WIN SOME, LOSE SOME

Supreme Court backs states over voter ID and executions, but favors federal laws in business-related cases.

BY DAVID G. SAVAGE

The states had a mixed record in the Supreme Court this year, as big wins for a new voter identification law and the use of lethal injections in executions were balanced by a growing trend in favor of federal preemption of state laws.

These days, defenders of state laws have less to fear from traditional lawsuits raising constitutional claims. The court, led by Chief Justice John G. Roberts Jr., has made clear it will cast a skeptical eye on broad claims that a state law is unconstitutional because it might infringe the rights of some people.

At the same time, state officials have more reason to worry when business leaders complain that a state measure conflicts with federal law. Those claims tend to win a sympathetic hearing in the Roberts Court.

Close watchers of the court say they are struck by the dueling trends. "We had a generally good term" in constitutional cases, says Dan Schweitzer, the Supreme Court counsel for the National Association of Attorneys General, "but we had a bad term on preemption."

VOTER ID, EXECUTIONS UPHELD

Cases testing state laws arise in two different ways, and, of late, reach quite contrasting results. In one set of cases, plaintiffs go to court alleging a state law is unconstitutional. For example, some Democratic Party activists sued Indiana in 2005 to challenge its new requirement that registered voters show government-issued identification with a photo before casting a ballot. They alleged the new law was a partisan-motivated measure to deter some poor, elderly and minority residents from voting, and argued it should be struck down as unconstitutional.

The Supreme Court upheld the law by a 6-3 decision in *Crawford v. Marion County*, saying the challengers failed to prove their case. The vast majority of Indianans have a photo ID, the court said, and those residents who do not can vote by mail or obtain an ID free from the county. Moreover, the challengers failed to cite a single voter who was denied the right to vote because of the requirement.

The author of the court's opinion came as a surprise to some. Justice John Paul Stevens usually agrees with the court's liberal bloc, but the 88-year old native of Chicago grew up there at a time when tales of phantom votes were commonplace. The states have "a valid interest in protecting the integrity and reliability of the electoral process," he said.

The court's skepticism toward such lawsuits also was on display in the ruling on *Baze v. Rees,* which upheld the use of lethal injections to carry out the death penalty. Defense lawyers for two convicted murderers in Kentucky sued, claiming this method of execution amounts to cruel and unusual punishment. They did not have evidence that the Kentucky warden had botched an execution or failed to administer the proper dose of sedative. Kentucky had not carried out an execution in a decade. Instead, the challengers relied largely on a British medical article that theorized dying inmates may suffer excruciating pain if the medications were

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REDISTRICTING ON THE FALL DOCKET

The Supreme Court in the fall will take up a Voting Rights Act question in a North Carolina case that has divided the lower courts.

The question to be decided: Does federal law require states to draw a district where African Americans or Hispanics would have a good chance of electing a minority candidate, or must they do so only when these minorities have a voting majority in the area?

Major federalism cases are missing from the court's line-up this fall. But a ruling on the voting-rights case likely will affect how legislatures redraw districts after the 2010 census. Civil rights lawyers say they worry that adopting the so-called "50 percent rule" would sharply diminish the number of minority lawmakers.

Last year, the North Carolina Supreme Court overturned the legislature's decision in the early 1990s to create House District 18. It brought together mostly black communities in Pender and New Hanover counties along the southeast coast. The new district also elected a black candidate, Representative Thomas Wright, even though only about 40 percent of its voters were black.

But in 2004, Dwight Strickland, a Pender County commissioner, sued the state Board of Elections and its director Gary Bartlett, contending there was no legal basis for splitting up the two counties. State law says the legislature should keep a county in one district whenever possible.

The case forced the state judges to examine the famously oblique clause in the Voting Rights Amendments of 1982. It defined an "abridgement" of the right to vote to occur when "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state are not equally open to participation" by minorities, and they have "less opportunity … to elect representatives of their choice." Four years later, the Supreme Court said this provision prohibits "vote dilution," but it did not precisely define when the law is violated.

The North Carolina judges said the federal law applies only when African Americans "constitute a numerical majority of citizens of voting age." Since Pender and New Hanover counties did not have such a bloc of minority voters, the legislature should not have drawn District 18 as it did, the state court ruled.

North Carolina Attorney General Roy Cooper appealed and said the state court ruling "leaves unresolved the rights of minority voters throughout the country and leaves states floundering in their efforts to comply with Section 2 of the Voting Rights Act." The justices have set arguments in *Bartlett v. Strickland* for Oct. 14.

administered improperly.

