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Supreme Court Review

Charles F. Williams

A year ago, the sheer number of 5-4 decisions garnered the most attention with regard to the 2006-07 Supreme Court term. Twenty-four of that term's 72 cases were decided by this narrowest of margins.

By contrast, the 2007–08 term was perhaps most remarkable in the unexpected coalitions of justices that decided the most controversial cases. During the previous term, many of these controversial cases had come down to a "conservative" bloc (Chief Justice John Roberts and Justices Alito, Scalia, and Thomas) vs. "liberal" bloc (Justices Breyer, Ginsburg, Souter, and Stevens) scenario that left Justice Kennedy as the sole swing vote. However, the most recent term featured a number of unexpected bedfellows, sometimes even in those cases that were most divisive.

Voter ID Laws

For example, it was the so-called liberal bloc's Justice Stevens who wrote the majority opinion in *Crawford v. Marion County Election Board* rejecting a constitutional challenge to Indiana's voter ID law.[1] That suit challenged a state law requiring citizens who seek to vote at their designated polling place to present a driver's license or other government-issued photo identification. Although the law's supporters say the rules are needed to deter voter fraud, skeptics note that there have never been recorded instances of in-person voter impersonation in Indiana. They contend that the law is purely a partisan electoral gimmick—"a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic," as a Seventh Circuit judge wrote in dissenting from the court of appeals' decision upholding the law.[2]

While most adults either already possess a valid photo ID or can easily obtain one, the plaintiffs in the case pointed out that some groups—specifically "the poor, the old, and the immobile"—will face economic and logistical hurdles in obtaining this documentation, which is likely to discourage them from voting. Thus, they reasoned, the law unconstitutionally and disproportionately burdens the right to vote, and should be struck down.

But Justice Stevens, agreeing with the arguments of the Indiana Republican party, accepted that the state's four justifications for the law—modernizing election procedures, combating voter fraud, addressing the consequences of the state's bloated voter rolls, and protecting public confidence in the integrity of the electoral process—outweighed the burden of requiring these voters to obtain a valid photo ID. Even though *Crawford* easily could have come down along ideological lines, it generated an unusual 6-member majority. Only three justices dissented: Souter, Ginsburg and Breyer.

Justice Souter (joined by Justice Ginsburg) reasoned in his dissent that "Indiana's law does no more than assure that any in-person voter fraud will take place with fake IDs." He critcized the state's requirements that even people without cars must travel to a motor vehicle registry to get their IDs before they vote or else get to their county seats within 10 days after the election.

In Justice Souter's opinion, the Indiana requirements

> translate into unjustified economic burdens uncomfortably close to the outright $1.50 fee we struck down 42 years ago [in *Harper v. Virginia Bd. Of Elections*]. Like that fee, the onus of the Indiana law is illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer residents from exercising the franchise.[3]

Harper is the Court's famous 1966 decision striking down Virginia's poll tax, which conditioned the right to vote on the payment of $1.50. The state had argued that it had an interest in promoting civic responsibility by weeding out those voters who did not care enough about public affairs to pay a small sum for the privilege of voting, but the majority ruled that a state "violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."[4]

Other 5-4 Decisions

More unusual alliances surfaced in other 5-4 decisions. In *Irizarry v. United States* (holding that a court need not give notice when it contemplates imposing a sentence above the maximum sentence provided by the Federal Sentencing guidelines), for example, Justice Stevens again joined the conservative bloc while Justice Kennedy dissented.[5] In *Ali v. Federal Bureau of Prisons* (holding that the Bureau of Prisons is exempt from claims under the Federal Torts Claim Act) it was Justice

Ginsburg who joined the Chief Justice and Justices Scalia, Thomas, and Alito to make the five-justice majority (Justices Stevens and Kennedy both joined the dissenters).[6] Justice Souter got into the act in *United States v. Santos* (a case interpreting the federal money-laundering statute) when he joined Justices Stevens, Scalia, Thomas, and Ginsburg to limit the federal law's reach to transactions using criminal profits rather than criminal receipts.[7]

Gun Rights

Even when the familiar 5-4 lineup emerged last term, the result seldom felt like the final word. The Second Amendment gun rights case, *District of Columbia v. Heller*, is a prime example.[8] The gun law at issue in *Heller* was the toughest in the nation. It banned almost all private handguns in the District of Columbia, and it required that all firearms be kept in an inoperable condition.

