2002-2003 Supreme Court Preview: Contents

Institute of Bill of Rights Law at The College of William & Mary School of Law

Copyright © 2002 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/preview
SUPREME COURT PREVIEW

What to Expect From the New Term

September 20-21, 2002

sponsored by the Institute of Bill of Rights Law, College of William & Mary, Williamsburg, Virginia
The Institute of Bill of Rights Law was established at William & Mary in 1982 to support research and education on the Constitution and the Bill of Rights. One of the principal missions of the Institute is to facilitate interaction between the professions of law and journalism. Through a discussion of key cases on the Supreme Court’s docket at the start of each term, the annual Supreme Court Preview provides in-depth education for journalists on the underlying issues in order to enhance press coverage of the decisions.

Staff

Neal Devins, Acting Director, Goodrich Professor of Law, and Professor of Government

Melody S. Nichols, Program Coordinator

Todd H. Muldrew and Harry Tashjian IV
Editors, 2002-2003 Supreme Court Preview

Eric D. Cook, Mary Carol Daly, and Yvette F. Zassenbraker
Editorial Assistants, 2002-2003 Supreme Court Preview

The Institute of Bill of Rights Law

College of William & Mary
School of Law
Williamsburg, Virginia 23187-8795
(757) 221-3810 Fax (757) 221-3775
E-Mail: ibrl@wm.edu
# 2002-2003 Supreme Court Preview

<table>
<thead>
<tr>
<th>Table of Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who's Who on the Panels</td>
</tr>
<tr>
<td>Schedule of Events</td>
</tr>
<tr>
<td>Acknowledgements</td>
</tr>
</tbody>
</table>

## I. MOOT COURT ARGUMENT

In This Section | 1

**New Case:** 01-1127 *Lockyer v. Andrade* (featured case)

Synopsis and Question Presented | 2

**New Case:** 01-6978 *Ewing v. California* (related case)

Synopsis and Question Presented | 10

**Supreme Court to Hear Three Strikes Challenge**

David G. Savage | 14

*Drive to Keep Repeat Felons in Prison Gains in California*

Jane Gross | 17

**Crimes and Punishments**

Evan P. Schultz | 21

*Perhaps a Court Ruling in a 'Three Strikes' Case Will Lead to Reform of the Draconian Law*

Erwin Chemerinsky | 24

*The Missing Piece in the Three Strikes Puzzle*

The Honorable Clay M. Smith | 27

*The Insanity of the Three Strikes and You're Out Law*

Charles Fannan | 30

*‘Three Strikes’ Works -- Don't Start Tinkering*

Mike Reynolds | 34
II. ADVOCACY BEFORE THE SUPREME COURT

In This Section

The Supreme Court: How It Was, How It Is
William H. Rehnquist

Lawyering for the Government: Politics, Politics & Principle
Rex E. Lee
Defending Congress
Seth P. Waxman

Government Lawyering: The Solicitor General and the Interests of the United States
David A. Strauss

U.S. Changes Stance in Case On Obscenity
Linda Greenhouse

Revisiting A Day and A Damned Solicitor General Draws Fire Over Affirmative Action Law
Tony Mauro

The Influence of Amicus Curiae Briefs on the Supreme Court
Joseph D. Kearney and Thomas W. Merrill

Friends with Agendas: Amicus Curiae Briefs May Be More Popular Than Persuasive
Alexander Wohl

Effective Amicus Briefs
Bruce J. Ennis

Appealing Practice
Tony Mauro

High Court Bar's 'Inner Circle'
Marcia Coyle

III. THE WAR ON TERRORISM

In This Section

Bush Writes Off Congress, Takes Reins in War, Law Some Question the
Constitutionality of the President's Decision to Fight Terrorism on U.S. Soil His Way, without Lawmakers' Approval
David G. Savage
Ashcroft Defends Anti-Terrorism Steps; Civil Liberties Groups’ Attacks ‘Only Aid Terrorists,’ Senate Panel Told
Dan Eggen

Liberty and the Pursuit of Terrorists
Charles Lane

Ideas & Trends: Executive Decisions; A Pendent for Secrecy
Linda Greenhouse

Historically, Laws Bend in Time of War, Rehnquist Says; Courts: Chief Justice Contends Judges Are Indeclear to Back the Government in Crises. Lincoln’s Suspension of Habeas Corpus Is Cited
David G. Savage

