



WAITING FOR GORSUCH

OCTOBER TERM 2016

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IN MANY WAYS, October Term 2016 was unlike any other in recent memory. From the first Monday in October until the start of the April argument calendar, there were only eight Justices on the bench. The vacancy appears to have affected every aspect of the Court's work – they took and decided fewer cases, and they seemed to avoid matters that were likely to lead to ideologically divided 4-4 rulings. There were no cases about the most controversial issues, like abortion, affirmative action, or gun rights. In fact, the Court was unanimous in over 50% of its decisions – not because the Justices have suddenly found great consensus, but because of the types of matters on the docket. But some things did not change: Like previous Terms during Chief Justice Roberts's tenure, it was really the Kennedy Court, as Anthony Kennedy was in the majority in 97% of the decisions – more than any other justice. Even focusing just on the non-unanimous cases, Kennedy was in the majority in 93% of cases, far more than any other justice.

The most important development during the Term was the nomination and confirmation of Justice Neil Gorsuch. The term began with many expecting Hillary Clinton to be President and Chief Judge Merrick Garland, or perhaps someone even more liberal, replacing Justice Antonin Scalia. It ended on Monday, June 26, with Justice Gorsuch authoring or joining a

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number of very conservative opinions that left no doubt that he will be on the far right of the Court.¹ In Gorsuch's few months on the bench, he consistently joined the most conservative justices, including voting 100% of the time with Justice Clarence Thomas.

The most important rulings of the Term, summarized below, involved race and free exercise of religion. And the Term ended with a bang – a temporary ruling on President Trump's travel ban – that is a sign of the big things to come next Term.

RACE

Race was at the core of some of the most significant decisions, arising in a number of different areas of constitutional law. Twice this Term, the Court spoke powerfully about the need to eradicate the taint of racism from criminal trials. Hopefully, these decisions reflect the Court's increased sensitivity to how racism infects virtually every aspect of the criminal justice system.

In *Buck v. Davis*, the Court concluded that Duane Buck had received ineffective assistance of counsel where his defense lawyer called an expert who made racist statements in his report and in court.² A Texas jury convicted Buck of killing two people, and at the penalty phase, the jury considered whether to impose the death penalty. The initial question for them was whether Buck posed a future danger. At the time of Buck's trial, a Texas jury could impose the death penalty only if it found – unanimously and beyond a reasonable doubt – “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”

¹ See, e.g., *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (Thomas, J., concurring in part and dissenting in part) (arguing, in an opinion joined by Justice Gorsuch, that the entire Trump travel ban, *see infra*, should be able to go into effect); *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (disagreeing with a per curiam decision holding that Arkansas must allow the spouse of a lesbian mother to have her name on a child's birth certificate); *Trinity Lutheran Church of Columbia, Missouri v. Comer*, 137 S. Ct. 2012, 2025 (2017) (Gorsuch, J., concurring in part) (refusing to join a footnote in Chief Justice Roberts' majority opinion limiting the scope of a holding in favor of a religious institution's Free Exercise claim and joining Justice Thomas in urging reconsideration of a prior precedent adverse to religious institutions).

² 137 S. Ct. 759 (2017).

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Buck's lawyer called Dr. Walter Quijano as an expert. Dr. Quijano had been appointed by the presiding judge to conduct a psychological evaluation. In determining whether Buck was likely to pose a danger in the future, Dr. Quijano considered seven "statistical factors." The fourth factor was "race." His report read: "4. Race. Black: Increased probability. There is an overrepresentation of Blacks among the violent offenders."³

Even though the report said Buck was more likely to be dangerous because of his race, the defense counsel called Dr. Quijano as a witness. On direct examination from Buck's lawyer, Dr. Quijano stated that certain factors were "know[n] to predict future dangerousness," and he identified race as one of them. On cross-examination by the prosecutor, Dr. Quijano repeated this assertion.

Buck was sentenced to death. His conviction and sentence were affirmed on appeal and his state and federal habeas corpus petitions were denied. In 2014, Buck filed a motion to reopen his sentence, claiming ineffective assistance of counsel based on his lawyer's calling Dr. Quijano as a witness. The district court denied the petition, concluding that Buck could not show that he was prejudiced because the jury likely would have sentenced him to death even without Dr. Quijano's testimony.

