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Last year I wrote a book identifying six proposed changes in the law that I thought - and still think - are sufficiently important to justify amendments to the Constitution. Four decisions announced during the last three days of the Supreme Court's term reinforce my judgment about four of those proposals.

I.

Before discussing those decisions, however, I must comment on a case involving a truly remarkable departure from the majority's love affair with dictionary definitions as the primary guide to determining the meaning of statutes. In *Michigan* against the *Environmental Protection Agency*, the key statutory language in the Clean Air Act instructed the EPA to regulate power plant emissions of noxious

substances if it found that it was "necessary and appropriate" to do so. At the first step of the rulemaking process, the EPA determined that it was appropriate and necessary to regulate certain hazardous air pollutants based on the results of a study that examined harms to public health. After making that initial determination, EPA then promulgated a second regulation requiring the implementation of certain control technologies, and, in doing so, considered the cost of those technologies.

Ignoring dictionary definitions of the adjective "appropriate" (which do not mention the word "costs") and the fact that the word "necessary" might well impose a duty to regulate even if costs were excessive, the Court held that the EPA's initial decision to regulate was defective because it had failed to include any reference to the costs of regulation. Instead of simply accepting the plain meaning of a Congressional command or deferring to the agency's reasonable interpretation of a statute that it administers — as

Chevron requires – the Court invalidated regulations that took years to draft and which, according to findings made in the rulemaking process, would have prevented 11,000 premature deaths annually and achieved benefits that exceeded costs by as much as \$80 billion each year. The decision rested squarely on the majority's conclusion that the agency had misinterpreted the words "necessary and appropriate". As a former English major in college, and as the author of the majority opinion in *Chevron*, I find that conclusion truly mind-boggling. Such a free-wheeling statutory decision can do even more harm—both to the public health and to the Court itself—than misinterpretations of the Constitution.

II.

Turning now to the Affordable Care Act case, the Chief Justice's excellent opinion for a majority of six Justices merits special praise because his previous writing about that statute indicates that as a matter of policy he probably would have been opposed to its

enactment. I regard his opinion as strong and cumulative evidence supporting the proposition that his votes as a judge are determined entirely by his understanding of what the law requires rather than being influenced by his views of sound policy.

I find his conclusion that Congress passed the statute "to improve health insurance markets, not to destroy them" to be both correct and also far more persuasive than the dissent's concentration on the meaning of the phrase "Exchange established by the State", not only for the reasons stated in his opinion but also because that phrase first appeared in early drafts of the legislation when its authors thought that the only exchanges to be adopted would be those established by States. Congress' decision to authorize federal exchanges as an alternative to their initial preference for state exchanges should have led to more editorial revisions reflecting that fact. In other words, the drafters' failure to remove the term "Exchange established by the State" should be viewed as

the equivalent of a scrivener's error. The Chief, however, was dead right in his understanding of the intent of Congress.

For me, however, the real importance of the case is the fact that it illustrates how misguided the majority of the Court was in 1997 when it created the anti-commandeering rule in the *Printz* case. *Printz* was the case holding that Congress could not require a local sheriff to conduct a background check of a prospective gun purchaser. Had that case been decided correctly, it would not have been necessary for Congress to give States an option to refuse to obey the command in 42 U. S. C. §1031 that "Each State shall . . . establish an American Health Benefit Exchange." Whether it was wise as a matter of policy to give each state an option to impose the burden of establishing a new exchange on the federal bureaucracy is an appropriate subject for debate, but the notion that Congress does not have the power to answer that question for the entire country is quite wrong. An amendment adding four words to the

Supremacy Clause in Article VI of the Constitution would restore Congress' power to make such decisions.

III.