David Cole

Security Versus Civil Liberties
Richard A. Posner

War on Terror Makes for Odd Twists in Justice System
Katharine Q. Seelye

Traces of Terror: The Detainees; Lawyers Argue Over Rights of a Citizen Seized on Enemy Land
Katharine Q. Seelye

Holding Pattern, Why Congress Must Stop Ashcroft’s Alien Detentions
Jeffrey Rosen

Ashcroft Is Right to Detain Suspects in Terror Probe
Griffin Bell

Judge: U.S. May Jail Material Witnesses; N.Y. Ruling Conflicts with Decision in Prior Case in Same Federal District
Steve Fainaru

Judge Orders U.S. to Release Names of 9/11 Detainees
Neil A. Lewis

Military Tribunals: Swift Judgments in Dire Times
Joan Biskupic and Richard Willing

U.S. Adds Legal Rights in Tribunals; New Rules Also Allow Lecary on Evidence
John Mintz
**Having Their Day in (a Military) Court**  
Robert H. Bork  

**Justice Can't Be Done in Secret:**  
*Why Public and Press Have a Right to Witness Proceedings of Military Tribunals*  
Edward J. Klaris  

**Supreme Court Blocks Limit on Secret Hearings**  
Lyle Denniston  

**Ruling Favors Limited Access to 9/11 Data**  
Benjamin Weiser  

### IV. FIRST AMENDMENT

**In This Section**  

**New Case: 01-1107 Virginia v Black**  

**Synopsis and Question Presented**  

*Supreme Court Takes Up Virginia Cross-Burning Case; Justices to Decide If Practice Is Free Speech or Criminal*  
Charles Lane  

**Klanman Guilty of Burning A Cross; All-White Jury Upholds Va. Law Defense to Appeal**  
Donald P. Baker  

**Warner Signs Bill Banning Cross-Burning Intimidation**  
Christina Nuckols  

**Why It Was Right to Strike Down the Cross-Burning Law**  
Kevin E. Martingayle  

**Why Striking Down the Cross-Burning Law Was Wrong**  
Scott Vachris and Afshin Farashahi  

**Looking Ahead: Child Internet Protection Act; American Library Ass'n v United States**  

**Synopsis and Question Presented**  

*Law Limiting Internet in Libraries Challenged*  
John Schwartz
US Court Overturns Internet Smut Law Ruling in Library Case is 3rd Loss for Congress
Robert O'Harrow Jr. 161

Internet Can Be a Safe Place for Kids and for Free Speech
Amitai Etzioni 163

No Easy Fixes Are Seen To Curb Sex-Site Access
John Schwartz 165

The Tricky Task of Sheding the Web
John Schwartz 167

Looking Ahead: Bipartisan Campaign Finance Reform Act of 2002

Campaign Reform Bill Passes Congress; Bush Says He'll Sign;
Politics: The Landmark Law Is the First Since Watergate to Seriously Curtail the Huge
Gifts of Money Being Pumped into National Politics
Nick Anderson 171

Starr Will Help Fight Finance Reform;
Politics: The Former Independent Counsel Will Help Lead a Senator's Suit Against the
Expected Law: The Move Signals the Next Phase in a Long Battle
Nick Anderson 175

Free Speech and Campaign Reform Don't Conflict
Seth P. Waxman 178

Paying Up Is Speaking Up
Kathleen M. Sullivan 180

McCain-Feingold: No Cause for Alarm
Norman Ornstein 182

McCain-Feingold's Fatal Flaws
Michael Kelly 184

Justices Back Outlay Limits on Campaigns;
Court: Decision Upholds Laws of Post-Watergate Spending Reforms of '70s.
Idea of Free-speech Right to Raise Funds Is Rejected
David G. Savage 186

Big Changes Loom, Some Unknowables: Bill to Transform Fundraising Tactics
Thomas B. Edsall 189

Strong Reaction to Soft Money Changes in Wording Ink Campaign Bill Sponsors
Bret Ladine 192
V. BUSINESS

