Fundamental Choices Facing the Supreme Court

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Introduction

The “Me Too” movement has in the span of less than one year upended male prerogatives that our civilization has suffered to exist for thousands of years. This follows on the heels of the revolution in gay rights that between 2003 and 2015 progressed from a regime where same-sex intercourse was a crime to a state where people have a constitutional right to enter into same-sex marriages.

Americans are experiencing rapid social change, due in part to modern revolutions in mass communications and information technology. Traditional social norms are being examined and found wanting; customary assumptions about human potential are being questioned and rejected; existing hierarchies are being challenged and rearranged. The rate of social change is accelerating. The Supreme Court’s interpretation of the Constitution has greatly influenced both the rate and the direction of social evolution.

The Constitution is the fundamental law of the United States, and it is fundamentally a moral document. It is not only the legal foundation of the country but also the moral foundation. The Constitution governs the government; for over two hundred years it has required the government to conform to moral standards. The Constitution paints these standards in broad strokes. Under the rubric of Due Process it requires the government to treat people fairly and prohibits the government from unnecessarily invading people’s liberty. Under the mantle of Equal Protection it requires the government to treat people equally if they are similarly situated. Under the imperative of the First Amendment it demands tolerance of dissenting religious and political views, and sufferance of art or literature that the majority finds distasteful.

But what is fair? Who is equal? How broad is our liberty? What limits can be placed on speech or religious exercise?

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1 I experienced the overwhelming moral influence of the “me too” movement. Late last year I was speaking at a conference on gender equality and during the question and answer session a dear friend whom I have known for over 30 years stood and announced that she had been raped in college by a professor, a secret she had kept her entire life. I cannot overstate the impact that the courage of her example has had on me.

The Constitution is not a prolix legal code. It is instead a statement of inspirational ideals, ideals that the framers enjoin us to continually strive for. They abjure us to continually reexamine ourselves and our communities so that we might more closely approximate a society that exhibits those ideals of fairness, liberty, equality, and tolerance.

American citizens naturally disagree about how these principles should be applied in specific situations or to particular groups of people. Those disagreements are reflected in the divided opinions of the Supreme Court, which has split 5 to 4 on a great number of social, political, and moral issues that are cast as legal issues in constitutional cases.

The purpose of this essay is to identify and briefly describe some of the fundamental constitutional choices facing the Supreme Court now and in the near future.

I. Reproductive Freedom

1. Abortion. The question of abortion is and has been one of the foremost constitutional questions of our times. This causes of this controversy are not ephemeral or accidental. The dispute exists because there are profoundly weighty and important concerns on both sides. The government seeks to protect fetal life. The government also guarantees women a constitutional right to make decisions regarding both parenthood and their own bodies. Neither side’s concerns can be dismissed out of hand. The abortion controversy exists because it involves issues that matter to people of good conscience on both sides of the debate. There is no easy resolution of this controversy. But people on both sides of the controversy could resolve to treat each other and each other’s views with respect.

2. Contraception. As the people of our society become more interdependent economically, our legal rights are more directly drawn into conflict. The individual right to use contraception was established more than 50 years ago, but the advent of universal health care means that entities other than the patient must pay for health care, and that change has generated conflict between those who view this as a matter of fundamental personal choice and those who consider that their involvement, either as taxpayers or employers, gives them the right to decide whether contraception should be funded. As part of its subsidies for the purchase of health insurance, should the government pay for contraception as it does for other forms of preventive medical care? Should employers who have moral or religious objections to

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3 See McCollough v. Maryland, 17 U.S. 316, 407 (1819) (stating, “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”).


contraception be required to pay for their employees’ insurance covering it? These questions will continue to arise as a matter of administrative law, statutory law, and constitutional law.

II. Equal Protection

The founders declared that “all men are created equal,” but it has taken more than two centuries for this country to more closely achieve the ideal that “all people are created equal.” A century and a half ago after a civil war that caused more deaths than all of our other wars combined we abolished slavery and incorporated the principle of equality into the Constitution. A century ago after an arduous fifty-year campaign women gained the right to vote. A half century ago the decades-long civil rights movement culminated in the enactment of civil rights legislation outlawing public and private acts of racial discrimination. We still have far to go.

There are three principal equal protection issues facing the Supreme Court now and in the near future: sexual orientation and gender identity; affirmative action; and the concept of “governmental intent to discriminate.”

