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Section 8: Upcoming Issues before the Court

Institute of Bill of Rights Law, William & Mary Law School

WHAT ISSUES LIE AHEAD FOR THE SUPEME COURT?

The Usual Suspects – And a Few New Faces

Matthew Frey *

Amid a Supreme Court era labeled "conservative" for both the tenor and small number of the Court's recent opinions, many commentators expect the Justices soon to take up cases involving a wide range of controversies, including a few the Court has never addressed before.

Affirmative action, censorship of the Internet, and a person's right to own a gun top the list of topics likely headed once again for High Court scrutiny, while questions about school voucher programs, federal hate-crimes laws, and government control over the export of computer encryption software lead the issues up for first-time review.

In This Section:

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SCHOOL VOUCHERS

Matthew Frey *

By refusing last year to hear an appeal from a Wisconsin Supreme Court decision that upheld Milwaukee's ambitious school voucher plan, the Supreme Court has left commentators wondering whether it agreed with the Wisconsin court or whether it is simply looking for a better case on which to rule. If the latter is true, court-watchers believe the Justices will have no trouble picking a case more to their liking, although it may take up to five years for one to reach the stage at which it is deemed ready for their review.

Disagreement over the constitutionality of voucher programs has sparked court cases in Ohio, Florida, Maine, and Vermont, and others are sure to follow in the wake of increasing interest in voucher programs among state and local governments.

Vouchers programs involve government-sponsored plans that provide parents with the option of sending their children to private schools at taxpayer expense. Proponents of these plans herald the choices they provide to parents looking to provide their children with the best education possible. They point out that vouchers represent a way to help mostly poor and minority children escape chronically underfunded public schools. Their adversaries counter by saying that the money devoted to voucher programs is better spent on improving the public schools themselves. Questions about public support of religious schools complicate things even more.

Despite their disagreements, most involved in the issue believe that the Supreme Court is destined to have the last word.

"There will be a showdown," Barry W. Lynn, executive director of Americans United for Separation of Church and State.

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GROUPS SEEK TO STOP VOUCHER PROGRAM THROUGH LAWSUIT

USA Today

Wednesday, July 21, 1999

Stephaan Harris

Education and civil liberties groups filed suit in federal court Tuesday to halt new legislation that resurrected Cleveland's 3-year-old school voucher program.

Almost two months ago, the program seemed dead when the Ohio Supreme Court struck it down on technical grounds.

The court said that because the program was adopted as part of a spending bill, it violated the Ohio Constitution's "one subject rule." This rule allows the state Legislature to address only one issue for each bill that it considers.

State legislators responded by drafting a new bill, which the governor signed just weeks ago, says Brian Perera, director of finance for the Ohio Senate. Cleveland's voucher program provides up to $ 2,250 a year in financial aid for low-income students to attend private, mostly religious, schools. Nearly 3,700 students received vouchers this past school year.

Perera says the bill allocates $ 11.2 million for the 1999-2000 school year and more than $ 13.8 million for the 2000-2001 school year.

The suit was filed in U.S. District Court in Cleveland and names Susan Zelman, the superintendent of public instruction for the state's Education department, as a defendant.

"We don't think taxpayers should be forced to contribute hard-earned dollars to any church school," says Barry Lynn, executive director of Americans United for Separation of Church and State. "In a real sense, we are very pro-public schools, and vouchers are a cancer on the efforts at education reform."

Americans United for Separation of Church and State, the American Civil Liberties Union, the Ohio Education Association and other groups are pushing the litigation.

Florida also was slapped with a lawsuit, led by the ACLU, for its new statewide voucher program.

"We're supporting what the Legislature recommends," says Monica Zarichny, a spokeswoman for Zelman.

PUBLIC FUNDS TO PRIVATE SCHOOL
A Test Emerges

The Christian Science Monitor

May 10, 1999, Monday

Warren Richey, Staff Writer of The Christian Science Monitor

MIAMI – Florida is emerging as the next major constitutional battleground over whether using public tax dollars to pay for parochial school tuition is a violation of the separation of church and state.

In late April, the state legislature in Tallahassee adopted the nation's first statewide school-voucher program, and Gov. Jeb Bush (R) is expected to sign the measure into law by early June.

It will become the most ambitious school-voucher program adopted so far, expanding on a similar voucher plan already under way in Milwaukee.

"This is probably the most important piece of education-reform legislation that the country has ever seen," says Pat Heffernan, president of Floridians for School Choice.

But critics are asking, is it constitutional?

Florida's so-called "A-plus" plan for education sets up a grading system for public schools throughout the state. Parents of students at a school receiving a grade of "F" for any two years in a four-year period would be eligible to transfer their children to a better school including private, parochial schools. The plan awards such parents state-issued vouchers to cover tuition costs.

The central concern is that under the First Amendment of the US Constitution, government money cannot be used to support parochial schools.

Voucher programs like the one in Milwaukee and the proposed Florida plan attempt to avoid this constitutional prohibition by having the state turn over voucher checks directly to parents. The idea is that technically the money is no longer public money but becomes the private property of the parents to pay for their child's education at a school of their choice.

Parents can use the funds to send their children to another public school, a private, nonreligious school, or a private, parochial school. Leaving the decision to the parents, proponents say, insulates the government from involvement in making payments to religious schools.

Critics say this is little more than a legal fig leaf. The money is still public money, they say, and the voucher program constitutes an illegal endorsement of religion by the government.

Supporters of the plan disagree. They say it enables low-income parents to choose the school that is right for their child, rather than encouraging the spread or practice of religion. It injects a level of accountability and competition into the education system, they say, granting parents the power to withdraw tuition dollars from failing schools and spending them instead in better schools.

"The public funds that we have contributed for the education of children belong to the children, not the system," says Mr. Heffernan. "If the system is

failing them then we are happy to have the children take those funds elsewhere to secure an education."

The US Supreme Court has never addressed the issue of school vouchers directly. Last fall, the high court declined to hear arguments on both sides of the Milwaukee voucher program. By refusing to hear that case, the justices let stand a Wisconsin Supreme Court decision that found the voucher program did not violate First Amendment principles.

Legal experts are divided over the significance of the US Supreme Court's decision not to hear the case last fall. Voucher supporters see it as a green light to expand voucher programs nationwide, and efforts are under way across the country to do exactly that.

Voucher critics counter that the justices merely sidestepped the issue, choosing to wait for a better case to settle the contentious debate over school vouchers.

Florida may provide that case. "There will be a showdown," says Barry W. Lynn, executive director of the Washington-based advocacy group Americans United for Separation of Church and State.

Mr. Lynn says it may take as long as five years for the Florida plan and others like it to work their way through various court challenges to the US Supreme Court. But he says the issue will inevitably land there.

In addition to Florida, school vouchers are a hot issue in Maine, Ohio, and Vermont.

The Maine Supreme Court ruled two weeks ago that school-voucher payments to parochial schools would violate the US Constitution. In that state, parents receiving education vouchers may use them only to pay tuition at another public school or a private, nonreligious school.

A group of Maine parents sued the state seeking to enroll their children in a parochial school using state-issued vouchers. They claimed the state's refusal to permit them to send their children to parochial schools under the state voucher program was a violation of their right to religious liberty.

The court ruled that the parents had a right to send their children to a religious school, but that they had no right to expect the State of Maine to pay for it.

School-voucher cases are also pending in Ohio and Vermont, with the supreme courts in both those states expected to rule within the next six weeks.

STATE CONSTITUTION POSES HIGH HURDLES FOR VOUCHER PROPOSAL

The New York Times

Friday, March 5, 1999

Alan Finder

Even if Mayor Rudolph W. Giuliani gains the Board of Education's approval for an experimental school voucher program, the idea of using public money to send New York City school students to private schools will still face serious, and perhaps insurmountable, legal hurdles.

New York State's Constitution specifically forbids public money to be used "directly or indirectly" for schools under the control of "any religious denomination." The overwhelming majority of private schools around the country are religious, and in New York most of those are Roman Catholic.

Moreover, opponents of the Mayor's plan contended yesterday, the State Legislature would have to approve the use of public money just to send city school students to nonsectarian private schools. And senior Democrats in the State Assembly made clear that no such law was likely to be passed.

"Regardless of the Mayor's position, regardless of what the Board of Education might approve, the New York State school system is a creation of the State Legislature," said Steven Sanders, a Manhattan Democrat who is chairman of the Assembly's Committee on Education. "There is no law now that allows for vouchers.

"In order for this proposal to become law, it requires more than a vote by the Board of Education. It requires a vote by the Legislature. And the Legislature is not going to pass a law that will commit the use of public money in vouchers for private schools."

Mr. Giuliani has not explained why he thinks the Board of Education has the legal power to create a voucher program on its own. But city lawyers said yesterday that the state education law granted broad powers to the board and the Schools Chancellor, Dr. Rudy Crew.

"The education law is drafted very broadly," said Jeffrey D. Friedlander, the First Assistant Corporation Counsel. "It gives the Chancellor the authority to promote the best interest of the schools. It gives the Chancellor the authority to open new schools. We think no direct legislation is necessary."

Mr. Friedlander did not address how the Mayor's plan could be interpreted to meet the restrictions of the State Constitution. He acknowledged that opponents of the plan would undoubtedly file lawsuits to block an experiment with vouchers, should a majority of the Board of Education approve. The board appears to be split evenly on the proposal, with the deciding voter—Terri Thomson of Queens—undecided. Ms. Thomson said yesterday that she would not make up her mind until late this month.

Several Board of Education officials said they did not know how the voucher plan could be interpreted to be in accord with the State Constitution's ban.

"Who died and left the Board of Education king to create legislation? Nobody," said a senior official of the Board of Education, who spoke on the condition of anonymity. "I understand that the Mayor wants school vouchers, and I'm sure he's sincere. But school districts are not sovereign. This is the policy purview of the Legislature."

In Milwaukee and Cleveland, public school students have been using vouchers to attend private schools. In both instances, state legislatures approved bills authorizing the programs, many experts said. Legislatures in several states, including Florida, Texas and Pennsylvania, are debating whether to enact voucher programs. In the last decade, voters in California and Colorado have voted down school vouchers in state referendums.

Many experts said they were unaware of a city that had created a voucher program on its own. "This is something that always has been legislated," said Peter W. Cookson Jr., director of educational outreach and innovation at Teachers College of Columbia University.

Joseph P. Viteritti, director of the program on education and civil society at New York University, and several other experts agreed that New York's Constitution and the lack of legislation would create legal problems for proponents of vouchers in the city.

But Mr. Viteritti noted that in upholding Wisconsin's school voucher law, that state's Supreme Court said it met constitutional principles because the taxpayers' money did not go directly to the private schools. Public money went, instead, to students and parents, who decided where the money would be spent.

The Wisconsin court also said that the primary purpose of the voucher program was secular, and that it neither promoted nor inhibited religion.

VOUCHERS LOOKING BETTER TO SOME BLACKS

The Houston Chronicle

Friday, June 4, 1999

Clarence Page

AN important crack has opened up in black America's once-impenetrable wall of resistance to school vouchers.

The eyebrow-raising split has opened up in Miami between two of America's oldest and most prominent civil rights organizations.

In a move that pokes gaping holes in the argument that publicly funded school vouchers are a racist plot, the Urban League of Greater Miami has retained a Washington law firm to intervene in court on behalf of a voucher plan passed by the Florida Legislature and was supported by Gov. Jeb Bush.

That puts the chapter on the opposite side of the National Association for the Advancement of Colored People, the nation's oldest and largest civil rights group, which has vowed to sue to block the Bush voucher plan.

It also puts the Miami Urban League chapter on the opposite side of its own national organization and its respected president, Hugh Price, longtime voucher opponents.

