Virginia Constitution Requires a Majority of ‘Justices’ to Invalidate a Law on Constitutional Grounds

By Stephen R. McCullough

Va. Const. Art. VI, § 2 provides that "no law shall be declared unconstitutional under either this Constitution or the Constitution of the United States except on the concurrence of at least a majority of all justices of the Supreme Court." This same provision specifies that the Supreme Court consists of seven justices. 

In the ordinary case, application of this constitutional directive is easy enough; indeed, it goes unnoticed. Although the Supreme Court of Virginia can sit in "divisions," Va. Code § 17.1-308, its long-standing practice in granted cases is for the entire Court to participate. Four votes are necessary for a majority opinion, and the requirement of "at least a majority of all justices" is satisfied.

But what happens when one or more justices must recuse themselves, as happened last year in the litigation over church property? Can the votes of Senior Justices who sit in place of a Justice count toward the required "majority" needed for invalidation of a law on constitutional grounds?

So it is plain enough that a Senior Justice’s vote cannot count toward the majority required by Art. VI, § 2 to invalidate a law on constitutional grounds. The practical consequence of this provision is that anytime a recusal occurs in the context of a constitutional challenge to a law, the challenger’s burden becomes more difficult. If three Justices are recused, as occurred recently in The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church, 280 Va. 6, 694 S.E.2d 555 (2010), the litigant who attacks the constitutional validity of a statute must persuade each remaining Justice that the law is unconstitutional. A single Justice in dissent would have precluded invalidation of the law as unconstitutional. Of course, the application of Art. VI, § 2 never arose in the church property case, because the Court decided the case on non-constitutional grounds.

Recusals in the context of constitutional challenges certainly are not an everyday occurrence. Nevertheless, in the right situation, Art. VI, § 2 could prove to be the deciding factor for a law to survive a constitutional challenge, as illustrated by the challenge to the statute criminalizing cross-burning. In Black v. Commonwealth, 262 Va. 764, 553 S.E.2d 738 (2001), Justice Keenan recused herself and Justice Whiting participated as a Senior Justice. The Court held by a 4-3 vote that the statute was constitutionally infirm. Senior Justice Whiting was in the majority. The Commonwealth did not seek rehearing on the basis that the Court impermissibly invalidated a statute under Art. VI, § 2, and the Court made no mention of it. The application of Art. VI, § 2 to this situation, however, should have resulted in the statute being upheld on the 3-3 vote of Justices. Ultimately, of course, the United States Supreme Court reversed in Virginia v. Black, 538 U.S. 343 (2003), so the final outcome was unaffected. Consider also the Court’s recent 4-3 invalidation on vagueness grounds of a motor vehicle statute in

Continued on page 14
Message from the Chair

Although the appellate courts take a break from oral arguments during the summer, the work of appellate practitioners never really ceases. Nevertheless, summer is often a time when we get to slow down and, if we are lucky, take a short break from the practice of law.

As you enjoy the slower pace and hopefully a vacation, I want to make some brief points about the appellate practice section. First, I want each of you to take a few minutes to reflect on how we can improve the appellate practice section and, just as importantly, what you can do to enhance the appellate section. Our section has grown significantly in its short life, but we can do so much more. I welcome your ideas and suggestions. Please contact me at wthro@cnu.edu.

Second, for those of you who attended the Summer Meeting, I hope you enjoyed the Section’s program on "The Roberts Court at Age Five: The 2010 U.S. Supreme Court Term in Review." That program included a panel of distinguished journalists, scholars, and U.S. Supreme Court advocates. Bill Hurd and his committee did an outstanding job and I expect that our program will be considered one of the jewels of the conference.

Third, please consider writing something for our newsletter. As you can see from the table of contents, this issue is packed with interesting and informative articles. Joseph Pope, Steve Emmert, and their committee are to be commended, but they cannot publish issues like this without your help. If we have more authors, we can increase both the number of articles and the frequency of issues.

Fourth, please tell your colleagues about the appellate practice section. Although we have seen dramatic growth in membership, we remain one of the smaller sections in the Virginia Bar Association. As more and more lawyers realize that appellate practice is fundamentally different from trial practice and seek to acquire advocacy skills, our section can grow.

William E. Thro
Appellate Practice Section Chair
Christopher Newport University
Yorktown
The Supreme Court of Virginia, the Fourth Circuit, and the ‘Serious Business’ of Applying the Second Amendment

By Joseph R. Pope

The Second Amendment states: "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." In District of Columbia v. Heller, the Supreme Court ruled that the Second Amendment secures an individual right to bear firearms. The Court’s ruling resolved a protracted and often contentious debate over whether the Second Amendment secures a private, individual right to carry weapons in connection with service in a state militia. The Court later concluded in Columbia v. Heller, the Supreme Court held the Second Amendment did in fact confer an individual right to possess firearms in the home and struck down the District’s gun laws as overly restrictive. The Heller Court reasoned that “like the Fourth and Fifth Amendments, [the Second Amendment] codified a pre-existing [individual] right” to possess and carry firearms “in case of confrontation.”

Two years after deciding Heller, the Supreme Court in McDonald v. City of Chicago held the Second Amendment was incorporated by the Fourteenth Amendment against the states and struck down a Chicago law similar to the one at issue in Heller. In McDonald, the Court characterized the right to possess firearms in the home for purposes of self-defense as "fundamental" and therefore enforceable against state and local governments.

In Heller and McDonald, the Court declared that individuals enjoy a fundamental constitutional right to possess firearms, but it did not define the outer limits of the right. The Court explained, however, that the right was "not unlimited," and its holding suggests that there is a significantly diminished right, if any right at all, to bear firearms outside the home. Indeed, while declining to fill in the interstices of the Second Amendment right, the Court identified the home as a special place “where the need for defense of self, family, and property is most acute.” And, moreover, the Court limited its holding to home possession and use, stating, "[W]e hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” Characterizing its ruling as narrow and context specific, the Court observed that "whatever it leaves to further evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” As such, it is plausible to conclude that the right dissolves—or at least its potency wanes—once a person leaves the home.