1. Sexual Orientation and Gender Identity. The four principal Supreme Court cases acknowledging gay rights have involved both liberty and equality; the right to love and marry whomever one chooses regardless of gender, and the right not to be discriminated against on account of sexual orientation. The two most recent rulings were decided by votes of 5 to 4. The Court is no less divided today. Should a single justice be replaced or change their mind these rights might be reversed. The leading case presently before the Court is Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission. This case involves two fundamental competing considerations: the power of the state to prohibit discrimination on the basis of sexual orientation, and the right of a business that is open to the public to express its rights to free exercise of religion and free speech by denying service to customers on the ground of sexual orientation.

The Supreme Court has not yet decided any cases based on gender identity. The President’s order prohibiting transgender individuals from serving in the armed forces, should it become effective, would no doubt ultimately have to be resolved by the Supreme Court.

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6 See Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014) (ruling that private, for-profit corporation had the right under the Religious Freedom Restoration Act to decline to pay for health insurance covering four types of contraception that the owners of the company regarded as abortifacients, because a less restrictive alternative was available).

7 See Romer v. Evans, 517 U.S. 620 (1996) (striking down amendment to state constitution prohibiting the enactment of laws prohibiting discriminating on the basis of sexual orientation); Lawrence, note __ supra; United States v. Windsor, 133 S.Ct. 2675 (2013) (striking down federal law refusing to recognize same-sex marriages); and Obergefell, note __ supra.

8 Of the foregoing, Romer and Lawrence were decided by a vote of 6-3; Windsor and Obergefell by a vote of 5-4.

9 Docket No. 16-111.

10 See, e.g., Doe 1 v. Trump, __ F.Supp. 3d __ (2017), 2017 WL 4873042. The District Court stated: Plaintiffs claim that the President’s directives cannot survive such scrutiny because they are not genuinely based on legitimate concerns regarding military effectiveness or budget constraints,
Moreover, the Supreme Court must decide whether or not discrimination on the basis of sexual orientation or gender identity is equivalent to discrimination on the basis of sex. Differential treatment of persons on the basis of sexual orientation and gender identity is based upon fixed beliefs about gender roles— that men and women stand in a certain unique relation to each other, and that gender identity is binary and physiologically determined at birth. If differential treatment based upon these beliefs qualifies as sex discrimination then such conduct would be presumptively unconstitutional under cases such as Virginia v. United States, and would be presumptively illegal under the Civil Rights Act of 1964.

2. Affirmative action. The issue of affirmative action is divisive because, like abortion, there are compelling moral imperatives on both sides of the question. We all look forward to the day when our laws and practices are color-blind. And there is broad agreement that our schools and workplaces should reflect the diversity of our society. These goals are not at present entirely compatible.

In its most recent decision, the Court upheld an affirmative action plan at the University of Texas where the evidence showed that there was no feasible alternative for achieving a diverse student population. The Court will continue struggling to achieve the proper balance between the goals of achieving a color-blind society and maintaining diverse institutions.

3. The doctrine of “governmental intent” as applied in equal protection cases. It is black letter law that the Constitution applies only to “state action.” But the Supreme Court has ruled that laws that have a disproportionately adverse impact on a particular group are not to be evaluated under Equal Protection unless the government “intended” to treat that group differently. In many cases one strongly suspects that a particular measure was aimed at a particular group; but what if there is a plausible alternative explanation for why the law was

but are instead driven by a desire to express disapproval of transgender people generally. The Court finds that a number of factors—including the sheer breadth of the exclusion ordered by the directives, the unusual circumstances surrounding the President’s announcement of them, the fact that the reasons given for them do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself—strongly suggest that Plaintiffs’ Fifth Amendment claim is meritorious.

Id. at 2.

11 United States v. Virginia, 518 U.S. 515, 524 (1996) (striking down Virginia’s policy of excluding women from admission to Virginia Military Institute, and ruling that discrimination based upon sex may be justified only if the state can establish an “exceedingly persuasive justification” for such discrimination).

12 See, e.g., Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017) (ruling that discrimination based on sexual orientation is not actionable under Title VII); Fred Barbash, Trump Administration, Intervening in Major LGBT Case, Says Job Bias Law Does Not Cover Sexual Orientation, Washington Post (July 27, 2017).


14 Civil Rights Cases, 109 U.S. 3 (1883) (establishing the principle that the Constitution applies to state action, not to private conduct).