In a 6-2 decision, with the Chief Justice writing for the majority, the Court found that Buck had received ineffective assistance of counsel. The Court wrote: "It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race. No competent defense attorney would introduce such evidence about his own client."⁴ The Court also dismissed the district court's finding of no prejudice, stating that "when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses."⁵ Finally, and perhaps most importantly, the Court emphatically stated that "it is inappropriate to allow race to be considered as a factor in our criminal justice system."⁶

³ *Id.* at 768.

⁴ *Id.* at 775.

⁵ *Id.* at 777.

⁶ *Id.* at 779.

In *Pena-Rodriguez v. Colorado*, the Court held that a jury verdict can be impeached based on alleged racist statements by a juror during jury deliberations.⁷ Miguel Angel Pena-Rodriguez was convicted of sexually assaulting his two teenage sisters. After the trial was over and the jury was dismissed, two of the jurors described a number of biased statements made by a third juror. According to the reporting jurors, the third juror said that he “believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.” The third juror also allegedly said, “I think he did it because he’s Mexican and Mexican men take whatever they want,” and claimed that in his experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” Finally, the reporting jurors recounted that the third juror disbelieved the defendant’s alibi witness because, among other things, the witness was “an illegal,” even though the witness testified that he was legally in the United States.⁸ Armed with these affidavits, defense counsel moved for a new trial. The trial court denied the motion because under Colorado law (like federal law), the actual deliberations that occur among the jurors are protected from inquiry. The Colorado Supreme Court affirmed.

In a 5-3 decision, the Supreme Court reversed. Justice Kennedy wrote for the majority, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Kennedy reiterated the need to eradicate considerations of race from the criminal justice system and concluded that a hearing must be held when there is evidence of racial bias in jury deliberations: “[T]he Court now holds that where a juror makes a clear statement that indicates 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.”⁹

Another important case about race, *Cooper v. Harris*, arose in a very different context: the use of race in drawing election districts.¹⁰ (The Court

⁷ 137 S. Ct. 855 (2017).

⁸ *Id.* at 862.

⁹ *Id.* at 869.

¹⁰ 137 S. Ct. 1455 (2017).

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previously held that, except in the most extraordinary circumstances, the government cannot use race in drawing districts, even where its goals are not race-based, but partisan.) The composition of the Court's majority was unusual: It was a 5-3 decision, with Justice Elena Kagan writing for the majority, joined by Justices Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor. Rarely in his 26 years on the Court has Justice Thomas joined with the liberal justices to create a majority. The Court's decision will have important political consequences, especially in Southern states.

To understand the decision, a bit of history is helpful. The Supreme Court has decided many cases addressing when the government may use race in drawing election districts, and great confusion developed in the law. In the 1990s, the Court considered a number of cases where governments factored race into their deliberations to create majority African-American or Hispanic electoral districts, and so increase political power for racial minorities. In a series of 5-4 rulings split along ideological lines, the Court's conservative Justices disapproved of this practice.¹¹ Reflecting their opposition to all forms of affirmative action, they held that the government cannot use race as the predominant factor in drawing election districts, even where it had benevolent aims, unless it met the very heavy burden of showing that its action was necessary to achieve a compelling government purpose.

But in 2001, the Court made the law in this area far more confusing when it held that the government *may* use race in drawing election districts by treating it as a proxy for political party affiliation.¹² In *Easley v. Cromartie*, the Court held that the North Carolina legislature could use race as a way of identifying who was likely to vote for Democratic candidates because African-Americans in that state overwhelmingly voted for Democratic candidates. This holding reflected that partisan gerrymandering – or drawing districts to maximize safe seats for the political party that controls the legislature – is permissible, while racial gerrymandering is not.

¹¹ See, e.g., *Miller v. Johnson*, 514 U.S. 1002 (1995), *Shaw v. Reno*, 509 U.S. 630 (1993) (government must meet strict scrutiny if it uses race as the predominant factor in drawing election districts).

¹² *Easley v. Cromartie*, 532 U.S. 234 (2001).

Since then, the lower courts and the Supreme Court have struggled with how to decide whether electoral districts are based on race or party. Further, the political context of litigation over the use of race in drawing election districts has changed greatly over the last 25 years. In the 1990s, such litigation involved challenges to the use of race to create majority-minority districts to increase minority electoral representation. The liberal Justices generally favored this practice and the Court's conservative majority disapproved. Now, however, the cases increasingly involve the use of race to achieve partisan gerrymandering that benefits Republicans, including by packing African-Americans into fewer election districts, as happened here.

