

May 2, 2003

Dear Sir or Madam:

The Judicial Review Project at Stanford Law School is pleased to announce the publication of its report on California Supreme Court Associate Justice Janice Brown. The enclosed report comprehensively examines Justice Brown's opinions and dissents. Compiled by law students at Stanford, this report is intended to provide decision-makers and other interested persons with an objective, unbiased look at the Justice. It attempts no argument regarding Justice Brown's potential nomination, and it seeks to characterize her views objectively through a review of her written works.

Concerned by the dearth of reliable, unbiased information on pending and potential judicial nominees, the Judicial Review Project has endeavored to inform the debate surrounding confirmation of federal judicial nominees. This debate is often marked by angry rhetoric and partisan hyperbole. While partisanship certainly has its place, we believe that the debate surrounding a judicial nominee should at the very least be grounded in an understanding of the nominee's views. The Judicial Review Project at Stanford is supported by but operates independent of the American Constitution Society. We hope that the enclosed report is useful to you in this important process.

Our methods in preparing this report were simple. A team of law students versed in constitutional issues examined over a dozen judicial opinions and articles authored by the Justice. For each source, a concise and evenhanded summary was written, as well as issue paragraphs summarizing the nominee's views on important topics. Both the summaries and a compilation of these issue paragraphs are included in this report. As with all Judicial Review reports, we welcome your suggestions for making reports on future nominees more useful.

The enclosed report is intended to be widely distributed to lawmakers, the media, and other interested parties. Dissemination of its contents, with attribution, is encouraged. Please contact us if you have any questions or would like additional copies of the report.

Sincerely,

Heidi Brooks
Judicial Review National Liaison
Stanford Law School
P.O. Box 11002
Stanford, CA 94309
(650)497-9940
Heidi.Brooks@stanford.edu

Report:
Justice Janice Brown of the California Supreme Court

Judicial Review
Stanford Law School
May 2, 2003

TABLE OF CONTENTS

I. Substantive Issue Summaries	2
II. Judicial Philosophy & Methodology Overview	6
III. Summaries of Brown’s Written Work	8
a. California Supreme Court Opinions	8
i. <i>Am. Acad. of Pediatrics v. Lungren</i> , 16 Cal.4th 307.	9
ii. <i>Aguilar v Avis Rent a Car System, Inc.</i> , 21 Cal.4th 121	12
iii. <i>Aydin Co. v First State Ins. Co.</i> , 18 Cal.4th 1183	14
iv. <i>Calatayud v State of California</i> , 18 Cal.4th 1057	15
v. <i>Etcheverry v Tri-Ag Service Inc., et al.</i> , 22 Cal.4th 316	16
vi. <i>Galland v City of Clovis</i> , 24 Cal.4th 1003	17
vii. <i>Golden Gateway Ctr. v Golden Gateway Tenants</i> , 26 Cal.4th 1013	18
viii. <i>Great W Shows, Inc. v County of Los Angeles</i> , 27 Cal. 4th 853	19
ix. <i>Green v Ralee Engineering Co</i> , 19 Cal.4th 66	20
x. <i>Hi-Voltage Wire Works, Inc. v City of San Jose</i> , 24 Cal.4th 537	21
xi. <i>Hooker v Dep’t of Trans.</i> , 27 Cal. 4th 198	22
xii. <i>Kasky v Nike</i> , 27 Cal.4th 939	23
xiii. <i>Kasler v Lockyer</i> , 23 Cal.4th 472	25
xiv. <i>Loder v City of Glendale</i> , 14 Cal.4th 846	26
xv. <i>Mountain Lion Found. v. Fish & Game Comm’n</i> , 16 Cal.4th 105	27
xvi. <i>Pavlovich v Superior Court</i> , 29 Cal.4th 262	28
xvii. <i>People ex rel. Gallo v Acuna</i> , 14 Cal.4th 1090	29
xviii. <i>People v McKay</i> , 27 Cal.4th 601	30
xix. <i>People v Reyes</i> , 19 Cal.4th 743	31
xx. <i>Stevenson v Superior Court</i> , 16 Cal.4th 880	32
b. Academic Publication	33
i. <i>The Quality of Mercy</i> , 40 UCLA L. Rev. 327 (1992)	34

Substantive Issue Summaries – Justice Janice Brown
Please see accompanying case summaries for full case citations and more detailed explanations of legal concepts

Equal Protection

- Minority Business Preferences: Justice Brown’s majority opinion in *Hi-Voltage Wire Works v. City of San Jose* (2000) holds that a “set-aside” program for minority- and women-owned contractors violates article I, section 31 of the California Constitution (which prohibits discrimination and preferential treatment on the basis of race, sex, color, or national origin). Justice Brown’s opinion catalogs the development of federal equal protection doctrine, noting the “sea change” that allowed states to institute racial preference programs which are narrowly designed as remedies for past discrimination. Chief Justice George’s concurring and dissenting opinion explicitly criticized Brown for embarking on an unnecessary analysis of federal equal protection law and for the methodology and content of the analysis she offered.
- Assault weapons control: Justice Brown’s concurrence notes that legislation which does not infringe on a fundamental right is subject only to rational basis review – a test easily met by California’s Assault Weapons Control Act (AWCA). She implies that the AWCA could even survive a more stringent level of scrutiny, since its underinclusiveness in regulating all assault weapons was not an attempt to “exploit a despised minority.”

Privacy Issues

Limited scope of privacy rights

- Parental consent for abortion: Justice Brown’s dissent in *American Academy of Pediatrics v. Lungren* (1997) argues that the 1987 amendments to the California Family Code, which require a minor to seek parental (or judicial) consent to terminate a pregnancy, are not a violation of the minor’s privacy rights. She disagreed with the majority, who held that the explicit right to privacy guaranteed by the California Constitution provides more protection for privacy rights than the implicit federal privacy right guaranteed by Supreme Court. She argued that since the legislature considered the Court’s privacy doctrine while drafting the law, evolving federal privacy doctrine should govern the interpretation of California’s Constitution. Even under state law, however, Justice Brown contended that the law should not be subjected to strict scrutiny since it does not (1) implicate a legally protected privacy interest; (2) involve a reasonable expectation of privacy; or (3) involve a serious invasion of a protected interest.
- Employment drug testing: Justice Brown’s concurrence and dissent in *Loder v. City of Glendale* (1997) would have upheld in full a preemployment and prepromotional drug testing program for city employees. She would like to replace the balancing test used with a clear rule based on the employee’s consent and the state’s ability to regulate the underlying activity. Justice Brown also argued that the distinction between the state acting as a sovereign and as an employer is an important one – in the latter context a state may use means it would be forbidden to use as a sovereign.

First Amendment / Free Speech

Protecting rights of speech in commercial and workplace environments

- **Commercial speech**: Justice Brown's dissent in *Kasky v. Nike (2002)* argued that the majority's standard for defining commercial speech infringed the rights of companies to address matters of public concern by improperly focusing on the identity of the speaker, and failing to recognize the increasingly inseparable nature of commercial and political speech. The majority explicitly criticized the logic and rhetoric Justice Brown employed in her dissent.

NB: This case is currently being considered by the US Supreme Court

- **Workplace epithets**: Justice Brown's dissent in *Aguilar v. Avis Rent a Car (1999)* argued that an injunction against racial epithets in the workplace constitutes an impermissible prior restraint on free speech, and asserts that awarding damages for past speech that violates state discrimination laws is a sufficient deterrent against such conduct. Her opinion identified discrepancies between two areas of Supreme Court doctrine, implying that the Court's First Amendment jurisprudence might make Title VII's protections against workplace discrimination unconstitutional.

Permitting restrictions on speech by private property owners

- **California's free speech caluse**: Justice Brown's plurality opinion in *Golden Gateway Center v. Golden Gateway Tenants Ass'n (2001)* held that the language of the California Constitution ("every person may freely speak, write, and publish his or her sentiments on all subjects") does not prevent private actors from restraining speech.

Permitting limitations on associational rights

- **Gang member association**: Justice Brown's majority opinion in *ex. Rel. Gallo v. Acuna (1997)* held that an injunction prohibiting specific gang members from gathering in public or confronting visitors to their community survives First Amendment scrutiny. She notes that the gang's informal structure did not implicate associational interests, and the specific naming of the enjoined parties sufficiently limited the injunction's scope.

