Supreme Court Roundup

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GLOSSIP V. GROSS

Docket Number	14-7955
Date Argued	April 29, 2015
Date Decided	June 29, 2015
Vote	5-4, for Gross
Issues	Eighth Amendment; cruel and unusual punishment

In this case, the Court ruled upon whether or not Oklahoma's three-drug protocol for lethal injection violated the Eighth Amendment. This protocol involved the use of sodium thiopental to induce unconsciousness, a paralytic agent to inhibit involuntary movements, and potassium chloride to induce cardiac arrest[1]. Due to circumstances resulting in an inability to obtain sodium thiopental, Oklahoma decided to substitute 500 milligrams of the sedative midazolam as the first drug in their three-drug protocol. Charles Warner and 20 other Death row inmates in filed a 42 U. S. C. §1983 action against the state on grounds of cruel and unusual punishment, stating that the dosage of midazolam would be insufficient in preventing the pain experienced after the administration of the second and third drugs[2]. Furthermore, four inmates also filed for a preliminary injunction to prevent Oklahoma from carrying out any executions. A federal district court denied the motion, citing that the prisoners were unable to establish a likelihood that the use of midazolam would result in unusual pain, as well as not being able to offer an alternative drug that would substantially cause less pain[3]. This decision was affirmed by the Tenth Circuit U.S. Court of Appeals.

The Court ruled 5-4 in favor of Gross. The opinion was delivered by Justice Samuel A. Alito, Jr., in which the court held that there was insufficient evidence that the use of midazolam in Oklahoma's three-drug protocol presented a great enough risk of severe pain to violate the Eighth Amendment. The Court concurred with the District Court that the prisoners failed to identify an acceptable alternative method of execution which would yield less pain than the use of midazolam. Furthermore, executions have always been viewed as a constitutional punishment in the United States, and the risk of pain is inherent in the nature of an execution. Thus, the Eighth Amendment's protection against cruel and unusual punishment does not extend to protect against any and all pain that may occur during capital punishment. Because of the plaintiff's failure to provide factual evidence that midazolam has a higher than acceptable risk of pain, nor identified other available alternative execution methods, the Court chose to affirm the decision made by the Tenth Circuit Court of Appeals[4] This is in line with the standards established by the Court in *Baze v. Rees, 553 U.S. 25* (2008).

Justice Scalia, joined by Justice Clarence Thomas, wrote a concurring opinion, in which

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[1]Glossip v. Gross, 576 U.S. ___ (2015) 1

[2]*Id.* at 1

[3]*Id.* at 1

[4]*Id.* at 14

he stated that the death penalty cannot be held as unconstitutional by its very nature, as it is a punishment that the Constitution itself contemplates. He states that the argument presented against the death penalty, that it is arbitrary and open to mistake, is more so a criticism of the jury system. Scalia states that "[But] when a punishment is authorized by law—if you kill you are subject to death— the fact that some defendants receive mercy from their jury no more renders the underlying punishment "cruel" than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned[5]". Here he argues that the moral question of whether or not the death penalty is cruel and unusual rests in the hands of the jury's conviction, and that the State carrying out its function of administering justice has no need of moral consideration[6].

A dissenting opinion was written by Justice Stephen G. Breyer and joined by Justice Ruth Bader Ginsburg, who argued that the death penalty should be ruled unconstitutional. He states that the social and legal standards have changed since the implementation of the death penalty, and that its constitutionality has long since been brought into question[7]. Breyer writes that "Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use[8]."

A second dissenting opinion was written by Justice Sonia Sotomayor, who wrote that scientific evidence has shown that midazolam does not adequately sedate prior the reaching its drug ceiling, and often fails to keep the subject fully unconscious the "face of [more] noxious stimuli[9]". She also argued that the Court's interpretation of *Baze v. Rees* as a precedent was incorrect, and that there is no requirement for petitioners for relief under the Eighth Amendment to provide an acceptable and available alternative. Sotomayor also points out that just because an alternative cannot be found does not automatically result in an execution method becoming constitutional[10]. She was joined by Justice Stephen G. Breyer, Justice Ruth Bader Ginsburg, and Justice Elena Kagan.

