

2007

Constitutional Law: The Reasonableness Requirement and Fourth Amendment Boundaries to Co-Occupant Consent

Tim Buskirk

Follow this and additional works at: <https://scholarship.law.ufl.edu/jlpp>

Recommended Citation

Buskirk, Tim (2007) "Constitutional Law: The Reasonableness Requirement and Fourth Amendment Boundaries to Co-Occupant Consent," *University of Florida Journal of Law & Public Policy*. Vol. 18: Iss. 3, Article 6.

Available at: <https://scholarship.law.ufl.edu/jlpp/vol18/iss3/6>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in University of Florida Journal of Law & Public Policy by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

FOREWORD

THE CONSTITUTION AND FUNDAMENTAL RIGHTS

*Erwin Chemerinsky**

During the twenty year existence of the *University of Florida Journal of Law and Public Policy* remarkably little has changed in the content of fundamental rights under the Constitution or in the scholarly debate about them. During this period, which spanned the Rehnquist Court and the first few years of the Roberts Court, the Supreme Court has recognized no new fundamental rights. The closest the Court came was in *Lawrence v. Texas*, where the Court held that a state may not prohibit private homosexual activity between consenting adults.¹ But *Lawrence* did not use the language of fundamental rights or explicitly employ strict scrutiny. Nor has the Court found any additional type of discrimination to warrant intermediate or strict scrutiny during this time.

At the same time, the scholarly debate over constitutional interpretation has changed remarkably little over the last two decades. There continues to be a huge divide between justices and scholars who deem themselves originalists, believing that the Constitution's meaning was fixed when it was adopted and can be changed only by amendment, and those who reject this view, believing that the Constitution evolves by interpretation as well as amendment. The arguments for and against originalism are familiar and have changed remarkably little over time.

So what has constitutional law been about for the last twenty years in which this journal has been published? The articles in this issue reflect the important matters that are the focus of contemporary decisions and discussions about fundamental rights. First, the Supreme Court constantly is asked to clarify the scope of existing rights. To pick a few prominent examples, do laws prohibiting so-called partial birth abortion violate the right to abortion?² If the government takes private property for purposes of economic development, is that properly deemed for "public use"?³ Countless cases ask the Court to resolve disagreements concerning the

* Alston & Bird Professor of Law and Political Science, Duke University.

1. 539 U.S. 558 (2003).

2. See, e.g., *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (upholding the constitutionality of the federal Partial Birth Abortion Ban Act of 2003); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a Nebraska law prohibiting partial birth abortion).

3. *Kelo v. City of New London*, 545 U.S. 469 (2005).

application of existing rights. For example, as discussed in Tim Buskirk's excellent comment,⁴ in *Georgia v. Randolph*, the Court had to decide when a co-occupant can give consent to search a dwelling when the target of the search is present and refuses to give approval.⁵ This case is typical of so many that provide important clarification as to the application and scope of rights, but does not create new rights.

Second, the Court has significantly changed the content of rights in some areas without using the label of fundamental rights. This has occurred primarily, but not exclusively, in the criminal procedure area. For example, in *Apprendi v. New Jersey*, the Court dramatically changed the law as to the role of the jury by holding that any factor, other than a prior conviction, that increases the defendant's sentence must be proven to the jury beyond a reasonable doubt.⁶ Another example is the Court's decision in *Crawford v. Washington*, which held that testimonial evidence could not be used against a criminal defendant simply because the declarant was unavailable and the statements were reliable.⁷ These decisions have spawned an enormous number of questions, and there are countless decisions clarifying them, including from the United States Supreme Court.

An example from the civil arena has been the constitutional limits on the amount of punitive damages. In three major decisions over the last eleven years—*BMW of North America, Inc. v. Gore*,⁸ *State Farm v. Campbell*,⁹ and *Philip Morris USA v. Williams*¹⁰—the Court has revived substantive due process as a protector of economic liberties and has imposed significant constraints on punitive damage awards.

Third, the Court has had to begin considering constitutional rights in the context of the war on terrorism. There have been only a few cases so far—*Hamdi v. Rumsfeld*,¹¹ *Rasul v. Bush*,¹² *Hamdan v. Rumsfeld*¹³—but no area of law has been more important since September 11. Ariel Meyerstein's magnificent article situates these cases in cultural rhetoric

4. Tim Buskirk, Comment, *Constitutional Law: The Reasonableness Requirement and Fourth Amendment Boundaries to Co-Occupant Consent*, 18 U. FLA. J.L. & PUB. POL'Y 475 (2007).

5. 547 U.S. 103 (2006).

6. 530 U.S. 466 (2000).

7. 541 U.S. 36 (2004).

8. 517 U.S. 559 (1996).

9. 538 U.S. 408 (2003).

10. 127 S. Ct. 1057 (2007).