15 See, e.g., Washington v. Davis, 426 U.S. 229, 239 (1976) (stating, “But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional Solely because it has a racially disproportionate impact.”).
adopted? Should the Court conclusively presume that measures that are neutral on their face were adopted by the government for legitimate reasons, or should the Court pierce the veil and examine the motives of the enacting body? That question is clearly presented in the travel ban cases currently before the Supreme Court in *Trump v. Int’l Refugee Assistance Project*\(^{16}\) and *Trump v. Hawaii*.\(^{17}\)

### III. Freedom of Religion

Freedom of religion is protected by two provisions of the Constitution: the Establishment Clause, which stands for the principle of separation of church and state, and the Free Exercise Clause, which has traditionally protected minority religions and unpopular religiously-motivated conduct from discriminatory treatment.

**1. Establishment Clause.** Until the Court’s recent decision in *Town of Greece v. Galloway*,\(^{18}\) the Supreme Court’s position was that the Establishment Clause requires the government to be neutral towards religion – that the government may neither endorse nor denigrate religion.\(^{19}\) In *Galloway* the Court did not mention the neutrality principle, but, rather, it adopted the standard that the government may engage in traditional conduct regarding religion so long it does not coerce individuals to engage in religious exercise. The Court’s decision expands the power of governmental entities to sponsor prayers and to place religious displays on government property. Current and future litigation will continue to test the extent of the government’s power to acknowledge, encourage and conduct religious exercise.

**2. Free Exercise Clause.** Constitutional protection for the Free Exercise of religion was dramatically weakened in 1990 in the case of *Employment Division v. Smith*,\(^{20}\) in which the court replaced the strict scrutiny test with the rational basis test in most cases. Congress responded by enacting the Religious Freedom Restoration Act (RFRA), which restored the strict scrutiny test with respect to judicial review of federal laws. In *Burwell v. Hobby Lobby Stores, Inc.*,\(^{21}\) the Supreme Court ruled that a private, for-profit corporation has the right to free exercise of religion under RFRA, and that a provision of the Affordable Care Act mandating employers to pay for certain forms of contraception violated the company’s rights under RFRA. The scope and extent of this form of religious liberty will be continue to be tested in similar cases such as *Masterpiece Cakeshop*.\(^{22}\)

\(^{16}\) Docket No. No. 16-1436

\(^{17}\) Docket No. 16-1540

\(^{18}\) *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014) (upholding town board’s practice of inviting clergy to deliver a prayer to open public meetings of the board).

\(^{19}\) *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 578-579 (1989) (striking down the display of a large nativity scene in the county courthouse as a government endorsement of religion) (abrogated in *Greece v. Galloway*, *supra*).

\(^{20}\) *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (replacing the strict scrutiny test with rational basis in most Free Exercise cases).

\(^{21}\) Note ___ *supra*.

\(^{22}\) See note ___ *supra* and accompanying text.

Electronic copy available at: https://ssrn.com/abstract=3272939
IV. Freedom of Expression

The most common substantive issues of constitutional law that are adjudicated by American courts are cases involving freedom of expression. On average every year the Supreme Court issues half a dozen significant rulings on the First Amendment. Four questions in particular will continue to command the attention of the Court: equal access to the internet; fair-share fees to public unions; appropriate protection for whistleblowers in public offices; and laws restricting freedom of expression in the interest of national security.

1. Equal access to the internet. Laws guaranteeing access to communications platforms are far more likely to be upheld as constitutional than laws that restrict the rights of speakers. Nearly fifty years ago at a time when many American households received no more than three broadcast television channels the Supreme Court ruled that the “Fairness Doctrine” was constitutional so that no single corporate licensee could exercise absolute control over editorial content over the airwaves. Twenty years ago the Supreme Court upheld the “must carry” provisions of the 1992 Telecommunications Act against cable operators who sought to freeze out local network affiliates; the Supreme Court acted to protect the public’s right of access to local news coverage. The same competing First Amendment values are present in the dispute over “net neutrality” laws. Internet service providers contend that net neutrality strikes at their right to freedom of speech, while individual users, online entrepreneurs and municipalities seek to guarantee equal access to the “vast democratic forums of the internet.”

2. Fair-share fees for public unions. In the case of Janus v. American Federation of State, County and Municipal Employees, the Supreme Court seems poised by a vote of 5 to 4 to strike down as unconstitutional laws that require government employees who are represented by a union to pay the union for the cost of representing them. This would constitutionalize “right to work” laws in the area of public employment. In the name of the First Amendment it would spell the doom of unions representing government employees. This will no doubt continue to be a hard-fought issue.