Search & Seizure Issues

Deference to police actions in parole searched

- **Searches pursuant to parole conditions**: Justice Brown's majority opinion in *People v. Reyes (1998)* reversed *People v. Burgener (1986)* by holding that searches pursuant to parole conditions do not violate a reasonable expectation of privacy even when they are conducted without reasonable suspicion.

Criticism of police actions

- **Pretext stops/custodial arrests**: Justice Brown's concurrence and dissent in *People v. McKay (2002)* specifically criticizes the US Supreme Court's Fourth Amendment doctrine for equating reasonableness with probable cause. She was concerned about this doctrinal development in light of the correlation between stop-and-search practices and the racial characteristics of the driver.

Tort Claims

Limitations on tort recovery

- **No recovery by public safety officers:** Justice Brown's majority opinion in *Calatayud v. California* (1998) held that a statutory exception to the "firefighter's rule" in tort cases did not apply to emergency personnel injured by the negligence of other peace officers. She concluded that the legislature did not intend for the text to assume its literal meaning since it would (1) run counter to the decision which inspired the legislature to pass the law and (2) violate important public policy concerns.
- **Liability for independent contractors:** Justice Brown's majority opinion in *Hooker v. Department of Transportation* (2002) held that the hirer of an independent contractor is not liable to that contractor's employees unless his exercise of retained control "affirmatively contributed" to an injury suffered. This standard is consistent with some jurisdictions, but deviates from the Restatement (Second) of Torts §414, which did not require an affirmative contribution for recovery against party with retained control.
- **Burden of proof in "sudden and accidental" insurance claims:** Justice Brown's majority opinion in *Aydin v. First State Insurance Co.* (1998) held that the burden of proving that pollution fell within the "sudden and accidental" exception to an insurance policy lies with the insured party.

Opposition to recognizing state and common law torts in statutory schemes

- **Preemption of common law tort claims by administrative schemes:** the majority in *Stevenson v. Superior Court* (1997) held that the California Fair Employment and Housing Act (FEHA) did not preempt common law tort suits for age discrimination. Justice Brown's dissent argued that the suit should not be allowed since FEHA provides adequate administrative remedies designed to promote settlement.
- **Employment decisions that violate public policy:** The majority in *Green v. Ralee Engineering Co.* (1998) allowed a dismissed at-will employee to bring a suit for tort damages since his actions to promote commercial airline safety were important enough to qualify for a "Tamany exception," which allows tort damages when an at-will employee's actions further a public policy interest. Justice Brown's dissent criticizes the majority for engaging in "judicial policymaking," and argues that any public policy important enough to qualify as a Tamany exception must be grounded in a specific statutory provision.
- **Failure-to-warn claims:** Justice Brown's majority opinion in *Etcheverry v. Tri-Ag Service, Inc.* (2000) held that state "failure-to-warn" claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) labeling provisions, since Congress did not explicitly note its intent to leave the common law action "intact."

Internet Commerce

Limiting lawsuits for internet-based conduct

- **Personal jurisdiction:** Justice Brown's majority in *Pavlovich v. Superior Court* (2002) held that a Texas resident could not be sued in California for posting technological information on the internet that allowed people to copy DVD movies. The defendant's actions in this case were not enough to meet the first part of a three-pronged analysis for establishing personal jurisdiction, since his activities were not "expressly aimed at or targeting" the forum state of California.

Local Regulatory Powers / Takings

- Gun control ordinances: Justice Brown's dissent in *Great Western Shows v. Los Angeles (2002)* distinguished between a county's powers as a regulatory body and as a property owner. She asserted that once a county leased land to a private party it can only ban gun sales on that land through the terms of the lease and not by ordinance.
- Economic rights: Justice Brown dissented from the majority's holding in *Galland v. City of Clovis (2001)* that takings claims in rent control regulation suits are only entitled to damages under 28 U.S.C. § 1983 if they have sought a future rent adjustment. Justice Brown argued that economic rights deserve more consideration, and that plaintiffs should be allowed to recover under § 1983 in such cases without seeking other state remedies.

Judicial Philosophy/Methodology Overview – Justice Janice Brown

Please note that the following examples are designed to highlight specific examples of Justice Brown’s analysis; they do not purport to be an exhaustive summary of her judicial approach

Judicial Philosophy / Jurisprudence

Need for judicial restraint

- Creation of tort claims: Justice Brown’s dissent in *Stevenson* cautioned against the creation of new tort claims that have “potentially enormous consequences for the stability of the business community.”
- Deference to political process: Justice Brown’s opinion in *Lungren* argued that the court should defer to the legislature’s determination of compelling government interests and the means chosen to achieve those ends.
- Separation of powers: Justice Brown’s dissent in *Green* argued that allowing the court to determine which fundamental public policies authorize *Tamany* tort claims, as opposed to forcing the court to identify the source of such policies in a specific statutory provision, leads to unacceptable judicial policymaking.

Methods of Textual Analysis

Examples of literal interpretation

- Constitutional text: in *Hi-Voltage* Justice Brown approvingly cited the standard that “a constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words,” and then proceeds to apply the dictionary definition of words such as “discriminate” and “preferential” to determine the meaning of § 31.
- Statutory text: in *Etcheverry* Justice Brown argued that since Congress “knows how to accomplish” the task of pre-empting state regulatory authority while leaving common law actions in tact, common law torts should not be allowed under pre-emption schemes unless they are explicit in the text of the statute.
- Contractual language: in *Aydin* Justice Brown advocated literal interpretation of contractual language rather than uniform rules of interpretation, despite objections that such a scheme would always allow insurers to shift the burden of proof to the insured.

Examples of intent (non-literal) analysis

- Constitutional text:
 - In *Golden Gateway* Justice Brown concludes that where the literal text is “not conclusive” of its meaning, the court must examine the legislative history of the act. Since there was no debate on the free speech clause of the California Constitution when it was adopted, she looked to the legislative history of the 1821 New York Constitutional Convention (she noted that many of California’s framers were from New York and argued that the clause had been taken “virtually unchanged” from that state’s constitution).
 - In *Lungren* Justice Brown argued that the privacy clause of the California Constitution was modeled on US Supreme Court privacy doctrines, and thus the Court’s evolving privacy jurisprudence should inform California’s interpretation

of its own privacy clause, despite the fact that California's right is constitutionally explicit, whereas the federal right is implicit.

- Statutory text:
 - In *Calatayud* Justice Brown argued that the literal meaning of a statute should not be considered if it leads to “absurd consequences” that violate the policy or intent of the legislature. Instead, “intent prevails over the letter and the letter will, if possible, be so read as to conform to the spirit of the act.”
 - In *Lungren* Justice Brown's dissent cites an “alternative” legislative analysis as evidence that the legislature considered a doctor's bias in determining whether a minor is competent to consent to an abortion. The plurality criticizes her appeal to the unofficial report, which was prepared by the Christian Action Council.

**Justice Brown
California Supreme Court Opinions**

Am. Acad. of Pediatrics v. Lungren
16 Cal.4th 307
Aug. 5, 1997

Case Summary

In 1953 the California legislature passed Fam.Code § 6925, a “limited medical emancipation” law that allowed minors to obtain medical treatment for care related to pregnancy without parental consent. That law was amended in 1987 by Bill 2274, which added a clause stating that the original code should not be construed to “authorize an unemancipated minor to receive an abortion without the consent of a parent or guardian” according to defined procedures.

The revised statute was never enforced, as plaintiffs sought and won an injunction barring enforcement of the law in December 1987. That injunction was sustained on appeal, and remanded to the trial court for the legislature to prove that (1) it had a compelling interest which justified the restriction, and (2) that the legislation was narrowly drawn to achieve those goals. *American Academy of Pediatrics v. Van de Kamp*, 214 Cal.App.3d 831 (1989).

On remand the trial court invalidated the law on two grounds. First, they held that it violated the right to privacy explicitly guaranteed by article I, section 1 of the California Constitution. While the court found that the interests the state attempted to promote were compelling, it nevertheless found that the weight of the evidence showed that the means employed by this law would not advance those interests. Secondly, the trial court invalidated the statute as a violation of the equal protection clause of the article I, section 7 of the California Constitution, since it failed to justify its distinction between minors who choose to carry their pregnancy to term and those who choose to seek an abortion. The appellate court affirmed the trial court’s ruling as to the violation of privacy guaranteed by the California Constitution. The court did not need to reach the Equal Protection claim.