T. Willard Fair, the Miami chapter's president, refuses to knuckle under to talk that his chapter has betrayed the race. "We are not bound by color the way we used to be bound. Where people said, 'You can't think that way because you're black,' " Fair says.

Actually, if it were up to grass-roots, rank-and-file African-Americans, Fair apparently would find more friends than foes.

In fact, surveys show that the more we African-Americans learn about vouchers, the better we seem to like them.

Some of us, anyway.

The racial angle is important in the voucher debate, since a disproportionate percentage of the nation's low-income parents who would take advantage of vouchers are poor, urban blacks and Latinos.

The Bush plan, written to go into effect in September, would permit students from the lowest-rated public schools in the state to attend private schools, including religious schools, with $ 4,000 vouchers per child paid by taxpayers' money.

Voucher support has climbed so much among African-Americans that blacks are now more likely to support them than whites are.

In a survey taken last year by the Joint Center for Political and Economic Studies, a black-oriented Washington think tank, 48.1 percent of blacks favored the use of state money for private school tuition vouchers, while 39.8 percent opposed it. Whites, by contrast, opposed vouchers by a margin of 50.2 percent to 41.3 percent.

A closer look at black responses reveals a glaring gap along income lines. Poorer and less-educated blacks were more likely to support vouchers than were their more affluent, well-educated counterparts.

Blacks with college degrees opposed vouchers by a 45.3 percent to 38.6 percent margin, while blacks with "some college" or other post-secondary vocational education favored vouchers by 58.7 to 41.3. Those with high school diplomas or less favored vouchers by 52.1 percent to 35.4 percent.

David Bositis, the Joint Center's research director, attributes the class gap to indications that better-educated blacks, like better-educated whites, tend to be more politically moderate and more satisfied with the job their public schools are doing.

"Moderate people have the most misgivings about vouchers, which they see as a radical solution," he says. "People who are happy with their schools see vouchers as a challenge to the status quo, a challenge that possibly could hurt their schools."

As a college-educated black parent whose son attends a fine, racially integrated, suburban public school, I have an additional theory.

I think low-income people are most concerned, for good reason, with helping their own children get the best education possible, while many of the rest of us are more concerned with helping all children get the best education possible.

I care not only about the few lucky kids who can escape bad schools with vouchers, whether publicly or privately funded, but also about the kids who are left behind after their former classmates are spirited away, along with badly needed taxpayers' dollars.

That's why, like many other taxpayers, I have serious reservations about vouchers as the salvation of America's complex educational needs.

I would rather see Americans return to their ancient commitment to quality education for everyone, not just the most fortunate and resourceful families.

Anything short of that will only invite wider cracks in the wall.

KIRYAS JOEL CONTINUES

Matthew Frey *

The Supreme Court's decision earlier this decade striking down a law creating a special public school district for the town of Kiryas Joel did little to diminish the resolve of the Hasidic community's citizens, whose efforts to create a special school district for their disabled children touched off a legal battle that has resulted in ten state and federal court rulings in as many years.

Most recently, a New York Court of Appeals opinion issued in May that struck down the third effort by the people of Kiryas Joel to create a separate school district left the plaintiffs to decide whether to appeal the state court's decision to the United States Supreme Court or whether to go back to the legislative drawing board for a fourth time.

At least one citizen of the town seemed to favor an appeal.

"It's a 4-3 decision, which is better than it's ever been," said Abraham Weider, mayor of Kiryas Joel, referring to the New York court's ruling.

Advocates of the plan to create a new school district argue that Kiryas Joel's 250 handicapped children feel out of place at the regional public schools they now attend. Critics of the school plan within the town believe the plan is merely an attempt to hijack millions of dollars of state and federal support to fund what will amount to a private religious school system.

The recent state court opinion faulted the plan for its "primary effect of advancing religion," a violation of the constitutional doctrine of the separation of church and state.

An appeal to the Supreme Court could come this term.

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COURT DECISION UPSETS SCHOOL DISTRICT MEASURE FOR KIRYAS JOEL

The New York Times

Wednesday, May 12, 1999

Joseph Berger

New York State's highest court yesterday declared unconstitutional the third and latest legislative effort to create a special public school district for the disabled children of the Hasidic village of Kiryas Joel, saying that it still amounted to "preferring one religion over others."

But a vigorous dissent by three judges of the State Court of Appeals suggested that the decade-old case, which has produced 10 court rulings, was not over.

"The intractable drama of this dispute has a David and Goliath staging to it—yet it is difficult to decide who will be left standing in the end as the true victor or hero," Judge Joseph W. Bellacosa said.

Abraham Weider, the Mayor of Kiryas Joel, a village of 15,000 Satmar Hasidic Jews in Orange County, said it was considering appealing for a second time to the United States Supreme Court or returning to the State Legislature for a fourth time.

In 1989, Kiryas Joel persuaded the Legislature to carve out a special public school district from surrounding Monroe-Woodbury, contending that the village's 250 handicapped children felt uncomfortable attending secular classes.

The Legislature's first law was declared unconstitutional by several courts, including the Supreme Court, which found that the law written explicitly for Kiryas Joel by name amounted to a favor for a single religious group. The Legislature's second effort, in 1994, did not name Kiryas Joel but was thrown out by succeeding courts because the law's criteria of wealth and population applied only to Kiryas Joel.

In 1997, the Legislature tried for a third time and slightly broadened the criteria. But the lower courts found that this version applied to only two of the state 1,545 municipalities—Kiryas Joel and the town of Stony Point in Rockland County. Yesterday, a four-judge majority of the Court of Appeals agreed, finding that the law, known as Chapter 390, did not meet the Supreme Court's test of neutrality toward religion.

"The conclusion is inescapable that Chapter 390 has the primary effect of advancing religion and constitutes an impermissible accommodation," Judge George Bundy Smith wrote for the majority. Proposing an alternative, he pointed out that public school teachers, after a 1997 Supreme Court decision, were now permitted to enter parochial schools or yeshivas to deliver remedial or special education classes and could now enter Kiryas Joel's religious schools.

In his dissent, Judge Bellacosa argued that in assessing constitutionality, the court must give the Legislature the benefit of the doubt. The 1997 law, he said, was written with two secular purposes—to create new school districts and provide secular education for children of Kiryas Joel, which he emphasized is a municipal village, not a religious entity. Nothing is wrong, he said, with passing a law that

benefits a single municipality so long as the language is broad enough to cover other communities.

Kiryas Joel's residents, the judge said, "simply took their place in the long line of supplicants walking and working the corridors of power in the Statehouse." It is not, he said, "un-American or unconstitutional to refuse to be absorbed into the melting pot."

Mayor Weider, a businessman who has led the battle to sustain the public school, was heartened by the dissent. "It's a 4-3 decision, which is better than it's ever been," he said.

But Joseph Waldman, a Kiryas Joel dissident who opposes the school, said the village was also trying to retain control of the school taxes its residents pay and millions of dollars in Federal and state programs for remedial, bilingual and transportation programs.

If the Legislature and the Supreme Court refuse to intervene, the State Education Department could close the district in the next few weeks and force the surrounding Monroe-Woodbury district to provide special education classes for the handicapped at the village's religious schools, said Jay Worona, general counsel for the New York State School Boards Association, which brought the litigation against Kiryas Joel.

Monroe-Woodbury, however, has resisted absorbing Kiryas Joel because it would add a large bloc of voters who do not send children to public schools and might stymie spending increases.

Gov. George E. Pataki, who supported the latest Kiryas Joel legislation, declined comment. Pat Lynch, speaking for Assembly Speaker Sheldon Silver, said Mr. Silver was "committed to finding a mechanism" to meet "the educational needs of this group of disabled youngsters."

BAKKE REDUX?

Matthew Frey *

Cases in Washington and Michigan stand an equal chance of prompting the Supreme Court to revisit a 1978 decision in which it held that college and university admissions offices could consider race as a "plus factor" in trying to achieve "educational diversity," commentators suggest. That case, *University of California v. Bakke*, arose when a white man challenged the admissions policies of the University of California system after he was denied admission to UC-Davis's medical school in favor of sixteen minorities whose credentials failed to match his own.

In the over twenty years since, colleges and universities have stood behind the *Bakke* ruling in the face of criticism that preferential treatment for minorities amounts to racism. Critics of preferential admissions policies in the University of Texas system won a significant victory in 1996, however, when the Fifth Circuit Court of Appeals ruled in the *Hopwood* case that such policies were unconstitutional. More recently, the First Circuit Court of Appeals struck down preferential admissions practices at the Boston Latin School, that city's most prestigious public high school.

The Washington case centers on Katuria Smith, a white woman who filed suit after she was denied admission to the University of Washington's law school. She claims to have been passed over in favor of African-Americans and Hispanics with lower test scores. The Michigan cases stem from similar challenges mounted by three white applicants to the University of Michigan.

At the center of all three lawsuits is the Center for Individual Rights, the conservative law firm which successfully represented Cheryl Hopwood in Texas. It anticipates equal success in the current cases.

"It's a sleeper nationally," said Michael Greve, the Center's executive director, referring to Smith's case. "(It) will be the next shoe to drop."

Critics of the *Hopwood* ruling predicted the Fifth Circuit's decision would spell the end of minority enrollments throughout public colleges and universities in Texas, and for a time it looked as though they might be right. But admissions officials in Texas estimate that more minorities will enroll at the University of Texas this year than in 1996, the year before *Hopwood* went into effect. The influence of the First Circuit's opinion on minority enrollment at Boston Latin is unknown.

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UW CASE MAY ALTER ADMISSIONS POLICIES
Challenge Being Closely Watched by Universities

***Seattle* Post-Intelligencer**

Thursday, July 8, 1999

Heath Foster, P-I Reporter

The most significant court ruling in the national legal struggle over affirmative action may come out of a reverse-discrimination case against the University of Washington.

Katuria Smith, the reluctant poster child of last year's Initiative 200 campaign, sued the UW Law School in 1997, claiming she was rejected to make room for blacks and Hispanics with lower test scores.

Her case hasn't yet gone to trial. The 9th U.S. Circuit Court of Appeals in San Francisco must first rule on whether it was constitutional for the UW to use the goal of a racially diverse student body as the basis for race-based admissions decisions.

"It's a sleeper nationally, with nobody paying much attention to it, but (the UW vs. Smith case) will be the next shoe to drop," said Michael Greve, the executive director of the Center for Individual Rights, a conservative, Washington, D.C.-based law firm.

CIR is handling Smith's case and two other high-profile challenges to similar admissions policies at the University of Michigan.

The 9th Circuit's decision could affect whether the U.S. Supreme Court weighs in on a growing stack of conflicting rulings on the constitutionality of admissions policies that make being a minority an advantage.

At issue is Smith's appeal of U.S. District Court Judge Thomas Zilly's February ruling that the U.S. Supreme Court's landmark reverse-discrimination ruling in the University of California vs. Bakke applies to Smith's case.

In the 1978 *Bakke* case, Justice Lewis Powell concluded that maintaining separate admission tracks for whites and minorities was illegal, as were racial quotas or set-asides. But Powell said it was constitutional for a university to try to attain "educational diversity" by using race as a "plus factor."

The *Bakke* opinion has been used by universities nationally as the foundation for affirmative action policies.

But recent appellate court rulings have contradicted *Bakke*. In CIR's best-known victory, the 1996 *Hopwood* case, the 5th U.S. Circuit Court of Appeals ruled that the University of Texas' policies to boost enrollment of blacks and Hispanics were unconstitutional. The court held that diversity alone did not justify the school's racial preferences, and such preferences were allowed only as a remedy for the continuing effects of specific past discrimination.