OBERGEFELL V. HODGES

Docket Number	14-556
Date Argued	April 28, 2015
Date Decided	June 26, 2015
Vote	5-4, for Obergefell
Issues	Fourteenth Amendment; Equal Protection Clause

The Supreme Court ruled in this case whether or not the Fourteenth Amendment of the U.S. Constitution guaranteed the right for same sex couples to obtain a marriage license and have

[5] *Id.* at 4 (Scalia, J., concurring)
[6] *Id.* at 3-4
[7] *Id.* at 2 (Breyer, J., dissenting)
[8] *Id.* at 2
[9] Id. at 6 (Sotomayor, J., dissenting)
[10] *Id.* at 24-25

their marriage recognized by the State. The petitioners of the original case were 14 same-sex couples and two other homosexual men who filed suits in the Federal District Courts in Michigan, Kentucky, Ohio, and Tennessee. [11] These suits attacked the definition of marriage used by said states, a union between a man and a woman, as well as their subsequent failure to recognize or perform marriages for same-sex couples as a violation of the Fourteenth Amendment's Equal Protection Clause. The trial courts ruled in favor of the plaintiffs. The decision was appealed and later reached the U.S. Sixth Circuit Court of Appeals, who reversed the decision and held that the states refusal to recognize same-sex marriages did not violate the Fourteenth Amendment.

The Supreme Court ruled in favor of Obergefell in a 5-4 decision, with the opinion delivered by Justice Kennedy, who was joined by Justice Ginsberg, Justice Sotomayor, and Justice Kagan. The Court's opinion stated that "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family...It would misunderstand these men and women to say that they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves.[12]" The Court also went on to list four reasons for their decision: (1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy" [13] and that such autonomy is a liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. (2) "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals." [14] (3) the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education[15]." And (4) "marriage is the keystone of the Nation's social order[16]". The consequence of denying same-sex couples from marriage would thus deny them these benefits, reduce social order, and unfairly diminish the legitimacy of their relationships. The Court also cited precedent rulings, such as *Turner v. Safley,* in which they held that prisoners could not be denied the right to marriage because it was a fundamental right[17]. Thus, the Court overturned the Sixth Circuit Court's decision and held that the four State's ban on same-sex marriages violated the Equal Protection Clause of the Fourteenth Amendment.

Dissenting opinions were written by all four of the dissenting Justices. Justice Roberts argued that using Due Process to cover the legalization of same-sex marriage is not inherent in the interpretation of the Fourteenth Amendment, but rather an expansion of its coverage. To bolster this argument, Roberts cited that no court decision had ever before challenged the definition of marriage as "between a man and a woman". Justice Roberts states that the Court's decision is based upon using a moral argument to override the spirit of the law in his statement: "[But]this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.[18]"

Justice Scalia viewed the decision as a "threat to American democracy", in that it was

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[11] Obergefell Et Al. v. Hodges, Director, Ohio Department of Health, Et Al., 576 U.S. ___ (2015) 1
[12] *Id.* at 28
[13] *Id.* at 3
[14] *Id.* at 13
[15] *Id.* at 14
[16] *Id.* at 4
[17] *Id.* at 14, citing Turner v. Safley, 482 U.S. 78 (1987)
[18] *Id.* at 2 (Roberts, J., Dissenting)

used to “create 'liberties' that the Constitution and its Amendments neglect to mention[19]”. In his opinion, the Court mandating that all States must accept same-sex marriages was an unfair imposition of will upon the American populous that removed democratic debate from the table. Scalia also addressed the claim that the Fourteenth Amendment had been violated by the four states in question with his standard originalist interpretation, stating that a ban on same-sex marriage was not considered unconstitutional when the amendment was ratified in 1868, and thus there is “no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text[20]”.

