

# Supreme Court Preview 2015

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# Overview of the Presentation

- ▶ What is on the docket right now
- ▶ What may be added to the docket
- ▶ Supreme Court and 2016 election

# What's on the Docket?

- ▶ Docket is about half full (30 or so cases)
  - ▶ Two “big” cases
  - ▶ Redistricting
  - ▶ Crime and punishment
  - ▶ Environmental case
  - ▶ Preemption
  - ▶ Sleeper

# “Big” Cases

- ▶ 2-3 a term
- ▶ Know by end of January
- ▶ Big for the moment?
- ▶ Timing makes this term big no matter what the Court decides

# Overriding Theme of this Term

- ▶ Confusion: what will the Court focus on?
- ▶ Obvious uncertainty in many cases
- ▶ How to present?

# *Fisher v. University of Texas at Austin*

- ▶ Deja vu anyone?
- ▶ Race in college admissions
- ▶ What will the Court focus on?

# *Fisher v. University of Texas at Austin*

- ▶ Texas's Top Ten Percent fills about 80% of UT's class; over 20% of students admitted are black and Hispanic
- ▶ Texas's high schools are racially segregated
- ▶ Holistic review: race is a factor
- ▶ Who is Abigail Fisher?

# *Fisher I*

- ▶ Affirmative actions plans
  - ▶ Narrowly tailored
  - ▶ Compelling government interest
- ▶ Fifth Circuit upheld the plan
- ▶ SCOTUS: Fifth Circuit should not have deferred to the university's argument that its use of race was narrowly tailored
- ▶ Surprising decision



# *Fisher II*

- ▶ Fifth Circuit: UT wins again!
  - ▶ Many well-qualified minority students are excluded
  - ▶ Test score gap
  - ▶ 25-30% of black and Hispanic students are admitted through holistic review

# *Fisher II*

- ▶ Dissent

- ▶ How does UT define “critical mass”?
- ▶ Is 216 out of 6,322 enough?
- ▶ Top Ten Percent Plan minority students v. holistic review minority students?

# *Fisher II*

- ▶ Fisher's position
  - ▶ Unchanged
  - ▶ Top Ten Percent=critical mass of minority students
  - ▶ Adding a few more minority students has no “constitutionally meaningful” impact

# *Fisher II*

- ▶ The possibilities
  - ▶ Standing
  - ▶ Critical mass (what is it v. what can universities do to achieve it)
  - ▶ Analyze the holistic plan
  - ▶ Diversity within diversity
- ▶ Lyle Denniston, SCOTUSblog, *The Mystery of Fisher II Review*

# *Fisher v. University of Texas at Austin*

- ▶ Why does this case matter so much?
  - ▶ National focus on race
  - ▶ Nation impact
  - ▶ The Court takes on the issue of affirmative action/race-based decision making frequently, directly, unapologetically, and with mixed results

# *Friedrichs v. California Teacher Association*

- ▶ “Big” case no matter what
- ▶ “Big” case if you don’t have unions
- ▶ Clear question presented
- ▶ If public employee’s don’t join the union do they still have to pay their “fair share” of collective bargaining costs?
- ▶ 20+ states directly affected

# *Friedrichs v. California Teacher Association*

- ▶ It is all about *Abood* (1977) and the “agency shop”
- ▶ First Amendment doesn’t prevent public sector unions from requiring non-members to pay their “fair share” of union dues for collective-bargaining, contract administration, and grievance-adjustment
- ▶ No free-riders are allowed!
- ▶ Is everything a union does is political?

# *Friedrichs v. California Teacher Association*

- ▶ Symbolic and practical importance of *Abood*
  - ▶ Guarantees significant funding
  - ▶ Cornerstone of public sector collective bargaining
  - ▶ Many employees may leave the union
    - ▶ Why not join and pay minimal “non-chargeable” political costs?
  - ▶ What might the weakening of public sector unions look like?



# *Friedrichs v. California Teacher Association*

- ▶ Middle ground?
  - ▶ Public sectors employees who don't join the union have to opt-out of paying "nonchargeable" union expenditures
  - ▶ Does requiring non-members to opt-out—rather than opt-in—violates the First Amendment
  - ▶ Many won't make the effort to opt-in

# *Friedrichs v. California Teacher Association*

- ▶ Is the writing on the wall?
  - ▶ Probably, see *Harris v. Quinn* (2014)
- ▶ What about precedent?
- ▶ Timing is everything...

