THE RETURN OF THE JEDI

THE PROGRESSIVE OCTOBER 2014 TERM

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IT HAS BEEN 40 YEARS SINCE I STARTED law school and I cannot remember a Supreme Court term with so many liberal victories in major cases. It may be the most liberal Term since the Warren Court. The liberal Justices were in the majority in many of the major decisions, declaring unconstitutional state laws prohibiting same-sex marriage, holding that tax credits to defray the cost of health insurance are available nationwide under the Affordable Care Act, preserving disparate impact claims under the Fair Housing Act, and permitting states to use independent districting commissions.

What explains this development? The easiest account is that Justice Anthony Kennedy voted with the liberal Justices much more often than in any prior Term. There were 13 cases that split 5-4 along ideological lines. Justice Kennedy joined Justices Ginsburg, Breyer, Sotomayor, and Kagan in eight of them, and the Chief Justice and Justices Scalia, Thomas, and Alito in only five.[1] By contrast, over the previous nine years of the Roberts Court, Justice Kennedy joined the conservative Justices about 70% of the time in such cases.

But that explanation does not tell the whole story. There were a few cases where Justice Kennedy dissented, but the liberal Justices

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[1] *Stat Pack for October 2014 Term*, SCOTUSblog 50-52 (June 30, 2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf

attracted one or more of the other Justices to create a majority. Thus another key factor explaining the Term's liberal slant was the cohesion of the four most liberal Justices. They voted together in 15 of the 19 5-4 decisions, meaning they needed to attract just one additional vote to control the outcome. One result of this development was that for the first time in the history of the Roberts Court, the Justice most often in the majority was Justice Breyer – not Justice Kennedy. Justice Breyer voted in the majority 92% of the time, and was the Justice most often in the majority in 5-4 decisions.

Does this mean that the Roberts Court has moved to the left? Not at all. It always is dangerous to generalize from a single Term. A year ago, for example, commentary on the Court focused on the fact that 66% of the cases were decided unanimously. This year, by contrast, only 34% of the cases decided after briefing and oral argument were unanimous. Next year, the Court will be deciding cases about affirmative action, voting rights, the First Amendment rights of non-union members, and possibly abortion. These are all areas where Justice Kennedy is much more likely to side with the conservative Justices. So if this year was the "Return of the Jedi" for liberals, next year well could be "The Empire Strikes Back."

In this essay, I review the Court's decisions concerning marriage equality, the Affordable Care Act, criminal procedure, the First Amendment, and separation of powers. Stunningly, the liberal justices were in the majority in all but one of the cases I discuss.[2]

MARRIAGE EQUALITY

In *Obergefell v. Hodges*, the Supreme Court ruled, 5-4, that laws prohibiting same sex marriage violate the Due Process and Equal

[2] As usual, a few important cases have been omitted from this essay. Two particularly important ones are *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. ___ (2015) (allowing states to use independent commissions to draw electoral districts) and *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.,* 135 S. Ct. ___ (2015) (permitting disparate-impact claims under the Fair Housing Act). These were both 5-4 decisions featuring a majority composed of the liberal Justices and Justice Kennedy.

Protection Clauses of the Fourteenth Amendment.[3] The Fourteenth Amendment, the Court concluded, requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. Justice Kennedy wrote for the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

Justice Kennedy explained that the Court long has protected the right to marry as a fundamental right, safeguarded under both the Due Process and Equal Protection Clauses. The Court examined the precedents concerning the right to marry and concluded that they "compel[ ] the conclusion that same-sex couples may exercise the right to marry."[4] There is no difference between same-sex and opposite-sex couples when it comes to the importance of marriage for couples, for their children, and for society.

Each of the four dissenting justices – Chief Justice Roberts and Justices Scalia, Thomas, and Alito – wrote an opinion. Each accused the majority of undue judicial activism. Each argued that the issue of marriage equality should be resolved through the political process. Each emphasized the long tradition of marriage being only for opposite-sex couples.

In many ways, the most powerful dissent came from Chief Justice Roberts. His opinion concluded with the following observation: "If you are among the many Americans – of whatever sexual orientation – who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it."[5] Chief Justice Roberts' forceful accusation must be answered: Was the Court's decision based on the Constitution? Was the Court's decision based on law, not politics?

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[3] 135 S. Ct. ___ (2015).

[4] Id. at ___.

[5] Id. at ___ (Roberts, C.J., dissenting).

