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Supreme Court Review

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Of the three branches of government, the Supreme Court usually receives the least national attention. Not so this year. In addition to another changing of the guard with the retirement of Justice Stevens and the nomination of Elena Kagan, the 2009-2010 term generated a great deal of controversy. And in a number of instances, the public's keen interest in significant cases before the Court was further piqued in less anticipated cases by decisions that will have wide-reaching impact on average citizens.

Margie M. Phelps, left, her husband Pastor Fred Phelps and daughter Margie J. Phelps, of the Westboro Baptist Church in Kansas, are pictured here demonstrating in Baltimore, in 2007. A jury was deliberating in a suit brought against them by Albert Snyder, the father of Lance CPL Matthew A. Snyder, for picketing his son's funeral in 2006. The first amendment case goes before the Supreme Court in the 2010-2011 term.

(AP Photo/Baltimore Sun, Jed Kirschbaum/Baltimore Examiner and Washington Examiner Out)

The topics before the Court were engaging and varied. From *McDonald v. Chicago* (successfully challenging a Chicago gun ban) to the reargument and decision in *Citizens United v. Federal Election Commission* (which became a hotter-than-hot-button issue when the president scolded the justices during his State of the Union Address), the Court occupied center stage in our national discussions and debates.[1]

While many suspected Justice Sotomayor would bring a more conservative vote to criminal justice matters than Justice Stevens had, Dean Erwin Chemerensky of the University of California, Irvine, School of Law, has noted that she turned out to be a generally consistent liberal vote in this area as well.[2] And while the Court generally maintained its traditional 5-4 conservative alignment, a number of defendants also prevailed in their cases.

In addition to *Citizens United*, three other important cases were decided under the First Amendment's framework: *Doe v. Reed*, *Christian Legal Society v. Martinez*, and *United States v. Stevens*.[3] And in a year wracked by recession and a miserable job market, labor and employment cases loomed larger than usual.

Gun Control Redux

One case that earned great attention from the very start because it dealt with politically charged issues was this term's gun control case, *McDonald v. City of Chicago*.[4] In this case, a gun-shop owner and some Chicago residents challenged a local ordinance that forbade most of the city's residents from possessing a handgun.

McDonald was the follow-up to a case two years ago, *District of Columbia v. Heller*, in which the Supreme Court held that a Washington, D.C., ordinance that forbade most residents from keeping a handgun in their homes for self-defense violated the Second Amendment right to bear arms.[5] Because Washington, D.C., is not a state, it remained to be seen whether the Court would apply the same reasoning to the gun control laws in all 50 states.

The Court's answer in *McDonald* was "yes, it would." According to the majority, the Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the states and local governments, because it is a fundamental right that is deeply rooted in our nation's history and tradition and because it is necessary to the nation's system of liberty.

So what does this mean for your state and community? While the Court's ruling is still being assessed, it is likely that to survive constitutional scrutiny, any state or local gun regulation will need to be tightly written and be "tailored" to meet specific goals other than just the broad goal of limiting the number of handguns within city limits. The city of Chicago has already enacted a new law to replace the one rejected by the Court. Whether this one will pass the expected constitutional challenge is a battle for another day.

Juvenile Justice

Five years ago, in *Roper v. Simmons,* the Court held that it was cruel and unusual punishment to impose the death penalty for a crime committed by a juvenile.[6] But what about a life sentence without possibility of parole? This term, in *Graham v. Florida,* the Court held that this too, is cruel and unusual punishment barred by the Eighth Amendment when imposed for a non-homicide crime.[7] Swing voter Justice Kennedy joined the liberal wing (which included Justice Sotomayor) and wrote the majority opinion.

The majority reasoned that life without parole is an especially harsh punishment for a juvenile as he or she would generally serve more years and a greater percentage of his or her life in prison than an adult offender given the same sentence. Thus, a 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. And, as in *Roper*, the Court noted the differences between adults and juveniles regarding the possibility of rehabilitation. The Court also observed that many other countries would not permit a sentence of life without parole for a crime committed before adulthood.

Chief Justice Roberts agreed that the life without parole sentence was unconstitutional in this case, although he was not prepared to say that such sentences are always unconstitutional. Only Justices Thomas, Scalia, and Alito dissented.

