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Steady as She Goes: The 2016-17 Term of the US Supreme Court

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By Miller W. Shealy Jr.

"Steady As She Goes" is the title of a popular song and album of the same name by The Raconteurs. While the title of this article is meant as a nautical reference to the US Supreme Court's steady helmsmanship during the 2016-17 term, it could apply to Judge Neil Gorsuch's Senate hearings, and the Court itself, in a very different way. One line from the song surely describes how the Court must often feel, as well as how Judge Gorsuch must have felt during the hearings on his nomination: "But no matter what you do, You'll always feel as though you tripped and fell, So steady as she goes." Indeed, despite a maelstrom of tough questioning, Judge Gorsuch ably piloted his nomination through the confirmation storm. In the end, he was approved by a Senate vote of 54-45. Likewise, the Court demonstrated a steady hand on the wheel throughout most of this term. As others have noticed, there has been less rancor in dissents, fewer 5-4 decisions, and what is certainly a tendency to decide cases on narrower grounds and avoid directly addressing the big issues. This, however, will surely not last. Some contentious issues will have to be addressed next term. The Court cannot pirouette around them indefinitely. I would note that Justice Gorsuch arrived too late to participate in many of the decisions. Thus, the total votes on many cases is less than nine.

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In any discussion of the Court's term, reasonable people will disagree on which cases deserve top billing. Nevertheless, these are the cases that seem most noteworthy.

The big cases this term: immigration, jury verdicts and religion

It is hard to say that any one case is the most important this term. I think we have a three way tie for the top spot: *Trump v. International Refugee and Assistance Project*, *Pena-Rodriguez v. Colorado* and *Trinity Lutheran Church of Columbia v. Comer*.

Trump v. International Refugee and Assistance Project dominated the media and is surely one of many cases to deal with President Trump's executive orders on immigration. It did not resolve all issues; however, the President gained some ground in the Supreme Court that he lost in lower court rulings. The Court ruled that the Trump administration could enforce part of an executive order that "suspends" for 90 days the entry of persons from six Muslim-majority nations. In a 9-0 decision, the high Court reversed lower court orders that blocked the executive order in toto. However, the Court held that the travel ban "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in

the United States," such as student enrolled at a university or a close relative.[1]

Pena-Rodriguez v. Colorado is the dark horse candidate for the most important case of the term.[2] The Court held 5-3 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."[3] Why is this case so important? It may not seem obvious because there is no assertion that jurors should consider race in deciding whether a criminal defendant is guilty of a crime. However, the real problem is with setting aside the "no-impeachment" rule and the consequences this may have.

The case raises as many questions as it answered. What exactly is a "clear statement" indicating "racial stereotypes"? What about stereotypes of other kinds, like sex, transgender, sexual orientation, religion, national origin and so on? No one approves of these things. However, the problem is the can of worms they open up for a kind of after-the-fact jury tampering. Do defense attorneys who lose a case have a duty to investigate the jury after the verdict? What about civil cases? The rule cannot in principle be limited to criminal cases. Do attorneys in civil cases now have a duty to investigate jurors if they lose their case? No one thinks race should play a part in a jury's decision, but this may unwind jury verdicts across the board. Thus, its importance cannot be underestimated. The ruling seeks to encourage confidence in jury verdicts; however, it is very possible that it will have the opposite effect. The Court will, no doubt, revisit *Pena-Rodriguez* in the future to modify and refine its application.

The big religion case this term is *Trinity Lutheran Church of Columbia v. Comer*.[4] Religion cases are always important, as they contribute the most to our ongoing "culture wars" and ignite the most intense passions. In a 7-2 decision, the Court ruled that a church was entitled to a state grant to enhance (rubberize) its playground area. The Court ruled that the state's refusal to treat the church like other non-religious organizations and provide state tax money to the church in the context of a state grant system violated the Free Exercise Clause.

> The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." [citation omitted] Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." [citation omit-

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ted] ... Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." [citation omitted] The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. [citation omitted] "[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract"). Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.[5]

In *Trinity Lutheran*, the Court found that the Free Exercise Clause was violated because a religious institution was singled out for exclusion. However, the real issue lurking in the background of the free exercise cases is the holding of *Oregon v. Smith*, which held that general laws that apply to all, apply with equal force to those with religious scruples.[6] However, *Smith* went on to hold that "the Free Exercise Clause *did* guard against the government's imposition of 'special disabilities on the basis of religious views or religious status.'"[7] The *Smith* balance is becoming ever harder to maintain. These issues are going to be with us for some time.

