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Looking at the Law

Supreme Court Preview

Charles F. Williams

During the 2006–07 Supreme Court term, it was the 5-4 decisions that garnered the most attention. Twenty-four of the term's 72 cases were decided by this narrowest of margins—the highest percentage of 5-4 opinions in a decade—even as the share of unanimous opinions fell "below levels seen during most recent years under former Chief Justice William Rehnquist."[1]

Chief Justice John Roberts, who famously told the *Atlantic Monthly* that "it's bad, long-term, if people identify the rule of law with how individual justices vote," can't be overly pleased with the attention these numbers place on the Court's ideological divide in general, and on the votes of Justice Kennedy, in particular.[2] Yet, if not always helpful, such focus is surely understandable. For years, the Rehnquist Court had two "swing voters"—Justices O'Connor and Kennedy—ideologically poised between three comparatively conservative justices and four comparatively liberal justices. But after Rehnquist's death and O'Connor's retirement, the confirmations of John Roberts and Samuel Alito (we now know) have transformed the Court.

Now four outright conservative justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—are frequently balanced against Justices Stevens, Souter, Ginsburg, and Breyer. In most of the high profile and controversial cases, that means there is only one swing voter left—Kennedy. As we review the past term, and consider the new one, which began October 1, we can see that, in general, this has made for a much more reliably conservative Court.

The Court and the Schools

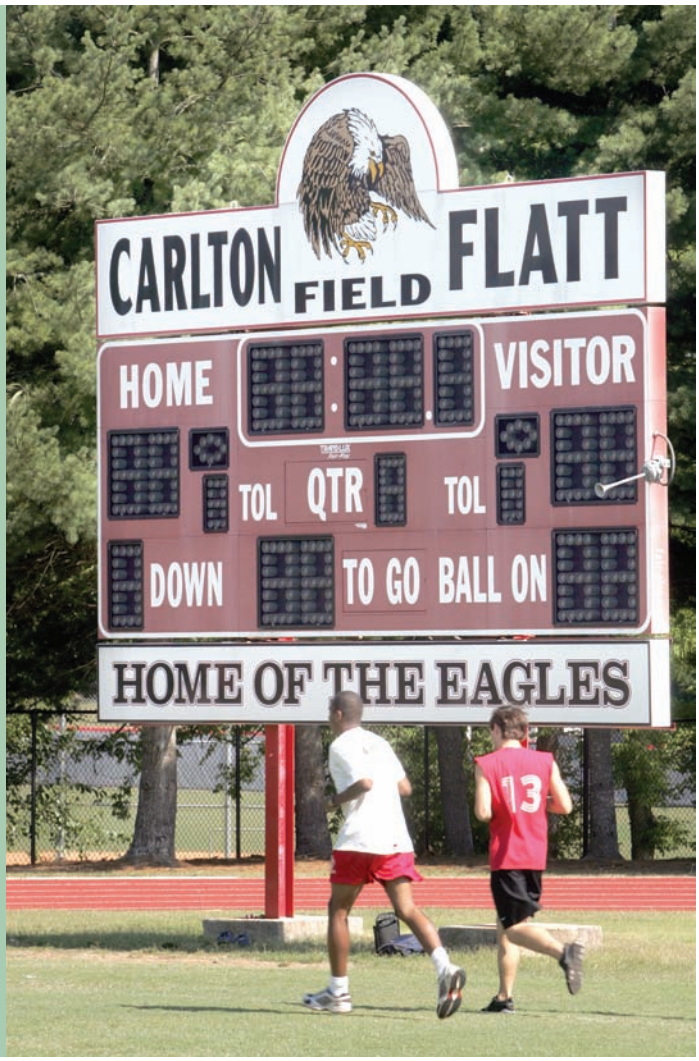
Several cases last term considered the constitutional limits on school policies and actions. *Parents Involved in Community Schools v. Seattle School District No. 1* (decided along with a similar case from Louisville, Kentucky) addressed the question of when a school district may take a student's race into account when deciding pupil school assignments.[3]

In *Parents Involved,* Seattle-area students going into high school were asked to register their preferences among any of the 10 high schools within the district. If a school was oversubscribed, students were admitted pursuant to four "tiebreakers," one of which was whether the numbers of "white" and "nonwhite" students in the school were "racially imbalanced" pursuant to a formula. The Seattle plan then allowed the school district to consider the race of individual applicants in order to redress such a racial imbalance.