First Amendment

State laws in Washington can be overturned by referendum, but to seek a referendum, a petition must first be signed by at least 4 percent of state voters. These signers and their addresses can then be disclosed and published under another law. It was this disclosure law that was challenged in *Doe v. Reed* on the grounds that it violates petition signers' First Amendment speech, association and privacy rights.

The Supreme Court determined that such disclosures do not, as a general manner, violate the First Amendment if the government has a particularly strong interest to justify them. In this case, the Court held that the state's interest in ensuring the integrity of the referendum process by combating fraud and catching simple mistakes justified the disclosure rules. So what does this mean in your community? Depending on your state, if you sign a political petition or other similar political document, there is a chance that your support of that political view could be made public, and in some cases, published in the media.

Citizens United v. Federal Elections Commission had two distinct litigation phases before the Court, but at its heart lay a First Amendment challenge to federal laws prohibiting or limiting corporations and unions from spending on political campaigns in the weeks leading up to an election. As we described last issue, the Court eventually reasoned that such prohibitions amounted to an unconstitutional ban on speech.[8]

Although the *Citizens United* decision garnered much initial criticism, including from President Obama, it's likely that the full impact won't be seen for years to come. In the near term, however, the biggest test of the new campaign rules will be how much money flows this fall from corporations and unions, particularly those affected by recent federal reforms such as health care and financial regulations.

Meanwhile, another First Amendment case, *Christian Legal Society v. Martinez*, asked whether a public law school could refuse to give official recognition to a religious student organization on the grounds that the student group required its officers and voting members to share its religious commitments. The school, the Hastings College of the Law in San Francisco, had a written policy that required all student groups seeking the status of being an officially recognized student organization to refrain from discriminating in accepting voting members and choosing officers "on the basis of [among other things] religion [and] sexual orientation."

The Christian Legal Society (CLS) challenged this policy on the grounds that it had a First Amendment right to receive official recognition and support despite excluding non-Christians and practicing gays. The Supreme Court ruled against them 5–4, with Justice Kennedy joining the more "liberal" wing of the Court. Justice Ginsburg's majority opinion accepted the school's description of its policy as simply requiring officially recognized student groups to accept "all comers" and "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of status or beliefs."[9]

> Compliance with Hastings's all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS—in common with all other student organizations—to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings's policy. The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.[10]

Dog Fighting

In the swath of other high-profile cases, the Court voted 8–1 in *United States v. Stevens* to overturn, on First Amendment grounds, a federal law that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty, including dog fighting.[11] The statute, 18 U.S.C. § 48, applied to any visual or auditory depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that underlying conduct violated federal or state law where "the creation, sale, or possession takes place."[12] Another clause exempts depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[13] Thus, this particular law did not address the actual acts that harmed animals (many of those are rendered illegal by other laws), but only the portrayals—videos, for example—of such conduct.

The defendant in this case, Robert J. Stevens, ran a business through which he sold videos of pit bulls engaging in dogfights and attacking other animals. When he was indicted under § 48, he argued that the law was unconstitutional under the First Amendment. In defense of the statute, the government argued that depictions of illegal acts of animal cruelty that are made for commercial gain necessarily "lack expressive value," and may accordingly "be regulated as *unprotected* speech."[14]

The Supreme Court agreed, holding that its previous decisions:

> cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them.[15]

Writing for the majority, Chief Justice Roberts then applied traditional First Amendment analysis, striking the statute on the grounds that it was "substantially overbroad." That is, the majority found that a substantial number of the law's possible applications in other situations, including those that involve, for example, hunting videos, would be unconstitutional.

Justice Alito filed the lone dissent, writing, "The Court strikes down in its entirety a valuable statue, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty." [16]

Workplace Privacy

Another case received less media attention, but likely has more implications for your day-to-day life. In *City of Ontario v. Quon*, the Court held that government employees do not have a reasonable expectation of privacy when using a work-issued pager. But its opinion grappled with larger questions involving technology, privacy, and workplace relations. Here, the city of Ontario, California's police force issued pagers to members of its SWAT team, including Jeff Quon. The city had in place a written technology policy indicating that use of city-owned technology for personal business was prohibited, but that incidental or occasional personal use was permitted. This policy did not explicitly refer to pagers, but some officers were told that the pagers were covered by the policy.