More recently, the 1st Circuit Court of Appeals ruled the race-based admission policies at a prestigious public high school, the Boston Latin School, weren't constitutional. The school used race as a factor in the admission of half of its students, along with grades and test scores.

At the urging of the NAACP and the U.S. Department of Education, Boston school district officials recently backed away from a decision to appeal the case to the Supreme Court. They feared the conservative high court would uphold the Boston case, making any school district in the nation that uses any type of race-based student assignments vulnerable to challenges. With the end of mandatory busing in many states, race-based assignments have become a popular tool for promoting racially balanced schools, and Seattle is no exception.

If the 9th Circuit upholds Zilly's ruling, it would directly conflict with the 5th Circuit's *Hopwood* decision. And only the U.S. Supreme Court could resolve the conflict.

Ironically, the 9th Circuit ruling won't impact admission policies at public universities in Washington or California. I-200 and California's Proposition 209 have eliminated the application preferences public universities gave to minority groups.

MICHIGAN CASE DRAWING NATIONAL ATTENTION

The Associated Press

Saturday, July 3, 1999

Justin Hyde, Associated Press Writer

ANN ARBOR, Mich. (AP) – The legal fight between the University of Michigan and three while applicants over the use of race in admissions has drawn the attention of educators across the country – and could set a precedent for the rest of the nation.

"It is a case that very well may go up to the Supreme Court," said Gary Orfield, a Harvard professor of education and social policy. "There's major intellectual preparation on both sides. It has every possibility of being truly historic."

The University of Michigan seems to be treating it that way. The university expects to spend more than $3 million on its case, which it is building on data that it says show affirmative action benefits not only minority applicants, but all students.

"Race is so significant in American life, its history, its culture," said Michigan President Lee Bollinger. "It's been so central to the evolution of the country.

"Living with the issue of race in an educational context raises questions for students about how you understand the world from the issue of race."

The university's detailed response, Orfield said, is novel.

"Most of these cases have not involved that kind of organized evidence or development," he said. "I think the University of Michigan has really turned some of its resources into looking at its own racial issues and the consequences of its own politics."

The main legal dispute involves a complicated 1978 Supreme Court decision that universities have relied on to set up affirmative action programs.

The case involved Allan Bakke, a white applicant to the University of California-Davis' medical school. When he applied in 1973 and 1974, the school had 16 of its 100 entering class spots reserved for "qualified" minorities. Bakke was turned down twice, even though his grades and test scores exceeded those of any minority who was admitted.

The court split its decision 4-4, with Justice Lewis Powell writing an opinion that straddled both sides and a single paragraph that universities have relied on since. He said the university was wrong to set aside seats or use racial quotas, but could not take race into account when selecting students.

Most if not all four-year public universities have adopted some form of affirmative action based on the Bakke case, said Hector Garza, vice president for access and equity programs at the American Council on Education.

"We in the higher education community are very concerned about any Michigan ruling," he said. "We are concerned because we firmly believe that there is still a need for programs that seek to provide access and opportunities to students of color and women."

Michigan was chosen as the target of the lawsuits because its methods were revealed to the public, said Terence Pell,

the senior counsel for the Center for Individual Rights, the group behind the lawsuits.

A Michigan philosophy professor, Carl Cohen, used the Freedom of Information Act in 1997 to get the grids used by the university in its admissions policies. State lawmakers called Cohen to testify, and later contacted the Center for Individual Rights.

The center gained fame from its handling of the case of Cheryl Hopwood, a white Texas woman who was denied admission to the University of Texas Law School. In 1996, the 5th U.S. Circuit Court of Appeals in New Orleans ruled that Texas had no reason to use race in admissions – and ruled that Bakke didn't apply in its three-state region of Texas, Louisiana, and Mississippi.

The Supreme Court chose not to hear the case, saying Texas had already ended its affirmative action policies. From 1995 to 1997, enrollment of black and Hispanic students decreased from 19 percent to 14 percent of total enrollment at the University of Texas.

Similar drops in enrollment were noted in California, after a voter initiative outlawed the use of race in admissions there.

Michigan wants to show through scientific studies that diversity improves education.

One Michigan professor, Patricia Gurin, analyzed data from about 10,000 students and concluded that those who were exposed to more diversity in classrooms and on campus do better in life.

"Majority and minority individuals whose childhood experiences take place in schools and neighborhoods that are largely segregated are likely to lead their adult lives in largely segregated ... settings," Gurin wrote.

"College is a uniquely opportune time to disrupt this pattern."

Experts William Bowen and Derek Bok found that minorities who had been admitted to selective schools under affirmative action policies were just as likely to succeed as other students. They also said ending racial preferences would reverse the outcome.

"Of the more than 700 black students who would have been rejected in 1976 under a race-neutral standard, more than 225 went on to earn doctorates or degrees in law, medicine or business," they said.

"The average earning of all 700 exceeds $71,000, and well over 300 are leaders of civic organizations."

The Center for Individual Rights has argued that Michigan's system is illegal under Bakke because it relies too much on race – and that Bakke should be read as only allowing racial preferences to cure specific cases of discrimination.

"The Michigan case is clearly illegal under existing Supreme Court precedents," Pell said.

"It's about as clear a case of what Justice Powell said you could not do as there is. If anything, it's the University of Michigan trying to overrule Bakke."

But Bollinger, who is also a lawyer, says Michigan's policies were written to pass Bakke's tests.

Diversity, he says, is just as important to a college education as teaching James Joyce or Shakespeare.

"Part of a great education is realizing you thought things were a certain way, and it turns out they're not," Bollinger said.

HIGH-SCHOOLERS IN UT PROGRAM GET TASTE OF COLLEGE

Longhorn Round-Up Aims to Recruit Top Scholars From Across Texas, with Focus on Minorities

Austin American-Statesman

Thursday, June 17, 1999

Peyton D. Woodson

Julie Cantu, a high school senior from Pharr, said she looks forward to being the first in her family to graduate from college.

Unlike many seniors embarking on that last year of high school, she's not worried about SAT scores or passing admission requirements. Cantu says that's because of her five-year involvement with University Outreach, a program geared toward getting students, with an emphasis on those from mostly minority schools, ready for college.

"Without University Outreach, I would have to prepare for college on my own," Cantu said. "They have SAT workshops and things to help us in college. My counselors at school are basically just concerned with scheduling classes."

Cantu was one of 180 Texas high school juniors and seniors that visited the University of Texas campus Tuesday and Wednesday as part of the school's Longhorn Round-Up recruitment program.

The program designed for University Outreach students allowed them to attend workshops by the admissions and financial aid offices and UT colleges, tour the campus, use campus sports and entertainment facilities, stay over night in dorms and meet with university students.

"We want them to get an idea of what college life is about," said Yolanda Easley, assistant director of the Austin University Outreach office. "It's a totally different environment."

And at a time when universities such as UT are struggling to recruit more minority students, university officials see the outreach program as a way to attract some top scholars and increase diversity.

"Longhorn Round-Up provides exposure for some students who might not have known about UT," said Wanda Nelson, director of the Austin University Outreach office.

The nonprofit group has six offices throughout Texas that are run by UT and Texas A&M University officials, but the group does not recruit for a particular school. Students from grades eight to 12 routinely participate in the program, which started in 1987.

"The impetus at that time was to increase the number of African American and Hispanic students continuing to college," Nelson said.

"It's very important to continue to promote this program so that they are prepared for jobs available in the next century."

As a result of the *Hopwood* legal decision, which eliminated race-based admissions in Texas state schools, UT was one of a number of schools that saw an immediate dip in freshman enrollment of minority students.

Texas college officials now are realizing that more emphasis must be placed on minority student recruitment in order to keep and raise the number of those students entering and graduating.

Nelson said university outreach can become a leader in that effort. Even before *Hopwood*, she said, the program was open to all students but targeted schools with high numbers of minority students – many of whom would be first-generation college students.

In 1996, 266 African American and 932 Hispanic students entered UT as freshmen. In 1997, the year the *Hopwood* decision went into effect, enrollment of African Americans dropped to 190 and Hispanics to 892. This fall, officials estimate 267 African American students and 978 Hispanic students will enroll at UT.

Nelson credits a host of initiatives, including the outreach program, with the rise in UT's minority enrollment even after *Hopwood.*

The students say they realize the value of their time with the program.

"They helped me to look past just athletic scholarships and to look further into my academics and to get more involved in school," said Latoria Randile, a junior from Houston. "It gives you an insight in what you need to prepare for. I know a lot of students out there that don't have this opportunity."

THE VIOLENCE AGAINST WOMEN ACT STRUCK DOWN

Are Hate Crimes Next?

Matthew Frey *

The White House and the National Organization of Women have petitioned the Supreme Court to overturn a Fourth Circuit Court of Appeals decision that struck down the Violence Against Women Act, a law Congress passed in 1994 with the aim of providing victims of rape and domestic violence with standing to sue their attackers in federal court.

In a 7-4 decision, the Fourth Circuit held that the Act was an impermissible extension of Congress's power to regulate interstate commerce, a holding common among today's increasingly activist conservative federal courts. Lawyers arguing on behalf of the Act asserted that Congress was within the scope of the Commerce Clause in passing the measure because sex-based violence leads to legal and medical costs, inhibits victims from traveling, and reduces worker productivity.

The case arose shortly after Congress passed the Act when Christy Brzonkala, then a 17-year-old freshman at Virginia Tech, reported to school officials that two of the school's football players had raped her. After the officials failed to punish the players to Brzonkala's satisfaction, Brzonkala took the case to federal court.

Commentators believe that the Supreme Court's decision in the case will determine whether federal hate-crimes laws, close cousins of the Violence Against Women Act, may stand.

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LAW ALLOWING RAPE SUITS RULED UNCONSTITUTIONAL

The Boston Globe

Saturday, March 6, 1999

Jean McNair, Associated Press

RICHMOND – For the first time, a federal appeals court yesterday declared unconstitutional a 1994 federal law that allows rape victims to sue their attackers for violating their civil rights.

Ruling 7-4 in the case of a Virginia Tech student who sued two football players, the 4th US Circuit Court of Appeals called the Violence Against Women Act a "sweeping intrusion" into matters traditionally handled by states. The court said Congress overreached in its attempt to regulate interstate commerce when it passed the law.

The ruling is binding only in Virginia, West Virginia, Maryland, and the Carolinas.

A lower court judge had previously thrown out the lawsuit of the Virginia student, Christy Brzonkala, who was the first person to sue under the Violence Against Women Act. Eileen Wagner, one of Brzonkala's lawyers, said she expects the case to go to the Supreme Court.

"They can either give it a thumbs-up – in which case people will use this law, which they are reluctant to do now – or a thumbs-down, which would encourage Congress to go back to the drawing board and rewrite the thing," Wagner said.

Brzonkala said she was raped in a dormitory. She did not report the alleged rape for several months and no criminal charges were filed against the two players, Antonio Morrison and James Crawford.

Their lawyers did not return calls seeking comment.

Brzonkala's lawyers defended the Violence Against Women Act by arguing that gender-motivated violence affects commerce by imposing medical and legal costs on victims, inhibiting travel by those who fear violence, and lessening productivity.

The appeals court rejected that line of reasoning. "Such a statute, we are constrained to conclude, simply cannot be reconciled with the principles of limited federal government upon which this nation is founded," Circuit Judge J. Michael Luttig said.

NEW CONSERVATIVE ACTIVISM SWEEPS THE FEDERAL COURTS

GOP- Appointed Jurists Back States' Powers; Strike Rules on Clean Air, Youth Smoking, Rape Victims' Right to Sue

Los Angeles Times

Tuesday, June 22, 1999

David G. Savage, Times *Staff Writer*

As a 17-year-old freshman at Virginia Tech University, Christy Brzonkala turned first to school disciplinary authorities with her charge that two star football players had raped her.