On review, a 5-4 Supreme Court rejected the plan. Writing for himself and Justices Kennedy, Scalia, Thomas, and Alito, Chief Justice Roberts determined that the plan was neither necessary nor sufficiently tailored—and thus failed the "strict scrutiny" test that is applied to laws involving racial classifications.

"The school districts," he wrote, "have not carried their burden of showing that the ends they seek justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis."[4]

Justice Kennedy provided the fifth vote to strike down the assignment plans, but wrote separately because he was concerned that parts of the chief justice's opinion were "too dismissive of the legiti-



Track runners pass by the scoreboard of the Carlton Flatt Field at Brentwood Academy, near Nashville, June 21, 2007, the same day the U.S. Supreme Court ruled—in a dispute between Brentwood and a Tennessee athletic association—that athletic associations could enforce limits on recruiting high school athletes.

(AP Photo/*The Tennessean*, Larry McCormack)

mate interest government" has in ensuring equal opportunities for people of all races. According to Kennedy, Roberts's opinion "is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling" caused by segregated housing patterns. "To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."[5] For Kennedy, the school districts' goals were not flawed; it was simply that the means they chose to reach those goals were too crude.[6]

The second major school case this term, *Morse v. Frederick* (better known as the "Bong Hits 4 Jesus Case"), pit high school principal Deborah Morse and her school board against high school senior Joseph Frederick and his free-speech claim.[7] This case arose when Morse suspended Frederick from school after he and some friends unfurled a large banner as the 2002 Olympic Torch and television crews passed by their Juneau, Alaska, school.

The sign read "Bong Hits 4 Jesus," which Morse contended advocated illegal drug use. Frederick claimed the phrase didn't mean anything in particular, but was something he'd seen written on a snowboard. Reversing the Ninth Circuit by a 6-3 vote, the Supreme Court ruled that because schools have a compelling interest in safeguarding students from speech that could reasonably be regarded as encouraging drug use, Frederick's suspension did not violate the First Amendment.

In a third school case last term, the Court ruled that the First Amendment did not prevent the Tennessee Secondary School Athletic Association (TSSAA) from enforcing restrictions on its member high schools' recruitment of middle school student athletes. Noting that TSSAA membership was voluntary, the Court ruled that the association has an interest in the efficiency and effectiveness of the league and that restrictions on certain recruiting-oriented speech serve this interest.

Justice Stevens wrote for the majority, stating, "We need no empirical data to credit TSSAA's common-sense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics."[8]

Global Warming

One of the biggest environmental law cases of the term may end up being more important for its wide effect on the global warming debate than for the more narrow statutory interpretation issue it actually resolved.[9] For this case, Justice Kennedy switched sides and voted with the four more liberal justices.

In *Massachusetts v. EPA,* the Court ruled 5-4 that Greenhouse Gases (GHG) qualify as an "air pollutant" under the Clean Air Act, and that therefore the Environmental Protection Agency (EPA) has the authority to regulate their emissions. And, according to the Court, the EPA *should* regulate unless it determines that such gases are not a contributing factor to climate change, or provides another explanation for not exercising this discretion, not based simply on policy judgments or uncertainty surrounding various aspects of climate change.[10]

One environmental law expert has described *Massachusetts v. EPA* as "the most memorable environmental decision since *Hill v. TVA*" (the case that decided, in 1976, that the Endangered Species Act could bar federal agency actions that jeopardized species). He noted that the decision will be widely viewed as having put the Court's "imprimatur" on the scientific linkage of Greenhouse Gas emissions to global warming, and that now "a spate of legislation addressing GHG emissions, global warming, and climate change seems certain to follow

and is already beginning to appear at every level of government."[11]

Abortion

Writing for another 5-4 majority in *Gonzales v. Carhart*, Justice Kennedy upheld the constitutionality of the Partial Birth Abortion Ban Act of 2003, which bars certain late-term abortion procedures known in the medical profession as "intact dilation and extraction."[12] The respondents in this case had argued that the law was unconstitutional on its face, in light of its failure to include an explicit exception for the health of the mother. But Justice Kennedy, noting that "respect for human life finds an ultimate expression in the bond of love the mother has for her child," reasoned that because of the government's interest in protecting potential life, Congress could decide to forgo a health exception in the face of medical disagreement over the impact of the intact D&E ban on women's health.[13] Justice Ginsburg—the only woman currently serving on the Court—issued a stinging dissent that she read orally from the bench.