# Redistricting

- ▶ Three redistricting cases
- ▶ One (for now) make the “big” cases list

# *Evenwel v. Abbott*

- ▶ Voting districts must have roughly equal populations to comply with “one-person one-vote”
- ▶ What population is relevant?
  - ▶ Total population
  - ▶ Total *voting* population
  - ▶ Either
- ▶ Who decides?
  - ▶ State legislatures
  - ▶ Supreme Court
- ▶ Status quo: state legislatures can do what they want

# *Evenwel v. Abbott*

- ▶ Total population includes a lot of people who can't vote
  - ▶ Non-citizens
  - ▶ Children
  - ▶ Inmates convicts
- ▶ Urban districts benefit from total population
- ▶ Most states use total population based on census data

# *Evenwel v. Abbott*

- ▶ Right now states have a number of choices
  - ▶ Total people in a district
  - ▶ Total citizens
  - ▶ Total citizens of voting age
  - ▶ Total numbers of registered voters

# *Evenwel v. Abbott*

- ▶ Court has never held any particular metric to be unconstitutional
- ▶ Metric can't be the result of a discriminatory choice
- ▶ Court okayed total voter population

# *Evenwel v. Abbott*

- ▶ Grant came as a surprise
  - ▶ 3 previous cert denials
  - ▶ Over the last 25 years
  - ▶ Arguing for total voter population



# *Evenwel v. Abbott*

- ▶ Challengers policy arguments
  - ▶ Votes in districts with a greater population of eligible voters are worth less if total population is used
- ▶ Texas!? Policy arguments
  - ▶ Legislature should be able to decide
  - ▶ Total voter population data?
  - ▶ Elected representatives represent everyone (not just voters)

# *Evenwel v. Abbott*

- ▶ Why is this a “big” case?
  - ▶ Legislative authority is on the line
  - ▶ States could have to make some big changes
  - ▶ If total population is required Republicans are expected to benefit
  - ▶ What is the Court thinking?

# *Harris v. Arizona Independent Redistricting Commission*

- ▶ June 29: Court hold Arizona's redistricting commission may could be solely responsible for congressional redistricting
  - ▶ In the first sentence: Arizona voters adopted the commission to avoid partisan gerrymandering
- ▶ June 30: Court agreed to decide *Harris*
  - ▶ Did Arizona's redistricting commission engaged in partisan gerrymandering in state legislative redistricting that violated one-person, one-vote
- ▶ Really three questions in this case

# *Harris v. Arizona Independent Redistricting Commission*

- ▶ Background
- ▶ Arizona was a “covered” under Section 5 of the Voting Rights Act (VRA)
- ▶ Until *Shelby County v. Holder* (2013) DOJ had to approve all changes to Arizona’s state legislative redistricting plans
- ▶ AIRC wanted Arizona’s 2010 plan precleared on the **first** try for the **first** time ever

# *Harris v. Arizona Independent Redistricting Commission*

- ▶ An important caveat:
  - ▶ “One of the complications of this case is that there is a clear disagreement between the two sides on just what was done, and why, raising the prospect that the case may not turn out to be a particularly good test case on the larger constitutional issues that the voters’ appeal insisted are at stake.”
- ▶ Lyle Denniston, SCOTUSblog, *The new look at “one person, one vote,” made simple*

# *Harris v. Arizona Independent Redistricting Commission*

- ▶ Important facts?
  - ▶ Commission wanted ability-to-elect 10 districts
  - ▶ Commission stated that it underpopulated some minority districts to strengthen minorities' ability to elect the candidate of their choice, so that DOJ would be more likely to pre-clear their plan
  - ▶ The plaintiffs claim the Commission underpopulated minority ability-to-elect districts to favor Democrats
    - ▶ Districts underpopulated by more than 2 percent had a Democrat plurality of registered voters and districts overpopulated by more than 2 percent had a Republican plurality

# *Harris v. Arizona Independent Redistricting Commission*

- ▶ Population deviation was about 9%
- ▶ *Harris* plaintiffs don't object to partisan gerrymander *per se* just partisan gerrymandering that leads to unequal distribution of voters
- ▶ If 0% population deviation, political gerrymander away
- ▶ Two judges: commission was *primarily* motivated by a desire to obtain pre-clearance