But they threw out the case against one of the players for lack of evidence, and sentenced the other to a "deferred suspension" that would take effect only when his football career was over.

So Brzonkala went to the federal courts, relying on the brand-new Violence Against Women Act. Not only did she fail to prevail, but the appeals court in Richmond, Va., threw out the law as an unconstitutional intrusion into states' rights.

That March 5 decision reflects a new conservative activism sweeping the federal courts now that judges appointed by the last two Republican presidents, Reagan and Bush, constitute the majority of federal judges.

Not long ago, Republicans decried activist judges for overstepping their authority and, in effect, making law from the bench. Conservatives complained that an elitist, unelected judiciary had assumed too much power: ordering nationwide school desegregation in the 1950s, throwing out state-sponsored prayers in public schools in the 1960s and striking down all the laws that made abortion a crime in the 1970s.

Now the roles are reversed. In recent years, the Supreme Court has thrown out federal laws intended to regulate handgun purchases and possession of guns in schools. In the last year alone, conservative judges have knocked down Clinton administration regulations on youth smoking and clean air.

This week, as the Supreme Court's current term wraps up, the justices will decide whether to extend the principle of "state sovereign immunity" to shield states from federal suits charging patent and copyright infringement.

Most legal scholars agree that the recent federal court rulings signal a fundamental shift in the balance of power between Washington and the states.

When Reagan and Bush were elected in 1980, they pledged to appoint cautious judges who would enforce the laws as written. Judges must "not legislate from the bench," Bush said.

Over their 12 years in office, Reagan and Bush appointed a majority of the 843 currently serving federal judges, including five of the nine Supreme Court justices. With little fanfare or public notice, conservative judges—most of them appointed by Reagan or Bush—have struck down an array of liberal laws and regulations during the last two years, not only on gun control and smoking but on

drivers' privacy, religious liberty, age discrimination and women's rights.

Yale law professor Akhil Amar said the Supreme Court had "put the pincers on federal power. The tone of these opinions is rather dismissive of Congress and the president." He noted that while the Supreme Court under Chief Justice Earl Warren in the 1960s was known for its activism, "rarely did that court strike down an act of Congress."

But University of Utah professor Michael McConnell, a former Reagan administration lawyer, praised the recent rulings as faithful to the Constitution.

"I see this as a revitalization of the principle that the federal government's power is limited," McConnell said. "As for the Violence Against Women Act, it is a popular bit of symbolic legislation, but it's hard to defend under the court's current precedents."

The Violence Against Women Act gives victims of sexual assault the right to sue their attackers in federal court.

The Brzonkala case is not the only recent case in which the Richmond appeals court has exercised what Judge J. Michael Luttig, a Bush appointee, has described as its "affirmative constitutional obligation to safeguard the sovereignty of the states against congressional encroachment."

Last August, the same court struck down the Clinton administration's campaign against youth smoking, ruling that federal regulators had no authority over tobacco.

In September, the Richmond-based court struck down the 1994 Drivers' Privacy Protection Act, which bars states from selling personal data from drivers' records, such as names, phone numbers and street addresses. Congress had responded to the 1989 murder of Los Angeles actress Rebecca Schaeffer, who was killed by a stalker who had obtained her home address from the state Department of Motor Vehicles.

The Supreme Court will hear the Clinton administration's appeals in both the tobacco and the drivers' privacy cases in the fall. But the biggest constitutional showdown is likely to occur over the Violence Against Women Act.

By the end of the month, the Clinton administration and the Legal Defense Fund for the National Organization for Women will appeal Brzonkala's case to the Supreme Court, seeking to have the law revived. The case, which will probably be heard in the new term beginning in October, sets the stage for a major battle over whether Congress has the power to enact national hate-crimes laws.

On nearly unanimous votes in both the House and the Senate, Congress enacted the law in the summer of 1994 on the heels of a series of stories about women who had been battered by husbands or boyfriends, college students who had been raped by their dates, and working women who feared leaving their jobs at night.

Sexual assaults often go unpunished, lawmakers found, particularly when the victim knows her attacker. And rarely, if ever, can victims obtain compensation for the damages they suffer.

All Americans have "a right to be free from crimes of violence motivated by gender," Congress declared in passing the act.

Just four weeks later, Brzonkala was allegedly raped by two football players in a dormitory room. She says she then cut off her hair, became depressed and suicidal and hid in her room. She did not report the incident to the police. Only after six

months did she tell a counselor what had happened.

Rape and sexual assault are the only violent felonies the university does not automatically report to the police. Instead, a hearing was held before a university officer in May 1995. Tony Morrison, the starting linebacker for Virginia Tech, was found guilty and suspended.

But his family hired a lawyer who pointed out that the campus policy on sexual assaults was not part of the student handbook in September 1994, and the university agreed to hold a new hearing during the summer. When Brzonkala returned home from a family vacation in August, she was stunned to learn that Morrison's suspension had been overturned. He would be back to play football in the fall.

"They didn't call me or send me a note. Nothing," she said. "And they said he was just guilty of verbal abuse." She did not return to school.

After her story exploded in the college newspaper, the state opened an investigation but decided not to charge Morrison.

"Whatever occurred between these two folks was consensual," said David Paxton, a Roanoke, Va., lawyer who represented Morrison. He too left the university and played out his football career at a small college in eastern Virginia, Paxton said.

With no other remedy available, Brzonkala filed a civil suit in the federal courts, only to see the U.S. 4th Circuit Court of Appeals throw out the entire law. Judge Luttig began his opinion: "We the people, distrustful of power, and believing that government limited and dispersed protects freedom best . . . ."

Brzonkala's reaction to the appeals court ruling: "I felt like I had been raped again."

ACLU v. RENO II

Matthew Frey *

On the heels of its victory before the Supreme Court two years ago in *Reno v. ACLU*, the American Civil Liberties Union (ACLU) is back in court fighting Congressional attempts to censor the Internet.

The *Reno* Court said that provisions of the Communications Decency Act (CDA) meant to shield children from Internet pornography violated the First Amendment. Now in pretrial stages, the present case stems from the ACLU's challenge to the Child Online Protection Act (COPA), Congress's 1998 attempt to accommodate the *Reno* Court's opinion. The law would punish operators of commercial Web sites who make available to children under 17 sexually explicit material deemed harmful to minors.

The ACLU and its backers in the lawsuit, who won a preliminary injunction against COPA last February, are concerned that "harmful to minors" is no more concrete a standard than "indecent," with which the Supreme Court found fault in *Reno*. They are also fearful that social conservatives could exploit COPA and prosecute any Web site whose content they disfavor.

Proponents of COPA, however, liken the law's effect to an "electronic brown paper bag" covering the offending Web sites.

"Playboy and Penthouse are protected speech for adults, but not kids," said Shyla Welch, a spokeswoman for Enough Is Enough, a family oriented anti-pornography organization. "We just want to extend those same laws to cyberspace."

Perhaps the most interesting aspect of the new litigation is the question it raises about how to enforce what amounts to a national obscenity standard, something the Supreme Court has never addressed.

COPA threatens to "stand decades of obscenity law on its ear," said Rachelle Chong, a lawyer and former commissioner at the Federal Communications Commission.

A full trial in *ACLU v. Reno II*, as the case has been dubbed, likely won't begin until later this fall.

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LAW BARRED SHIELDING KIDS FROM NET PORN

The San Francisco Chronicle

Tuesday, February 2, 1999

Jon Swartz, Chronicle Staff Writer

In a victory for free-speech advocates and another blow to anti-cyberporn lobbyists, a federal judge yesterday blocked the government's latest attempt to shield children from pornography on the Internet.

U.S. District Judge Lowell Reed of Philadelphia continued a preliminary injunction against the Child Online Protection Act, which would require U.S. commercial Web sites with sexual content deemed "harmful to minors" to block access to those under 18 by using a credit card or age-verification system.

Reed had issued a temporary restraining order in November against the act that expired at midnight last night.

"Perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection," Reed said in a strongly worded 49-page opinion.

Plaintiffs led by the American Civil Liberties Union had pressed Reed during a six-day hearing last month to extend the preliminary injunction blocking the act's enforcement, paving the way for a full trial to have the law overturned.

A judge's clerk said the injunction would remain in place until the ACLU case reaches trial. A court date is expected this spring.

"This proves that the statute was unconstitutional and ineffectual," said Alan Davidson, staff counsel of the Center for Democracy and Technology, an online civil liberties group in Washington that also filed a brief objecting to the act.

A spokesman for the Justice Department, which could appeal the decision, said government lawyers "are reviewing the judge's decision."

"We're disappointed but not surprised," said Shyla Welch, a spokeswoman for Enough Is Enough, an Internet safety organization in Fairfax, Va. "This bipartisan law had broad public support. It's a perfect example of the ACLU trying to foist its agenda on the rest of us."

Though passed overwhelmingly by Congress and signed into law by President Clinton in October, the controversial law has yet to go into effect.

The act is a watered-down successor to the Communications Decency Act, which was struck down by the U.S. Supreme Court on First Amendment grounds in 1997.

The new law is more narrowly focused, however, because it applies only to commercial Web sites and tries to clearly define objectionable material. Authors of the bill identify "objectionable sexual material" as lacking "serious literary, artistic, political or scientific value" for those under 18. Web operators who violate the law could get up to six months in jail and a $50,000 fine.

Proponents say the law is necessary to shield children from a myriad of graphic

sexual images and obscene material readily available on the World Wide Web.

In arguments before Reed last week, the Justice Department said the law is merely an "electronic brown paper bag" for Web sites that peddle X-rated material.

"COPA is concerned with what's clearly pornographic. Those who are there to excite, entice and fill their coffers," Justice attorney Karen Stewart said in the government's closing argument last week.

"Playboy and Penthouse are protected speech for adults, but not kids," Welch said. "We just want to extend those same laws to cyberspace."

But critics of the law said it violates the First Amendment and could be exploited by social conservatives to prosecute AIDS activists, abortion groups, artists or gays who distribute information over the World Wide Web.

"It should be up to parents, and not the government, to decide what children should see," ACLU staff counsel Chris Hansen said. "This case was about speech."

Others—such as Donna Hoffman, a Vanderbilt University professor who is an expert on e-commerce—said the law might inadvertently endanger mainstream commercial sites.

Rachelle Chong, a former Federal Communications Commission commissioner and partner at Coudert Bros. in San Francisco, added that the law threatened to "stand decades of obscenity law on its ear" because it set a national—rather than local—obscenity standard. The U.S. Supreme Court has never approved a national standard before.

Parents would be better off if they opted for commercially available filtering software to protect children from online pornography rather than accept an "ill-conceived law that limits the rights of adults to free speech," Jerry Berman, executive director of the CDT, said.

The ACLU spearheaded a coalition of 17 businesses and organizations—among them, Salon, an online magazine; local poet Lawrence Ferlinghetti; Planet Out, a gay and lesbian online service in San Francisco; and the Internet Content Coalition, which represents 23 Web publishers including CNet in San Francisco.

SETBACK FOR A LAW SHIELDING MINORS FROM ADULT WEB SITES

The New York Times

Tuesday, February 2, 1999

Pamela Mendels

A Federal judge yesterday blocked a new law that supporters said would shield children from pornography on the World Wide Web but that opponents said would chill free speech on line.

In issuing the preliminary injunction, Judge Lowell A. Reed Jr. of District Court in Philadelphia wrote that many of those who had brought the lawsuit to stop the law, the Child Online Protection Act, had said their fears of prosecution under the law would result in self-censorship and that he had concluded "such fears are reasonable given the breadth of the statute."

