

SUPREME COURT REVIEW

Presented by the Attorney General's Office

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Featured Speaker: Professor Paul Bender

SOME HIGHLIGHTS OF THE OCTOBER 2014 TERM

By the Numbers

The Court decided 74 cases this term. With a week to go in the term, the Court had reversed in 72 percent of its cases and affirmed in 28 percent. The Court reviewed 16 cases from the Ninth Circuit, reversing in 10 (69 percent) and affirming in 6 (31 percent). The Court issued unanimous decisions in 29 cases, down from last year. The Court issued 5-4 decisions in 18 cases.

A Liberal Court?

A number of observers have suggested that the Court took a liberal turn this year. This trend is reflected in the decisions on Obamacare, marriage equality, and racial gerrymandering, among others. Justice Breyer, a Clinton appointee, was the justice most frequently in the majority for the first time in his 20 years on the Court. But the conservatives on the Court also scored significant victories in the cases striking down a farm program (*Horne*), invalidating the Obama administration's proposed environmental regulations, upholding lethal injections, and limiting habeas review.

Swing Justice?

With the Court fairly evenly divided between conservatives and liberals, Justice Kennedy has often been viewed as the “swing justice”—the one whose vote could swing a close decision one way or the other. He lived up to that reputation again this year. Of the Court's 5-4 decisions, 13 featured a division between liberals and conservatives. Kennedy joined with the liberal bloc (Ginsburg, Breyer, Sotomayor, and Kagan) in 8 of the 13 and joined with the conservative bloc (Roberts, Scalia, Thomas, and Alito) in the other 5. Justice Kennedy also wrote the majority opinion in the marriage equality case.

For Someone Who Doesn't Talk, He Says A Lot

Again this term, Justice Clarence Thomas did not ask a single question at oral argument. The most active questioners were Justice Scalia (average of 22 questions per argument) and Justice Sotomayor (average of 19). But Justice Thomas was far and away the most prolific opinion writer. He filed 32 opinions totaling 395

pages. Of those, 18 were dissenting opinions totaling 205 pages. In most cases, he took a position that could fairly be characterized as conservative, though he joined with the Court's liberal bloc in the Confederate license plate case and also sided with them (and the Obama administration) in the passport case (*Zivotofsky*).

Survey Says. . .

Several recent public opinion polls have been conducted about the Supreme Court. The most recent poll, taken June 10-14 by CBS News and the New York Times, found that 41% approved and 40% disapproved of the way the Court is handling its job. A poll in late May by CNN/ORC found that 52% of respondents approved of the way the Supreme Court is handling its job while 41% said they disapproved. Similarly, a poll taken in March by the Pew Research Center found that 50% have a favorable view of the Supreme Court, while 39% have an unfavorable view. These results indicated a slightly lower favorability rating than the Court received in polls taken last year. According to a poll conducted by Rasmussen Reports in May, only 31% of respondents thought the Supreme Court is doing a good or excellent job. That poll found that 55% think a majority of the justices have their own political agenda, while 28% believe the justices are impartial. In an AP/GfK poll taken in April, respondents were asked specifically the latest challenge to Obamacare (*King v. Burwell*). Only 1 in 10 said they were highly confident the justices would rely on objective interpretations of the law rather than their personal opinions, and 48% said they were not confident in the Court's impartiality.

For more information on the polls:

<http://www.cbsnews.com/news/poll-obamacare-and-the-supreme-court/>

<http://www.cnn.com/2015/06/08/politics/cnn-poll-supreme-court-health-care-same-sex-marriage/>

<http://www.people-press.org/2015/04/20/views-of-supreme-court-little-changed-as-major-rulings-loom/>

<http://www.people-press.org/files/2015/04/4-20-15-Supreme-Court-release.pdf>

http://www.rasmussenreports.com/public_content/politics/mood_of_america/supreme_court_update

<http://news.yahoo.com/ap-gfk-poll-supreme-court-fair-health-law-123801462.html>

http://ap-gfkipoll.com/main/wp-content/uploads/2015/05/AP-GfK_Poll_April_2015_Topline_healthcare.pdf

Recent Books About the Supreme Court and Constitution

Ian Millhiser, *Injustices: The Supreme Court's History of Comforting the Comfortable and Afflicting the Afflicted* (2015)

<http://www.publicaffairsbooks.com/book/hardcover/injustices/9781568584560>

Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* (2015)

<http://www.amazon.com/The-Law-Land-Constitutional-Republic/dp/0465065902>

Scott Dodson (ed.), *The Legacy of Ruth Bader Ginsburg* (2015)

<http://www.scotusblog.com/2015/02/book-review-law-professor-feminist-and-jurist-extraordinaire/>

Senator Mike Lee, *Our Lost Constitution: The Willful Subversion of America's Founding Document* (2015)

<http://www.penguin.com/book/our-lost-constitution-by-mike-lee/9781591847779>

INDIVIDUAL RIGHTS, POLITICS, AND CIVIL RIGHTS ACTIONS

Same Sex Marriage – The Fourteenth Amendment requires a state to license a marriage between two people of the same sex. *Obergefell v. Hodges*. 5-4 decision.