Cooper involved two congressional districts in North Carolina, which were drawn to create an African-American majority. As to one of those, the state argued that it had looked to race as a proxy for political party and that it had engaged in permissible partisan gerrymandering by seeking to maximize congressional seats for Republicans. Justice Kagan, writing for the majority, concluded that race can rarely, if ever, be used in drawing election districts, even where the government's goal is giving an electoral advantage to the incumbent political party: "If legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests . . . their action still triggers strict scrutiny. In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics."¹³

It is striking that several of the conservative Justices who usually condemn government decisions based on race – John Roberts, Anthony Kennedy, and Samuel Alito – did not agree with the Court's decision to strike down the consideration of race. But Clarence Thomas, perhaps the staunchest opponent to the government's use of race in decision-making, joined with the liberals to create the majority.

This decision marks a very significant change in the law: Racial gerrymandering can no longer be justified on the ground that it is a proxy for political party affiliation. Courts need no longer engage in the impossible inquiry of whether it is race or party that caused the legislature to draw election districts. This decision will also matter enormously in voting liti-

¹³ *Cooper*, 137 S. Ct. at 1492 n.7.

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gation. In many states, especially in the South, predominantly Republican legislatures use race in drawing election districts and justify the practice by saying that they are acting to help their political party, not discriminating against racial minorities. But the Court's decision in *Cooper v. Harris* should end this practice. The Court's ruling will provide a constitutional basis for challenging redistricting in many states and should create a much fairer election process.

Finally, the most important free speech case of the year, *Matal v. Tam*, also involved an issue of race.¹⁴ The case involved a dance-rock group comprised of Asian-Americans that wanted to call themselves "The Slants" – a derogatory term often directed at Asian-Americans. Simon Tam, the leader of the band, said the goal was to appropriate this term back to the Asian community. The band's trademark registration was denied on the ground that its name is a term disparaging to Asians. The Lanham Act, the statute governing registration of trademarks, prohibits registration of a trademark that "[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."¹⁵

The Court unanimously held that this provision of the Lanham Act was unconstitutional, though it did so in two separate opinions, by Justices Kennedy and Alito, that were each joined by three other Justices. The opinions emphasized that the government cannot regulate speech or deny benefits for speech on the ground that it is offensive, even deeply offensive. All eight Justices agreed that the law was impermissible viewpoint discrimination: The Slants could have registered a trademark for a name of a band that was favorable to Asian-Americans, but not derogatory.

Besides meaning that the Washington Redskins can continue to register their logo, the case likely will lead to challenges to other provisions of intellectual property law that can be seen as viewpoint discrimination. For instance, there is a provision of the Lanham Act that prohibits registration of trademarks that are "scandalous." The Court also was clear that the government never can attempt to regulate speech based on its offensiveness. Justice Alito, quoting Justice Oliver Wendall Holmes, declared: "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disabil-

¹⁴ 137 S. Ct. 1744 (2017).

¹⁵ 15 U.S.C. § 1052(a).

ity, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”¹⁶

RELIGION

The Supreme Court’s decision on June 26, in *Trinity Lutheran of Columbia, Inc. v. Comer*, is deeply disturbing because it is the first time in history that the Supreme Court has held that the government is constitutionally required to provide assistance to religious institutions.¹⁷ This decision represents a dramatic change in the law that likely is going to require governments to provide much greater support for religious institutions than ever before.

First, the facts: The State of Missouri has a program through which it provides reimbursement grants to schools that install playground surfaces made from recycled tires. The State provides this aid to public and secular private schools, but had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. The policy is based on a provision of the Missouri constitution which prohibits the government from giving aid to religious institutions. A majority of the states have similar provisions in their state constitutions.

Trinity Lutheran of Columbia, a religious school, applied for the aid and was denied. It then filed suit, claiming an infringement of free exercise of religion and an equal protection violation. The Supreme Court, in a 7-2 decision, held that Missouri violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment by denying the school an otherwise available public benefit on account of its religious status. Chief Justice Roberts, writing for the Court, held that Missouri was clearly discriminating against religious institutions in the receipt of this benefit and its law was therefore subject to strict scrutiny under the Free Exercise Clause.

