SUPREME COURT
Highlights of the 2015-2016 Term

SCALIA
Impact on the Court's Jurisprudence, and Aftermath

Compiled by

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Albany

SUPREME COURT
HIGHLIGHTS OF THE 2015-2016 TERM

AFFIRMATIVE ACTION
Fisher v. University of Texas at Austin, 4-3
Upheld race-conscious college admissions programs.

RIGHT TO CHOOSE
Whole Woman's Health v. Hellerstedt, 5-3
Invalidated two restrictions on abortion services Texas.

EXECUTIVE POWER/IMMIGRATION
U.S. v. Texas, 4-4
Affirmed, by a divided Court, lower court's ruling invalidating the executive order deferring deportation action for certain aliens.

UNION DUES
Friedrichs v. California Teachers Association, 4-4
Affirmed, by a divided Court, lower court's upholding public sector "agency shop" where non-members pay union dues to defray costs of collective bargaining.

RELIGIOUS LIBERTY
Zubik v. Burwell, 8-0
Vacated lower court rulings and remanded to afford the parties an opportunity to reach an accord.

PUBLIC CORRUPTION
McDonnell v. U.S., 8-0
Narrowly construed "official act" in public corruption law, vacated convictions, and remanded case to lower court to determine whether the record contained sufficient evidence to permit retrial.

SEARCH & SEIZURE
Utah v. Strieff, 5-3
Evidence discovered pursuant to a valid, preexisting warrant is admissible despite the initial unconstitutional stop.

Birchfield v. North Dakota, 5-3 (2-1)
Upheld warrantless breath tests incident to drunk driving arrests, but not warrantless blood tests.

Vincent Martin Bonventre
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SCALIA
Impact on the Court's Jurisprudence, and Aftermath

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   a. **Religious Liberty** *Oregon (Employment Division) v. Smith (1990)*

   b. **Campaign Finance** *Citizens United v. FEC (2010)*

2. **2nd Amendment** *District of Columbia v. Heller (2008)*

3. **4th Amendment**

   a. **Tech. Surveillance** *U.S. v. Jones (2012)*

   b. **Tech. Devices** *Kyllo v. U.S. (2001)*

4. **14th Amendment**

   a. **Affirm. Action** *Fisher v. University of Texas (2013)*;
   Schuette v. Coalition to Defend Affirmative Action (2014)

   b. **Gay Rights** *Romer v. Evans (1996)*
   Lawrence v. Texas (2003)
   Obergefell v. Hodges (2015)

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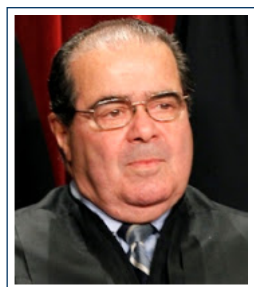
SATURDAY, FEBRUARY 13, 2016

Antonin Scalia's Passing



All good Americans are saddened by the news that Justice Antonin Scalia has died. Surely, even his most vehement critics mourn his unexpected passing and would have preferred that, if he was to leave the Court, he could have done so of his own accord and then enjoyed a long, happy retirement.

As an Italian-American (and a Sicilian-American at that), his appointment to the Court as the first Italian-American (and Sicilian-American) was a source of no small pride. Beyond that, he was smart and scholarly, and he could certainly write.

But we do no honor to Justice Scalia to feign sympathy for his avowed jurisprudence or respect for his opinion and voting record. He himself would have preferred candor and open disagreement. Indeed, one of his truly charming and admirable qualities was his ability to take criticism as well as he could dish it out.

So, for whatever it's worth, here's my candid assessment of his overall decisional record on the Court: abhorrent. Yes. For example, his position on gay rights was homophobic, on racial discrimination it was hostile to African-Americans, and on the death penalty it was medieval.

Let's also be frank about the influence he exerted. Yes, he was very influential among those for whom his positions on issues were appealing anyway--e.g., very conservative scholars, very conservative politicians, and very conservative judges on lower courts.

But on the Court itself, his influence was increasingly negligible. His writings could be very nasty--and personally so--and his positions were often extreme. He was openly dismissive and contemptuous of views held by colleagues with whom he disagreed, and even dismissive and contemptuous of those colleagues themselves. Indeed, he could be so nasty and extreme, that colleagues who actually agreed with him on the result in a case would often write their own separate opinions instead of joining his.

Of course, all people of good will hope that Justice Scalia rests in peace and, if the heaven in which he apparently believed exists, that he is there and will be happy for eternity. And certainly, the kind words expressed about him and the condolences to his family and others who loved him are appropriate and all decent people share them.

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But our sadness at his death does not make pretense or silence about his record and legacy respectful. Many, including me, view them very unfavorably.

Let me finish with a sincere God Rest His Soul. Here's hoping that he is now with St. Francis and other of the gentlest souls, and that together with them he is kindly sending his blessings to all of us, including those, like me, who disagreed with him so strongly.

In the coming days, on **New York Court Watcher**, I will discuss some of Justice Scalia's most important and representative opinions.

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THURSDAY, FEBRUARY 18, 2016

Justice Scalia's Record (Part 1)

In Tuesday's Albany Times-Union, columnist ***Chris Churchill eloquently decried the shameful glee*** *in some corners for Antonin Scalia's death. Whether one cared for Scalia's opinions or even for him, all decent people with any sense of humanity are saddened by the death of a dedicated public servant. As I have repeated in different ways, I wish him the eternal happiness of his religious faith.*

photo: Mark Avery/ZUMA

Let's take a look at Justice Scalia's record. Neither a sympathetic nor a hostile look. Just a straightforward, unvarnished survey of some of his most significant judicial opinions on the major constitutional issues of the day.

Some may hail these opinions; others may deplore them.
Some may view them as appropriately faithful to traditional values and to original constitutional meaning; others may view them as reactionary.
Some may see them as honest, neutral applications of the law; others may see them as personal beliefs and preferences cloaked in an expedient judicial philosophy.
But whatever one thinks of these opinions, they ***are*** his.

I have previously made clear **my own unfavorable view** of his jurisprudence. No secret there. But that is irrelevant for this survey.
[I will, however, state my agreement or disagreement with the opinions in this survey, purely in the interests of full disclosure.]

What is relevant are the positions Justice Scalia took in his opinions. His actual positions on critical constitutional issues. Not the gibberish we've been hearing from many politicians and commentators who seem utterly unfamiliar with Scalia's actual record.

In fact, it is doubtful that most conservative politicians and commentators, who claim great admiration for the Justice Scalia, would really be willing to publicly embrace many of the positions he ardently espoused. And doubtful, as well, that most liberal politicians and commentators would really have any credible rebuttal to Scalia's call for adherence to what the Constitution says and to what meaning was intended.
[There are others, such as federal appeals judge Richard Posner and

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the late professor of jurisprudence Ronald Dworkin (and I would add my Albany Law colleague Stephen Gottleib), who have forcefully challenged Scalia's judicial philosophy. But we are not hearing any such critiques--positive or negative--among the mostly nonsensical din we have been subjected to in the immediate aftermath of Justice Scalia's death.]

So let's get started.

Obviously, a full exposition of the cases and Scalia's opinions over his 30 years on the Court would take a volume or volumes. So here are a few: the unadorned rulings of the Court--i.e., the resolution of the major constitutional issues presented and the rules of law settled or adopted by the Court--and the positions taken in those cases by Scalia, whether in majority, concurring, or dissenting opinions.

Religious Freedom
Oregon v. Smith (1990), majority opinion by Scalia: "*any otherwise valid law*" defeats a claim of religious liberty. The 1st Amendment does not entitle a religious objector to an exemption "*from obedience to a general law*," otherwise "'*every citizen [would] become a law unto himself*.'"

[N.B., some additional discussion of *Smith* is particularly called for because it is such a consequential ruling and because, almost certainly, it would be shocking to many conservative admirers of Justice Scalia who may not be so familiar with his record.
Justice O'Connor and two other Justices vehemently disagreed with Scalia's position in *Smith*. They argued that, consistent with the Court's precedents and its treatment of other fundamental rights, religious freedom could not be abridged unless government had a compelling reason to do so, e.g., forbidding human sacrifice, requiring medical care for gravely ill children, etc.
As a a result of Scalia's majority opinion in *Smith*, free exercise of religion is the only 1st Amendment right that is not protected by the "compelling reason"/"strict scrutiny" test.

Congress passed a statute (the Religious Freedom Restoration Act [RFRA]) to overrule Scalia's opinion and to restore the "compelling reason"/"strict scrutiny" test. That statute now protects religious freedom from federal--but not state--laws.
In *Burwell v. Hobby Lobby* (2014), where the Court majority (including Scalia) did exempt the religious objectors from purchasing contraceptive insurance coverage under the Affordable Care Act, it did so by applying the statute--not the 1st Amendment which would have provided no religious protection because of *Smith*.

As a continuing consequence of Scalia's opinion in *Smith*, there is no 1st Amendment or federal statutory protection for religious freedom from any "*otherwise valid (state) law*"--i.e., a law that is valid without regard for the religious objection.
Smith may be a wise decision or a foolish one, a favored or detested one, a correct or mistaken view of 1st Amendment religious liberty. But whatever else it is, it is a Scalia opinion.]

[Disclosure: I disagree strongly with Scalia's opinion in Smith *and believe that decision to be one of the Court's worst in the modern era. (I have previously written and spoken on the subject. E.g., "**The Fall of Free Exercise**," 70 Alb. L. Rev. 1399 [2007].) I agree with the decision to protect religious freedom in* Hobby-Lobby.*]*

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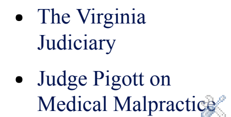

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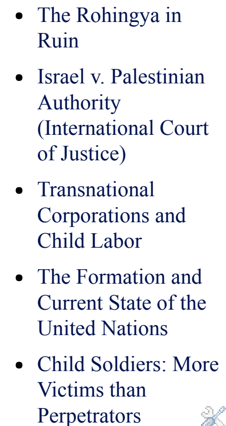

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Gun Rights
District of Columbia v. Heller (2008), majority opinion by Scalia: the 2nd Amendment guarantees an individual right to bear arms. The "*prefatory clause*" of the 2nd Amendment (i.e., "*A well regulated Militia, being necessary to the security of a free State*") "*announces the purpose*" of the Amendment, but it "*does not suggest...the only reason*" that Americans valued the right to bear arms. Instead, at the time of the founding, most Americans "*undoubtedly thought it even more important for self-defense and hunting*."

[Scalia's textual and historical analysis rejected the position of the four dissenters who argued that a natural reading of the 2nd Amendment, together with its acknowledged military purpose and the Court's previous decisions, compels the opposite conclusion. That is, that the 2nd Amendment was adopted only to protect the right of the people in each state "*to maintain a well-regulated militia*"--not for individual self-defense or hunting.

Scalia's opinion served as the springboard for the Court's subsequent decision in *McDonald v. City of Chicago* (2010) in which the Court: held that the individual right to bear arms was assertable against state governments, overruled precedent that had held that 2nd Amendment rights were not applicable to the states, rendered numerous state and municipal gun control laws unconstitutional, and did so by broadly interpreting the terms "liberty" and "due process" in the 14th Amendment to include individual gun rights.]

[Disclosure: I agree with the Heller *decision protecting individual gun rights, but find Scalia's analysis a bit tortured; I agree with the decision in* McDonald *that individual gun rights are part of the fundamental "liberty" protected by the Constitution and was properly made assertable against the states.]*

In **Part 2**, we'll take a look at a few of Scalia's significant opinions on questions of constitutionally guaranteed equal protection.

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THURSDAY, FEBRUARY 25, 2016

Justice Scalia's Record (Part 2: Women's Rights)

*In **Part 1**, we looked at Justice Antonin Scalia's opinions in major cases dealing with religious liberty and gun rights. Again, the purpose there, and here, is neither to hail nor condemn the positions he took on those issues. I have made plain enough that I find much of his record dreadful--i.e., reactionary, hostile to some basic rights and equalities, and less than persuasive. Indeed, I am sure that many of his supposed supporters and admirers would actually be aghast at some of Scalia's positions, or at least would decline to embrace them publicly. But the focus of this series is what Scalia himself did embrace in his opinions, right or wrong, wise or foolish, popular or not.*

photo: AP/Manuel Balce Ceneta

As in **Part 1**, we'll review some of the most significant opinions Justice Antonin Scalia authored in cases involving major constitutional issues. We'll take an unvarnished look at the positions he took and the arguments he made. We'll direct our attention to Scalia's record on issues of equality. In this Part 2, we'll focus specifically on women's rights.

[As in Part 1, in the interest of full disclosure, I will state my agreement or disagreement with Scalia.]

Women's Rights

U.S. v. Virginia (1996): the Court's majority ruled that it was unconstitutional discrimination for women to be denied admission to Virginia Military Institute, a state institution. Scalia, dissenting by himself, argued that the exclusion of women was a legitimate state policy.

The majority took the position that governments may not treat women unequally unless there is some "important governmental objective" for doing so. In the majority's view, Virginia failed to present any such justification.

In his lone dissent, Scalia argued that it was more consistent with "our past jurisprudence" to only require some "rational-basis" for treating women differently than men. But even applying the "important governmental objective" standard, Scalia contended that the benefits of single-sex education more than sufficed to validate Virginia's decision to maintain VMI as an all male institution.

J.E.B. v. Alabama (1994): the Court's majority ruled that intentional gender-based discrimination in jury selection violates constitutional equal protection. In dissent, Scalia argued that a litigant's gender-based

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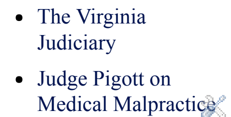
dismissal of potential jurors (by so-called "peremptory challenges) is not "sex-based animus," but merely the "desire to get a jury favorably disposed" to one's case.
The majority took the position that all persons have a right not to be excluded from a jury on the basis of discriminatory presumptions, whether about race or gender.
But Scalia reasoned that no group is denied equal protection if "all groups are subject to the peremptory challenge." He chided the majority for basing its decision, not on "any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes."

Planned Parenthood v. Casey (1992): the Court's majority reaffirmed a woman's right to choose an abortion in the early stages of pregnancy, and it held that governments could impose some reasonable restrictions, but not an "undue burden" on that right. In dissent, Scalia rejected the notion that there was any such right, period.
The majority explained that "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected" by the Constitution--whether "marriage, procreation, contraception, family relationships, child rearing, and education."
Scalia, "appalled" by the "outrageous arguments" of the majority's opinion, protested that the "Constitution says absolutely nothing" about the right to an abortion. Moreover, he argued that the majority's asserted protection of "intimate and personal" decisions was equally applicable to "homosexual sodomy, polygamy, adult incest, and suicide"--"all of which," he insisted, "can constitutionally be proscribed because it is our unquestionable constitutional tradition."

[Disclosure: Not too surprisingly, I disagree with Scalia's position in each of those cases. As for the Virginia *(VMI) case, it seems clear that a break from the historical 2nd class treatment of women demands that there be some genuinely strong reason for treating women differently than men, not some mere "rational" ground that Scalia preferred. As for the* J.E.B. *case, it is surely more than "conspicuous obeisance to the equality of the sexes" to prohibit discriminatory treatment that is based solely on a person's gender, whether in jury selection or in any other governmental function. As for* Casey, *Scalia's protestation that the right to choose an abortion is not mentioned in the Constitution is a preposterous constitutional argument. Most fundamental rights are not mentioned, e.g., the right to marry, to have children, to raise one's own children, to be intimate with one's spouse, to have a friend, etc., etc., etc. (See* ***Supremely Awful Arguments: Constitutional Nonsense [Part 2]: It's not mentioned in the Constitution****.) Beyond that, if there is no genuinely legitimate reason for government to prohibit "homosexual sodomy," as Scalia was fond of repeatedly calling it, then it should not be prohibited--which is precisely what the Court, over Scalia's dissent, subsequently held in* Lawrence v. Texas *(2003).*

Notably, Scalia took positions in each of those cases that were contrary to the rights of women. Lest that observation be deemed to insinuate something unfairly, it is, in fact, consistent with views Scalia expressed off the Court. For example, in ***an interview in 2011****--several years after his opinions in those cases--he made clear, as he did on numerous occasions, that he did not think that constitutional equal protection even applied to women: "*[T]he Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that.*"*
Scalia seemed to backtrack a bit in ***another interview a couple of years***



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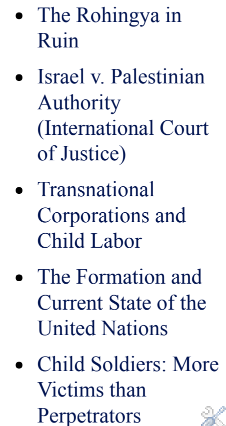

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later--*but only with cryptic ambiguity* "Of course [the Constitution] covers it! No, you can’t treat women differently, give them higher criminal sentences. Of course not. What I was [previously] referring to is: The issue is not whether it prohibits discrimination on the basis of sex. Of course it does. The issue is, 'What is discrimination?'"

Indeed, in his lone dissenting opinion in the Virginia *(VMI) case, Scalia supported his preference for the mere "rational basis" standard by favorably citing older decisions of the Court that had upheld state laws excluding women from jury rolls (*Hoyt v. Florida *[1961]) and prohibiting women from being bartenders (Goesaert v. Cleary [1948]).]*

In Part 3, we'll review Scalia's positions on gay rights.

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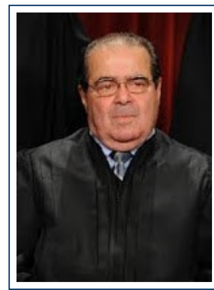
TUESDAY, MARCH 1, 2016

Justice Scalia's Record (Part 3: "Homosexual Sodomy")

We'll now take a look at Justice Antonin Scalia's record on the question of gay rights.
Or as he would refer to the issue--with raw hostility, exasperation, and rather peculiar frequency--the "fundamental right of homosexual sodomy."



During Scalia's tenure on the Court, the Justices confronted numerous questions of constitutionally protected liberty and equality as applied to gays and lesbians.
It is no surprise, at least to those who actually follow the Court and the positions taken by its members, that Scalia sided against gays and lesbians in every case.

Let's review the positions taken by Scalia in those cases where he wrote an opinion.

Gay Rights
Romer v. Evans (1996): the Court's majority invalidated a state law that had prohibited any local law that sought to protect gays and lesbians from discrimination. Scalia dissented and argued that the state law was a legitimate exercise of the popular disapproval of homosexuality.
In its opinion for the Court, the majority took the position that it was a violation of the constitutional guarantee of equal protection of the law to single out a group to be denied legal protection from discrimination. Scalia disagreed, protesting that the law was a "constitutionally permissible" and "eminently reasonable" effort by the state's citizens--who are "entitled to be hostile toward homosexual conduct"--to deny protection "to those with a self-avowed tendency or desire to engage in the conduct."

Lawrence v. Texas (2003): the Court's majority invalidated a state law that criminalized "homosexual sex." Scalia dissented again and argued that the law was a legitimate expression of the state's belief that certain sexual conduct was "immoral and unacceptable."
In its opinion for the Court, the majority held that there was in fact no legitimate government interest that justified the law's (or similar "anti-sodomy" laws') intrusion into the intimate private lives of individuals. Scalia protested that "homosexual sodomy is not a fundamental right" and, therefore, that a state may criminalize such behavior just as it may criminalize other sexual conduct it considers immoral such as "fornication, bigamy, adultery, adult incest, bestiality, and obscenity."

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U.S. v. Windsor (2013): the Court's majority invalidated that part of the so-called Defense of Marriage Act (federal DOMA) that denied federal marriage benefits to legally married same-sex couples. Scalia dissented once again and argued that the law's denial of benefits was a valid defense of traditional marriage.
In its opinion for the Court, the majority held that a "bare congressional desire" for disparate treatment of "a politically unpopular group" was not a legitimate reason for denying benefits to legally married same-sex couples that are available to other legally married couples.
Scalia repeated his previous complaint that the Court's majority had "declared a constitutional right to homosexual sodomy," as well as his argument that the Constitution "let['s] the People decide" whether to "enforce traditional moral and sexual norms."

Obergefell v. Hodges (2015): the Court's majority ruled that the right to marry may not be denied to same-sex couples. Scalia dissented one more time and argued that the majority had "rob[bed] the People" of their "freedom to govern themselves" on the issue.
In its opinion for the Court, the majority took the position that the right to marry is fundamental, that personal choices concerning marriage are among the most intimate aspects of constitutionally protected liberty, and that there is no legally relevant difference between same- and opposite-sex couples with respect to these matters.
For Scalia, however, the issue of same-sex marriage was easily resolved and the majority was clearly wrong: "When the Fourteenth Amendment was ratified in 1868 [protecting 'liberty' from undue deprivation by the states], every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases."

There were two additional major cases involving gay rights in which Scalia participated. In these, he voted but did not author an opinion:

Boy Scouts v. Dale (2000): the Court's majority held that a state's anti-discrimination law could not be applied to the Boy Scouts. According to the majority's opinion, the choice to exclude gays from leadership positions was constitutionally protected by "the Scouts' freedom of expressive association."
The dissenters in that case took the position that "eliminating discrimination is a compelling state interest" that justified application of the state law.
Scalia joined the majority, siding with the Boy Scouts.

Christian Legal Society v. Martinez (2010): the Court's majority upheld a state college's decision to deny student activity funding, recognition, and other benefits to a campus organization that refused membership to all gay and lesbian students.
On the other hand, the dissenting Justices argued that the state college's application of its non-discrimination policy to the campus group violated that group's right to express its viewpoint about sexual morality.
Scalia joined the dissenters, siding with the student group.