"Such a chilling effect," he continued, "could result in the censoring of constitutionally protected speech, which constitutes an irreparable harm to the plaintiffs."

Judge Reed cited the "personal regret" that his decision would "delay once again the careful protection of our children." But, he added, "perhaps we do the minors of this country harm if the First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection."

The law, which was signed by President Clinton last October, has never gone into effect because Judge Reed blocked it last fall under a temporary restraining order that was to expire at midnight yesterday.

Ann Beeson, a lawyer for the American Civil Liberties Union, which led a coalition of businesses and groups opposed to the law, said she was "thrilled" by the decision. "Yet again, a Federal judge has recognized that Congress must be careful—and it has not been careful—when it passes laws that burden speech on the Internet," she said.

A spokeswoman for the Department of Justice, which defended the law, had no comment beyond saying that Government lawyers were reviewing the decision, though Ms. Beeson said the Government had several options, among them appealing the preliminary injunction.

Bruce A. Taylor, a lawyer for the National Law Center for Children and Families, which filed court papers on behalf of legislators who sponsored the law, said he was disappointed by the ruling. The legislators intended the act "to regulate porn sites to stop giving their teasers to our kids," Mr. Taylor said, referring to free samples that some pornographic Web sites offered visitors. "We think the judge was in error."

Plaintiffs, meanwhile, were jubilant. "We can operate business as usual," said Mitchell S. Tepper, who operates the Sexual Health Network, a small Web site with information on sex for the disabled. Mr. Tepper had testified in court that he feared the candid nature of his site could put it in jeopardy if the new law stayed on the books.

The law would make it illegal for the operator of a commercial Web site to

make sexually explicit material deemed harmful to minors available to those under 17. A site that carried such material, but that gated it off from children through credit cards or other mechanisms to verify the age of the user, would have an acceptable defense under the act. Violators face fines of up to $50,000 per offense and six months in jail.

The measure was introduced in Congress last year after an earlier effort to regulate children's access to pornography on line, the Communications Decency Act, was found to be unconstitutionally broad in a 1997 decision by the United States Supreme Court. That law was wider in scope than the Child Online Protection Act. It banned not only material harmful to minors, which, among other things, must lack scientific, literary, artistic or political value for those under 17, but "indecent" material in general.

Backers of the new law say it is aimed primarily at teaser ads, free samples offered by Web pornography sites that sell most of their material. But opponents say the law is so broad that it could be applied to other kinds of Web ventures that frequently or on occasion carry sexually explicit content, like those dealing with gynecological issues.

The plaintiffs included a broad variety of Web businesses, from Condomania, a condom retailer, to Powell's Bookstore, the on-line version of a general-interest bookstore chain in Portland, Ore.

ENCRYPTION SOFTWARE

Matthew Frey *

Next to figuring out how to deliver Internet access to more people more quickly, perhaps the greatest challenge facing the Internet industry is how to safeguard the transmission of sensitive information over the Net. In an effort to meet this challenge, however, many companies have run up against government restrictions on exports of the most powerful encryption software. The government claims that making the software available overseas will curtail law-enforcement efforts to break the codes that international criminals and terrorists use.

Yet a Ninth Circuit Court of Appeals decision issued this spring may put a damper on the government's efforts. A three-judge panel ruled that the government's policies "interdict(ed) the flow of scientific ideas" and "appear(ed) to strike deep into the heartland of the First Amendment."

The case stems from an application a professor of computer science made to the State Department earlier this decade. Then a graduate student at the University of California at Berkeley, Daniel J. Bernstein requested government permission to publish the source code of an encryption program he had developed. The State Department rejected his request under the terms of the government's export restrictions. In its letter to Bernstein, the government wrote that the program qualified as a "munition," and therefore was subject to arms-trafficking laws.

Critics of the government's stance point to the unregulated market in encryption software overseas as evidence that U.S. restrictions do little to deter international crime organizations.

If the government chooses to appeal, export restrictions will remain in effect until the matter is settled.

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COURT BACKS SCIENTIST ON ENCRYPTION

Export Limits Ruled Curb on Free Speech

The Washington Post

Friday, May 7, 1999

Aaron Pressman, Reuters

A U.S. Appeals Court ruled yesterday that strict export limits on computer data-scrambling technology violated the free-speech rights of a computer scientist who wanted to post his encryption software program on the Internet.

While the scope of the decision by a three-judge panel of the 9th Circuit Court of Appeals in Washington was limited to the scientist, University of Illinois professor Daniel Bernstein, other academics and numerous high-technology companies that oppose the export rules are likely to seek a broader ruling.

The Department of Commerce, which oversees the export limits, could also appeal the decision to the full 9th Circuit or the Supreme Court. A spokeswoman for the agency said officials were still reviewing the decision yesterday and declined to comment.

In yesterday's decision, the court ruled that a version of Bernstein's encryption program, called Snuffle, written in a way that humans could understand, known as "source code," was protected by the First Amendment's free-speech clause.

Source code must be run through another program to create code readable by a computer known as object code.

The court did not strike down the rules as applied to working computer software programs, written to actually run on a computer.

"To the extent the government's efforts are aimed at interdicting the flow of scientific ideas (whether expressed in source code or otherwise), as distinguished from encryption products, these efforts would appear to strike deep into the heartland of the First Amendment," the court said.

Bernstein's attorney, Cindy Cohn, said the decision meant the export rules were unconstitutional for anyone living in the 9th Circuit's territory, which includes California. "This is precedent for them that it is unconstitutional in the 9th Circuit," Cohn said.

The case arose in 1995 after Bernstein, then a graduate student at the University of California, asked the State Department for permission to put source code for Snuffle on the Internet. The department said the posting would violate the export rules, so Bernstein sued.

GOVERNMENT IS DEALT BLOW ON ENCRYPTION CODE RESTRAINTS

U.S. Appeals Panel Says Federal Export Restrictions on Data-Scrambling are Unconstitutional

Los Angeles Times

Friday, May 7, 1999

Greg Miller, Times Staff Writer

Government efforts to block the export of data-scrambling encryption code are an unconstitutional restraint on free speech, according to a ruling by a federal appeals court in San Francisco on Thursday.

The decision, which affirms an earlier lower court ruling, is a significant setback for the government in its efforts to curb the spread of encryption technology developed by U.S. companies.

"This is a giant step forward to bringing down export controls," said Tara Lemmey, president of the Electronic Frontier Foundation, a civil liberties group. "Encryption is critical to the advancement of the Internet, e-commerce and communications."

The government has up to 45 days to appeal the ruling, perhaps to the U.S. Supreme Court, and export restrictions will remain in place in the meantime. Government attorneys were not available for comment.

But the three-judge panel on the U.S. 9th Circuit Court of Appeals chastised the government for "interdicting the flow of scientific ideas," and said such efforts "appear to strike deep into the heartland of the 1st Amendment."

Encryption software is widely used on the Internet to scramble everything from e-mail to financial transactions, rendering sensitive communications unreadable to all but intended recipients.

The federal government has restricted the export of the most powerful encryption software on the grounds that it weakens the ability of law enforcement agencies to intercept and decode the communications of international crime rings and terrorists.

Thursday's ruling arose from a case involving an encryption program created by a University of Illinois professor while he was a UC Berkeley student in the early 1990s.

The professor, Daniel J. Bernstein, sought permission to publish the source code for his program, called "Snuffle," but the State Department rejected the request, saying the program was a "munition" subject to federal arms-trafficking regulations.

Backed by privacy advocates and civil liberties groups, Bernstein filed a suit arguing that the government's restriction was unconstitutional. That view was first affirmed by a U.S. District Court in Northern California, and upheld on Thursday by the appellate panel.

The panel noted that Bernstein wished to publish his program in "source code" format, meaning as text that can be read by humans. Programmers share ideas by exchanging source code the "way that mathematicians use equations," a means

of sharing ideas that deserves 1st Amendment protection.

The 9th Circuit encompasses nine Western states, including California.

Privacy advocates and software industry executives in the U.S. have chafed under the restrictions, arguing that it keeps them out of a growing international market for security software. They also point out that criminals and terrorists are free to use powerful encryption programs developed overseas.

In its comments, the appellate panel made an argument for relaxing export controls and encouraging the development of encryption technology. "The availability and use of secure encryption may offer an opportunity to reclaim some portion of the privacy we have lost," the court said.

THE CLEAN AIR ACT

Matthew Frey *

The Environmental Protection Agency (EPA) must decide whether to appeal a ruling issued last May that blocked agency efforts to combat air pollution. The regulations, part of the Clean Air Act governing the output of smog and soot, took effect in 1997.

By a 2-1 majority, however, the United States Appeals Court for the D.C. Circuit, ruled that the EPA had "failed to state intelligibly" how much pollution was too much. As a result, the court concluded that the agency had assumed "an unconstitutional delegation of legislative power."

Advocates for the regulations including the White House were dismayed by the court's ruling. "We will continue to do everything in our power to ensure that the American people are adequately protected against . . . harmful air pollutants," said presidential spokesman Joe Lockhart.

The U.S. Chamber of Commerce, one of the organizations that challenged the EPA's regulations, however, was jubilant. "It's a big victory, one of the biggest," said Robin Conrad, the Chamber's senior vice president for litigation. Conrad likened the method the EPA used to set the standards to "picking numbers out of the hat."

If the EPA does not appeal the D.C. Circuit's decision, it will have to begin to draft new regulations in line with the court's ruling, a process that could take years.

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CLEAN AIR RULE HITS ROADBLOCK

Appeals Court Decision May Bring Revisions in Smog, Soot Standards

The Houston Chronicle

Saturday, May 15, 1999

Bill Dawson, Houston Chronicle *Environment Writer*

A cloud of uncertainty enveloped planning efforts to improve air quality in Houston and other cities as a result of a federal appeals court's ruling on Friday.

The divided ruling by the three-judge panel threw into doubt the U.S. Environmental Protection Agency's ability to enforce the stricter air quality standards it adopted in 1997 for ground-level ozone ("smog") and airborne particles ("soot").

Clinton administration officials had said the stricter standards were essential to protect children, the elderly and other sensitive individuals from various health problems related to air pollution.

By a 2-1 vote, the Court of Appeals in Washington, D.C., said the interpretation of one section of the federal Clean Air Act that the EPA used in adopting the standards represented "an unconstitutional delegation of legislative power."

The case was returned to the EPA to develop a "constitutional" interpretation of the act—a process that the majority ruling said could produce modifications in the disputed ozone and particle standards.

The American Trucking Associations led an array of industry groups in waging the legal effort that led to the ruling, which one major business organization quickly praised.

"It's a big victory. One of the biggest," said Robin Conrad, senior vice president for litigation at the U.S. Chamber of Commerce.

The EPA now will have to start the process of setting the new ozone and particle standards over again "and justify its numbers," she said.

Business and industry groups, including the Greater Houston Partnership, had argued that the standards were not sufficiently backed by scientific evidence.

But President Clinton's press secretary, Joe Lockhart, said administration officials were "deeply disappointed" by the ruling, "particularly given the court's explicit recognition that there is a strong scientific and public health rationale for tougher air quality protections."

He said administration officials "will continue to do everything within our power to ensure that the American people are adequately protected against smog, soot, and other harmful air pollutants."

The EPA released a statement saying it would recommend that the Justice Department appeal the ruling.

The complex ruling created a number of immediate questions about its relevance in different cities, because it involved an older and newer ozone standard (both of which are legally in force) and two interrelated standards for airborne particles tiny ones known as "coarse" and even smaller ones known as "fine."