The answer, in short, is yes. There is no dispute that the question whether same sex couples should be allowed to marry has been addressed through the political process in some states. But there is likewise no dispute that challenges to laws prohibiting same sex marriage in Kentucky, Michigan, Ohio, and Tennessee presented a constitutional question for the judiciary to answer. The gay and lesbian couples argued that they were denied equal protection on the basis of their sexual orientation: in their states, heterosexual couples could marry, but gay and lesbian couples could not.

The Supreme Court long has held that the right to marry is a fundamental right protected by the Due Process Clause of the Constitution.[6] It is true, of course, that the right to marry is not mentioned in the text of the Constitution. But the Supreme Court has protected many rights that are not mentioned in the Constitution's text, such as freedom of association, the right to procreate, the right to custody of one's children, the right to keep one's family together, the right to control the upbringing of one's children, the right to purchase and use contraceptives, the right to abortion, the right to engage in private consensual adult homosexual activity, and the right to refuse medical treatment. The gay and lesbian couples in *Obergefell* claimed that they did not have equal access to the right to marry – a straightforward claim of unequal, and thus unconstitutional, treatment.

Of course, to say that the plaintiffs presented Equal Protection and Due Process claims does not mean that the laws they challenged are necessarily unconstitutional. But it does mean that the courts were presented with *legal*, not political claims: do laws that allow only opposite sex couples to marry deny same sex couples the equal protection of the laws? Do such laws violate the right to marry, which the Court has said in prior cases constitutes a fundamental right?

The answer to that question likewise reflected the application of basic legal principles. In constitutional law, infringements of a fundamental right must be justified by a compelling purpose. And all discrimination, at the very least, must serve a legitimate govern-

[6] *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 384-385 (1978).

ment interest under equal protection analysis. The Court concluded that the state governments had not set forth an adequate justification for their actions. State laws prohibiting same sex marriage serve no legitimate government interest – let alone a compelling one, which is needed for infringement of a fundamental right.

The actual basis for such laws is the state's moral condemnation of homosexual activity. But the Court made clear in *Lawrence v. Texas*[7] and *United States v Windsor*[8] that this justification is not legitimate. The states, and the dissenters, thus instead argued that the laws were justified by the long tradition of limiting marriage to opposite sex couples. A tradition of discrimination, however, is never a sufficient justification for continued discrimination. When the Court declared unconstitutional state laws prohibiting interracial marriage in *Loving v. Virginia*,[9] it rightly gave no weight to the existence of such statutes throughout American history. So too here.

In their briefs and at oral argument, the opponents of same-sex marriage also stressed that marriage primarily exists for procreation, and same sex couples cannot procreate. This argument is both false and irrelevant. It is false because the challenged laws do not limit marriage just to those who have the desire or ability to procreate – in fact, no state has imposed such limits on marriage. And the argument is irrelevant because same sex couples will procreate whether or not they can marry, by artificial insemination, surrogacy, and adoption. As Justice Kennedy noted, thousands of children in the United States are being raised by same-sex parents. Marriage always has been thought to create family stability and benefit children. And there was no basis for denying these benefits to children of same-sex couples.

The absence of a legitimate purpose for the laws compelled the Court to strike them down as unconstitutional. The Court's decision was thus entirely based on the Constitution, contrary to Chief Justice Roberts' assertion, which was echoed by many conservative commentators.

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[7] 539 U.S. 558, 578-579 (2003).

[8] 133 S. Ct. 2675, 2695-2696 (2013).

[9] 388 U.S. 1, 12 (U.S. 1967).

More broadly, there is some irony to the dissenters' claims of undue judicial activism and usurping the democratic process. None of the four dissenters seemed the least bit concerned with deference to the political process or avoiding judicial activism two years ago, when they were part of the majority striking down key provisions of the Voting Rights Act that had been passed almost unanimously by Congress and signed into law by President George W. Bush. In that case, *Shelby County, Alabama v. Holder*,[10] it was not even possible to tell what constitutional provision the majority thought was violated by the Voting Rights Act. Likewise, the four dissenters were similarly unconcerned with deferring to the political process when they invalidated key provisions of the Bipartisan Campaign Finance Reform Act in *Citizens United v. Federal Election Commission*.[11]

The more basic point is that the rights of minorities, especially fundamental rights, are not left to the political process for protection. The Supreme Court fulfilled its role in the constitutional system when it struck down the laws prohibiting same sex marriage. So Chief Justice Roberts was wrong: *Obergefell v. Hodges* should be celebrated as a matter of constitutional law.