[Disclosure: I disagree with Scalia's position in every one of those cases.
Connect the dots. Scalia always sided against gays and lesbians. He always found the competing interest or the competing argument or the competing theory to outweigh any liberty and equality rights of gays and lesbians.
So, in his view, a popular majority's disapproval of gays and lesbians

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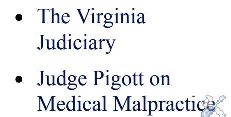

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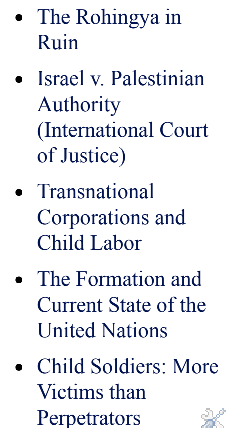

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was reasonable and justified laws criminalizing "homosexual sodomy." Similarly, hostility towards gays and lesbians justified denying them any legal protection from sexual orientation discrimination.
So too, according to Scalia, the enforcement of traditional moral and sexual norms justified denying marriage benefits to same-sex couples even if they were legally married. Also, the view of marriage from nearly 150 years ago sufficed, without more, to justify prohibiting same-sex marriage today.
Beyond that, Scalia supported the notion that an organization's disapproval of gays and lesbians outweighs a state law that prohibits discrimination. And a state college should be required to subsidize and recognize a student group despite the group's open discrimination against gays and lesbians.
Contrary to Scalia's positions in all these cases, my own view is that there is simply no legitimate government reason--as opposed to some individual's or majority's religious, or moral, or traditional view--to deny gays and lesbians the same liberties and equal treatment as heterosexuals. And the application of equal protection and anti-discrimination laws to rectify the historic savage discriminatory treatment and persecution of gays and lesbians more than justifies overriding the associational preferences of organizations and activities, except perhaps for those that are truly private.]

In Part 4, we'll look at Scalia's positions on issues of race.

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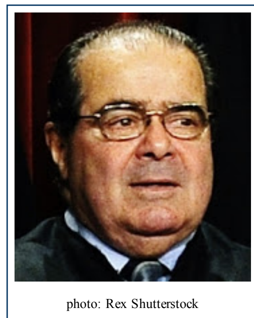
FRIDAY, MARCH 11, 2016

Justice Scalia's Record (Part 4: Racial Justice)

We have previously explored Justice Antonin Scalia's positions on 1st Amendment religious liberty, 2nd Amendment gun rights, and women's rights and gay rights both as a matter of equal protection and fundamental liberty. Let's now turn our attention to the positions he took on issues of race. The cases involve claims of racial discrimination, racial preferences, race-based conduct, and racism.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As with women's rights and gay rights, Scalia's record on issues of racial justice is not terribly surprising to those who follow the Court. His opinions and votes evince little support for laws or other government action intended to protect racial minorities and, in fact, precious little sympathy for the interests of racial minorities generally. Whatever the issue, he invariably sided with the competing interests or concerns.

Let's take a look at cases in which he authored an opinion.

Racial Justice

Alabama Legislative Black Caucus v. Alabama (2015): the majority held that racial gerrymandering in specific voting districts cannot be excused by considering the state "as a whole." The majority ordered the lower court to re-evaluate the claims of racial gerrymandering, this time by considering individual districts.
In his dissenting opinion, Scalia protested that the majority had undermined "the primacy of the State in managing its own elections." He also argued that the complainants had not clearly "proved (or even pleaded) district-specific claims," that the Court's majority had refocused the complainants' "flawed litigation strategy," and that, by doing so, the majority was "discourag[ing] careful litigation."

Schuette v. Coalition to Defend Affirmative Action (2014): the majority upheld a voter adopted state law prohibiting the use of race-based preferences in state university admissions.
In the opinion for the Court, a plurality of the Justices took the position that voters are free to end race-conscious policies. Such policies may be constitutionally permissible, but they are not required.
In her dissenting opinion, Justice Sotomayor protested that the law effectively established "two very different processes" for admissions to the state's universities: "one for persons interested in race-sensitive admissions policies and one for everyone else."
Justice Scalia sided with the plurality to uphold the law, but he did so in

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a separate concurring opinion. He argued that the only issue in the case was whether the law "reflects a racially discriminatory purpose," and he insisted that the challengers "do not have a prayer of proving it here." His explanation was that any law requiring state universities "to afford all persons equal protection of the laws...does not--cannot--deny" equal protection of the laws.

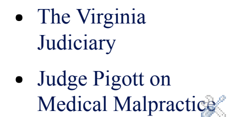
Fisher v. University of Texas (2013): the Court reversed the decision of the lower court that had approved the state university's race-conscious admissions process. The majority opinion held that the university has the burden to demonstrate that the consideration of race as a "plus factor" is actually necessary to achieve a diverse student body.
In her dissenting opinion, Justice Ginsburg argued that the admissions process was correctly approved by the lower court, because state universities "need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality.'"
Scalia joined the majority opinion to reverse the lower court's approval of the admissions process. But he penned a short concurring opinion of his own to repeat his unqualified view that "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."

League of United Latin American Citizens v. Perry (2006): among other things, the majority held that the state's redistricting plan violated the Voting Rights Act. The plan diluted the voting strength of Latino voters in a congressional district in which they had become increasingly powerful.
Dissenting from that part of the majority opinion, Scalia took the position that the voter-dilution claim should be dismissed, because there is no such legal claim specifically recognized by the Voting Rights Act. In his view, the sole purpose of the relevant provision of the Act was to "ensur[e] minority voters equal electoral opportunities," not to protect the electoral strength of any group.
With regard to the race-based equal protection claims (which the majority opinion did not need to discuss), Scalia dismissed them as well. He explained that "Congressional redistricting is primarily a responsibility of state legislatures, and [w]e presume, moreover, that legislatures fulfill this responsibility in a constitutional manner. Although a State will almost always be aware of racial demographics when it redistricts, it does not follow from this awareness that the State redistricted on the basis of race."

To be sure, there have been other significant cases involving issues of race during Scalia's tenure on the Court. In virtually all of those, he joined someone else's opinion rather than writing his own.

Here are a few such cases in recent years:
Texas Dept. of Housing v. Inclusive Communities Project (2015): the majority ruled that the Fair Housing Act protects against practices that have racially discriminatory consequences.
Scalia joined the dissenting opinion which argued that the law's protection was narrower: it only prohibits housing practices where an intent to discriminate has been proven.

Davis v. Ayala (2015): the majority upheld a death penalty conviction in a case where the prosecutor had dismissed all seven potential Hispanic and Black jurors. (The prosecutor was using his "peremptory challenges"--i.e., discretionary strikes permitted to each side, but not on the basis of race or other forbidden categories.) The trial judge had



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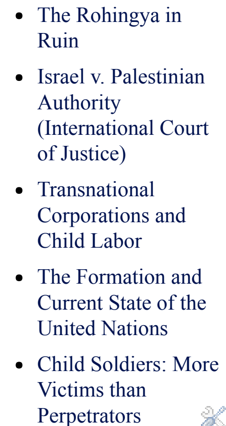

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conducted hearings for the prosecutor to explain his actions, but the judge did not permit the defendant's lawyers to attend and, thus, they had no opportunity to challenge the prosecutor's explanations.
The majority of the Justices took the position that the trial judge's exclusion of the defense counsel was a harmless error--i.e., it did not prejudice the defendant.
The dissenters argued that, given the strong indications that the prosecutor's actions were racial, there is little doubt that the defense lawyers' "exclusion from [the] hearings substantially influenced the outcome."
Scalia joined the majority's holding of harmless error.

Walker v. Texas Sons of Confederate Veterans (2015): the majority upheld the state's decision to reject the proposed Confederate Flag design for a vanity license plate. The state had decided that the design was offensive to many citizens, and a majority of the Justices ruled that the state was within its right to pick and choose designs for the vanity plates it produces.
The dissenters argued that the state, which had accepted many proposed vanity plates, violated the free speech rights of those who proposed the Confederate Flag design.
Scalia joined the dissenters opinion that the state must accept the Confederate Flag proposal.

Shelby County, Ala. v. Holder (2013): the majority invalidated the pre-clearance provision of the Voting Rights Act which required certain states to obtained federal approval before enacting changes to their election laws and procedures. The majority reasoned that the data on which the pre-clearance provision was based were outdated.
The dissenters argued that the pre-clearance provision was recently renewed because the discriminatory conditions that led to its initial enactment persisted.
Scalia joined the majority opinion that the pre-clearance provision was no longer justified.

CBOCS v. Humphries (2008): the majority ruled that civil rights law (sec. 1981) not only protects employees from racial discrimination in hiring, firing, and promotion, but it also protects them from retaliation for making a civil rights complaint. The majority thus upheld the retaliation claim of an African-American employee who was fired after he complained that another employee had been fired for race-based reasons.
In his dissenting opinion, Justice Thomas argued that the civil rights law did not protect against retaliation.
Scalia joined Justice Thomas in taking the view that the law is a "straightforward ban on racial discrimination," but "[r]etaliation is not discrimination."

There are still others, but the pattern is the same. Indeed, over the past ten years since John Roberts was appointed Chief Justice, it is difficult to find a case in which Scalia favored protecting racial minorities. As noted at the outset, Scalia invariably sided with the interest or concern that opposed that of racial minorities.
[In my review of divided decisions involving an issue of race over the past ten years, I found that Scalia took the position opposite that of racial minorities in every case.]

[Disclosure: I disagree with virtually every position taken by Justice Scalia in these cases.
So, for example, in the Alabama Legislative Black Caucus *case,*

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eliminating racial gerrymandering seems far more important than Scalia's interest in promoting careful litigation strategy.

In Schuette*, Scalia was simply wrong that the law prohibiting the consideration of race in university admissions was nothing more than equal protection. That law was a mean-spirited reaction to attempts to redress a long history of racial discrimination. It was disguised as promoting admission-by-merit. In fact, the law had little to do with either equality or merit in admissions. Racial preferences were prohibited, but a myriad of other preferences were not: legacies (a family connection to the university), wealth (the family generously donated to the university), athletics (the applicant could help one of the sports teams), geography (the applicant might come from an underrepresented state or a foreign country), influence (the applicant's family might be politically or otherwise influential), fame (the applicant might bring some celebrity to the university), etc., etc., etc. None of those preferences were outlawed. Any one of those preferences were still permitted to outweigh actual merit. So, again, the law had little or nothing to do with promoting equality or merit. Only distaste for any consideration of minority race.*

In Fisher*, the Court was presented with the very difficult issue of the constitutional validity of affirmative action. Ideologues on both sides of the issue insist that it's easy and that their respective opposing positions are clearly correct. Scalia was on one ideological side of the issue. To him the issue was easy and the answer clear: equal protection means equal treatment, period; at least with regard to race; no exceptions. I strongly disagree. No constitutional right or guarantee is absolute. There are exceptions to every one: free speech, religious liberty, free press, gun rights, etc. When there is a legitimate reason of the highest order that necessitates an exception--a "compelling government interest" is the term of art--then some compromise of the right or guarantee is justified. That is a basic and essential principle of constitutional law. Scalia would treat racial equality as an absolute--at least as an instrument to oppose preference or protection for racial minorities. Yes, affirmative action is a very difficult matter. But, in my view, some compelling reasons do justify the consideration of race--as the majority opinion held.*

In League of United Latin American Citizens*, I disagree with Scalia's contention that diluting the voting strength of racial-minority voters is not a violation of the Voting Rights Act. Such dilution seems clearly to contravene the overarching purpose of that law.*

In the Texas Dept. of Housing *case, I disagree with Scalia's opposition to claims based on disparate racial impact, and his insistence that claims must be based on demonstrated discriminatory intent. Sometimes it is only the consequences of an activity that evince its discriminatory nature.*

In Davis v. Ayala*, I disagree with Scalia that a prosecutor's dismissal of racial minorities from a jury, combined with a judge's exclusion of the defense counsel from the hearing to investigate the prosecutor's action, should be treated as a mere technical error that may be overlooked.*

In Texas Sons of Confederate Veterans*, I think that a state may reject hateful designs and slogans on the vanity license plates that it produces--e.g., "Heil Hitler" or a swastika or "Bring Back Slavery" or the N word--and that includes the Confederate Battle Flag which symbolizes somethings just as heinous for many people. So I disagree with Scalia--who again took a rather absolutest position, this time in support of a free speech right to have a Confederate Battle Flag design on a vanity plate.*

In Shelby County, Ala*, I actually agree with the majority opinion which Scalia joined--but only to an extent. I do agree that the pre-clearance provision of the Voting Rights Act should not stand when it is based on*

data that is long overdue for updating. But because pre-clearance is still a necessary antidote to discriminatory changes in voting laws, I would not have discarded the pre-clearance provision then in existence until it could be updated with more current data.
In CBOCS, *I think the argument made in the dissenting opinion joined by Scalia was absurd. I.e., racial discrimination in employment is prohibited, but retaliation for seeking to enforce that prohibition is permitted. Again, in my view, that's absurd.]*

Well there it is. Scalia in cases involving issues of race.
Connect the dots.
His record shows little or no sympathy for the interests of racial minorities. Indeed, it does show hostility for laws and practices intended to benefit them.

Next, we'll look at Scalia's position on cruel and unusual punishment.

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MONDAY, MARCH 28, 2016

Justice Scalia's Record (Part 5: Punishment)

*Back from spring break and the Easter holiday. Yes, the big news concerning the high court is President Obama's nomination of federal appeals court judge Merrick Garland to fill the Scalia vacancy. As we continue with the examination of Justice Scalia's record, readers who are eager to learn more about Judge Garland might want to take a look at 2 posts on New York Court Watcher from 2010 (**Merrick Garland [1]** & **Merrick Garland [2]**) and listen to an **interview last week on Susan Arbetter's Capitol Pressroom** [@ ~21:50 mins]).*

photo: AP/Manuel Balce Ceneta

The 8th Amendment prohibits "cruel and unusual" punishments. Justice Antonin Scalia viewed that prohibition as outlawing only punishments that are both extremely gruesome and extremely rare. Applying those criteria, he voted to uphold the 8th Amendment constitutionality of whatever sentence came to the Court for review.

A look at a few cases in which Scalia participated and wrote an opinion will illustrate his rather narrow and unyielding perspective on what qualifies as "cruel and unusual."

Punishment

Harmelin v. Michigan (1991): the 5-4 majority held that a life sentence, without the possibility of parole, for possession of 650 grams of cocaine was not unconstitutionally excessive.

Three Justices in the majority concluded that the sentence was not so excessive as to be "cruel and unusual."

Four dissenting Justices viewed the sentence as so disproportionate that it did violate the 8th Amendment.

That made 7 of the 9 Justices who agreed that the "cruel and unusual" prohibition of the 8th Amendment did include an excessiveness component.

Justice Scalia, on the other hand, had a different view. Writing for himself and Chief Justice Rehnquist *[The majority joined only part 5 of his 5-part opinion.]*, he took the position that the sentence was clearly constitutional. But that was so, according to him *[I.e., in the 4 of 5 parts of his opinion that the majority did NOT join.]*, because "the Eighth Amendment contains no proportionality guarantee." Instead, the "cruel and unusual" prohibition only "disables the Legislature from authorizing particular forms or 'modes' of punishment — specifically, cruel methods of punishment that are not regularly or customarily employed." Quoting with approval from some historical studies, Scalia

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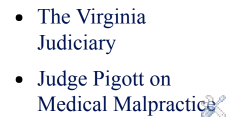
insisted that the "cruel and unusual" prohibition referred only to such punishments as "[b]reaking on the wheel, flaying alive, rending assunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death to punishments."

Atkins v. Virginia (2002): the 6-3 majority held that the death penalty for a severely mentally disabled murder defendant--an IQ of 59--was unconstitutionally "cruel and unusual."
In his dissent, Scalia protested that "mental retardation does not render the offender morally blameless." Moreover, according to Scalia, "[t]he fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders."

Roper v. Simmons (2005): the 5-4 majority held that it was unconstitutional to impose the death penalty for a murder committed by a juvenile.
In his dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas *[Justice O'Connor wrote her own dissent.]*, Scalia berated the majority for "reach[ing] this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to 'the evolving standards of decency.'"

Baze v. Rees (2008): the 7-2 majority upheld the constitutionality of a common method of lethal injection.
In his opinion for the Court, Chief Justice Roberts explained that a "method of execution is unconstitutional if it entails an 'intolerable risk' of 'severe pain.'" He concluded that lethal injection was acceptable under that standard.
In dissent, Justice Ginsburg refused to approve lethal injection until those seeking to impose it proved that any risk of pain was actually unavoidable.
Scalia agreed with the Court's decision to uphold lethal injection, but disagreed with the intolerable-risk-of-severe-pain standard. He authored a separate concurring to criticize Justice Stevens for generally questioning the justification for the death penalty. Beyond that, Scalia explicitly stated at the outset that he was joining Justice Thomas's own concurring opinion.
In that opinion, Thomas repeated the view shared by him and Scalia about the very limited contours of the "cruel and unusual" prohibition. To them, the 8th Amendment was only "intended to prohibit torturous modes of punishment." And in accord with early case law and commentary, this meant that the constitutional prohibition was confined to "burning at the stake, crucifixion, breaking on the wheel, or the like."

Kennedy v. Louisiana (2008): the 5-4 majority held that the death penalty for raping a child is unconstitutional; that capital punishment is almost exclusively reserved for homicidal crimes.
Justice Alito, in his opinion for the 4 dissenters including Scalia, posed the following question: Consider "a previously convicted child rapist [who] kidnaps, repeatedly rapes, and tortures multiple child victims. Is it clear that [any murder] defendant is more morally depraved than the [child rapist]?"
Subsequently, Scalia himself authored a "Statement" when the Court refused to rehear the case. He mocked the majority's initial decision in the case, and specifically its view that "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on questions about the death penalty." Scalia's retort: "Of course the Constitution contemplates no such thing; the proposed Eighth



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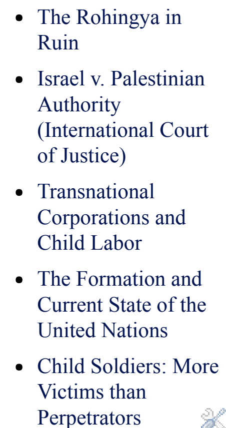

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Amendment would have been laughed to scorn if it had read 'no criminal penalty shall be imposed which the Supreme Court deems unacceptable.' But that is what the majority opinion said."

*[Disclosure: I disagree with the positions argued by Scalia in every one of these cases. I actually do agree with his **votes** in 2 of these cases: in Baze v. Rees (to uphold the constitutionality of lethal injection) and Kennedy v. Louisiana (to uphold the constitutionality of the death penalty for child rape--at least in the worst cases). But in those cases, I agree with the positions taken by others in their opinions, not Scalia in his.*
So, in Baze v. Rees, I agree with Roberts' view that the "cruel and unusual" prohibition does outlaw "intolerable risk[s]" of "severe pain;" and in Kennedy v. Louisiana, with Alito's view that some crimes of child rape are even more morally depraved than some homicides and, thus, justify the death penalty even more than some homicides (if, of course, the death penalty is ever justified).
I find Scalia's and Thomas's position in Baze v. Rees (which Scalia had previously expressed), that the 8th Amendment only prohibits punishments such a crucifixion, burning alive, disemboweling, etc., absolutely repugnant to any civilized and enlightened view of criminal justice.
And I find Scalia's view in Kennedy v. Louisiana, criticizing the Court for actually believing that the Constitution calls for the exercise of judgement, to be an astonishingly puerile--or disingenuous--denial of the judicial role.
I disagree with his position, expressed in Harmelin v. Michigan, that the "cruel and unusual" prohibition can never be violated by an excessive sentence, regardless of how extremely disproportionate to the crime. The death penalty for blasphemy? For gay sex? Both were imposed in the past. For that reason, or for the rejection of any disproportionality consideration in "cruel and unusual," must such punishments really be upheld?
I also strenuously disagree with Scalia's positions in Atkins v. Virginia and Roper v. Simmons that a defendant's mental disability or youth have no bearing on the constitutionality of the death penalty.
*Scalia's positions on punishment--much like his consistent rejection of **racial minority protection** and **gay rights**--were, in my view, among the most unattractive (i.e., deplorable and antediluvian--ok, maybe immediately post-diluvian) aspects of his jurisprudence.]*

In the next and final post on Scalia's record, we'll take a look at his positions in search and seizure cases involving technology.

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THURSDAY, APRIL 21, 2016

Justice Scalia's Record (Part 6: Technological Surveillance)

One additional look at Justice Scalia's record. Then we'll move on. Besides the Supreme Court, there's much to discuss about the New York Court of Appeals--now the "DiFiore Court" with a near total change in personnel. But first, let's conclude this series with a look at a particularly salient and--How should I say?--curious aspect of Scalia's jurisprudence.

photo:Sang H. Park/AP

Any consideration of Justice Antonin Scalia's record must include his views on technology. More specifically, the positions he espoused on the use of technological devices by law enforcement in criminal investigations.

He was the author of the majority opinion in two of the Supreme Court's most important decisions in recent years on technological surveillance. The cases dealt with the validity of such surveillance undertaken without a warrant. If the surveillance in question constituted a "search" within the meaning of the 4th Amendment, then law enforcement was required to first obtain a warrant.

Each of Scalia's opinions was controversial. They raised questions not simply about the ultimate conclusions he reached, but much more so about the constitutional arguments he advanced. Let's take a look.

Surveillance

U.S. v. Jones (2012): the Court unanimously held that the government violated the 4th Amendment when it monitored a person's movements for 4 weeks, without a warrant, by means of a GPS (Global Positioning System) device that it surreptitiously attached to his vehicle.

Justice Scalia wrote the opinion for the Court, which 4 other Justices joined. He took the position that the surveillance in question was a "search"--thereby requiring a warrant--because 1) the government had engaged in a **trespass** on 2) an **item specifically mentioned** in the 4th Amendment. According to Scalia, the government trespassed on the defendant's vehicle when it attached the GPS device without his permission. And the item trespassed upon--i.e., a vehicle--is an "effect," which is a term specifically used in the 4th Amendment. [The 4th Amendment specifically mentions "persons, houses, papers, and effects."]