Most Supreme Court cases about aid to parochial schools have focused on whether the government violates the Establishment Clause when it

¹⁶ 137 S. Ct. at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

¹⁷ 137 S. Ct. 2012 (2017).

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chooses to provide a particular type of assistance to religious institutions. Only once before had the Court considered the possibility that the Constitution *compels* government aid to religious institutions – and there the Court emphatically rejected such a requirement. In *Locke v. Davey*, the Court considered a program in the State of Washington that provided college scholarships to students from that state.¹⁸ Joshua Davey wanted to use his Promise scholarship to attend a seminary to be ordained as a minister, but the State refused to grant him a scholarship. Davey, like Trinity Lutheran, sued, claiming the denial violated his free exercise of religion and denied him equal protection. In a 7-2 decision by Chief Justice Rehnquist, the Court rejected Davey’s claim and held that the Government did not violate the Constitution by insisting that its funds be used at secular institutions.

In *Trinity Lutheran*, the Court distinguished *Locke v. Davey* on two grounds. First, the Court said: “Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do – use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is – a church.”¹⁹ Second, the Court said that *Locke v. Davey* involved aid for training a minister, whereas this case concerns assistance for playgrounds. Having distinguished *Davey*, the Court found that Missouri failed to meet strict scrutiny. Chief Justice Roberts concluded his opinion with a powerful statement: “[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.”²⁰

Justice Sotomayor wrote a vehement dissent, joined by Justice Ginsburg, lamenting that the Court’s opinion represented the first time in history the Supreme Court had ever found that the government was required to provide aid to a religious institution.²¹ She described the Framers’ desire to keep people from being taxed to support the religions of others.

The Court’s decision is very troubling. It opens the door to religious institutions suing whenever they are denied any form of aid given to secular institutions. Chief Justice Roberts’ only attempt to address this issue is in

¹⁸ 540 U.S. 712 (2004).

¹⁹ 137 S. Ct. at 2023.

²⁰ *Id.* at 2025.

²¹ *Id.* at 2027 (Sotomayor, J., dissenting).

footnote 3, where he writes: “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.”²² But only three other justices (Kennedy, Alito, and Kagan) joined this footnote. Justices Thomas and Gorsuch wrote separately to say that they did not agree, and stated they instead wanted to overrule *Locke v. Davey*.

I am very skeptical that this holding can or will be limited to aid for playgrounds. The Court’s explicit use of strict scrutiny for the denial of aid to religious institutions will make it very hard to justify treating them differently. Moreover, the Court refused to accept that Missouri had a compelling interest in not using tax dollars to subsidize religious institutions. Chief Justice Roberts’s opinion decrying the denial of aid to religious institutions as “odious” also suggests states will be hard pressed to limit assistance in other areas.

The Court’s purported distinctions of *Locke v. Davey* further suggest the holding will not be limited to playgrounds. As to the first distinction – that Trinity Lutheran was wrongly denied aid because of what it is – that description applies any time the government denies aid to parochial schools. The logic of *Trinity Lutheran* thus would seem to make *any* denial of aid to religious schools (or, for that matter, religious institutions) unconstitutional when assistance is provided to public schools or institutions. This result runs counter to years of historical practice, as governments have long refused to provide faith-based institutions the assistance offered to secular institutions, whether for preschools or drug rehabilitation programs or other social services. Religious institutions could receive the aid only by creating a secular arm. The “charitable choice” movement attempted to change this practice, and the language in Chief Justice Roberts’ opinion suggests that charitable choice may now be a constitutional requirement.

The Court’s other distinction – how the aid is used – is equally troubling. As the Court often has observed, dollars are fungible. The aid at issue may have been provided for playgrounds, but receiving it frees up money for the parochial school to use for other purposes, including religious indoctrination. Previously, in *Zelman v. Simmons-Harris*, the Court held that it was constitutionally *permissible* for the government to allow vouchers to be

²² *Id.* at 2024 n.3.

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used in parochial schools, notwithstanding that they may indirectly result in funding for indoctrination.²³ The Court's decision in *Trinity Lutheran* suggests that the government may be *required* to allow vouchers to be used in parochial schools when they can be used in secular schools. With this distinction, the Court also invited endless line drawing as to which types of aid are like *Trinity Lutheran* and which are like *Locke v. Davey*.