Chief Justice George, writing for a PLURALITY of 3 Justices, affirmed the appellate court’s ruling. He first noted that California constitutional law is different than federal constitutional law. In this case, the right to privacy that protects reproductive choice is explicit in article I, section 1 of the California Constitution, whereas the US Supreme Court had implied that right in a series of cases including *Griswold v. Connecticut* and *Roe v. Wade*.

The court asserted that the substantive provisions of its privacy protections are governed according to *Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal.4th 1 (1994). The *Hill* analysis is performed in two parts. First the court evaluates whether the claim meets the three threshold elements: a legally protected privacy interest; a reasonable expectation of privacy under the circumstances; and a serious invasion of that privacy by the defendant. If the claim meets this threshold, the court then examines whether the defendant’s interests justify the invasion. The level of scrutiny applied to this last step in the analysis is determined by a sliding scale; more serious invasions of privacy require more intense scrutiny by the Court.

Applying *Hill*, the PLURALITY found that this statute violated the explicit right to privacy under Article I, section 1 of the California Constitution. It first held that the claim met all three of the threshold elements of the *Hill* standard. Determining that the claimed invasion of privacy affected a “fundamental autonomy privacy interest,” the court proceeded to apply strict scrutiny to the statute. Although it agreed that the state’s interests in protecting the physical, emotional, and psychological health of minors, and the parent-child relationship are “compelling,” it nevertheless deferred to the trial court’s findings that the ends the legislature

employed were not narrowly tailored to further those ends. It agreed that (1) the legislature's purported purpose was undermined by numerous other limited medical emancipation statutes that were designed to further the same goals as this restriction and (2) the weight of evidence at trial showed that this law would in fact injure the interests it sought to protect.

The Court critiqued Justice Brown's opinion in both the text and a footnote of its opinion. It explicitly criticized the logic behind Justices Brown and Baxter's assertions that if a physician is qualified to determine a minor's capacity to consent to an abortion, then a judicial officer must be equally competent. Finally, the Court critiqued Brown's methodology in a footnote at the end of its analysis. It noted that in support of her conclusion that the record supports the idea that "health care providers cannot be trusted to make unbiased determinations" about a minor's capacity to consent, Justice Brown cited an "alternative" legislative analysis available to the Legislature while drafting the bill. The majority points out that this analysis was in fact prepared by the Christian Action Council, and criticizes her for citing a "self-styled" unofficial analysis, and suggests that it might not be appropriate to "take judicial notice" of the document.

In her DISSENT, Justice Brown criticized the majority's opinion for (1) reinventing legal standards and misapplying the standards it invents; (2) disposing of two decades of "highly pertinent" US Supreme Court opinions; (3) eliminating the threshold elements of a state privacy case; and (4) subjecting the Bill to an "inherently insurmountable" level of judicial scrutiny.

She began by critiquing the Court's methodology in assessing a "facial challenge" to the law, asserting that there is no basis for applying an "overbreadth" analysis to this case. Justice Brown next criticized the majority for placing so much weight on the distinction between the explicit privacy right in the California Constitution and the implied privacy right in the US Supreme Court's cases; she asserted that where, as here, the state right was "modeled on" federal precedents, those cases should not be disregarded. Her footnotes specifically accused the majority of taking "selective quotations" from the case law.

Justice Brown then criticized the court for making only a "superficial" application of the three elements required to establish a valid privacy claim. She did not find either a reasonable expectation of privacy or a serious invasion of a protected interest in this case. Most of this section of the opinion, however, was devoted to the claim that this case does not implicate a legally protected privacy interest since (1) the rights of minors are particularly limited vis-à-vis their parents and (2) due to the unique context of abortion, there is reason to believe that a judicial officer is just as qualified as a physician in determining whether a minor is competent to consent. The later conclusion relied on the argument (criticized by the majority as unsupported in the record) that abortion doctors are not disinterested and that minors are especially vulnerable to their bias. She also criticized the majority's holding that norms do not play a part of the threshold analysis as "revisionist legal history at its best and judicial activism at its worst."

Finally, Justice Brown criticized the level of scrutiny used by the majority and its specific application to this case. She asserted that since the underlying issue is in "bona fide dispute," a balancing test should be applied instead of strict scrutiny. Applying the higher standard of review, she asserted, decides the case. Justice Brown concluded by noting that fairly debatable questions involving moral and philosophical issues should be left to the legislature; when they "accommodate competing constitutional claims," then the courts "have nothing more to say."

Throughout her DISSENT, Justice Brown directed strong language at the style, logic, and judicial philosophy employed by the majority. She noted that the court wrote "a sentence whose

length is exceeded only by its circuitry.” In another part of the opinion she cautioned the court that “smoke and mirrors should not be a part of our repertoire.” Further criticizing the Court for its interpretation of *Hill*, she asserted that “only Lewis Carroll could countenance this slight of hand,” and then proceeded to quote *Through the Looking Glass* extensively in a footnote.

Finally, she repeatedly criticized the Court for a jurisprudence that allows the Court to “topple every icon, to dismiss all societal values, and to become the final arbiters of traditional morality in a context in which their view of wisdom cannot be challenged.” She warned that they should “think long and hard before constructing a virtually impregnable citadel.” Quoting from legal scholar Raoul Berger, she asked “how long can public respect for the Court, on which its power ultimately depends, survive if the people become aware that the tribunal which condemns the acts of others as unconstitutional is itself acting unconstitutionally?” In her conclusion, Brown invoked Plato’s *Republic* by asserting that “this case is an excellent example of the folly of the courts in the role of philosopher kings.”

Case History

There is no subsequent case history.

Aguilar v. Avis Rent A Car System, Inc.
21 Cal.4th 121
Aug. 2 1999

Case Summary

Defendant Avis Rent-A-Car appealed a trial court's injunction of discriminatory speech by certain employees against Latino employees in violation of the California Fair Employment and Housing Act (FEHA), claiming that the injunction violated the First Amendment of the U.S. Constitution and the free speech clause of the California Constitution.

A PLURALITY of three justices held that a workplace injunction prohibiting racial epithets does not violate freedom of speech "if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination." The plurality opinion reviewed the jurisprudence surrounding the limitations on First Amendment protection – including several U.S. Supreme Court decisions – and noted that freedom of speech is not absolute. Employment discrimination is one of those contexts where the First Amendment will not protect the speaker, so long as the discriminatory speech is pervasive and severe enough to create a sufficiently hostile work environment for the plaintiff employee.

The PLURALITY presented a lengthy synthesis of precedents addressing prior restraints on speech and concluded that a narrowly tailored injunction designed to prevent employment discrimination is not an unconstitutional prior restraint on speech; in fact the Court held that once the speech is determined to be unlawful, the injunction is not considered a prior restraint at all. The court found sufficient the trial judge's holding that there was a substantial likelihood of future discriminatory speech, justifying both damages for past discrimination and an injunction against future conduct.

Citing cases in which racist speeches and Ku Klux Klan marches were protected as free speech, Justice Brown, in her DISSENT, rejected the notion that speech is less protected in work environments than it is on the sidewalk. "We as a nation so value the free exchange of ideas that we are willing to tolerate even offensive ideas, knowing that 'one man's vulgarity is another's lyric' ... and today's heretical idea may become tomorrow's gospel." She suggested that inconsistency in U.S. Supreme Court precedents addressing sexually harassing speech in the workplace and racist speech outside of the workplace might call into question the constitutionality of Title VII altogether "because it is a content-based regulation of speech not limited to fighting words." Justice Brown illustrated how many of the high court's decisions on verbal harassment in the workplace constitute nonbinding dictum or confused rulings that do not apply to the instant case.

Justice Brown considered the plurality's interpretation to be an absolute prior restraint on speech that seems to single out certain content – namely racist remarks – and declare it unprotected by the First Amendment. This categorization of speech based on its content, calling such speech "unlawful," is a direct violation of the First Amendment's requirement that any speech regulation be content neutral, according to Justice Brown.

Moreover, Justice Brown saw no need for injunctive relief in this case where money damages provide effective compensation to plaintiffs and an effective deterrent from future discriminatory speech in the workplace. Citing an 1896 judicial opinion interpreting the free speech clause of the California constitution, Justice Brown concluded that the state constitution

specifically prohibits prior restraints and instead favors a damages scheme to hold speakers responsible for harmful speech only after the fact. Justice Brown did admit that in certain egregious situations prior restraints on speech are permitted, such as with obscenity or fighting words, but that no such extreme scenario exists in this case. Moreover, she notes that regulations on workplace speech cannot extend to speech that does not subjectively affect the plaintiff employee, so an injunction that prohibits discriminatory speech anywhere in the workplace, even where plaintiff cannot hear it, is overbroad.