Justice Alito authored a separate concurring opinion which 3 other Justices joined. He harshly criticized Scalia for relying on the "18th

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century tort law" of trespass to decide a constitutional issue about 21st century technological surveillance. He argued that the case should have been decided on the basis of the Court's actual search and seizure jurisprudence which asks "whether [a person's] reasonable expectations of privacy [are] violated by the long-term monitoring of the vehicle he drove."

Alito emphasized that the Court had long ago rejected a trespass-based view of search and seizure rights, as well as a rigid limitation to the places enumerated in the 4th Amendment--that the landmark 1967 *Katz* decision (and the Court's case law ever since) repudiated the old doctrines and focused on the "unjustifiable intrusion by the government on the privacy of the individual" [quoting Justice Brandeis's venerated and vindicated dissent in the 1928 *Olmstead* case].

Most critically, perhaps, Alito highlighted the fact that much, if not most, technological monitoring can be accomplished today without any technical trespass--i.e., by electronic as opposed to any physical contact. According to Alito and the Justices joining him, the government's warrantless surveillance violated constitutional search and seizure rights, not because there was some minimal "trespass" or "physical intrusion" on a vehicle, but because of the intrusion on legitimate privacy interests.

Responding to Alito's concurring opinion, Scalia repeated his position that the 4th Amendment "embod[ied] a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates." Moreover, the Court had "***deviated*** from that exclusively property-based approach [my emphasis]" when it adopted the *Katz* expectation of privacy test and "said that 'the Fourth Amendment protects people not places.'"

Scalia also took issue with the notion that mere monitoring of a person's movements implicates the 4th Amendment. The Court, he insisted "has ***to date not deviated*** from the understanding that mere visual observation does not constitute a search [again, my emphasis]." To prove his point, Scalia referred to previous decisions where the Court had held that surveillance of a driver's movements did not constitute a 4th Amendment "search." The reason, according to Scalia, was that in those cases the technological device was actually attached to property that did not belong to the driver--so there was no trespass.

Finally, as to his insistence on limiting constitutional protection to trespasses upon the items or places explicitly mentioned in the 4th Amendment, Scalia argued that the text of that Amendment itself "reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous." By way of example, he noted that the Court has repeatedly refused to apply the 4th Amendment to privately owned land away from one's home (i.e., so-called "open fields")--but only to the "houses," which the text does mention.

Florida v. Jardines (2013): in this case, Scalia employed the same analysis to police use of a drug-detection dog. In a 5-4 decision, the Court ruled that the 4th Amendment was violated when the police, without a warrant, brought the dog to a homeowner's porch to investigate the presence of marijuana--which the dog did detect. Writing for the majority, Scalia relied on his *Jones* opinion. As with the GPS device attached to someone's vehicle in that case, Scalia explained that the police had "physically intru[ded]" with the canine on a place "enumerated in the [4th] Amendment's text." Although the Court had repeatedly held that canine-sniffs themselves were not "searches" withing the meaning of the 4th Amendment [among other reasons

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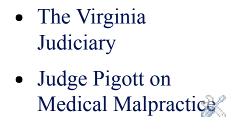

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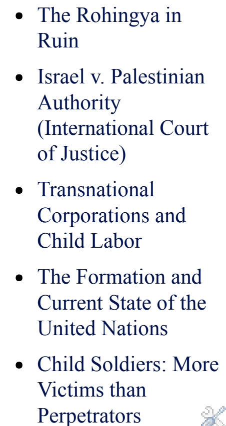

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because they only detected contraband, not anything constitutionally protected], in this case the government had "gather[ed] information in an area belonging to [the defendant] and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself."

Scalia contrasted the search in this case with others which the Court had deemed outside the 4th Amendment's protections. One was the investigation of private property beyond the immediate area of a home, and another was the visual observation of the home from airspace. The first was not constitutionally restricted because private lands are not "houses;" the second because there was no physical intrusion, i.e., no trespass.

Justice Kagan, writing for herself and two other Justices, concurred in Scalia's opinion. But she explained that the case could--seems like she meant should--have been decided under the *Katz* rubric of "reasonable expectation of privacy." Aiming "high-powered binoculars" at a home to discover what's inside would be a search because, even without a trespass, it would still be an invasion of protected privacy.

Justice Alito, in a dissenting opinion joined by 3 other Justices, argued that the use of the drug-detection dogs did not violate the 4th Amendment. Indeed, the Court had already decided that a canine-sniff was not a "search" under *Katz,* because it did not invade a legitimate expectation of privacy.

But beyond that, Alito contended that Scalia's majority opinion "is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence." According to Alito, Scalia was "unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based. Thus, trespass law provides no support for the Court's holding today."

Technological Devices

Kyllo v. U.S. (2001): the Court, 5-4, held that the warrantless use of a thermal-imaging device, aimed at the marijuana-growing suspect's house from across the street, in order to detect heat emanating from his the roof, violated the 4th Amendment. [The division among the Justices was actually over the esoteric question of whether the information being obtained by the device was outside the house (the heat coming off the roof) or inside the house (the marijuana-operation that was creating the heat). The latter scored one more vote than the former.]

In his majority opinion, Scalia relied on a few major premises. First, a house is a constitutionally protected area, i.e., specifically enumerated in the 4th Amendment. Quoting from prior Supreme Court case law, he emphasized that "'the very core' of the Fourth Amendment was 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"

Second, Scalia analogized the use of the thermal imaging device to a trespass into the house. He insisted that the device was being used to obtain "information regarding the **interior of the home**," information that "could not otherwise be obtained without **physical 'intrusion' into**" the home [my emphases].

Finally, Scalia expressed concern that the "degree of privacy secured" by the 4th Amendment was being eroded by advancing technology. He nevertheless drew the line of constitutional protection at "technology [that] is not [yet] in general public use." And "on the basis of this criterion," the government's use of a thermal imager was a search.

Putting it all together, Scalia concluded that, "Where, as here, the Government uses a **device that is not in general public use**, to explore **details of the home** that would previously have been **unknowable without physical intrusion**, the surveillance is a 'search' and is

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presumptively unreasonable without a warrant [my emphases]."

[Disclosure: I agree with the result reached by Justice Scalia in each of these cases. But the analysis used by the Justices to support a decision is typically far more important than the particular result reached in a particular case. It is the analysis that will then be applied by lower courts and by the Supreme Court itself in resolving related issues that they confront thereafter. And with regard to Scalia's analysis, I disagree with it in every case.
His trespass analysis dangerously limits the constitutional protection of privacy under the 4th Amendment--the protection that the Supreme Court expressly outlined in its landmark Katz *decision a half century ago. [And which Justice Brandeis did 40 years before that.] Indeed, as Justice Alito stressed in his concurring opinion in* Jones *(the GPS case), most technological surveillance that intrudes on individual privacy does not require any trespass or any other physical intrusion. Just consider: tracking by means of cell phone towers, following by means of drones or helicopters, scrutiny by means of cameras, snooping by means of high-powered binoculars, eavesdropping by means of audio amplifiers, etc., etc., etc. If trespass analysis was ever an adequate basis for constitutional adjudication, it certainly is not in the modern world.*
Similarly, Scalia's insistence on the textual limits of the 4th Amendment's enumerated items undermines what has long been recognized as the fundamental principle underlying search and seizure rights--protecting "people not places." That is, securing the personal privacy essential in a free society, not merely protecting the physical interests in the items specifically mentioned. Note well, private property--other than "house"--is not mentioned. Likewise, private conversation is not mentioned. Neither is a person's movements or whereabouts. Indeed most of what people in a free society would as private, whether places or conduct, is not mentioned.
Then there's Scalia's limited protection to technology that is "not in general public use." Of course, the technology that is in common use has been expanding exponentially and will continue to do so. May any of it be used by the government with impunity? Yes, according to Scalia's formula. From binoculars and other visual enhancing devices, to audio amplifying devices (regularly advertised, readily available, and widely used), to drones, etc., etc., etc.--as technologies advance and become more readily available, personal privacy protection under the Constitution diminishes drastically under Scalia's formula.
Personally, I do not foresee any of these analytical approaches of Scalia to endure.]

So this concludes the series on Justice Scalia's record.
As I said at the outset, I certainly hope he is resting in peace and that he has reached the heavenly afterlife in which he apparently believed.
Beyond that, if there is such an afterlife, I presume that Justices Louis Brandeis (*Olmstead* dissent) and John Marshall Harlan II (*Katz* concurring opinion) are explaining to him, much better than I could, the errors of his privacy jurisprudence.

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Labels: GPS, Judicial Decisionmaking, Scalia_Antonin, Search and Seizure, Technology

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New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More

SUNDAY, FEBRUARY 26, 2012

Catholics, Contraceptives, and the Constitution

Requiring Jews to remove their yarmulkes--it's not just about head-wear uniformity.
Requiring Jehovah Witnesses to salute the flag--it's not just about national unity.
Requiring Seventh Day Adventists to work on Saturday--it's not just about working weekends.
Requiring Amish to keep their children in high school--it's not just about education.
Requiring Quakers to agree to bear arms--it's not just about possible military needs.
Requiring Mennonites to be photographed--it's not just about driver identification.
Requiring a Sikh or Hasidic man to shave--it's not just about good grooming.
Requiring students to remove their crosses, chai pendants, Allah charms, or other religious symbols--it's not just about school harmony.

And requiring Catholics to provide contraceptive and morning-after coverage--it's not just about health care.

All of these, of course, are also about religious liberty.
Only someone deliberately indifferent to religion, or to someone else's religion, or blindly partisan on one side of these issues, could fail to appreciate how these implicate religious liberty.

All of these interfere with religion.
All require violation of of religious beliefs.
All prohibit adherence to religiously dictated practices.
All violate the ***literal*** command of the 1st Amendment: that there be "***no law***" prohibiting the freedom to exercise one's religion.
All even violate a less absolutist, ***more flexible*** and realistic view of the 1st Amendment: that religion must be ***accommodated when reasonably possible***.

And every one of the foregoing requirements is in fact amenable to a reasonable accommodation for religious freedom.
Including the contraceptive and morning-after requirement.
Obviously.
As when the Obama administration adopted such an accommodation--albeit under political pressure, as opposed to constitutional command.

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VIN BONVENTRE

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No, not every religious practice or belief can be, or need be accommodated.
Also obvious.

Contrast the previous list of requirements to the following:
Requiring religious believers in human sacrifice to forgo their practice.
The same for honor killings or the killing of heretics.
Requiring religious segregationists to serve customers at their restaurants and hotels, regardless of race.
Requiring religious fundamentalists to admit women to their affiliated law and medical schools.
Requiring faith-healers to allow life-saving medical treatment for their children.
Requiring religious objectors to have their children vaccinated against fatal disease.
Requiring the end of religious marriages and sex with children.
Requiring safety and health inspections of sacred religious buildings.

In many ways, these requirements are the same as the one's previously listed.
All of these, like the previous ones, implicate religious liberty.

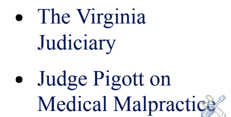
All of these requirements, like the previous ones, interfere with religion.
All require violation of of religious beliefs.
All prohibit adherence to religiously dictated practices.
All violate the ***literal*** command of the 1st Amendment: that there be "***no law***" prohibiting the freedom to exercise one's religion.

The difference, of course, between these and the previous requirements, is that these are not readily susceptible to reasonable accommodations.
Any accommodations for religion would be very difficult or extremely ***un***reasonable.

Each of these requirements serves an overriding societal purpose--preventing homicide, protecting children from disease or death or sexual abuse, eradicating racial segregation and discrimination, guaranteeing equal rights for women, reducing dangers to the safety and health of congregants, etc.

Additionally, and just as critically, religious accommodations would actually defeat or seriously undermine the very compelling reasons for these requirements.
Exempting religion from the criminal laws that prohibit homicide?
Exempting religious objectors from laws that prohibit racial or gender discrimination in public accommodations and in higher education?
Exempting religious objectors from laws that protect children from disease or death or sexual abuse?
Exempting religious buildings from laws that insure their safety to those inside?

No, 1st Amendment freedom of religion does not mandate any such accommodating exemptions. It has never been deemed to do so. Never



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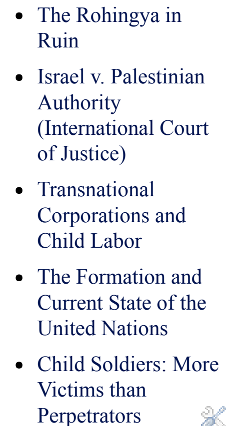

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been deemed to allow religions or individual believers to engage in practices dangerous to health or safety or the public welfare. Neither the historical genesis of constitutional freedom of religion (e.g., Jefferson's Statute for Religious Freedom in Virginia), nor its subsequent application by the courts, has viewed religious liberty as freedom from the requirements of laws that are essential to societal health, safety, and welfare.

But requiring the end of human sacrifice and requiring life-saving medical treatment for children and requiring the end of racial segregation are a far far cry from requiring Catholic institutions to provide contraceptive coverage. Such a requirement is hardly essential to serve its underlying purpose. The need it serves can certainly be accomplished in other ways.

There is absolutely no necessity to force Catholics--or any other religious objectors--to violate their religion for contraceptive coverage. A reasonable accommodation, an accommodation that is workable and serves the underlying health-care purpose of the requirement, is eminently possible. Indeed, it is eminently ***un***reasonable to force religious objectors to violate their religious beliefs when that is entirely unnecessary to achieve the underlying purpose.

1st Amendment free exercise of religion may not mean what it literally says--i.e., that "***no law***" is allowed to prohibit a religious practice. But the 1st Amendment must ***at the very least*** mean that government cannot impose a law restricting religious liberty ***when the government doesn't even need to do so***.

That's why the imposition of contraceptive and morning-after coverage on Catholics was wrong. Constitutionally wrong. That's also why the accommodation eventually adopted by the Obama administration should have been made from the start--without the need for a political furor.

And that's why states that have the same legal requirement of contraceptive and morning-after coverage and impose that on Catholics and other religious objectors are wrong. Constitutionally wrong. And it's why those states should adopt religious accommodations.

One final note.
Many states have requirements for contraceptive coverage, and they ***do not make accommodations*** for religious institutions. ***Nor do they have to under current Supreme Court case law***.

Why? Because the religiously conservative Justices on the Court--i.e., Scalia, et al--didn't think any accommodation had to be made for a minority religion that they apparently didn't take very seriously. So they adopted a dreadful rule which renders ***freedom of religion less protected than any other fundamental right in the Constitution.***

Hard to believe? Yes, it certainly is and should be. And it was extremely

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hard to believe for the Justices in dissent, as well as for religious liberty scholars.

We'll turn our attention to that in the next post. We'll see just how the 1990 Scalia-penned decision drastically diluted constitutional protection of free exercise of religion, and how that decision made it entirely permissible for governments to impose contraceptive and morning-after coverage on Catholics and other religious objectors under the Court's current jurisprudence. And how, under that decision, most impositions on religious liberty are entirely permissible today as well.

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New York Court Watcher

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FRIDAY, MARCH 2, 2012

Catholics, Contraceptives, and the (current Supreme Court's) Constitution

It used to be...

I hate to begin that way.

Whenever someone talks that way I get skeptical. Much of the time, mention of how "it used to be" or of the "good old days" is followed by nonsense. Too often it means the days before civil rights, before equal protection for women, before the law treated gays and lesbians with some semblance of human dignity, before the "activist" Supreme Court outlawed racial segregation and made the Bill of Rights applicable to the states. Yep, America was sure a better place before that time!

No, I'm not talking about any such nonsense. I am talking about how free exercise of religion used to be protected as a fundamental right. As one of those important constitutional rights along with free speech, free press, right to assemble, right to counsel, right against forced confessions, right to a fair trial, right to have a family, right to raise your children, etc. Yes, I'm talking about how free exercise of religion, guaranteed in no uncertain terms in the 1st Amendment, used to be protected.

Because it isn't any more. No it isn't. Not under current Supreme Court case law.

Whatever one thinks about the mandate for contraceptive and morning-after coverage, whatever one thinks about any law or government regulation that interferes with freedom of religion, it is modern Supreme Court case law that has stripped religious freedom of the protection provided for every other fundamental constitutional right. Yes, stripped of the protection given speech, press, assembly, counsel, parenting, etc.

This is hard to believe. Very. But this is no exaggeration. This blog is not talk radio.

Every constitutional rights scholar knows this. Some may even agree that religious freedom should be treated as a 2nd class right. Most would adamantly disagree. But agree or disagree, everyone who teaches, or studies, or practices in the field of constitutional rights knows this to be true. 1st Amendment free exercise of religion is treated as an annoyance, not a fundamental right, under recent Supreme Court decisions.

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And no. This is not the result of a liberal Supreme Court. No, this is not the result of an increasingly secular Court that disparages religion.

No, this is, instead, the result of conservative Justices who viewed a minority religion as a nuisance. Who viewed the religious liberty of a minority religion as an affront to the majority's preferred legal order. Who viewed the religious objections of minority religions as invitations to chaos. And who, consistent with that view, ruled that a law's infringement on, or disregard for, religious freedom is virtually irrelevant to the law's validity.

Yep, forbid a religious practice--irrelevant. Require violation of a religious belief--irrelevant. Perfectly fine under the current Court's view of the 1st Amendment.

The Justice Scalia-authored *Oregon v. Smith* (1990) is the culprit. (Or, it's the word of wisdom for those who agree with it.) But before looking at that decision and its progeny, let's first take a look at...how it used to be.

It's basic constitutional law that the Constitution is the supreme law of the land. It is superior to legislation and to anything else that government does. Consequently, any legislation or government act that conflicts with the Constitution is invalid. In short, the Constitution trumps all else.

That applies to constitutional rights no less than to the rest of the Constitution. So, when government violates constitutional rights, its actions are contrary to the Constitution and, thus, invalid. That is all elementary.

What is tougher is the extent to which the Constitution's commands--including its guarantees of rights--can be absolute. Well, of course, they can't be. Free speech, free press, right to assemble, and free exercise of religion, to name a few, cannot be absolute. At least they can't in any minimally ordered, healthy, safe, and sane society. All such rights must of necessity be limited when, for example, they threaten national security, human life or limb, the health and safety of children, etc.

But the threats must be real. Otherwise, if constitutional rights could be defeated whenever the government simply claimed national security, life and limb, health and safety, etc., those rights would be at government's mercy. Government would have little difficulty justifying violations. The proper Constitutional order would be reversed. Laws and other government acts would effectively be superior to the Constitution whenever government had some plausible excuse for what it was doing.

To prevent such a dilution of the Constitution, to insure that the Constitution's commands actually had some force and effect--including the Constitution's guarantee of rights--the Supreme Court has over time made it difficult for government to behave contrary to those commands

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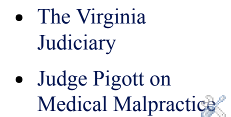

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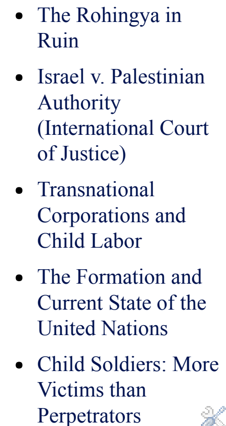

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and guarantees. Every student of the Constitution and the Supreme Court knows how.

It's called the "***strict scrutiny***" or "compelling interest" test. Whenever government infringes on a fundamental constitutional right--e.g., rights explicit in the 1st Amendment--the law or other government act in question is subject to a high level of scrutiny by the courts. The law or act is invalid and impermissible unless the government passes a ***strict*** test.

Here's that test.

First, the government must show that it has a ***compelling purpose*** for its law or action. That is, the law or action must be serving some very important government purpose or interest such as national security, health or safety, life or limb, etc. Just any reason or even a good reason won't do. The government must have a very very strong reason. A reason of the highest order--i.e., a ***compelling*** one--in order to override a constitutional right.

And that's not all. The government must then show that it has ***no alternative*** to infringing upon the constitutional right. If there is some other way for the government to accomplish the same compelling purpose, then the law or other government action is invalid. In other words, government must do what it's doing in a way that ***doesn't interfere, or interferes least, with constitutional rights***.

In short, in the plainest language, what all this means is that ***government is not allowed to infringe on fundamental constitutional rights unless it really really has to for a very very important reason.*** Yep, that's the ***strict scrutiny*** test. It makes sure that constitutional rights are treated seriously by government. And it's the supreme law of the land.

The Supreme Court formulated this test after countless decisions involving constitutional rights, eventually refining and defining the common threads that tied those decisions together. In some of those decisions, the claim of constitutional right won. In others, government's infringement was upheld.

Certain rights such as free speech, free press, and free exercise of religion were early recognized as fundamental--i.e.,essential to a free society. Other rights were added to the fundamental list--e.g., the right to counsel in a criminal case, the right to a jury trial, parental rights to raise their children, and the right against racial discrimination. The American concepts of freedom, liberty, and justice could not exist without them. Hence, they were afforded a very high level of protection.

Accordingly, whenever any fundamental right was interfered with by government, the ***strict scrutiny*** test (regardless of how labelled over the years) would be triggered. Government would have to prove that ***it really really has to do what it's doing for a very very important reason.***

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Otherwise, the government's law or action would be declared unconstitutional and be rendered null and void.

In some of the most heralded landmark decisions in Supreme Court history, this is precisely what happened when government intruded on religious liberty.

In *West Virginia v. Barnette* (1943), the Court held that a state could not require Jehovah Witnesses students to stand and pledge allegiance to the flag, because their religious beliefs prohibited them from doing so.
In *Girouard v. U.S.* (1946), the Court held that the federal government could not require Quakers to pledge to bear arms in the national defense as a condition of naturalization, because that was contrary to their pacifist religious beliefs.
In *Sherbert v. Verner* (1963), the Court held that a state could not require Seventh Day Adventists to agree to work on Saturdays as a condition of receiving unemployment benefits, because their religion prohibited them from working on their Saturday Sabbath.
In *Wisconsin v. Yoder* (1972), the Court held that a state could not require Amish children to attend high school, because that would violate Amish religious beliefs against "worldly influences."

