



APPEARANCES CAN BE DECEIVING

OCTOBER TERM 2013
MOVED THE LAW TO THE RIGHT

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THE CONSERVATIVE POSITION PREVAILED in virtually every major case during October Term 2013. Many of the cases were decided on narrow grounds, and the majority (or in some instances plurality) opinions did not go as far as the most conservative Justices wanted. But still, the Term was striking in that there were almost no dramatic progressive victories,¹ such as the decisions in the previous two Terms upholding the individual mandate of the Affordable Care Act² and striking down Section 2 of the Defense of Marriage Act.³

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¹ The primary decisions which did not come out in a conservative direction were *Riley v. California*, 134 S.Ct. 999 (2014), discussed below, which unanimously held that absent a warrant or exigent circumstances, police cannot search the contents of a cell phone; and *Hall v. Florida*, 134 S.Ct. 1986 (2014), which held, 5-4, that a state cannot use an IQ score as the sole basis for determining if a person is intellectually disabled and ineligible for the death penalty.

² *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012).

³ *United States v. Windsor*, 133 S.Ct. 2675 (2013).

Some aspects of October Term 2013 followed a familiar pattern. The Court decided 68 cases after briefing and oral argument – slightly fewer than the 73 decisions from the previous Term and slightly more than the 65 cases from two years ago.⁴ Once more, Justice Kennedy was the Justice most often in the majority – in 94% of the cases decided, and every 5-4 ruling.

Yet in other ways, this Term was different. Far more cases were decided unanimously: 65%, compared to 49% of the decisions from October Term 2012 and 44% in October Term 2011. On the flip side, only 14% of cases were 5-4 decisions, compared with 29% the year before.

Yet this unanimity should not be mistaken for a greater consensus on the Court, especially on divisive issues. Sometimes the Court achieved unanimity by not deciding the significant issues before it. For example, in *Executive Benefits v. Arkison*, the Court faced the question whether a bankruptcy court, with consent of the parties, can issue a final judgment in a case involving a state law claim.⁵ Although the lower courts are divided and the issue was briefed and argued, the Court ducked the question, finding that in this instance, there was adequate review by a federal district court.⁶ Likewise, *Bond v. United States* presented the question of the scope of Congress's power to enact laws to implement treaties – in *Bond*, a criminal statute prohibiting the use of chemical weapons.⁷ The Court did not decide the issue, instead interpreting the statute to not apply to the defendant's conduct. These issues remain and will need to be decided in future cases where the Court almost certainly will not be unanimous.

Nor should the Court's unanimity be construed as agreement on the proper reasoning – indeed, several unanimous results disguised starkly different rationales. In *Noel Canning v. NLRB*, the Supreme

⁴ The statistics are from the Statpack on SCOTUSBlog, last checked July 18, 2014.

⁵ 134 S.Ct. 2165 (2014).

⁶ On the last day of the Term, the Court granted review in *Wellness International Network v. Sharif*, which poses the same issue as *Arkison*.

⁷ 134 S.Ct. 2077 (2014).

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Court unanimously found that President Obama's recess appointments to the National Labor Relations Board were invalid.⁸ The majority ruled narrowly on the ground that the Senate was not in recess when the appointments were made, but four Justices strongly objected, wanting to impose much greater restrictions on the President's power to make recess appointments.

Finally, focusing on the Court's unanimity in most cases obscures the fact that many of the most *important* cases – in terms of their impact on the law and on society – were divided. The Court issued 5-4 rulings in cases involving the death penalty,⁹ separation of church and state,¹⁰ religious exemptions for corporations,¹¹ opt-out rights for those who don't want to support a public employees' union,¹² and campaign finance.¹³ It is a mistake to read too much into the presence of some consensus; Justice Scalia is just as conservative and Justice Ginsburg is just as liberal as ever.

Perhaps most of all, what we saw this Term were narrow holdings that made it easier to gain unanimity, but also opened the door to future litigation that will lead to conservative results. In this way, October Term 2013 likely is a harbinger of things to come. And in almost every case, the direction points towards the right.

⁸ 134 S.Ct. 2550 (2014).

⁹ *Hall v. Florida*, 134 S.Ct. 1986 (2014) (holding that it violates the Eighth Amendment for a state to use an IQ score above 70 as the sole basis for determining that a person is not intellectually disabled and thus eligible for the death penalty).