Free speech

The top free speech case this term is *Matal v. Tam*, which has implications for the Washington Redskins and other sports teams across the country.[8] "The Slants," an Asian-American rock band, sought to register their name. In another sweeping victory for First Amendment advocates, the Court ruled that the government cannot deny trademark protection by denying registration to trademarks because they are racially disparaging. The Court struck down part of The Lanham Act. Basically, The Lanham Act barred trademark protection for trademarks that are offensive or disparaging on account of race or ethnicity. The Court split 4-4 on some of the legal technicalities but was 8-0 on the result and basic First Amendment principles that the government cannot regulate speech because of its content. The case does not really announce a new principle of law, but it is another body-blow to those who would like to make "hate-speech" an exception.

In addition, the Court ruled 8-0 against a North Carolina law that made it a crime for a registered sex offender to post anything on a social media website that was accessible to children. Thus, social media such as Facebook and Twitter were included as improper sites for the offender in question to post. The defendant posted "God is good" on his Facebook page. In *Packingham v. North Carolina*, the Court ruled that the law was too broad and violated the First Amendment.[9]

Equal protection, same-sex couples and birth certificates

In *Pavan v. Smith*, the Court struck down an Arkansas law that gave opposite-sex couples but not same-sex couples the right to have the spouse's name on the birth certificate.[10] A 6-3 majority found that the law violated the Equal Protection Clause.[11] It would seem that *Obergefell v. Hodges* is even more firmly entrenched.[12] Interestingly, the child was conceived by means of artificial insemination. Arkansas claimed that it had an interest in maintaining information concerning biological parentage.

Suing government officials

Ziglar v. Abbasi arose in the context of aliens who were detained on immigration violations in the wake of the terrorist attacks of September 11, 2001.[13] The plaintiffs alleged that they were the subject of beat-

ings and arbitrary strip searches and brought suit under 42 U.S.C. § 1983 against a former Attorney General and the FBI Director.[14] The Court, in a 4-2 opinion (two justices on the then eight-member court recused themselves), found that Congress had not authorized the suits and dismissed the case.[15]

Redistricting, again

It seems we have been getting one of these every term for a few years now. In *Cooper v. Harris*, the Court in a 5-3 decision (joined by Justice Thomas) found that North Carolina lawmakers had engaged in racially motivated redrawing of districts that had already elected African-American representatives.[16] Thousands of African-American citizens were redrawn into already majority African-American districts, diluting the votes of African-Americans in neighboring districts.[17] Redistricting will remain a hot issue. The Court has already agreed to hear a Wisconsin case dealing with redistricting that allegedly favors one political party over another.[18]

Education and children with special needs

In *Endrew F. v. Douglas County Schools*, the Court in an 8-0 decision set a higher standard for children with special needs.[19] The parents of a child with autism brought suit under the Individuals with Disabilities Education Act (IDEA). The Court ruled that the child's individualized learning program must be "reasonably calculated to enable a child to make progress"[20]

Insider trading

Salman v. United States, is the Court's latest sortie in the area of insider trading.[21] A unanimous Court upheld insider trading charges against a man who received confidential corporate information from his brother-in-law.[22] The Court rejected the notion that insider trading required the actual exchange of something of value or money.[23] An insider trading conviction may be sustained where there is a close family relationship.[24] A person commits insider trading where they know that the person who made the tip stands to benefit from disclosing insider information.[25]

Criminal law

There are a number of criminal law cases that are of importance this term. I have already mentioned a couple in the related, but more specific, contexts of jury verdicts and insider trading.

In *Nelson v. Colorado*, the Court ruled 7-1 that where a conviction is overturned the defendant is entitled to a return of all fees, fines and costs paid to the court.[26] The Court rejected Colorado's claim that such funds were state property.[27]

In *Moore v. Texas*, the Court reaffirmed 5-3 that a person suffering from "intellectual disabilities" is exempt from the death penalty.[28] More importantly, in determining whether someone has "intellectual disabilities" the state must adhere to the latest and appropriate scientific standards.[29] The later point is a major change in the law. Non-clinical standards will no longer pass muster under the Eighth Amendment.