Legislative Redistricting – In 2000, Arizona voters approved an initiative that removed congressional redistricting authority from the Legislature and gave it to an independent commission. After the commission approved a congressional map to be used in the 2012 elections, the Legislature filed suit challenging the commission's authority. Does the Legislature have standing to sue? Does the Elections Clause of the Constitution prohibit removal of redistricting authority from the Legislature? *Arizona State Legislature v. Arizona Independent Redistricting Commission*. Undecided as of 6/26/15.

Racial Gerrymandering – The Republican-controlled legislature of Alabama case redrew legislative districts after the 2010 census. The result was to pack more of the state's African Americans, the state's most reliable Democratic voters, into fewer districts, thereby strengthening Republican voting power throughout the rest of the state. Was race the predominant factor in the redistricting? A divided lower court said no. The Supreme Court ruled in a 5-4 decision that the lower court erred by analyzing the state as a whole rather than district by district, and it remanded the case for rehearing. *Alabama Legislative Black Caucus v. Alabama*.

Housing Discrimination – In *Texas Dept. of Housing and Community Affairs v. Inclusive Community Project*, the Court held that disparate impact claims are cognizable under the Fair Housing Act. 5-4 decision.

Pregnancy Discrimination – Federal law prohibits discrimination against female employees who become pregnant and unable to perform all or part of their jobs. The law generally requires employers to treat pregnant employees the same as others on the payroll who have similar limitations in their ability to perform their

jobs. In *Young v. UPS*, the Court clarified the framework for analyzing failure-to-accommodate claims.

Religious Discrimination – An Oklahoma teenager, Samantha Lauf, applied for a job at an Abercrombie & Fitch store in a Tulsa shopping mall. A devout Muslim, Samantha believed that her religion required her to wear a headscarf. Abercrombie & Fitch, whose clothes feature a “preppy” or “casual” look, has a rule against wearing a cap of any kind for those who work as sales clerks. The store refused to hire Samantha. Reversing a lower court ruling that favored the employer, the Supreme Court held in *EEOC v. Abercrombie & Fitch* that Samantha only had to show that her need for the company to accommodate her religious beliefs was a motivating factor for the hiring decision.



GOVERNMENTAL POWERS

Obamacare – Under the Affordable Care Act, low income individuals are eligible for a tax credit subsidy if they buy health insurance on an “exchange established by the State.” Many states, including Arizona, did not establish an exchange, forcing those who would be eligible for the tax credit to buy health insurance on the federal exchange. In *King v. Burwell*, the Court held that the tax credits provided by the ACA are available to those who buy insurance on a federal exchange.

Foreign Relations/Passport Policy – In 2002, Menachem Zivotofsky was born to U.S. citizens in Jerusalem. Later that year, his mother went to the American Embassy in Tel Aviv and applied for a passport for Menachem. She requested that his place of birth be listed as Israel on the passport. The State Department refused her request. The Executive Branch does not recognize Israeli sovereignty over the holy city of Jerusalem. That has been the case since the Truman Administration. However, Congress had passed a law in 2002 providing that for any U.S. citizen born in Jerusalem, “Israel” shall be listed as the place of birth if requested by the citizen or his legal guardian. Held, in *Zivotofsky v. Kerry*, the President has exclusive power to grant recognition to a foreign sovereign, and the law enacted by Congress infringed on that power. 6-3 decision.

Power Plants/Air Pollution – The Environmental Protection Agency promulgated rules that will require coal-burning power plants to sharply reduce emissions of mercury, arsenic, and other pollutants. The coal and power industries, backed by twenty-one Republican-led states (including Arizona), contend that the new rules are unreasonable because the EPA failed to consider the cost of compliance. *Utility Air v. EPA* and *Michigan v. EPA* (consolidated). Undecided as of 6/26/15.

