitutional right to engage in "unfettered" political speech. The court also explained, citing to its controversial *Citizens United* decision last term, that "leveling the playing field" among candidates is not a legitimate state interest. Justice Elena Kagan's strongly worded dissent asserted that the Arizona law prevents corruption as much as it levels the field — and suggested that the court's opinion silently laid the groundwork for the invalidation of public financing measures of every kind.

FIRST AMENDMENT: RELIGION

On the religious wing of the First Amendment, the court again split 5-4 over whether individual taxpayers may bring an action claiming that the government is violating the Establishment Clause by spending funds to benefit a specific religion. In *Arizona Christian School Tuition Organization v. Winn*, 11 C.D.O.S. 3982, the court carved a tunnel through 40 years of precedent, which granted taxpayers standing to challenge government spending on Establishment Clause grounds, on the theory that otherwise few parties would have a sufficient direct injury to enforce that constitutional limitation on government power. Kathleen Winn is an Arizona taxpayer who challenged a state law that provides a tax credit to individuals who donate to certain private schools, 90 percent of which are religious. This, she contended, amounted to government subsidy of religious education. The Ninth Circuit permitted the suit to proceed, but the Supreme Court reversed. Rather than reach the Establishment Clause question, however, the court held the plaintiffs lacked standing to bring the claim. The court explained that the Arizona scheme creates a tax credit rather than a tax expenditure, and because a credit does not involve the spending of any funds collected from taxpayers, individual taxpayers have no standing to sue. Thus, *Winn* may provide a method for states to effectively subsidize private spending on religious activities, because it is not clear who would be sufficiently disadvantaged by a tax credit like Arizona's to have standing to bring a constitutional challenge.

IMMIGRATION

With the United States' foreign-born population exceeding the entire population of Canada by the early 2000s, states, particularly in the West, spent much of the decade experimenting with measures to restrict illegal immigration on their own. Those efforts received a big boost this term with the Supreme Court's ruling in *Chamber of Commerce v. Whiting*, 11 C.D.O.S. 6297. In that case the court affirmed a Ninth Circuit decision upholding an Arizona law that requires businesses to verify the employment eligibility of new hires and provides that companies found to knowingly employ undocumented immigrants may face sanctions. In a 5-3 decision, the court explained that Arizona's efforts to enforce federal immigration law are not pre-empted by that law because the state's regulations do not interfere with the statutory regime and Congress did not express a desire to restrict the role of states in immigration enforcement. *Whiting* will likely become critical precedent as even more restrictive state laws designed to prevent illegal immigration wind their way through the courts.

CIVIL RIGHTS

In a major case affecting tens of thousands of Californians, prison reform advocates celebrated a watershed civil rights victory in *Brown v. Plata*. There, the court affirmed 5-4 the order of an unusual three-judge district court panel, established under the 1996 Prison Litigation Reform Act and comprising two district judges and one appellate judge. The order required California to lower the drastic overcrowding in its prisons by either building new prisons or releasing prisoners. When the district court issued its order in 2009, California prisons held nearly 156,000 inmates — almost twice their designed capacity of 80,000. This left suicidal prisoners in cages the size of telephone booths without access to bathrooms, and medical care that involved packing up to 50 sick inmates in 12-by-20-foot cages while awaiting treatment. The court found the three-judge panel correctly ordered the state to reduce its prison population to 137.5 percent of capacity within two years.

Because California has made clear it lacks both the funds and political will to build enough new prisons to meet this requirement, this order essentially forces the state to release, parole or transfer to county jails and halfway homes almost 46,000 inmates. The court found this drastic remedy necessary because of the "severe" mistreatment of prisoners and their medical needs as a result of overcrowding. But the opinion drew sharp dissents from the court's conservative justices, who warned of "hardened criminals" roaming California's streets and threatening the safety of law-abiding citizens.

CLASS ACTIONS

The Supreme Court effectively sounded a death-knell to class action litigation arising from contractual disputes, reversing the Ninth Circuit in *AT&T v. Concepcion*, 11 C.D.O.S. 4842. *Concepcion* arose after AT&T held a free cellphone giveaway — but allegedly unlawfully charged customers $30.22 in sales tax for each free phone. Thirty bucks is far too little at stake for a direct lawsuit, so the Concepcions brought a class action alleging fraud and related claims. Their adhesion cellular service contract with AT&T, however, included a clause requiring them to arbitrate any disputes that arose with the company, and to do so individually rather than as part of a class. Such "class action waivers" have long been banned under California law as against public policy, and so the lower courts denied AT&T's motion to dismiss the class action in favor of individual arbitration. The Supreme Court reversed 5-4. The court held the Federal Arbitration Act pre-empts state public policy restricting class action waivers in adhesion contracts because such a restriction interferes with Congress' goal of ensuring the enforcement of arbitration clauses and encouraging the use of streamlined arbitration procedures. One result of this decision is that nearly all consumer contracts will soon contain arbitration clauses with class action waivers — meaning suits for small frauds on a large scale likely will no longer be cost-effective for any individual victim to prosecute.

The court reached another critical decision involving class actions this term in *Wal-Mart v. Dukes*, 11 C.D.O.S. 7485. *Dukes* was a putative class action with more than 1.5 million class members — three times the population of Wyoming — consisting of all the women who had ever worked for any Wal-Mart store. The suit alleged that Wal-Mart has a corporate culture of discrimination against women in hiring, pay and promotion, which the company enforces, counterintuitively, by leaving human resources decisions

to the discretion of the individual managers of each of the company's nearly 4,000 stores. The plaintiffs based their allegations largely on statistical evidence that women were hired and promoted at lower rates than men throughout the company, and claimed the corporate headquarters knew this decentralized policy would cause discrimination against women. After a tortuous route through the Ninth Circuit, which included a stop before an 11-judge *en banc* panel, the Supreme Court ruled 5-4 that the plaintiffs had not proffered "significant proof" that the class members could meet the commonality requirement for class certification, and so the class could not be certified. The court held that statistical evidence alone was far from sufficient to meet that threshold, particularly because with so many women in the class, there could be a multitude of reasons for any given individual's pay and grade. (The court also held 9-0 that a class cannot be certified for injunctive relief when money damages play a nontrivial component of the suit, as they did in *Dukes*.)

A LOOK AHEAD

These cases from California and the Ninth Circuit were some of the most important of OT10 — and the trend looks to continue in OT11. Already, the Supreme Court has granted a *certiorari* petition for a controversial Ninth Circuit decision holding that prison guards at privately run, government-contracted prisons may be subject to civil rights claims based on alleged violations of prisoners' constitutional rights, even though such claims are traditionally brought only against government employees who, unlike contractors, may be entitled to absolute or qualified immunity. Stay tuned.

Ben Feuer is an appellate attorney in San Francisco and of counsel to Eisenberg and Hancock LLP. He is a former law clerk at the Ninth Circuit U.S. Court of Appeals, and is the founder and co-chair of the Appellate Section of the Bar Association of San Francisco's Barristers Club. He can be reached at ben@feueresq.com.

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