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Supreme Court

SCOTUS's Left Turn Just a Detour On Long Haul to Conservative Destination

The U.S. Supreme Court just wrapped up its most liberal term in almost 50 years.

There were ''stunning'' victories for liberals on same-sex marriage, the Affordable Care Act, housing discrimination and campaign solicitations, one constitutional law professor told Bloomberg BNA.

Many attribute those victories to the swing-Justice Anthony M. Kennedy.

But in his tenth year leading the high court, Chief Justice John G. Roberts Jr. contributed to these liberal triumphs, too.

Court watchers told Bloomberg BNA that these wins don't indicate that the court is taking a permanent leftward turn.

Each term is a brief jaunt through the court's jurisprudence; one is never seeing the full bird's eye-view.

So while this leg looked good for liberals, conservatives set a course for potentially big victories in coming terms.

The next stop may be what one practitioner called Roberts's long-term project: cutting back on agency deference.

In the Cross Hairs

Timeline of attacks on judicial deference to agency actions:

- Roberts bemoans modern administrative state in *City of Arlington v. FCC*, 81 U.S.L.W. 4299, 2013 BL 132478 (U.S. May 20, 2013) (81 U.S.L.W. 1651, 5/21/13);
- Scalia, Thomas and Alito signal desire to revisit deference owed to agencies' interpretations of their own regulations—so-called Auer deference—in *Perez v. Mortg. Bankers Ass'n*, 83 U.S.L.W. 4160, 2015 BL 61684 (U.S. March 9, 2015) (83 U.S.L.W. 1293, 3/10/15);
- Roberts, Kennedy among justices that refuse to defer to agency in *King v. Burwell*, 83 U.S.L.W. 4541, 2015 BL 202630 (U.S. June 25, 2015) (83 U.S.L.W. 1990, 6/30/15), because issue is too important to be left to IRS;
- Thomas says Chevron deference violates separation of powers in *Michigan v. EPA*, 83 U.S.L.W. 4620, 2015 BL 206164 (U.S. June 29, 2015) (83 U.S.L.W. 2005, 6/30/15).

First Day of School. It was a remarkable term for liberals, Adam Winkler, a professor at UCLA School of Law, Los Angeles, told Bloomberg BNA June 30.

They won ''stunning'' victories, he said, noting the court's 5-4 decision confirming a national right for same-sex couples to marry in *Obergefell v. Hodges*, 83 U.S.L.W. 4592, 2015 BL 204553 (U.S. June 26, 2015) (83 U.S.L.W. 1989, 6/30/15), and its 6-3 decision refusing to strike down tax subsidies that could have crippled the Affordable Care Act in *King v. Burwell*, 83 U.S.L.W. 4541, 2015 BL 202630 (U.S. June 25, 2015) (83 U.S.L.W. 1990, 6/30/15).

The Cato Institute's Ilya Shapiro agreed, saying that, on the whole, liberals had a better year than conservatives. But he said that there were only slightly more liberal decisions than conservative ones.

The Cato Institute is a Washington-based libertarian think tank.

Nevertheless, Shapiro—who has filed over 100 Supreme Court amicus briefs—told Bloomberg BNA June 30 that it's not helpful to think about the Supreme Court in this way—liberal versus conservative.

The so-called liberal bend this term could be due to a number of factors, he said, including that the liberal justices—namely, Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan—were more aggressive about granting certiorari.

Notably, it only takes four justices to agree to hear a case.

But Shapiro said it's not like the beginning of school, where each justice will say to themselves, ''Gee . . . this term I'm going to be more liberal.''

The outcome—whether liberal or conservative—really depends on the case in front of the justices, he said.

Kennedy Court. Jonathan Adler of Case Western Reserve University School of Law, Cleveland, agreed. The Roberts court generally ''trends conservative, but that's mostly a function of the cases in front of it,'' he told Bloomberg BNA June 30.

Caroline Fredrickson, president of the American Constitution Society, Washington, confirmed that the ''traditional understanding'' of the Roberts court is that it's conservative.

''That's still true,'' she told Bloomberg BNA June 30.

While it ''overstates'' it to say the court took a ''leftward turn,'' Fredrickson said this term demonstrates

that the justices are more unpredictable than we thought. They have more variety in their perspective than most assume, she said.

"The picture is more nuanced."

ACS is an organization promoting progressive ideals.

Nevertheless, Fredrickson said that the "liberals prevailed this term because of Kennedy."

"At the end of the day, the Supreme Court goes where Anthony Kennedy goes," Adler, who is a contributor to the popular blog The Volokh Conspiracy, said.

It's really the "Kennedy Court," Adler said.