11. 542 U.S. 507 (2004) (stating that the federal government may hold a United States citizen apprehended in a foreign country as an enemy combatant, but must provide due process).

12. 542 U.S. 466 (2004) (finding that those held in Guantanamo shall have access to federal courts via a writ of habeas corpus).

13. 126 S. Ct. 2749 (2006) (holding that military tribunals created by executive order violated international law and the Uniform Code of Military Justice).

about the critical role of lawyers and the legal system and should be a “must read” for judges dealing with these issues.¹⁴

Fourth, the Court has had to consider what is sufficient to constitute an infringement of a fundamental right. At what point is the burdening of a right sufficient to constitute an infringement? For example, does requiring the Boy Scouts to include gays infringe the organization’s freedom of association?¹⁵ Does requiring that livestock producers contribute to a fund for generic advertising violate the First Amendment?¹⁶ The excellent article by Lyryssa Barnett Lidsky and Tera Jckowski Peterson looks at whether the stringent restrictions on lawyer advertising in Florida should be deemed an infringement and violation of the First Amendment.¹⁷

Fifth, the Court has had to consider what government interests are sufficient to justify violations of rights or discrimination. For example, the Court had to consider whether a principal was justified in punishing a student for holding up a banner, “Bong Hits 4 Jesus,” at a school event on a public sidewalk.¹⁸ More dramatically, the Court concluded that diversity in higher education is a compelling government interest that justifies colleges and universities considering race as a factor in admitting students.¹⁹

The scholarly literature has focused on all of these areas and the cases within them. There, of course, continues to be intense discussion about how courts should define the content of constitutional rights. One relatively new aspect of this debate has been the dispute over whether American courts interpreting the Constitution should ever look to foreign law. This debate is largely the result of the Court mentioning foreign practices in striking down the death penalty for crimes committed by the mentally retarded²⁰ or by juveniles.²¹ Although the debate about this has been intense, it is important to note that no Supreme Court decision interpreting the Constitution ever has been based primarily, or even substantially, on foreign law. Adam Lamparello’s insightful article discusses this and urges caution in using foreign law.²² Mr. Lamparello

14. Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL’Y 299 (2007).

15. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

16. See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

17. Lyryssa Barnett Lidsky & Tera Jckowski Peterson, *Medium Specific Regulation of Attorney Advertising: A Critique*, 18 U. FLA. J.L. & PUB. POL’Y 259 (2007).

18. *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (ruling in favor of the school principal).

19. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

20. *Atkins v. Virginia*, 536 U.S. 304 (2002).

21. *Roper v. Simmons*, 543 U.S. 551 (2005).

22. Adam Lamparello, *A New Method of Constitutional Interpretation: Introducing “Negative Originalism,”* 18 U. FLA. J. L. & PUB. POL’Y 383 (2007).

suggests that the gap between originalists and non-originalists might be bridged by what he terms “negative originalism.” Courts should look to the original understanding to be sure that it does not reject a specific right, but otherwise can be non-originalist.

There has been much less scholarly literature, though, on what is sufficient to constitute an infringement of rights and how to determine whether a government interest is sufficient to warrant an infringement. These are crucial questions in constitutional law. For example, how should a court determine whether there is a legitimate interest (under rational basis review), an important interest (under intermediate scrutiny), or a compelling interest (under strict scrutiny)? Advocates of originalism are quick to argue that judges, including Supreme Court Justices, should not be making value choices as to the content of constitutional rights. But how can this possibly be avoided in deciding what is a sufficient interest to justify discrimination or infringement of a constitutional right?

Of course, not all rights, or even most, are based on the Constitution. This anniversary issue also contains important articles on statutory rights. Bill F. Chamberlin, Cristina Popescu, Michael F. Weigold, and Nissa Laughner have written a significant piece on how to assess the effectiveness of public records laws.²³ Additionally, Lawrence Scheinert has written a fascinating note on a corporation’s violations of the rights of its directors: Hewlett-Packard’s astounding use of investigators to go through its directors’ trash and private phone records.²⁴

I congratulate this journal on celebrating its twentieth anniversary. In writing this essay, I kept wondering what the law will be twenty years from now when I hope the editors will invite me to write a foreword for the fortieth anniversary issue. I realized that twenty years ago, no one could have imagined the Internet and the countless legal issues it raises, or the United States holding prisoners in Guantánamo or claiming the right to detain individuals indefinitely as enemy combatants. But some issues are as salient today as they were two decades ago: what can be done to desegregate public schools, how may the government regulate abortion, when can schools punish student speech?