While proponents both for and against a constitutional right to own handguns contended that the language of the Second Amendment "plainly" supported their opposing interpretations, it is in fact one of the more puzzling and awkward sentences in the Bill of Rights: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[9] So is the Amendment's reference to a well-regulated militia meant to limit this constitutional right to only members of official state militias? Or was that prefatory, "militia clause" not a limitation at all but simply the identification of a civic purpose behind the Amendment's protection of the right of individuals—"the people"— to keep firearms for their own self-defense or other private use?

Although the majority struck down both the handgun ban and the safe-storage requirement on Second Amendment grounds, the decision has left the intellectual supporters of the "Originalist" theory of constitutional interpretation in a bit of disarray. Justice Scalia and other judges and scholars who have endorsed originalism generally believe, as Robert Bork, has said, that "If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended."

In *Heller*, however, both the majority and the dissent employed originalism. Writing for the majority, Justice Scalia examined the history of the Second Amendment and determined that the framer's intent was to "protect an individual's right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." Under this view, while the drafters meant to convey that maintaining an organized militia (or its closest modern equivalent, the National Guard) was one of the lawful purposes contemplated by the Amendment, they did not mean to say that this was the only lawful purpose.

Writing in dissent, Justice Stevens undertook an equally rigorous investigation of the framers' original intent—and came to the exact opposite conclusion. In his view, the Second Amendment was historically intended to protect only the right to possess and carry a firearm in connection with militia service. Supreme Court commentators accustomed to being allies in advocating originalist methods of interpretation have found themselves similarly split by this case.[10]

Perhaps unintentionally adding to the confusion, Justice Scalia's opinion went on to endorse several other kinds of gun control (disarming of convicted felons, enforcement of "gun-free zones," and bans on short-barreled shotguns) that were not at issue in the case, comments that are certain to help fuel the future litigation that will soon be taking place around the nation as gun owners and local governments try to clarify exactly which gun restrictions remain viable after the Supreme Court's ruling. Another issue being raised by some commentators: does the Second Amendment apply to the states at all (by virtue of being "incorporated" into the Fourteenth Amendment's due process clause)? Most commentators assume that (like virtually every other right in the Bill of Rights) it does, but the Court has never explicitly ruled on the question.

The Facial versus As-Applied Distinction

In the 2007-08 term, the justices seemed to be moving towards a greater consensus, on paper at least, as demonstrated by an increasing number of 6- or 7-justice majorities. However, as Pepperdine law professor Douglas Kmiec has pointed out, the Court's approach to deciding these cases in general terms may well mask the reality of sharper divisions amongst the justices when it comes to specifics.[11] The approach the Court took in a number of cases when considering a constitutional challenge to a statute was to find the statute to be "facially valid" (that is, not necessarily unconstitutional in every instance), while still leaving open the possibility of a closer review in a later "as-applied" challenge in which future plaintiffs may yet contend that, although the statute may not be unconstitutional in every instance, it is unconstitutional as applied to them.

Cases employing this facial/as-applied distinction to muster a majority last term included *Washington State Grange v. Washington State Republican Party,* in which the Court rejected the claim that Washington's Initiative 872 (allowing candidates to designate their party "preference" and providing for a primary in which only the top two candidates advance to the general election regardless of party preference) violates the political parties' First Amendment right of association.[12] Concluding that it was faced with a facial challenge to the statute, the majority, by a 7-2 vote, held that there were several possible ways that Washington could proceed that would make the ballot constitutionally acceptable.

Similarly, in *United States v. Williams* the Court for the first time upheld a congressional effort to combat sexually explicit material on the Internet that exploits children.[13] Under the law, anyone

who deliberately tries to get someone else to believe that he is offering to provide child pornography (regardless of whether his purported child pornography is real or fake, and regardless of whether he is seeking compensation for it) is subject to a mandatory five years in prison. Likewise, anyone who intentionally tries to solicit child pornography is also liable to spend five years in prison.