Even though Scott Nelson of Public Citizen Litigation Group, Washington, noted in a July 2 e-mail that Breyer and Sotomayor were the justices most often in the majority "over the Court's docket as a whole," Adler said that Kennedy is the justice most likely to be on the winning side of a 5-4 decision.

Gutting Disparate Impact. Erwin Chemerinsky, dean of the University of California, Irvine School of Law, Irvine, Calif., pointed out that this "was a term where the liberal position prevailed far more often than in the prior nine years of the Roberts Court."

"In part, this was because Justice Kennedy was with the liberal bloc much more often than with the conservatives in ideologically divided 5-4 decisions," Chemerinsky told Bloomberg BNA in a July 6 e-mail.

For example, Kennedy joined Ginsburg, Breyer, Sotomayor and Kagan in confirming that disparate impact claims are available under the Fair Housing Act in *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 83 U.S.L.W. 4555, 2015 BL 203075 (U.S. June 25, 2015) (83 U.S.L.W. 1993, 6/30/15).

For a disparate impact claim, even when a practice looks neutral on its face, it's still discriminatory if it causes great disadvantage to a protected group, Fredrickson explained.

So even if you can't show a discriminatory intent, discriminatory impact is enough for liability, she said.

Fredrickson called the decision a "pleasant surprise," noting that "the right has been attacking disparate impact claims" for years.

She explained that all 11 federal circuit courts to have considered the issue agreed these claims were available under the Fair Housing Act.

So there wasn't the kind of circuit split that is emblematic of Supreme Court cases, Fredrickson said.

Nevertheless, the Supreme Court twice granted review on the issue, only to see those cases settle at the eleventh hour.

With the court agreeing to hear the issue a third time in just four years, there was a fear that the court would gut disparate impact liability, Fredrickson said.

In the end the court avoided what Paul Smith of Jenner & Block LLP, Washington, said would have been a massive upheaval in civil rights law.

And the court's decision—which Winkler called a "huge victory for civil rights advocates"—was written by Kennedy.

United We Stand. But Chemerinsky said liberal victories came in part, too, "because the ideological bloc was more cohesive."

"The statistics bear out far greater agreement among the liberals than with the conservatives this Term," David Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC, Washington, said.

One Fish, Two Fish

Shapiro agreed that the liberal justices were "in lock-step" this term.

But he pointed to *Yates v. United States*, 83 U.S.L.W. 4120, 2015 BL 47842 (U.S. Feb. 25, 2015) (83 U.S.L.W. 1259, 3/3/15) as a time when they were out of sync.

Roberts, Breyer and Sotomayor joined Ginsburg's plurality opinion finding that an illegally caught fish wasn't a "tangible object" under 18 U.S.C. § 1519.

Ginsburg said that Section 1519, which is part of the Sarbanes-Oxley Act of 2002 and aimed at curbing corporate and accounting fraud, was only intended to capture tangible objects that are "used to record or preserve information."

With Alito's concurring opinion, the court overturned a boat captain's conviction for ordering his crew to throw undersized fish overboard after being ordered by a federal agent to return with the fish to port.

Joined by Scalia, Kennedy and Thomas, Kagan's cheeky dissent argued that a "fish is, of course, a discrete thing that possesses physical form."

Her support for that obvious proposition: Dr. Seuss's classic story, "One Fish Two Fish Red Fish Blue Fish."

"The liberals agreed with each other in more than 90 percent of the cases," he told Bloomberg BNA in a July 7 e-mail.

Frederick—who has argued more than 40 cases at the Supreme Court—added that the "liberal justices also showed greater agreement by writing many fewer separate opinions than the conservatives."

This played out most starkly in the same-sex marriage decision, where all four dissenters—Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr.—wrote separate dissenting opinions.

In contrast, the liberals stayed silent, all signing on to Kennedy's opinion finding that the fundamental right to marry can't be denied to same-sex couples.

But Frederick said the solidarity among liberal justices wasn't "just a function of the same-sex marriage cases—it was also true in other important cases like the Federal [Fair] Housing Act disparate impact case and the ACA case."

"One can theorize that the liberals had come to realize that their separate writings were making no impact on the conservatives in past cases and that their divisions simply conveyed an inability to marshal arguments that would get five votes," Frederick said.

"Given how hotly contested some of the high-profile cases were this Term, it wouldn't surprise me if the liberals drew strength in having joint positions in the face of some very strong disagreements expressed by the conservatives."

Frederick added that a "striking statistic is that the justice with whom Justice Kennedy agreed the most this Term was Justice Sotomayor (with Justice Kagan next closest)."

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The "agreement among the conservatives with each other was much lower than it has been in past Terms," he said.

Thomas, Roberts Stepping Out. Chemerinsky said this cohesion enabled the liberal bloc to draw in other justices, even when Kennedy wasn't with them.