HEALTH CARE

In *King v. Burwell*, the Court ruled that individuals throughout the country can receive tax credits to help them purchase health insurance, so long as they qualify economically.[12]

Prior to the Affordable Care Act, approximately 50 million Americans lacked access to health insurance. The Act was designed to close that gap and allow all Americans to obtain quality, affordable health coverage. To that end, the Act provides low- and moderate-income Americans with federal tax credits to offset the cost of insurance policies. Those credits are available to individuals who enroll in a health plan "through an Exchange *established by the State* under Section 1311." The Act also provides that if a state does not "elect"

[10] 133 S. Ct. 2612 (2013).

[11] 558 U.S. 310 (2010).

[12] 135 S. Ct. ___ (2015).

to create an exchange, the federal government "shall establish and operate such exchange within the State."

When *King v. Burwell* arrived at the Court, only 16 states and the District of Columbia had established exchanges. In the other 34 states, the exchanges were created by the federal government. The challengers argued that individuals in those 34 states were ineligible for tax credits, because the credits are available only to individuals who purchase insurance from a state-established exchange.

In a 6-3 opinion, the Court ruled that subsidies are available to all eligible taxpayers, regardless whether their exchange was created by a state or the federal government. The majority opinion, written by Chief Justice Roberts, acknowledged that the key statutory language was ambiguous. But the Chief Justice also observed that a ruling for the challengers would collapse the health care exchanges. Without tax credits, many Americans would become unable to afford health insurance on the exchanges. Only sick people would continue to purchase coverage, causing the costs of coverage and premiums to rise. The result would be a spiral that would collapse the exchanges and undermine the entire Affordable Care Act – a result Congress could not have intended.

Justice Scalia's dissenting opinion criticized the Court for not following the plain language of the statute, which he read to provide tax credits only to those who purchase insurance on "state established exchanges."[13] But as the Court noted, a construction that leads to obviously unintended (and disastrous) consequences is not an acceptable one. As the Chief Justice observed in concluding his opinion, "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."[14] That is just what the Court did in allowing all eligible Americans to receive tax credits.

It is easy to view this case as focusing on a technical question of statutory interpretation. But that would ignore the crucial human

[13] 135 S. Ct. at ___ (Scalia, J., dissenting).

[14] Id. at ___.

dimension of this case: millions of people will continue to have access to health care because of the Court's decision. Lives will be saved and suffering will be lessened – exactly what Congress intended.

CRIMINAL LAW AND PROCEDURE

In *Glossip v. Gross*, the Court ruled, 5-4, that the protocol used for lethal injection in Oklahoma likely does not constitute cruel and unusual punishment in violation of the Eighth Amendment.[15] *Glossip* was one of the major victories for the conservative Justices. Justice Alito wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. The Court held that death-row inmates had failed to establish a likelihood of success on the merits of their claim that the use of a sedative called midazolam as the first drug in Oklahoma's lethal injection protocol violates the Eighth Amendment because it fails to render a person insensate to pain. The Court stressed that a person challenging a method of execution has the burden of showing that there are better, more humane alternatives – a standard the inmates could not meet.

There were two notable dissenting opinions. First, Justice Sotomayor wrote an opinion disagreeing with the majority's decisions to allow the use of midazolam and to require the condemned individuals to prove that there is a better alternative way to kill them.[16] Second, Justice Breyer wrote a separate dissent urging the Court to reconsider the constitutionality of the death penalty.[17] Justice Scalia wrote a concurring opinion sharply disagreeing with Justice Breyer, attacking his reasoning, and defending the death penalty.[18]

There is much that is troubling about this decision, perhaps most of all the Court's holding that a person challenging a method of execution must prove that there is an available, more humane alternative. The Supreme Court has long held that the Eighth Amendment's prohibition of cruel and unusual punishment prevents "in-

[15] 135 S. Ct. ___ (2015).

[16] Id. at ___ (Sotomayor, J., dissenting).

[17] Id. at ___ (Breyer, J., dissenting).

[18] Id. at ___ (Scalia, J., concurring).

herently barbaric punishments under all circumstances."[19] If a method of execution is likely to cause excruciating pain, it is unconstitutional. Period. The availability of other methods of execution is irrelevant. As Justice Sotomayor observed, "If a State wishes to carry out an execution, it must do so subject to the constraints that our Constitution imposes on it, including the obligation to ensure that its chosen method is not cruel and unusual. Certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death."[20]

In *Ohio v. Clark*, the Court unanimously ruled that the Sixth Amendment's Confrontation Clause was not violated when the state introduced the out-of-court statements of a three-year old boy against a criminal defendant.[21] In a landmark 2004 decision called *Crawford v. Washington*, the Court held that prosecutors cannot use testimonial statements from unavailable witnesses even if they are reliable.[22] *Clark* provides an important clarification of what it means for a statement to be "testimonial" – it must have been made with the primary purpose of creating evidence for the prosecution. The statements at issue in *Clark* stemmed from a conversation between the boy and his teacher, and neither party had intended to create evidence for trial. The admission of the statements thus did not violate the Constitution.