# *Harris v. Arizona Independent Redistricting Commission*

- ▶ Can complying with the VRA could justify minor population deviations?
  - ▶ Judge Clifton reasoned: “we fail to see how compliance with a federal law concerning voting rights—compliance which is mandatory for a redistricting plan to take effect—cannot justify minor population deviations when, for example, protecting incumbent legislators can.”
- ▶ What about *Shelby County*?
  - ▶ Maps were drawn up before *Shelby County*
  - ▶ But about all the elections that will happen from 2010-2020?



# *Harris v. Arizona Independent Redistricting Commission*

- ▶ What's really at stake in this case that will affect other jurisdictions?
- ▶ Political gerrymandering

# *Shapiro v. Mack*

- ▶ On the surface: typical Supreme Court case
  - ▶ Narrow, dull, (seemingly) little at stake
- ▶ Question: under the Three Judge Act, what is the right standard to determine whether a three-judge panel is not required?
  - ▶ Must the complaint fail to state a claim?
  - ▶ Must the complaint be frivolous?
- ▶ Is there more here? Maybe?

# *Shapiro v. Mack*

- ▶ Three-Judge Act applies certain challenges brought under the Voting Rights Act, Bipartisan Campaign Reform Act, Prison Litigation Reform Act, and Communications Act
- ▶ Three-judge panels must decide constitutional challenges to congressional and legislative redistricting
- ▶ A single judge may determine that three judges are not required
- ▶ Complaint must state a “substantial question”

# *Shapiro v. Mack*

- ▶ Shapiro: only frivolous cases shouldn't go to a three judge panel
- ▶ Fourth Circuit: complaints that don't state a claim shouldn't go to a three judge panel—they are frivolous

# *Shapiro v. Mack*

- ▶ Bottom line:
  - ▶ Plaintiffs want to go to three-judge panels
  - ▶ Frivolous complaints have even less merit than complaints that fail to state a claim
  - ▶ So Shapiro argues everything but frivolous complaints should go to three judge panels

# *Shapiro v. Mack*

- ▶ Pros for plaintiffs of three-judge panels?
  - ▶ Supreme Court is more likely to take them
  - ▶ If the Supreme Court “summarily disposes” such a case it has some precedential value

# *Shapiro v. Mack*

- ▶ Wait, wait there's more
- ▶ Shapiro wants a ruling on his **First Amendment (not Fourteenth Amendment)** partisan gerrymandering claim
- ▶ Did Maryland violate his **First Amendment** rights of political association by drawing districts drawing strange looking districts to include people with dissimilar political views?

# Crime & Punishment

- ▶ Four cases
- ▶ On the heels of the bombshell that was *Glossip v. Gross*
- ▶ Two non-death penalty cases



# *Montgomery v. Louisiana*

- ▶ Is *Miller v. Alabama* (2012) retroactive?
- ▶ 5-4 decision that states may not **mandate** that juvenile to life in prison with parole
- ▶ Charles Hurt, 17 at the time of the crime, was convicted of murder in 1964

# *Montgomery v. Louisiana*

- ▶ Louisiana Supreme Court said no
- ▶ Per *Teague v. Lane* (1989) if a new rule completely removes a punishment from the list of punishments it can be retroactive
- ▶ *Miller* only barred sentencing schemes that mandate life in prison for juveniles

# *Foster v. Humphries*

- ▶ Check out some blogs
- ▶ Has the most potential to tarnish the Court's image
- ▶ Per *Boston v. Kentucky* (1985), prosecutors may strike a number of jurors for any unstated reason except race and sex
- ▶ Not a death penalty case *per se*

# *Foster v. Humphries*

- ▶ Timothy Tyrone Foster, who is black, murdered an elderly white woman
- ▶ The jury was all-white
- ▶ The prosecutor peremptorily struck all four prospective black jurors

# *Foster v. Humphries*

- ▶ Foster gets prosecutor's jury selection notes
- ▶ The names of the black jurors were highlighted in green and a key indicated that green represented black
- ▶ "Black" was circled on the black jurors' questionnaires,
- ▶ Prospective black jurors were identified as B#1, B#2, and B#3 in the notes
- ▶ Investigator ranked black jurors and recommended one in case a black juror had to be selected