¹⁰ *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014) (allowing Christian legislative prayers), discussed below at text accompanying notes 16-21.

¹¹ *Burwell v. Hobby Lobby*, 134 S.Ct. ___ (2014) (declaring that the federal Religious Freedom Restoration Act precludes requiring closely held corporations to include contraceptive coverage that they find religiously objectionable in the insurance coverage provided to employees), discussed below at text accompanying notes 14-15.

¹² *Harris v. Quinn*, 134 S.Ct. 2618 (2014) (holding that it violates the First Amendment to require that home health care workers pay for their share of the union dues which support collective bargaining activities).

¹³ *McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434 (2014) (declaring unconstitutional aggregate contribution limits in the Bipartisan Campaign Finance Reform Act), discussed below at text accompanying notes 24-26.

RELIGION

The most high profile case of the Term, *Burwell v. Hobby Lobby*, involved the contraceptive mandate in the Patient Protection and Affordable Care Act.¹⁴ The Act mandates that the Department of Health and Human Services promulgate regulations requiring that employer-provided health insurance include preventative health care coverage for women. These regulations, in turn, direct that employer-provided insurance include contraceptive coverage for women. Religious institutions and non-profit corporations affiliated with religious institutions may exempt themselves from this requirement, but for-profit companies must comply.

In a 5-4 decision, the Supreme Court held that the federal Religious Freedom Restoration Act prohibits requiring a closely-held for-profit corporation to provide coverage for contraceptives that allegedly violate the religious beliefs of its owners.

The decision is problematic on many levels. First, *Burwell* is the first Supreme Court decision holding that a for-profit corporation can exercise religious beliefs. A corporation is a fictional entity created to protect its owner from liability. So long as the corporation is run as a separate entity, the owner is liable only for what he or she invests in it. But a fictional entity cannot have beliefs or a religion. The liabilities of the corporation are not usually attributed to the owners, so the owners should not be able to attribute their beliefs to the corporation.

This principle applies to family-owned businesses just as it does to any other corporations. Hobby Lobby, the corporation that challenged the contraceptive mandate, operates in dozens of states and employs thousands of people. By creating a corporation, the owners received the benefits of having an entity separate from themselves, so they should also have to accept the burdens of not being able to claim that the business is an extension of their religious views. Moreover, the Court's reasoning would theoretically allow all corporations to claim religious freedom.

¹⁴ 134 S.Ct. ___ (2014).

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Second, the Court mistakenly concluded that it substantially burdens a corporation's religious freedom to require that it provide insurance that includes contraceptive coverage. Corporations and their owners are not required to use or endorse contraceptives; they remain free to openly express opposition to their use. Never before has the Supreme Court found a substantial burden on a person's religious exercise where the person is not required to take or forgo action at odds with his or her religious beliefs, but must instead do something that might enable others to take such actions.

This holding is sure to lead to countless other challenges. To name just one example, Christian Scientists will claim that they do not have to provide any health insurance to their employees. Still more, an employer, at least in a family-owned business, may attempt to require that *no money* paid as salary be used to purchase contraceptives (or other things that violate the employers' religious beliefs). If the employer has a right to avoid using his money for things deemed religiously objectionable, why would that right be limited to dollars paid for employees' insurance?

More broadly, corporations now can try to claim that other federal laws, such as anti-discrimination statutes, violate their religious beliefs. Justice Alito, writing for the majority, addressed this concern in part, declaring that "[t]he Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."¹⁵ But what of employers who have a religious belief that women with children should not work outside their homes or businesses who claim a religious basis for sexual orientation discrimination? The Court's pointed focus on racial discrimination may well inspire businesses to claim a religious right to discriminate on other grounds.

The other major decision regarding religion, *Town of Greece v. Galloway*, involved the Establishment Clause of the First Amendment, and should have been an easy case for the Court.¹⁶ The Town

¹⁵ *Id.* at ___.

¹⁶ 134 S.Ct. 1811 (2014).

of Greece is a suburb of Rochester, New York of about 100,000 people. Its town board opened meetings with a moment of silence until 1999 when the town supervisors initiated a policy change. The town began inviting ministers to begin meetings each month with a prayer. From 1999-2007, the town invited exclusively Christian ministers, most of whom gave explicitly Christian prayers. In 2007, citizens complained to the Town Board, and for four months, the town invited clergy from other religions. But in the following 18 months, the Town Board reverted to inviting only Christian clergy, and their prayers were almost always Christian in their content.

