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# Recent Developments: Michigan Dep't. of State Police v. Sitz: State's Use of Sobriety Checkpoints Does Not Violate the Fourth Amendment

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subject to a different standard of review than classifications prescribed by state and local governments. *Id.* Thus, applying the mid-level standard of scrutiny proposed by *Fullilove*, the Court held the FCC minority ownership policies constitutional. *Id.* at 3008-09.

In upholding the FCC's minority policy, the Court held that promoting minority ownership of broadcasting stations served an important governmental objective. *Id.* The Court agreed with the congressional and FCC findings that minority preference policies promoted diversity in programming. *Id.* The role of the government, the Court reasoned, is to promote the dissemination of diverse information. *Id.* at 3010. The Court determined that the process of disseminating diverse information, through programming, was essential to the public welfare, and thus an important governmental objective.

After finding FCC preference policies served an important governmental objective, the Court determined that the FCC's policies were substantially related to the achievement of the government's interest. *Id.* In reviewing the nexus between minority ownership and programming diversity, the Court deferred to the fact-finding abilities of Congress and the FCC's expertise and noted that Congress made clear its view that minority ownership policies advanced the goal of diverse programming. The Court further noted Congress' continually expressed support of diversity in programming through minority ownership. *Id.* at 3012-13.

The Court found race-based classification may be permissible in some instances. In supporting permissible benign discrimination, the Court analogized diversity in programming and the fair cross-section requirement of the sixth amendment, which forbids excluding groups from a jury venire on the basis of race or sex. In addition, the Court compared *Metro Broadcasting* with voting rights cases that permit benign discrimination to involve minorities in the political process. *Id.* at 3019. Similarly, the Court reasoned, benign discrimination is permissible to promote programming diversity. *Id.*

Next, the Court rejected Shurberg's final contention that the minority distress policy operated to exclude nonminorities from consideration in the trans-

fer of certain stations, and thus unduly burdens nonminorities. *Id.* at 3025. As the majority noted, the policy could only be invoked at the Commission's discretion and distress sales only involved a small number of broadcast licenses. Furthermore, the power to invoke the distress sale was in the hands of the nonminority station owner who may choose to seek renewal by attending an FCC hearing, rather than sell his license to a minority group. This, the Court found, decreased the chance that nonminorities would suffer an undue burden. *Id.* at 3027.

In a lengthy dissent, Justice O'Connor, joined by the Chief Justice, Justice Scalia, and Justice Kennedy, contended that the constitution's guarantee of equal protection bound the federal and state governments equally, and that no lower level of scrutiny should be applied for federal action. *Id.* at 3030 (O'Connor, J., dissenting). Justice O'Connor opined that the guarantee of equal protection extended to each citizen, regardless of race. *Id.* at 3032 (O'Connor, J., dissenting). Neither the federal government nor the states may deny any person equal protection of the laws and governmental distinctions, she contended, among citizens based on race or ethnicity would exact costs and carry substantial dangers. *Id.* (O'Connor, J., dissenting). Justice O'Connor believed the FCC policies should have been evaluated under strict scrutiny and that under such analysis, the FCC policies would fail. *Id.* at 3044.

*Metro Broadcasting* is significant as it illustrates the Supreme Court's implementation of an intermediate level of review for federal race-conscious affirmative action policies. While state programs continue to receive a strict scrutiny standard of review, federal affirmative action programs with the approval of Congress, need only survive the mid-level test for constitutionality. *Metro Broadcasting* also signifies that *Fullilove* remains good law.

— Daryl D. Jones

## *Michigan Dep't of State Police v. Sitz:* STATE'S USE OF SOBRIETY CHECKPOINTS DOES NOT VIOLATE THE FOURTH AMENDMENT

In *Michigan Department of State Police v. Sitz*, 110 S. Ct. 2481 (1990), the United States Supreme Court held that state highway sobriety checkpoints do not violate the Fourth or Fourteenth Amendments to the United States Constitution. The Court ruled that the state's interest in preventing drunk driving outweighed any intrusion upon drivers.

The Michigan Department of State Police established a sobriety checkpoint program in 1986. Under specific guidelines, sobriety checkpoints would be set up at selected sites along state roads. Vehicles passing through the checkpoints would be stopped, and their drivers would be briefly examined for signs of intoxication. Drivers displaying signs of alcohol impairment would be directed to a location out of the traffic flow where an officer would check the driver's license and car registration and, if warranted, conduct further sobriety tests. An arrest would be made if the test results and observations by the police suggested that the driver was intoxicated. *Id.* at 2484. At the only checkpoint operated under the program, two of the drivers stopped were arrested for driving under the influence of alcohol. *Id.*

Respondents, the day before the operation of the first checkpoint, filed a complaint seeking relief from potential subjection to the checkpoints. The trial court applied the balancing test set forth in *Brown v. Texas*, 443 U.S. 47 (1979), to decide the program's constitutionality. This three prong test involved "balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints." *Sitz*, 110 S. Ct. at 2484 (citing *Brown*, 433 U.S. at 50-51). After applying the test, the trial court determined that the program violated the fourth amendment. *Id.*

Affirming the decision, the Michigan Court of Appeals stated that the trial court was correct in its findings that the state had "a 'grave and legitimate' interest in curbing drunken driving; [but] that sobriety checkpoint programs are

generally 'ineffective' and, therefore, do not significantly further that interest; and that the checkpoints' 'subjective intrusion' on individual liberties is substantial." *Id.* at 2484-85.