The Court also decided three Fourth Amendment cases. In *Heien v. North Carolina*, the Court held that an officer's reasonable mistake of law can provide the reasonable suspicion required to justify a traffic stop under the Fourth Amendment.[23] In *Rodriguez v. United States*, the Court ruled that a police officer may not extend an already completed traffic stop for a canine sniff without reasonable suspicion or other lawful justification.[24] And in *City of Los Angeles v. Patel*, the

[19] *Graham v. Florida*, 560 U.S. 48, 59 (2010).

[20] 135 S. Ct. at ___ (Sotomayor, J., dissenting).

[21] 135 S. Ct. ___ (2015).

[22] 541 U.S. 36, 68-69 (2004).

[23] 135 S. Ct. ___ (2014).

[24] 135 S. Ct. ___ (2015).

Court declared unconstitutional Los Angeles Municipal Code § 41.49, which requires hotel operators to record and keep specific information about their guests for a ninety-day period and to make those records available to "any officer of the Los Angeles Police Department for inspection" on demand.[25] The Court said that the provision is facially unconstitutional because it failed to provide hotel operators with an opportunity to review the records before turning them over to the police.

FREEDOM OF SPEECH

One of the most basic First Amendment principles is that the government cannot engage in content-based restrictions on speech unless the restrictions are necessary to achieve a compelling government purpose. The Court applied this principle in striking down a municipal sign ordinance in *Reed v. Town of Gilbert*.[26]

Gilbert, Arizona limits the types of outdoor signs that can be displayed. Such signs cannot be displayed as a general matter, but the town ordinance exempts 23 categories of signs, such as political signs. One category of signs falling within the ordinance's more restrictive ambit are signs giving directions for events. The Good News Community Church and its pastor, Clyde Reed, filed a lawsuit challenging the ordinance. The Church holds Sunday services at various temporary locations in and near the Town, and relies on signs to let people know where worship services are being held.

The Court unanimously invalidated the ordinance. Justice Thomas's majority opinion began by noting that the Gilbert ordinance is classically content-based: it treats different types of signs – such as ideological or political signs – differently based on their content. As the Court put it, "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign."[27] Because the law was content-based, it had to meet strict scrutiny – that is, it had to be narrowly tailored to

[25] 135 S. Ct. ___ (2015).

[26] 135 S. Ct. ___ (2015).

[27] Id. at ___.

achieving a compelling purpose. The Court concluded that the ordinance failed this test, but also stressed that content-neutral sign regulations would be allowed – a theme Justice Alito echoed in his concurring opinion.

The strict scrutiny test used for content-based laws (and applied in *Gilbert*) is exacting, but it is not always fatal. In *Williams-Yulee v. Florida State Bar*, for example, the Court upheld a content-based restriction on speech.[28] Florida, like 30 other states, prohibits candidates for elected judicial office from personally soliciting or receiving funds.[29] In a 5-4 decision, the Court upheld this prohibition. Chief Justice Roberts wrote the opinion for the Court, which was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. The Court's analysis can be summed up with the following quote from the opinion: "Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."[30]

Williams-Yulee represents a significant shift in the law. In 2002, the Supreme Court issued a 5-4 decision invalidating as unconstitutional a state law that prohibited candidates for elected judicial office from making statements about disputed legal or political issues.[31] Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Both Justice Scalia's majority opinion and Justice O'Connor's concurring opinion rested on the premise that in states that elect their judges, judicial candidates are politicians and should be allowed to engage in speech as politicians. In *Williams-Yulee*, the Court expressly rejected this principle, potentially opening the door to other regulations of speech and fundraising in judicial elections.

The Court upheld another content-based regulation of speech in *Walker v. Texas Division, Sons of Confederate Veterans* – albeit on different

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[28] 135 S. Ct. ___ (2015).

[29] 135 S. Ct. ___ (2015).

[30] 135 S. Ct. at ___.