Galloway is not the first time the Supreme Court has dealt with legislative prayer. In *Marsh v. Chambers*, the Supreme Court upheld the constitutionality of prayers before sessions of the Nebraska legislature delivered by a Presbyterian minister who was on the state's payroll.¹⁷ The Court, in an opinion by Chief Justice Burger, emphasized the historical practice of legislative prayers since the earliest days of the country. But the Court also noted that the prayers were "non-sectarian" and that all references to Christ had been removed.¹⁸

Galloway is different. Under any theory of the Establishment Clause, the Town of Greece acted unconstitutionally. Under the more relaxed approach to the Establishment Clause, which finds a violation only when there is government endorsement of religion, the Town of Greece acted unconstitutionally in so clearly linking itself to Christianity by inviting only Christian clergy to deliver explicitly Christian prayers. And the town also acted unconstitutionally under the view that the Establishment Clause is violated only if there is "coercion." The prayers were delivered to an audience of local children and adults, who attended meetings at the Town Board's invitation or direction. Children's athletic teams were invited to be publicly honored; police officers and their families attended to participate in oath-of-office ceremonies; people came to speak about local issues of great personal importance; and business owners came to request zoning permits. All of these people – Christians and

¹⁷ 483 U.S. 783 (1983).

¹⁸ 483 U.S. at 793 n.14.

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non-Christians – were asked to stand and bow their heads and participate in many of these prayers. But Muslims, Jews, and nonbelievers cannot in good conscience participate in a prayer to Jesus Christ, and doing so should not be the price of civic participation.

There was no majority opinion in *Galloway*. Justice Kennedy wrote the plurality opinion, joined by Chief Justice Roberts and Justice Alito. Justice Kennedy emphasized the long history of clergy-delivered prayers before legislative sessions, and noted that in *Marsh v. Chambers*, the legislative prayers had no reference to Jesus Christ. The Court nevertheless held that legislatures are not limited to non-sectarian prayers. The Supreme Court's decision will mean that meetings of town boards, city councils, school boards, and government commissions of all types can, and often will, begin with Christian prayers. This is the very essence of the establishment of a religion. To be sure, Justice Kennedy's plurality opinion leaves open the possibility of challenges to legislative prayers in very limited circumstances. As he wrote: "Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation."¹⁹ But that is exactly what the Town of Greece did – it encouraged a long pattern of prayers that advanced Christianity.

Justices Thomas and Scalia concurred in part and concurred in the judgment; both would have gone much further in allowing religious involvement in government. Writing only for himself, Justice Thomas reiterated his position that the Establishment Clause should not apply to state and local governments at all. Under this view, a state or local government could do anything from declaring an official religion to requiring participation in prayer, all without violating the Constitution.

In a part of the opinion joined by Justice Scalia, Justice Thomas argued that an Establishment Clause violation should at least require "actual legal coercion . . . not the 'subtle coercive pressures' alleg-

¹⁹ 134 S.Ct. at 1814.

edly felt by respondents in this case.”²⁰ Under this approach, a city or state could declare itself Christian, put a cross atop city hall, and even institute prayers in schools and everywhere else so long as no one was legally required to participate.

Justice Kagan wrote for the dissent and emphasized that the central purpose of the Establishment Clause is to keep anyone from feeling like an outsider (or an insider) as to his or her government.²¹ Explicitly Christian prayers before every month’s town board meeting inevitably make those of other religions feel that they do not belong and are outsiders. As she observed, the five justices in the majority were stunningly insensitive to how much sectarian prayers make members of other religions feel like outsiders in their own governments.

Not long before she left the bench, Justice O’Connor declared: “At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate Why would we trade a system that has served us so well for one that has served others so poorly?”²² It is unfortunate that the majority of the Court fails to understand this basic insight.