Soon before she left the Court, Justice Sandra Day O'Connor spoke eloquently of the need for the separation of church and state: "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"²⁴ Why indeed? But that is exactly what the Court did in *Trinity Lutheran* in taking a significant step towards dismantling the wall that separates church and state.

THE TRAVEL BAN

The Court's most high profile action occurred at the very end of the Term. On Monday, June 26, the Court agreed to review the legality of President Trump's "travel ban" and allowed part of it to go into effect pending its decision.²⁵

As background, on January 27, 2017, President Trump issued an Executive Order, widely referred to as the travel ban,²⁶ that suspended the refugee program for 120 days, capped the number of refugees at 50,000 instead of 110,000, and barred immigration from Sudan, Syria, Iran, Lybia, Somalia, Yemen, and Iraq for 90 days. The United States Court of Appeals for the Ninth Circuit upheld a preliminary injunction of the ban, concluding that it ordered religious discrimination against Muslims.²⁷

²³ 536 U.S. 639 (2002).

²⁴ *McCreary County, Ky. v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 882 (O'Connor, J., concurring).

²⁵ *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

²⁶ Executive Order No. 13769, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 Fed.Reg. 8977 (2017).

²⁷ *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

President Trump then issued a new Executive Order.²⁸ Like its predecessor, the new Order suspends the entire refugee program for 120 days and caps the total number of refugees admitted this fiscal year at 50,000 instead of 110,000 – but no longer includes Iraq on the list of excluded countries. Also, the new version does not apply to those who have the lawful right to be in the United States, such as those with green cards and visas.

The United States Court of Appeals for the Fourth Circuit, in an en banc decision, affirmed a federal district court injunction preventing the second Executive Order from going into effect.²⁹ The court concluded that the travel ban was based on impermissible religious animus. Soon after, the Ninth Circuit affirmed a different district court injunction, focused on statutory grounds, that held that the ban represented discrimination based on nationality that violates federal law.³⁰ The United States government asked the Court to grant review and lift both of these injunctions.

The Supreme Court granted review in both cases, and partially granted the government’s request to lift the injunctions. Specifically, the Supreme Court held that the travel ban could go into effect “with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States.”³¹ The Court concluded: “Denying entry to such a foreign national does not burden any American party by reason of that party’s relationship with the foreign national. And the courts below did not conclude that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself.”³² The Court came to a different conclusion for those with a bona fide relationship with a person or entity in the United States. But the Court clarified that “[f]or individuals, a close familial relationship is required. . . . As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO-2.”³³

²⁸ Exec. Order No. 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed.Reg. 13209 (2017).

²⁹ International Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017).

³⁰ Hawaii v. Trump, 859 F.3d 754 (9th Cir. 2017).

³¹ 137 S. Ct. at 2087.

³² *Id.* at 2088.

³³ *Id.*

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As a matter of law, this compromise does not make much sense. The key factor in evaluating whether to lift the injunction is supposed to be whether the government has a substantial likelihood of ultimately prevailing on the merits. If the Court concludes, as the lower courts held, that the executive order is religious discrimination or in violation of federal law, then it is invalid as to all. By contrast, if the Court rejects the reasoning of the Fourth and Ninth Circuits, then the travel ban is lawful as applied to all. The Court's ruling on the merits should not turn on whether a person seeking admission to the United States has or does not have a relationship to someone in the country.

CONCLUSION

The legality of the travel ban will be one of the blockbuster cases on the docket for next Term. The Court also will be deciding other important issues, including whether federal courts can invalidate partisan gerrymandering,³⁴ whether a business owner can discriminate against gay and lesbian couples based on his religious beliefs,³⁵ and whether the government must get a warrant to access cell tower information.³⁶ Justice Gorsuch's first full year on the Court thus promises to be momentous. In many ways, October Term 2016 was simply a year of waiting for the ninth justice to be confirmed – a year of waiting for Gorsuch.



³⁴ Gill v. Whitford, *probable jurisdiction noted*, 137 S. Ct. ____ (2017).

³⁵ Masterpiece Cakeshop v. Colorado Civil Rights Commission, *certiorari granted*, 137 S. Ct. ____ (2017).

³⁶ Carpenter v. United States, 137 S. Ct. 2211 (2017).