Justice Thomas rejected the idea that same-sex marriage could be guaranteed by the Constitution, stating that “liberty has been understood as freedom from government action, not entitlement to government benefits[21]”. Nowhere in the Constitution does it declare that individuals have an expectation to receive a government service, such as a marriage license. Furthermore, Thomas also criticized the Court for interpreting the Constitution “guided only by their personal views as to the 'fundamental rights' protected by that document”. [22]

Justice Alito took a similar stance as the former two Justices on this issue, stating that “'liberty' under the Due Process Clause should be understood to protect only those rights that are 'deeply rooted' in this Nation's history and tradition'”. [23] Same-sex marriage cannot be considered “deeply rooted” in history or tradition, and thus should not be protected under Due Process. Alito also feared the decision would contribute to a “tyranny of the majority”, and that those who hold views against it would risk being labeled as bigots and be discriminated against by society. [24]

WALKER V. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS

Docket Number	14-144
Date Argued	March 23, 2015
Date Decided	June 18, 2015
Vote	5-4, for Walker
Issues	First Amendment, Freedom of Speech

This case covered the Supreme Court's ruling on a controversial use of the Confederate Flag on government-issued property. The Texas Division of the Sons of Confederate Veterans and its officers (the SCV) applied for the issuing of a specialty license place to be issued by the Texas Department of Motor Vehicles (the TDMV). This specialty plate would feature a confederate flag both in the organization's logo and one faintly printed on the background[25]. The TDMV refused to create the license plate after multiple complaints from the public, which prompted the SCV to sue on the grounds of a violation of their First Amendment rights. The district court ruled in favor of Walker, stating that license plates were government property and

[19] *Id.* at 1 (Scalia, J., Dissenting)
[20] *Id.* at 4 (Scalia, J., Dissenting)
[21] *Id.* at 1 (Thomas, J., Dissenting)
[22] *Id.* at 2 (Thomas J., Dissenting)
[23] *Id.* at 2 (Alito J., Dissenting)
[24] *Id.* at 7 (Alito J., Dissenting)
[25] Walker v. Texas Division, Sons of Confederate Veterans, 576 US ___ (2015) 3-4

could be reasonably regulated as they were not considered a public forum. The United States Court of Appeals for the Fifth Circuit reversed this decision, arguing that the denial was a form of discrimination against the symbology of the Confederate Flag.

The Court ruled 5-4 in favor of Walker, with the opinion written by Justice Breyer stating that "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.[26]" The Court based their decision upon the precedents set in *Pleasant Grove City v. Summum,* in which the Court upheld the city's refusal to allow the Summum church to erect a monument of the Seven Aphorisms on grounds that it would be a government establishment of religion. In that case, the Court found that the "display of a permanent monument in a public park" would be perceived by an ordinary and reasonable observer to reflect the values of the government[27]. This was in direct contrast to protests and demonstrations, which were finite in time. Like a monument, the Court considered a license plate to be similar as a permanent fixture. The Court also found that license plates are reasonably associated with the government, stating that "drivers displaying license plates 'use their private property as a 'mobile billboard' for the State's ideological message.'[28]" Thus, the TDMV did not violate the First Amendment in refusing to produce the SCV's license plates, as government property is held to a lower standard of free speech, as they are required to uphold viewpoint neutrality.

A dissenting opinion was written by Justice Alito, with Chief Justice Roberts, Justice Scalia, and Justice Kennedy joining. Alito argued against the Court's decision to find license plates government property. Alito cited that over 350 varieties of specialty Texas license plates were available, and that many plates honor private institutions and corporations as well[29] (some examples given were high schools, the Masons, soft drinks, and NASCAR drivers). Many plates also feature tongue-in-cheek slogans such as "Rather Be Golfing". Alito states that, by the logic used behind the Court's decision, all of the previous license plates can be seen as examples of government speech (which he considers ludicrous). Instead, Alito asserts that "while all license plates unquestionably contain some government speech (e.g., the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages.[30]" Thus these plates should be considered an expression of personal speech, and its limitation would indeed be a violation of the First Amendment.