Justice Brown expressed a fear that the plurality's ruling will "create the exception that swallowed the First Amendment." She worries that a mere declaration that certain speech is illegal and therefore subject to injunction even before such speech is uttered could lead to "a prohibition against 'verbal conduct' creating a 'hostile sidewalk environment' analogous to the similar prohibition that applies in the workplace."

She closed saying, "Fundamentally, this is a case about equality and freedom. Thus, it is a case about our most basic political ideals; about our highest aspirations and our greatest failures; our toughest challenges and our deepest fears. It is about a bafflingly elusive dream of equality and the freedom, not immune from abuse, to speak words that make others more than uncomfortable. It is a case about equality and freedom and the irreconcilable tension between the two. We are all the beneficiaries of the freedom the Constitution guarantees, and we all pay its costs, even though the price may sometimes be anguish. I dissent."

Case History

Certiorari was denied by the Supreme Court of the United States. 529 U.S. 1138.

Aydin Co. v. First State Ins. Co.
18 Cal.4th 1183
Oct. 14, 1998

Case Summary

From 1969 to 1984, Aydin Co. operated a research and manufacturing complex that required the use of a variety of noxious chemicals. First State Insurance Co. provided Aydin with a general liability insurance policy. This policy excluded coverage for liability arising from pollution released by Aydin unless the pollution was sudden and accidental in nature. In 1980, Aydin discovered that it had contaminated the grounds of its complex with PCB and sued First State to pay for liability arising from this pollution. First State refused on the grounds that only sudden and accidental pollution was covered by Aydin's policy and the long-term PCB contamination was therefore not covered. At trial, Aydin prevailed because the trial court placed the burden of proof on First State to show that Aydin's liability arose from the discharge of toxic waste and that the discharge was not sudden and accidental. The appellate court reversed on the grounds that the trial court should have assigned Aydin the burden of proving that its claim came within the sudden and accidental exception to the general pollution exclusion of First State's policy.

Justice Brown, writing for the MAJORITY, upheld the appellate court's ruling that once an insurer carries the burden of showing that a policy exclusion applies to a situation, the burden shifts to the insured to prove that its claim falls within an exception to the policy exclusion. Justice Brown reached this conclusion by first deciding that the California cases cited by Aydin, *Bebbington v. Cal. Western etc. Ins. Co.*, 30 Cal. 2d 157 (1947) and *Strubble v. United Services Auto. Assn.*, 35 Cal. App. 3d 498 (1973), are inapposite because they did not discuss burden shifting and the record in these cases shows that the terms of the contested insurance policies differed significantly from Aydin's term coverage. Having noted that the issue of burden shifting regarding insurance exclusions and exceptions to exclusion is a matter of first impression in California, Justice Brown looked to case law from other states and found that all other jurisdictions which have dealt with the issue have placed the burden of proving the sudden and accidental exception on the insured. In addition to relying on the consensus conclusion from other states, Justice Brown argued that because the insured already bears the burden of establishing coverage under an insurance policy, it makes sense that the insured should also prove that exception to their policy exclusion affords coverage after the exclusion is triggered. In conclusion, Justice Brown noted that public policy favors placing the burden on the insured because the insured has the best information about their actions and they will have an incentive to cover up polluting activities if it becomes the insurer's responsibility to investigate whether pollution was sudden and accidental.

Case History

There is no subsequent case history.

Calatayud v State of California
18 Cal.4th 1057
Aug. 6, 1998

Case Summary

Eduardo Calatayud III, a police officer, sued the State of California and Michael Byrd, a highway patrol officer, for the injuries Officer Calatayud sustained when Officer Byrd's shotgun accidentally discharged during the apprehension of a suspect. The state and Officer Byrd argued that the "firefighter's rule", which says no duty of care results from negligently causing an event to which a peace officer responds and sustains injury, applied and would bar recovery. Officer Calatayud argued that the statutory exception in California Civil Code section 1714.9, subdivision (a) applied. The statute reads that "any person" who negligently causes injury after becoming aware of the presence of peace officers is liable for that injury.

Justice Brown, writing for the MAJORITY, held that the legislature did not intend the Civil Code to apply to allow recovery by public safety officers from injuries caused by fellow officers. In reaching her conclusion, Justice Brown relied upon the public policy justifications for the firefighter's rule and legislative history. Public policy considerations included: 1) the value of cost-spreading by only allowing police officers to receive tax-supported compensation if they are injured, 2) the interest of judicial efficiency in reducing claims before the courts, and 3) the potential for liability concerns to prevent public safety officers from working together effectively. Justice Brown found that the legislature had focused on civilian tortfeasors and had not considered the possibility of injuries being caused by officers themselves. She further noted the legislature chose to amend the Worker's Compensation Act in order to prevent peace officers and firefighters from suing their employers. In addition, section 1714.9 preserves the exclusivity of the Worker's Compensation Act, so Justice Brown found that allowing the statutory exception to apply would lead to the absurd conclusion that injured officers could sue officers from another agency, but not officers from their own agency. This evidence was taken to show the legislature did not intend the words "any person" to refer to other public safety officers.

Case History

There is no subsequent case history.

Etcheverry v. Tri-Ag Service, Inc., et al.
22 Cal.4th 316
March 2, 2000

Case Summary

Monique Etcheverry, a walnut orchard operator, sued Tri-Ag Service, Paul Osterlie, a pest control adviser at Tri-Ag, and Bayer Corporation (a manufacturer of the pesticides Guthion and Morestan) for negligence, strict liability for ultrahazardous activity, negligence per se, products liability, breach of implied warranty, misrepresentation and trespass. Osterlie recommended a combined application of Guthion and Morestan (two pesticides) to Etcheverry's walnut orchards. This combined application resulted in approximately \$150,000 damage to Etcheverry's walnut crop. Tri-Ag moved for summary judgement on the basis that all of the causes of action were state law challenges to the adequacy of the warnings on the pesticide's EPA-approved labels, and thus were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Justice Brown, writing for the MAJORITY, held that state law failure-to-warn claims were preempted by FIFRA and remanded the issue of whether all of the causes of action were predicated upon the alleged inadequacies in the EPA-approved labels. In reaching her conclusion, Justice Brown relied on the holding in *Cipollone v. Liggett Group* where the US Supreme Court found that the 1969 Federal Cigarette Act bars state common law claims against failure-to-warn of the dangers of smoking. 505 U.S. 504 (1992). In addition, she found the fact that the overwhelming majority of courts have concluded that state law failure-to-warn claims are preempted by FIFRA was "persuasive and entitled to great weight".

The United States filed an amicus curiae brief stating that the EPA's waiver of review of pesticide efficacy claims allows the marketplace and the prospect of tort liability to regulate warnings in this area. Justice Brown found that the mixing of Guthion and Morestan does not fall under the efficacy waiver. She finds that even if it does fall under the waiver, state law claims are still preempted because (1) the EPA considers efficacy claims after a pesticide has been registered, and (2) California's regulatory program performs additional safety analysis on pesticides.

Case History

There is no subsequent case history.

Galland v. City of Clovis
24 Cal.4th 1003
Feb. 5, 2001

Case Summary

The Gallands, owners of a mobile home park, filed suit against the city and its rent control review commission, alleging violations of the Fourteenth Amendment's guarantee of substantive due process and demanding damages under 28 U.S.C. § 1983. The suit arose after a series of disputes between the Gallands and the commission regarding the Gallands' desire to increase the base rent on mobile home "pads" in their park. California law provides for local commissions to make determinations regarding the appropriate rent for mobile home pads in light of an owner's fair rate of return on his capital investment. Through a series of protracted proceedings, the city variously denied or reduced the Gallands' proposed rental increases. The trial court found, and the Court of Appeals agreed, that the Gallands had suffered an unconstitutional regulatory taking in violation of substantive due process.

Justice Mosk, writing for the MAJORITY, offered new guidance in determining the proper rent and, more importantly, stated that damages under § 1983 were unavailable to Plaintiffs who assert a regulatory takings on the basis of legally controlled rents being held at confiscatory levels, unless they have attempted to remedy the rent levels through a prior judicial proceeding. This proceeding should seek a writ of mandamus against the city and its commission to issue a *Kavanau* future rent adjustment. *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761 (1997). Only if such a rent adjustment is found inadequate and the property owner is not responsible for this inadequacy can § 1983 damages be awarded.