Heller’s holding also implies that regulations preventing the possession and limiting the availability of "dangerous and unusual weapons" are constitutionally sound. The test suggested by the Court asks whether a particular weapon falls within the realm of weapons in "common use" by "law-abiding" citizens for purposes of self-defense. Because the District’s handgun ban amounted to a "prohibition of an entire class of arms" overwhelmingly chosen by American society for that lawful purpose,” it failed this test. Since weapons such as machine guns, sawed-off shotguns, and military-style assault weapons do not fall within the class of weapons in "common use" for purposes of self-defense, laws restricting their possession presumably remain valid. Thus, according to Heller, the Second Amendment confers an individual right to possess in the home weapons commonly used by law-abiding citizens, such as handguns and non-military long-guns, for the purpose of self-defense.

At the same time, recognizing the negative externalities created by gun violence, the Court stressed:

"[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of..."
The plaintiff claimed also that the law was unconstitutional because it “violates the historic understanding of the right to bear arms.” The court rejected the standards proposed by the plaintiff and instead evaluated the law in light of express language in Heller; specifically, language stating that certain categorical prohibitions on the possession of firearms are presumptively lawful.

Referencing Heller’s categorical location, the court noted that “[n]either Heller nor McDonald casts doubt on laws or regulations restricting the carrying of firearms in sensitive places, such as schools and government buildings.” GMU is an especially sensitive place, according to the court, because it has “30,000 students enrolled ranging from age 16 to senior citizens, and... over 350 members of the incoming class would be under the age of 18.” Additionally, “approximately 50,000 elementary and high school students attend summer camps at GMU” and “approximately 130 children attend the child study center preschool there.” The court also observed that, unlike a public street or park, “a university traditionally has not been open to the general public” and “parents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm.” For these reasons, many buildings on GMU’s campus fell within the category of “sensitive places” described in Heller; accordingly, the regulation did not contravene the Second Amendment.

The approach adopted by the Supreme Court of Virginia may be described as a “categorical approach” —meaning an approach where courts identify certain categories of conduct that fall within the scope of the Second Amendment (and thus protected) or outside the ambit of the Amendment (and thus unprotected). Many other courts have adopted this approach and, looking to the list of presumptively lawful public-safety regulations, have upheld laws banning firearm possession by convicted felons and firearm bans in other “sensitive places” such as airports and post office parking lots. Reasoning by analogy to the list of presumptively lawful restrictions, courts have also concluded that laws banning the possession of firearms by unlawful users of controlled substances and illegal aliens also remain constitutional.

III. The Fourth Circuit Applies a Two-Part Hybrid Test in United States v. Chester

At issue in United States v. Chester was the constitutionality of 18 U.S.C. § 922(g)(9)—a statute forbidding persons convicted of a “misdemeanor crime of domestic violence” from possessing firearms. Following his conviction under § 922(g)(9), the defendant argued on appeal that laws restricting the right protected under the Second Amendment should be evaluated under strict scrutiny. Like the Supreme Court of Virginia in DiGiacinto, a panel of the Fourth Circuit rejected this argument. But the court declined to apply a categorical approach; instead choosing to follow a test developed by the Third Circuit in United States v. Marzzarella.

Under the Marzzarella test, the threshold inquiry is whether the challenged statute regulates conduct falling within the scope of the Second Amendment. This inquiry “seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification.” If not, the challenged law is valid. If the law does burden protected conduct, the court must evaluate the law under the appropriate standard of constitutional scrutiny. Drawing from First Amendment jurisprudence, the Marzzarella test applies the level of scrutiny that accords with the level of protection the Second Amendment affords the regulated conduct and the degree to which the challenged regulation burdens the protected conduct.

Applying this composite approach to § 922(g)(9), the Chester panel first found that laws barring persons convicted of domestic violence misdemeanors from possessing firearms were of recent vintage; thus, it could not "say that the Second Amendment did not apply to persons convicted of domestic violence misdemeanors." Hence, the panel assumed "that Chester's Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense."

Although the defendant’s conduct fell within the scope of the Second Amendment, the court concluded that the defendant’s right to possess a

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firearm in his home did not fall within the core of the Second Amendment because the core right extends only to "law-abiding, responsible citizen[s]." In other words, because of his domestic violence conviction, the defendant’s Second Amendment rights were significantly impaired. Since the defendant could not claim possession of the core right identified in *Heller*, strict scrutiny was inappropriate. Instead, the court found that intermediate scrutiny should apply. "Intermediate scrutiny queries whether a statute is substantially related to an important governmental interest." And the burden of satisfying the test falls "squarely upon the government." Put another way, "the government must demonstrate . . . that there is a 'reasonable fit' between the challenged regulation and a 'substantial' government objective."54

After identifying the appropriate standard for testing the constitutionality of § 922(g)(9), the court concluded that the record was insufficient to determine whether the government had carried "its burden of establishing a reasonable fit between the important object of reducing domestic gun violence and § 922(g)(9)'s permanent disarmament of all domestic-violence misdemeanants." While acknowledging that the government had offered plausible reasons why the permanent disarmament of persons convicted of domestic violence misdemeanors is substantially related to the important government goal of public safety in general and protection of domestic violence victims in particular, the court nevertheless remanded the case and instructed the government to offer more than a plausible explanation.56 The court, instead, required the government to offer "evidence to establish a substantial relationship between § 922(g)(9) and an important government goal."57

Like the Fourth Circuit, other courts have followed the test developed in *Marzzarella*. For example, in *United States v. Reese*, the Tenth Circuit considered the constitutionality of 18 U.S.C. § 922(g)(8), which prohibits persons subject to a restraining order for domestic violence from possessing firearms, by considering (1) "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee"; and, if it does, (2) whether the law passes muster under "some form of means-end scrutiny."58 Similarly, in *GeorgiaCarry.Org, Inc. v. Georgia*, a district court applied the *Marzzarella* test and upheld a Georgia statute that barred persons from possessing firearms in places of worship.59