Search and Seizure

The justices did speak with one voice in some cases, however. In *Brendlin v. California*, a unanimous Court held that, like the driver of a car that has been stopped by the police, the passengers in such a vehicle will also be considered "seized" for Fourth Amendment purposes.[14] Therefore, the Court ruled, passengers in stopped vehicles have the same right as the driver to challenge the constitutionality of the police stop and to seek the suppression of any evidence seized during the illegal stop.

Writing for the Court, Justice Souter explained that the test for telling when a "seizure" occurs is whether, in light of all the surrounding circumstances, a reasonable person would have believed he was not free to leave. He reasoned that the passenger in this case was seized within the meaning of the Fourth Amendment:

> An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.[15]

Looking Ahead to the 2007-08 Term

A long and robust conversation between the three branches of government may finally have set the stage for the Court to determine what rights are actually possessed by the suspected terrorists and enemy combatants now held at the U.S. Navy base on Guantanamo Bay, Cuba.

What could be one of the new term's biggest cases has been a long time coming. In 2004, the Supreme Court rebuffed the Bush administration and held that the prisoners being detained as enemy combatants at Guantanamo are covered by the federal habeas corpus statute, and thus have the right to contest the legality of their incarcerations in federal court.[16] Subsequently, however, Congress passed the Detainee Treatment Act (DTA), which appeared to strip the Guantanamo detainees of such habeas rights.[17]

In 2006, the Court responded in *Hamdan v. Rumsfeld* by holding that the DTA actually did not strip federal courts of jurisdiction over any of the many habeas cases that were already pending at the time of the DTA's enactment.[18] Seeing that the ball was back in its court, Congress then passed the Military Commissions Act (MCA), which denies detainees any habeas corpus rights whatsoever, regardless of whether their cases are already pending.[19] (Instead, the MCA says, detainees are entitled to special military trials.)

Last winter, the U.S. Court of Appeals for the District of Columbia Circuit upheld these habeas-stripping provisions and, in April 2007, the Supreme Court denied the detainees' petitions for certiorari. Two months later, however, the Court surprised nearly everyone by changing its mind and granting the detainees' petitions for certiorari, so as to decide once and for all whether federal courts have jurisdiction over petitions for writs of habeas corpus that are (1) filed by aliens who were (2) captured abroad and then (3) detained at Guantanamo Bay, Cuba. The Court consolidated two separate cases for argument on these issues: *Boumediene v. Bush* (involving seven detainees) and *Al Odah v. United States* (involving 56 detainees).[20] These consolidated cases were not immediately scheduled for argument, but are likely to be heard in either November or December.

When they are, and assuming the Court agrees with the government that Congress *intended* to deprive the courts of jurisdiction over the detainees' habeas petitions, the case will be decided on the basis of whether or not the MCA violates the Constitution's Suspension Clause, which states 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."[21]

Meanwhile, this 2007-08 term, the Court will hear arguments in *Washington State Grange v. Washington State Republican Party*, a case that questions the constitutionality of state laws that regulate the party identification that candidates can include on primary election ballots, and *New York City Board of Education v. Tom F.*, a case that asks the Court to identify the circumstances in which parents are entitled to tuition reimbursement for their disabled child's education.[22]

Judging from the October argument calendar, sentencing issues in general, and the Federal Sentencing Guidelines in particular, will also remain a fertile ground for the Court, with one case, *Kimbrough v. United States,* of particular interest as it seeks to address the oft-noted disparity between the heavier sentences imposed for crimes involving crack cocaine as opposed to those involving powder cocaine.[23]

The 2006-07 Supreme Court term gave court watchers plenty to talk about—the role of Justice Kennedy, 5-4 decisions, Justice Ginsburg as the sole female voice, and lest we forget, Chief Justice Roberts's desire to unite the increasingly divided Court. This previous term proved to be one of great movement and change on the Court. And with numerous controversial and high profile cases on the docket for 2007–08, this new term will likely be even more important and interesting to watch.