# *Foster v. Humphries*

- ▶ Georgia Superior Court ruling
  - ▶ Prosecutor's notes fail to demonstrate purposeful discrimination
  - ▶ Even if they did that the prosecutor cited numerous race-neutral reasons
- ▶ None of the prospective black jurors were ideal
  - ▶ Live at home son convicted of burglary
  - ▶ Husband and brother-in-law had undisclosed criminal history
  - ▶ Worked at Head Start
  - ▶ Knew defendant

# *Foster v. Humphries*

- ▶ Foster responds: What were the **real reasons** the prosecutor struck the black jurors?
- ▶ How do you know?
- ▶ Are the notes enough?

# *Hurst v. Florida*

- ▶ Broad question presented
- ▶ Does Florida's death penalty sentencing scheme violate the Sixth (right to a jury trial) and Eighth (no cruel and unusual punishment) Amendments
- ▶ Seven out of 12 jurors recommend that Hurst be put to death based on unspecified aggravating factors



# *Hurst v. Florida*

- ▶ *Ring v. Arizona* (2002) jury must determine any facts that increase maximum punishment
- ▶ Florida does not require jurors to articulate which aggravating factors they find
- ▶ Maybe all seven jurors relied on a different aggravating factor
- ▶ Florida pre-*Ring* precedent says this is okay

# *Hurst v. Florida*

- ▶ Must juries be unanimous as to the finding of an aggravating circumstance?
  - ▶ Every other state and the federal system require juror unanimity
- ▶ Should a jury—rather than a judge—decide intellectual disability?
  - ▶ *Atkins v. Virginia* (2002) ended executing the intellectually disabled

# Kansas Capital Cases

- ▶ Two questions
- ▶ Must juries be affirmatively instructed that capital defendants do not have to prove factors mitigating against the death penalty beyond a reasonable doubt?
- ▶ Should the Carr brothers have been sentenced separately?
  - ▶ Reginald said “I didn’t do it”
  - ▶ Johnathan said “Reginald was the leader I was the follower”
  - ▶ During Reginald’s mitigation case, on cross-examination by Johnathan’s lawyer, their sister testified that Reginald admitted to her, while she was visiting him in jail, that he shot the four roommates
- ▶ *Kansas v. Carr*

# *EnerNOC v. Electric Power Supply Association*

- ▶ Every term has a big environmental case
- ▶ If states aren't suing each other, they are typically on both sides of the issue as *amici*
- ▶ This case is no exception!

# *EnerNOC v. Electric Power Supply Association*

- ▶ “I believe that this case is the most important case regarding the energy system in this country that the Supreme Court has ever yet to consider.”  
Former Federal Regulatory Energy Commission (FERC) Chairman [Jon Wellinghoff](#)
- ▶ Last two landmark cases involving the nation’s electric grid were from 1923 and 1944

# *EnerNOC v. Electric Power Supply Association*

- ▶ May FERC regulate “demand response” payments offered to electric utility customers to reduce their electricity use during periods of high demand?
- ▶ Lower court said no
- ▶ Tension are high
  - ▶ States may save money through participating in demand response programs
  - ▶ State regulatory authority impacted

# *EnerNOC v. Electric Power Supply Association*

- ▶ Per the Federal Power Act, FERC regulates the **wholesale** sale of electric energy
- ▶ States regulate the **retail** sale
- ▶ Retail electricity prices remain constant over a period of time regardless of demand
- ▶ So customers have no price incentive to reduce consumption during those time periods
- ▶ The purpose of “demand response” is to reduce electricity use when it is most expensive and least clean to produce

# *EnerNOC v. Electric Power Supply Association*

- ▶ Demand response affects wholesale prices but...
- ▶ “Demand response—simply put—is part of the retail market. It involves *retail* customers, their decision whether to purchase *at retail*, and the levels of *retail* electricity consumption.”
- ▶ Is compensation level for demand response is too high?