He pointed to *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 83 U.S.L.W. 4453, 2015 BL 194034 (U.S. June 18, 2015) (83 U.S.L.W. 1949, 6/23/15) and *Williams-Yulee v. Fla. Bar*, 83 U.S.L.W. 4269, 2015 BL 123300 (U.S. April 29, 2015) (83 U.S.L.W. 1622, 5/5/15) as examples.

In *Walker*, it was Thomas who split from the conservative bloc in finding that states could ban potentially offensive specialty license plates without running afoul of the First Amendment's protections for free speech.

Without comment, Thomas signed off on the court's 5-4 opinion, which said that Texas didn't violate the Constitution when it banned Confederate-themed specialty license plates because such plates were "government speech."

Just "as Texas cannot require [private individuals] to convey 'the State's ideological message,' " private individuals can't force Texas to display a certain message either, the court said.

In *Williams-Yulee*, it was the Chief who sided with the liberal justices in upholding Florida's prohibition on personal solicitation of campaign funds by judicial candidates.

Although the court has struck down campaign-finance restrictions for political candidates—most notably in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (78 U.S.L.W. 1433, 1/26/10)—the 5-4 decision said that judicial candidates were different.

Politicians "are expected to be appropriately responsive to the preferences of their supporters," the court said.

Quoting *McCutcheon v. Fed. Election Comm'n*, 82 U.S.L.W. 4217 (U.S. April 2, 2014) (82 U.S.L.W. 1487, 4/8/14), the court said that "such 'responsiveness is key to the very concept of self-governance through elected officials.' "

"The same is not true of judges," the court said. "In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors."

SCOTUScare. In a July 6 e-mail, Smith said this demonstrates that the "real key" to liberal victories this term "was the number of important cases in which one of the other five was induced to split off."

But Kennedy is not *the* swing Justice, Nelson said.

"He is still the Justice most often appearing in that role (in about ⅔ of the 5-4 cases), but on some issues, it is Roberts who is a possible fifth vote with the four 'liberal' justices," Nelson—who has argued four cases before the high court—said.

In fact, the "biggest news in the blockbuster cases was that the Affordable Care Act case was not 5-4 at all, but had both Roberts and Kennedy 'swinging' to align with the 'liberals,' " he said.

In an opinion written by Roberts, the court in *King* said that federal tax subsidies under the Affordable Care Act are available to individuals who purchase their insurance on the federal health care exchange, healthcare.gov—not just to those who purchase insurance on state-run exchanges.

The ACA makes those subsidies available to individuals who purchase their insurance on an exchange "established by the State."

The court acknowledged that its reading of the statute wasn't the "most natural."

But with a majority of states opting to use the federally run exchange, the court said that its broad interpretation of the statute was necessary to "avoid the type of calamitous result that Congress plainly meant to avoid."

That's because taking away subsidies would trigger so-called death spirals in which the price of health insurance skyrockets and becomes unaffordable for many Americans.

Referencing the court's decision to uphold the constitutionality of the law in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 80 U.S.L.W. 4579, 2012 BL 160004 (U.S. June 28, 2012) (81 U.S.L.W. 19, 7/3/12), Scalia said this wasn't the first time the court has done "somersaults" to rescue the law colloquially known as Obamacare.

"We should start calling this law SCOTUScare," Scalia said.

A decision going the other way would have been "disastrous," Fredrickson said.

"Eight million people would have been thrown off their health insurance."

The decision had a huge impact on millions of people, and for one man in particular, Winkler said.

This is President Barack Obama's signature piece of legislation, he said. The court's decision preserved the president's "legacy."

House Divided

Nelson noted some 5-4 decisions that garnered "unusual alignments"—where both the liberal and conservative justices divided.

In *Dart Cherokee Operating Co. v. Owens*, 83 U.S.L.W. 4029, 2014 BL 350806 (U.S. Dec. 15, 2014) (83 U.S.L.W. 891, 12/16/14), the court held that a defendant need include only a "plausible allegation" of the jurisdictional requirements in a notice of removal to federal court—not evidentiary proof.

In *Dart Cherokee*, Roberts, Ginsburg, Breyer, Alito and Sotomayor stacked up against Scalia, Kennedy, Thomas and Kagan, who thought the court didn't have jurisdiction to hear the dispute.

Similarly, in *Comptroller of Treasury of Md. v. Wynne*, 83 U.S.L.W. 4309, 2015 BL 152755 (U.S. May 18, 2015) (83 U.S.L.W. 1726, 5/19/15), Alito wrote the opinion for the hodgepodge of justices in the majority—Roberts, Kennedy, Breyer and Sotomayor.

They found that Maryland's refusal to give its residents a full credit against taxes paid to other states violated the so-called dormant commerce clause.

Scalia, Thomas, Ginsburg and Kagan, however, thought the state's tax scheme passed constitutional muster.