Justice Brown, DISSENTING from the court's decision, lamented the fact that rent control cases are treated similarly to price control cases regulating goods. While she acknowledged that such precedent is unavoidable, she urged the court to give full consideration to the real property rights of regulated property owners such as the Gallands. Analogizing that the court would not force a plaintiff in a § 1983 race discrimination case to seek alternate state remedies, Justice Brown argued that if a violation of substantive due process has occurred (which she believes happened in this case), the plaintiff is entitled to a federal remedy under § 1983 without a requirement to seek other state remedies. *Kavanau* did not require the majority's holding because Plaintiffs in that case did not assert a § 1983 claim. Justice Brown wrote, "The Constitution bespeaks no hierarchy of rights, no preferences with respect to its constraints on government action, no partiality among its protections of liberty. Nevertheless, today's majority consigns economic rights to a secondary status that can only reflect opposition to the balance the framers carefully struck between private and public power."

Case History

Certiorari was denied by the Supreme Court of the United States. 534 U.S. 826.

Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n
26 Cal.4th 1013
Aug. 30, 2001

Case Summary

Golden Gateway, the private owner of a residential complex in San Francisco, sought to enjoin the tenants association from disseminating newsletters and leaflets to all building tenants. The association appealed on the grounds that the injunction violated its freedom of speech under the California State Constitution. The tenants association argued that the language of the state constitution's freedom of speech clause protects the speaker not only from *state* suppression but also from suppression by *private* actors.

Justice Brown, writing a PLURALITY opinion (two justices joined Justice Brown's opinion, and Chief Justice George wrote a concurring opinion), holding that the text of the state constitution's freedom of speech clause is ambiguous; unlike the federal Constitution, whose language limits Congressional actions, the California Constitution guarantees to the individual a right to speak ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right"). Due to this ambiguity Justice Brown examined the legislative history of the provision, and determined that it was meant to restrain only *state* infringement upon speech. Since this provision of the California Constitution had no direct legislative history, Justice Brown noted that California drafters openly borrowed from the New York state Constitution, and thus looked to New York's 1821 Constitutional Convention to determine the intent of the California Constitution. She also cited several scholarly articles and similar holdings from the courts of other states supporting the position that state actor requirements can be inferred where the constitutional text is otherwise silent.

Since Golden Gateway was the private owner of a private building, Justice Brown concluded that there was no state actor in this case, and thus there was no violation of the right of free speech under the California Constitution. Finally, Justice Brown explained why this holding does not contradict the court's 1979 holding in *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979), which held that the state constitutional right to free speech can be enforced in a privately owned shopping center. Justice Brown noted that the *Robins* decision did not touch upon the question of a state actor requirement, and that in certain cases a private property that is open to the general public (unlike Golden Gateway) might be considered a state actor for purposes of the free speech clause. Additionally, Justice Brown noted that her Court's recent comment in the *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468 (2000) – that the free speech clause "runs against the world, including private parties" – constituted nonbinding dictum.

Case History

There is no subsequent case history.

Great W. Shows, Inc. v. County of Los Angeles
27 Cal. 4th 853
April 22, 2002

Case Summary

Plaintiff Great Western Shows, Inc., an organizer of conventions where firearms are bought and sold, filed suit in federal court to enjoin the enforcement of a Los Angeles County ordinance forbidding the sale of firearms on county property. The property in question was the Los Angeles County Fairgrounds, where Plaintiff customarily had held three gun shows per year. The Los Angeles County Fairgrounds had been leased to an independent entity, the Los Angeles County Fair Association, and are located within the incorporated city limits of the City of Pomona. The U.S. District Court for the Central District of California granted Plaintiff's motion for preliminary injunction, and the county filed an interlocutory appeal. The U.S. Court of Appeals for the Ninth Circuit certified two questions to the California Supreme Court: (1) whether state law regarding the sale of firearms preempts the county ordinance in question, and (2) whether a county can, consistent with the California Constitution, regulate the sale of firearms on its property that is located within the limits of an incorporated city.

The MAJORITY of the California Supreme Court found that Los Angeles County may constitutionally regulate the sale of firearms on its property within the City of Pomona and that state law does not preempt such a regulation.

Judge Brown was the lone DISSENTER. She attacked the majority's conclusion that Los Angeles County may permissibly regulate its property that lies in the City of Pomona. Her opinion distinguished the county's powers as a *property owner* from its powers as a *regulating government*. The county obviously may control its property, but in this case it has temporarily relinquished this right by leasing its property to the Los Angeles County Fair Association. The terms of the lease may allow the county to control the uses to which its tenant puts the fairgrounds, but the county must act through the lease as a property owner and not through ordinance. In contrast, Judge Brown found that once a city has been incorporated, a surrounding county has no power to regulate "the public at large" within the city limits, including on property owned by the county.

Case History

Based on these answers to its certified questions, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's grant of preliminary injunction and remanded the case for further proceedings consistent with the California Supreme Court opinion. 42 Fed. Appx. 929, 2002 WL 1769957 (9th Cir. 2002).

Green v. Ralee Engineering Co.
19 Cal.4th 66
Aug. 31, 1998

Case Summary

Green, a quality control inspector, sued his former employer Ralee Engineering Company, an aircraft components manufacturer, for wrongful termination. Green was an at-will employee, and as such, could be discharged at any time and for any reason not otherwise prohibited by law. Green alleged his termination was retaliation for his complaints about Ralee's inspection practices. Employers' rights to discharge at-will employees are limited by a *Tamany* action: a public policy exception that states that an employee may recover tort damages if his employment actions or complaints further a policy affecting the public interest. *Tamany v Atlantic Richfield Co.*, 27 Cal.3d. 167 (1980). Green claimed that his complaints about Ralee's inspection practices served the broad public policy favoring aviation safety, citing the Federal Aviation Act of 1958 (FAA), and therefore he was entitled to tort damages despite the fact that he was an at-will employee under *Tamany*.

Defendant Ralee argued that Plaintiff's public policy must be "tethered to" either a specific constitutional or statutory provision. Defendant argued that Plaintiff's reliance on the FAA was too broad, and without a specific statute or constitutional provision upon which to base his claim, Plaintiff's case was deficient as a matter of law and warranted summary judgment in his favor. Previously, the court would not extend a *Tamany* cause of action beyond policy based in either a constitutional or statutory provision for two reasons: (1) to ensure that employers have adequate notice of the conduct that will subject them to tort liability when they discharge at-will employees, and of greater importance, and (2) to avoid judicial interference with the legislative domain and to limit judicial policymaking. The issue before the court was whether public safety regulations governing commercial airline safety may provide a basis for declaring a public policy exception in the context of a retaliatory discharge action. Additionally, Defendant argued that because the regulations upon which Plaintiff relies are wholly federal, the court should not extend the common law tort doctrine to his claim.

The MAJORITY held that promoting airline safety constitutes a policy of sufficient public importance to fall within *Tamany*. Moreover, the majority noted the strong congruence between state and federal public policy involving air safety, asserting that the state legislature need not have enacted identical legislation for the plaintiff to prevail.

Justice Brown, in her DISSENT, argued that this case is not about whether air safety is a matter of fundamental public policy, but rather is about judicial policymaking. She wrote that the majority's result allows courts full discretion to determine what public policy deserves legal recognition, thereby undermining the legislative branch. She argues that the court fails to articulate a clear rationale or define a set of criteria to determine what qualifies for the *Tamany* public policy exception. Her main point is that anything that qualifies as important public policy should be grounded in a specific statutory provision. If not tied to a statute, the courts are overextending their role into the legislative domain by determining what is important or what fundamental public policy is.

Case History

There is no subsequent case history.

Hi-Voltage Wire Works, Inc. v. City of San Jose
24 Cal.4th 537
Nov. 30, 2000

Case Summary

Justice Brown wrote for the MAJORITY invalidating a San Jose government contract program that offered preferential treatment to businesses owned by minorities or women (MBEs and WBEs) for public works contracts. All seven justices invalidated the Program, but several wrote concurrences to voice objections to some of Justice Brown's language and analysis. The Program requires bidders to fulfill either an outreach or participation component, and to document reasons for rejecting MBE or WBE subcontractor bids.