In This Section

New Case: 01-618 Eldred v. Ashcroft

Synopsis and Question Presented

'Limitless' Copyright Case Faces High Court Review
David G. Savage

Copyright Crusader
Daren Fonda

Supreme Court to Review Copyright Term Extensions
E-Business Law Bulletin

In Step with the World
Edward Samuels

Breyer Seen as Key Justice on Copyright Issue
Victoria Slind-Flor

Studies May Have the Most to Lose Courts: The Ownership of Early Depictions of Favorite Characters and Music Could be at Stake
Henry Weinstein, Ann W. O'Neill, and Meg James

The Mouse That Ate the Public Domain: Disney, the Copyright Term Extension Act, and Eldred v. Ashcroft
Chris Sprigman

New Cases: 01-653 Federal Communications Commission v. NextWave Personal Communications
01-657 Arctic Slope Regional Corp. v. NextWave Personal Communications

Synopsis and Question Presented

Justices Agree to Resolve Wireless Dispute
Tony Mauro

NextWave's Wireless Rights to Get High Court Scrutiny
Greg Stohr and Jonathan Cox

The Price of FCC Integrity: $15 Billion
Harold Furchtgott-Roth
New Kids on the Block; PCS Challenges Cellular Duopoly
Kristen Beckman 242

**New Case:** 01-1243 *Borden Ranch Partnership v U.S. Army Corps of Engineers*

Synopsis and Question Presented 245

*Farm Case Wins High Court Review*
Denny Walsh 252

*Soil Case Could Cut Wide Swath*
Michael Kirkland 254

**New Case:** 01-0963 *Norfolk & Western Railway Co v Ayers*

Synopsis and Question Presented 256

*The Real-life Tragedy of the Asbestos Theatre*
Amity Shales 257

*Asbestos Is Gold For Trial Lawyers*
Phyllis Schlafly 259

**New Case:** 01-1325 *Washington Legal Foundation v Legal Foundation of Washington*

Synopsis and Question Presented 261

*Critics of Mandatory IOLTA Have Their Day*
The National Law Journal 268

*A Matter of Principle*
George M. Kraw 269

*IOLTA and the Takings Clause Scrooges*
Connecticut Law Tribune 271

**New Case:** 01-1289 *State Farm v Campbell*

Synopsis and Question Presented 273

*Top Court to Review Punitive Damages*
Steven Brostoff 274

*State Farm to Pay $146 Mln Award by Utah High Court*
William McQuillen 276
VI. CIVIL RIGHTS

In This Section

New Cases: 01-1118 Scheidler v. NOW; 01-1119 Operation Rescue v. NOW

Synopsis and Question Presented

Abortion Clinic Protest Rules Face Review; Supreme Court: Justices Will Decide Whether a Law Targeting Mobsters Can Apply to Actions Meant to Halt Providers
David G. Savage

And Liberty for Some; Switching Sides on Free Speech
Neil A. Lewis

Behavior Modification; Illegal Conduct No Longer Tolerted
Gina Raith and Jennifer Koehler

Antiabortion Racketeers?
Nat Hentoff

New Case: 01-1437 Branch v. Smith; 01-1596 Smith v. Branch

Synopsis and Question Presented

Supreme Court to Rule on Drawing Congress Boundaries
Deborah McGregor

Fight Over Political Map Centers on Race
David E. Rosenbaum

Race Takes Back Seat as States Prepare to Redistrict
Robert Pear

Legislatures Suit Up for Battle over Boundaries of Districts; Census Data Will Mean New Maps, with Lawmakers’ Political Careers at Stake
Karen Branch-Brioso

New Case: 01-1067 United States v. White Mountain Apache Tribe

Synopsis and Question Presented
New Case: 01-1375 United States v Navajo Nation

Synopsis and Question Presented

Supreme Court Agrees to Consider Damage Awards to Navajo Nation
Associated Press

Court to Rule on Indian Buildings' Repair
Associated Press

Bush Wants Navajo Ruling Reversed
truthout

Navajo Lawsuits Contend U.S. Government Failed the Tribe in Mining Royalty Deals
Barry Meier