Scalia's dissent criticized the majority's reliance on a doctrine not spelled out in the Constitution—what he called the "Imaginary Commerce Clause."

Triumph of Context. In many ways, this term was the ''triumph of context,'' Jeffrey Fisher of Stanford Supreme Court Litigation Clinic, Stanford, Calif., told Bloomberg BNA June 30.

Cases like *King* demonstrate that the court is willing to look at the broader purpose of a statute—not just a few particular words or phrases, Fisher said.

''Scalia has been in the vanguard of textualism''—the theory that a statute's terms should be interpreted by their ordinary meaning.

It's a theory that has been gaining force, Fisher said. But this term it ''came to a head.''

Lawyers made arguments that they wouldn't have several years ago, Fisher said, pointing to the Affordable Care Act case.

The court, however, refused to ''cross the line from textualism to literalism,'' he said.

While *King* shows that context sometimes ''carries the day'' with Roberts, Fisher said that *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 83 U.S.L.W. 4633, 2015 BL 206163 (U.S. June 29, 2015) (83 U.S.L.W. 1995, 6/30/15) demonstrates that sometimes it doesn't.

There, the court split 5-4 over whether states, via ballot initiative, could take the often controversial redistricting process out of the hands of the state legislature and put it with an independent commission.

Writing for the majority, Ginsburg said the Constitution's grant of redistricting authority to the ''Legislature'' wasn't limited to the state's representative body.

It can include any mechanism the state authorizes for ''legislative functions,'' including—as here—citizen initiative, the court said.

Taking away the possibility for independent commissions would tie the hands of citizens attempting to deal with political gerrymandering, the court said.

Writing for the four dissenters, however, Roberts said, ''No matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution.''

The majority performs a ''magic trick'' and ''erase[s] the words 'by the Legislature thereof' from the Elections Clause,'' he added.

Roberts is really in the middle of the spectrum when it comes to context, Fisher said, with Scalia and Breyer on opposite ends.

Nibbling at the Edges. But Fisher suggested that the court's consideration of context was a positive development.

It really minimizes judicial authority, Fisher said. If the court ignores the context in which drafters were acting, it gives judges greater leeway to make up their own law, he said.

But Adler said that another kind of minimalism has become the ''dominant tendency'' of the Roberts court. Over the past 10 terms, the court has tended toward ''conservative minimalism''—''moving the law in small steps,'' Adler said.

He acknowledged that there are ''conspicuous'' areas where this is not true—namely, speech.

But Shapiro said that Roberts really tries not to ''rock the boat.'' Referencing comments made during Roberts's confirmation hearing, Shapiro said that the Chief really does want to just ''call balls and strikes.''

We saw that play out last year, Robin Conrad, of Dentons, Washington, told Bloomberg BNA July 1.

Lackluster Term for Business

There weren't any real blockbusters for businesses this term, Lauren Goldman, of Mayer Brown LLP's New York office, said.

The Roberts court is consistently viewed as biased toward business, she said. But, ''there's no truth to that.''

Of the business cases that were before the court this term, it was really a mixed bag, Goldman said.

Every term Mayer Brown tallies all the cases where there is a business on one side, and an individual or government entity on the other, she said.

This term there were 22 that fit that bill.

But business won in only about 12 of those cases, Goldman said.

And even the wins were pretty narrow.

She pointed to *Kimble v. Marvel Entm't, LLC*, 83 U.S.L.W. 4531, 2015 BL 197538 (U.S. June 22, 2015) (83 U.S.L.W. 1947, 6/23/15) as an example.

There the court refused to overturn *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), a more than 50-year-old precedent prohibiting a patentee from receiving royalties for sales accruing after a patent expires.

Goldman said that though this was a victory for businesses, it wasn't a ''sweeping'' one.

But next term is shaping up to be more important for business, she said.

In particular, the court has already agreed to hear three recurring issues in class actions:

- ''No-injury'' class actions in *Spokeo, Inc. v. Robins*, *review granted*, 83 U.S.L.W. 3819 (U.S. 4/27/15) (No. 13-1339);
- Effect of Rule 68 offers of judgment in *Campbell-Ewald Co. v. Gomez*, *review granted*, 83 U.S.L.W. 3855 (U.S. 5/18/15) (No. 14-857); and
- Class certification standards in *Tyson Foods, Inc. v. Bouaphakeo*, *review granted*, 83 U.S.L.W. 3888 (U.S. 6/8/15) (No. 14-1146).

A longtime advocate at the U.S. Chamber Litigation Center who helped file more than 2,000 amicus and party briefs with the Supreme Court, Conrad said that even in the controversial, headline-grabbing cases last term, the court was ''nibbling around the edges.''