Because Chapter 2 of my book recommends the adoption of an Amendment that would give federal courts the authority to put an end to political gerrymandering throughout the Nation by simply applying the same rules that prohibit racial gerrymandering, I welcomed the Supreme Court's five to four decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, upholding Arizona's authority to create a special commission to draw congressional districts in that State. Accepting the views of the dissenters that the state law adopted by a state-wide ballot initiative was invalid because it had not been enacted by the "legislature" would have been tantamount to granting the State Legislature a permanent license to engage in political gerrymandering. Just as it is settled that judges should construe statutes to avoid constitutional issues whenever possible, it seems to me that it was

entirely appropriate for the majority in that case to treat the product of a popular initiative as the equivalent of a law enacted by the legislature.

In his dissent the Chief Justice argued that a literal reading of the word "legislature" as used in the text of Article I, Section 4, of the Constitution would have produced a different result, but he failed to confront the question whether a literal reading of that whole section would have affected the outcome. That text merely gives state legislatures the authority to prescribe the "Times, Places, and Manner of holding Elections" - it does not mention the quite different task of drawing the designs of election districts. An interpretation of the section that allows state legislatures to perform that unmentioned task surely must also allow a State to use a popular initiative to create a special agency to perform it as well.

The first issue presented in the case was whether the State Legislature had standing to bring the case. Justices Scalia and Thomas dissented on that issue, but

nevertheless - contrary to normal practice - also expressed their views on the merits. Justice Scalia used unusually strong language in explaining his reasons for departing from his normal practice. He explained that "the majority's resolution of the merits question ('legislature' means 'the people') is so outrageously wrong, so utterly devoid of textual or historic support, so flatly in contradiction of prior Supreme Court cases, so obviously the product of hostility to districting by state legislatures, that I cannot avoid adding my vote to the devastating dissent of the Chief Justice." My reason for quoting this hyperbola is to note its contrast with the language used by the Chief in his dissent. Even though that dissent is really not all that devastating (because it fails to consider the important difference between a literal reading of one word in Article I, Section 4, - the word "legislature" - and a literal reading of the entire section which does not even mention redistricting), notwithstanding his profound

disagreement with Justice Ginsburg, his opinion avoids the use of any disrespectful rhetoric - which is another reason why I admire his work even though I frequently disagree with his views.

IV.

On the last day of the term the Court's decision of a capital case featured a debate between Justice Alito for the Court and Justice Sotomayor writing for four dissenters and a second debate between Justices Breyer and Ginsburg, arguing that the Court should revisit the question whether the death penalty violates the 8th Amendment, and Justices Scalia and Thomas who analogize the arguments of the so-called "abolitionists" to a defendant's plea for mercy because he was orphaned by his murder of his parents.

One of the majority's two reasons for rejecting the defendant's method of execution claim was that he had failed to identify a different procedure that would have been constitutional. In her dissent Justice Sotomayor correctly argued that that reasoning would

permit a State to use burning at the stake as an acceptable method of execution.

The separate opinion by Justice Breyer, which carefully reviewed the history of our death penalty jurisprudence, was unusual because it did not address any question directly presented in the case, and because his oral summary prompted an oral response by Justice Scalia which, I am quite sure, was the first time in the Court's history that a concurring Justice thought it appropriate to make an oral response to a dissenter's oral statement.

Justice Breyer's 46 page dissent reviews forty years of experience with the administration of the death penalty to identify four special difficulties. First, convictions in capital cases are notoriously unreliable - innocent individuals have actually been executed and in over 100 cases individuals who have been sentenced to death have later been fully exonerated. Second, the death penalty is imposed arbitrarily. Factors such as race, gender, and

geography, rather than the egregious character of the crime, make the determination of whether the penalty should be imposed analogous to the risk of being struck by lightning. Third, the delay associated with the death penalty continues to increase. Whereas in 1960 the average interval between sentencing and execution was only two years, last year that average was almost 18 years. The last ten inmates executed in Florida had spent an average of nearly 25 years on death row. Delay is itself the source of cruel punishment and undermines the principal penological rationales for the death penalty. Fourth and finally, as more and more states abandon the penalty - it was imposed in only seven states last year - it is becoming increasingly unusual. As an aside, I note that Nebraska's decision to override the Governor's decision to veto the state statute putting an end to capital punishment in that State may be interpreted in two quite different ways.