Civil procedure

A number of very significant civil procedure cases were decided this term. Whatever your view of the law, the cases this term definitely favored business and the civil defense bar. The plaintiffs' bar will be disappointed.

In *BNSF Railway v. Tyrrell*, the Court ruled 7-2 (the two dissenters concurred in part and dissented in part) that the Due Process Clause forbade Montana courts from exercising general personal jurisdiction over a defendant that was not incorporated in Montana and did not maintain its principal place of business in Montana, but had other permanent business operations in Montana.[30]

In *Bristol-Myers Squibb Co. v. Superior Court*, the Court held 8-1 that the Due Process Clause forbade California courts from exer-

cising specific personal jurisdiction over the non-class action claims of non-Californians who claimed the same sort of injury as their companion Californian claimants from ingesting a medicine, because the non-Californians' claims had no connection with California.[31]

In *Goodyear Tire & Rubber Co. v. Haeger*, the Court ruled 8-0 that fee sanctions for discovery abuse, issued pursuant to court's non-rule/statutory-based inherent power to sanction, must be limited to fees actually incurred because of the misconduct.[32]

Lastly, in *Town of Chester v. Laroe Estates*, the Court held unanimously that a litigant who wishes to intervene in a federal civil lawsuit must independently possess Article III standing if that litigant is seeking relief not requested by a plaintiff.[33]

At the end of a long and busy term, the Court was more collegial and unified in its rulings than in the recent past. Given the "interesting times" in which Washington finds itself these days, this was surely no accident. The Court is concerned about its image and no doubt wants to avoid partisan and divisive issues for the time being. The Court is still in the middle of the storm, but it stayed the course.

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Endnotes

[1] *Trump v. International Refugee and Assistance Project*, 137 S. Ct. 2080, 2088 (2017).
[2] *See generally Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 197 L. Ed. 2d 107, 580 U.S. (2017).
[3] *Id.* at 869.
[4] *See generally Trinity Lutheran Church of Columbia v. Comer* 137 S. Ct. 2012 (2017).
[5] *Id.* at 2022-23.
[6] *Oregon v. Smith*, 110 S. Ct. 1595 (1990).
[7] *Trinity Lutheran*, 110 S. Ct. at 2021 (emphasis added) (citing *Smith*, 110 S. Ct. at 1599).
[8] *See generally Matal v. Tam*, 137 S. Ct. 1744 (2017).
[9] *See generally Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).
[10] *See generally Pavan v. Smith*, 137 S. Ct. 2075 (2017).
[11] *Id.* at 2078-79.
[12] *See generally Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
[13] *See generally Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).
[14] *Id.* at 1847.
[15] *Id.* at 1868-69.
[16] *See generally Cooper v. Harris*, 137 S.Ct. 1455 (2017).
[17] *Id.* at 1482.
[18] Craig Gilbert, *At heart of landmark Supreme Court case: a gerrymandered map that has helped lock in huge legislative majorities for Wisconsin GOP*, JOURNAL SENTINEL, http://www.jsonline.com/story/news/politics/2017/06/18/wisvoter/399504001/.
[19] *See generally Endrew F. v. Douglas County Schools*, 137 S. Ct. 988 (2017).
[20] *Id.* at 1000.
[21] *See generally Salman v. US*, 137 S. Ct. 420 (2016).
[22] *Id.* at 423-24.
[23] *Id.* at 428.
[24] *Id.* at 426.
[25] *Id.* at 427.
[26] *See generally Nelson v. Colorado*, 137 S. Ct. 1249 (2017).
[27] *Id.* at 1257-58.
[28] *See generally Moore v. Texas*, 137 S. Ct. 1039 (2017).
[29] *C.f. id.* at 1052-53.
[30] *See generally BNSF Railway v. Tyrrell*, 137 S. Ct. 1549 (2017).
[31] *See generally Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).
[32] *See generally Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017).
[33] *See generally Town of Chester v. Laroe Estates*, 137 S. Ct. 1645 (2017).