# *Gobeille v. Liberty Mutual Insurance Company*

- ▶ First significant preemption case in a while
- ▶ At least 16 other states affected
- ▶ Vermont has a good chance of winning
- ▶ Vermont wants claims data from health insurance companies

# *Gobeille v. Liberty Mutual Insurance Company*

- ▶ ERISA applies to most health insurance plans and requires them to report detailed financial and actuarial information
- ▶ ERISA preempts state laws if they “relate to” an ERISA plan
- ▶ Second Circuit: ERISA preempts Vermont’s law because one of the key functions of ERISA is reporting
  - ▶ Database: “Vermont Healthcare Claims Uniform Reporting and Evaluation System” and the operative section of the regulation is titled “Reporting Requirements”
- ▶ Reporting obligations are “burdensome, time-consuming, and risky”
- ▶ Worse when multiplied by other states laws

# *Gobeille v. Liberty Mutual Insurance Company*

## ▶ Dissent

- ▶ ERISA reporting objectives: mismanagement of funds and failure to pay employee benefits=information on plan assets or allocation
- ▶ Vermont seeks: medical claims data, the services to beneficiaries, charges and payments, and demographics
- ▶ Why? Make sure health care is being provided to its citizens
  - ▶ Vermont does not seek information on plan assets or review the allocation or denial of benefits
- ▶ Health insurance companies already possess data

# *Gobeille v. Liberty Mutual Insurance Company*

- ▶ SLLC brief
  - ▶ Big picture perspective on why states want this data and what they do with it
  - ▶ Presumption against preemption
  - ▶ States are trying to makes laws uniform and data is already available

# *Gobeille v. Liberty Mutual Insurance Company*

- ▶ Examples from the brief of how the data is used:
  - ▶ One Miami hospital charged \$127,038 to implant a pacemaker, while a hospital down the street charged only \$66,030
  - ▶ When a six-year-old girl cut her eyebrow and needed stitches, the girl's mother was able to compare emergency room costs for that procedure on the NH HealthCost website. She used the data to save \$500 by driving to a hospital 20 minutes further than the one closest to her home.

# *Franchise Tax Board of California v. Hyatt (Hyatt II)*

- ▶ Sleeper (for so many reasons!)
- ▶ Federal courts case with fun facts!
- ▶ It all started with a **1992** newspaper article about someone striking it rich patenting a computer chip
- ▶ Hyatt sues the **California** tax board in **Nevada**
- ▶ Why? Nevada laws are more favorable to him
- ▶ Claims: invasion of privacy, fraud, intentional infliction of emotional distress

# *Hyatt II*

- ▶ Hyatt sues the **California** tax board in **Nevada**
- ▶ Why? Nevada laws are more favorable to him
- ▶ Claims: invasion of privacy, fraud, intentional infliction of emotional distress

# *Hyatt I*

- ▶ Is Nevada required to apply California's laws to California?
- ▶ No
- ▶ Full Faith and Credit Clause does not require Nevada to offer FTB the full immunity that California law provides



# *Hyatt II*

- ▶ A jury awards Hyatt nearly \$400 million in damages
- ▶ Nevada Supreme Court refuses to apply Nevada's statutory cap on damages to Hyatt's fraud claim
- ▶ Why?
- ▶ Nevada has a policy interest in providing adequate redress for Nevada citizens that overrides providing FTB the statutory cap because California operates outside the control of Nevada

# *Hyatt II*

- ▶ State interest
  - ▶ States are sued all the time in other states
  - ▶ If they cannot receive the benefits of their own laws they should at least receive the benefits of the laws of the jurisdiction in which they are sued

# Hyatt II

- ▶ SLLC brief
  - ▶ What about *equal* sovereignty?
  - ▶ Practical problems for states
    - ▶ Forum shopping
    - ▶ Unpredictable litigation costs

# *Hyatt II*

- ▶ Here is the sleeper question
- ▶ Should *Nevada v. Hall* (1979) be overruled?
- ▶ Can states be exempt from being sued in other states' courts?

Added 2015-2016?

# Abortion

- ▶ Numerous states have recently passed laws restricting abortions
- ▶ Many commentators all but assume the Court will take the most significant case, *Whole Women's Health v. Cole*
- ▶ Consider mid-October?
- ▶ Most important abortion case since *Roe v. Wade* or at least *Planned Parenthood v. Casey*?