Still other courts have applied a variant of the test that looks to whether the law places a "substantial burden" upon the "right to keep and to bear arms." After making this threshold finding, the court then applies a heightened level of scrutiny (either intermediate or strict scrutiny) to the law. In *Nordyke v. King*, a panel of the Ninth Circuit considered the constitutionality of a county ordinance that banned the possession of firearms on county property. In the court's view, because there was no suggestion that the ordinance "makes it materially more difficult to obtain firearms" or causes a "shortage of places to purchase guns in or near" the county, the ordinance did not substantially burden the plaintiff's Second Amendment rights.60 Arguably, the substantial burden test is a simpler and more judiciable manageable variation because its threshold inquiry is more exacting and often obviates any need to weigh empirical evidence to determine whether the regulation in question bears a substantial relationship between an important government goal or is narrowly tailored to a compelling government interest.61 What is more, the substantial burden approach is hardly novel and has proven itself workable in evaluating restrictions on other fundamental rights, such as the right to vote, the right to marry, and a woman's right to terminate her pregnancy.62

IV. The Fourth Circuit Refines Its Second Amendment Jurisprudence in *United States v. Masciandaro*

A few months after deciding *Chester*, the Fourth Circuit revisited the Second Amendment in *United States v. Masciandaro*. There, the defendant was discovered by an officer of the United States Park Police sleeping in his car in a parking lot located in a National Park. During the encounter, the officer discovered the defendant was in possession of a loaded 9mm semiautomatic pistol. The officer arrested the defendant and charged him with "carrying or possessing a loaded weapon in a motor vehicle" within a national park area, in violation of 36 C.F.R. § 2.4(b). At trial before a magistrate judge, the defendant explained he carried the firearm for self-defense, as he often slept in his car while traveling on business, and, while traveling, he often kept cash, a laptop computer, and other valuables on hand. The magistrate judge found him guilty of the offense and the district court affirmed.63

On appeal to the Fourth Circuit, the defendant offered, *inter alia*, two arguments supporting his claim that § 2.4(b) was unconstitutional as applied to him. First, the defendant argued that "because he regularly slept in his car, as much as three to five days a week while traveling on business, his arrest for carrying or possessing a handgun ran afoul of *Heller*'s core protection of the right to use arms in defense of hearth and home." If the court did not find his car to be at his home, he argued in the alternative that his arrest and conviction under § 2.4(b) "violated a more general right to carry or possess a handgun outside of the home for self-defense."64

Side-stepping both arguments, in a majority opinion written by Judge Wilkinson and joined by Judge Duffy, the court believed it sufficient to follow the canon of constitutional avoidance and simply assume without deciding the presence of an existing right to possess firearms outside the home. As such, it was unnecessary to consider the defendant’s argument that his car was his home and the more nettlesome question of "whether and to what extent the Second Amendment right recognized in *Heller* applies outside the home."65 Explaining its cautious approach, the majority said:

To the degree that we push the right beyond what the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee. This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. It is not far-
Niemeyer found that "[w]hat the those activities or needs occur[.]
83 but extends in some form to wherever defense, and for hunting is… not strict-
for participation in militias, for self-
Heller's
tence of a Second Amendment right with language suggesting the exis-
§ 2.4(b). At the outset, the court
firearm while in his car, the court
individual right to possess a loaded
of the court's opinion, holding that
Judge Niemeyer joined the remainder
the approach taken by the majority,
agreed with the majority on this point

Judge Niemeyer, however, dis-
reed with the majority on this point and argued that "this is not the type of case where constitutional avoidance is appropriate" because the defendant squarely presented the constitutional question of whether § 2.4(b) infringed his Second Amendment right to pos-

"we would take into account the nature of a person's Second Amend-
ent interest, the extent to which those interests are burdened by gov-

Pragmatic features

In addition to considering the fac-
tual distinctions between the case be-
before it and Chester, the panel injected
majoritarian and pragmatic features to its analysis, noting that requiring strict scrutiny based on the facts before it "would likely foreclose an extraordi-
inary number of regulatory measures, thus handcuffing lawmakers' ability to prevent armed mayhem in public places," and depriving them of a vari-
ety of tools for combating that prob-

Taking account of these various considerations, the court held that "36
C.F.R. § 2.4(b) will survive Mascian-
daro's as-applied challenge if it satis-
ies intermediate scrutiny—i.e., if the
government can demonstrate that
§ 2.4(b) is reasonably adapted to a sub-
stantial governmental interest.

Applying intermediate scrutiny, the court had little difficulty finding the
government could satisfy its burden.
First, the court concluded that "the government has a substantial interest in providing for the safety of individu-
als who visit and make use of the national park." Indeed, the court noted that many cases have character-
ized the government's interest in public safety on government property as "compelling." Second, the court ruled
that § 2.4(b) "is reasonably adapted to that substantial governmental inter-
est," as the law only prohibited per-
sons from possessing loaded firearms while within their motor vehicles.

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the relevant governmental objective, or that there be no burden whatsoever on the individual right in question.”

To be sure, Masciandaro refines the Marzzarella test in a number of ways. First, Masciandaro does not require a court to resolve the issue of whether a challenged law imposes a burden upon conduct falling within the scope of the Second Amendment as understood at the time of its enactment—it allows the court to skip this difficult and often unanswerable question. By assuming the conduct falls within the scope of the right, a court can simply proceed to determine and apply the appropriate level of scrutiny. Second, Masciandaro articulated that a person’s Second Amendment interest is dependent on whether the person claims a right to bear firearms out-of-the-home or in-the-home and whether the person can be described as a “law abiding citizen.” Under the court’s formulation, if a regulation burdens the right of a law-abiding person to possess firearms in his home, the regulation is subject to strict scrutiny. On the other hand, if the regulation burdens the assumed right of a law-abiding citizen to bear arms outside the home, it is subject to intermediate scrutiny. By noting the government’s “compelling interest” in public safety, the Masciandaro decision also implies a more severe burden on firearm possession rights on property owned and managed by the government would presumably survive even strict scrutiny.