Writing for another 7-2 majority, Justice Scalia concluded that the law was not facially invalid under the First Amendment because its intent requirement would prevent it from restricting a substantial amount of speech. And he rejected the reasoning of the Eleventh Circuit, which had worried that instances could be imagined in which it might be difficult to know what the defendant's true belief or intent was. According to Justice Scalia, "The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt."

Rep. Julia Carson, left (D-Ind.), looks over a sample ballot with poll workers during the primary election in Indianapolis, May 2, 2006. Indiana's new voter-ID law ran into a snag moments after the polls opened when Carson's congressional identification created confusion. Indiana's new voter-ID law requires voters to have a federal or state issued photo identification with an expiration date, which the congressional ID lacked. (AP Photo/Michael Conroy)

Baze v. Rees was a third 7-2 case decided on the basis of the facial versus as-applied distinction.[14] Here, especially, the lopsided vote may not reflect the depth and breadth of disagreement among the justices. *Baze* effectively gave the green light to the dozens of executions that have been put on hold in states across the nation. Writing for the Court, Chief Justice Roberts rejected the arguments pressed by two Kentucky death-row inmates who contended that the Eighth Amendment bans the lethal injection methods used by Kentucky. The inmates based their argument on evidence that Kentucky's methods pose a greater risk of causing pain and suffering than other possible methods of killing them. They acknowledged that the lethal injection procedure would result in an essentially pain-free death if implemented as intended and without any errors. But according to the inmates, the risk of significant pain comes from the fact that the Kentucky procedures are subject to possible human error.

Kentucky's lethal-injection procedure calls for the use of three drugs: first a fast-acting barbiturate (sodium thiopental) designed to render the prisoner unconscious; then a neuromuscular blocking agent or paralytic (pancuronium bromide) "that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration"; and lastly a third drug designed to cause cardiac arrest (potassium chloride). Any of several possible errors in the administration of the first barbiturate could render an execution extremely painful, although (because of the paralyzing effect of the second drug) the dying inmate wouldn't be able to express that pain.

The inmates recommended the state be ordered to consider adopting a "one-drug protocol" and "additional monitoring by trained personnel to ensure that the first dose of sodium thiopental has been adequately delivered."

Chief Justice Roberts concluded, however, that "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." That approach, the chief justice reasoned, would transform courts into boards of inquiry charged with determining "best practices" for executions, "with each ruling supplanted by another round of litigation touting a new and improved methodology." That there is a chance the law's procedures might be applied improperly is not enough for the Court to declare the statute facially unconstitutional.

An Unusual Mistake

Another death penalty case, *Kennedy v. Louisiana*, reminded us that even Supreme Court justices and top lawyers can make mistakes.[15] The case, involving the alleged rape of an 8-year-old girl by a 300-pound man, asked whether, as Justice Scalia put it, "a permissible death penalty can be imposed for this crime" of violent child rape. The defendant's attorney stressed that there is a "long-standing national consensus" against authorizing the death penalty for rape.

The Court agreed, holding that the Eighth Amendment bars Louisiana from imposing the death penalty for the rape

of a child where the crime did not result, and was not intended to result, in the victim's death. But in the course of holding that the nation's "evolving standards of decency" dictated that ruling, the Court declared (erroneously as it turns out) that the death penalty for the rape of a child was available only in six states. Unbeknownst to the justices, the attorneys, or the federal government, however, the death penalty is also available for rape under military law. Louisiana has petitioned to reconsider its ruling in light of that mistake. And although Supreme Court commentators and scholars differ on whether this petition will succeed, it is an interesting footnote to an already interesting and unexpected term.

Guantanamo Bay (Again)

The Constitution's Suspension Clause provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[16] In *Boumediene v. Bush*, the Court decided for the first time that the Suspension Clause applies to aliens who were captured abroad and then detained at Guantanamo Bay, Cuba.[17] The decision was also notable for its effect on the balance of power among the three branches, as it had the effect of extending the constitutional right to habeas corpus to the Guantanamo Bay detainees despite concerted congressional and executive efforts to strip them of such protection.