SPEECH

In *McCullen v. Coakley*, the Court addressed the constitutionality of a Massachusetts law that created a 35-foot buffer zone around reproductive health care facilities.²³ The only individuals allowed in this area were patients, employees, law enforcement personnel, and those needing to cross the space to get to an adjacent facility. Chief Justice Roberts, writing for the majority, held that the law was unconstitutional because it restricted speech on public sidewalks and

²⁰ *Id.* at 1848 (Thomas, J., concurring).

²¹ 134 S.Ct. at 1843-44 (Kagan, J., dissenting).

²² *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring).

²³ 134 S.Ct. 2518 (2014).

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other traditional public forums, but was not sufficiently narrowly tailored. Justice Scalia – joined by Justices Kennedy and Thomas – and Justice Alito wrote separate opinions concurring in the judgment and would have gone much further in limiting buffer zones around reproductive health care facilities.

Across the country, including in Massachusetts, women patients and health care providers have been targeted at reproductive health care facilities. Sometimes there have been violent assaults, including murders. Often there are verbal assaults and harassment. Many state and local governments have adopted buffer zones as a way to protect patients and clinic employees, while still protecting the speech rights of protestors.

McCullen is not the first Supreme Court case to deal with buffer zones. In 2000, in *Hill v. Colorado*, the Court upheld a Colorado law that created a 100-foot buffer zone around medical care facilities.²⁴ The law prohibited a person from going, without consent, within eight feet of another person within the zone for purposes of “protest,” “education,” or “counseling.” Opponents of buffer zones urged the Supreme Court in *McCullen* to overrule this earlier decision.

The Supreme Court did not do so, although four Justices – Justices Scalia, Kennedy, Thomas, and Alito – made clear that they believe *Hill* should be overturned. Instead, the majority said that the Massachusetts law was flawed because it was not sufficiently “narrowly tailored.” The Court said that restrictions of speech on public sidewalks and other traditional public forums must be narrowly drawn, and the Massachusetts law went too far in restricting speech in these places.

The Court’s ruling is an open invitation to arbitrary line drawing. The Court offered no criteria for determining which buffer zones are sufficiently narrowly tailored and which violate the First Amendment. Further, the Court gave insufficient weight to the rights of those who are using or working at clinics and want to be free from verbal and physical assaults. Those going into clinics should not have to be yelled at, shown graphic photographs, called

²⁴ 530 U.S. 703 (2000).

names, and made to fear for their safety. Women exercising their constitutional rights should be protected from harassment.

The Court's decision in *McCullen v. Coakley* has importance outside of the reproductive health care context. After the Court found a right to protest at military funerals,²⁵ a federal law was enacted which creates a 300-foot buffer zone around military funerals. Many states adopted laws creating buffer zones around cemeteries and funeral homes, and many cities have ordinances creating buffer zones around places of worship. In all of these instances, peaceful protests are permitted, but the buffer zones help to ensure that they do not intrude on privacy or disrupt activities. Now, however, the constitutionality of such buffer zones is in doubt and they can be challenged on the ground that they are not sufficiently narrowly tailored.

In *McCutcheon v. Federal Election Commission*, the Court, in a 5-4 decision, declared unconstitutional the aggregate contribution limits created by the McCain-Feingold Bipartisan Campaign Finance Reform Act.²⁶ Specifically, the Court invalidated a part of the Act which provided that an individual contributor cannot give more than \$46,200 to candidates or their authorized agents or more than \$70,800 to anyone else in a two-year election cycle. Within the \$70,800 limit, the law precludes a person from contributing more than \$30,800 per calendar year to a national party committee.

Chief Justice Roberts wrote a plurality opinion, joined by Justices Scalia, Kennedy, and Alito, finding that these provisions violate the First Amendment. Chief Justice Roberts explained that limits on contributions are allowed solely to prevent corruption and the appearance of corruption by stopping quid pro quo corruption. He concluded that the aggregate contribution limits do not sufficiently further these goals and are thus unconstitutional. Justice Thomas concurred in the judgment and argued that all contribution limits should be deemed to violate the First Amendment, and urged the Court to overrule *Buckley v. Valeo*,²⁷ which articulated the frame-

²⁵ *Snyder v. Phelps*, 131 S.Ct. 1207 (2011).

²⁶ 134 S.Ct. 1434 (2014).

²⁷ 134 S.Ct. at 1464 (Thomas, J., concurring).

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work for campaign finance laws that has been followed for the last several decades.