Houston has long violated the older ozone standard – which sets a legal limit for one-hour concentrations of the

respiratory irritant – and local and state planners are busy assessing new measures that might be adopted to meet that standard by 2007, as the Clean Air Act orders.

Regardless of what the appeals court ruling may do to the new and stricter standard – which sets an eight-hour average limit for ozone exposures – state officials believe planning efforts to meet the older standard in Houston will remain on track, said Patrick Crimmins, spokesman for the Texas Natural Resource Conservation Commission.

Beyond that, however, TNRCC attorneys were analyzing the ruling but "really unsure of its implications for Texas now," Crimmins said.

Along with Houston, Dallas-Fort Worth, Beaumont-Port Arthur and El Paso also violate the older ozone standard, while five other urban areas in the state are believed to be at risk of violating the newer standard.

The TNRCC had planned to report to Gov. George W. Bush in July on whether it appears that those areas - Austin, San Antonio, Corpus Christi and Victoria, Longview-Tyler-Marshall - will be in violation of that standard at the end of this year and therefore subject to required pollution-reduction measures.

The uncertainties created by the appeals court's ruling are exemplified by the TNRCC's pending proposal to require the sale of cleaner-burning gasoline across the eastern half of the state. (A different, lower-emission blend is already required in the Houston and Dallas areas.)

The state commission is to decide later this month on whether to adopt the new gasoline rule, which largely was intended to help cities in the eastern part of the state avoid violation of the newer ozone standard.

The ruling also raised questions about Houston Mayor Lee Brown's call last week for measures to substantially reduce airborne particles in the Houston area, even before the EPA rules that Houston violates the new particle standard and such action is federally required here.

Brown's proposal was based on a city-sponsored study by California researchers, who concluded that airborne particles are responsible for annual health impacts in this area, including an estimated 435 "premature" deaths and 1,196 new cases of chronic bronchitis.

COURT BLOCKS NEW EPA RULES
Ozone, Particulate Levels at Issue

***The Arizona* Republic**

Saturday, May 15, 1999

Mary Jo Pitzl

A U.S. Appeals Court on Friday blocked tighter standards for ozone and particulate pollution that earned praise – and raised a furor – in Arizona when announced in 1997.

The court ruled that the federal Environmental Protection Agency had arbitrarily set standards for permissible levels of pollution and that it would have been unconstitutional for Congress to have granted it such broad authority under the Clean Air Act.

The action of a three-judge panel of the U.S. Court of Appeals in Washington puts on hold standards that were to be phased in over the next decade by the EPA.

The standards would have applied nationally for ozone, or smog, and microscopic bits of particulate matter. For the first time, the new rules were designed to regulate the tiniest particles spewed by industrial smokestacks and autos.

Proponents had welcomed the EPA measures, saying that Phoenix and other Western cities would be among the places that would benefit the most. The stricter standards would have especially helped children and the elderly who suffer from health problems related to air pollution, the advocates said.

But critics said the changes could have cost Maricopa County businesses up to $184 million in federal non-compliance standards over the next 10 years.

On Friday, local air-quality officials said they couldn't immediately determine the effect of the court's ruling on metropolitan Phoenix.

The state Department of Environmental Quality declined to comment, saying it will take some time to analyze the opinion.

The fact that the EPA likely will appeal the decision also makes the DEQ hesitant to comment immediately, said agency spokeswoman Kerri Waggener.

However, the pollution-plagued Valley of the Sun faced bleak prospects with the EPA's 1997 standards for ozone.

Air quality analyses over the past two years have repeatedly shown that, if required to meet the new health standard for ozone measured over eight hours, the Valley would fail. That would tighten the limit on how many ozone-forming chemicals local businesses could emit.

The Valley is having trouble meeting the EPA's existing ozone standard. If it could meet the existing standard by summer's end, it would have faced the EPA's new standards, effective in 2006.

The EPA regulations for tiny bits of particulate matter, called PM 2.5, would have taken effect in 2003.

However, the U.S. Court of Appeals in Washington, D.C., ruled that the EPA crossed constitutional lines in drawing up the new pollution rules, calling the

agency's action "an unconstitutional delegation of legislative power."

The court, in a 2-1 ruling, said the EPA didn't clearly define the point at which ozone and particulate-matter levels become threats.

"It has failed to state intelligibly how much is too much," the judges wrote.

The court sent the rules back to EPA to be redrawn in a method that does not trample on Congress' role to set law.

The EPA said it will ask the Justice Department to appeal, and called on Congress to keep public health protections intact.

"The soot and smog standards put in place almost two years ago will protect the health of 125 million Americans, including 35 million children" who breathe polluted air, the agency said.

The White House said it was "deeply disappointed" by the ruling, especially since the court acknowledged that science and public health concerns justified the tighter air pollution rules.

"We will continue to do everything in our power to ensure that the American people are adequately protected against . . . harmful air pollutants," White House spokesman Joe Lockhart said.

A variety of industry sources sued the EPA after the new rules were announced in 1997. Among the plaintiffs were the American Trucking Association Inc. and the U.S. Chamber of Commerce.

"It's a big victory, one of the biggest," said Robin Conrad, senior vice president for litigation at the U.S. Chamber of Commerce. She said the ruling acknowledged industry claims that the EPA was "picking numbers out of the hat" when it set the standards.

The EPA will have to "start the process all over again . . . and justify its numbers," she said.

That might be good news, said Dave Feuerherd, program manager for the American Lung Association of Arizona.

The court appears to have problems with the process of drawing up the new pollution rules, not the scientific need for tighter health standards, he said.

If that's the case, a rewrite of the rules could allow health groups to argue for even tighter standards, especially those for ozone, he said.

The Appeals Court rejected industry claims that the new rules were based on bad science— and it said the agency was right in not considering costs when deciding how much air pollution is unhealthful.

Randy Wittorp, a spokesman for the EPA division that oversees Arizona, said the court ruling will have no effect on ongoing clean-air efforts, such as the push for cleaner fuels or vehicle-emissions programs.

THE FOURTH CIRCUIT CONFESSES
Miranda *Warning Not Necessary*

Matthew Frey *

Revisiting one of the Supreme Court's most famous reforms of criminal procedure, a 2-1 majority of the Fourth Circuit Court of Appeals declared last February that Congress in 1968 effectively gutted the Court's ruling in *Miranda v. Arizona*, the case that introduced "You have the right to remain silent. . ." into every policeman's vocabulary.

The *Miranda* Court justified its 1966 on the grounds that it would protect against coerced confessions. The Fourth Circuit, however, said that a law curtailing *Miranda* that Congress passed in 1968 but seven consecutive presidential administrations have chosen not to enforce was a legitimate alteration of the law governing confessions. The 1968 law states that voluntary confessions can be admitted in federal court even if a Miranda warning was not given before the confession took place.

The controversy turns on whether the Supreme Court's ruling in *Miranda* was constitutional, one that Congressional legislation cannot alter, or whether Congress was indeed free to pass legislation overriding the Court's decision.

Commentators seem to agree that, if the Fourth Circuit's decision is appealed, the Supreme Court will be reluctant to overturn *Miranda.*

"If this goes to the Supreme Court, the justices will have to decide whether they want to toss out more than 30 years of jurisprudence that's stemmed from *Miranda*," noted Stephen Saltzburg, a law professor at George Washington University. "I don't think they'll go for that."

"It would be an interesting battle," said University of Michigan law professor Yale Kamisar, "but I think *Miranda* would win out."

An appeal to the Supreme Court could follow the full Fourth Circuit's review of the three-judge panel's decision.

* College of William and Mary School of Law, Class of 2001; Co-Director, Student Division of the Institute of Bill of Rights Law.

ADMINISTRATION DEFENDS MIRANDA DECISION

Justice Department Argues That Congress has No Power to Overturn Ruling

The Baltimore Sun

Tuesday, March 9, 1999

Lyle Denniston, Sun *National Staff*

WASHINGTON – The Clinton administration came to the defense yesterday of the Supreme Court's controversial 1966 Miranda decision, arguing that Congress had no power to tell courts to accept confessions by criminals who had not been given "Miranda warnings" about their rights.

In a case that appears headed for the Supreme Court, the Justice Department asked the full 4th U.S. Circuit Court of Appeals in Richmond, Va., to reconsider and scuttle a ruling last month by three of its members. That decision said that under a 1968 law passed by Congress, voluntary confessions can be admitted in federal cases even if a Miranda warning was not given.

On the contrary, the department said, the ruling in Miranda vs. Arizona "implements and protects constitutional rights," and thus can be overridden only by the Supreme Court or by a constitutional amendment, not by Congress or by lower courts.

Under the 1966 Miranda decision, police are required to tell any suspects they are holding—before any questioning—of the right to remain silent and the right to have a lawyer present, and to warn them that anything they say can be used against them in court. The warnings are designed to prevent coerced confessions.

The decision by the three-judge panel "raises an issue of exceptional importance" justifying full appeals court review, the department argued.

By a 2-1 vote, the three-judge panel ruled that Miranda is not a constitutional ruling, so Congress was free to displace it, as it did, with a federal law that said a confession that was voluntary is to be admitted in federal court even if the suspect did not get Miranda warnings.

The Justice Department said that while Congress passed the 1968 confessions law "with the express purpose of overturning Miranda," the lawmakers had "no power to alter the substance of the Supreme Court's constitutional interpretations by legislation."

"Miranda has never been overruled, and it is the Supreme Court's sole province to pass on the continuing validity of its decisions."

Examining all of the court's rulings on Miranda warnings, from 1966 onward, the department said, "requires the conclusion that the court understands Miranda to rest on a constitutional foundation."

The clearest evidence of that, it added, is that "the Supreme Court has consistently applied Miranda to the states"—something that it could not do if the ruling were not based upon the Constitution.

"Although the court has the power to announce rules of procedure and evidence

binding on federal courts," it has not done so for state courts, because its authority in that realm "is limited to enforcing the commands of the U.S. Constitution," it added.

The department took its position in the case of a Maryland man, Charles T. Dickerson, formerly of Takoma Park, who faces charges stemming from at least seven bank robberies in Maryland and three in Virginia.

The key to the dispute in his case is a confession that he gave to police before getting Miranda warnings. The appeals court panel ruled that, despite the lack of warnings, the confession was given voluntarily, and thus can be used against Dickerson when he goes to trial.

Dickerson has asked the full appeals court to review the case, and the Justice Department's filing adds its support to that request.

LEGAL EXPERTS EXPECT MIRANDA TO BE UPHELD

An Appeals Court Ruling Could Spur Justices to Restudy the Landmark Case

Dayton Daily News

Friday, February 12, 1999

Richard Carelli, Associated Press

WASHINGTON – Americans, having witnessed untold numbers of arrests in movies and on TV, know the drill: "You have the right to remain silent. Anything you say may be used against you in a court of law. You have the right to an attorney. If you cannot afford one, an attorney will be appointed for you."

Now the Supreme Court's 1966 Miranda decision requiring police nationwide to give such warnings before questioning criminal suspects is under attack. A federal appeals court ruling could spur the justices to restudy the landmark case that has made numerous confessions or incriminating remarks to police inadmissible as evidence when offered by people who had not been read their rights.

Legal experts doubt the Supreme Court will let state and local police ignore its decision called Miranda vs. Arizona. "If this goes to the Supreme Court, the justices will have to decide whether they want to toss out more than 30 years of jurisprudence that's stemmed from Miranda," said Stephen Saltzburg, a George Washington University law professor. "I don't think they'll go for that."

University of Michigan law professor Yale Kamisar said, "It would be an interesting battle, but I think Miranda would win out."

The Miranda decision was steeped in the constitutional protection against self-incrimination, but the Supreme Court never explicitly said the Constitution requires such warnings to guard against police coercion.

