Game Changers

Some high-profile Supreme Court cases this term chart a new course for gay rights and voting practices.

BY DAVID G. SAVAGE

The Supreme Court ruled on several cases this term that have a direct impact on states. It ushered in a new era of equal rights for gays and lesbians, as it struck down part of the federal law that denied benefits and tax breaks to legally married same-sex couples. At the same time, another era of civil rights law ended, when the court struck down part of the historic Voting Rights Act that put much of the South under special federal oversight.

These two rulings had few fans in common. Those who hailed one as long overdue condemned the other as an appalling mistake. But these opinions and several others nonetheless share a common theme under Chief Justice John Roberts—that state legislatures have primary authority to make the laws for much of what goes on within their borders, at least most of the time.

Gay Rights Win

The Supreme Court took on gay rights in *United States v. Windsor*, which focused on Section 3 of the 1996 federal Defense of Marriage Act (DOMA). The federal law defines "marriage" as a legal union between one man and one woman, and Section 3 says the federal government would not recognize same-sex marriages if legalized elsewhere, which has prevented couples from filing a joint federal tax return, or, if they were federal employees, from covering their spouses on their health care plans. Section 2 states that no state need recognize these marriages either, a provision that still stands.

Congress passed the law before any state allowed gay marriages, but it has became a point of contention as more couples marry in the 13 states that now allow same-sex marriage.

In a 5-4 decision, Section 3 was declared unconstitutional for two reasons. First, it intrudes on states' turf. "The federal government, throughout our history, has deferred to state-law policy decisions with respect to domestic relations," Justice Anthony Kennedy wrote. "By history and tradition, the definition and regulation of marriages … has been treated as being within the authority and realm of the separate states."

The second reason Kennedy gave was that excluding these couples from federal benefits denies them their constitutional rights to liberty and equality. "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal," he wrote. Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan agreed.

The opinion can be interpreted in a couple of ways. By stressing the states' role in regulating marriage, Kennedy may be suggesting states are free to decide for themselves whether to permit same-sex marriages. On other hand, by characterizing the issue as one of equal rights, the opinion lays the groundwork for the argument that barring same-sex marriages denies gays and lesbians their equal rights.

In his dissent, Justice Antonin Scalia said he could see what is coming. "No one should be fooled. It's just a matter of listening and waiting for the other shoe to drop. By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition." The dispute is likely to play out in the lower courts now, as gay plaintiffs sue to challenge their state's Defense of Marriage laws.

The Supreme Court also ended one long legal battle by throwing out the defenders of California's gay marriage ban, Proposition 8, thereby clearing the way for same-sex marriages there. This back-and-forth dispute began in 2008 when the California Supreme Court ruled the state's ban on same-sex marriage violated the state's constitution. A few months later, the voters approved a ballot measure to amend the state constitution and limit marriage to a man and a woman. Then, in 2010, two gay couples who wished to marry sued in federal court and won. The judge ruled they had a constitutional right to marry as a matter of liberty and equality. When California officials chose not to contest the ruling and defend the ban, private supporters stepped up to its defense. For this reason Roberts dismissed *Hollingsworth v. Perry* on the grounds that individual proponents of the ban had no legal "standing" to defend its constitutionality and speak for the state when state officials had chosen not to.

Scalia, Ginsburg, Breyer and Kagan joined with Roberts to dismiss the appeal. The outcome suggests several justices—on the left and the right—want to avoid for now a broad constitutional ruling on gay marriage.

Voting Rights Outdated

In the case against the Voting Rights Act, *Shelby County (Ala.) v. Holder*, the Court struck down the coverage formula contained in Section 4 of the act that determined which jurisdictions need federal "permission" for any and all changes to their elections laws. In another 5-4 decision, Roberts called the criteria no longer appropriate today, and "a drastic departure from basic principles of federalism … [and] an equally dramatic departure from the principle that all states enjoy equal sovereignty."

In his opinion, Roberts noted that in the states covered by the 1965 law, African-Americans now register and vote at the same or higher rates than whites. "The question is whether the act's extraordinary measures, including its disparate treatment of the states, continue to satisfy constitutional requirements." The chief justice said the answer was "no," and Justices Scalia, Kennedy, Clarence Thomas and Samuel Alito agreed.