### Conclusion

Heller and McDonald conclusively establish that the right to keep and bear arms is an individual right unrelated to service in state militias. Nevertheless, in those decisions, the Court failed to provide clear guidance to lower courts on the standards to apply when adjudicating constitutional claims to the approximately 20,000 gun control laws in the United States. The Supreme Court of Virginia and the Fourth Circuit have followed different approaches when resolving cases raising Second Amendment issues: the Supreme Court of Virginia adopted a categorical approach that looks to the categories of firearm laws and regulations identified by Heller as “presumptively lawful,” while the Fourth Circuit has adopted and refined an approach developed by the Third Circuit in United States v. Marzzarella. This divergence in decisional models is emblematic of the current state of Second Amendment jurisprudence. Indeed, since lower courts have developed such irremediably fractured analytical frameworks for resolving Second Amendment problems, it is only a matter of time before the Supreme Court will be forced to chime-in and furnish lower courts the guidance Heller and McDonald failed to provide.

### Notes:
1. In a recent Fourth Circuit decision, United States v. Masciandro, 2011 U.S. App. LEXIS 5964 (4th Cir. Mar. 24, 2011), Judge Wilkinson remarked that interpreting the Second Amendment right to bear firearms is, indeed, “serious business.” Id. at *48.
3. Two interpretational models comprise the collective-rights position. The first understands the Second Amendment as a guarantee that state governments may arm militias, while the second claims the Amendment guarantees individuals the right to own and possess firearms insofar as it is connected to service in a state militia. See Kenneth A. Klukowski, Armed By Right: The Emerging Jurisprudence of the Second Amendment, 18 Geo. Mason U. Civ. Rts. L.J. 167, 175-76 (2008)
5. 128 S. Ct. at 2797 (emphasis omitted).
6. McDonald, 130 S. Ct. at 3036, 3038 n. 17 (plurality opinion).
8. Id. at 2817.
9. Id. at 2821-22.
10. Id. at 2821.
12. Id. at 2816.
13. Id. at 2817.
14. See id. at 2816-17.
15. Id. at 2817.
17. Heller, 128 S. Ct. at 2816 (emphasizing that the Second Amendment right to keep and bear arms is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose”).
18. Id.
19. Id. at 2816-17.
22. The Third Circuit noted that the phrase “presumptively lawful” could have different meanings under the newly enunciated Second Amendment doctrine. The court observed, On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny.
23. Id.
24. Id. at 2817. The Court did, however, expressly reject Justice Breyer’s proposed “interest-balancing” test, which would ask “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” Id. at 2821.
25. See United States v. Booker, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (concluding that Supreme Court “consciously left the appropriate level of scrutiny for another day”).
27. Id. at 130, 704 S.E.2d at 367.
28. Id. at 132-33, 704 S.E.2d at 368.
29. Id. at 133, 704 S.E.2d at 368.
30. Id. at 135, 704 S.E.2d at 369.
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31. Id. at 135-36, 704 S.E.2d at 370.
32. Id.; 704 S.E.2d at 370.
33. Id. at 136, 704 S.E.2d at 370.
34. Id. The Court noted that under the
law as currently drafted individuals
may lawfully carry firearms on "the
open grounds of GMU’s campus." Id.
at 133, 704 S.E.2d at 368.
35. See Joseph Blocher, Categoricalism
and Balancing in First and Second
Amendment Analysis, 84 N.Y.U.L. Rev.
375 (2009).
36. United States v. Rozier, 598 F.3d
375 (2009).
37. See United States v. Davis, 304 F. App’x
473 (9th Cir. 2008).
38. United States v. Dorosan, 350 F. App’x
874, 875 (5th Cir. 2009).
39. United States v. Richard, 350 F. App’x
252, 260 (10th Cir. 2009).
40. United States v. Yanez-Vasquez, 2010
Jan. 28, 2010); United States v. Boffil- 
Rivera, 2008 U.S. Dist. LEXIS 84633,
41. Neither the parties, nor the Virginia
Supreme Court, addressed whether the
firearm ban in certain areas of
GMU’s campus was constitutional
because the Commonwealth, in its role
as proprietor, can, like a private owner,
enact regulations designed to maintain
order and safety on its property. See
Adderley v. Florida, 385 U.S. 39, 47-48
(1966) (finding that a state govern-
ment, "no less than a private owner of
property, has power to preserve the
property under its control for the use
to which it is lawfully dedicated. . . . .
The United States Constitution does
not forbid a State to control the use of
its own property for its own lawful
nondiscriminatory purpose.").
42. 628 F.3d 673 (4th Cir. 2010).
43. 614 F.3d 85 (3d Cir. 2010). At issue in
Marzzarella was the constitutionality of
§ 922(k), which prohibits possession of
a firearm with an obliterated serial
number.
44. Id. at 89.
45. Chester, 628 F.3d at 680.
46. Id. at 680.
47. In Marzzarella, the court observed
that federal courts do not apply one
standard of review to First Amend-
ment challenges. 614 F.3d at 96. For
instance, "[s]trict scrutiny is triggered
by content-based restrictions on speech in a public forum, but content-
neutral time, place, and manner
restrictions in a public forum trigger a
form of intermediate scrutiny." Id.
citations omitted).
48. See Marzzarella, 614 F.3d at 96.
49. Chester, 628 F.3d at 681.
50. Id. at 681-82.
51. Id. at 683.
52. Id. at 690.
53. Id. at 683 (citing Bd. of Trs. of State
Univ. of N.Y. v. Fox, 492 U.S. 469, 480-81
(1989)).
54. Id.
55. Id.
56. Id.
57. Id.
58. 627 F.3d 792, 800 (10th Cir. 2010).
59. 627 F.3d at 800-01 (quoting
Marzzarella, 614 F.3d at 89). 
60. 2011 U.S. Dist. LEXIS 6370 (M.D.
61. Id. at *30-*41.
62. See, e.g., Nordyke v. King, 2011 U.S.
App. LEXIS 8906 (9th Cir. Cal. May 2, 2011).
63. Id. at *22.
64. Id. at *3-*4.
65. Id. at 27.
66. See Eugene Volokh, Implementing
the Right to Keep and Bear Arms for Self-
Defense, 56 UCLA L. Rev. 1443, 1459-60
(2009) (arguing that it is easier to deter-
mine whether a law substantially bur-
dens the right to bear arms than to fig-
ure out whether a law "will reduce the
danger of gun crime"); Richard H.
Fallon, Jr., Judicially Manageable
Standards and Constitutional Meaning,
119 Harv. L. Rev. 1274, 1291 (2006) ("A
test may be deemed judicially unman-
geable if it would require courts to
make empirical findings or predictive
judgments for which they lack compe-
tence.").
67. Burdick v. Takushi, 504 U.S. 428, 432, 
112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)
(noting that the rigorousness of our
inquiry into the propriety of a state
election law depends upon the extent
to which a challenged regulation bur-
dens First and Fourteenth Amendment
rights.").
68. Zablocki v. Redhail, 434 U.S. 374, 383,
98 S. Ct. 673, 54 L. Ed. 2d 618 (1978)
(stating that even though "the right to
marry is of fundamental importance,"
regulations of that right do not trigger
strict scrutiny unless they "significantly
interfere[ ] with [its] exercise.").
Casey, 505 U.S. 833, 112 S. Ct. 2791, 120
L. Ed. 2d 674 (1992) (holding that pre-
viability abortion regulations are
unconstitutional if they impose an
"undue burden" on a woman’s right to
terminate her pregnancy).
70. 2011 U.S. App. LEXIS 5964 (4th Cir.
71. Id. at *4.
72. Id.
73. Id. at *5.
74. Id. at *7-9.
75. Id. at *23.
76. Id. at *23-*24.
77. Senior United States District Judge
for the District of South Carolina, sit-
ting by designation.
78. Id. at *47 (citing Ashwander v. TVA,
297 U.S. 288 (1936) (Brandeis, J., con-
curring)).
79. Id. at *45.
80. Id. at *48
81. Id. at 27.
82. Id. at *24.
83. Id. at *26.
84. Id. at *27. 
85. Id. at *30.
86. Id. at *32.
87. Id.
88. Id.
89. Id. at *33-*34.
90. Id. at *33-*34.
91. Id. at *34 (noting Heller’s reliance on
Nunn v. State, 1 Ga. 243, 249 (1846)).
92. Id. at *31-*32.
93. Id. at *34 (citing United States v.
Skoien, 614 F.3d 638, 642 (7th Cir. 2010)
(en banc).
94. Id. (citing Heller, 128 S. Ct. at 2822).
95. Id. at *35.
96. Id. at *41.
97. Id.
98. Id.
99. Id. at *43.
The justice had a surprise for those who had read too much into Whitehead.