In every one of these landmarks, the Supreme Court ruled that the government had to make exceptions for the religious objectors. Requiring compliance with the law, in violation of religious beliefs, was not justified by any genuinely compelling need to do so.

That was the law. That was the Supreme Court's jurisprudence. That still accurately represents the law and still accurately represents the Supreme Court's jurisprudence when it comes to fundamental constitutional rights--generally, that is. Just not for free exercise of religion. No, not any longer.

First came a case involving an Orthodox Jew, serving in the military, who was threatened with a court martial for wearing his yarmulke indoors. A deeply divided Supreme Court upheld the military dress code, refused even to consider an accommodation, and simply deferred to military discipline. *Goldman v. Weinberger* (1986).

Then, 4 years later, in *Oregon v. Smith* (1990), another deeply divided Supreme Court put the nail in the coffin of free exercise protection. The case involved a Native-American church that had used peyote in its sacramental ritual for a long time. It sought an exemption from Oregon's drug laws so it could continue its indisputedly sincere religious practice. The Court, in the Scalia-penned opinion mentioned previously, rejected the church's request and refused to require any accommodation.

But most importantly, speaking for the majority, Scalia denied that the Court had ever required an exemption for a religion. He further ***denied that the strict scrutiny, compelling interest test ever applied to religious liberty***! According to the Scalia-authored decision, as long as a law is "***otherwise valid***," it makes no difference if it interferes with

religious free exercise.

Yes, that's what he wrote--writing for the majority over vehement, incredulous dissenting Justices. And yes, that is the law of 1st Amendment free exercise of religion today. It's the one fundamental constitutional right that is not treated as fundamental!

Think about that for a bit. Some of us have been speaking and writing and complaining about it ever since. Not only because we believe the decision is dreadful, but because it's even worse than one dreadful decision. It was shortly followed by another Supreme Court decision reaffirming it. And it has been followed by some state supreme courts who have similarly diluted the protection of religious liberty under their own state constitutional law.

But this is enough for now. We'll return in the next post to review some of those religious liberty landmarks mentioned above, and take a closer look at that u-turn of a decision in *Smith*. We'll also take a brief look at *Smith*'s progeny, both at the Court itself and in the states.

(For the first post in this discussion of the Catholics & contraceptive-coverage controversy, see Catholics, Contraceptives, and the Constitution, Feb. 26, 2012.)

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Labels: Compelling Interest, Contraceptive Coverage, Free Exercise of Religion, Fundamental Rights, Religion and the Law, Scalia_Antonin, Strict Scrutiny

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THURSDAY, MARCH 15, 2012

Catholics, Contraceptives, and 2nd Class Religious Liberty

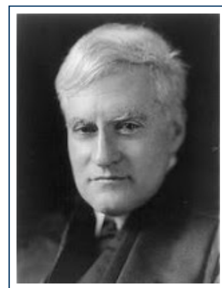
> *[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.*
> ---Chief Justice Warren Burger, *Wisconsin v. Yoder*, 1973
>
> *We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law.*
> ---Justice Antonin Scalia, *Oregon v. Smith*, 1990

We've been examining this issue for the last 2 posts. We discussed how the law of religious liberty has changed. How religious liberty has been demoted by the Supreme Court.

How free exercise of religion--i.e., the freedom to practice one's religion, to abide by one's religious convictions--was historically recognized as a fundamental right in this country. How it was strongly protected as such (along with free speech, free press, right to counsel in a criminal case, right to equal racial treatment, etc.) by the Court.

How government was not allowed to interfere with that right unless it had a very important reason for doing so, and had no other way to accomplish its purpose. In other words, unless the government really needed to and had no alternative.

That was basic constitutional law. Basic Supreme Court jurisprudence to protect rights considered essential to a free people. Rights that had always included religious liberty.



Along with other fundamental rights, free exercise of religion was considered "implicit in the concept of ordered liberty"--to use Justice Benjamin Cardozo's immortal phrase from his 1937 opinion for the Court in *Palko v. Connecticut*. Yes, one of those truly indispensable rights about which it could be said--in Cardozo's words again--"neither liberty nor justice would exist if they were sacrificed."

Yes, that is the right included in the very first clause of the very first amendment of the national charter. That's a pretty good indication of where religious freedom fits in the constitutional hierarchy. And the Supreme Court treated religious liberty accordingly--at least for a while.

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(For the previous discussions, see Catholics, Contraceptives, and the (current Supreme Court's) Constitution, March 2, 2012; Catholics, Contraceptives, and the Constitution, Feb. 26, 2012.)

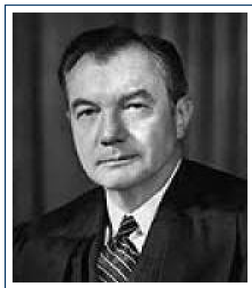
But then an increasingly conservative, law and order Court decided that minority religions didn't need to be accommodated. That minority religions had to tolerate government's beliefs and practices--not vice versa. That minority religions could not interfere with decisions of the majority or with other government authority--not vice versa.

That minority religions had to make exceptions to their beliefs and practices in order to obey government; government no longer had to make exceptions to its laws or rules in order to obey the Constitution's guarantee of religious freedom. Henceforth, laws and other government rules trumped the constitutional right--not vice versa.

Yes, topsy-turvy. Easier. Clearer. Tidier. More convenient. But constitutionally upside down.

Let's finish this series of posts with a look at some of the religious liberty landmarks of the Supreme Court. Specifically, let's take a look at what the Court said about free exercise of religion and about the necessary ***restrictions that free exercise placed on government***--and ***NOT vice versa***.

There is, perhaps, no decision more seminal to freedom of religion than the Court's 1943 ruling in *West Virginia v. Barnette*. And there is, perhaps, no language more magnificent or oft-quoted among the Court's landmarks than that penned by Justice Robert Jackson in his opinion for the majority.



[Yes, that's the Robert Jackson who served as the Chief Prosecutor in the Nuremberg trials, who was from Jamestown in western New York, and who attended Albany Law School. He is widely considered the Court's most beautiful stylist together with Benjamin Cardozo--another New Yorker, another Justice tied to Albany Law School (He as a lecturer.), and, as noted above, another avowed believer of religious freedom as a right "implicit in the concept of ordered liberty."]

In *Barnette*, the Court invalidated the state's mandatory flag salute in public schools insofar as it applied to the religiously objecting Jehovah Witnesses. An exemption was required to protect their religious freedom, because of their religious belief that the 1st Commandment permits allegiance only to God.

Although the state had a legitimate purpose to promote patriotism, the Court held that fundamental liberties like freedom of worship could "not be infringed on such slender grounds." As Justice Jackson put it: such liberties "are susceptible of restriction ***only to prevent grave and immediate danger*** to interests which the state may lawfully protect."

And then, in those lines as magnificent as any in the Court's history, Jackson wrote:

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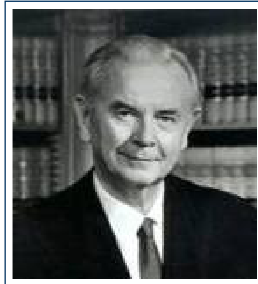
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

[I gladly admit that I--along with many others--am stirred whenever I hear or read those lines. Now THAT was a judge, and THAT was a court.]

Twenty years later, in *Sherbert v. Verner*, the Supreme Court confronted an issue involving the denial of unemployment benefits to a Seventh Day Adventist who, in accord with her religion, refused to work on the Saturday Sabbath. The Court held that the state violated the 1st Amendment by requiring a choice between religious beliefs and receiving benefits.



As in *Barnette*, the Court, speaking through Justice William Brennan, recognized religious liberty as one of those "indispensable democratic freedoms." Accordingly, Brennan explained, "***only the gravest abuses, endangering [a] paramount interest***" could justify a burden, even an incidental one, on free exercise of religion.

Nine years after *Sherbert*, the Court again reaffirmed the Constitution's guarantee of religious liberty, applying the strictest of scrutiny to any governmental interference with free exercise. In its 1972 decision in *Wisconsin v. Yoder*, the Court held that the state had to exempt the Amish from its compulsory education law.

The Amish had objected on religious grounds to exposing their children to worldly influences other than basic read, writing and arithmetic in elementary school. Speaking through Chief Justice Warren Burger, the Court acknowledged government's very important interest in the education of children. But, what was decisive was the state's failure to show that it could not or should not accommodate the Amish with an exemption.

Explaining that the government's interest in compulsory education had to give way to the religious claims of the Amish, Burger summarized the Court's dedication to protecting freedom of religion:

> The essence of all that has been said and written on the subject is that ***only those interests of the highest order and those not otherwise served*** can overbalance legitimate claims to the free exercise of religion.

Continuing in his opinion for the Court, the Chief Justice went further:

> Nor can this case be disposed of on the grounds that Wisconsin's requirement...applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion...A regulation neutral on its

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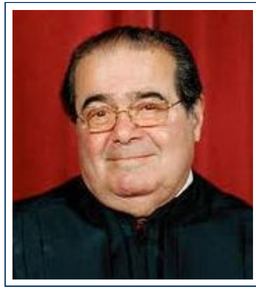
> face may, in its application, nonetheless offend...the free exercise of religion.

But that was then.

Eighteen years later, in 1990, came *Oregon v. Smith*. This time, instead of the Amish, it was the Native American Church. Instead of Chief Justice Burger, it was Justice Scalia.

Instead of a compulsory education law, it was a drug prohibition. Instead of a belief in avoiding worldly influences, it was a long-standing (and indisputedly genuine) sacramental ritual using peyote. And instead of respecting religious liberty's essential role in a free society, the Court denigrated it to second-class status. In fact, to a status ***below*** legislation. Yes, constitutional, 1st Amendment, free exercise of religion subordinated to routinely enacted laws.



Refusing to require an exemption from the law prohibiting the use of peyote, and consequently refusing to protect the religious worship of the Native American Church, Scalia recharacterized the law of religious liberty in a way that was simply unrecognizable from what it actually had been. To the astonishment of virtually every religious liberty scholar, as well as 4 of his colleagues, Scalia insisted in his majority opinion that:

> We have ***never held*** that an individual's religious beliefs excuse him from compliance with an ***otherwise valid law***.

So, as Scalia further explained, a law that prevented the free exercise of religion was still perfectly constitutional, and no religious exemption was required, as long as the law was neutral on it face and did not intentionally target a particular faith. And again, according to him, the Court had never held differently.

Of course, that was not true. Justice Sandra Day O'Connor said so politely, if firmly, in her separate concurring opinion condemning the Scalia-penned new rule. (Scalia "misreads settled First Amendment precedent.") So did Justice Harry Blackmun in his dissenting opinion for 3 of the Justices. (Scalia "mischaracteriz[es] this Court's precedents.")

And so did Michael McConnell--former U.S. Court of Appeals, 10th Circuit Judge; current Stanford professor; and the nation's foremost religion and the law scholar. As McConnell put it: Scalia's "purported ...use of precedent is troubling, bordering on the shocking."

Indeed, as support for this rather shocking proposition that an "otherwise valid law" supersedes freedom of religion, ***Scalia quoted from a decision of the Court which the Court itself had quickly overruled***.

The overruled decision was *Minersville School Dist. v. Gobitis* (1940). That was the first case involving Jehovah Witness school children refusing to pledge allegiance to the flag. In that case, the Court held that the 1st Amendment did ***not*** require a religious exemption from the mandatory pledge. The majority in *Minersville*--just three years before the Court reversed itself--had argued that:

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> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law...The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

As anyone with even the slightest familiarity with Constitutional Law knows (and that includes Scalia), the Court overruled *Minersville* in its landmark decision in *West Virginia v. Barnette*. As we've already discussed, the Court majority in *that* case, speaking through Justice Jackson, gave effect to the fundamental right of free exercise of religion. Under the 1st Amendment, religious liberty could be denied "***only to prevent grave and immediate danger***."

And the Supreme Court had ever since repeated the same. As it did in its decision in *Sherbert* with the Saturday Sabbatarians and in its decision in *Yoder* with the Amish. But the Court's majority in *Smith*, speaking through Scalia, disregarded those precedents and literally stripped religious liberty of protection from any "***otherwise valid law***."

Stated otherwise, in the aftermath of Scalia and the *Smith* decision, the 1st Amendment guarantees freedom of religion only against laws that are ***otherwise invalid***. Of course, that is no protection at all! Those laws are already invalid for some other reason. Anyone believing in freedom of religion, anyone who takes it seriously, should hope the Court overrules *Smith* and returns to *Barnette*, *Sherbert*, and *Yoder*.

Congress attempted to do just that. In an attempt to overrule *Smith*, it passed, and the president signed, the Religious Freedom Restoration Act of 1993 [RFRA]. That law prohibited interference with religious liberty unless government had a compelling purpose, and that purpose couldn't be accomplished in some other way. In other words, the law was an attempt to restore *Barnette*, *Sherbert*, and *Yoder*.

Unfortunately, the Court majority showed that it really meant what it said in *Smith*. In *City of Boerne v. Flores* (1997), the Court held that RFRA protected religious liberty more than the 1st Amendment, and that Congress had no authority to impose such protection for religious liberty upon the states. Consequently, the city government in that case was free to enforce a local zoning law against a Catholic parish, without any concern whatsoever for the church's religious objections.

Subsequently, the high courts of several states, among them California and New York, unencumbered by any meaningful federal constitutional protection for free exercise of religion, approved state health insurance requirements on religious organizations, despite their religious objections. Yes, contraceptive coverage.

In both *Catholic Charities of Sacramento v. Superior Court* (2004) and *Catholic Charities of Albany v. Serio* (2006), the California Supreme Court and the New York Court of Appeals, respectively, dismissed the religious liberty claims. They did so without any concern about compelling government interests or alternative ways to accomplish them.

No. With *Smith* as the federal constitutional standard and, thus, virtually no 1st Amendment restrictions on interfering with religious liberty, the state courts could and did dismiss the religious objections with near-impunity. And other states--and the federal government--had every

reason to believe that they could do so as well.

OK, so in these cases, as in the recent political controversy, what was involved was contraceptive coverage. And religious beliefs forbidding contraceptive use may seem absurd to many. Contraceptive coverage may be overwhelmingly popular. But such seeming absurdity and such popularity is hardly relevant to any serious treatment of religious liberty. It was not relevant at all until *Smith*. But that decision treated religious liberty with disdain, not seriously.

The Supreme Court used to treat free exercise seriously. And it did so because it understood fundamental rights. And because it understood its role as the guardian of those rights. Even when not popular. Even when inconvenient. Even when the majority or other government authority would prefer to disregard those rights.

As the Court said in *West Virginia v. Barnette*, again in the words of Justice Jackson:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

[For additional discussion of the Supreme Court's treatment of religious liberty, past and present, see my "The Fall of Free Exercise: From 'No Law' to Compelling Interests to Any Law Otherwise Valid," 70 Albany Law Review 1399.]

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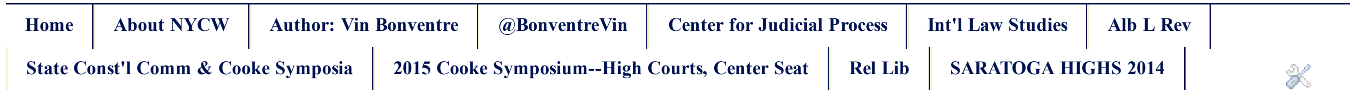

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SATURDAY, JANUARY 23, 2010

Supreme Court: Lessons from the Campaign Reform Decision

Haiti
****

As if we needed a reminder--and astonishingly, some of us seem to need one periodically--the Supreme Court is not what we're usually told it is or is supposed to be. You know, what we're told by politicians, nominees, the Justices themselves, some who follow the Court and should know better, and grade school teachers.

Yes, grade school teachers. Because how they describe the Judicial Branch to our children is just about as sophisticated as what the others tell us about the Court's role and how it functions. Just think back several months to the laughably superficial and puerile debate about the Court during the Senate confirmation of Sonia Sotomayor.

Recall the Senators being utterly aghast that Sotomayor's background and experience might possibly affect her decisions, and that she might be a dreaded *activist*. Then there was her equally pitiable insistence that the Justices make no policy, make no law, but simply apply the already-existing law to the facts of a case.

Well, the Court's decision earlier this week was another pail of ice cold water thrown in the face of anyone who might have been snoozing and needed a wake-up call. Anyone who needed a fresh freezing dose of realism. Realism about the Court's politics, about the importance of appointments, about the nonsense of the judicial activism versus restraint debate, and about what the Court actually does.

First, just what did the Court decide earlier this week in *Citizens United vs. The Federal Elections Commission*? The Court held, by a 5 to 4 vote, that corporations may spend money--however, whenever, and how much they want--to finance ads supporting or opposing political candidates. That is their 1st Amendment right of free speech. Consequently, the restrictions contained in the McCain-Feingold Act on such corporate spending are unconstitutional.

Now, the lessons learned, or remembered.

The Court is Highly Political. And I don't just mean this in the Aristotelian sense that the Court is engaged in governance, in the determination and distribution of powers, rights and obligations. Hopefully, that at least is not in question.

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I mean this in the partisan, ideological, polarized sense. The Justices were divided exactly as we would expect politicians in the Congress or the Senate or on the campaign trail to be. The 4 conservative Justices voted precisely the way conservative Republican politicians would; the 4 liberal Justices voted precisely the way liberal Democratic politicians would.

The 4 conservatives (Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito) voted in favor of corporate spending in politics. The 4 liberals (Justices John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor) voted against such corporate spending. Political, ideological, polarized.

(The Justice who broke the tie was Anthony Kennedy. That's no surprise. He's, of course, the moderately conservative Republican on the Court who oftentimes is the swing vote. In this case, it was not surprising that he would be the swing vote, nor what his vote would be. Kennedy is as close as anyone on the current Court comes to being a free speech absolutist. He has consistently opposed restrictions on speech in a wide variety of contexts. Sometimes that means he votes with the conservatives [who favor some speech but disfavor others]; sometimes that means he votes with the liberals [the same]. Regarding corporate spending to express political views? Kennedy's vote in support was to be expected. That gave the more staunchly-conservative Justices the 5th vote they needed in this case.)

Appointments Count. President George W. Bush appointed Samuel Alito to fill the vacancy created by the retirement of Sandra Day O'Connor. The more moderately-conservative Justice O'Connor supported campaign finance reform. She voted that way--with the liberals--in prior cases while she was on the Court. Justice Alito, being a much more staunchly conservative Republican, is quite different. He opposes such goody-two-shoes liberal laws that place restrictions on how corporations and the wealthy can spend their money.

So Alito replaced O'Connor. Consequently, the balance on the Court changed, the majority shifted, and the Court's view on corporate spending in politics is the opposite of what it was. Just 1 appointment. Just 1 vote.

(As for President Obama's appointment of Sonia Sotomayor to fill the vacancy created by the retirement of David Souter, that was the replacement of one liberal with another. Justice Souter voted with the other liberals to support campaign finance reform while he was on the Court. Not surprisingly, Justice Sotomayor did the same in this latest case. Now if Souter had retired while President Bush was still in office, his replacement would surely have been a conservative. And the vote this past week would surely have been 6 to 3 rather than 5 to 4. Soooooo, it's also no surprise that Souter waited for Obama's election before he chose to retire.)

The Judicial Activism vs. Restraint Debate is Nonsense. The major debate in constitutional law over the past few decades has been the legitimacy of Supreme Court Justices being "activist"--i.e., invalidating laws passed by Congress or the states, breaking with settled precedents, broadly interpreting the Constitution, rendering expansive decisions, and making law from the bench. Conservative politicians accuse the liberal Justices of doing just that. (And, let's be honest, their accusations are accurate.)

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- Cooke_Lawrence
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- CrimLvApps (NYCOA)
- Cruel and Unusual
- Crummey_Peter
- Cuomo_Andrew
- Cuomo_Mario
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
- Discrimination
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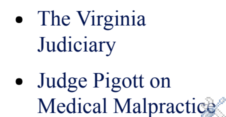
- IA SupCt



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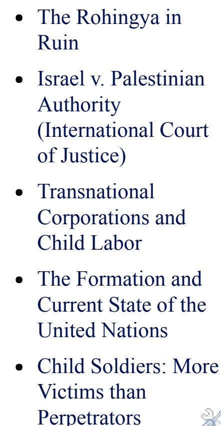
- Judge Pigott on Medical Malpractice



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- Lippman_Jonathan
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- Madison_James
- Malone_Bernard
- Marshall_Margaret
- Marshall_Thurgood
- Martin_Trayvon
- Mayberger_Robert
- McGregor
- Minors/Children
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- NY Ct Workload
- O'Connor_Sandra Day
- Obama and SupCt
- Obamacare

Those politicians, and the conservatives on the Court as well, angrily denounce the liberal Justices' activist decision-making as contrary to the will of the people, contrary to the judgments of the people's representatives in the legislative and executive branches, contrary to democracy, and contrary to way in which the Court is supposed to function and (to be sure!) the way it used to function before liberal Justices started making political decisions rather than legal ones.

OK. Liberal Justices are activist. They have been so in the interpretation and enforcement of individual civil rights and liberties. Yes, like liberal politicians. That part of the denunciation is true.

What is sheer nonsense is the notion that liberal Justices are activist but not the conservatives. The notion that conservative Justices actually oppose activism, and it's only the liberals who favor it.