Taxes/Interstate Commerce – Under Maryland’s personal income tax scheme, residents do not receive a full tax credit for income taxes paid to other states. Consequently, those earning income in another state are taxed twice on that income—once in the state

where it is earned, then again in Maryland. In *Comptroller v. Wynne*, the Court held that this duplicative tax scheme violated the dormant Commerce Clause. 5-4 decision.

Medicaid/Supremacy Clause – A group of healthcare providers contended that Idaho’s procedures for reimbursing them violated a provision of the federal Medicaid Act. Does the Supremacy Clause of the Constitution provide an implied right of action that would enable the providers to sue the state or state officials? No, the Court said in *Armstrong v. Exceptional Child Center*. 5-4 decision.

Private Property/Regulation of Raisin Market – Under a federal farm program, raisin growers are required to turn over full control of part of their annual crop to the government, to be held off the market temporarily to push up prices for the annual crop. In *Horne v. Dept. of Agriculture*, the Court held that requiring growers to set aside their reserve raisins is a taking for which the growers are entitled to just compensation. 5-4 decision.

FIRST AMENDMENT

License Plates/Confederate Flag – Like many states, Texas allows vehicle owners a choice between general-issue license plates and specialty license plate. Specialty plates must be approved by the State. A group proposed a plate design featuring the Confederate battle flag. In *Walker v. Sons of Confederate Veterans*, the Court held that because the license plate designs constitute government speech, the State was entitled to reject the proposal for the Confederate flag license plate. 5-4 decision.



Regulation of Signs – In *Reed v. Town of Gilbert*, the Court held that Gilbert’s comprehensive sign ordinance was content-based regulation of speech that violated the First Amendment. Unanimous.

Solicitation of Campaign Contributions – Florida is one of a majority of states in which voters elect judges. The code of conduct for Florida judges prohibits judicial candidates from personally soliciting campaign contributions. A candidate for a seat on a county court ran afoul of this rule when she sent out a mass mailing with a personal appeal for contributions. Facing disciplinary action by the Florida Bar, she argued that her right to ask for campaign contributions is protected by the First Amendment. In *Williams-Yulee v. Florida Bar*, the Court applied strict scrutiny and yet still upheld the ban, finding it narrowly tailored to serve the state’s compelling interest in preserving public confidence in the integrity of the judiciary. 5-4 decision, with Chief Justice Roberts joining the Court’s liberals to form the majority.

Facebook Threats – A man posted threats against his ex-wife on Facebook. He was under a federal law making it a crime to transmit in interstate commerce a “communication containing any threat to kidnap any person or any threat to injure the person of another.” The case was expected to provide some guidance on how far First Amendment protection extends to private expression on the Internet. However, the Court in *Elonis v. United States* left that for another day and merely ruled that the jury had been improperly instructed about the requisite mental state needed for a conviction.

CRIME AND PUNISHMENT

Lethal Injections/Death Penalty – Oklahoma uses a three-drug protocol to execute people sentenced to death. The first drug is intended to protect against the suffering caused by the latter two. The most protective drug, sodium thiopental, is not available because drug companies, under pressure from death penalty opponents, have stopped supplying it for use in executions. Consequently, Oklahoma uses a drug called midazolam, a sedative used to treat anxiety that neither kills pain nor reliably maintains the condemned person in an unconscious state during the execution. Does Oklahoma's three-drug protocol violate the Eighth Amendment's prohibition of cruel and unusual punishment? The case is *Glossip v. Gross*. Undecided as of 6/26/15.

Race-Based Juror Strikes/Habeas Review: In 1989, Hector Ayala was convicted in California state court of murdering three people during an armed robbery of an automobile body shop. Ayala, who is Hispanic, was sentenced to death. At his trial, the prosecution struck each of the seven black or Hispanic people in the pool of more than 200 prospective jurors. The trial judge permitted the prosecution to disclose its reasons for the strikes outside the presence of the defense and concluded that the prosecution had valid, race-neutral justifications for the strikes. On appeal, the California Supreme Court affirmed the conviction and sentence, finding that although the trial court had acted in error, the error was harmless. Ayala then sought habeas review in federal court. A divided Ninth Circuit granted habeas relief. In *Davis v. Ayala*, the Supreme Court reversed. Writing for a 5-4 majority, Justice Alito concluded that "the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent." Justice Kennedy joined the majority but filed a separate concurring opinion in which he expressed dismay that Ayala and many other prison inmates spend most of their time in solitary confinement.