Justice Scalia, known for his caustic dissents, was even blunter than usual in this instance, writing that "most tragically" the Court's decision "sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner. The Nation will live to regret what the Court has done today."

The 2008–2009 Term

The new term that opened October 6, 2008, looks like it will be busier and— in an election year—even more controversial than ever. Whereas last term the Court typically only heard arguments in two cases on any given argument day, it has already booked three cases for each available day on the October and November oral argument calendars. Among the cases to watch as the new term unfolds: *FCC v. Fox Television Stations* (examining the scope of federal law regulating the single or fleeting use of "indecent" words on radio and TV); *Pleasant Grove City v. Summum* (considering the right to display a religious monument on government property); and *Altria Group v. Good* (evaluating the right to sue tobacco companies over their marketing of "light" cigarettes).

Of particular interest to civil liberties students will be *Pearson v. Callahan.* The Court, in this case, has agreed to review the Tenth Circuit's ruling that the so-called consent once removed doctrine does not allow police to enter a private home without a warrant once the homeowner has acquiesced to an undercover police informant's request to enter.

In this case, a police informant went to the home of a Utah man suspected of dealing methamphetamine. After pretending to be a customer, he was invited in. Once inside, he used the hidden wire he was wearing to signal officers hidden outside that they were to join him, which they did, even though they lacked a warrant and there was no emergency.

The homeowner eventually filed a civil rights lawsuit seeking damages for the police officers' violation of his Fourth Amendment rights. The federal district court ruled first that by consenting to the entry of a confidential informant into his home, the owner had consented to entry by the police, so there was no constitutional violation. And it ruled, second, that even if there was a violation, the police were entitled to qualified immunity. The Tenth Circuit disagreed and held that the officers' warrantless entry violated the Fourth Amendment

The Supreme Court has now agreed not only to review the Fourth Amendment question, but has also asked the parties to argue the immunity question. This

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TEACHING ACTIVITY

The Right to Keep and Bear Arms: Just *What* did the Founders Mean?

Tiffany Willey

Overview

One of the central issues before the Supreme Court in *District of Columbia v. Heller* was how to interpret the Constitution. When the founders wrote the Second Amendment, *what* exactly did they have in mind, and *how* does that affect us today? In the *Heller* case, debate among the justices focused on whether the Second Amendment right to bear arms is tied to militia service or protects an individual right to bear arms. In this lesson, students will analyze primary documents and attempt to determine what the founders intended with the Second Amendment and how its language should be interpreted today.

Estimated Time: 30-45 minutes

Students will:

- Read, comprehend, analyze, and interpret primary documents;
- Make relevant connections between the past and their own lives; and
- Articulate positions based on historical evidence in a debate about constitutional interpretation.

Part I: How Should We Read the Constitution?

1. Discuss with students two ways of interpreting the Constitution, *original intent* and the *living constitution* methods, and the ongoing debate between historians, lawyers, and judges about which is correct.

Original Intent Interpretation holds that the correct way to interpret the Constitution is through identifying the intentions of the founders that wrote it. Originalists believe that the Constitution, as a written document, continues to guide Americans today as it did in the past, and should not be subject to modern interpretations.

Living Constitution Interpretation holds that the correct way to interpret the Constitution is not solely through the intentions of the founders that wrote it, but according to the needs of the modern American people. The Constitution, as a living document, must grow and change with the society it guides.

2. Ask students how we might figure out which method of interpretation is correct, and segue into analyzing primary documents. The founders left notes detailing how the Constitution should be read, as in the following two excerpts from Thomas Jefferson and Edmund Randolph:

Reading 1

On every question of construction, carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was pas[sed].

Thomas Jefferson to William Johnson, letter June 12, 1823

Reading 2

In the draught of a fundamental constitution, two things deserve attention: (1) To insert essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events: and (2) To use simple and precise language, and general propositions, according to the example of the constitutions of the several states.

Edmund Randolph, Draft Sketch of a Constitution, July 26, 1787

3. Discuss the two readings:

- In Readings 1 and 2, Jefferson and Randolph discuss how the Constitution should be interpreted by readers. How should the Constitution be interpreted, according to each?
- How does Jefferson's method of interpretation compare with Randolph's?
- Who do you think describes the best way of interpreting the Constitution? Why?