Last year, in two simultaneous criminal-law opinions, the court revised its Whitehead holding, pulling back from its broad application of the contemporaneous-objection rule to appellees. In Perry v. Commonwealth, 280 Va. 572 (2010) and Banks v. Commonwealth, 280 Va. 612 (2010), the justices clarified how and when the “right for the wrong reason” rule would be applied.

These two appeals rose from prosecutions for possession of drugs and a weapon, respectively. In each case, the Commonwealth sought affirmance on a ground other than the one it had relied upon in the trial court. These arguments would appear to be swimming against a very recent flood tide, in the form of the new Whitehead doctrine.

But the justices had a surprise for those who had read too much into Whitehead. After quoting the essence of that ruling, adapted from the earlier case of Eason v. Eason, 204 Va. 347 (1963), the court diverged from its previously charted course, starting with Perry:

However, upon reconsideration of the case law on this matter, we are of the view that this principle, adopted from Eason, is too broad and is inconsistent with case law that followed it. Failure to make the argument before the trial court is not the proper focus of the right result for the wrong reason doctrine. Consideration of the facts in the record and whether additional factual presentation is necessary to resolve the newly-advanced reason is the proper focus of the application of the doctrine.

280 Va. at 580

The court explained the brand-new doctrine even further in its opinion in Banks:

[W]e must clarify what it means to say that the record supports an alternative ground for affirmance. The record supports an alternative ground when it reflects that all evidence necessary to that ground was before the circuit court. And if that evidence was conflicting, then the record must show how the circuit court resolved the dispute—for example, it must demonstrate how contradicting testimony was weighed or credited.

In affirming the denial of Banks’ motion to suppress on an alternative ground, the Court of Appeals concluded that Banks consented to the seizure of the jacket. The facts surrounding the seizure, however, were in dispute; and the circuit court made no findings as to consent, resolving the motion on a separate, independent ground: exigent circumstances.

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Right for Wrong Reason
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280 Va. at 617

Make no mistake; the law in this area has shifted. These are not the rulings that you would have forecast after reading Whitehead and then speculating on how Perry and Banks would come out. The two excerpts quoted above will probably be the best short definition of the parameters of the court’s approach to this doctrine. Practitioners seeking to apply or resist the application of the doctrine should focus on the state of the record: Are the relevant facts all in the record? Were there any disputed facts? If so, how did the court resolve those? If the facts were resolved by a jury, then an appellee has the high cards; if it was decided on summary judgment or by a motion to strike, then the appellant will probably be in better position.

One last question: What’s left of the obligation of the appellee to assert cross-error? There is still a role for that tool in some cases, such as where an appellant seeks a new trial. In that instance, if the appellee won despite losing some evidentiary rulings, and he doesn’t want to be stuck with those rulings as the law of the case on retrial (as they would be if they went unappealed), then he has to assign cross-error.

Cross-error to preserve an independent ground for affirmance, though, is probably an unnecessary tool now. In this sense, the approach recently taken by the court to bar an appellee’s argument in Kitchen v. Newport News, 275 Va. 378, 387 n.6 (2008) (“The final order referenced neither of these grounds in sustaining the demurrer, and the City did not assign cross error to the circuit court’s failure to rule on its claims. Therefore, we do not consider either of these claims. Rule 5:18; Rule 5:27.”) is probably dead and buried at this point.

L. Steven Emmert is a partner at Sykes, Bourdon, Ahern & Levy, P.C., in Virginia Beach. He joined the law firm in 1999 after nine years in the Virginia Beach City Attorney’s Office. He is immediate past chair of the VBA Appellate Practice Section Council.