Ruling in a Virginia bank robbery case this week, a three-judge panel of the 4th U.S. Circuit Court of Appeals said a long-ignored 1968 federal law trumped the Miranda decision and freed federal law enforcement officers from having to give the familiar warnings in every case.

That ruling is now binding law in the 4th Circuit's five states – Virginia, Maryland, North Carolina, South Carolina and West Virginia.

Congress said in the 1968 law that evidence obtained without the warning being given could be used at trial as long as federal judges are sure the statements were made voluntarily. The law says compliance with Miranda is just one factor to be considered.

Seven presidential administrations have refused to enforce that law, however, out of concern for its constitutionality.

"We ... have determined the Supreme Court has concluded that (Miranda) is constitutionally based since ... it has applied it to the states as well," Attorney General Janet Reno said Thursday. "It would be up to the Supreme Court to make the determination that it was not

constitutionally based."

The nation's highest court is far more conservative than it was 33 years ago, and several of its members repeatedly have played down the Miranda decision's constitutional dimensions even as the court rebuffed numerous attempts through the 1970s and 1980s to overturn it.

"There's no groundswell to get rid of Miranda," Kamisar said.

The Virginia case likely will be referred to the full 4th Circuit court, and then to the Supreme Court.

CONFESSIONS ISSUE SPLITS COURT
4TH Circuit Says Law Supersedes Miranda

Richmond Times-Dispatch

Tuesday, February 9, 1999

Tom Campbell, Times-Dispatch *Staff Writer*

The U.S. Court of Appeals in Richmond ruled 2-1 yesterday that a long-unused 1968 federal law on voluntary confessions supersedes the U.S. Supreme Court's 1966 Miranda decision and must govern the admissibility of confessions in federal courts.

A split three-judge panel of the appeals court for the 4th Circuit made that ruling in reversing a U.S. District Court judge in Alexandria who suppressed a bank robbery defendant's voluntary confession. The case was argued more than a year ago.

The published opinion is binding only in federal court cases in the five states of the 4th Circuit – Virginia, West Virginia, Maryland, North Carolina and South Carolina.

U.S. District Judge James C. Cacheris of Alexandria found that defendant Charles Thomas Dickerson's confession, made Jan. 27, 1997, to FBI agents who were questioning him, was voluntary. But the judge suppressed it as evidence because it was made before Dickerson waived his rights under Miranda, the U.S. Supreme Court decision protecting a suspect's right to counsel and to remain silent.

Appeals court Judge Karen J. Williams wrote the 60-page opinion and U.S. District Judge Jackson L. Kiser, sitting on the appeals court as a substitute, joined with her to reverse the lower court.

The third panel member, Judge M. Blane Michael, disagreed with them on the confession issue and called it a mistake to consider the 1968 law, Section 3501 of the U.S. Criminal Code, because it was not raised on appeal by government prosecutors.

The issue of Section 3501 was brought up on appeal not by parties in the case, but by the Washington Legal Foundation and the Safe Streets Coalition, which entered as friends-of-the-court.

Law professor Paul George Cassell at the University of Utah, who helped argue the case on behalf of the two groups, said last night that the ruling restores "voluntariness" as the standard for admissible confessions. He also said the issue is likely to go to the U.S. Supreme Court.

In 1966, Miranda established protection of a defendant's Fifth Amendment right to avoid self-incrimination through the required use of warnings and waivers when authorities question a suspect. But, Cassell said, Miranda is a set of rules for protecting constitutional guarantees, and not part of the Constitution or on the same level.

Judge Michael's dissent said whether Miranda is "a constitutional rule" is still at issue.

Congress enacted Section 3501 in 1968, two years after Miranda, making it clear that in federal criminal prosecutions, "a confession ... shall be admissible in

evidence if it is voluntarily given."

Cassell said the 4th Circuit panel ruling says that, with Section 3501, Congress properly changed—but did not overturn—the rules set by the Supreme Court in the Miranda decision.

In her opinion, Williams scolded the U.S. Department of Justice for not invoking and defending Section 3501, which no administration has done since 1968 and which U.S. Attorney General Janet Reno in 1997 refused to do in a letter to Congress. Reno said the section is unconstitutional.

Section 3501 was invoked by assistants of Helen F. Fahey, U.S. attorney for the Eastern District of Virginia, in a motion before the trial court. However, the U.S. Department of Justice prohibited Fahey from raising it as an issue on appeal.

Cassell said there has been no definitive case on the issue of Section 3501 for about 20 years. Police follow Miranda rules most of the time and no case with a clear Miranda violation and a clearly voluntary confession has been decided by a federal appeals court until now.

In this case, because Dickerson's voluntary confession was obtained in clear violation of Miranda, "we cannot avoid deciding the constitutional question associated with Section 3501," Williams wrote.

In his dissenting opinion, Judge Michael complained that Williams and Kiser went too far.

Michael wrote that 30 years have passed since Congress enacted Section 3501 "in reaction to Miranda." President Clinton's is the seventh consecutive administration to decide not to use it in criminal prosecutions.

Now, Williams and Kiser say Section 3501 "must be invoked" and also have decided that it is constitutional, Michael wrote.

"In pressing Section 3501 into the prosecution of a case against the express wishes of the Department of Justice, the majority takes on more than any court should."

THE SECOND AMENDMENT ALIVE AND WELL IN TEXAS

Matthew Frey *

A federal district court decision last March that struck down a Texas law barring persons under a restraining order from owning a gun may lead to the Supreme Court's first ruling on the Second Amendment in over 60 years.

In the decision, Judge Sam Cummings ruled that Timothy Joe Emerson, a doctor arrested and charged with being in possession of a handgun while under a restraining order requested by his estranged wife, had an inalienable right under the Second Amendment to own the gun. Judge Cummings held that the Texas law was an unconstitutional infringement of that right.

At issue is the familiar question of whether the Second Amendment grants an individual or a collective right to own a gun. Does "militia" refer to private citizens? Or does it refer to what today is known as the National Guard?

The Supreme Court's last word on the controversy came in 1939 in *U.S. v. Miller*, in which it ruled that a man caught transporting a sawed-off shotgun across state lines could not claim Second Amendment protection because the weapon was "not any part of the ordinary military equipment (n)or (could) its use . . . contribute to the common defense."

Judge Cummings referred to *Miller* in his decision. "Ironically, one can read *Miller* as supporting some of the most extreme anti-gun control arguments," he wrote. "For example, that the individual has a right to keep and bear bazookas, rocket launchers and other armaments that are clearly used for modern warfare, including, of course, assault weapons." Judge Cummings also championed the Second Amendment as an integral part of the Bill of Rights. "The rights of the Second Amendment should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights," he wrote.

Advocates on both sides of the gun control debate read great potential into Judge Cummings' ruling.

"This has monumental potential," said Jerry Patterson, the former Texas state senator who introduced the law allowing Texans to carry concealed weapons.

Stephen Holbrook, the lawyer who successfully challenged provisions of the Brady Bill before the Court in 1997's *Printz v. United States*, agreed. "If appealed, this could be the springboard for a definitive Supreme Court ruling on the Second Amendment," he said.

Brian Morton, a spokesman for the Center to Prevent Violence in Washington, conveyed a sense of the urgency underlying the issue.

"With all respect to the judge, this goes almost totally contrary to all decision on the matter," he said. "This is a case screaming for appeal."

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STICK TO YOUR GUNS

2nd Amendment Issue Heading to High Court

***The Denver* Post**

Sunday, July 11, 1999

Jules Witcover

Ever since the Columbine High School shooting put the debate about guns on the front burner of American discourse, the advocates of a guaranteed individual right to own firearms, led by the National Rifle Association, have been put on the defensive.

NRA spokesmen declare the Second Amendment's stipulation that "the right of the people to keep and bear arms shall not be infringed" is not merely a collective right, despite numerous lower court rulings and one 60 years ago by the Supreme Court to the contrary.

These rulings have taken note of the conditional phrase in the Second Amendment that prefaces the declared right: "A well-regulated militia, being necessary to the security of a free state. . . ." The courts have often said the Constitution intended that the right to bear arms be tied to collective defense of the state, as in a militia in Colonial times and its closest modern-day counterpart, the National Guard.

Most often cited by gun-control activists is the Supreme Court's 1939 ruling in U.S. vs. Miller. It found that a man charged with transporting a sawed-off shotgun across state lines in violation of the National Firearms Act of 1934 could not claim an individual right of ownership, because the weapon was not proved to have "some reasonable relationship to the preservation or efficiency of a well-regulated militia."

The court noted that the weapon was "not any part of the ordinary military equipment or that its use could contribute to the common defense."

Interpretation too narrow

But the NRA and the rest of the gun lobby argue that this ruling and others like it were too narrow in their interpretations of the Second Amendment. In a largely effective public-relations campaign, the gun lobbyists have managed to inculcate as fact their contention that the Constitution guarantees an individual right to keep and bear arms.

Until recently, the success of this effort has been based more on relentless repetition than legal precedent. But a case that could bring the issue to a head might be the one from a U.S. District Court in northern Texas. There, Judge Sam R. Cummings has held that the Second Amendment did indeed bestow an individual gun-bearing right on law-abiding American citizens. (Convicted felons lose that right, a condition that the gun lobby does not challenge.)

A family physician, Timothy Joe Emerson, under a Texas lower court's temporary restraining order in a divorce proceeding, was ordered not to make "threatening communications or actual attacks" on his wife, Sacha. She alleged, according to court papers, that he "threatened over the telephone to kill the man with whom Mrs. Emerson had been having an adulterous affair."

Emerson happened to have a gun in his possession, in violation of the restraining order. The court papers noted, however, that no evidence was presented to show Emerson had threatened violence. The papers also noted the court had not admonished Emerson that the restraining order would make him subject to federal criminal prosecution "merely for possessing a firearm while being subject to the order."

Cummings, in explaining his decision, took note of the argument between gun advocates and foes about whether the Second Amendment guarantees an individual or a collective right to keep and bear arms.

Siding with the NRA, he ruled that the function of the clause relating to a "well-regulated militia" was "not to qualify the right, but instead to show why it must be protected." He cited precedents in English law and colonial statutes, observing that without the individual right to bear arms, "the colonists never could have won the Revolutionary War."

Aligned with other rights

Drawing on James Madison's Federalist No. 46 and other documents, the judge observed that Madison had "aligned the right to bear arms along with the other individual rights of freedom of religion and the press, rather than with congressional power to regulate the militia."

Of the Supreme Court decision in the Miller case, Cummings said, "Ironically, one can read Miller as supporting some of the most extreme anti-gun control arguments; for example, that the individual has a right to keep and bear bazookas, rocket launchers and other armaments that are clearly used for modern warfare, including, of course, assault weapons."

As for the argument of gun-control advocates that the Second Amendment's reference to a well-regulated militia reflected societal conditions of a bygone day that had not yet seen the firearms that have become a public scourge, the Cummings decision said, "Concerns about the social costs of enforcing the Second Amendment must be outweighed by considering the lengths to which the federal courts have gone to uphold other rights (such as freedom of speech, press and religion) in the Constitution. The rights of the Second Amendment should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights."

The Miller case, Cummings said, "did not answer the crucial question of whether the Second Amendment embodies an individual or collective right to bear arms. The court in Miller simply chose a very narrow way to rule on the issue and left for another day further questions of Second Amendment construction."

For the NRA and its allies, the decision in the Texas case could be a life preserver in the sea of troubles that has swept over them in the wake of the Colorado school shootings. Until now, they have relied on other constitutional protections to fight the gun-control forces, rather than—their critics say—risking a Supreme Court test on the meaning and scope of the Second Amendment.