This frees Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia, along with parts of California, Florida, Michigan, New York, North Carolina and South Dakota, from getting "pre-clearance" from Washington, D.C. These jurisdictions had been singled out because they had either screened new voters with literacy tests or collected poll taxes in the 1960s, or their 1972 voter turnout rates were less than 50 percent.

Roberts stressed the court's decision did not touch Section 2 of the Voting Rights Act, which makes it illegal to enforce any "standard, practice or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." The Justice Department and individuals may continue to sue to enforce this provision. It is "permanent, applies nationwide and is not at issue in this case," the chief justice said.

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Following the ruling, Alabama, Mississippi and Texas, formerly under preclearance rules, indicated they would implement their previously enacted photo voter ID laws. And North Carolina lawmakers passed a voter ID bill that had been on hold until the ruling.

U.S. Attorney General Eric Holder, responding to the ruling, said the federal government would "keep taking appropriately aggressive action against any jurisdiction that attempts to hinder free and fair access to the franchise." In late July the justice department indicated it may use Section 3 of the Voting Rights Act in asking a federal court to require that Texas preclear its future voting changes with federal officials. Section 3 allows a court to "bail in" states or jurisdictions under preclearance procedures based on recent, intentional voting discrimination practices.

In the Arizona voting registration case, *Arizona v. Inter Tribal Council of Arizona*, the court, in a 7-2 decision, struck down the state law that required would-be voters to show proof of citizenship to register. Scalia said the state requirement was pre-empted by the federal Motor Voter Act, which requires states to "accept and use" a simple federal form for registering. His opinion in the case could prove significant because it says Congress has "broad" authority to set uniform federal regulations for elections. Alabama, Georgia and Kansas have similar proof-of-citizenship statutes.

DNA, Affirmative Action, Takings, too

In a case affecting more than half the states, the court upheld laws that authorize the police to take DNA samples from people arrested for, but not yet convicted of, serious crimes. The 5-4 decision said mouth swabs for DNA are equivalent to fingerprints and mug shots and should be allowed to be a standard part of the booking process.

Crime victim advocates have pressed for widespread DNA testing of arrestees, arguing it can stop serial predators and help solve cold crimes, as exemplified by the case before the court. When Alonzo King was charged with an attempted assault in 2009, a standard DNA test revealed a match with DNA from a rape six years earlier in Maryland, which he was convicted of and sentenced to life in prison. When a Maryland appeals court ruled the DNA swab was an unreasonable search, and that he should go free, the Supreme Court took up the case. It reversed the lower court decision, upheld the state law and affirmed King's conviction. Currently, 29 states have laws requiring the collection of DNA from individuals arrested or charged with certain crimes.

In *Fisher v. University of Texas at Austin*, the Court did not answer the ultimate question of whether the university's affirmative action policies violated the Constitution. Instead, the justices agreed, 7-1, that the case should be revisited by the Fifth Circuit Court of Appeals because it had failed to use the correct legal standard—strict scrutiny—in its previous decision.

The case revolved around Abigail Fisher, who sued the school after being denied admission. Fisher, who is white, alleged the university's use of race in admission decisions violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

To pass strict scrutiny, the university must prove that achieving more diversity is a compelling governmental interest, and, if so, that its affirmative action policy is tailored narrowly enough to meet its diversity goal. The Fifth Circuit Court will have a do-over on this case.

And finally, the Supreme Court also took on the issue of government takings in *Koontz v. St. Johns River Water Management District.* This case involved a man who sought permits to develop a portion of wetlands that he owned in Florida. St. Johns River Water Management District told him he could proceed if he would reduce the impact by limiting the area of development or, alternatively, pay for improvements on district-owned property several miles away. He refused both options, was denied a permit, and sued, claiming his property was taken without just compensation.

The Supreme Court ruled in favor of Mr. Koontz with two primary findings: First, there must be a "nexus" and "rough proportionality" between the government's conditions for issuing a land-use permit and the effects of the proposed development—denying a permit because the landowner refused to accept conditions that did not meet those standards amounted to a taking in the same way that issuing the permit with those conditions did.

And second, "nexus" and "rough proportionality" also apply when the conditions require the land owner to pay money to mitigate the impacts of development, and not just when the land owner is required to give up rights to real property to accomplish the same purposes.

What's ahead next term? The Supreme Court already has granted enough cases to fill the argument calendar into January; so far, few look to be blockbusters for the states.