(There is also much nonsense about activism being illegitimate at all. What cherished liberties don't you want the Court to protect? Guns? Private property? Religion? Protesting, or supporting, health care reform? But that discussion is well beyond the focus here. *[For more on that, see my "Judicial Activism...Conventional Wisdom and Nonsense," 68 Alb. L. Rev. 557 (2005), also available at http://ssrn.com/abstract=1142071.]*)

Let's review what the conservative Justices did in the campaign reform decision. What those ardent proponents of judicial restraint, fierce opponents of judicial activism did. *[And let me make clear that I support the outcome in the case. I support the right to finance a documentary criticizing a presidential candidate during the presidential primaries. Even if, as here, the documentary was against Hillary Clinton who I think is fabulous. What I don't support is the utter hypocrisy of denouncing judicial activism even while using it whenever it serves your own purposes.]*

Here's what the conservative majority did--those arch enemies of judicial activism:

--overruled Congress. Yes, the democratically elected legislative branch of government passed the McCain-Feingold Act, and the Court declared that law's relevant parts invalid. The conservative majority substituted its judgment for that of the people's representatives. Instead of deferring to the lawmakers--an axiom of judicial restraint--the conservatives nullified the legislation.
And they did so even though the legislation was not *clearly* unconstitutional. Can it honestly be said that the legislation in this 5-4 case was *clearly* unconstitutional, as in *beyond a reasonable doubt* unconstitutional? That's the standard of judicial restraintists. Well, another one of their own axioms violated.

--overruled their own precedents. The Court overruled 2 recent decisions, and a full century of legislative and judicial tradition restricting the influence of corporate money in politics. The recent precedents, *Austin v. Michigan Chamber of Commerce* (2000) and *McConnell v. FEC* (2007), were explicitly overturned by the conservative majority because those decisions dictated the opposite result in the case. Those Justices also distinguished away or dismissed the rest of the century-old tradition. So much for *stare decisis*, for respecting precedent, for stability and predictability in the law. All axioms of judicial restraint violated.

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--broadly interpreted the Constitution. The 1st Amendment protects free speech. That's what it says: *speech*. A strict interpretation of that, which is what judicial restraint calls for, would limit that to--well--*speech*. Not any conduct or activity that has expressive quality. Not wearing a black arm band or a peace button, not waving or burning the flag, not a dance or a musical composition, not a march or a parade, and certainly not spending money.
To be sure, all of those are expressive activities. But they're not *speech*. Oh, don't be so narrow, so rigid, so strict. Hey, I agree. But that's not what the conservative politicians and Justices argue. They insist upon *strict* interpretation and condemn the broad sort. They insist upon sticking with the terms of the Constitution and condemn expanding what the provisions actually say. They insist on limiting rights to those set forth in the Constitution and condemn finding rights that are not clearly there.
Well, corporations spending money to finance political ads is not clearly in the Constitution. A strict interpretation of the term "speech" does not include spending money. Treating corporations as though they were actual human people is also not clearly in the Constitution. A corporation spending money to finance a political ad is not the same thing as a human person speaking about politics. That is hardly a strict interpretation of the 1st Amendment.
I may not have a problem with broad interpretations, but judicial restraintists do. And the conservative majority violated yet another one of their own axioms.

--made law. The !st Amendment expressly prohibits laws "abridging the freedom of speech." As of the Supreme Court's ruling this week, the 1st Amendment now prohibits as well, "abridging the freedom of corporations to spend as much of their money as they choose and whenever they choose to finance any communication supporting or opposing a political candidate." The conservative majority just added that.
That was not there before. Whether in the text of the 1st Amendment, or in the Court's prior decisions, or in the legislative history of the country. It was not there. But it is now.
The conservative Justices made law. Just what they complain about when the the liberal Justices do it. Just what they and their conservative political supporters denounce. In fact, just what everyone seems to denounce at those pathetic confirmation hearings.
That's another fundamental axiom of judicial restraint violated. Justices should just apply the law, not make it. Well, they just did.

So that's my humble take on the *Citizens United* decision. Again, for whatever it's worth, I agree with the result in the case. Like Justice Kennedy, I favor the freest possible political debate, and I'm opposed to virtually any governmental restrictions on the free exchange of opinions on politics--i.e., on governance itself.

I'm also delighted to have another vivid illustration of how and why the Justices actually decide cases. Another wonderful lesson in judicial realism.

What I continue to be appalled at, and what is pellucidly clear *[had to use it!!]* in this case, is what a fake the ongoing debate about activism versus restraint is, and how those Justices who rightiously condemn activism are so willing to be activist--and wildly so--when it serves whatever it is that they really believe.

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- Voting Rights
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- Wilson_Rowan
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[BTW, anyone wanting to see the gist of this on video should be able to find it at: http://legacy.news10now.com/shared/videolists/default.asp?VLID=1048&destlist=2673¤t=2673]

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FRIDAY, OCTOBER 8, 2010

Supreme Court: Highlights...(Part 2--Free Speech & Related Decisions)

In the previous post on **New York Court Watcher**, we looked at 10 decisional highlights of the Supreme Court's last term. (See Supreme Court: Highlights, Patterns & Implications from Last Term (Part 1), Sept. 29, 2010.) As explained in that post, these are the decisions that seemed particularly important, politically and ideologically charged, and, consequently, particularly revealing. The number 10 was purely fortuitous. An unintended "Top Ten."

This past Monday--the first Monday in October--was the beginning of the Court's new term. So this seems a good time to take stock of what the Court and its Justices did in the immediately preceding term, and, in that way, to get a sense of where they've been, where they are, and where they're going.

In the next several posts, we'll take a closer look at the decisional highlights identified in the last post. We'll start by looking at those decisions involving issues of free speech and closely related matters. There are 4 of these among the highlights. They deal with speech, association, and open government.

[For each case, I've imported a slide from a presentation I gave in commemoration of the First Monday in October. Each slide contains the case name, the matter at issue, the Court's ruling, the numerical vote, and pics of the Justices in the majority and those in dissent. Alongside each one, is commentary for this post which I hope is at least minimally helpful in understanding the decisions, the realpolitik*, and the ramifications.]*

(click to enlarge)

Citizens United v. FEC
Corporate spending, in excess of statutory limits, on a political, election-related film
Vote: 5-4
Court's ruling: such corporate spending is constitutionally protected free speech.

In *Citizens United*, the Court was faced with a conflict between corporate political activity (funding an anti-Hillary Clinton film) and federal campaign finance reform legislation (the McCain-Feingold law). The Court--i.e., a 5-4 majority--sided with the corporate activity.

The Court divided along strict ideological lines. The 4 conservative

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VIN BONVENTRE

Vincent Martin Bonventre is a frequent lecturer and widely quoted commentator on courts, judges, and public law. (**More**.)

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Justices versus the 4 liberals. The Court's conservative bloc--Chief Justice John Roberts (Bush II appointee), and Justices Antonin Scalia (Reagan), Clarence Thomas (Bush I), and Samuel Alito (Bush II)--was on one side. On the other was the liberal bloc--Justices John Paul Stevens (Ford), Ruth Bader Ginsburg (Clinton), Stephen Breyer (Clinton), and Sonia Sotomayor (Obama).

The 4-4 tie was broken by the Court's moderate-conservative "swing-vote," Justice Anthony Kennedy (Reagan), who was with the conservatives in *Citizens United*.

So, the 4 conservatives, plus Kennedy, favored the corporate political activity. The 4 liberals supported the restrictions in the campaign finance law. From a purely political perspective, the voting was precisely what one would have predicted. The conservative Justices voted like Republican politicians; the liberals like Democrats.

But then there's the judicial activism versus judicial restraint angle. If you take seriously what the politicians say--and some pontificating Justices too--you'd be very surprised.

Take activism. For example, overriding the choices of the other branches of government, the ones that are elected--i.e., the Congress and the President. The conservative Justices [The restraintists?] did just that. They invalidated campaign finance legislation passed by Congress and signed by the President. Legislation that was not ***clearly*** unconstitutional--the standard that conservative "restraintists" always insist is the proper one before invalidating a law.

Another aspect of activism: loosely interpreting the Constitution. The conservatives did that as well. First Amendment free speech protects not only persons, but now corporations as well. And more than that, "speech" includes not just talking and its equivalent, such as signing, but spending funds to pay for a film. Yes, to be sure, a political film. And yes, that is activity for the purpose of expressing an opinion. But it is ***spending***, not speech; it's **supporting *expression*** or ***expressive activity***, not speech.

Lots of activities have expressive content and are engaged in to express an opinion. But they are activities, conduct. They are physical, not verbal. Conduct versus pure speech. That is a traditional divide. It's what separates criticizing the government from burning the flag or a draft card, rioting, destroying government property, and other activity intended to express discontent. The former is pure speech and virtually always protected by the First Amendment. The latter, on the other hand, is conduct--expressive, but still conduct--and much more susceptible to restrictions without offending the Constitution.

Only a loose, expansive interpretation of ***"speech"*** would include corporate spending to pay for a film. "Loose" or "expansive" interpretation of rights is what conservative "retsraintists"--Justices and politicians--condemn. But that is precisely what the conservative Justices engaged in.

[Let me be clear. Some of us have no problem with the Court, and judges generally, giving the fullest sensible effect to rights and liberties--yes, "loose" and "expansive" interpretation if need be. But then again, some of us don't bellyache incessantly about such judicial activism. Sometimes it's just what a free society and fundamental fairness require.]

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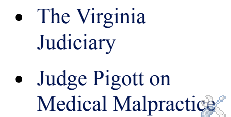
- Judge Pigott on Medical Malpractice



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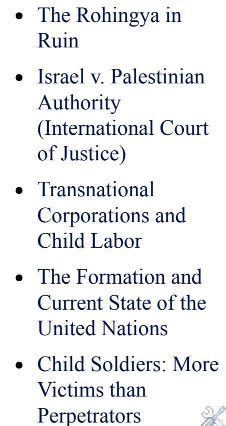

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As for the liberal Justices, they were suddenly restraintists in *Citizens United*. In that case, it became very important to respect the choice made by the other branches. And it was suddenly compelling to give a strict, narrow ruling to First Amendment free speech. Or at least to subordinate it to campaign finance reform.

So free speech only for individual persons, not their organizations? At least not if those organizations are incorporated? And spending to express a political opinion is too far afield from speech itself to warrant constitutional protection? Well now, the liberal Justices sort of sounded like the conservative Justices and politicians advocating "strict interpretation."

Bottom line: the conservative Justices "interpreted" the Constitution the way they criticize the liberals for doing. Vice versa for the liberals. On the other hand, the conservative and liberal Justices did vote, respectively, just like ***political*** conservatives and liberals. It's a familiar story. Political, philosophical values typically trump an avowed interpretive methodology.

Now that we've elaborated on a couple of themes, let's deal with the other highlight cases with these in mind.

(click to enlarge)

The Court again confronted a conflict involving free speech in *Humanitarian Law Project*. This time it was the "war on terror" that was the competitor. On the one side was a human rights group teaching about international human rights and about non-violent political advocacy. On the other side was the federal law prohibiting "material support" of any kind to a "designated foreign terrorist organization." The humanitarian group gave instruction to 2 such organizations.

All 4 conservative Justices--Roberts, Scalia, Thomas and Alito--rejected the claim that free speech, even speech regarding non-terrorist matters, had to be excepted from the law's prohibition. The conservative bloc was joined by swing-vote Justice Kennedy and, somewhat surprisingly, liberal Justice Stevens. Only *somewhat* surprisingly because Stevens often shows a considerable deference to the government in foreign matters. Additionally, Stevens was likely appeased by Chief Justice Roberts's majority opinion. It emphasized that the government had to show a compelling interest in order to curb speech, even in the "war on terror."

Three of the liberal Justices--Ginsburg, Breyer and Sotomayor--dissented. For them, there was no justification to curb free speech under the law unless the speech was advocating terrorism or actually supporting terrorist activities.

So, the conservative Justices, who went out of their way to support the free speech rights of corporations to spend money on a political film (in *Citizens United*), were less sympathetic to a humanitarian group

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advocating human rights and peaceful political change. Those Justices invalidated a law that targeted corporate spending. But they were unwilling to carve an exception in another law for pure speech by a human rights group. "Activists" in one case; "restraintists" in the other.

The liberal Justices, on the other hand, were more than willing to subordinate expressive political activity to very debatable campaign finance reform (in *Citizens United*). But they (minus Stevens) were unwilling to curb expressive activity in the government's efforts to fight international terrorism. Those Justices would uphold a law restricting domestic political activity, but would curtail a law restricting activity with foreign terrorists. "Restraint" in one case; "activism" in the other.

Yes, there are good arguments--as well as bad ones--for the positions taken by the conservative Justices in both cases. Same for the positions of the liberals. And yes, that's typically the way it is with cases before the Supreme Court. Especially these highly charged cases. That's one of the very reasons the cases are highly charged.

That being said, what can hardly be gainsaid *[Always liked that word, no doubt for some odd reason, when "denied" would do just fine.]* is that the conservative Justices don't always defer to the judgments of the other branches. That is, the other, more accountable, more democratic (with a small "D"), elected, more representative branches.

The conservative Justices are not above substituting their own judgments for that of the other branches, even in close cases. Even when the law passed by Congress and signed by the President is arguably constitutional. They are not above invalidating a law whose constitutionality is a close call. Exactly what they and conservative politicians decry as illegitimate judicial activism. Yes, that's what they did when they invalidated the restrictions on corporate political spending at issue in *Citizens United*. It was a close call, but they didn't give Congress and the President the benefit of the doubt.

And the liberal Justices are just as ready to suddenly adopt the mantra of judicial restraint. Congress passed the law, the President signed it, the Court should respect their judgments. Well, that is, at least when the laws enacted reflect politically liberal values, interests, and policies. Like campaign finance reform. Like curbing corporate influence. Then judicial restraint.

Something else that cannot be gainsaid: the conservative Justices are not always "strict constructionists," sticking to the text of the Constitution and to its original meaning. ***Spending*** to fund a film, by a ***corporation***, is hardly free ***speech*** within the strict text or original meaning of the First Amendment. Only a very expansive interpretation of free speech can get to corporate political spending. That's the kind of interpretation supposedly antithetical to conservative Justices and politicians. But that's exactly the kind of interpretation employed by the conservative Justices in *Citizens United.*

And the liberal Justices are not always opposed to "strict construction." Well, not when strict construction of the First Amendment would help deny constitutional protection to disfavored corporate political activity. No, they are ready to adopt a literalistic and cramped reading of free speech in order to support restrictions on activity that is expressive, political, and part of the election process--but engaged in by persons joined in a corporate entity.

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When it comes to a law that limits the activities of a human rights group, however, the roles are reversed. In *Humanitarian Law Project*, the conservative Justices were back to deferring to the other branches and limiting the freedom of speech. In that case, it was a liberal internationalist group, not an American corporation, that was seeking free speech protection. And the law at issue was part of the "war on terror," not some liberal campaign finance reform.

So while *Citizens United* was about corporation "speech" versus campaign finance reform, *Humanitarian Law Project* was about a liberal human rights group's speech versus the "war on terror." It's not difficult to see where the sympathies of conservatives--Justices as well as politicians--would lie in the two cases. Likewise, it's not difficult to see why conservatives--Justices as well as politicians--sided with free speech in *Citizens United*, but not in *Humanitarian Law Project.*

As for the liberals--Justices as well as politicians--it's just the reverse. Corporate "speech," no. Campaign finance reform, yes. Liberal human rights group's speech, yes. "War on terror" restrictions, no--at least not on speech.

Forget activism and restraint, loose and strict interpretation, deference or not to the other branches. In *Citizens United* and *Humanitarian Law Project*--as in most of the close, highly charged cases--it's ideology, political philosophy that usually determines the Justices' votes and, ultimately, the Court's decisions.

"Just apply the law!" That only begs the question in these cases. The law is either indeterminate, or there's law on both sides, or there's no law on point. That's why ideology and political philosophy tip the scales in these cases. That's just another way of saying that the Justices' views on Law, on a free society, on the necessary balance between government and authority, between order and liberty, etc., ultimately determine their votes in these difficult cases.

In the next post, we'll look at 2 more such cases. These are the 2 other cases among last term's highlights dealing with free speech and related matters. Following that, we'll have a few graphs to help visualize what the Court decided and how the Justices voted--i.e., how they behaved in these cases. Then, in the next several posts, we'll do the same for other categories of cases, including criminal law and church and state.

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SATURDAY, JANUARY 8, 2011

Supreme Court: Highlights...(Part 10--Even More Criminal Law: "Honest Services" and Guns [continued])

In *McDonald v. Chicago*, the Court ruled that the recently recognized 2d Amendment right of ***individuals*** to keep and bear arms was applicable against state and local laws, not only against federal ones. This is the last of the 5 criminal law-related cases among the "Top Ten" highlights of last term.

The Court had previously decided, in *D.C. v. Heller* (2008), that the 2d Amendment guarantees the firearm right to individuals, not simply to states to form and maintain organized militias. But because the Bill of Rights, ratified in the early years of the Republic, provides protections only against the federal government, the question remained whether such an ***individual*** firearm right was sufficiently fundamental to be a protection against state and local government infringement as well. That is, speaking constitutionally, whether the firearm right is part of the "liberty" that is guaranteed against state governments and their subsidiaries by the 14th Amendment--one of the Amendments ratified after the Civil War.

In *McDonald*, a 5-4 majority answered in the affirmative. State and local gun control laws throughout the country are now subject to close constitutional scrutiny. Undoubtedly, many of them will be casualties of the *McDonald* ruling.
Previous posts on **New York Court Watcher**, written shortly after the *McDonald* decision was rendered in June last year, discussed that case and the question of the firearm right itself. *(See Supreme Court: Gun Right Decision #2--A Fundamental Right & A Blatantly Ideological Court, June 30, 2010; Guns & Rights & The States (Some Final Q's from the Kagan Hearings, Part 7), Aug. 4, 2010; Guns & Rights & The States (Concluding Q's from the Kagan Hearings, Part 8), Aug. 18, 2010.)*

I made no bones about the fact that I believe the Court majority was correct. At least, that is, to the extent that an individual right to bear arms was considered basic to a free society by the Founders and Framers, that the American people have largely continued to believe the same, and that, therefore, it should be protected by the 14th Amendment against state and local government violation.

Not an absolute right, of course. No right--explicit or implicit in the Constitution--has ever been deemed absolute, or could sanely be treated as such. But it is simply very difficult to deny the American constitutional heritage of a right of individuals, not just state governments, to keep and bear arms as a necessary protection of

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freedom. Whatever the specific language or intent of the 2d Amendment itself, the fundamental heritage of an ***individual*** firearm right in this country can hardly be dismissed.

I also discussed at length the Justices' voting on the issue. How they mostly contravened their respectively avowed principles about constitutional interpretation and the judicial role. You know: avowed believers in restraint voting like activists. And vice-versa. Avowed believers in individual rights voting like majoritarians. And vice-versa. Avowed believers in strict interpretation voting like loose constructionists. And vice-versa. Avowed believers in fidelity to precedent voting like constitutional reformers. And vice-versa.

Since that was discussed at length (*ad nauseam* ?) in those previous posts, we need not spend much time on it here. Well not the *exact* same thing, and not *too* much time. Just a few comments.

Let's recall how the Justices voted. Here's the breakdown pictorially.

The 4 conservative Justices (Roberts, Scalia, Thomas, and Alito) voted to "incorporate" the firearm right into the 14th Amendment's protection of "liberty." That makes the right applicable against state and local government laws. The conservatives won because they were joined by swing-vote Justice Kennedy.

The liberal Justices (Stevens, Ginsburg, Breyer, and Sotomayor) voted that the firearm right was not part of the "liberty" guaranteed by the 14th Amendment. If they had won, state and local governments would not be bound by the Constitution to honor any firearm right. Those governments would be entirely free under the Constitution to enact gun control laws. (Gun rights might be protected under their own state constitutions, but there would be no ***federal*** constitutional protection.)

Most states, as well as many of their cities, have enacted gun control laws. Because of the *McDonald* ruling, all of those laws are now subject to constitutional scrutiny. All of them will now have to pass the test of whether they are sufficiently necessary, as well as sufficiently well drafted (i.e., narrowly focused and not too burdensome), to outweigh the firearm right.

So why do states and localities have gun control laws? That might seem obvious. But it will help this discussion to spell it out.

States and localities have enacted these laws as part of their efforts to combat crime. To help reduce violent street crime. To help reduce the most violent domestic abuse. To help reduce attacks upon police. To reduce shootings and reduce killings. There are other reasons, e.g., to

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help reduce firearm accidents. But largely, gun control laws are law enforcement tools. Reducing the proliferation and access to guns in order to reduce crimes committed with guns.

Let's consider that in terms of the traditional ideological spectrum. Law-and-order versus individual-rights. Crime control versus due process (to use Herbert Packer's classic criminal justice models). Safe streets versus the right to be let alone. War on crime versus freedom from government intrusion. Community interests versus personal liberty.

Yes, conservative versus liberal. Right wing versus left wing. Republican versus Democrat. And yes, not only the ideological division among the public, but among the Justices as well. Cases dealing with confessions. With the death penalty and punishment generally. With searches. With arrests. With rules of evidence. With prosecutorial latitude. With legislative prerogative. Such cases evoke that divide.

Yes, in case after case, we know how conservatives, Republicans, the law-and-order crowd generally side on these issues. We know how the liberals, Democrats, the right-to-be-let-alone and rights-of the accused crowd generally side. And we know that the Justices generally divide into the same camps. There's the conservative, crime-control, pro-law enforcement camp. There's the liberal, due-process, pro-civil liberties camp. We know how the Justices generally vote on these issues. We know how they generally divide.

But when it comes to gun control laws enacted as crime fighting tools, the sides are reversed. Among the public and among the Justices.

In the more rural areas of the country, in the South, the Southwest, much of the Midwest and Mountain States, the Bible Belt--i.e., the more conservative, Republican areas of the country--the right to bear arms is near sacred. It outweighs the crime-combating purposes of gun control laws. In the more urban areas of the country, in the educational and cultural centers, in the Northeast, much of the Pacific Coastal and North Central States--i.e., the more liberal, Democratic areas of the country--the right to bear arms is much more lightly regarded (indeed, almost with contempt). It is easily outweighed by the need to reduce armed violence.