Last term the court didn't fully resolve a number of issues, which she said lived to see another day.

Somewhat in tension with Fisher's observation about contextual minimalism, Conrad said, ''This term was different.'' The justices really took issues ''head on.''

She cited the same-sex marriage cases as an example.

There, the court held 5-4 that states can't ban same-sex couples from getting married.

Kennedy's opinion for the divided court said there is no union ''more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.''

He said the right to marry was fundamental, and therefore can't be denied to same-sex couples unless the ban survived strict scrutiny.

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The court said the states' procreative reasons for banning same-sex marriage couldn't withstand that exacting test.

Writing one of the four dissents, Roberts said that supporters ''of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view.''

''That ends today,'' he said.

''Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.''

''Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept,'' Roberts said.

Laying the Groundwork. Winkler said *Obergefell* was like the *Brown v. Board of Education* for LGBT rights.

Douglas Hallward-Driemeier of Ropes & Gray LLP, Washington—who argued for the same-sex couples at the Supreme Court—seemed to agree that the court's decision had far-reaching implications.

The decision was broad in a couple of ways, he said.

First, the court had the opportunity to be incrementalist by limiting its ruling to the second question considered by the court, Hallward-Driemeier said July 8.

While the first question involved the state's outright bans, the second asked only whether states could refuse to recognize marriages that were validly entered into in other jurisdictions.

But Hallward-Driemeier said the majority chose not to stop there.

And that's good, he said. We really felt like a decision limited to the second question would have just encouraged states to try to find ways to distinguish same-sex marriages, Hallward-Driemeier said.

It would have relegated those marriages to ''second-class status.''

But the decision was also broad in that it laid the groundwork for a suspect classification for gays and lesbians going forward, Hallward-Driemeier said.

A suspect classification determination would subject laws classifying on the basis of sexual orientation to more exacting scrutiny, and require jurisdictions to provide stronger justifications for those laws.

Although not explicitly spelled out, Kennedy hit on all four requirements needed to find a suspect classification, Hallward-Driemeier said.

Kennedy noted that sexual orientation is ''immutable,'' that there is a long history of discrimination against gays and lesbians, that they are able to participate equally in society, and that any political gains that they have made aren't a proper basis for denying them equal dignity, Hallward-Driemeier said.

Invitation for Death. Despite the court's broad, encompassing ruling in the same-sex marriage cases, Winkler said there were still issues that the court left open for another day.

He said that this isn't unusual.

For example, the court has already agreed to hear a challenge to public sector unions in *Friedrichs v. Cal. Teachers Ass'n*, *review granted*, 83 U.S.L.W. 3942, (U.S. 6/30/15) (No. 14-915) (84 U.S.L.W. 8, 7/7/15), which is a follow-up to last term's *Harris v. Quinn*, 82 U.S.L.W. 4662, 2014 BL 180311 (U.S. June 30, 2014) (83 U.S.L.W. 25, 7/1/14).

But Winkler said that in concurring and dissenting opinions throughout the term, some justices ''invited'' litigants to bring cases that challenge certain precedents.

He said this term's ''invitations'' were remarkable in that they seek to challenge ''long-standing criminal justice norms.''

He pointed to *Glossip v. Gross*, 83 U.S.L.W. 4656, 2015 BL 206563 (U.S. June 29, 2015) (83 U.S.L.W. 1992, 6/30/15) and *Davis v. Ayala*, 83 U.S.L.W. 4470, 2015 BL 193518 (U.S. June 18, 2015) (83 U.S.L.W. 1959, 6/23/15) as examples.

In *Glossip*, the court held 5-4 that states can continue to use a controversial drug cocktail to execute death row inmates.

The drug came to notoriety after the botched execution of Clayton Lockett, who witnesses say writhed in pain for approximately 40 minutes before his death.

Following an investigation, Oklahoma decided to significantly increase the dose of the drug at issue—midazolam—for future executions.

The Supreme Court said that the prisoners challenging the drug protocol didn't show that the ''use of a massive dose of midazolam'' during executions created a ''substantial risk of severe pain.''

Dissenting, Breyer said, rather ''than try to patch up the death penalty's legal wounds one at a time,'' he would prefer to address the ''more basic question: whether the death penalty violates the Constitution.''

Ginsburg joined Breyer's dissent.

Frederick said that *Glossip* was ''quite important for what it revealed about the justices.''

''For Justices Breyer and Ginsburg to signal that they were openly questioning the constitutionality of the death penalty was an important development after each had served for more than two decades on the Court.''

Frederick added that Scalia's ''vituperative'' response to Breyer's dissent was ''striking.''

Shapiro said that justices always announce their decisions from the bench—providing a brief summary of the court's decision.

A dissenting justice sometimes delivers their dissent from the bench too, most often in closely divided cases presenting hot-button issues.