Fort Apache History
White Mountain Apache Tribe

New Case: 01-1120 Meyer v Holley

Synopsis and Question Presented

Supreme Court to Hear Real Estate Discrimination Case; Housing Jurists Will Consider
Whether a Firm's Owner May Be Liable for an Agent's Bias
David G. Savage and Daryl Strickland

New Case: 01-7662: Miller-E, Thomas J. v Cockrell, Dir. TX DCJ

Synopsis and Question Presented

Execution Is Stayed in a Case With Race Issues
Linda Greenhouse

In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate
Sara Rimer

Looking Ahead: Affirmative Action; Grutter v Bollinger

Synopsis and Question Presented

Court Says Law School May Consider Race in Admissions
Jacques Steinberg

Rolling Bakke
Bob Zelnick
Learning From Diversity
Jeffrey S. Lehman 365

Suit Tests Race’s Role in College Admissions
Dennis Cauchon 367

Discrimination, Not Diversity: At Michigan and Other Universities, ‘Affirmative Action’ Is Just Another Phrase for Racism
Roger Clegg 370

Inclusive America, Under Attack
Gerald R. Ford 373

Easing the Spring Strict Scrutiny and Affirmative Action After the Redistricting Cases
Pamela S. Karlan 375

VII. FEDERALISM

In This Section 379

New Case: 01-1368 Nevada Dept. of Human Resources v Hibbs

Synopsis and Question Presented 381

The Supreme Court: Federalism; Justices to Hear a Major State-Immunity Case
Linda Greenhouse 387

Federalism and the Supreme Court
David G. Savage 388

The Rehnquist Court: (Cases, Controversy, and the Court)
Erwin Chemerinsky 395

Federalism’s Benchmarks
Terry Eastland 400

Will the Court Reassert National Authority?
Linda Greenhouse 402

Stephen Breyer Restrains Himself: Modest Proposal
Jeffrey Rosen 405

New Case: 01-0706 Spritsma v Mercury Marine

Synopsis and Question Presented 408
Boat Propeller Lawsuits to be Considered by U.S. Supreme Court
Greg Stohr 413

The Supreme Court Term That Was and the One That Will Be
Michael S. Greve 415

Federal Boating Law Kills State Suit over Accident
Daniel C. Vock 419

Case Summary Justice Department, A TLA Say Boat Motor Claim Not Preempted
Products Liability Litigation Reporter 421

New Case: 01-1229 Pierce County v Guillen

Synopsis and Question Presented
423

Supreme Court to Clarify Privacy Rights in Wash State Case
Gina Holland 431

La. Appealing Ruling Ordering Disclosure in Road Hazard Suits
Bruce Schultz 433

New Case: 00-1471 Kentucky Assoc. of Health Plans, Inc v Miller

Synopsis and Question Presented
436

ERISA: Health Benefit Plans Discriminating Against Providers
Mary A. Zendran 444

Justice Accept Case on Maine's Drug Discount Program
Linda Greenhouse 446

Court Backs Patient Appeals in Battle Over HMO Coverage
Sarah Lueck, Robert S. Greenberger and Rhonda Rundle 448

New Case: 01-1420 Washington Dept. of Social and Health Services v Keffer

Synopsis and Question Presented
451

Orphan Takes DSHS to Task: Supreme Court Agrees to Review State's Claim to Social Security Payments
Jonathan Martin 457

Supreme Court to Consider System for Taking Foster Children's Benefits
Gina Holland 460
New Case: 01-0188 Pharmaceutical Research & Manufacturers of America v Connannon

Synopsis and Question Presented 462

High Court to Rule on Maine Carbs on Drug Cost
Lyle Denniston 471

Court Backs Maine Drug Price Carbs; Ruling Would Allow Controls If Pharmaceutical Firms Don't Give Discounts
Ceci Connolly 474

The Election and Why It Counts, A Special Report: Prescriptions Drugs, More to Issue than Meets Eye, Proposals Offer Little for Poor or Uninsured Who Aren't Elderly
Christian Murray 476

VIII. CRIMINAL LAW & PROCEDURE

In This Section 480

New Case: 01-1444 Chavez v Martinez

Synopsis and Question Presented 482

Justias Take Up Police Interrogation Case;
Law The Supreme Court Will Consider Whether an Oxnard Officer Had the Right to Pressure a Badly Injured Man for a Statement
David G. Savage and Tracy Wilson 487