For example, in their battle against the Brady Law imposing a waiting period on gun purchases, they argued in Printz vs. U.S. that the 10th Amendment, which says powers not delegated to the federal government are reserved to the states, meant that the 50 states could not be ordered to enforce the background checks at their expense. In direct conflict

The Cummings decision is expected to be appealed to the 5th Circuit Court this summer, and gun-control activists insist it will be reversed because it is in direct conflict with federal district court rulings that the Second Amendment conveys a collective, not an individual, right to keep and bear arms. Therefore, one would expect that they would welcome a higher court review and be doing all they could to bring one about.

But, surprisingly, that is not happening. Dennis Hennigan, legal director of the Center to Prevent Handgun Violence, says his side will not be pushing for the Emerson case to go to the Supreme Court, because the legal situation as it stands—with all the favorable lower-court decisions, as well as the Miller case—"couldn't be better for us, (so) why take the risk?"

Even if the Supreme Court were to rule that gun ownership is not an individual right, Hennigan says, at least two conservative justices could be counted on to dissent—Antonin Scalia and Clarence Thomas—and the NRA would insist the dissenting opinions were correct. However, he says, if the Cummings decision is upheld on appeal in Texas, "the whole landscape changes," and the gun-control forces could not stand by idly.

In any event, he acknowledges, the current public revulsion toward the gun epidemic does offer a favorable climate for a Supreme Court showdown on the intent and reach of the Second Amendment. "The Court is not supposed to be influenced by public opinion," Hennigan says, but its members are not totally insulated from it, either.

One might think that if both sides are convinced of the rightness of their arguments, they would welcome a definitive ruling from the highest court, once and for all. There is a risk, to be sure, in such a finding. A declaration that gun-bearing is an individual right would open the door to even more gun ownership. A ruling that it is a collective right would undercut the very premise on which the NRA operates.

Still, such a critical issue should not be left so clouded in dispute, more than 200 years after the amendment's ratification.

Jules Witcover is an author and syndicated columnist. This article originally appeared in the Baltimore *Sun*.

US JUDGE HITS AT GUN CONTROL
2nd Amendment Cited in Texas Case

The Boston Globe

April 4, 1999

Chris Newton, Associated Press

LUBBOCK, Texas – A federal judge's ruling last week involving an unusual Texas law could be the basis for far-reaching challenges to other gun-control laws, legal specialists said.

In the case, US District Judge Sam Cummings dismissed charges against a man accused of breaking a law that bars someone under a restraining order from owning a gun.

"If appealed, this could be the springboard for a definitive Supreme Court ruling on the Second Amendment," said Stephen Holbrook, a lawyer who represented sheriffs in a successful challenge to provisions of the federal Brady gun-control law. "That could have wide implications."

The case revolves around Timothy Joe Emerson, a doctor in San Angelo who was arrested last year and charged with violating a restraining order after brandishing a handgun in front of his wife and her daughter.

Defense attorneys argued that Emerson has a right to own guns under the Second Amendment to the Constitution, and that any law infringing upon that is unconstitutional.

Cummings agreed, ruling on Thursday that the right to bear arms described in the Second Amendment is a protected individual right and not just a right belonging to an organized militia, as federal prosecutors contended.

Government lawyers planned to appeal.

Activists on both sides of the issue agreed that the decision could be the first in which a judge specifically called a law unconstitutional because it infringed on an individual's Second Amendment rights.

"This has monumental potential," said former state senator Jerry Patterson, who authored the law that allows Texans to carry concealed handguns.

Gun-control advocates, however, assailed the case as an anomaly that will probably be overturned.

"No gun-control law has ever been struck down because of the Second Amendment," said Brian Morton, a spokesman for the Center to Prevent Violence in Washington.

"With all respect to the judge, this goes almost totally contrary to all decisions on the matter," Morton said. "This is a case that is screaming for appeal."

SANS SEAT BELT, SOCCER MOM SEIZED

May Police Use Custodial Arrests to Enforce Minor Traffic Violations?

Matthew Frey *

A Texas case involving a woman who was jailed for driving without her seat belt fastened may eventually provide the Supreme Court with an opportunity to clarify the circumstances under which police may engage in custodial arrests of people who commit minor violations of the law. In 1997, the Court took up a similar case, *Ricci v. Village of Arlington Heights*, but dismissed it before hearing oral arguments.

The plaintiff in the Texas case, Gail Atwater, alleges that her Fourth Amendment protections against unreasonable search and seizure were violated when she was thrown in jail for violating Texas' seat belt law. A first-time offender, Atwater contends that jailing her was out of all proportion to her crime, and that authorities just as easily could have enforced the seat belt provision by requiring her to sign a citation swearing to appear in court. (Ordinarily, the law carries a penalty of between $25 and $50.)

The defendant, Lago Vista, Texas, Atwater's hometown, contends that the seat belt law grants officers broad discretionary power to enforce the measure, up to and including placing first-time offenders like Atwater under arrest.

According to court records, Atwater was stopped by Lago Vista Police Officer Bart Turek while driving her three young children home from their soccer practice in March 1997. At the time, Atwater was traveling 15 miles per hour through her own neighborhood. Atwater claims that Turek mistakenly believed that Atwater had violated the law previously and that Turek treated her harshly as a result, frightening her and her children. Atwater further claims that Turek refused to allow her to drive the few short blocks to her house so she could drop off her children before Turek took her away in handcuffs. (A neighbor of Atwater's who happened to be passing by during the incident guided the children home.)

Lago Vista defeated Atwater's claims at the trial court level. A decision by Federal District Court Judge Sam Sparks labeled claims such as Atwater's "the bane of the American legal system." Last January, however, a unanimous three-judge panel in United States Court of Appeals for the Fifth Circuit reversed Sparks' ruling. Writing for the majority, a sardonic Judge Robert M. Parker noted that Atwater's arrest "was not a proud moment for the City of Lago Vista."

"We easily conclude that an arrest for a first-time seat belt offense is indeed an extreme practice and a seizure conducted in an extraordinary manner," Judge Parker wrote. Nothing about Atwater's crime or her conduct during Officer Turek's roadside questioning suggested that arresting Atwater was reasonable, he concluded.

The Fifth Circuit has decided to consider the case en banc. Arguments will be heard sometime this fall, making an appearance before the Supreme Court this term possible, but not likely.

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JUDGE THROWS OUT 2 SUITS AGAINST LAGO VISTA POLICE

Austin American-Statesman

February 19, 1998

Dave Harmon

Stung by several citizens' lawsuits alleging abuse of power, false imprisonment and brutality, the Lago Vista Police Department has found redemption after a federal judge dismissed two of the lawsuits, calling them meritless.

Meanwhile, the lawyer who filed the two lawsuits -- along with four other similar lawsuits against Lago Vista and its police -- has been banned from practicing in federal court and faces a possible criminal investigation for allegedly forging a court document in an unrelated case.

U.S. District Judge Sam Sparks last week tossed out lawsuits filed in August by Lago Vista residents Gail Atwater and her family and by Shiloh Ciaccio and his mother.

Atwater claimed an officer verbally abused her and wrongly arrested her on March 26, 1997, for failing to buckle in her children while driving. Ciaccio claimed the same officer beat him during an arrest on April 9, 1997.

In a tersely worded ruling, Sparks said the plaintiffs provided no evidence that officer Bart Turek used excessive force or violated either citizen's constitutional rights.

"This is a lawsuit that should have never been filed and was poorly litigated once it was," Sparks wrote in Atwater's case. "Suits such as this are the bane of the American legal system."

The judge pointed out that a drunken Ciaccio had jumped fully clothed into a country club pool, then drove his car over the golf course before Turek and another officer were called and found Ciaccio parked in his driveway.

Ciaccio, who accused the officers of yanking him out of the car and beating him, was struggling "vigorously" and later had no proof he'd been injured, Sparks ruled.

But a medical report showed Turek had knots on his head and other injuries, and a "disinterested witness" reported that Ciaccio was striking the officers, Sparks wrote. Ciaccio has been charged with felony assault in the incident.

As for Atwater's lawsuit, which claimed Turek verbally abused her during a traffic stop and wrongly jailed her as her children watched, Sparks ruled that Turek legally arrested her for violating Texas' seat belt law.

Atwater and Ciaccio and their lawyer, Charles E. Lincoln, could not be reached for comment Wednesday. Turek, now a Williamson County deputy, did not return a phone message.

For Lago Vista police Chief Frank Miller, who has handpicked each of the eight officers on his force, the rulings brought vindication.

"It's been a very difficult time to sit back and not defend yourself," Miller said Wednesday. "My guys out here are not abusive cops. In a small department, if it's going on, I'll know it."

Miller, who was personally named in the lawsuits, said he and his officers found that the majority of the community supported the Police Department after the lawsuits were filed.

"It was overwhelming. If anything, it pulled this Police Department closer together," Miller said. "Being wrongly accused has hurt our department, hurt our families and hurt us."

Lago Vista officials were thrilled by Sparks' ruling. They issued a press release with a quote from City Manager Kelvin Knauf: "After all of the negative publicity the city received when these cases were initially filed, I am pleased to be able to show that these claims are totally frivolous and that we have a professional Police Department."

Four other similar lawsuits against Lago Vista police and the city are pending before Sparks and U.S. District Judge James R. Nowlin. But the future of those cases seems bleak, given the way Sparks disposed of the other two lawsuits and the lawyer who filed them.

Last Friday, Sparks banned Lincoln from practicing in the Western District of Texas, the federal court district that includes Austin. Lincoln's lawyer, John Campbell of Austin, said his client will appeal that decision.

The expulsion followed a hearing before the Western District's grievance committee and an angry letter from Judge Nowlin, who apparently became exasperated by some of Lincoln's legal maneuvers and was disturbed by his actions in a lawsuit involving a Lago Vista family's property dispute.

According to a Sept. 8 letter Nowlin wrote to federal court officials, Lincoln told Marcelina and Timoteo Alvarado -- who were suing a man who sold them property -- that they should start giving their mortgage payments to Lincoln, who promised to turn them over to the court for safekeeping during the litigation.

In a written statement to Lago Vista police, the Alvarados claimed they asked Lincoln for receipts for the more than $5,000 they gave him and grew suspicious because the receipts, supposedly issued by the court, had no date or signature.

Nowlin's letter said that Chief Miller informed Nowlin that Lincoln cashed one of the family's checks at a Galveston resort.

When the family later called the court clerk, they were told that no such account existed and that the court never ordered the clerk to hold any money, according to Nowlin's letter.

When the Alvarados faxed the receipt to the clerk, Nowlin wrote, it was determined that the creator of the receipt' had clipped the heading off of a civil summons and attached it to a blank page.

"Once again, the court has been shocked by the actions of Mr. Lincoln. Forgery appears to be a new low," Nowlin wrote.

In his letter, Nowlin also said he personally contacted a federal prosecutor about Lincoln, and the prosecutor has contacted the FBI and the State Bar Association and is "looking into whether federal criminal charges are appropriate."

In court documents, Lincoln denied the allegations, saying that the grievance committee took the Alvarados' side from the beginning and that he worked on the case without pay for a year. Lincoln said the Alvarados never asked him for receipts.

Campbell, Lincoln's lawyer, said his client welcomes an FBI investigation.

"To my knowledge, they haven't (investigated). We would love for them to

investigate," he said. He added that Lincoln's livelihood is at stake, and until he's had his day in court, I'd hate to see too much said about it."

Joanna Lippman, one of the Austin lawyers representing Lago Vista and its Police Department, said the plaintiffs in the four remaining lawsuits would have to hire another lawyer to proceed in federal court. "If the lawsuits move forward," she added, we can win these in court."