And again, the same for the Justices. Those who generally vote like conservative Republicans, strongly support the firearm right. Those who generally vote like liberal Democrats, strongly support gun control.

The conservative Justices who generally vote pro-law enforcement in criminal cases, vote against law enforcement efforts when it comes to the firearm right versus gun control. I.e., they vote just like political Republicans in both criminal cases and gun control cases. The liberal Justices who generally vote pro-individual rights in criminal cases, vote against individual rights when it comes to the firearm right versus gun control. I.e., those Justices vote just like political Democrats in both criminal cases and gun control cases.

There is consistency in the seeming inconsistencies. There is a common denominator in the divide. But it's not the nonsense we usually hear.

The consistency in the divide is not government authority versus individual rights. It's not judicial restraint versus activism. It's not judicial elitism versus the wishes of the majority. It's not strict versus loose interpretation. It's not federal power versus local governance. It's

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not about safe streets versus personal liberties. It's not about any of this or about so many related matters. It's not even about conservative principles (limited government) versus liberal ones (government for the general welfare).

It's about ideological (as in perspectives, presumptions, and partisanship) and emotional (as in sympathies, familiarities, comfort, and other feelings) leanings. The 4 conservative Justices have much of that in common. The same for the 4 liberal Justices.

Distilled--or, rather, reduced--to the bare-bones essence, it's this: Some of the Justices vote just the way conservative Republican politicians would vote. On most criminal law issues and on gun rights. Some of the Justices, like liberal Democratic politicians.

Anyone who reads this blog is familiar with the following refrain: sorry, but there's no Wizard of Oz. Let alone 9 of them. The Justices are like the rest of us. They are not disembodied intellects divining the meaning of pre-existing law or transcendental truths. They have their prejudices, presumptions, biases, beliefs, leanings. Their decisions are greatly affected by that. Just as our own decisions are.

The Court in the *McDonald* case was deeply divided. The vote was 5-4. And yet all 9 Justices were so certain that they were right and that those on the other side were wrong. That's not open-minded, unbiased, constitutional exegesis. That's not disinterested, selfless wisdom. That's ideology and emotion. That's what drove the vote on the right to bear arms at issue in *McDonald*--just as it has on other close, controversial, politically-charged, hot-button issues in other cases.

In the next post, we'll graph the voting that we've seen in the 5 criminal law-related cases in this series. And in the interests of full disclosure, we'll even graph how I would have voted.

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MONDAY, JANUARY 30, 2012

Supreme Court: Right on GPS Surveillance--But BEWARE! (part 1)

(Back from end of semester + winter break + Arizona + beginning of new semester + other excuses for the respite.)

Yes, it's a search!

Electronically monitoring someone's movements by means of a tracking device, secretly attached to his car, is a search. That's what the Supreme Court ruled last week.

It means that government must get a warrant before it attaches a GPS (global positioning system) device to someone's car, without his consent, and uses that device to obtain information about his coming and going and stopping and visiting, etc. If the government does not first get a warrant--i.e., authorization from a judge based on some good reason for conducting that search--then the search is illegal. As a result, any evidence obtained in that search will be largely unusable by the government in a criminal trial.

New York State's highest court, the Court of Appeals, had reached the same decision a few years ago. As has happened many times in the New York Court's history, the Supreme Court has followed suit.

The New York Court of Appeals case was *People v Weaver* (2009). That Court, in an opinion by New York's Chief Judge, Jonathan Lippman, ruled that the state constitution's protection against unreasonable searches was violated when the police conducted a surreptitious GPS surveillance, over the course of several weeks, without obtaining a warrant. In short, GPS surveillance ***IS*** a search, so the state constitution requires a warrant. *[See the discussion in New York Court Watcher at the time: Court of Appeals: 4-3 Majority Holds GPS Surveillance Requires Warrant Supported By Probable Cause, May 12, 2009.]*

The Supreme Court last Monday, in *U.S. v Jones*, reached the same conclusion under the federal constitution. In an opinion by Justice

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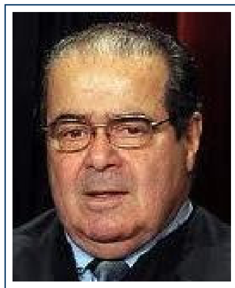

Antonin Scalia, the Court ruled that the same kind of GPS surveillance, conducted by the police in that case, was indeed a search and, therefore, that the 4th Amendment's protection against unreasonable searches required a warrant.

But that's where the similarities between the two decisions end. That's just about the end of the agreement between Lippman's opinion for New York and Scalia's opinion for the Supreme Court. And that's why Justice Samuel Alito refused to join Scalia's opinion. That's why Alito wrote a separate concurring opinion and why three other Justices joined him instead of Scalia. Beware!

The Supreme Court's decision was widely reported to be unanimous, 9-0. Well, it was that on the bare minimum holding. Yes, surreptitious GPS surveillance over an extended period is a "search" within the meaning of the federal constitution. That, of course, is no trivial ruling. Certainly not one to be taken for granted. Not with today's Supreme Court.

As has been discussed before on **New York Court Watcher**, the Supreme Court's search and seizure jurisprudence over the last few decades has been nothing short of preposterous. Yes, preposterous. Think that's an exaggeration? OK. Just try these:

A search of your private property--as long as not too close to your house--is not a "search." Even if you post "No Trespassing" signs and erect a fence. (That's *Oliver v U.S.*, 1984.)
Searching your backyard by hovering above in a helicopter. Not a "search." (*Fla. v Riley*, 1989.)
Searching through your garbage that you've covered in a garbage can, tied in a black garbage bag, and put at the end of your driveway. Not a "search." (*Cal. v Greenwood*, 1988.)
Searching your car, your belongings, and probably even what you're wearing by using a sniffing K-9 dog. Not a "search." (*Ill. v Caballes*, 2005.)
Electronically listening to your private conversations by means of a police informant who's been wired. Not a "search." (*U.S. v White*, 1971.)
Tracking your movements by means of a beeper that happened to be attached to your car before you owned it. Not a "search." (*U.S. v Knotts*, 1983; *U.S. v Karo*, 1984.)
And on and on.

And because none of these are a "search," none of these require a warrant, or probable cause, or reasonable suspicion, or any justification or authorization at all.
[For a previous discussion of this nonsense, see Court of Appeals: The First Big Test for the Lippman Court -- Is a Search a Search? Or the Supreme Court's Nonsense?, March 24, 2009.]

To be sure, there is a reason for this nonsense. The majority of the Court in all these "not-a-search" cases simply didn't want to exclude the evidence--i.e., throw it out. They wanted to allow the prosecution to use the evidence. Or they wanted to uphold a conviction already obtained

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with such evidence.

As every lawyer and many non-lawyers know, when the government engages in an unconstitutional search, the evidence obtained cannot be used by the prosecution. There are some clever ways to avoid that result. One way is for the Court to rule that the search--conducted without a warrant or without legal justification--is not really a "search" at all. Clever Justices can usually come up with some reason to support such a seemingly ridiculous ruling. And, as a result, they can approve the prosecution's use of the evidence. And they can uphold the conviction.

The point in all the foregoing discussion? Last week's decision was hardly a sure thing. The Supreme Court's ruling in the *Jones* case, that the GPS surveillance constituted a "search"--and, therefore, was illegal without a warrant-- was a welcome reprieve from the nonsense we've come to expect. That aspect of the decision was welcome. Very welcome, that is, to anyone who takes the constitutional protection of personal privacy seriously.

BUT... Yes, BUT!

A unanimous, 9-0 ruling, that electronic monitoring of a person's movements does constitute a search and does require a warrant, just seemed too good to be true. Too good in light of all the previous "not-a-search" decisions. Too good for a Court that has seemed more than willing to sacrifice constitutional privacy protection in order to aid criminal prosecution. And, in fact, it ***was*** too good to be true.

In its most significant aspect, the Court's ruling was 5-4. The Court was deeply divided on the reasoning used to decide that GPS surveillance is a search. It was deeply divided on the rule applied by Scalia.

Justice Alito's concurring opinion, which was joined by Justices Ginsburg, Breyer, and Kagan, flatly rejected--no, condemned--the reasoning in Justice Scalia's opinion for the Court. Indeed, the rule applied by Scalia for the majority is just as troubling as the ultimate ruling in the case is welcome.

That rule? The GPS surveillance was a "search" because the attachment of the device to the car was a ***physical trespass*** on the owner's personal property. Not because electronic monitoring of a person's movement is an invasion of that person's constitutionally protected privacy, especially when conducted over an extended period of time. That protected-privacy reasoning is what was applied by Chief Judge Lippman in his opinion for the New York Court in *Weaver*, and it's the one vigorously argued for by Alito in his concurring opinion in *Jones*.

But no. According to Scalia's majority opinion, the GPS surveillance in

Jones was a "search" because of the ***physical*** attachment of the device.

As Alito emphatically warned, technological advances hardly require any ***physical*** attachment or intrusion or other trespass. A rule in which a "search" is defined in terms of any ***physical*** requirement is both, 1) contrary to the Court's long established privacy landmarks, and 2) dangerously unprotective of privacy against technological invasions that entail no ***physical trespass*** at all.

In the next post, we'll continue with the dueling Scalia and Alito opinions, as well as with the extraordinary stakes for search and seizure law and for constitutionally protected personal privacy.

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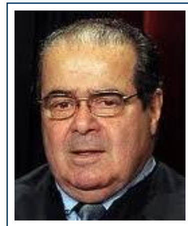
SUNDAY, FEBRUARY 12, 2012

The GPS Decision--part 2: Scalia's Dangerous Nonsense & Alito's Rebuttal



The 4th Amendment does not prohibit unreasonable searches--only unreasonable searches of the few ***items it specifically mentions***.
The 4th Amendment's fundamental concern is not even a search *per se*--it's concern is ***physical trespass***.
The 4th Amendment is not even concerned with all physical trespasses--but only a physical trespass of an ***item it specifically mentions***.
The Court's decisions protecting private activities from unreasonable searches (rather than protecting specified areas from physical trespass)--are ***deviations***.
The Court's earlier decisions ***permitting warrantless wiretapping***, warrantless ***eavesdropping***, and warrantless searching of ***private property*** other than the house were correct under the 4th Amendment.
The GPS search in this case was unconstitutional, not because of its unreasonable invasion of personal privacy, but because the police ***"trespassorily" "encroached on a protected area."***

--Justice Scalia's view of the 4th Amendment, as expressed in his opinion for the majority in *U.S. v. Jones*

The 4th Amendment cannot be applied using ***1791 trespass law***.
The 4th Amendment must be adapted to ***21st century technological surveillance***.
A physical trespass is ***not*** the same as a search--***nor is a physical trespass required*** for one.
4th Amendment doctrine must be concerned with modern, ***electronic surveillance,*** whether ***trespassory or not***.
4th Amendment decisions that focused on ***physical trespass of a specified item*** have been ***repudiated.***
The prolonged GPS search in this case was unconstitutional because it was an ***unjustified intrusion on privacy*** that reasonable people expect.

--Justice Alito's view of the 4th Amendment, as expressed in his separate concurring opinion

Before going further, let's look at a few of the Court's past decisions that Scalia relied upon and explained with approval. Some, including me, may find this alarming.

Olmstead v. U.S. (1928)--warrantless wiretapping of phone

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VIN BONVENTRE

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conversations was fine under the 4th Amendment (i.e., was not a "search"). Why? Because the telephone wires were outside, and the tapping did not require entry into the person's house or office.
Hester v. U.S. (1924)--warrantless searching of someone's private property was fine. Why? Because the 4th Amendmend mentions "houses" but not the land ("open field") beyond.
U.S. v. Knotts (1983) & ***U.S. v. Karo*** (1984)--warrantless surveillance of a person's whereabouts by means of a beeper (i.e., it was placed inside a container on a vehicle he drove) was fine under the 4th Amendment. Why? Because (i.e., the important point according to Scalia), in each case, the driver didn't own the container when the beeper was installed.

On the other hand, Alito relied on sharply contrasting 4th Amendment jurisprudence.

Olmstead v. U.S. (1928)--same case as relied on by Scalia. But Alito relied on the landmark dissent in that case, by Justice Brandeis, which was later adopted by the Court.
Warrantless wiretapping ***is*** an unreasonable search. Why? It's irrelevant "where the physical connection with the telephone wires was made," and irrelevant that telephone conversations are not mentioned in the 4th Amendment. Quoting Brandeis further: the 4th Amendment's purpose is to forbid "every unjustifiable intrusion by the government upon the privacy of the individual."
Katz v. U.S. (1967)--the Court repudiated the trespass and specifically-mentioned-item approach to the 4th Amendment, and it adopted Brandeis' ***Olmstead*** dissent.
Warrantless eavesdropping on a phone conversation taking place in a phone booth ***is*** an unconstitutional search. Why? It is immaterial that there was no physical trespass on any property owned by the phone caller, and immaterial that telephone booths and phone conversations are not specifically mentioned items. The 4th Amendment does not depend on a property right in a place or thing falling within its "literal words." Instead, it is about "the privacy upon which [a person] justifiably relie[s]."

Now let's be clear. Scalia's opinion for the majority in *Jones* ***did*** declare that the GPS monitoring of the defendant's movements for a 4 week period was a "search" and, therefore, it was unconstitutional without a warrant. So far, so good.

But let's also be clear that, according to Scalia's majority opinion, the GPS monitoring was a "search" because the police placed a device on the defendant's car without his permission. ***Not because the police engaged in pervasive electronic monitoring of a person's movements!***

That's what's important about the Court's decision. That's what the law is from this case. That's the precedent now. That's what is so troubling--indeed, dangerous--about Scalia's opinion for the Court. The extraordinary narrowing of the meaning of a "search." The narrowing of a "search" that must be reasonable to be valid. The narrowing of a "search" that requires a warrant.

And Scalia knew exactly what he was doing. This was not the result of some casual reference of his or of some careless choice of phrasing. No, this was deliberate. That's why he cited those above-mentioned decisions with approval. That's why he explained them the way he did. Reviewing his opinion in *Jones* further leaves no doubt.

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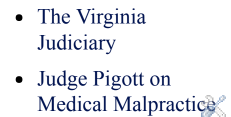

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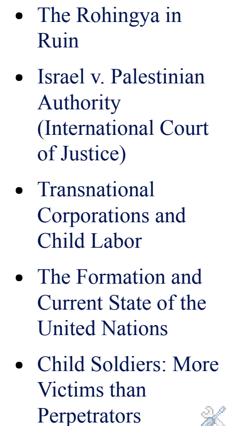

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Scalia's very first sentence begins with his framing of the issue to be decided by the Court: "whether the ***attachment*** of a Global Positioning System (GPS) tracking device ***to an individual's vehicle..."*** And just in case it wasn't clear what he--and the majority he wrote for--saw as the critical factor in this "search" case, he made the point repeatedly. Using several variations on the same theme.

"Installed...on the undercarriage of the Jeep." "Installation...on a target's vehicle." "Physically occupied private property." "Significance of property rights." "Common-law trespass." "Government trespass." "Physical intrusion." "Government trespassorily inserted the...device." "Trespassory searches." "Mere visual observation does not constitute a search."

Oh, and according to Scalia, the "true and ultimate expression" of constitutional search and seizure protection is a 1765 English decision, *Entick v. Carrington.* That case discussed ***trespassing on a neighbor's property.***

Which leads to the other point emphasized in Scalia's majority opinion. It's not just any "attachment" or "physical intrusion" or "trespass" that makes a "search." No. Scalia makes clear: 1) that it must be a physical trespass upon an area or item specifically mentioned in the 4th Amendment, and 2) that the area or item must be owned by the person being "searched."

Otherwise, according to Scalia, "the [4th Amendment's] phrase 'in their persons, houses, papers, and effects' would have been superfluous." The 4th Amendment "embod[ies] a particular concern for...the areas it enumerates." It reflects a "principle [about] physical intrusion of a constitutionally protected area." "The 4th Amendment protects against trespassory searches only with regards to those items that it enumerates"--e.g., ***not*** outside telephone wires as in *Olmstead* and ***not*** land beyond the house as in *Hestor*. The "officers [in this GPS case] encroached on a protected area." A vehicle is a protected area only because it is "an 'effect' as the term is used in the [4th] Amendment."

And....the defendant in this case was "the exclusive driver"of the Jeep. "He at least had the property rights of a bailee." He lawfully "possessed the Jeep at the time the Government trespass[ed]." He was "on much different footing" then a non-owner [like the drivers in the beeper cases, *Knotts* and *Karo*] would have been.

Soooo, the 4th Amendment is about preventing unauthorized physical trespass upon an owner's property, and only property of the type listed.

But Alito--and the 3 Justices who joined him--protested. Much like Justice Brandeis did in 1928, in his dissent in the wiretapping case, ***Olmstead***. "Not so quick; you're entirely wrong and heading in a dangerous direction," was the emphatic point of Alito's concurring opinion.

The 4th Amendment is not about 18th century tort law. A claim of unconstitutional search cannot be analyzed like a "1791 suit for trespass to chattels." Indeed, nothing similar to the 4 week surreptitious GPS monitoring in this case would have been possible at that time. [Scalia actually dropped a footnote to suggest the possibility of "a constable concealing himself in the target's coach."]

As Alito noted, Scalia's majority opinion "largely disregards what is

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really important[, i.e.,] long-term tracking." That aspect of the case is virtually ignored. Instead, Scalia's opinion "attaches great significance to something...relatively minor," i.e., "attach[ing] a small, light object that does not interfere in any way" with the driver or his car's operation. In fact, such a "technical trespass" would be treated as "so trivial" as to be largely dismissed in modern tort law.

As Alito explains, "if ***long-tern monitoring*** can be accomplished ***without committing a technical trespass***, the Court's theory would provide ***no protection***." And, of course, such monitoring is not difficult today.

Police monitoring someone for a lengthy period using unmarked cars. The same using helicopters. Using video cameras. Pre-installed GPS or roadside assistance devices. Phone-location-tracking services. Any electronic device attached to something owned by someone else. Or engaging in any electronic surveillance whatsoever that does not require physical contact with the person's property. Or all of that at once.

None of that is a "search" under Scalia's physical-trespass approach to the 4th Amendment. No, not a "search" regardless of how pervasive or how long the duration. No, none of that surveillance would require reasonableness or a warrant.

In fact, for that very reason, the physical-trespass approach--which had permitted warrantless wiretapping and eavesdropping in the early part of the last century--was ultimately discredited and the Court repudiated its prior decisions. Nearly half a century ago, in *Katz*, the Court put the physical-trespass test to rest. As Alito explained, property rights became only a single factor in determining whether a 4th Amendment "search" had taken place. The test, ever since, was whether the person had a reasonable expectation of privacy. If so, government intrusion--whether or not physical--was a "search" requiring reasonableness and a warrant.

That's the 4th Amendment that Alito would have applied. And since the long-term GPS surveillance in *Jones* entailed "a degree of intrusion that a reasonable person would not have anticipated," that surveillance was a "search" mandating 4th Amendment protections. Under Alito's view of the 4th Amendment, any modern technological monitoring that similarly intrudes on legitimate privacy expectations--regardless of any physical intrusion or not--would likewise be recognized as a "search" triggering constitutional protections.

The contrast between Scalia's and Alito's approaches to the 4th Amendment, and the difference in the consequences, could hardly be greater for search and seizure rights.

Sotomayor joined Scalia's opinion to give him the bare 5 Justice majority. (So did Chief Justice Roberts and Justices Thomas and Kennedy.) ***BUT*** Sotomayor authored a separate concurring opinion which, among other things, explained her voting with Scalia. It was only because she understood his physical-trespass view of the 4th Amendment to be "***an irreducible constitutional minimum***."

Yes, in her view, the *Katz* protection of reasonable-privacy-expectations, regardless of any physical intrusion, remains the law. And she agreed with Alito (and Justices Ginsburg, Breyer, and Kagan who joined him), that long-term GPS monitoring, such as in this case, "impinges on expectations of privacy."

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So why didn't Sotomayor join Alito? Why didn't she vote with him and simply author her opinion as a concurrence to his--instead of to Scalia's? It's curious. It's certainly not clear.

What is clear, is that she could have made Alito's opinion the majority. If she had voted with him, she would not have helped Scalia revive the previously repudiated physical-trespass approach to the 4th Amendment. She would not have given Scalia's dangerous nonsense the authoritative legitimacy it now has.

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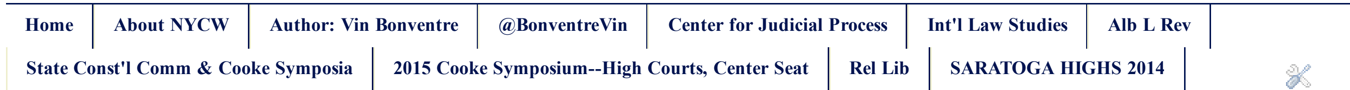

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SATURDAY, JANUARY 23, 2010

Supreme Court: Lessons from the Campaign Reform Decision

Haiti
****

As if we needed a reminder--and astonishingly, some of us seem to need one periodically--the Supreme Court is not what we're usually told it is or is supposed to be. You know, what we're told by politicians, nominees, the Justices themselves, some who follow the Court and should know better, and grade school teachers.

Yes, grade school teachers. Because how they describe the Judicial Branch to our children is just about as sophisticated as what the others tell us about the Court's role and how it functions. Just think back several months to the laughably superficial and puerile debate about the Court during the Senate confirmation of Sonia Sotomayor.

Recall the Senators being utterly aghast that Sotomayor's background and experience might possibly affect her decisions, and that she might be a dreaded *activist*. Then there was her equally pitiable insistence that the Justices make no policy, make no law, but simply apply the already-existing law to the facts of a case.