Justice Breyer wrote for the dissenters and lamented that the Court has “eviscerated” federal campaign finance law and has too narrowly defined the government’s interests in regulating contributions.²⁸ This case is likely to lead to further challenges to federal, state, and local laws limiting campaign contributions, or rules restricting prohibiting contributions by corporations and unions, on the grounds that they violate the First Amendment.

FOURTH AMENDMENT

In *Riley v. California*, the Supreme Court held that absent a warrant or exigent circumstances, police cannot examine the contents of a person’s cell phone as part of a search incident to an arrest.²⁹ Chief Justice Roberts, writing for a unanimous Court, stressed the great privacy interests people have in the contents of their cell phones. He noted that cell phones store millions of pages of text and thousands of photographs, including all aspects of the “privacies of life.” He pointed out that cell phones contain material from a long period of time and can give access to cloud or web services where even more information can be found. The Court also dismissed the possibility of allowing police to conduct a search incident to an arrest to protect the safety of the officers and prevent destruction of evidence. Neither of these interests, the Court explained, justifies looking at the contents of a cell phone.

The decision is a stunning, unanimous victory for privacy. It recognizes the importance of informational privacy, especially with regard to new technology, and will limit the ability of police to look at the contents of a person’s laptop or tablet or phone absent a warrant or exigent circumstances.

But in *Navarette v. California*, the Supreme Court made it easier for police to stop anyone on the roads, ruling that an anonymous tip that a person is driving erratically is a sufficient basis for a police

²⁸ *Id.* at 1465 (Breyer, J., dissenting).

²⁹ 134 S.Ct. ___ (2014).

stop.³⁰ Although normally there must be some corroboration of an anonymous tip for it to justify a police stop, the Court held that corroboration is not required when a vehicle is pulled over.

On August 23, 2008, an anonymous 911 caller stated that a car was driving erratically and had run the caller off the road. The caller described the vehicle and its license plate number. Within 15 minutes, officers located the truck that had allegedly been driving erratically and followed it for five minutes. During the five-minute period, the driver violated no traffic laws and was not driving erratically. Nonetheless, the officers pulled the truck over solely because of the anonymous call. When the police approached the truck, the officers said that they smelled marijuana, and a search revealed 30 pounds of the drug.

The Supreme Court, in a 5-4 ruling, rejected the defendants' Fourth Amendment arguments. Justice Thomas, writing for the majority, said the content of the tip indicated that it came from an eyewitness victim of reckless driving, and that the officer's corroboration of the truck's description, location, and direction established that the tip was reliable enough to justify a traffic stop. The Court held that the government's interest in stopping intoxicated drivers merited an investigative stop without any requirement that the officers observe additional reckless driving themselves.

Justice Scalia, writing for the dissenters, said that the majority made it too easy to subject anyone to a police stop. Under the majority's rule, if someone does not like the bumper sticker on a car, all it takes to prompt a police search is a 911 call describing the vehicle and saying it was driving erratically. Even if the car was being driven erratically at the moment, there are many explanations other than illegal conduct. Perhaps the driver sneezed, was texting, or swerved to avoid an animal. The Court ignored these possibilities, as well as the sensible alternative requirement that police themselves observe a traffic violation before pulling over vehicles. This rule would not restrict police from stopping cars where appropriate, but would prevent an anonymous call from being the basis for a stop by itself.

³⁰ 134 S.Ct. 1683 (2014).

CIVIL RIGHTS

In a series of cases this Term, the Supreme Court made it more difficult for plaintiffs to recover for civil rights violations. These decisions continue a pattern in recent years of the Court's significantly expanding immunity accorded to government officials sued for violating the Constitution.

Suing individual government officers is often the only way that injured persons can recover for constitutional violations. But suits against government entities are often difficult, if not impossible. Both the federal and state governments are protected by sovereign immunity, which greatly limits suits against them for damages. And local governments can be held liable for civil rights violations only if there is a municipal policy or custom that led to the injury.