Lessons from the Supreme Court of Virginia in 2010 on Preserving Error and Rule 5:25

By Monica Taylor Monday

What did 2010 signal for the principles governing the preservation of error in Virginia? First and foremost, the long-awaited revision of the Supreme Court of Virginia’s appellate rules introduced a different title and updated text for Rule 5:25, which codifies the contemporaneous objection rule. Although Rule 5:25 got a face lift, it still retains the core elements of the contemporaneous objection rule and its narrow exceptions. And a review of just a few of the cases issued in 2010 addressing Rule 5:25 suggests that traditional and familiar principles continue to drive the Supreme Court’s preservation-of-error analysis.

The ‘New’ Rule is Much Like the ‘Old’ Rule

The new version of Rule 5:25 took effect on July 1, 2010. Prior to July 1, the rule stated:

Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.

The old version of Rule 5:25 differed from the Court of Appeals of Virginia’s version of the contemporaneous objection rule, which is found in Rule 5A:18.1 The newly revised Rule 5:25 harmonizes the two appellate court rules, conforming Rule 5:25 with 5A:18.2 With the changes that became effective last July, Rule 5:25 now reads:

No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

As the changes to the text of Rule 5:25 were designed to achieve conformity with the contemporaneous objection rules in appellate courts,3 those revisions apparently do not change the purpose and effect of the rule. Thus, it is unlikely that the freshly minted language of Rule 5:25 will produce significant or meaningful changes to the Court’s application of the contemporaneous objection rule.4

Even after revision, Rule 5:25 retains its core purpose by requiring a contemporaneous objection to rulings subject to review by the appellate court—that means an objection, including the grounds for the objection, stated at the time of the ruling. Although the rule has always required an objection to be stated with reasonable certainty, it now explicitly states that a general objection will not suffice: “A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.” This addition to Rule 5:25 signals the importance of a well-stated objection and, more importantly, the penalty for failing to make one.5

Further, the revised Rule does not disturb the two well-known exceptions to the contemporaneous objection rule, which permit the Supreme Court to consider matters not preserved for appeal for “good cause shown” or “to attain the ends of justice.” Thus, litigants may still seek relief from the requirements of Rule 5:25 in limited and extraordinary circumstances.

Finally, the titles for Rule 5:25 and Rule 5A:18 have also changed. The new title, “Preservation of Issues for Appellate Review,” replaces “Questions

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to Be Considered,” Rule 5:25’s new title underscores the central function of the rule to articulate the steps required to preserve issues in the trial court so the appellate court may undertake review of those issues on appeal.

The Purpose of the Contemporaneous Objection Rule

Scialdone v. Commonwealth provided the Court a platform to discuss the purpose of the contemporaneous objection rule. Scialdone is last year’s must-read preservation-of-error case. Although the result in Scialdone was the product of its unique facts, the opinion provides a look into the Court’s view of the purpose and proper application of the rule.

The legal question in Scialdone was whether the trial court deprived the defendants of due process by conducting a summary contempt proceeding. An en banc Court of Appeals held that the defendants had failed to preserve this issue for appeal by “never specifically ask[ing] for the relief they now claimed was improperly denied.” The Supreme Court reversed, concluding that the defendants filed motions that “squarely presented their arguments to the circuit court and the court ruled on the merits of the objections.”

During the course of trial, the circuit court held two attorneys and their law clerk in summary contempt, and sentenced them to serve ten days in jail. The attorneys and their clerk filed motions for a stay of execution of the sentence, together with supporting legal memoranda. They argued inter alia that the alleged contempt was not subject to a summary proceeding, they were denied their right to counsel and to present evidence, and the alleged contemptible conduct was not wholly contained in the record of the case.

The next day, the judge entered an order holding the defendants in contempt. Several days later, it held a hearing on the defendants’ motions to stay. The circuit court stated on the record that it had read the motions to stay and rejected the defendants’ arguments.

The Court focused its analysis with the purpose of the rule: “In analyzing whether a litigant has satisfied the requirements of Rule 5:25, this Court has consistently focused on whether the trial court had the opportunity to rule intelligently on the issue.” A party must state the objection so that the trial judge may understand the precise question to be answered. “To satisfy the rule, ‘an objection must be made...at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error.’” Such an approach avoids unnecessary appeals and reversals by giving the opposing party an opportunity to respond to the objection, and giving the court an opportunity to consider, and possibly correct, the alleged error. If the Court has not been given an opportunity to rule, the appellate court will not consider any assigned error.

Guided by these principles, the Court unanimously found that the motions to stay execution and the accompanying memoranda satisfied the requirements of Rule 5:25. Those pleadings pressed the due process concerns that were later raised on appeal: “the defendants’ motions to stay clearly encompassed the arguments they now present on appeal.” Noting that the circuit court had read the motions and overruled them, the Court found that the lower court “unquestionably” was afforded an opportunity to rule intelligently on the issue “because the court in fact did so.” Because the circuit court was given an opportunity to rule on the motions and actually did rule on the merits of those motions, there was a basis for appellate review of that ruling.

Although the circuit court had entered the contempt order before ruling on the motions to stay, it had acknowledged that it was aware of the motions before it entered the order. The Supreme Court held that, under these circumstances, the error was properly preserved:

Where a party makes his objections known to the court prior to or at the time of entry of a final order or decree and does not specifically disclaim the desire to have the court rule on those objections, entry of a final order or decree adverse to those objections constitutes a rejection of them and preserves them under [Rule 5:25] for purposes of appeal.

Scialdone is a reminder that the purpose of the contemporaneous objection rule should drive the Court’s preservation-of-error analysis. Given the purpose of the rule, error is preserved for appellate review if the trial court is provided an opportunity to intelligently rule on a timely, well-stated objection.

The ‘Good Cause’ and ‘Ends of Justice’ Exceptions

The Supreme Court had several opportunities to apply the “good cause” or “ends of justice” exceptions to Rule 5:25 to entertain an argument that was not made in the trial court. In these cases, the Court held firmly to the existing principle that the “ends of justice” exception will apply when there is error and the failure to apply the exception would result in “a grave injustice.”