But in *Glossip*, after Alito announced the court's decision and Sotomayor delivered her dissent, both Breyer and Scalia summarized their decisions from the bench as well.

''I've never heard of that before,'' said Shapiro—four justices reading opinions from the bench.

Human Toll. Winkler said another remarkable instance of an invitation for future consideration of an issue occurred in *Davis v. Ayala*, 83 U.S.L.W. 4470, 2015 BL 193518 (U.S. June 18, 2015) (83 U.S.L.W. 1959, 6/23/15)—but not because of anything in the majority opinion.

In yet another 5-4 decision, the Supreme Court held that a convicted killer couldn't get a new trial even though his attorney wasn't allowed to participate in discussions between the prosecutor and judge regarding the defendant's Batson challenge.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court said that prosecutors couldn't exercise peremptory challenges based on race.

But Kennedy's concurring opinion took aim at, as he put it, a ''factual circumstance, mentioned at oral argu-

ment but with no direct bearing on the precise legal questions presented by this case.''

''In response to a question, respondent's counsel advised the Court that, since being sentenced to death in 1989, Ayala has served the great majority of his more than 25 years in custody in 'administrative segregation' or, as it is better known, solitary confinement,'' Kennedy said.

He condemned the ''human toll wrought by extended terms of isolation.''

''Years on end of near-total isolation exact a terrible price,'' Kennedy said.

He concluded by saying that if a case presented the issue, the court may be required ''to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.''

Winkler said Kennedy's request was significant because ''as long as we have had criminal justice, we have had solitary confinement.''

''The country is on the verge of significant change with regard to criminal justice reform,'' Winkler said, noting recent moves to decriminalize drugs and reduce prison sentences.

With these opinions in *Glossip* and *Davis*, the court signaled it's going to be a part of that change, Winkler said.

Law & Order. Other criminal cases were behind the Obama administration's deceptively bad record this term.

Although the administration won its biggest cases, it actually lost 62 percent of its cases overall, Winkler said.

That's ''easily the worst success rate at the Court since going back at least to Truman,'' Shapiro said.

Many of those losses were due to the government's positions in criminal cases, Winkler said.

He pointed to *Elonis v. United States*, 83 U.S.L.W. 4360, 2015 BL 171331 (U.S. June 1, 2015) (83 U.S.L.W. 1816, 6/2/15) as an example.

There, the defendant Anthony Douglas Elonis was convicted of threatening his wife and others on the social media site Facebook.

''Fold up your [protection-from-abuse order] and put it in your pocket. Is it thick enough to stop a bullet?'' Elonis wrote on his Facebook page.

Many of these ''threats'' were in the form of rap lyrics and references to satirical matter.

Elonis said that shows that he never actually intended to threaten his wife—his posts were merely a therapeutic way to deal with his divorce and other personal setbacks.

But the federal government said that was beside the point. It doesn't matter what Elonis thought; all that matters is what a ''reasonable person'' would regard as a threat, the government argued.

The Supreme Court didn't agree.

The federal government's argument sets up a negligence standard, which is ''inconsistent with 'the conventional requirement for criminal conduct—*awareness* of some wrongdoing,' '' the court said in an 8-1 opinion written by Roberts.

''Elonis's conviction cannot stand,'' it held.

In criminal cases like *Elonis*, the Obama administration took law-and-order positions that the liberal justices just couldn't go with, Winkler said.

Lousy Term or Winning Big? The Obama administration's ''big political wins''—*Obergefell* and *King*—just overshadow everything, Shapiro said. But the administration really had a lousy term, he said.

Winkler agreed that the administration's ''overall record wasn't good.''

The executive typically wins around 60 to 70 percent of its cases, Winkler said.

That's been lower for the Obama administration, he said—last term it was about 50 percent.

But Winkler said the administration's win/loss record probably doesn't evidence a significant ideological disagreement between the court and the administration.

Liberal justices actually voted against the administration the most, he said.

Breyer and Ginsberg—generally counted among the court's most liberal justices—voted against the administration about 70 percent of the time, he said.

In contrast, Winkler said Thomas and Kennedy voted with the government the most.

But the administration had Breyer, Ginsburg and Kennedy on its side when it chalked up its high-profile and historic wins.

The administration—like liberals—had a good term because it won big, Winkler said.

In addition to *Obergefell* and *King*, Winkler said *Zivotofsky v. Kerry*, 83 U.S.L.W. 4391, 2015 BL 179781 (U.S. June 8, 2015) (83 U.S.L.W. 1863, 6/9/15) was another big win.

There, a fractured 6-3 court said that Congress couldn't force the State Department to list ''Israel'' as the country of birth for a U.S. citizen born in Jerusalem.