New Case: 01-1231 Connecticut Dept. of Public Safety v Doe

Synopsis and Question Presented 489

New Case: 01-729 Godfrey v Doe

Synopsis and Question Presented 498

Megan's Laws to Undergo Scrutiny
Joan Biskupic 504

States Push for Sex Offender Laws to Apply Retroactively
Joan Biskupic 506

Sloppy 'Megan's Laws' Hinder Goal of Boosting Public Safety
USA Today 508
States Search for Fairness in Implementing Megan's Law
Dale Russakoff 510

Clinton Signs Sex Offender Law
Lawrence L. Knutson 513

Whitman Approves Stringent Restrictions on Sex Criminals
Joseph F. Sullivan 515

New Case: 01-9094 Abdur' Rahman v Bell

Synopsis and Question Presented 518

Before the High Court: Abdur' Rahman Case Could Clarify Issue of Effective Counsel for Poor Defendants
The Knoxville News-Sentinel 525

Life of Violence, Abuse Set to End Early Wednesday
Amber McDowell 526

Abu Ali's Date with Death Called 'Utter Failure' of Entire System
David Waters 529

The Changing Debate Over the Death Penalty
Stuart Banner 530

Shouldn't We, the People, Be Heard More Often by This High Court?
Akhil Reed Amar 534

Judge Says Executions Violate Constitution
Charles Lane 535

New Case: 01-1184 United States v Rocio

Synopsis and Question Presented 537

Court Asked To Define Limits of Conspiracy
Michael Kirkland 542

Court to Hear Case Involving Drug Smuggling and Terrorism
Gina Holland 544

IX. LOOKING AHEAD: UPCOMING ISSUES FOR THE COURT

In This Section 546

Looking Ahead: Oregon Death with Dignity Act; Oregon v Ashcroft

Synopsis and Question Presented 550
Agency Won't Back Off Assisted Suicide Ruling  
Los Angeles Times 554

Suicide Law Upheld  
The Ruling: A Judge Decides Ashcroft Lacks Authority to Decide Oregon's Law  
Don Colburn 555

A Chronology  
The Oregonian 558

Ashcroft Attacks Oregon's Suicide Law  
Josh Meyer and Kim Murphy 559

More by U.S. on Suicide Law Draws Suit in Oregon  
Sam Howe Verhovek 562

Looking Ahead: The Second Amendment; Haney v United States  
Synopsis 565

Looking Ahead: The Second Amendment; United States v Emerson  
Synopsis 570

Supreme Court Sidesteps Gun-control Cases, Lower Courts to Weigh Personal Right to Bear Arms  
Lyle Denniston 578

Court Says That Individuals Have a Right to Own Guns; Law: The Appellate Ruling Holds That the 2nd Amendment Goes Beyond the Issue of State Militias  
David G. Savage 580

U.S., in a Shift, Tells Justices Citizens Have a Right to Guns  
Linda Greenhouse 583

Revised View of 2nd Amendment Is Cited as Defense in Gun Cases  
Adam Liptak 586

Ashcroft's Assault on Gun Laws  
Senators Edward M. Kennedy and Charles E. Schumer 589

Word for Word: The Second Amendment Debate: To Bear or Not to Bear: It Depends on How You Read History  
William Glaberson 591

Dueling Scholars Join Fray Over a Constitutional Challenge to Gun Control Laws  
William Glaberson 594
Liberals Have Second Thoughts on the Second Amendment
Collin Levey

Looking Ahead: School Vouchers; Davey u Locke

Synopsis and Question Presented

Another Surprise Church-State Ruling from the 9th Circuit; Court Strives for Neutrality In Washington State Case
The News Tribune

In States, Hurdles Loom
Laurie Goodstein

School Choice, Not an Ed doc
After the Supreme Court's Decision, the Future of the Movement
John J. Miller

Looking Ahead: Pledge of Allegiance; Newlowu United States

Synopsis

U.S. Court Votes to Bar Pledge of Allegiance; Use of 'God' Called Unconstitutional
Charles Lane

'Under God' Iconodast Looks to Next Targets
Evelyn Nieves

Court That Ruled on Pledge Often Runs Afool of Justices
Adam Liptak

Court Statistics
John T. Noonan Jr

Looking Ahead: Executive Privilege

GAO Goes to Court to Get Cheney Data; Disclosure: It's the First Time the Watchdog Agency Has Sued the Executive Branch. White House Vous a Legal Battle
David G. Savage

White House Told to Save Records
Stephen Labaton & Don Van Natta Jr.