Ali v. Commonwealth presented the rare circumstance where the Court will apply the “ends of justice” exception to consider error that was not raised below. In Ali, the defendant was convicted of both robbery and grand larceny. He argued on appeal that he could not be lawfully convicted of both offenses because they arose out of a single act. However, the precise issue he pressed on appeal—that the convictions resulted from an inconsistency at the core of the Commonwealth’s case—was not raised in the trial court. The Court of Appeals concluded that the issue was waived under Rule 5A:18, and refused to apply that rule’s “ends of justice” provision. However, the Supreme Court found...
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that application of the “ends of justice” exception was necessary “to avoid a grave injustice” because the record “clearly and affirmatively shows that an element of one of the crimes of which Ali was convicted did not occur.”

Although the decision in Ali is remarkable because it serves as one of the rare occasions when the appellate court will consider an argument that was not raised first in the trial court, it is at heart simply an affirmanace of existing law. In prior cases, the appellate courts have applied the “ends of justice” exception only when it was clear from the record that an actual miscarriage of justice had occurred.

By contrast, in Gheorghiu v. Commonwealth, the Court declined to apply both the “good cause” and “ends of justice” exceptions to consider an objection to venue that was not raised in the trial court. The defendant justified his failure to object by arguing that an objection to venue for charges of credit card theft would have been “fruitless under the state of the law at that time.” But a new Supreme Court case decided after his conviction changed the law and, according to the defendant, the considerations of venue.

Thus, he argued that the change in the law triggers the “good cause” exception to Rule 5:25. In a footnote, the Court stated that he may not have properly raised this issue in the Court of Appeals, the defendant asked the Court to invoke the “ends of justice” exception to Rule 5:25. The Court also refused to apply the ends of justice exception in Carroll v. Commonwealth. The issue in Carroll was whether a defendant who enters an Alford plea to a charge of rape and is placed on probation violates the terms of his probation by refusing to admit his guilt during court-ordered sex-offender treatment. The trial court found that the defendant violated his probation by refusing to admit his guilt during the treatment. The defendant raised several issues on appeal, including an argument that the revocation of his probation was a breach of the plea agreement. Acknowledging that he may not have properly raised this issue in the Court of Appeals, the defendant asked the Court to invoke the “ends of justice” exception to Rule 5:25. In a footnote, the Court stated that, based upon the record, it could not say that “a grave injustice” would result if it did not consider the issue.

The exceptions to Rule 5:25 apply in very limited circumstances. Nevertheless, counsel should ask the appellate court to invoke those exceptions; otherwise, the Court will not consider whether it should address an issue that has not been preserved to attain the “ends of justice” or for “good cause.”

Motions to Strike the Sufficiency of the Evidence

Defense counsel in criminal and civil cases also received a stern reminder in 2010 about motions to strike the sufficiency of the evidence. The cases are United Leasing Corporation v. The Lehner Family Business Trust and Murillo-Rodriguez v. Commonwealth.

In these cases, the Supreme Court held that when a defendant makes a motion to strike at the conclusion of the plaintiff’s case-in-chief, and then introduces evidence in defense, the appellate court will not review the merits of the trial, was not an element of the crime at issue, and could be waived. As the defendant had not challenged the sufficiency of the evidence supporting these convictions on appeal, the Court found that the defendant would have been convicted “in whatever venue these charges were prosecuted.” In short, the Court concluded that the circumstances were not sufficient to invoke the “ends of justice” exception to Rule 5:25.

The Court also refused to apply the ends of justice exception in Carroll v. Commonwealth. The issue in Carroll was whether a defendant who enters an Alford plea to a charge of rape and is placed on probation violates the terms of his probation by refusing to admit his guilt during court-ordered sex-offender treatment. The trial court found that the defendant violated his probation by refusing to admit his guilt during the treatment. The defendant raised several issues on appeal, including an argument that the revocation of his probation was a breach of the plea agreement. Acknowledging that he may not have properly raised this issue in the Court of Appeals, the defendant asked the Court to invoke the “ends of justice” exception to Rule 5:25. In a footnote, the Court stated that, based upon the record, it could not say that “a grave injustice” would result if it did not consider the issue.

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In these cases, the Supreme Court held that when a defendant makes a motion to strike at the conclusion of the plaintiff’s case-in-chief, and then introduces evidence in defense, the appellate court will not review the motion to strike unless the defendant also moves to strike at the conclusion of all the evidence or moves to set aside the verdict. This is so, the Court explained, because when a defendant introduces evidence in defense after making a motion to strike, he abandons his argument that the plaintiff failed to meet his burden of proof. When a motion to strike is made at that stage of the case, the trial court will consider all of the evidence introduced, including that by the defense, creating a different issue for the court to decide. Thus, a motion to strike at the conclusion of all the evidence is a new motion.

Murillo-Rodriguez involved a prosecution for rape and abduction with intent to defile. At trial, the defendant made a motion to strike at the conclusion of the prosecution’s case-in-chief, and then introduced evidence in his defense. However, he failed to make a motion to strike at the close of all the evidence, and failed to move to set aside the jury’s verdict. He was convicted on both charges. The defendant appealed the sufficiency of the evidence supporting his abduction conviction.

The Supreme Court held that the defendant waived his right to challenge the sufficiency of the evidence by failing to make a motion to strike at the close of all the evidence or by making a motion to set aside the verdict. In so holding, it rejected the defendant’s argument that Code § 8.01-384(A) should apply because he made a motion to strike at the close of the prosecution’s case and was not required to renew that motion once it was made. The Court held that Code § 8.01-384(A) does not apply because a motion to strike all the evidence is a “separate and distinct motion” from a motion to strike the Commonwealth’s case-in-chief.