Hi-Voltage was the lowest bidder for a city contract, but was not awarded the contract. Hi-Voltage planned to use its own workforce, and therefore did not meet the minority outreach and participation requirements of the Program. Hi-Voltage brought a lawsuit challenging the Program as a violation of Article I, section 31 of the California Constitution, which prohibits discrimination and preferential treatment on the basis of race, sex, color, ethnicity or national origin. Hi-Voltage claimed that the Program required contractors to accord unlawful preferences to minority and women subcontractors.

Justice Brown's opinion affirmed the lower courts, and holds that the outreach and participation requirements constitute race- and sex-based classifications that violate §31. Justice Brown begins with a lengthy review of 150 years of legislative and judicial treatment of race, spanning canonical federal cases like *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Education*, 347 U.S. 483 (1954), as well as landmark California cases like *Bakke v. Univ. of CA Regents*, 18 Cal.3d 34 (1976). Within the jurisprudential histories she identified the "sea change," a fundamental shift from a staunch anti-discrimination jurisprudence to approval (and sometimes endorsement) of remedial race- and sex-conscious governmental decision making. She next examined the legislative history of Proposition 209, which added §31 to the California Constitution in 1996, and concluded that it represents a deliberate effort to repudiate the recent federal and California decisional authority that permitted discriminatory, preferential treatment. Justice Brown read Proposition 209 to proscribe special treatment of any group, for any reason. Instead, she found it was intended to make the government "fair, color-blind, race-blind, gender-blind." The Program was invalidated because it created "discriminatory quotas or set-asides, or at least race- and sex-conscious numerical goals."

Chief Justice George's CONCURRENCE and DISSENT explicitly criticized Justice Brown for undertaking this analysis of federal law, as well as for the substance of her opinion:

"The overall tenor of the majority opinion's discussion of these decisions – including its repeated and favorable quotation from dissenting opinions in these cases and from academic commentators critical of these decisions – leaves little doubt that the majority opinion embraces the view that the types of affirmative action programs at issue in these past decisions *always* have violated the provisions of the federal and state equal protection clauses and Title VII, and that the numerous decisions of the United States Supreme Court and this court that reached a contrary conclusion were wrongly decided"

Case History

There is no subsequent case history.

Hooker v. Dep't of Trans.
27 Cal. 4th 198
January 31, 2002

Case Summary

Estate of decedent Hooker sued the California Department of Transportation (Caltrans) for the tort of negligent exercise of retained control as set forth in § 414 of the Restatement (Second) of Torts. Decedent was employed by an independent contractor hired by Caltrans. A crane operator, decedent retracted the outriggers and left the crane; upon return, he attempted to swing the boom without first reextending the outriggers. He was thrown to the ground and killed.

The specific question presented for review was whether an employee may sue the hirer of an independent contractor for the tort. The case came to the court on a grant of summary judgment for the Defendant.

Justice Brown, writing for the MAJORITY, held that the hirer of an independent contractor is not liable to an employee of the independent contractor merely because the hirer retained control over safety conditions at the worksite. However, a hirer is liable to an employee of the independent contractor “insofar as a hirer’s exercise of retained control *affirmatively contributed* to the employee’s injuries.” (emphasis in original).

Justice Brown’s holding varied from § 414 of the Restatement because of her addition of the words “affirmatively contributed.” She justified the difference on fairness grounds: if the entity primarily responsible for the worker’s safety, the independent contractor, is limited to workers’ compensation coverage, then it would be unfair to impose tort liability on the hirer of the independent contractor in the absence of something more than the hiring of the independent contractor.

Case History

There is no subsequent case history.

Kasky v Nike
27 Cal.4th 939
May 2, 2002

Case Summary

Defendant Nike, which manufactures athletic shoes and apparel, became the subject of negative publicity regarding its labor practices from a variety of news sources. In response, Nike made a number of statements to consumers about its labor practices. The statements at issue were made in letters to university presidents and athletic directors, as well as in press releases and letters to newspaper editors. Plaintiff alleges these statements were false and misleading, in violation of California's Unfair Competition Law and its False Advertising Law. The threshold issue is whether the statements were commercial speech. If they were, then California may prohibit statements proving to be false. Conversely, if the statements were noncommercial speech, then the statements are protected, even if shown to be false. The court considered only the commercial nature of the statements. The truth or falsity of the statements was not at issue in this stage of the litigation. The lower court dismissed the case on the grounds that the speech was fully protected noncommercial speech.

Justice Kennard, writing for the MAJORITY, reversed the lower court and held that the statements at issue did constitute commercial speech. Since the speech was commercial, the state could impose a truthfulness requirement.

The court held that determining the commercial nature of speech requires consideration of three elements: the speaker, the intended audience, and the content of the speech. Here, the speaker was Nike, which is engaged in commerce. The court held that the intended audience was also a commercial one. University presidents and athletic directors are major purchasers of Nike products, and so constitute a commercial audience. The court also suggested that the public generally, to whom the press releases and letters to the editor were addressed, were actual and potential purchasers of Nike products, making them a commercial audience as well. Finally, the court held that the representations of fact were commercial in nature. These statements, about Nike's own business operations, are subject to regulation for precisely the reason that the Supreme Court has allowed all commercial speech to be regulated – Nike was in the best position to verify the truth of the factual assertions it made and the statements were made to maintain Nike's sales and profits. Finally, regulation of this type of speech is consistent with the traditional government authority to protect consumers through regulation of commercial transactions.

The court argued that it can impose a truthfulness requirement on commercial speech even if relates to a matter of public interest. The fact that commercial speech may be intermingled with noncommercial speech does not make it immune from regulation. Otherwise, the court reasoned, a commercial speaker would be able to immunize its false commercial statements merely by including references to public issues.

In her DISSENT, Justice Brown called for a reformulation of the Supreme Court's commercial speech doctrine. "In 1942, the United States Supreme Court, like a wizard trained at Hogwarts, waved its wand and 'plucked the commercial doctrine out of thin air.'" This has created considerable confusion for the Supreme Court and for lower

courts. In light of the fact that the Supreme Court has refused to define the elements of commercial speech, Brown argued that the majority's formulation of the test is overly simplistic. The test, Brown argued, makes the level of protection dependent on the identity of the speaker, which violates First Amendment principles against speaker discrimination. Because commercial speech status depends on the identity of the speaker, corporate speakers' ability to participate in public debate is stifled.

Also, the strict division between commercial and noncommercial speech, providing the same level of protection for all commercial speech, ignores the shrinking gap between commercial and noncommercial speech. She called for a more nuanced approach to commercial speech, allowing an intermediate category of protected speech where commercial and noncommercial elements are intertwined. At the very least, she argued, strict liability for false statements is too high a standard for commercial speakers. "Making Nike strictly liable for any false or misleading representations about its labor practices stifles Nike's ability to participate in a public debate *initiated by others*." Even under the Supreme Court's existing commercial speech doctrine, Brown would categorize Nike's speech as noncommercial. Nike's commercial speech was inextricably intertwined with its noncommercial speech. In *Riley v National Federation of Blind*, 487 U.S. 781 (1988), the Supreme Court held that where commercial and noncommercial elements are "inextricably intertwined," the court should apply the test for fully protected speech. While that case was in the context of a charity, Justice Brown argued the same principle is especially applicable where Nike's labor practices were themselves the public issue. It would be impossible for Nike to speak on the issue without referring to its own practices. This is very far from traditionally less protected commercial speech, which merely proposes a commercial transaction.

The MAJORITY responded with criticism of Justice Brown's methodology and rhetoric: "Sprinkled with references to a series of children's books about wizardry and sorcery, Justice Brown's dissent itself tries to find the magic formula or incantation that will transform a business enterprise's factual representations in defense of its own products and profits into noncommercial speech exempt from our state's consumer protection laws. As we have explained, however, such representations, when aimed at potential buyers for the purpose of maintaining sales and profits, may be regulated to eliminate false and misleading statements because they are readily verifiable by the speaker and because regulation is unlikely to deter truthful and nonmisleading speech."

Case History

Certiorari was granted by the Supreme Court of the United States. 123 S.Ct. 817 (Jan 10, 2003). Oral argument took place on April 23, 2003. As of the time of publication of this report, no decision had been issued.