At the Supreme Court, respondents argued that a probable cause or reasonable suspicion analysis was required, rather than the *Brown* balancing test. *Id.* at 2485. Relying on *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), they contended that there must be a showing of some special governmental need beyond the normal need for criminal law enforcement before a balancing analysis is appropriate. *Sitz*, 110 S. Ct. at 2485. Respondents argued that because petitioners demonstrated no special need, sobriety checkpoints warranted some level of individualized suspicion. *Id.*

The Court, however, disagreed, stating that *Von Raab* did not repudiate any prior cases dealing with police stops of drivers on public highways. *Id.* The Court ruled that the relevant authorities were *Brown* and *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976), which also utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens. *Sitz*, 110 S. Ct. at 2485. The Court then reiterated its holding that a fourth amendment "seizure" occurred when a vehicle was stopped at a checkpoint, and thus, the central issue was whether such seizures were "reasonable." *Id.*

Applying the first prong of the *Brown* balancing test, the Court emphasized the magnitude of the drunken driving problem and the states' interest in eradicating it. *Id.* The Court cited the statistical evidence, which showed that drunk drivers "cause an annual death toll of over 25,000, nearly one million personal injuries, and over five billion dollars in property damage." *Id.* at 2485-86 (quoting 4 W. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 10.8(d) (2d ed. 1987)).

The Court then examined the second prong of the *Brown* balancing test, that of "the measure of the intrusion on motorists stopped briefly at sobriety checkpoints." *Id.* at 2486. Comparing this intrusion to the one upheld in *Martinez-Fuerte*, the Court found "virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints. . . ." *Id.* Thus, the Court agreed

with the Michigan Court of Appeals' finding that the "objective" intrusion, measured by the duration of the seizure and the intensity of the investigation, was minimal. *Id.*

The Court, however, disagreed with that court's conclusion that the "subjective intrusion" on drivers, because of the potential for generating fear and surprise, was substantial and unreasonable. *Id.* Comparing checkpoint stops to roving patrol stops, the Court found that the subjective intrusion of checkpoint stops was considerably less, reasoning that they were selected pursuant to specific guidelines with uniformed police officers stopping every approaching vehicle. *Id.* at 2486-87. The intrusion resulting from the brief stop at the sobriety checkpoint, the Court stated, was "for constitutional purposes indistinguishable from the checkpoint stops. . . upheld in *Martinez-Fuerte*." *Id.* at 2487. Consequently, the Court held that the "subjective intrusion" on motorists was not unreasonable. *Id.*

Lastly, the Court considered the "effectiveness" prong of the *Brown* balancing test, measuring the "degree to which the seizure advances the public interest." *Id.* (quoting *Brown*, 443 U.S. at 51). The Michigan Court of Appeals, relying on *Martinez-Fuerte* and *Delaware v. Prouse*, 440 U.S. 648 (1979), found that the program failed this part of the test. *Sitz*, 110 S. Ct. at 2487. In *Prouse*, the Court struck down a system of random stops made by Delaware Highway Patrol officers in an effort to apprehend unlicensed drivers and unsafe vehicles. In that case, the Court found no empirical evidence which would indicate that such stops were an effective means of accomplishing that purpose and promoting road-way safety. *Id.*

In this case, however, the Court found that the empirical data supported a finding that the program was effective in advancing the state's interest in preventing drunken driving. *Id.* The Court looked particularly close at the statistics in the record, which showed that approximately 1.5 percent of the drivers passing through the checkpoint were arrested for alcohol impairment, and that sobriety checkpoints utilized by other states resulted in arrests of approximately 1 percent of all drivers stopped. *Id.* at 2487-88. As the ratio found constitutional in *Martinez-Fuerte* was only 0.5

percent, the Court found no justification for a different conclusion in this case. *Id.* at 2488.

Justice Brennan, in dissent, disagreed with the majority's holding that "no level of suspicion [was] necessary before the police may stop a car for the purpose of preventing drunken driving." *Id.* at 2489 (Brennan, J., dissenting). He stated that even though a majority of society would probably be willing to suffer the minimal intrusion of a sobriety checkpoint, the government should still be required to prove that it had a reasonable suspicion for such a seizure. *Id.* at 2490.

Justice Stevens, in dissent, believed that the Court misapplied the balancing test of *Brown* by undervaluing the citizen's freedom from random, unannounced, investigatory seizures. *Id.* at 2492 (Stevens, J., dissenting). He concluded that the majority mistakenly assumed that there was "virtually no difference" between a routine stop at a fixed checkpoint and a surprise stop at a sobriety checkpoint. *Id.* Justice Stevens was also of the opinion that sobriety checkpoints were more intrusive and generated more fear and surprise than fixed checkpoints. *Id.* at 2493-94. Lastly, he noted that the majority's analysis of the "effectiveness" prong did not represent an increase over the number of arrests which would have been made using conventional patrols. *Id.* at 2495.

This decision is significant because of the potential effect on other states. The Supreme Court held that the intrusion of sobriety checkpoints upon individual liberties was minimal. Therefore, a state's use of such checkpoints to prevent drunken driving may be employed if the checkpoints show some degree of effectiveness. Thus, the Supreme Court ruled that sobriety checkpoints were considered a reasonable seizure as required by the fourth amendment.

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