United Leasing presents a related, but different, issue regarding motions to strike. It warns of the danger of simply “renewing” a motion to strike at the conclusion of all the evidence. In United Leasing, the defendant moved to strike the evidence at the close of the plaintiff’s case-in-chief. The defendant asserted two grounds for the motion. When the trial court overruled the motion, the defendant introduced evidence in defense. At the close of all of
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the evidence, the defendant renewed its motion to strike, arguing only one of the grounds raised in the first motion to strike. The trial court overruled the motion, and the jury returned a plaintiff’s verdict.55

The Supreme Court held that the defendant failed to preserve for appellate review the second ground for the motion to strike. It ruled that the defendant had affirmatively abandoned that ground when it elected to introduce evidence in its own behalf and later failed to assert that ground as a basis for its motion to strike at the conclusion of all the evidence.56 The renewed motion to strike, the Court reasoned, “is in reality a new motion because it addresses a different quantum of evidence.”57 Thus, a motion to strike (made at any stage of the trial) must inform the circuit court of each ground upon which the movant relies.58 By failing to present to the trial court all the grounds for the motion to strike at the close of the case, the defendant deprived the trial court of an opportunity to rule intelligently on the specific issue at a time when the trial court can informally rule on the specific issue and later failed to assert that ground as a basis for the motion to strike, arguing only one of the grounds raised in the first motion to strike. The trial court responded. Therefore, counsel addressing preservation-of-error issues on appeal should carefully review the record to identify when the objection was made, what it told the trial court, and how the trial court responded.

Notes
1. Rule 5A:18 now provides: No ruling of the trial court or the Virginia Workers’ Compensation Commission will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice. A mere statement that the judgement or award is contrary to the law and the evidence is not sufficient to preserve the issue for appeal. 2. Report of the Supreme Court of Virginia Appellate Rules Advisory Committee, Rule 5:25 and Rule 5A:18 (June 9, 2008).
3. Id.
4. Most of the changes to Rule 5:25 are “housekeeping” measures. First, the rule now reaches rulings of disciplinary boards. This expansion is apparently intended to reflect the Supreme Court’s jurisdiction over appeals from the Virginia State Bar disciplinary boards. Second, the new rule expands the reach of Rule 5:25 to cases “initially heard,” rather than those that were “initially tried.” This change may reflect the fact that a contemporaneous objection must be made not just at trial, but also at any hearing.
5. The importance of preserving error is further underscored by the new requirement governing petitions and briefs. After July 1, 2010, the rules require counsel assigning error to cite to the specific location in the record where each issue has been preserved in the record or the appendix. Rule 5:17(c)(1) (petition for appeal); Rule 5:27(c) (appellant’s opening brief); and Rule 5:28(e)(1) (assignments of cross-error in the brief of appellee).
7. Id. at 435, 689 S.E.2d at 723.
8. Id. at 442, 689 S.E.2d at 727.
9. Id. at 433, 689 S.E.2d at 722.
10. Id. at 433-4, 689 S.E.2d at 722.
11. Id. at 434-5, 689 S.E.2d at 722-3.
12. Id. at 437, 689 S.E.2d at 724.
13. Id.
14. Id. at 437, 689 S.E.2d at 724 (quoting Johnson v. Ravotta, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002)).
15. Id.
16. Id. at 440, 689 S.E.2d at 726.
17. Id. at 439, 689 S.E.2d at 725.
18. Id.
19. Id.
20. Id. at 440, 689 S.E.2d at 726.
24. Id. at 668, 701 S.E.2d at 66.
25. Id. at 669, 701 S.E.2d at 67.
26. Id.
27. Id. at 668, 701 S.E.2d at 66.
28. Id. at 671, 701 S.E.2d at 68.
29. In practice, this exception is applied only in “limited circumstances.” Gheorghiu, 280 Va. at 689, 701 S.E.2d at 414; see, e.g., Jimenez v. Commonwealth, 241 Va. 244, 250, 402 S.E.2d 678, 681 (1991) (applying the “ends of justice” exception when the defendant had been “convicted of a crime of which under the evidence he could not properly be found guilty”).
30. Gheorghiu, 280 Va. at 688, 701 S.E.2d at 413.
32. Gheorghiu, 280 Va. at 688, 701 S.E.2d at 413.
33. Id.
34. Id. at 688-9, 701 S.E.2d at 413.
35. Id.
36. Id. at 689, 701 S.E.2d at 413.
37. Id.
38. Id. at 689, 701 S.E.2d at 414.
39. Id.
42. 280 Va. at 647-8, 701 S.E.2d at 417.
43. Id. at 649 n.3, 701 S.E.2d at 418 n.3.

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Similarly, the Court refused to apply the “ends of justice” exception in Murillo-Rodriguez v. Commonwealth, finding that the record “amply demonstrates that no miscarriage of justice has occurred.” 279 Va. 64, 84, 688 S.E.2d 199, 210 (2010).

44. E.g., Dominion Coal Corp. v. Bowman, 53 Va. App. 367, 372 n.6, 672 S.E.2d 122, 125 n.6 (2009) (declining to consider sua sponte the “good cause” or “ends of justice” exceptions to Rule 5A:18).


46. 279 Va. 64, 688 S.E.2d 199 (2010).

47. 279 Va. at 517, 689 S.E.2d at 673-4.

48. Id. at 517, 689 S.E.2d at 674.

49. Id. at 517, 689 S.E.2d at 674.

50. Id. at 518, 689 S.E.2d at 674.

51. 279 Va. at 69-70, 688 S.E.2d at 201-2.

52. Id. at 83-4, 688 S.E.2d at 210.

53. Id. at 82, 688 S.E.2d at 209.

54. Id.

55. Id. at 514-5, 689 S.E.2d at 672-3.

56. Id. at 520, 689 S.E.2d at 674.

57. Id. at 518, 689 S.E.2d at 674.

58. Id.

59. Id. at 520, 689 S.E.2d at 675.

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Volkswagen of America v. Smit, 279 Va. 327, 689 S.E.2d 679 (2010). Had one of the Justices in the majority been recused, under Art. VI, § 2 the law would have been upheld by a 3-3 vote, even if a Senior Justice had participated.

Some conundrums remain under Art. VI, § 2. It precludes the invalidation of “a law” by less than a majority of the Justices. A “law” surely includes statutes, but does it include municipal ordinances or regulations? The plain meaning of the term “law” strongly suggests that regulations and ordinances are “laws” for purposes of Art. VI, § 2. What about an “as applied” constitutional challenge, as opposed to a “facial” challenge? The text of Art. VI, § 2 suggests that a successful “as applied” challenge, in which the court concludes that a statute was unconstitutionally applied to a specific situation would not implicate Art. VI, § 2. In that situation, the law as a whole is not declared unconstitutional. Future litigation, however, will be needed to provide a definitive answer to these questions.
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