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Notes

1. Thomas C. Goldstein, "End of Term Statistics and Analysis," *Preview of United States Supreme Court Cases* 426, No. 8 (August 2007).
2. Jeffrey Rosen, "Roberts's Rules," *The Atlantic* 106 (January/February 2007).
3. *Parents Involved in Community Schools v. Seattle School District No. 1,* Docket No. 05-908, decided with *Meredith v. Jefferson County Board of Education,* No. 05–915 (June 28, 2007).
4. Ibid., 34.
5. Ibid., 7-8 (opinion of Justice Kennedy, dissenting).
6. Vikram Amar, "The Court and the Schools in the 2006 Term," *Preview of United States Supreme Court Cases* 439, No. 8 (August 2007).
7. *Morse v. Frederick,* Docket No. 06-278 (June 25, 2007).
8. *Tennessee Secondary School Athletic Assn. v. Brentwood Academy, 8,* Docket No. 06-427 (June 21, 2007).
9. Robert Abrams, "Environmental Law in the New Supreme Court," *Preview of United States Supreme Court Cases,* 450, No. 8 (August 2007).
10. *Massachusetts v. Environmental Protection Agency,* Docket No. 05–1120 (April 2, 2007).
11. Abrams, 450.
12. *Gonzales v. Carhart,* 127 S.Ct. 1610 (2007).
13. Martha F. Davis, "Women's Issues and the Roberts Court," *Preview of United States Supreme Court Cases* 433, No. 8 (August 2007).
14. In *Brendlin v. California*, Docket No. 06-8120 (June 18, 2007).
15. Ibid., 7.
16. *Rasul v. Bush*, 542 U.S. 466 (2004).
17. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005).
18. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).
19. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).
20. *Boumediene et al. v. Bush et al.*, Docket No. 05-5062; *Al Odah et al. v. United States et al.*, No. 05-5064.
21. U.S. Constitution. art. I, § 9, cl. 2.
22. *Washington State Grange v. Washington State Republican Party*, Docket No. 06-713; New York City Board of Education v. Tom F., Docket No. 06-637.
23. *Kimbrough v. United States*, Docket No. 06-6330.

RESOURCES

Supreme Court Preview

www.abanet.org/publiced/preview

A website maintained by the ABA's publication *Preview of United States Supreme Court Cases*, offering merits and amicus briefs and questions presented for every case to be argued before the Court in the new term, along with expert analysis of the issues, arguments, and background of previous and upcoming cases.

Cornell University's Legal Information Institute Supreme Court Collection

law.cornell.edu/supct/index.html

A website with a searchable collection of Supreme Court opinions.

Supreme Court of the United States Official Site

www.supremecourtus.gov

The official website of the Supreme Court, providing opinions, oral argument transcripts, biographical information about justices, and other material.

Friends of the Court: Using Amicus Briefs in the Classroom

James Landman

Background

In every case before the Supreme Court, the parties who will be arguing the case submit written arguments, known as **briefs**, in advance of their oral arguments. The parties in a Supreme Court case are usually the **petitioner** (the party who petitions the Court for a writ of certiorari, by which the Court grants review of the decision of a lower court) and the **respondent**. The petitioner seeks review of the unfavorable decision of a lower court and argues why the lower court's decision should be reversed. The respondent argues why the lower court's decision should be affirmed. The briefs that the petitioner and respondent submit are called **merits briefs**.

Supreme Court decisions are often of interest to persons who are not parties to the case. Persons with a strong interest in the case (for example, groups of individuals, corporations, non-profits, or trade unions) can also file briefs for the justices to consider. A party who submits such a brief is known as an **amicus curiae** (a Latin term meaning "friend of the court"), and the brief is called an **amicus brief**. To submit an amicus brief, the amicus curiae needs the consent of the parties or the approval of the Court. The Court encourages amicus briefs only from persons who raise issues not addressed by the parties.