This challenge met defeat in a 7-2 decision. Roberts said there was no evidence the condemned men faced a "significant risk" of suffering severe pain.

As in the Indiana case, the court did not close the door entirely to a future, more targeted challenge, if, for example, lawyers can show a state prison has mishandled executions. However, Roberts and his colleagues made clear they are not inclined to declare state laws unconstitutional based on a theoretical claim that some people might be harmed.

BONDS KEEP TAX BREAK

The states also fended off a constitutional challenge to their taxing municipal bonds in *Department of Revenue of Kentucky v. Davis*.

About two-thirds of the capital expenditures of state and local governments are financed by municipal bonds, the court said. And nearly all the states give their own taxpayers an exemption from paying interest on the bonds they issue. George and Catherine Davis, residents of Kentucky, objected to paying state taxes on bonds issued by other states. They challenged this "differential taxation" and won a state court ruling holding it amounted to discrimination against interstate commerce.

The Supreme Court disagreed in a 7-2 decision and said it would not "upset the market in bonds and the settled expectations of their issuers."

U.S. LAWS TRUMP STATES

Business lawyers, in contrast, fared much better by contending that state measures are trumped or "preempted" by the broad sweep of federal law. For example, the U.S. Chamber of Commerce won a ruling that voided a California law barring employers from using state funds to "assist, promote or deter union organizing." The sponsors of A.B. 1889 called it a "state neutrality" law because its aim was to prevent state money from being used to encourage or discourage workers from joining unions.

Labor leaders who tried to organize janitors, nurses and other workers had complained that major employers in health care and education had funded anti-union ad campaigns with state grants and contracts. Several other states adopted measures modeled on the California law.

But the Supreme Court sided with the employers 7-2 in *Chamber of Commerce v. Brown*, ruling these state laws conflict with the free-speech zone created by federal labor law. The justices said Congress made clear that both management and labor are free to make their case to the employees and this "uninhibited, robust and wide-open debate" cannot be regulated or restricted by the states.

Similarly, the court knocked down Maine's move to prevent cigarettes from being delivered to minors. This ruling could loom large in the era of Internet commerce, where products can be purchased online and shipped directly to a home. In the past, retailers had the duty to make sure products such as alcohol, cigarettes, pornography or fireworks were not sold to children. Maine's law extended this duty to

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delivery services, such as UPS or FedEx. It said these delivery services must check to see that the recipient of a package of cigarettes is an adult, not a minor.

Truckers and shippers challenged this law, and the Supreme Court voided it by a 9-0 decision in *Rowe v. New Hampshire Motor Transport*. The justices said it conflicted with the deregulatory laws passed by Congress prohibiting states from enforcing any laws "related to rates, routes or services" of these carriers.

Lawyers for 37 states had supported Maine, saying states had a long-standing authority to regulate in the interest of public health. The high court dismissed that argument and said Congress included no such exception in its deregulatory law. However, states may prohibit all sales of tobacco products except through face-to-face transactions, the court noted.

KEY RULING ON MEDICAL DEVICES

In a third win for business, the court shielded the makers of medical devices from suits in state courts, so long as their devices were approved by the Food and Drug Administration. The 8-1 decision in *Riegel v. Medtronic* interpreted a 1976 law more broadly than its sponsor, Massachusetts Senator Edward Kennedy, said he and others had intended.

In the wake of the Dalkon Shield disaster of the early 1970s, Congress gave the FDA the authority to test and approve new medical devices before they went on the market. The law also said states may not enforce "any requirement" that differed from federal law. Now, the Supreme Court has concluded that personal-injury lawsuits amount to state "requirements" and therefore, conflict with federal law. The notion is that if a jury finds that a medical device was defective under state law, this verdict conflicts with the FDA's belief that the device was safe and not defective.

In the fall, the court will consider whether to extend this liability shield to prescription drugs. Diana Levine, a musician from Vermont, sued Wyeth after she was injected with a drug that was supposed to control nausea but resulted in gangrene. Her right arm had to be amputated, and she won a $6 million verdict in a state court. Lawyers for Wyeth appealed to the Supreme Court and contended her suit and others like it conflicted with federal law, since the FDA had approved the sale and labeling of the drug.

The case of *Wyeth v. Levine* figures to be one of the most closely watched of the term because of its potentially huge impact on the pharmaceutical industry, injured patients and the states' consumer protection laws.