Part II: What Did They Mean by That?

1. Explain to students that much of the debate surrounding the meaning of the Second Amendment has to do with the way that it was written, with the mention of militia service in a clause before the mention of the right of the people:

A well regulated militia, being necessary to the security of a free state, **the right of the people** to keep and bear arms, shall not be infringed.

Discuss with students what they think the Second Amendment means.

2. Make reference to the disagreement over how to interpret

the Constitution in Part I, and ask how the analysis of primary documents might contribute to our understanding of the amendments. The following two excerpts from James Madison and William Blackstone offer clues to the meaning of the Second Amendment:

Reading 3
Let a regular army, fully equal to the resources of the country, be formed…This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.
James Madison, The Federalist No. 46, 1788

Reading 4
THE fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is…indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.
William Blackstone, Commentaries on the Laws of England, 1807

3. Discuss Readings 1-4:
   - How do Blackstone and Madison each describe the right to bear arms in relation to service in the armed forces?
   - Based on the readings, what do you think the founders' original intent was for the right to bear arms? Why?
   - How do Jefferson and Randolph contribute to your understanding of Blackstone and Madison, and your understanding of the Second Amendment today?
   - What impact might Jefferson, Randolph, Blackstone, and Madison have on current gun control legislation?

Additional Resources for Understanding the Supreme Court

Supreme Court Preview
The ABA Division for Public Education publishes all of the Supreme Court dockets, briefs, opinions, and orders for free download at **www.supremecourtpreview.org.**

The Oyez Project
Northwestern University Law School faculty maintains the Oyez Project, an online archive of Supreme Court media. In addition to court documents, audio recordings and transcripts of arguments are available for free download at **www.oyez.org.**

Supreme Court of the United States
The official site of the Supreme Court offers court documents, calendars, rules, regulations, and other 'inside' information for free at **www.supremecourtus.gov.**

Federal Judiciary
The educational outreach portion of the federal judiciary system provides general information on the U.S. court system, current issues, podcasts, and case guides for famous trials in American history. Download free at **www.uscourts.gov**.

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could indicate that the Court is seriously considering overruling *Saucier* v. *Katz*, the 2001 case that set out the procedures for courts reviewing a police officer's claim of immunity from a civil rights suit.[18]

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Notes
1. *Crawford v. Marion County Election Board,* No. 07-21 (April 28, 2008)
2. Ibid., 472 F. 3d 949, 954 (CA7 2007)
3. Ibid., slip opinion pages 29-30.
4. *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966)
5. *Irizarry v. United States*, No. 06-7517 (June 12, 2008)
6. *Ali v. Federal Bureau of Prisons,* No. 06-9130 (January 22, 2008)
7. *United States v. Santos,* No. 06-1005 (June 2, 2008)
8. *District of Columbia v. Heller*, No. 07-290 (June 26, 2008)
9. U.S. Constitution, amendment II
10. Compare Douglas W. Kmiec, "Of Judicial Methods and Judicial Integrity: Has Originalism Struck Out?" 35 *ABA S.Ct. Preview* 386 (August 11, 2008); with Nelson Lund, "The Second Amendment and Original Meaning Jurisprudence," 35 *ABA S.Ct. Preview* 392 (August 11, 2008)
11. Douglas W. Kmiec, "Of Judicial Methods and Judicial Integrity: Has Originalism Struck Out? 35 *ABA S.Ct. Preview* 386 (August 11, 2008)
12. *Washington State Grange v. Washington State Republican Party,* No. 06-713 (March 18, 2008)
13. *United States v. Williams,* No. 06-694 (May 19, 2008)
14. *Baze v. Rees,* No. 07-5439 (April 16, 2008)
15. *Kennedy v. Louisiana,* No. 07-343 (June 25, 2008)
16. U.S. Constitution, article 1, § 9, cl. 2
17. *Boumediene v. Bush*, No. 06-1195 (June 12, 2008)
18. *Saucier v. Katz*, 533 U.S. 194 (2001)

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