Kasler v. Lockyer
23 Cal.4th 472
June 29, 2000

Case Summary

Peter Alan Kasler, on behalf of California taxpayers, brought a lawsuit seeking to stop enforcement of the Assault Weapons Control Act (AWCA). The AWCA authorized the suspension of manufacture, sale, distribution transportation, giving or lending of firearms found to be within the statutory definition of an assault weapon. The plaintiffs made several state and federal claims. Justice Brown, writing for the MAJORITY, held that the AWCA did not violate state or federal equal protection clauses for failure to include other weapons that were identical to or indistinguishable from the weapons listed in the AWCA. Justice Brown also CONCURRED separately to express her view that although *Warden v. State Bar*, 21 Cal.4th 628 (1999), compels the court to reject the appellants' equal protection claim, she would reach the same conclusion based on the factual circumstances of this case independent of *Warden*.

In reaching her conclusion, Justice Brown notes rational basis review is the appropriate standard of review for legislation that does not infringe on a fundamental right is rational basis scrutiny. She notes that the underinclusiveness of the group of weapons regulated by the AWCA was “not an attempt to exploit a despised minority,” but an attempt to stem gun violence without arousing the “political enmity of a large and effective constituency (i.e. gun owners).” Justice Brown saw no reason to overturn the legislative outcome produced by the political process.

Case History

Certiorari denied by the Supreme Court of the United States. 531 U.S. 1149.

Loder v. City of Glendale
14 Cal.4th 846
Jan. 6, 1997

Case Summary

Lorraine Loder, a taxpayer and city resident, brought an action challenging on statutory and constitutional grounds the validity of city's prepromotional and preemployment drug testing program. Plaintiff argued that the city's drug testing violated the provisions of a California statute, the Confidentiality of Medical Information Act, the Fourth Amendment's prohibition against unreasonable searches and seizures, and the right to privacy. The MAJORITY opinion held that the "across-the-board" drug testing was invalid in the prepromotional context but not in the preemployment context.

Justice Brown joined Justice Chin's CONCURRING and DISSENTING opinion where he indicated he would find the entire drug testing program was valid and that there was a not a supportable legal distinction between the preemployment and prepromotional programs (the same justifications/arguments that support one go to support the other).

However, Justice Brown CONCURRED and DISSENTED to express that she thought that the whole debate had been framed improperly by relying on an ambiguous balancing test (*Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)), which she noted is "not a standard; it is a conundrum." She supports the creation of a "clear, concise rule." In this case, the rule should be based on people's consent and the government's right to impose restrictions on the exercise of a given activity that it has the power to completely ban. *Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 378 (1986). She believes that the entire drug testing scheme was valid on statutory and constitutional grounds. She states that there is a difference between government as sovereign and government as employer and that the government as employer should not be treated any differently than a private employer, which has full reign to perform the drug testing.

Case History

Certiorari denied by the Supreme Court of the United States. 522 U.S. 807.

Mountain Lion Found., et al. v. Fish & Game Comm'n
16 Cal.4th 105
Jul. 31, 1997

Case Summary

Mountain Lion sought to set aside the Fish and Game Commission's decision to remove the Mojave ground squirrel from the threatened species list under the California Endangered Species Act (CESA). Mountain Lion asserted that the Commission's decision violated the procedural requirements of the California Environmental Quality Act (CEQA) and was, therefore, invalid. The Commission appealed the Court of Appeals decision in favor of Mountain Lion on two grounds: 1) CESA's requirements conflicted with those of CEQA, thus exempting the delisting action from CEQA requirements, 2) the Commission qualifies for a statutory exemption from CEQA Environmental Impact Report (EIR) requirements when it follows its approved regulatory procedures.

Justice Brown, writing for the MAJORITY, held the delisting action invalid. She held that 1) the CESA and CEQA requirements were not in conflict and the Commission's delisting decisions were subject to CEQA procedural requirements, 2) the Commission's action was exempt from the EIR requirements under CEQA as long as the Commission followed approved regulatory procedures, and 3) the Commission failed to adhere to such approved procedures in this case. Justice Brown relied on the text of the statutes to derive the administrative requirements and legislative intent that guide the statutes' application and that distinguish the California environmental laws from their national counterparts.

Case History

There is no subsequent case history.

Pavlovich v. Superior Court
29 Cal.4th 262
November 25, 2002

Case Summary

DVD Copy Control Association (DVD CCA), incorporated in Delaware with its principal place of business in California, sued Matthew Pavlovich, a resident of Texas, for misappropriation of trade secrets. Pavlovich founded LiVid video project while studying in Indiana. In October 1999, LiVid's Web site posted the code for a program that allows the user to circumvent technology that prevents the copying of DVD's containing motion pictures. LiVid's Web site "only provided information; it did not solicit or transact any business and permitted no interactive exchange of information between its operators and visitors."

Justice Brown, writing for the MAJORITY, held that the California court did not have personal jurisdiction over a defendant based on a posting on an Internet Web site. She found that a court may exercise specific jurisdiction over a nonresident defendant if three requirements are met:

- 1) "the defendant has purposefully availed himself of forum benefits"
- 2) "the controversy is related to or arises out of the defendant's contacts with the forum"
- 3) "the assertion of personal jurisdiction would comport with 'fair play and substantial justice'"

In reaching her conclusion, she found that the first requirement is not satisfied. She relied on the "effects test" for determining purposeful availment that the Supreme Court established in *Calder v. Jones*, 465 U.S. 783 (1984). She agreed with the holding in virtually every jurisdiction that the *Calder* effects test requires "intentional conduct *expressly aimed at or targeting* the forum state in addition to the defendant's knowledge that his intentional conduct would cause harm in the forum." Given that Pavlovich did not know that DVD CCA was the company whose DVDs would be affected and that his sole contact with California is LiVid's web site posting, Justice Brown found that the "record failed to show that Pavlovich expressly aimed his tortious conduct at or intentionally targeted California."

Even though Pavlovich knew that the program on the Web site might adversely affect the motion picture, computer and consumer electronics industries in California, foreseeability is not enough to establish jurisdiction. No courts have "exercised jurisdiction under the effects test based solely on the defendant's knowledge of industry-wide effects in the forum state." "[K]nowledge *alone* is insufficient to establish express aiming at the forum state as required by the effects test."

Case History

There is no subsequent case history.

People ex rel. Gallo v. Acuna
14 Cal.4th 1090
Jan. 30, 1997

Case Summary

The City Attorney for the City of San Jose brought suit to affirm two provisions of a preliminary injunction entered by the Superior Court of Santa Clara County against individual members of a criminal street gang. The declarations submitted by the City in support of the injunction depict the four-block community of Rocksprings as “an urban war zone. . . [which is] claimed as the turf of a gang.” Gang members congregate in the neighborhood at all hours of the day and night, drinking and doing drugs openly, creating much noise, and committing a range of crimes including murder, assault, and battery.

The two provisions of the preliminary injunction at issue in the case were paragraphs (a) and (k). Paragraph (a) enjoined gang members from “[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view with any . . . known [gang] member.” Paragraph (k) enjoined gang members from “confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to ‘Rocksprings’, or any other persons who are known to have complained about gang activities.”

Justice Brown, writing for the MAJORITY, noted that “The people of this community are prisoners in their own homes. Violence and the threat of violence are constant.” She held that the two challenged provisions fell within the equitable power of the Superior Court to abate a public nuisance and did not violate rights guaranteed by the U.S. Constitution. She based this ruling on a number of conclusions: (1) The acts of the gang members constituted a public nuisance in that they were substantial and unreasonable interferences with the exercise of rights common to the public. (2) Paragraph (a) did not violate the First Amendment’s guarantee of associational interests because a gang is “a loosely structured, elective form of social association.” (3) Paragraph (a) was not “overbroad” under the First Amendment since the injunction only applied to the speech of certain named defendants, not to anyone else. (4) Paragraphs (a) and (k) were not “void-for-vagueness” once the purposes of the injunction are considered and the words are read in that context. (5) Based on its express language, the Street Terrorism Enforcement and Prevention Act “is not the exclusive remedy for abating gang activity constituting a public nuisance,” and it was perfectly appropriate for the City to seek equitable relief under general public nuisance statutes. (6) The two challenged provisions “burden no more speech than necessary to serve a significant government interest.”

Three justices concurred in Justice Brown’s opinion. Two justices each filed separate opinions concurring in part and dissenting in part. One justice filed a dissenting opinion.

Case History

Certiorari was denied by the Supreme Court of the United States. 521 U.S. 1121.