Cheney Should Stop Stalling
John W. Dean

Cheney Is Right to Fight the GAO
Douglas W. Kmiec
Judge Orders Cheney Panel’s Files Released; Courts: Ruling Opens a New Path to Details of Secret U.S. Energy Policy Meetings That the Vice President Had Sought to Suppress
Edmund Sanders

White House Subpoenaed Over Contacts with Enron; Inquiry: The Bush Team Defends Its Staff Actions and Provides the Senate Panel with Information about Letters, Phone Calls and Meetings
Richard Simon

U.S. Judge Slams Administration; Says White House Defines too Broadly What Advice Can Be Kept Confidential
The Associated Press

Looking Ahead: The Nuremberg Files; Planned Parenthood v ACLA

Synopsis

Abortion Foes Are Ruled a Threat; Court: ‘Wanted’ Posters Labeling Doctors ‘Baby Butchers’ Are Not Protected by the 1st Amendment, U.S. Appellate Judges Find
Henry Weinstein

43 in Congress Ask Court to Revisit Clinic Threat Issue; Abortion: They Say a Web Site and Posters Calling Doctors ‘Butchers’ Aren’t Protected Free Speech
Henry Weinstein

Free Speech Is Nothing to Fear
Eugene Volokh

A Civil Action Becoming Doctors’ Defense Weapon; Abortion: Providers Are Turning to the Courts for Relief: Current Case Raises Internet 1st Amendment Issues
Kim Murphy

Looking Ahead: Commercial Speech; Kasky v Nike

Synopsis and Question Presented

Boardrooms Fret over Nike Ruling: Will U.S. Supreme Court Hear the Appeal?
Gary Young

Beware Clever Metaphors! Eliminate Humor! California Supreme Court Opinion Tells Businesses: Anything You Say Can and Will Be Used Against You!
Thomas H. Clarke, Jr.

Just Sue It
Corbett Miller

Gagged by the Left
George Will
X. MISCELLANEOUS

In This Section

Also This Term: Other Cases for the 2002-2003 Term

01-188 Pharmaceutical Research v. Conannon

01-270 Yellow Transportation, Inc. v. Michigan

01-593 Dole Food Co. v. Patrickson; 01-594 Dead Sea Co. v. Patrickson

01-704 United States v. Bean

01-705 Bannhart, Social Security Commissioner v. Peabody Coal Co.

01-715 Holland v. Bellaire Corp.

01-757 Syngenta Crop Protection Inc. v. Herson

01-800 Houram v. Dean Witter Reynolds, Inc.

01-896 Ford Motor Co. v. McCauley

01-1015 Moseley v. V. Secret Catalogue, Inc.

01-1209 Boeing Co. v. United States; 01-1382 United States v. Boeing Sales Corp.

01-1269 Cayugha Falls v. Buckeye Community Hope

01-1418 Anchel v. Warner

01-1491 Demore v. Kim

01-1500 Clay v. United States

01-1572 Cook County v. United States

01-7574 Sattazahn v. Pennsylvania

Justice Byron White

Byron R. White, Longtime Justice And a Football Legend, Dies at 84
Linda Greenhouse

Court's Unanimous View on White
Legal Times

xvii
Sports of The Times; Justice Byron White: A Friend and a Mentor
Ira Berkow 696

'So Much for History'
Compassion and Humor Formed the Byron White the Public Didn't See
Dennis J. Hutchinson 698

Reflections at the End of the 2001-2002 Term

Retirement Rumors Swirl Around 3 Senior Justices
Mark Helm 702

Judicial Intent; The Competing Visions of the Role of the Court
Linda Greenhouse 704

Rehnquist
Joan Biskupic 707

Clarence Thomas After Ten Years: Some Reflections
Stephen J. Werneil 711