3. Government retaliation against whistleblowers. In 1968 in the case of Pickering v. Board of Education, the Supreme Court declared that it was unconstitutional for a school system to fire a teacher who had written a letter to the editor complaining about the amount of money spent

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25 Reno v. American Civil Liberties Union, 521 U.S. 844, 868 (1997) (striking down provisions of the Communications Decency Act restricting material that is “harmful to minors” from the internet.)
26 Docket No. 16-1466.
28 391 U.S. 563 (1968) (ruling that the termination of a public school teacher for public criticism of the schools violated the First Amendment).
on athletics rather than academics. However, in 2006 in the case of *Garcetti v. Ceballos*,\(^\text{29}\) the Supreme Court upheld the decision of a prosecutor’s office to fire an assistant prosecutor who had complained that the office had obtained warrants illegally. The Court distinguished *Ceballos* from *Pickering* on the ground that Ceballos had made statements “pursuant to [his] official duties,”\(^\text{30}\) while Pickering had commented on “matters of public interest in connection with the operation of the public schools.”\(^\text{31}\) The distinction has not proven to be self-evident to the courts and public administrators. Over the intervening years, the lower courts have repeatedly sought to thread the needle between *Pickering* and *Ceballos*.\(^\text{32}\) The Supreme Court will no doubt re-enter this thicket and will have to decide how much protection government whistleblowers are owed under the First Amendment.

4. Restrictions on expression and the expansion of information-gathering based on national security. In *Holder v. Humanitarian Law Project*,\(^\text{33}\) the Supreme Court ruled that the government may criminalize any type of advice or counseling to listed terrorist organizations, even including attempts to persuade such organizations to abandon violence for peaceful means of dispute resolution. The Supreme Court has yet to determine the scope of the government’s power to conduct other activities affecting the expressive rights of American citizens in the name of national security. The NSA conducts massive ongoing interception of foreign communications, and the FBI routinely demands information about American citizens from banks, credit card companies, phone companies, and libraries. Are these programs constitutional? Although enacted for the purpose of protecting the American public from acts of terrorism, these expansive powers could easily be turned to more sinister purposes.

V. The Right to Vote

\(^{29}\) 547 U.S. 410 (2006) (upholding the termination of a deputy district attorney who had recommended dismissal of a case based on government misconduct as consistent with the First Amendment).

\(^{30}\) Id. at 413.

\(^{31}\) *Pickering*, note ___ supra, at 568.


\(^{33}\) 561 U.S. 1 (2010) (upholding provision of Patriot Act prohibiting “expert advice or assistance” to terrorist organizations as applied to individuals and organizations seeking to persuade such organizations to achieve their goals through peaceful means).
The right to vote is the hallmark of a citizen. The right to vote is preservative of all other rights. Half a century after the Supreme Court’s decisions upholding the Voting Rights Act and striking down malapportionment and poll taxes, the right to vote is once again under assault. This term and over the next few years the Supreme Court will have to determine the constitutionality of a number of laws and practices that affect the exercise of the franchise.

1. **Partisan gerrymandering.** The foremost question in the area of voting rights is the constitutionality of political gerrymandering. By clever drawing of legislative district boundaries a political party can double its electoral power, enabling a minority of voters to elect a supermajority of legislators – legislators who out of self-interest will never abandon the practice of political gerrymandering. The solution to this problem must come from the courts if it is to come at all. The principle of “representation-reinforcement” – the duty of the courts to protect representative government from power-grabbing incumbent politicians, political parties, or partisan interests – is at stake. The Supreme Court will address this issue in the pending case of *Gill v. Whitford.*

2. **Voter registration restrictions and requirements.** In recent years a host of laws and practices have been adopted that have the effect of making it more difficult to register to vote: a requirement for government-issued identification cards was upheld in *Crawford v. Marion County Election Board,* and voter registration purges such as that currently under review in the Supreme Court in *Husted v. A. Philip Randolph Institute.*

3. **Election practices.** Is it not remarkable that in the cradle of democracy many people must wait in line for hours to cast their votes, or that election day is a scheduled day of work? Moreover, restrictions on the number and placement of polling places, days and times for voting, and availability of mail-in ballots all reduce voter turnout particularly among the poor and the disabled. At some point the Supreme Court will be called upon to address the constitutionality of restrictive election laws in a comprehensive manner.