Well, the Court's decision earlier this week was another pail of ice cold water thrown in the face of anyone who might have been snoozing and needed a wake-up call. Anyone who needed a fresh freezing dose of realism. Realism about the Court's politics, about the importance of appointments, about the nonsense of the judicial activism versus restraint debate, and about what the Court actually does.

First, just what did the Court decide earlier this week in *Citizens United vs. The Federal Elections Commission*? The Court held, by a 5 to 4 vote, that corporations may spend money--however, whenever, and how much they want--to finance ads supporting or opposing political candidates. That is their 1st Amendment right of free speech. Consequently, the restrictions contained in the McCain-Feingold Act on such corporate spending are unconstitutional.

Now, the lessons learned, or remembered.

The Court is Highly Political. And I don't just mean this in the Aristotelian sense that the Court is engaged in governance, in the determination and distribution of powers, rights and obligations. Hopefully, that at least is not in question.

VIN BONVENTRE

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I mean this in the partisan, ideological, polarized sense. The Justices were divided exactly as we would expect politicians in the Congress or the Senate or on the campaign trail to be. The 4 conservative Justices voted precisely the way conservative Republican politicians would; the 4 liberal Justices voted precisely the way liberal Democratic politicians would.

The 4 conservatives (Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito) voted in favor of corporate spending in politics. The 4 liberals (Justices John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor) voted against such corporate spending. Political, ideological, polarized.

(The Justice who broke the tie was Anthony Kennedy. That's no surprise. He's, of course, the moderately conservative Republican on the Court who oftentimes is the swing vote. In this case, it was not surprising that he would be the swing vote, nor what his vote would be. Kennedy is as close as anyone on the current Court comes to being a free speech absolutist. He has consistently opposed restrictions on speech in a wide variety of contexts. Sometimes that means he votes with the conservatives [who favor some speech but disfavor others]; sometimes that means he votes with the liberals [the same]. Regarding corporate spending to express political views? Kennedy's vote in support was to be expected. That gave the more staunchly-conservative Justices the 5th vote they needed in this case.)

Appointments Count. President George W. Bush appointed Samuel Alito to fill the vacancy created by the retirement of Sandra Day O'Connor. The more moderately-conservative Justice O'Connor supported campaign finance reform. She voted that way--with the liberals--in prior cases while she was on the Court. Justice Alito, being a much more staunchly conservative Republican, is quite different. He opposes such goody-two-shoes liberal laws that place restrictions on how corporations and the wealthy can spend their money.

So Alito replaced O'Connor. Consequently, the balance on the Court changed, the majority shifted, and the Court's view on corporate spending in politics is the opposite of what it was. Just 1 appointment. Just 1 vote.

(As for President Obama's appointment of Sonia Sotomayor to fill the vacancy created by the retirement of David Souter, that was the replacement of one liberal with another. Justice Souter voted with the other liberals to support campaign finance reform while he was on the Court. Not surprisingly, Justice Sotomayor did the same in this latest case. Now if Souter had retired while President Bush was still in office, his replacement would surely have been a conservative. And the vote this past week would surely have been 6 to 3 rather than 5 to 4. Soooooo, it's also no surprise that Souter waited for Obama's election before he chose to retire.)

The Judicial Activism vs. Restraint Debate is Nonsense. The major debate in constitutional law over the past few decades has been the legitimacy of Supreme Court Justices being "activist"--i.e., invalidating laws passed by Congress or the states, breaking with settled precedents, broadly interpreting the Constitution, rendering expansive decisions, and making law from the bench. Conservative politicians accuse the liberal Justices of doing just that. (And, let's be honest, their accusations are accurate.)

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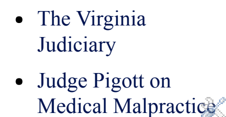

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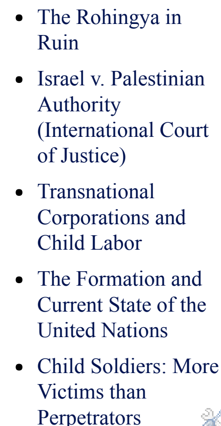

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Those politicians, and the conservatives on the Court as well, angrily denounce the liberal Justices' activist decision-making as contrary to the will of the people, contrary to the judgments of the people's representatives in the legislative and executive branches, contrary to democracy, and contrary to way in which the Court is supposed to function and (to be sure!) the way it used to function before liberal Justices started making political decisions rather than legal ones.

OK. Liberal Justices are activist. They have been so in the interpretation and enforcement of individual civil rights and liberties. Yes, like liberal politicians. That part of the denunciation is true.

What is sheer nonsense is the notion that liberal Justices are activist but not the conservatives. The notion that conservative Justices actually oppose activism, and it's only the liberals who favor it.

(There is also much nonsense about activism being illegitimate at all. What cherished liberties don't you want the Court to protect? Guns? Private property? Religion? Protesting, or supporting, health care reform? But that discussion is well beyond the focus here. *[For more on that, see my "Judicial Activism...Conventional Wisdom and Nonsense," 68 Alb. L. Rev. 557 (2005), also available at http://ssrn.com/abstract=1142071.]*)

Let's review what the conservative Justices did in the campaign reform decision. What those ardent proponents of judicial restraint, fierce opponents of judicial activism did. *[And let me make clear that I support the outcome in the case. I support the right to finance a documentary criticizing a presidential candidate during the presidential primaries. Even if, as here, the documentary was against Hillary Clinton who I think is fabulous. What I don't support is the utter hypocrisy of denouncing judicial activism even while using it whenever it serves your own purposes.]*

Here's what the conservative majority did--those arch enemies of judicial activism:

--overruled Congress. Yes, the democratically elected legislative branch of government passed the McCain-Feingold Act, and the Court declared that law's relevant parts invalid. The conservative majority substituted its judgment for that of the people's representatives. Instead of deferring to the lawmakers--an axiom of judicial restraint--the conservatives nullified the legislation.
And they did so even though the legislation was not *clearly* unconstitutional. Can it honestly be said that the legislation in this 5-4 case was *clearly* unconstitutional, as in *beyond a reasonable doubt* unconstitutional? That's the standard of judicial restraintists. Well, another one of their own axioms violated.

--overruled their own precedents. The Court overruled 2 recent decisions, and a full century of legislative and judicial tradition restricting the influence of corporate money in politics. The recent precedents, *Austin v. Michigan Chamber of Commerce* (2000) and *McConnell v. FEC* (2007), were explicitly overturned by the conservative majority because those decisions dictated the opposite result in the case. Those Justices also distinguished away or dismissed the rest of the century-old tradition. So much for *stare decisis*, for respecting precedent, for stability and predictability in the law. All axioms of judicial restraint violated.

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--broadly interpreted the Constitution. The 1st Amendment protects free speech. That's what it says: *speech*. A strict interpretation of that, which is what judicial restraint calls for, would limit that to--well--*speech*. Not any conduct or activity that has expressive quality. Not wearing a black arm band or a peace button, not waving or burning the flag, not a dance or a musical composition, not a march or a parade, and certainly not spending money.
To be sure, all of those are expressive activities. But they're not *speech*. Oh, don't be so narrow, so rigid, so strict. Hey, I agree. But that's not what the conservative politicians and Justices argue. They insist upon *strict* interpretation and condemn the broad sort. They insist upon sticking with the terms of the Constitution and condemn expanding what the provisions actually say. They insist on limiting rights to those set forth in the Constitution and condemn finding rights that are not clearly there.
Well, corporations spending money to finance political ads is not clearly in the Constitution. A strict interpretation of the term "speech" does not include spending money. Treating corporations as though they were actual human people is also not clearly in the Constitution. A corporation spending money to finance a political ad is not the same thing as a human person speaking about politics. That is hardly a strict interpretation of the 1st Amendment.
I may not have a problem with broad interpretations, but judicial restraintists do. And the conservative majority violated yet another one of their own axioms.

--made law. The !st Amendment expressly prohibits laws "abridging the freedom of speech." As of the Supreme Court's ruling this week, the 1st Amendment now prohibits as well, "abridging the freedom of corporations to spend as much of their money as they choose and whenever they choose to finance any communication supporting or opposing a political candidate." The conservative majority just added that.
That was not there before. Whether in the text of the 1st Amendment, or in the Court's prior decisions, or in the legislative history of the country. It was not there. But it is now.
The conservative Justices made law. Just what they complain about when the the liberal Justices do it. Just what they and their conservative political supporters denounce. In fact, just what everyone seems to denounce at those pathetic confirmation hearings.
That's another fundamental axiom of judicial restraint violated. Justices should just apply the law, not make it. Well, they just did.

So that's my humble take on the *Citizens United* decision. Again, for whatever it's worth, I agree with the result in the case. Like Justice Kennedy, I favor the freest possible political debate, and I'm opposed to virtually any governmental restrictions on the free exchange of opinions on politics--i.e., on governance itself.

I'm also delighted to have another vivid illustration of how and why the Justices actually decide cases. Another wonderful lesson in judicial realism.

What I continue to be appalled at, and what is pellucidly clear *[had to use it!!]* in this case, is what a fake the ongoing debate about activism versus restraint is, and how those Justices who rightiously condemn activism are so willing to be activist--and wildly so--when it serves whatever it is that they really believe.

[BTW, anyone wanting to see the gist of this on video should be able to find it at: http://legacy.news10now.com/shared/videolists/default.asp?VLID=1048&destlist=2673¤t=2673]

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New York Court Watcher

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FRIDAY, OCTOBER 8, 2010

Supreme Court: Highlights...(Part 2--Free Speech & Related Decisions)

In the previous post on **New York Court Watcher**, we looked at 10 decisional highlights of the Supreme Court's last term. (See Supreme Court: Highlights, Patterns & Implications from Last Term (Part 1), Sept. 29, 2010.) As explained in that post, these are the decisions that seemed particularly important, politically and ideologically charged, and, consequently, particularly revealing. The number 10 was purely fortuitous. An unintended "Top Ten."

This past Monday--the first Monday in October--was the beginning of the Court's new term. So this seems a good time to take stock of what the Court and its Justices did in the immediately preceding term, and, in that way, to get a sense of where they've been, where they are, and where they're going.

In the next several posts, we'll take a closer look at the decisional highlights identified in the last post. We'll start by looking at those decisions involving issues of free speech and closely related matters. There are 4 of these among the highlights. They deal with speech, association, and open government.

[For each case, I've imported a slide from a presentation I gave in commemoration of the First Monday in October. Each slide contains the case name, the matter at issue, the Court's ruling, the numerical vote, and pics of the Justices in the majority and those in dissent. Alongside each one, is commentary for this post which I hope is at least minimally helpful in understanding the decisions, the realpolitik, *and the ramifications.]*

(click to enlarge)

In *Citizens United*, the Court was faced with a conflict between corporate political activity (funding an anti-Hillary Clinton film) and federal campaign finance reform legislation (the McCain-Feingold law). The Court--i.e., a 5-4 majority--sided with the corporate activity.

The Court divided along strict ideological lines. The 4 conservative

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Justices versus the 4 liberals. The Court's conservative bloc--Chief Justice John Roberts (Bush II appointee), and Justices Antonin Scalia (Reagan), Clarence Thomas (Bush I), and Samuel Alito (Bush II)--was on one side. On the other was the liberal bloc--Justices John Paul Stevens (Ford), Ruth Bader Ginsburg (Clinton), Stephen Breyer (Clinton), and Sonia Sotomayor (Obama).

The 4-4 tie was broken by the Court's moderate-conservative "swing-vote," Justice Anthony Kennedy (Reagan), who was with the conservatives in *Citizens United*.

So, the 4 conservatives, plus Kennedy, favored the corporate political activity. The 4 liberals supported the restrictions in the campaign finance law. From a purely political perspective, the voting was precisely what one would have predicted. The conservative Justices voted like Republican politicians; the liberals like Democrats.

But then there's the judicial activism versus judicial restraint angle. If you take seriously what the politicians say--and some pontificating Justices too--you'd be very surprised.

Take activism. For example, overriding the choices of the other branches of government, the ones that are elected--i.e., the Congress and the President. The conservative Justices [The restraintists?] did just that. They invalidated campaign finance legislation passed by Congress and signed by the President. Legislation that was not ***clearly*** unconstitutional--the standard that conservative "restraintists" always insist is the proper one before invalidating a law.

Another aspect of activism: loosely interpreting the Constitution. The conservatives did that as well. First Amendment free speech protects not only persons, but now corporations as well. And more than that, "speech" includes not just talking and its equivalent, such as signing, but spending funds to pay for a film. Yes, to be sure, a political film. And yes, that is activity for the purpose of expressing an opinion. But it is ***spending***, not speech; it's **supporting *expression*** or ***expressive activity***, not speech.

Lots of activities have expressive content and are engaged in to express an opinion. But they are activities, conduct. They are physical, not verbal. Conduct versus pure speech. That is a traditional divide. It's what separates criticizing the government from burning the flag or a draft card, rioting, destroying government property, and other activity intended to express discontent. The former is pure speech and virtually always protected by the First Amendment. The latter, on the other hand, is conduct--expressive, but still conduct--and much more susceptible to restrictions without offending the Constitution.

Only a loose, expansive interpretation of ***"speech"*** would include corporate spending to pay for a film. "Loose" or "expansive" interpretation of rights is what conservative "retsraintists"--Justices and politicians--condemn. But that is precisely what the conservative Justices engaged in.

[Let me be clear. Some of us have no problem with the Court, and judges generally, giving the fullest sensible effect to rights and liberties--yes, "loose" and "expansive" interpretation if need be. But then again, some of us don't bellyache incessantly about such judicial activism. Sometimes it's just what a free society and fundamental fairness require.]

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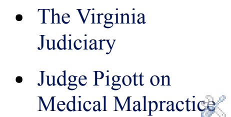

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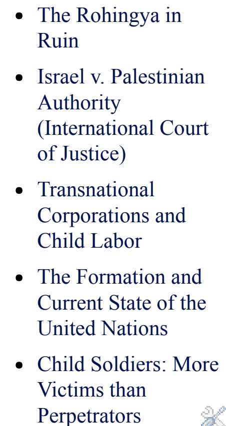

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As for the liberal Justices, they were suddenly restraintists in *Citizens United*. In that case, it became very important to respect the choice made by the other branches. And it was suddenly compelling to give a strict, narrow ruling to First Amendment free speech. Or at least to subordinate it to campaign finance reform.

So free speech only for individual persons, not their organizations? At least not if those organizations are incorporated? And spending to express a political opinion is too far afield from speech itself to warrant constitutional protection? Well now, the liberal Justices sort of sounded like the conservative Justices and politicians advocating "strict interpretation."

Bottom line: the conservative Justices "interpreted" the Constitution the way they criticize the liberals for doing. Vice versa for the liberals. On the other hand, the conservative and liberal Justices did vote, respectively, just like ***political*** conservatives and liberals. It's a familiar story. Political, philosophical values typically trump an avowed interpretive methodology.

Now that we've elaborated on a couple of themes, let's deal with the other highlight cases with these in mind.

(click to enlarge)

The Court again confronted a conflict involving free speech in *Humanitarian Law Project*. This time it was the "war on terror" that was the competitor. On the one side was a human rights group teaching about international human rights and about non-violent political advocacy. On the other side was the federal law prohibiting "material support" of any kind to a "designated foreign terrorist organization." The humanitarian group gave instruction to 2 such organizations.

All 4 conservative Justices--Roberts, Scalia, Thomas and Alito--rejected the claim that free speech, even speech regarding non-terrorist matters, had to be excepted from the law's prohibition. The conservative bloc was joined by swing-vote Justice Kennedy and, somewhat surprisingly, liberal Justice Stevens. Only *somewhat* surprisingly because Stevens often shows a considerable deference to the government in foreign matters. Additionally, Stevens was likely appeased by Chief Justice Roberts's majority opinion. It emphasized that the government had to show a compelling interest in order to curb speech, even in the "war on terror."

Three of the liberal Justices--Ginsburg, Breyer and Sotomayor--dissented. For them, there was no justification to curb free speech under the law unless the speech was advocating terrorism or actually supporting terrorist activities.

So, the conservative Justices, who went out of their way to support the free speech rights of corporations to spend money on a political film (in *Citizens United*), were less sympathetic to a humanitarian group

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advocating human rights and peaceful political change. Those Justices invalidated a law that targeted corporate spending. But they were unwilling to carve an exception in another law for pure speech by a human rights group. "Activists" in one case; "restraintists" in the other.

The liberal Justices, on the other hand, were more than willing to subordinate expressive political activity to very debatable campaign finance reform (in *Citizens United*). But they (minus Stevens) were unwilling to curb expressive activity in the government's efforts to fight international terrorism. Those Justices would uphold a law restricting domestic political activity, but would curtail a law restricting activity with foreign terrorists. "Restraint" in one case; "activism" in the other.

Yes, there are good arguments--as well as bad ones--for the positions taken by the conservative Justices in both cases. Same for the positions of the liberals. And yes, that's typically the way it is with cases before the Supreme Court. Especially these highly charged cases. That's one of the very reasons the cases are highly charged.

That being said, what can hardly be gainsaid *[Always liked that word, no doubt for some odd reason, when "denied" would do just fine.]* is that the conservative Justices don't always defer to the judgments of the other branches. That is, the other, more accountable, more democratic (with a small "D"), elected, more representative branches.

The conservative Justices are not above substituting their own judgments for that of the other branches, even in close cases. Even when the law passed by Congress and signed by the President is arguably constitutional. They are not above invalidating a law whose constitutionality is a close call. Exactly what they and conservative politicians decry as illegitimate judicial activism. Yes, that's what they did when they invalidated the restrictions on corporate political spending at issue in *Citizens United*. It was a close call, but they didn't give Congress and the President the benefit of the doubt.

And the liberal Justices are just as ready to suddenly adopt the mantra of judicial restraint. Congress passed the law, the President signed it, the Court should respect their judgments. Well, that is, at least when the laws enacted reflect politically liberal values, interests, and policies. Like campaign finance reform. Like curbing corporate influence. Then judicial restraint.

Something else that cannot be gainsaid: the conservative Justices are not always "strict constructionists," sticking to the text of the Constitution and to its original meaning. ***Spending*** to fund a film, by a ***corporation***, is hardly free ***speech*** within the strict text or original meaning of the First Amendment. Only a very expansive interpretation of free speech can get to corporate political spending. That's the kind of interpretation supposedly antithetical to conservative Justices and politicians. But that's exactly the kind of interpretation employed by the conservative Justices in *Citizens United.*

And the liberal Justices are not always opposed to "strict construction." Well, not when strict construction of the First Amendment would help deny constitutional protection to disfavored corporate political activity. No, they are ready to adopt a literalistic and cramped reading of free speech in order to support restrictions on activity that is expressive, political, and part of the election process--but engaged in by persons joined in a corporate entity.

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When it comes to a law that limits the activities of a human rights group, however, the roles are reversed. In *Humanitarian Law Project*, the conservative Justices were back to deferring to the other branches and limiting the freedom of speech. In that case, it was a liberal internationalist group, not an American corporation, that was seeking free speech protection. And the law at issue was part of the "war on terror," not some liberal campaign finance reform.

So while *Citizens United* was about corporation "speech" versus campaign finance reform, *Humanitarian Law Project* was about a liberal human rights group's speech versus the "war on terror." It's not difficult to see where the sympathies of conservatives--Justices as well as politicians--would lie in the two cases. Likewise, it's not difficult to see why conservatives--Justices as well as politicians--sided with free speech in *Citizens United*, but not in *Humanitarian Law Project.*

As for the liberals--Justices as well as politicians--it's just the reverse. Corporate "speech," no. Campaign finance reform, yes. Liberal human rights group's speech, yes. "War on terror" restrictions, no--at least not on speech.

Forget activism and restraint, loose and strict interpretation, deference or not to the other branches. In *Citizens United* and *Humanitarian Law Project*--as in most of the close, highly charged cases--it's ideology, political philosophy that usually determines the Justices' votes and, ultimately, the Court's decisions.

"Just apply the law!" That only begs the question in these cases. The law is either indeterminate, or there's law on both sides, or there's no law on point. That's why ideology and political philosophy tip the scales in these cases. That's just another way of saying that the Justices' views on Law, on a free society, on the necessary balance between government and authority, between order and liberty, etc., ultimately determine their votes in these difficult cases.

In the next post, we'll look at 2 more such cases. These are the 2 other cases among last term's highlights dealing with free speech and related matters. Following that, we'll have a few graphs to help visualize what the Court decided and how the Justices voted--i.e., how they behaved in these cases. Then, in the next several posts, we'll do the same for other categories of cases, including criminal law and church and state.

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SATURDAY, JANUARY 8, 2011

Supreme Court: Highlights...(Part 10--Even More Criminal Law: "Honest Services" and Guns [continued])

In *McDonald v. Chicago*, the Court ruled that the recently recognized 2d Amendment right of ***individuals*** to keep and bear arms was applicable against state and local laws, not only against federal ones. This is the last of the 5 criminal law-related cases among the "Top Ten" highlights of last term.

The Court had previously decided, in *D.C. v. Heller* (2008), that the 2d Amendment guarantees the firearm right to individuals, not simply to states to form and maintain organized militias. But because the Bill of Rights, ratified in the early years of the Republic, provides protections only against the federal government, the question remained whether such an ***individual*** firearm right was sufficiently fundamental to be a protection against state and local government infringement as well. That is, speaking constitutionally, whether the firearm right is part of the "liberty" that is guaranteed against state governments and their subsidiaries by the 14th Amendment--one of the Amendments ratified after the Civil War.