At issue in *Zivotofsky* was a 2002 law—Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003—which Presidents George W. Bush and Obama refused to enforce because they said it encroached on the executive's authority over foreign affairs.

The Supreme Court agreed, saying the executive had the sole authority to act in that area.

Garden Variety Opinion. Even though most of the buzz following the term is about the Obama administration and the liberal justices, Adler said there were some

No Go on CivPro

Conrad noted that the court's meat-and-potatoes civil procedure cases were generally missing from this term.

Don't worry, though. Adler assured Bloomberg BNA that civil procedure cases will be back at the Supreme Court.

One reason Adler is so sure is that the court has an increasing tendency to take only the cases it has to.

He said, in general, the court doesn't go out and look for cases.

That means that the majority of cases that reach the court involve circuit splits, Adler said—those issues that divide the lower courts of appeal such that the Supreme Court feels compelled to step in.

Issues that are most likely to show up in these splits? Relatively mundane issues, like civil procedure, Adler said.

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pretty important developments for conservatives this term too.

Conrad noted the concurring opinions coming from the conservative justices—mainly, Thomas and Scalia.

Thomas in particular is writing more frequently and is focused more on overturning precedent, she said.

These aren't your ''garden variety'' concurrences, Conrad said. They are taking on ''huge, fundamental questions.''

She called Thomas's concurrence in *Michigan v. EPA*, 83 U.S.L.W. 4620, 2015 BL 206164 (U.S. June 29, 2015) (83 U.S.L.W. 2005, 6/30/15) the perfect example.

The 5-4 court struck down the Environmental Protection Agency's costly rule regulating mercury emissions from power plants.

Although EPA said the rule would save thousands of lives annually, the court took the agency to task for not considering its $9.6 billion per year price tag for the industry.

EPA acted ''unreasonably when it deemed cost irrelevant to the decision to regulate power plants,'' the court said.

But Thomas went further.

In his concurring opinion, he said the case ''raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes'' under *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

Chevron deference instructs courts to defer to an agency's reasonable interpretation of an ambiguous statute that the agency administers.

Drawing on *Marbury v. Madison*, 1 Cranch 137 (1803), Thomas said it is the duty of the judiciary to '' 'exercise its independent judgment in interpreting and expounding upon the laws.' ''

But ''Chevron deference precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction,'' Thomas said.

Chevron ''raises serious separation-of-powers questions,'' he said, because it ''wrests from Courts the ultimate interpretative authority to 'say what the law is,' '' and ''hands it over to the Executive.''

Buyers' Remorse ''In a variety of contexts, the justices appeared to have buyers' remorse about the court's own doctrines of agency deference,'' Allyson Ho of Morgan Lewis & Bockius LLP, Dallas, said in a July 7 e-mail.

''Most notably, in *King v. Burwell*, the Chief Justice gave the IRS no deference whatsoever in interpreting the Affordable Care Act,'' she said.

Winkler explained that the language in *King* was ''probably ambiguous,'' which usually triggers agency deference.

But the court didn't defer to the agency there at all, he said. Instead, it created a new principle that some things—like billions of dollars in tax subsidies—are just too important to leave to the administration, Winkler said.

The decision not to defer to the agency had the effect of insulating the law from future administrations' contrary interpretations.

But, Chevron deference wasn't the only agency deference doctrine in the court's cross hairs, Ho said.

In *Perez v. Mortg. Bankers Ass'n*, 83 U.S.L.W. 4160, 2015 BL 61684 (U.S. March 9, 2015) (83 U.S.L.W. 1293, 3/10/15), three justices—Scalia, Thomas and Alito—''indicated their willingness to revisit the deference owed to agencies' interpretations of their own regulations,'' Ho said.

Ho argued for the respondents in *Mortgage Bankers*.

''All in all, it was a rough term for agency deference,'' she said, ''even in cases where the government ended up prevailing.''

Long-Term Quest. Agency deference is something the court is going to come back to, Conrad said.

There have been ''rumblings'' regarding agency overreach in past terms, but the discourse this term was much louder, she said.

Helgi Walker of Gibson, Dunn & Crutcher LLP, Washington, said at a June 19 Chamber of Commerce event that this was all part of a ''long-term project'' on the part of Roberts to cut back on agency deference.

She pointed to his dissent in *City of Arlington v. FCC*, 81 U.S.L.W. 4299, 2013 BL 132478 (U.S. May 20, 2013) (81 U.S.L.W. 1651, 5/21/13), in which he bemoaned the modern administrative state.

''It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed,'' Roberts wrote.

Walker said *King*, *EPA* and *Mortgage Bankers* signal that Roberts has some solid allies in his long-term quest.

Limitless & Pointless

Shapiro said that the intellectual property bar was ''disappointed'' that the number of patent/IP cases at the Supreme Court dropped off this term.

