U.S. Supreme Court Update: October 2016 Term

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Neil S. Siegel
David W. Ichel Professor
Duke Law School
siegel@law.duke.edu

I. First Amendment

A. Speech

Matal v. Tam, 137 S. Ct. 1744 (2017) (8-0) (Alito). The disparagement provision of the Lanham Act, 15 U.S.C. 1052(a), which provides that no trademark shall be refused registration on account of its nature unless, *inter alia*, it "[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute," is facially unconstitutional under the Free Speech Clause because it offends the bedrock First Amendment principle that speech may not be banned on the ground that it expresses ideas that offend.

Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (8-0) (Roberts). This Court's review is limited to whether New York General Business Law Section 518 is unconstitutional as applied to the particular pricing scheme that, before this Court, petitioners, five New York businesses and their owners, have argued they seek to use: a single-sticker regime, in which merchants post a cash price and an additional credit card surcharge. Section 518 prohibits the pricing regime petitioners wish to employ. Moreover, in regulating the communication of prices rather than prices themselves, Section 518 regulates speech. On remand, the court of appeals should determine whether Section 518 survives First Amendment scrutiny as a speech regulation.

Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (8-0) (Kennedy). A 2008 state statute, which makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages," impermissibly restricts lawful speech in violation of the First Amendment.

B. Religion

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (7-2) (Roberts). The Free Exercise Clause prohibits a state from denying an otherwise qualified religious entity a public benefit (here, grants to help in the purchase of rubber playground surfaces made from recycled tires) solely because of its religious character. This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

II. Fourth Amendment

Manuel v. City of Joliet, 137 S. Ct. 911 (2017) (6-2) (Kagan). Elijah Manuel may challenge his pretrial detention on Fourth Amendment grounds. On remand, the U.S. Court of Appeals for the Seventh Circuit should determine the accrual date of Manuel's Fourth Amendment claim, unless it finds that the city of Joliet has previously waived its timeliness argument.

County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (8-0) (Alito). The Fourth Amendment provides no basis for the U.S. Court of Appeals for the Ninth Circuit's "provocation rule," which makes an officer's otherwise reasonable use of force unreasonable if the officer "intentionally or recklessly provokes a violent confrontation" and "the provocation is an independent Fourth Amendment violation."

III. Takings Clause

Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (5-3) (Kennedy). In this regulatory takings case, the Court of Appeals of Wisconsin was correct to analyze the lot owners' property as a single unit in assessing the effect of the challenged governmental action on the "parcel as a whole."

IV. Racial Discrimination and the Sixth Amendment Right to a Fair Trial

Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (5-3) (Kennedy). When a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

V. Ineffective Assistance of Counsel

Buck v. Davis, 137 S. Ct. 759 (2017) (6-2) (Roberts). The U.S. Court of Appeals for the Fifth Circuit exceeded the limited scope of analysis for a certificate of appealability, which, by statute, follows a two-step process: an initial determination whether a claim is reasonably debatable, and, if so, an appeal in the normal course. In addition, petitioner Duane Buck has demonstrated ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Finally, the district court's denial of Buck's motion under Federal Rule of Civil Procedure 60(b)(6) was an abuse of discretion.

VI. Death Penalty

Moore v. Texas, 137 S. Ct. 1039 (2017) (5-3) (Ginsburg). By rejecting the habeas court's application of current medical diagnostic standards regarding intellectual disability and by instead following the standard under its own decision in Ex parte Briseno, 135 S. W. 3d 1 (2004), including the nonclinical Briseno factors, the decision of the Texas Court of Criminal Appeals does not comport with the Eighth Amendment and U.S. Supreme Court precedents.

VII. Civil Rights

A. Voting Rights

Bethune-Hill v. Virginia State Board of Elections, 137 S. Ct. 788 (2017) (7-1) (Kennedy). The district court used an incorrect legal standard in determining that race did not predominate in 11 of 12 new state legislative districts drawn by the Virginia State Legislature after the 2010 census. In addition, the district court's judgment regarding District 75—that the legislature had good reason to believe that a 55 percent target for black voting-age population was necessary to avoid diminishing the ability of black voters to elect their preferred candidates, which at the time would have violated Section 5 of the Voting Rights Act of 1965—is consistent with the basic narrow tailoring analysis explained in Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015).