In *McDonald*, a 5-4 majority answered in the affirmative. State and local gun control laws throughout the country are now subject to close constitutional scrutiny. Undoubtedly, many of them will be casualties of the *McDonald* ruling.
Previous posts on **New York Court Watcher**, written shortly after the *McDonald* decision was rendered in June last year, discussed that case and the question of the firearm right itself. *(See Supreme Court: Gun Right Decision #2--A Fundamental Right & A Blatantly Ideological Court, June 30, 2010; Guns & Rights & The States (Some Final Q's from the Kagan Hearings, Part 7), Aug. 4, 2010; Guns & Rights & The States (Concluding Q's from the Kagan Hearings, Part 8), Aug. 18, 2010.)*

I made no bones about the fact that I believe the Court majority was correct. At least, that is, to the extent that an individual right to bear arms was considered basic to a free society by the Founders and Framers, that the American people have largely continued to believe the same, and that, therefore, it should be protected by the 14th Amendment against state and local government violation.

Not an absolute right, of course. No right--explicit or implicit in the Constitution--has ever been deemed absolute, or could sanely be treated as such. But it is simply very difficult to deny the American constitutional heritage of a right of individuals, not just state governments, to keep and bear arms as a necessary protection of

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- IA SupCt

freedom. Whatever the specific language or intent of the 2d Amendment itself, the fundamental heritage of an ***individual*** firearm right in this country can hardly be dismissed.

I also discussed at length the Justices' voting on the issue. How they mostly contravened their respectively avowed principles about constitutional interpretation and the judicial role. You know: avowed believers in restraint voting like activists. And vice-versa. Avowed believers in individual rights voting like majoritarians. And vice-versa. Avowed believers in strict interpretation voting like loose constructionists. And vice-versa. Avowed believers in fidelity to precedent voting like constitutional reformers. And vice-versa.

Since that was discussed at length (*ad nauseam* ?) in those previous posts, we need not spend much time on it here. Well not the *exact* same thing, and not *too* much time. Just a few comments.

Let's recall how the Justices voted. Here's the breakdown pictorially.

The 4 conservative Justices (Roberts, Scalia, Thomas, and Alito) voted to "incorporate" the firearm right into the 14th Amendment's protection of "liberty." That makes the right applicable against state and local government laws. The conservatives won because they were joined by swing-vote Justice Kennedy.

The liberal Justices (Stevens, Ginsburg, Breyer, and Sotomayor) voted that the firearm right was not part of the "liberty" guaranteed by the 14th Amendment. If they had won, state and local governments would not be bound by the Constitution to honor any firearm right. Those governments would be entirely free under the Constitution to enact gun control laws. (Gun rights might be protected under their own state constitutions, but there would be no ***federal*** constitutional protection.)

Most states, as well as many of their cities, have enacted gun control laws. Because of the *McDonald* ruling, all of those laws are now subject to constitutional scrutiny. All of them will now have to pass the test of whether they are sufficiently necessary, as well as sufficiently well drafted (i.e., narrowly focused and not too burdensome), to outweigh the firearm right.

So why do states and localities have gun control laws? That might seem obvious. But it will help this discussion to spell it out.

States and localities have enacted these laws as part of their efforts to combat crime. To help reduce violent street crime. To help reduce the most violent domestic abuse. To help reduce attacks upon police. To reduce shootings and reduce killings. There are other reasons, e.g., to

- The Virginia Judiciary
- Judge Pigott on Medical Malpractice

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- The Formation and Current State of the United Nations
- Child Soldiers: More Victims than Perpetrators

- Immigration
- International Law
- Interrogations
- Interstate Commerce Power
- Intro to NYCW
- Jackson_Robert
- Jefferson_Thomas
- Jerkens_H. Allen
- Jewish Seat (NY COA)
- Jones_Theodore
- Journalist Privilege
- Joyce_Sister Maureen
- Judicial Activism
- Judicial Decisionmaking
- Judicial Experience
- Judicial Federalism
- Judicial Output
- Judicial Restraint
- Judicial Selection
- Juvenile Justice
- Kagan_Elena
- Kaye_Judith
- Kennedy_Anthony
- Lethal Injection
- Levine_Howard
- Lippman_Jonathan
- Literalism
- Madison_James
- Malone_Bernard
- Marshall_Margaret
- Marshall_Thurgood
- Martin_Trayvon
- Mayberger_Robert
- McGregor
- Minors/Children
- Miranda
- Mullarkey_Mary
- Napravnik_Rosie
- Nomination
- Non-Establishment of Religion
- NY Commission on Judicial Nomination
- NY Court of Appeals
- NY Court of Appeals (2012-13)
- NY Ct Workload
- O'Connor_Sandra Day
- Obama and SupCt
- Obamacare

help reduce firearm accidents. But largely, gun control laws are law enforcement tools. Reducing the proliferation and access to guns in order to reduce crimes committed with guns.

Let's consider that in terms of the traditional ideological spectrum. Law-and-order versus individual-rights. Crime control versus due process (to use Herbert Packer's classic criminal justice models). Safe streets versus the right to be let alone. War on crime versus freedom from government intrusion. Community interests versus personal liberty.

Yes, conservative versus liberal. Right wing versus left wing. Republican versus Democrat. And yes, not only the ideological division among the public, but among the Justices as well. Cases dealing with confessions. With the death penalty and punishment generally. With searches. With arrests. With rules of evidence. With prosecutorial latitude. With legislative prerogative. Such cases evoke that divide.

Yes, in case after case, we know how conservatives, Republicans, the law-and-order crowd generally side on these issues. We know how the liberals, Democrats, the right-to-be-let-alone and rights-of the accused crowd generally side. And we know that the Justices generally divide into the same camps. There's the conservative, crime-control, pro-law enforcement camp. There's the liberal, due-process, pro-civil liberties camp. We know how the Justices generally vote on these issues. We know how they generally divide.

But when it comes to gun control laws enacted as crime fighting tools, the sides are reversed. Among the public and among the Justices.

In the more rural areas of the country, in the South, the Southwest, much of the Midwest and Mountain States, the Bible Belt--i.e., the more conservative, Republican areas of the country--the right to bear arms is near sacred. It outweighs the crime-combating purposes of gun control laws. In the more urban areas of the country, in the educational and cultural centers, in the Northeast, much of the Pacific Coastal and North Central States--i.e., the more liberal, Democratic areas of the country--the right to bear arms is much more lightly regarded (indeed, almost with contempt). It is easily outweighed by the need to reduce armed violence.

And again, the same for the Justices. Those who generally vote like conservative Republicans, strongly support the firearm right. Those who generally vote like liberal Democrats, strongly support gun control.

The conservative Justices who generally vote pro-law enforcement in criminal cases, vote against law enforcement efforts when it comes to the firearm right versus gun control. I.e., they vote just like political Republicans in both criminal cases and gun control cases. The liberal Justices who generally vote pro-individual rights in criminal cases, vote against individual rights when it comes to the firearm right versus gun control. I.e., those Justices vote just like political Democrats in both criminal cases and gun control cases.

There is consistency in the seeming inconsistencies. There is a common denominator in the divide. But it's not the nonsense we usually hear.

The consistency in the divide is not government authority versus individual rights. It's not judicial restraint versus activism. It's not judicial elitism versus the wishes of the majority. It's not strict versus loose interpretation. It's not federal power versus local governance. It's

- Open Fields
- Pataki_George
- Pellucidly Clear
- Pigott_Eugene
- Plain Touch
- Powell_Lewis
- Presidential Power
- Presidential Powers
- Proposition 8
- Prosecutorial Ethics
- Racial Discrimination
- Read_Susan
- Reasonable Doubt
- Recess Appointments
- Rehnquist_William
- Religion and the Law
- Right to Counsel
- Right to Silence
- Rivera_Jenny
- Roberts Court
- Roberts_John
- Rogers_Chase
- Same-Sex Marriage
- Saratoga Highlights
- Scalia and Thomas
- Scalia_Antonin
- Search and Seizure
- Sears_Leah Ward
- Second Amendment
- Self-incrimination
- Sex Discrimination
- Simons_Richard
- Smith_Malcolm
- Smith_Robert
- Sotomayor_Sonia
- Souter_David
- Souter's possible replacements
- Standing
- State Constitutional Commentary
- State Constitutional Law
- State Courts
- Statutory Interpretation
- Stein_Leslie
- Stevens_John Paul
- Stevens' possible replacements
- Stop and Frisk
- Strict Scrutiny

not about safe streets versus personal liberties. It's not about any of this or about so many related matters. It's not even about conservative principles (limited government) versus liberal ones (government for the general welfare).

It's about ideological (as in perspectives, presumptions, and partisanship) and emotional (as in sympathies, familiarities, comfort, and other feelings) leanings. The 4 conservative Justices have much of that in common. The same for the 4 liberal Justices.

Distilled--or, rather, reduced--to the bare-bones essence, it's this: Some of the Justices vote just the way conservative Republican politicians would vote. On most criminal law issues and on gun rights. Some of the Justices, like liberal Democratic politicians.

Anyone who reads this blog is familiar with the following refrain: sorry, but there's no Wizard of Oz. Let alone 9 of them. The Justices are like the rest of us. They are not disembodied intellects divining the meaning of pre-existing law or transcendental truths. They have their prejudices, presumptions, biases, beliefs, leanings. Their decisions are greatly affected by that. Just as our own decisions are.

The Court in the *McDonald* case was deeply divided. The vote was 5-4. And yet all 9 Justices were so certain that they were right and that those on the other side were wrong. That's not open-minded, unbiased, constitutional exegesis. That's not disinterested, selfless wisdom. That's ideology and emotion. That's what drove the vote on the right to bear arms at issue in *McDonald*--just as it has on other close, controversial, politically-charged, hot-button issues in other cases.

In the next post, we'll graph the voting that we've seen in the 5 criminal law-related cases in this series. And in the interests of full disclosure, we'll even graph how I would have voted.

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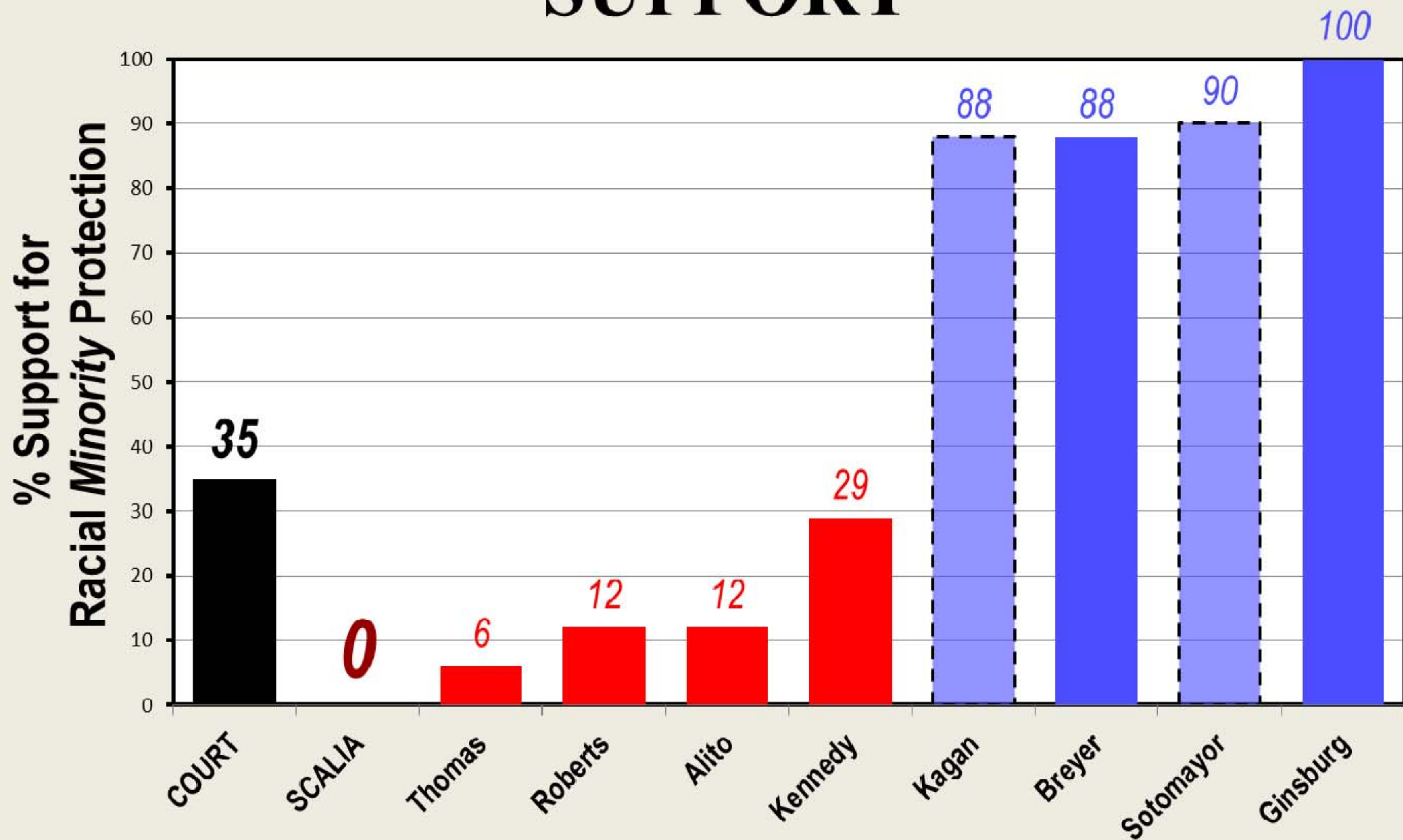
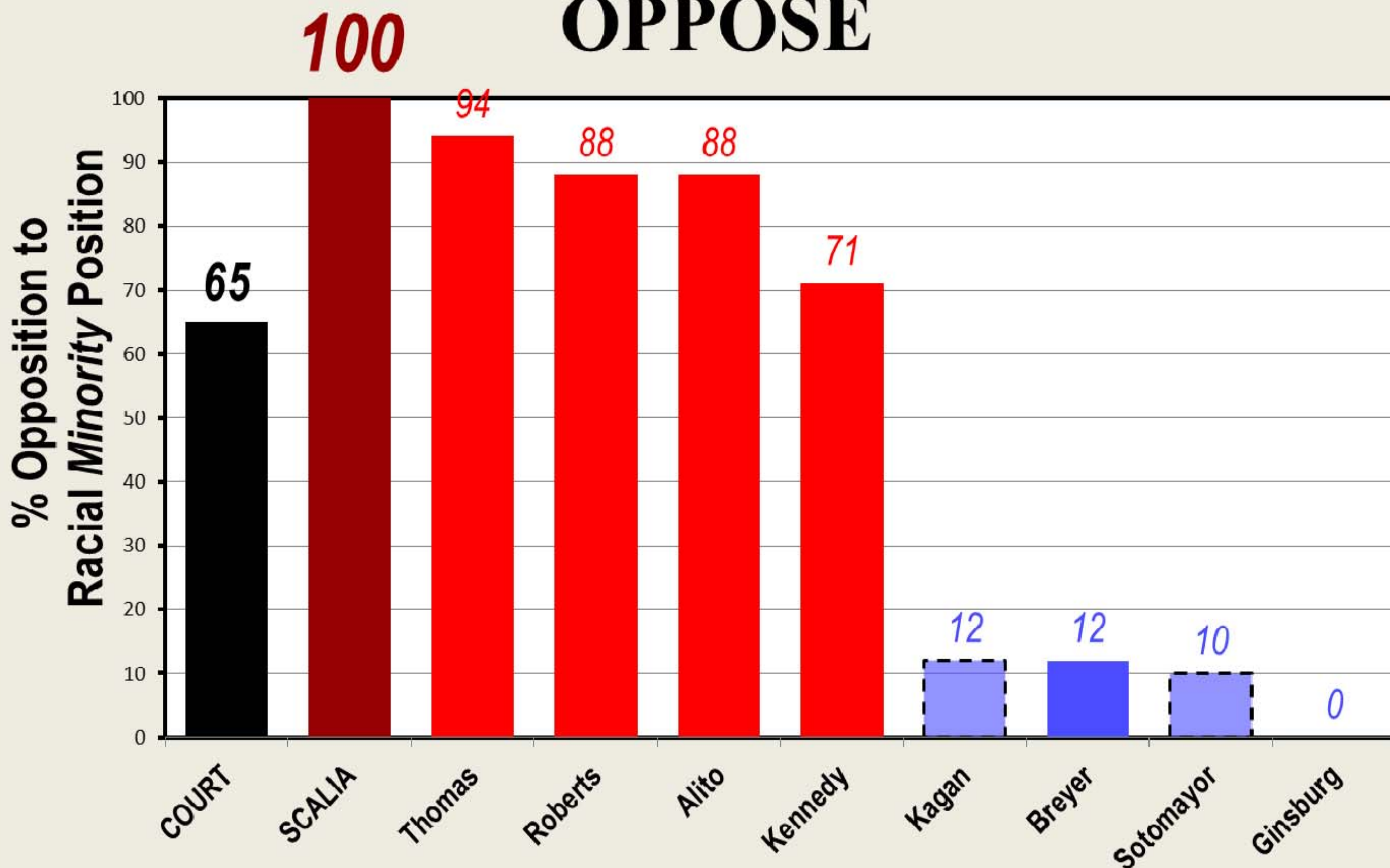

Racial Minority Protection Position
SUPPORT
% Support for
Racial Minority Protection
100
90
80
70
60
50
40
30
20
10
0
35
0
6
12
12
29
88
88
90
100
COURT
SCALIA
Thomas
Roberts
Alito
Kennedy
Kagan
Breyer
Sotomayor
Ginsburg
Decisions/Voting in divided cases
(% favoring racial minority protection position, 2005T thru 2014T)
Source: Vincent M. Bonventre, Albany Law School 5/16



Racial Minority Protection Position
OPPOSE
% Opposition to Racial Minority Position
100
90
80
70
60
50
40
30
20
10
0
65
100
94
88
88
71
12
12
10
0
COURT
SCALIA
Thomas
Roberts
Alito
Kennedy
Kagan
Breyer
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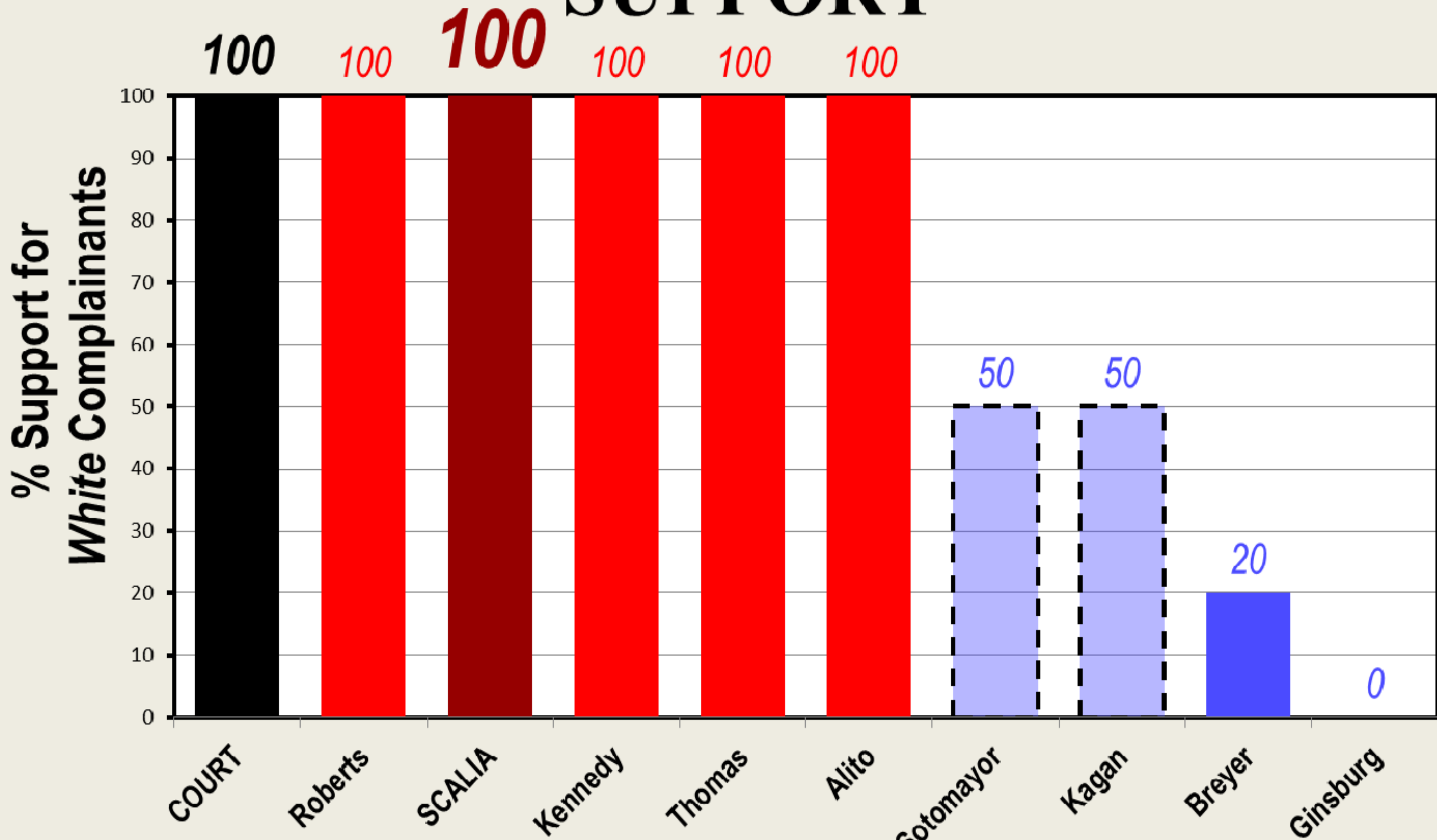

White Complainants
SUPPORT
100
100
100
100
100
100
50
50
20
0
% Support for
White Complainants
100
90
80
70
60
50
40
30
20
10
0
COURT
Roberts
SCALIA
Kennedy
Thomas
Alito
Sotomayor
Kagan
Breyer
Ginsburg
Decisions/Voting in *divided* cases
(% favoring claims brought by Whites, 2005T thru 2014T)
Source: Vincent M. Bonventre, Albany Law School 5/16