For those who continue to believe that the issue is best resolved on a state-by-state basis, Nebraska's

decision supports the view that we can safely rely on the democratic process to put an end to this form of cruel and unusual punishment. But I am persuaded that this decision actually enhances the need for a prompt nation-wide solution. For as the number of individual citizens opposed to this form of punishment continues to increase, the pool of jurors not subject to valid challenges by prosecutors in capital cases continues to decrease. It may already have become impossible to obtain a fair cross-section of impartial jurors in death cases because the Supreme Court has endorsed a standard for determining the eligibility of jurors in such cases that puts a thumb on the prosecutor's side of the balance. As more and more citizens become convinced that capital punishment is unwise as a matter of policy, the risk that juries in death cases will not represent a fair cross-section of the community will continue to increase. The inability to obtain a truly impartial jury in such cases may well provide the basis for a nation-wide solution that brings the United

States to the point that most civilized countries reached long ago.

Returning to the opinions announced by the Court, I note that Justice Scalia's first response to Justice Breyer was his statement that it "is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*." If the prohibition against depriving a defendant of his life without due process of law were a valid argument for preserving the death penalty, I wonder how many cruel punishments would be protected from Constitutional challenge by the Fifth Amendment's prohibition against being "twice put in jeopardy of life or limb." Perhaps it would be permissible for a State to amputate one of a pickpocket's hands, but not both of them.

V.

Probably the most significant opinion announced during the Term was Justice Kennedy's explanation for holding that the Constitution protects an individual's right to marry a person of the same sex. I was

surprised by his decision to rely primarily on a substantive due process rationale rather than the Equal Protection Clause but, after reflection, I am persuaded that he was wise to do so. The difference between categories of couples capable of producing children and those completely unable to do so surely provides a rational basis for treating the two categories differently, but the substantive due process doctrine is more appropriate for an all-or-nothing analysis. The right to marry - like the right to decide whether to have an abortion, or the right to control the education of your children - fits squarely within the category of liberty protected by the Due Process Clause of the 14th Amendment. Just as Potter Stewart's reliance on substantive due process in *Roe v. Wade*, 410 U. S. 113 (1973), and Justice Harlan's and Justice White's reliance on the substantive content of the word "liberty" in *Griswold v. Connecticut*, 381 U. S. 479 (1965), were far better explanations for those two correct decisions than the concept of "privacy"

developed by the majority opinions, I am persuaded that a fair reading of the word "liberty" best explains the real basis for the Court's holding in the marriage case.

The point is strongly reinforced by the dissenting opinions which rely heavily on earlier decisions rejecting the substantive due process analysis in *Lochner v. New York*, 198 U. S. 45 (1905). But those dissents incorrectly assume that our cases overruling *Lochner* rejected the entire doctrine of substantive due process, whereas in fact they merely rejected its application to economic regulation. Indeed, it is ironic that all of today's dissenters (except Justice Thomas) who accuse the majority of improperly resurrecting *Lochner*, came much closer to committing that sin themselves when they decided to rely on substantive due process as the basis for their conclusion that the Second Amendment applies to the States. It borders on the absurd to assume that the word liberty does not include one's right to choose a

spouse but does include a right to possess a firearm in one's home. Because today's dissents may one day persuade their authors to reconsider their own earlier reliance on substantive due process, I think those dissents may have the unintended consequence of lending support for the position advocated in the final chapter of my book.

I endorse the Court's holding that the Due Process Clause of the 14th Amendment protects an individual's right to choose his or her spouse but I remain unpersuaded that that Clause also protects an individual's right to use a gun. The dissenters have things backward when they argue that it protects the latter but not the former.

Thank you for your attention.