[31] 536 U.S. 765, 788 (2002).

grounds.[32] Texas allows non-profit groups to propose specialty license plates containing particular messages. The Texas Division of the Sons of Confederate Veterans proposed a plate design featuring a Confederate battle flag. The Board of the Department of Motor Vehicles rejected the design, promoting the Veterans to sue. But in a 5-4 decision, the Court held that the Texas Department of Motor Vehicle Board's decision did not violate the First Amendment. Justice Breyer's majority opinion – which was joined by Justices Thomas, Ginsburg, Sotomayor and Kagan – held that license plates are government speech, and that the government has wide latitude under the First Amendment to restrict the messages it wishes to communicate.

It is easy to like the result in this case because Confederate battle flags convey a message of racism that is inherently hurtful and divisive. But the Court's approach is troubling. If license plates are government speech and the government can say (or not say) whatever it wants, can the government issue license plates saying that abortion is murder or endorsing the Republican Party? More importantly, the Court's approach allows governments to avoid free speech challenges by declaring that something is government speech. Could a city library choose to carry only books by Republican authors by saying that the contents of the library are government speech? Could a city allow a pro-war demonstration in a city park and deny access to an antiwar demonstration by claiming that it wants to express its own pro-war message?

The key distinction for First Amendment purposes is whether the government is itself speaking or is instead creating a forum for private speech. By allowing people to put messages on license plates, Texas seems very much to be doing the latter. And when the government creates a forum for private speech (rather than speaking on its own), it cannot engage in viewpoint discrimination – exactly what Texas was doing.

[32] 135 S. Ct. ___ (2015).

SEPARATION OF POWERS

The last case of note from this Term, *Zivotofsky v. Kerry*, involves the decades-long dispute between Israel and Palestine concerning sovereignty over Jerusalem. [33] Since the establishment of Israel in 1948, American Presidents have expressed a position of neutrality over which sovereign controls Jerusalem. In 2002, however, Congress passed a bill purporting to establish "United States Policy with Respect to Jerusalem as the Capital of Israel." Among other things, the bill directed the State Department to record "Israel" as the place of birth on the passport of a U.S. citizen born in Jerusalem, if the parents or guardians of the child so requested. President George W. Bush signed the bill into law, but issued a signing statement declaring that the provision just described represented an unconstitutional encroachment on presidential power. The Obama Administration has taken the same position.

The plaintiff in *Zivotovsky* is a child named Menachem who was born in 2002 in Jerusalem to parents who are United States citizens. Menachem's mother applied for a United States passport listing his place of birth as "Jerusalem, Israel" – exactly what the statute allows. Following the President's policy, however, the State Department issued a passport listing only "Jerusalem" as the place of birth, prompting a lawsuit.

The underlying issue in the case is of profound importance: can a statute, properly passed by Congress and signed by the President, control an aspect of foreign policy? Both Democratic and Republican Presidents have often claimed that such statutes are unconstitutional, but the Supreme Court never accepted those arguments.

Until now. In *Zivotofsky*, the Supreme Court held that the statutory provision at issue unduly interferes with the President's right to decide whether to recognize a foreign government. Justice Kennedy wrote the majority opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Although the Constitution is silent about who has the authority in American government to recognize foreign

[33] 135 S. Ct. ___ (2015).

governments, the Court held that the recognition power exclusively belongs to the President. The Court based this conclusion on both the text of Article II of the Constitution, which provides that the President "shall receive Ambassadors and other public Ministers," and historical practice. Indeed, throughout American history, the President has decided whether and when to recognize a foreign government. The Court also stressed that it is important for the United States speak with one voice in foreign relations – the President's voice.

The Court's conclusion appears straightforward, but is troubling in many respects. First, contrary to the majority's assertion, the case was not actually about the power to recognize a foreign government. That issue arises when there are two competing factions within a foreign country that each claim to be the legitimate government. The statute takes no position on that issue (i.e., on who is sovereign over Jerusalem) – it simply allows an American citizen born in Jerusalem to designate his place of birth as Israel on his passport. In so doing, it represents an exercise of Congress's long-established power to control the content of passports as part of its power over immigration.

More importantly, the Court's decision embraces the view that the President has broad powers in foreign policy that cannot be checked by statute. I am always skeptical of arguments based on the framers' intent or the original meaning of the Constitution, but if anything is clear it is that those who drafted the Constitution rejected unchecked executive power. The drafters believed in checks and balances and wanted to avoid the abuses that they witnessed from a King who was not constrained by any other branch of government. The Court's decision in *Zivotovsky* is a dangerous and unwarranted step toward unchecked and uncheckable executive power.

Conclusion

Summarizing just these cases is enough to illustrate that it was a historic year in the Supreme Court. The Court's decisions will affect so many people, often in the most important and intimate aspects of their lives. For that reason, the Term can truly be described as progressive.