Cooper v. Harris, 137 S. Ct. 1455 (2017) (5-3) (Kagan). North Carolina's victory in a similar state-court lawsuit does not dictate the disposition of this case or alter the applicable standard of review. In addition, the district court did not err in concluding that race furnished the predominant rationale for District 1's redesign and that the state's interest in complying with the Voting Rights Act of 1965 could not justify that consideration of race. Finally, the district court also did not clearly err by finding that race predominated in the redrawing of District 12.

B. Housing Discrimination

Bank of America Corp. v. City of Miami, 137 S. Ct. 1296 (2017) (5-3) (Breyer). The city of Miami is an "aggrieved person" authorized to bring suit under the Fair Housing Act (FHA). In addition, the court of appeals erred in concluding that the city's complaints—charging that the banks engaged in discriminatory conduct that led to a disproportionate number of foreclosures and vacancies in majority-minority neighborhoods, which diminished the city's property-tax revenue and increased the demand for police, fire, and other municipal services—met the FHA's proximate-cause requirement based solely on the finding that the city's alleged financial injuries were foreseeable results of the banks' misconduct. Proximate cause under the FHA requires "some direct relation between the injury asserted and the injurious conduct alleged." The lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the city's claims for lost property-tax revenue and increased municipal expenses.

VIII. Equal Protection—Gender Discrimination

Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (6-? / 8-0) (Ginsburg). The gender line that Congress drew in Section 1409(c) of the Immigration and Nationality Act—which creates an exception for an unwed U.S.-citizen mother, but not for such a father, to the physical-presence requirement for the transmission of U.S. citizenship to a child born abroad—violates the equal protection component of the Fifth Amendment's Due Process Clause (6-?). The Supreme Court is not, however, equipped to convert Section 1409(c)'s exception into the main rule displacing other relevant provisions of the law; it falls to Congress to select a uniform prescription that neither favors nor disadvantages any person on the basis of gender (8-0).

IX. Sexual Orientation Minorities

A. Names of Same-Sex Couples on Birth Certificates

Pavan v. Smith, 137 S. Ct. 2075 (2017) (6-3) (per curiam). When Arkansas law requires the name of the male spouse of a new mother to appear on the child's birth certificate regardless of his biological relationship to the child, the state may not, consistent with Obergefell v. Hodges, 135 S. Ct. 2584 (2015), decline to extend that rule to similarly situated same-sex couples by refusing to issue birth certificates that include the female spouses of women who give birth in the state.

B. Transgender Bathroom Access

Gloucester County School Board v. G.G., 137 S. Ct. __ (2017) (N/A). The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.

X. Federal Jurisdiction and Procedure

Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178 (2017) (8-0) (Kagan). When a federal court exercises its inherent authority to sanction bad-faith conduct by ordering a litigant to pay the other side's legal fees, the award is limited to the fees that the innocent party incurred solely because of the misconduct.

Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017) (8-1) (Alito). California courts lack specific jurisdiction to entertain the claims in this case brought by plaintiffs who are not California residents, because there is an insufficient connection between the forum and the claims at issue.

XI. Statutory Interpretation: Justice Gorsuch's First Opinion

Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718 (2017) (9-0) (Gorsuch). A company may collect debts that it purchased for its own account without triggering the statutory definition of a "debt collector" under the Fair Debt Collection Practices Act.

XII. President Trump's Travel Ban

Trump v. International Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam) (6-3). Both of the federal government's petitions for certiorari are granted and the cases are consolidated for argument. The government's applications to stay the injunctions entered by the lower courts are granted to the extent the injunctions prevent enforcement of § 2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States. The injunctions entered by the lower courts are left in place with respect to respondents and those similarly situated.