For more on this case:

<http://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights>

Sentencing/Sawed Off Shotgun – The federal Armed Career Criminal Act increases the length of sentences for felons who have three or more convictions of a “violent felony,” which is defined as a crime that is “burglary, arson, or extortion, or involves use of explosives, or *otherwise involves conduct that presents a potential serious risk of physical injury to another.*” The government sought an enhanced sentence of an individual convicted of being a felon in possession of a firearm—a sawed-off shotgun. Is that a violent felony? The Court didn’t really say, holding instead that the ACCA’s residual clause was unconstitutionally vague. *Johnson v. U.S.*

Death Penalty/Mental Disability – Under *Atkins v. Virginia* (2002), individuals convicted of murder who are found to be intellectually disabled cannot be given the death penalty. In *Brumfield v. Cain*, the Court ruled that a Louisiana man, who had been convicted and sentenced to death for the murder of an off-duty police officer, was entitled to a new hearing on his *Atkins* claim.

Inmate Suicide – An inmate at a Delaware prison committed suicide. The inmate had a history of psychiatric treatment and had previously attempted suicide. His family sued alleging that the suicide was the result of prison officials’ deliberate indifference (the standard for an Eighth Amendment claim). In *Taylor v. Barkes*, the Court held that prison officials were entitled to qualified immunity because, at the time of the suicide, “an incarcerated person’s right to the proper implementation of adequate suicide prevention protocols” was not clearly established.

Excessive Force/Pretrial Detention – Detention officers removed a pretrial detainee from his holding cell, slammed his head on the floor, and tased him. The detainee sued alleging that the officers used excessive force. In *Kingsley v. Hendrickson*, the Court held that excessive force claims by pretrial detainees under an objective standard rather than a subjective one. 5-4 decision.

CRIMINAL LAW AND PROCEDURE

Privacy of Hotel Guests - A provision of the Los Angeles Municipal Code requires “every operator of a hotel to keep a record” containing the names of guests and other information about guests, and to make this record available to any officer the L.A.P.D. for inspection on demand. Affirming the Ninth Circuit, the Court held in *City of Los Angeles v. Patel* that this Code provision is facially unconstitutional under the Fourth Amendment because it did not provide for precompliance review.

Traffic Stop/Mistake of Law – A North Carolina police officer stopped a car because it had a brake light that didn’t work. During the stop, the driver consented to a search of the car. Cocaine was found and the driver was subsequently convicted of drug trafficking. But a state appeals court ruled that the vehicle code required only one working brake light, and therefore there had been no violation of the law that would permit the stop. In *Heien v. North Carolina*, the Court ruled 8-1 that the officer’s mistake about the law was reasonable and thus the seizure didn’t violate the Fourth Amendment.

Traffic Stop/Duration – A Nebraska K-9 police officer stopped a car because it crossed the shoulder line. The officer checked the driver’s license and registration, found nothing unusual, and issued a warning for the traffic offense. He asked the driver for permission to walk his dog around the car, and the driver refused. The officer did so anyway, and the dog alerted to methamphetamine about 7 or 8 minutes after the officer had issued the warning. In *Rodriguez v. United States*, the Court held that, absent reasonable suspicion (which didn’t exist here), police extension of a traffic stop to conduct a dog search violates the Fourth Amendment’s shield against unreasonable seizures.

Child Witness/Confrontation Clause – A three-year-old boy told his teachers that he’d been physically abused by his mother’s boyfriend. Prosecutors used what the boy said to help convict the boyfriend of assault, though the boy did not testify. In *Ohio v.*

Clark, the Court held that the use of the boy's statement didn't violate the Sixth Amendment Confrontation Clause.

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Paul Bender teaches courses on U.S. and Arizona constitutional law. He has written extensively about constitutional law, intellectual property and Indian law, and is coauthor of the two-volume casebook/treatise, *Political and Civil Rights in the United States*. Professor Bender has argued more than 20 cases before the U.S. Supreme Court, and actively participates in constitutional litigation in federal and state courts.

Professor Bender served as Dean of the College of Law from 1984-1989, during which time he was instrumental in starting its Indian Legal Program. Prior to joining the College faculty, he was law clerk to 2nd U.S. Circuit Court of Appeals Judge Learned Hand and to U.S. Supreme Court Justice Felix Frankfurter, and spent 24 years as a faculty member at the University of Pennsylvania Law School. Professor Bender served as Principal Deputy Solicitor General of the United States from 1993-1997, with responsibility for Supreme Court and federal appellate litigation in the areas of civil rights, race and sex discrimination, freedom of speech and religion, and tort claims against the federal government.

Professor Bender has served as a member of the Hopi Tribe's Court of Appeals, and is currently Chief Justice of the Fort McDowell Nation Supreme Court, and the San Carlos Apache Court of Appeals.