Last year the court heard six patent cases.

But Carter Phillips, of Sidley Austin LLP, Washington—who has argued 80 cases at the Supreme Court—noted at a June 19 Chamber of Commerce event that at least one patent case from this term may have implications for future cases—albeit unsatisfactory implications.

In *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 83 U.S.L.W. 4055, 2015 BL 12182 (U.S. Jan. 20, 2015) (83 U.S.L.W. 1058, 1/20/15), the court said that an appellate court must review a district court's factual—as opposed to legal—findings regarding claim construction under clear error review—not de novo as the Federal Circuit was doing.

Phillips, who argued for Sandoz Inc., said the Federal Circuit was over-reversing on this issue. Parties basically had a 50–50 shot at reversal on claim construction, he said.

There is nowhere near that rate of reversal in any other circuit on any other issue, Phillips said.

The result is that now there will be ''limitless'' fights over whether an issue presents a question of fact, subject only to clear error review, or law, triggering de novo review, he said.

But it's not clear that makes any real difference to the outcome of the case, Phillips said. ''We pointed out that there hasn't been a single instance where a factual issue made any difference in the claim construction.''

These agency deference doctrines were ''originally developed and vigorously applied by conservative justices and judges,'' Nelson said.

''Their withdrawal of support for the doctrine may have significant consequences in future cases,'' he added.

Indeed, Winkler said that scaling back agency deference could benefit opponents of big government.

We will just have to wait and see what happens to Chevron and the like, Shapiro said.

Call of Duty. Although agency deference hasn't made its way back to the court yet, Fredrickson said next term will be ''extraordinarily important.''

The court has already agreed to hear two noteworthy redistricting challenges relating to the one-person-one-vote principle—*Evenwel v. Abbott*, *probable jurisdiction noted*, 83 U.S.L.W. 3867 (U.S. 5/26/2015) (No. 14-940) and *Harris v. Ariz. Indep. Redistricting Comm'n*, *probable jurisdiction noted*, 83 U.S.L.W. 3942 (U.S. 6/302015) (No. 14-232) (84 U.S.L.W. 11, 7/7/15).

The court has also taken *Friedrichs*, a challenge to public sector unions.

Affirmative action will also return to the court next term, after it agreed to hear *Fisher v. Univ. of Texas at Austin*, *review granted*, 83 U.S.L.W. 3928 (U.S. 6/29/15) (No. 14-981) (83 U.S.L.W. 2010, 6/30/15) yet again.

And abortion is looming too, Shapiro said.

The day before Texas's new regulations for abortion clinics were set to go into effect, the court in *Whole Woman's Health v. Cole* (No. 14A1288) (83 U.S.L.W. 2022, 6/30/15) stayed a lower court's decision upholding the rules to allow the challengers to file a petition for review with the U.S. Supreme Court.

The challengers say the rules—including requiring physicians at abortion clinics to have admitting privileges at a local hospital—would close about half of the remaining abortion clinics in the state.

Shapiro said that eleventh hour stay signals that the court is going to hear this issue.

Adler agreed, saying the court has to take that case or the Mississippi abortion case.

He was referring to *Currier v. Jackson Women's Health Org.*, *filed*, 83 U.S.L.W. 3705 (U.S. 2/18/15) (No. 14-997), in which challengers of Mississippi's admitting-privileges requirement say it will close the state's only remaining clinic.

Agreeing that review is likely in one of these cases, Fisher called abortion the court's ''call of duty.''

On Tap for Next Term

- Affirmative action
- Redistricting
- Class actions
- Public sector unions
- Possibly abortion

Next term is shaping up to be another blockbuster, Fredrickson said.

Fisher said there are several justices that would probably like to take a ''breather'' from the spotlight. But we have seen blockbuster cases a few terms in a row now, he said.

Adler added that Roberts ''wants the court to be an umpire that no one pays attention to.''

We are long past that, he said. ''Now we expect the court to hear these types of cases.''

Swinging Back? But as this term wraps up, and court watchers start looking to the next, Chemerinsky warned against making generalizations about the court.

With the court hearing about only 70 cases each term, one doesn't get a full picture just looking at one term, Adler said. ''You are only getting a snap shot.''

Therefore, no ''generalizations should be drawn from a single year,'' Chemerinsky said.

''Last year, the Court was unanimous 66 percent of the time and so many proclaimed it a trend.''

''This year, the Court was unanimous less than 40 percent of the time,'' he said.

So while many are now proclaiming a leftward turn for the court, Chemerinsky said that could quickly change.

''Next year, there will be cases involving affirmative action, voting, labor, the First Amendment, and probably abortion,'' he said.

''These are all areas where Justice Kennedy is more likely to side with the conservative than the liberal justices.''

By Kimberly Robinson

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