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34 *See Reynolds v. Sims, 377 U.S. 533, 565 (1964) (Warren, C.J.).* Chief Justice Warren stated:
But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

35 *See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (referring to the right to vote as a “fundamental political right, because preservative of all rights.”


38 Docket No. 16-1161.


40 Docket No. 16-980.
VI. The Powers of Congress

Constitutional interpretation of the Commerce Clause and the General Welfare Clause determine the permissible scope of congressional action. In *NFIB v. Sebelius*,\(^4\) the Court upheld some portions of the Affordable Care Act and struck down others. The Court’s decision in that case had massive implications for the financing of health care in the United States.

The Supreme Court also has the ultimate power to interpret not only the Constitution but all federal laws. The Court’s methods of statutory interpretation determine whether laws protective of workers, consumers, minorities, and the environment are broadly or narrowly construed. In recent decades the Supreme Court has been more protective of business\(^4\) and less protective of civil rights than at any time since the middle of the 20\(^{th}\) century.\(^4\) These decisions, too, have a tremendous effect on people’s daily lives.

VII. The Powers of the President

The Supreme Court recently reaffirmed the unilateral power of the President to recognize foreign governments as well as the President’s power to recognize the extent of foreign governments’ sovereignty over foreign territory.\(^4\) Another constitutional question that continually arises in the field of foreign affairs is the President’s power to unilaterally order offensive military action in foreign countries. The United States now has a military presence in over 170 countries.\(^4\) Some of these military actions have been authorized by Congress under statutes such as the Authorization to Use Military Force against the perpetrators of the attack on September 11, 2001, and the Authorization to Use Military Force to eliminate the threat of

\(^{4}\) 567 U.S. 519 (2012) (upholding the individual mandate enforcement mechanism of the ACA as a tax permissible under the General Welfare Clause, and striking down the requirement on the states to accept funds for the expansion of Medicaid or risk losing funding for the traditional Medicaid programs).


\(^{4}\) Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. 2076 (2015) (ruling that the President has exclusive power to recognize foreign nations and striking down federal law infringing upon that power).

weapons of mass destruction in Iraq. But there is no present congressional enactment authorizing the United States to conduct military operations against Iran or North Korea, and authorization to conduct military operations in Syria is presently limited to action against ISIS, which is regarded as a successor to al Qaeda. Should the President initiate military action beyond that currently authorized it may provoke a constitutional crisis. Until now the Supreme Court has avoided deciding upon the power of the President to initiate military conflict without authorization from Congress. Whatever the Court does in response to such an event would have life and death consequences.

Life and death are also at stake in our immigration policies. The power of the President to ban visitors, immigrants, and refugees who are overwhelmingly members of a particular religion will be examined by the Supreme Court this term in Trump v. Int’l Refugee Assistance Project and Trump v. Hawaii.

Similarly, should the United States once again resort to torturing prisoners, the Court may have to squarely face the President’s power to order such conduct, an issue that the Court has until now failed to address.

Finally, the Supreme Court may be called upon once again to rule upon the powers of a special prosecutor to investigate members of the Executive Branch and the power of the President to withhold evidence from that investigation, as the Court did forty-five years ago in United States v. Nixon.

Conclusion

The Constitution does not regulate all conduct that occurs in the United States. It governs only a fraction – the actions of the government. The Supreme Court has the final say regarding the constitutionality of legislation adopted by Congress, state legislatures, and city councils; law enforcement actions by federal, state, and local police and administrative agencies; and decisions and orders issued by federal, state and local courts. But the Constitution is not simply a legal document. It is a blueprint for society. The moral content of the Constitution is what gives it vitality and makes it relevant to the present day. The Supreme Court’s interpretations of the Constitution regarding fairness, liberty, equality, and tolerance will continue to shape not only our government but also our daily lives, as its moral precepts influence how we treat each other.

46 See, e.g., Commonwealth of Massachusetts v. Laird, 400 U.S. 886, 886-900 (1970) (Douglas, J. dissenting). Douglas and two other justices argued in dissent that the State of Massachusetts had standing to challenge the legality of the Vietnam war and that the matter was justiciable (i.e., not a political question).
47 Docket No. No. 16-1436.
48 Docket No. 16-1540.
49 United States v. Nixon, 418 U.S. 683 (1974) (ruling that in a criminal prosecution of government officials and presidential campaign officials a subpoena for recordings of confidential communications between the President and top aides was enforceable against the President).