Suing officers is not much easier: the Supreme Court has said that all government officials, when sued for money damages, may raise "immunity" as a defense. Some government officers have absolute immunity to suits for money damages: judges performing judicial tasks, prosecutors performing prosecutorial tasks, legislators performing legislative tasks, police officers testifying as witness, and the President for acts taken in office. All other government officers have "qualified immunity." In *Harlow v. Fitzgerald*, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."³¹

Since *Harlow*, courts have struggled with how to determine if there is "clearly established" law that the "reasonable person would have known." Must there be a case on point to say that there is such clearly established law? In *Hope v. Pelzer*, the Court seemed to resolve the question, holding that there need not be a prior decision on point in order for plaintiffs to show the existence of clearly established law.³² Rather, officers can be held liable if they had "fair

³¹ 457 U.S. 800, 817-18 (1982).

³² 536 U.S. 730 (2002).

warning” that their conduct was impermissible. But this Term, the Court repeatedly found qualified immunity based on the absence of a case on point, ignoring *Hope*. These decisions have made it much harder for plaintiffs to overcome qualified immunity and hold government officers liable for constitutional violations.

In *Lane v. Franks*, the Court unanimously held that a government employee’s First Amendment rights were violated when he was fired for truthful testimony he gave in court pursuant to a subpoena.³³ Of course, it is wrong to fire a person for testifying honestly in a criminal trial, especially when the individual had no choice because of a subpoena. Yet the Court granted qualified immunity to the defendant responsible for the firing. The Court relied on the fact that no precedents clearly held that the firing decision violates the First Amendment. But *Hope v. Pelzer* said that a case on point is not necessary, and every government officer should know that it is wrong to fire a person for truthfully testifying in court.

In *Plumhoff v. Rickard*, the Court again found that government officials were protected by qualified immunity.³⁴ Officers pulled over a vehicle because it had only one operating headlight. An officer asked the driver to step out of the car, but the driver sped away. A high-speed chase then occurred that lasted five minutes and reached speeds over 100 miles per hour. At one point, the officers appeared to have the car pinned. But when the car pulled away, officers fired three shots into the vehicle. As the car attempted to speed away, the officers fired another 12 shots. Both the driver and the passenger were killed. The Sixth Circuit concluded that the police used excessive force and violated the Fourth Amendment.

The Supreme Court unanimously reversed. Justice Alito wrote for the Court and held that there was no Fourth Amendment violation. The Court said that the driver’s conduct posed a “grave public safety risk,” and the police were justified in shooting at the car to stop it: “[O]fficers need not stop shooting until the threat has end-

³³ 134 S.Ct. 2369 (2014).

³⁴ 134 S.Ct. 2012 (2014).

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ed.”³⁵ Moreover, the Court said that even if there were a Fourth Amendment violation, the officers were protected by qualified immunity because the law was not clearly established that the conduct violated the Fourth Amendment.

This holding is disturbing. The Supreme Court now has said that whenever there is a high-speed chase that officers perceive could injure others (a description true of virtually all high-speed chases) the police can shoot at the vehicle until it stops. The car in *Plumhoff* was stopped for having only one working headlight. If the driver refused to stop, why not just let the car go and track the driver down later? Death should not be the punishment for making the extremely poor choice to begin a high-speed chase.

Finally, in *Wood v. Moss*, the Court found that Secret Service agents were protected by qualified immunity when they engaged in viewpoint discrimination with regard to speakers.³⁶ In Oregon, Secret Service agents allowed supporters of President George W. Bush to be closer to him, and pushed his opponents further away. First Amendment law clearly holds that the government cannot discriminate among speakers based on their views unless it satisfies strict scrutiny.

Nonetheless, the Court, in a unanimous decision written by Justice Ginsburg, found that the Secret Service agents were protected by qualified immunity because there were no cases on point concerning when Secret Service agents violate the First Amendment. Again, though, *Hope* should have controlled – it is well established that viewpoint discrimination violates the First Amendment.

All of these cases were unanimous. All found qualified immunity because of the absence of a case on point. Together they show a Court that is very protective of government officials who are sued for money damages, and that has made it very difficult for victims of constitutional violations to recover.

³⁵ *Id.* at 2022

³⁶ 134 S.Ct. 2056 (2014).

CONCLUSION

First appearances can be deceiving. At first glance, October Term 2013 was a year of consensus, a Term filled with narrow rulings that did not change the law very much. But on closer examination, it was a year with many decisions that are narrow on their own terms but push the law in a conservative direction. It was a year filled with rulings that suggest much more conservative changes to come in constitutional law.

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