Reading an Amicus Brief

Students can get a lot of information from the first few pages of an amicus brief. The cover page of every amicus brief includes a statement naming the amicus curiae, the party (usually petitioner or respondent) whom the amicus supports, and whether the amicus seeks affirmance or reversal of the lower court's decision. The first few pages of the brief following the cover page include the table of contents, the amicus's statement of interest, and the summary of the amicus's argument. The statement of interest tells why the amicus curiae is submitting the brief, while the summary of argument provides an overview of the reasons why the amicus curiae is seeking affirmance or reversal of the lower court's decision.

Classroom Activity

Student review of amicus briefs can illustrate the range of interests at issue in a Supreme Court decision. It also offers insight into the potential impact of a Supreme Court decision beyond the actual parties to the case.

During the 2007-08 term, the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States* are likely to draw a significant number of amicus briefs. These cases, discussed in the accompanying article by Charles Williams, ask the Court to consider the constitutionality of the Military Commissions Act of 2006. The Military Commissions Act drastically limits the ability of detainees at Guantanamo Bay to seek writs of habeas corpus in the federal courts. (The writ of habeas corpus is sought by individuals who ask a court to decide whether they are being lawfully detained.) Article I, Section 9, of the Constitution provides that Congress cannot suspend the writ of habeas corpus "unless when in cases of rebellion or invasion the public safety may require it."

The *Boumediene* and *Al Odah* cases will most likely be argued in November or December 2007, and briefs in the case should be available by October. To access the merits and amicus briefs, follow the "Briefs" link from the ABA's Supreme Court Preview website at **www.abanet.org/publiced/preview** (search for *Boumediene* using the option that allows you to search for briefs in alphabetical order).

1. Begin the activity by discussing with students the primary question presented by the case: Does the Military Commissions Act's restriction on habeas corpus rights for Guantanamo detainees violate the Constitution? Make sure that students understand what habeas corpus means and how Article I of the Constitution limits Congress's ability to suspend the writ of habeas corpus.

2. Divide the students into small groups. Ask half the students to research and prepare reports on the petitioner's arguments, and the other half to research and report on the respondent's arguments. Ask students to use the "Summary of Argument" sections of the merits briefs to prepare these reports. Allow students enough time to research terms that they will need to explain when they report on the arguments. Have the small groups report back to the class. Record the arguments made by the petitioner and respondent on the board.

3. Have students return to their small groups. Divide the amicus briefs that have been filed in the case among the groups (depending on the number of amicus briefs filed, each group may be asked to research and report on several amicus briefs). Ask the students to focus on the "Statement of Interest" and

"Summary of Argument" sections at the beginning of the briefs and prepare to report on the following questions:

- Who is the amicus curiae in the brief you have researched and what does the amicus curiae state as its interest in the case?
- Does the amicus curiae support the petitioner or the respondent?
- What arguments does the amicus curiae make? Are these arguments different from those presented by the petitioner or the respondent?

4. Have the small groups report back to the class. Capture on the board (1) the number of amicus briefs in support of the petitioner and the respondent, (2) the identities of the amicus curiae, and (3) arguments presented in the amicus briefs that are different from those presented by the petitioner or the respondent.

5. As a class, discuss the following questions:

- Did the majority of the amicus briefs support the petitioner or the respondent? If you were a Supreme Court justice, do you think you would be influenced by the number of briefs submitted in support of a party's position? Why or why not?
- Were there any significant similarities among the statements of interest in the amicus briefs for the petitioner, or did the briefs represent a diverse range of interests? For the respondent?
- Do you think any of the arguments put forth in the amicus briefs added significant new perspectives on the case or introduced significant issues that were not brought up in the merits briefs? Explain.
- Looking at the amicus briefs filed in the *Boumediene* and *Al Odah* cases, what value do you think amicus briefs would have to the Supreme Court's justices as they deliberate on their decision?

Note to teachers: This classroom activity can be easily adapted to any Supreme Court case that attracts a significant number of amicus briefs. Another good candidate, if the Supreme Court grants certiorari, will be *Parker v. District of Columbia*. The District of Columbia has petitioned the Court to review a decision of the U.S. Court of Appeals for the D.C. Circuit striking down the District's gun control laws for violating the Second Amendment.

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