People v. McKay
27 Cal.4th 601
Mar. 4, 2002

Case Summary

Conrad McKay was stopped by police for riding a bicycle the wrong way down a sidewalk in violation of Vehicle Code § 21650.1. The police officer took him into custody under Vehicle Code § 40302(a) for “failing to produce a drivers license” or other identification upon request. During a search conducted after this custodial arrest, the police officer found a quantity of methamphetamine in McKay’s sock. He pleaded guilty to possession charges after the denial of his Fourth Amendment suppression motion. That denial was appealed to the appellate court, which affirmed the trial court’s holding.

Justice Baxter, writing for the MAJORITY, affirmed the denial of exclusion motion. According to US Supreme Court’s decision in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), custodial arrests for “fine only” offenses do not violate the Fourth Amendment. He specifically held, in accordance with most circuits (including the Ninth), that the validity of a search under the Fourth Amendment does not depend on its compliance with state law. Alternatively, the court held that even if state law were a part of the inquiry, the arrest affected in this case was valid under section 40302(a). In a footnote Justice Baxter made specific reference to Justice Brown’s dissent, noting that although she finds the US Supreme Court’s Fourth Amendment jurisprudence as “unfortunate,” the California Supreme Court is bound to follow it.

Justice Brown offered both a concurrence and a dissent in the case. Her CONCURRENCE agreed with the holding that if an officer really has no way of establishing the offender’s identity – a proposition she calls “unlikely” – then “believing or disbelieving the offender is largely in the officer's discretion.”

The DISSENTING portions of Justice Brown’s opinion focused mainly on the modern Fourth Amendment jurisprudence of the US Supreme Court. She criticized the Court’s doctrine for “[u]nfortunately” giving a “new vigor to petty rummagers.” She contended that Scalia’s unanimous opinion in *Whren v. United States*, 517 U.S. 806 (1996), “essentially legitimized pretextual stops – the sine qua non of unjustified and arbitrary law enforcement.” She asserted that the Court’s probable cause requirement “is so diluted it ceases to matter,” since an “officer need only point to a minor traffic violation to negate a claim of unfettered arbitrariness.” Finally, Brown lamented that for the “false peace” of “insisting probable cause and reasonableness are synonymous,” “we pay too high a price.” She noted the irony that “the severe sanction of the exclusionary rule has not discouraged unreasonable searches; it has, instead, shrunk the constitutional protection against them.”

The association of reasonableness and cause is troubling to Justice Brown since “there is an undeniable correlation between law enforcement stop-and-search practices and the racial characteristics of the driver.” While she conceded that in this case she does not know Mr. McKay’s ethnic background, she noted that riding the wrong way on a sidewalk would not lead to arrest unless the person appeared “like he did not belong” there. “That is the problem,” she asserted, “And it matters.”

Case History

There is no subsequent case history.

People v. Reyes
19 Cal.4th 743
Sept. 21, 1998

Case Summary

Defendant Rudolfo Reyes was released on parole after one prior felony conviction. The parole agreement signed by Reyes included the following standard search condition: “[Y]ou and your residence and any property under your control may be searched without a warrant by an agent of the Department of Corrections or any law enforcement officer.” After receiving an anonymous telephone tip, Defendant’s parole officer contacted the Woodland Police Department and requested that they evaluate the defendant to determine whether he was under the influence of any drugs. After witnessing Defendant coming out of a shed in his backyard, they searched the shed and found a small amount of methamphetamine. Defendant filed a motion to suppress this evidence. The motion was denied by the trial court, which found that the evidence available to the parole officer was more than sufficient to satisfy the reasonable suspicion standard set forth in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). The Court of Appeal reversed his conviction, finding that the search of his backyard was not supported by a reasonable suspicion. The Supreme Court of California granted the Attorney General’s petition for review to consider whether the reasonable suspicion standard is still required for a lawful parole search based on a search condition.

Justice Brown, writing for the MAJORITY, found that the reasonable suspicion standard does not apply to searches pursuant to parole conditions. In reaching this conclusion, Justice Brown weighed society’s interest both in assuring the parolee corrects his behavior and in protecting its citizens against dangerous criminals against the rights of the individual. She ultimately found that a search pursuant to a parole condition, without reasonable suspicion, does not intrude on a reasonable expectation of privacy, which she defined as an expectation that society is willing to recognize as legitimate. Justice Brown goes on to state that threat of suspicionless search is fully consistent with the deterrent purpose of the search condition of the parole agreement. Furthermore, she argued that because the defendant’s own conduct (the crime which results in conviction) created the need for government intervention, any reasonable expectation is diminished. Justice Brown also found that refusal to apply this principle in subsequent criminal proceedings does not violate due process or ex post facto principles.

Case History

Certiorari denied by the Supreme Court of the United States. 526 U.S. 1092.

Stevenson v. Superior Court
16 Cal.4th 880
Aug. 27, 1997

Case Summary

Plaintiff Joan Stevenson brought an action for wrongful termination in violation of public policy against age discrimination when she was not reinstated at Huntington Memorial Hospital after disability leave. A California statute, the Fair Employment and Housing Act (FEHA), prohibits employers from discriminating against workers over 40 because of their age. FEHA includes some administrative remedies, but does not preempt any common law tort claims.

The MAJORITY held that the plaintiff could bring a tort claim for wrongful discharge in violation of public policy against age discrimination because it satisfied the criteria for wrongful discharge in violation of public policy: it was articulated by statute (in FEHA), it benefited society at large, it was “substantial” and “fundamental,” and it was well-established at the time of the discharge.

Justice Brown, DISSENTING, would have declined to extend the common law tort of wrongful discharge in violation of public policy to age discrimination. She argued that a common law claim would duplicate the FEHA-based administrative remedies already available, thereby defeating the goal of an alternative administrative remedy, which is to resolve disputes promptly and efficiently. She noted that the FEHA system gives plaintiffs ample opportunity to pursue a judicial remedy, only first requiring an attempt at settlement. Allowing an employee to seek a judicial remedy without administrative review forecloses any likelihood of settlement, which is one of the legislative goals of the system. Justice Brown also noted that many other jurisdictions have limited the common law wrongful discharge in violation of public policy to statutes that do not create a comprehensive remedial scheme.

Case History

There is no subsequent case history.

Academic Publication

The Quality of Mercy
Janice Rogers Brown
UCLA Law Review
December, 1992
40 UCLA L. REV 327 (1992)

Summary

This law review article is a discussion of the clemency process. Brown believes that the clemency process should be very distinct from the judicial process, i.e. it should not have as many rigid standards and processes. The article analyzes California's Governor Pete Wilson's decision to hear condemned murderer Robert Alton Harris's plea for mercy. Brown believes there should be a strong distinction between the clemency process and the judicial process because the clemency process is based more on the idea of mercy, and mercy cannot be quantified or institutionalized. She feels that clemency should be granted not because of some flaw in the law but because the conscience of the executive tells him/her to do so.

In justifying her belief that these two processes should be very separate, Brown specifically states that this article represents her personal view. She explains that there are enough safeguards in the judicial process, and that the clemency process should not be viewed as the end of this process. It is a separate process that is 'somewhat erratic' and allows for a type of discretion that is not available in trial and judicial procedure. While this may present an opportunity for abuse, Brown does not believe that making the clemency process more structured is necessarily the antidote to that problem. By keeping it as an open process, the decision maker can rely on subjective as well as the objective record. Such a decision, as Brown states, is what mercy is all about.

JUDICIAL REVIEW MEMBERSHIP

EXECUTIVE BOARD

HEIDI BROOKS – NATIONAL LIAISON

MIKE ABATE – SUBSTANTIVE EDITOR

RENEE BELTRANENA – PRODUCTION EDITOR

LAURA KABLER – ADMINISTRATOR

CONTRIBUTING MEMBERS

SUZANNE BRATIS

ERICA FARMER

STEPHANIE FINKELSTEIN

LINDSAY GORDON

KELLY HORVATH

ROSALIA IBARROLA

NICK JABBOUR

JENNA KLATELL

JON LANGE

BRIAN LINK

ALISA MALL

MATT MARMOLEJO

MELVIN PRIESTER

JESS RASSLER

LEE REEVES

SEEMA SHAH

RYAN SPIEGEL

CHRISTOPHER VIAPIANO

**THANKS TO THE AMERICAN CONSTITUTION SOCIETY FOR THEIR SUPPORT OF THE
JUDICIAL REVIEW PROJECT AT STANFORD LAW SCHOOL.**