Perhaps that is the greatest brilliance of the United States Constitution. It provides a framework for discussing and deciding our most important social issues, both enduring and new ones. Law journals play a key role in this by providing a forum for discussion of ideas that can influence

23. Bill F. Chamberlin, Cristina Popescu, Michael F. Weigold, & Nissa Laughner, *Searching for Patterns in the Laws Governing Access to Records and Meetings in the Fifty States by Using Multiple Research Tools*, 18 U. FLA. J.L. & PUB. POL’Y 415 (2007).

24. Lawrence Scheinert, Note, *Hewlett-Packard’s Spy Games and the “Duty of Caremark”*: *How Inconsistent Standards Governing a Director’s Duty of Care Disgraced a Company*, 18 U. FLA. J.L. & PUB. POL’Y 447 (2007).

thought, including by lawyers, judges, professors, and students. This journal has done just that for two decades. I look forward to reading it for decades to come.

**A DEDICATION TO
CHESTERFIELD H. SMITH**

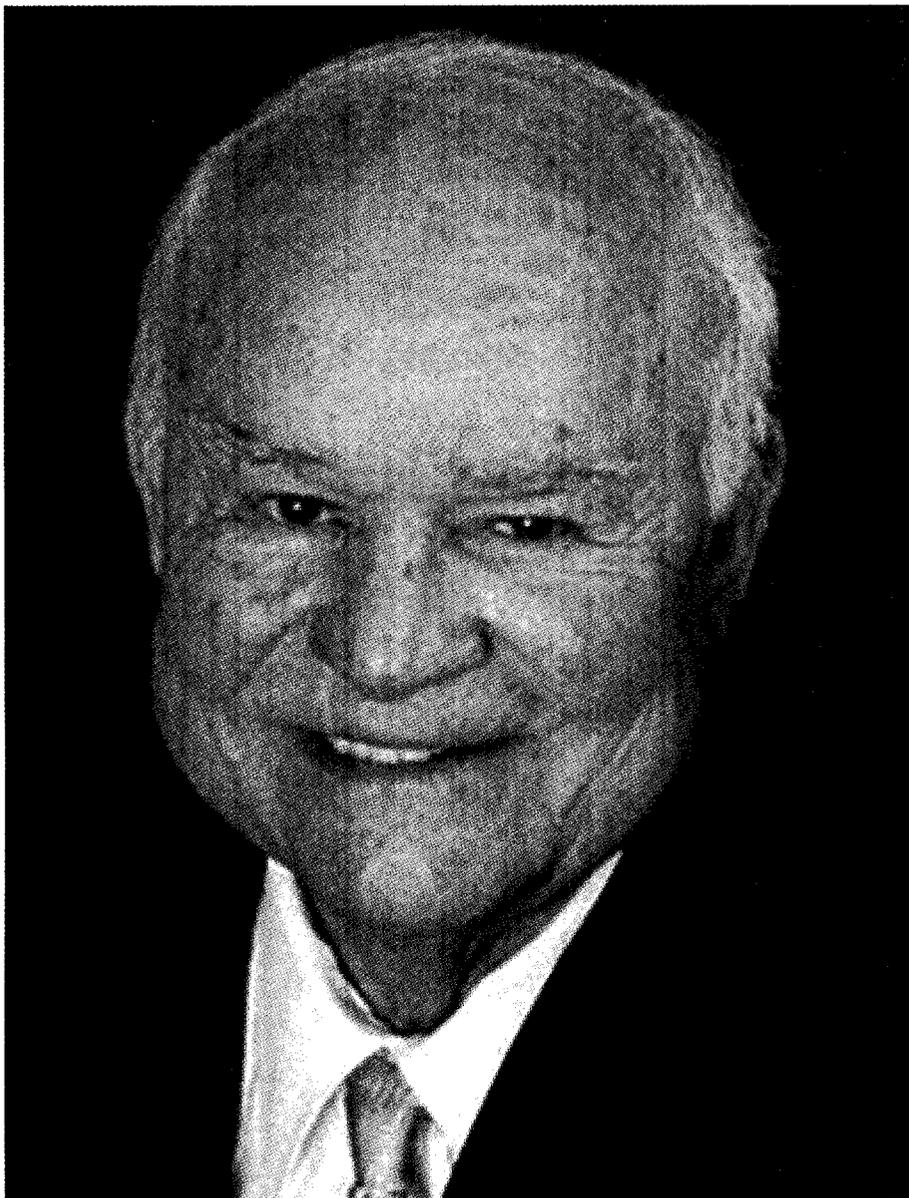
*“He pursued great causes with a contagious exuberance and a style
that could make even the most sober judge smile.”*

Ruth Bader Ginsburg

American Jurist and U.S. Supreme Court Justice

REMARKS FOR DEDICATION OF CHESTERFIELD SMITH
CEREMONIAL CLASSROOM—September 21, 2006

Printed in Memory of Chesterfield H. Smith



Chesterfield H. Smith
(1917-2003)