ELONIS V. UNITED STATES

Docket Number	13-983
Date Argued	December 1, 2014
Date Decided	June 1, 2015
Vote	8-1, for Elonis
Issues	First Amendment, 18 U. S. C. §875(c)

[26] *Id.* at 5
[27] Pleasant Grove City v. Summum, 555 U.S. 460 (2009)
[28] Walker v. Texas Division, Sons of Confederate Veterans, 576 US ___ (2015) 17
[29] *Id.* at 2 (Alito, J. Dissenting)
[30] *Id.* at 3

With the increasing assimilation of social media in society, the definitions of "protected speech" must also be examined. In this case, the Supreme Court ruled on whether or not Anthony Douglas Elonis' posting of violent rap lyrics to Facebook constituted as "threatening language". Elonis posted his rap lyrics to Facebook after a recent divorce under the pseudonym "Tone Dougie". The lyrics contained several instances of graphically violent language and imagery pertaining to his former wife, select co-workers, a kindergarten class, and state and federal law enforcement. They were interspersed with disclaimers that stated the lyrics to be "fictitious" and not depicting real persons[31]. Despite this, he was indicted by a grand jury on five counts of threats relayed through interstate communication, a violation of Federal Law 18 U. S. C. §875(c). He appealed to a district court stating that the government must prove that he intended to communicate a "true threat", but was dismissed on the grounds that a "reasonable person would foresee that his statements would be interpreted as a threat[32]. Elonis was convicted on four of the five counts and served 44 months in prison. He appealed to the United States Court of Appeals for the Third Circuit, who affirmed the district court's decision.

With no luck on those fronts, Elonis appealed to the Supreme Court, who ruled 8-1 that Elonis' actions did not meet the requirements of a "reasonable person's" expectation of threatening speech. The Court's opinion was written by Chief Justice Roberts, and joined by seven other Justices. Roberts offered in his opinion that the "reasonable person" standard that Elonis was convicted on is acceptable for tort law, it is inconsistent with conventional requirements for establishing criminal conduct: *mens rea, or* an awareness that one's actions are wrong[33]. While ignorance of the law is not usually considered a defense for breaking it, sufficient *mens rea* is required to prove the comission of a crime under Federal Law §875(c)[34]. Roberts argued that, at best, Elonis was negligent and reckless in his posting of speech that could potentially be seen as threatening. However, because Elonis obviously did not post the lyrics with the intent to threaten, as evidenced by his disclaimers and taking up of a persona, the Court found insufficient reason for Elonis' indictment.

Justice Alito wrote a concurring opinion in which he agreed that *mens rea* was required to convict under §875(c), but also argued that the Court's ruling left the definition of the terms necessary to prove a crime needlessly vague (how do you know if someone is purposeful or simply negligent or reckless?). Alito stated that "this will have regrettable consequences. While the Court has the luxury of choosing its docket, lower courts and juries are not so fortunate. They must actually decide cases, and this means applying a standard[35]." Alito also addressed the First Amendment issue brought up by Elonis, stating that song lyrics are generally performed in public or sold in recorded form, whereas statements made on social media "pointedly directed at their victims" and thus are much easier to be taken seriously[36]. To allow this would be to allow anyone to post threats on social media under the guise of "lyrics" or other similar artistic expressions.

Justice Thomas, as the sole dissenter, argued that the Court's ruling "casts aside the approach used in nine Circuits and leaves nothing in its place[37]", in essence removing a general standard used by the justice system without replacing it. Thomas also cites precedent, such as

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[31]Elonis v. United States, 575 US ___ (2015) 1
[32]*Id.* at 1
[33]*Id.* at 13
[34]*Id.* at 2-3
[35]*Id.* at 1-2 (Alito, J. Concurring)
[36]*Id.* at 6
[37]*Id.* at 1 (Thomas, J. Dissenting)

Rosen v. United States, in which the Court ruled against the petitioner even though he did not show purposeful intent[38].

Dedication to Justice Scalia:

We at the Brandeis Law Journal would like to dedicate this year's Supreme Court Roundup in memoriam of Justice Antonin Gregory Scalia, who passed away on February 13, 2016, after nearly thirty years of service on the Supreme Court. A strong supporter of the originalist and textualist Constitutional interpretations, Scalia proved himself numerous times to hold strong conviction in his beliefs, even when they proved controversial with the American populous. Regardless of our personal views on his political beliefs, we greatly respect him for his service to this country.

[38] *Id.* at 4