After a couple of months during which Quon and some other officers exceeded their monthly allowance of pager minutes, the city undertook a review of the accounts to determine whether police work required a greater monthly allowance. During the review, the city learned that the majority of the messages sent and received by Quon were not work-related, and that a number were sexually explicit. Quon and those with whom he exchanged messages sued on the basis that the review violated their privacy rights.

According to the Court, such a search was reasonable given that it was motivated by a legitimate work-related purpose and not excessive in scope. However, the Court refused to spell out specifically whether, and to what degree, employees should have a reasonable expectation of privacy when using work-provided technologies. This means that if you use company email, or a company phone or other gadget, you should think twice before sending a message you wouldn't want your boss to see.

The 2010–2011 Term

The new term that just opened October 4 looks to be as busy, and possibly as controversial, as last year's. The opening session included 12 cases set for argument, with a full list of others cases yet to be scheduled for the November and December sessions. Among the cases to watch are *Chamber of Commerce v. Candelaria*[17] (challenging a state statute imposing punishments on employers for hiring illegal immigrants), *Schwarzenegger v. Entertainment Merchants Association*[18] (looking at whether the First Amendment bars a state from restricting the sale of violent video games to minors), and *Brueswitz v. Wyeth*[19] (evaluating the right to sue under the National Childhood Vaccine Injury Act for claims that a vac-

cine is defective even if the side effects were unavoidable).

A case of particular interest for First Amendment watchers is *Snyder v. Phelps*.[20] *Snyder* involves the extraordinarily controversial act of picketing funerals of U.S. soldiers. The Westboro Baptist Church in Topeka, Kansas, under the leadership of Fred W. Phelps, travels around the country to conduct protests during the funerals of U.S. soldiers. According to Phelps and his followers, the soldiers' deaths are God's response to the nation's tolerance of homosexuality. The church protested outside the funeral of Albert Snyder's son, Marine Lance Cpl. Matthew Snyder, who was killed while serving in Iraq. Signs displayed during Matthew Snyder's funeral included "Thank God for Dead Soldiers" and "You're Going to Hell."

Snyder and his family attempted to sue Phelps and the church after the funeral, claiming that the protests had invaded their privacy and intentionally inflected emotional distress. Phelps and his supporters responded that their speech was protected under the First Amendment. One way of looking at the case is to say the Supreme Court is now being asked to determine whether Phelps's First Amendment's freedom of speech trumps the Snyder family's First Amendment freedoms of religion and peaceful assembly. Of course, the case is unlikely to be resolved by such a cut and dry ruling.

And, as always, this term will have a number of seemingly smaller cases that may end up having unexpected implications for all of us. The new Supreme Court term is still unwritten and the justices may, and probably will, surprise us.

Notes

1. *McDonald v. Chicago*, No. 08–1521 (June 28, 2010); *Citizens United v. Federal Election Commission*, No. 08–205 (Decided January 21, 2010).
2. Erwin Chemerinsky, "The Criminal Docket in October Term 2009," 37 *Preview* 339 (August 13, 2010).
3. *Doe v. Reed*, No. 09–559 (June 24, 2010); *Christian Legal Society v. Martinez*, No. 08–1371 (June 28, 2010); *United States v. Stevens*, No. 08–769 (April 20, 2010).
4. *McDonald v. Chicago*, No. 08–1521 (June 28, 2010)
5. *District of Columbia v. Heller*, No. 07–290 (June 26, 2008)
6. *Roper v.* Simmons, 542 U.S. 551 (2005)
7. *Graham v. Florida*, 130 S.Ct. 2011 (2010)
8. Charles F. Williams, "The New World of Campaign Finance," *Social Education* 74, no. 4 (2010): 171–175.
9. *Christian Legal Society v. Martinez*, Ibid., 4.
10. Ibid., 2.
11. *United States v. Stevens*, No. 08–769 (April 20, 2010).
12. 18 § 48(c)(1)
13. 18 § 48(b)
14. Brief for *United States* at page 10, available online at www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-769_Petitioner.pdf.
15. *United States v. Stevens*, Ibid., 9.
16. *United States v. Stevens*, Ibid., Alito dissent page 1.
17. *Chamber of Commerce v. Candelaria*, No. 09-115
18. *Schwarzenegger v. Entertainment Merchants Association*, No. 08-1448.
19. *Brueswitz v. Wyeth*, No. 09-152.
20. *Snyder v. Phelp*, No. 09-751.

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