# *Whole Women's Health v. Cole*

- ▶ Texas's new law has two requirements
  - ▶ Ambulatory Surgical Center
  - ▶ Admitting privileges

# *Whole Women's Health v. Cole*

- ▶ Were 41 abortion clinics in Texas; now 19
- ▶ Advance women's health?
- ▶ Ruse to reduce access to abortions?
- ▶ 5<sup>th</sup> Circuit upheld the law
- ▶ 5-4 decision at the end of June stayed the 5<sup>th</sup> Circuit ruling



# Whole Women's Health v. Cole

- ▶ Justice Kennedy's call
- ▶ He voted for the stay but...
- ▶ Kennedy voted on 21 abortion restrictions and allowed all but one of them to go into effect
  - ▶ Ian Millhiser, ThinkProgress, *Coming Next: The Revenge of the Supreme Court's Conservatives*

# *Whole Women's Health v. Cole*

- ▶ About 11 states have some adopted some form or admitting privileges laws
- ▶ Why so hard to get?
  - ▶ Doctors live far away
  - ▶ Doctors can't commit to admitting the minimum number of patients
  - ▶ Hospitals have religious objections/don't want to deal with the issue
- ▶ But anyone can go to an ER right?

# *Currier v. Jackson Women's Health Organization*

- ▶ 5<sup>th</sup> Circuit struck down Mississippi's admitting privileges law
- ▶ Would have closed the only abortion clinic in the state

# *Walker v. McGill-Stuart*

- ▶ Fourth Circuit struck down NC's ultrasound law
- ▶ SCOTUS denied cert
- ▶ Circuit split

# ACA Birth Control Mandate

- ▶ *Hobby Lobby v. Burwell* (2014)—ACA's contraception mandate as applied to closely held corporations violated RFRA
- ▶ A solution would have to be offered to make sure birth control would be available but objecting corporations would not have to pay
- ▶ Court suggested the exemption for religious nonprofits
- ▶ Exemption requires completing paperwork asking for one; contraception must still be available

# ACA Birth Control Mandate

- ▶ But nonprofits were challenging the exemption for religious non-profits
- ▶ HHS has made a number of attempts to revise the form
- ▶ Conflict is simply this: does completing this paper work make the non-profit complicit or does it avoid the nonprofit to avoid being complicit
- ▶ Government hijacks plans that remain their own

# ACA Birth Control Mandate

- ▶ Six federal circuit courts have ruled that providing notice doesn't violate religious nonprofits rights
- ▶ Notice doesn't trigger birth control coverage the ACA does
- ▶ Lead case is ready for Supreme Court review: *Little Sisters of the Poor v. Burwell*

# ACA Birth Control Mandate

- ▶ Why might the Court take up the issue regardless of no circuit split?
  - ▶ Disagreement about how to apply the relevant law
  - ▶ Court likes to see issues/cases through



# ACA Birth Control Mandate

- ▶ Religious liberty will continue to be debated

# *Sissel v. HHS*

- ▶ Origination Clause case
- ▶ ACA was a federal revenue bill and that should have started in the House not the Senate
- ▶ Three judge panel rejected the claim
- ▶ ACA was a health insurance reform statute not a revenue statute
- ▶ D.C. Circuit refused to hear this case *en banc* decision
- ▶ This case could destroy the whole act

# Solitary Confinement

- ▶ Unusual for the Supreme Court to call a question
- ▶ Most significant if it Justice Kennedy
- ▶ Did it at least twice last term
- ▶ Stray comment at oral argument in *Davis v. Ayala*
- ▶ Breyer and Ginsburg follow up in *Glossip v. Gross*

# Solitary Confinement

- ▶ Ask and you shall receive:
- ▶ *Prieto v. Clarke*
- ▶ May a state put all death row inmates in solitary confinement?
- ▶ VA argues this isn't the right case
  - ▶ VA executes people quickly—7-10 years
  - ▶ Prieto is scheduled to be executed October 1
  - ▶ Prieto is not sympathetic

# Solitary Confinement

- ▶ Renewed dialogue
  - ▶ DOJ reviewing solitary confinement guidelines in federal facilities
  - ▶ California settlement
  - ▶ Association of State Correctional Administrators
  - ▶ Policy ideas
    - ▶ None for disruptive inmates who are mentally ill
    - ▶ Transition before release to society

# Solitary Confinement

- ▶ Justice Kennedy wants this issue heard it will be heard
- ▶ If not this case than another one

# Excessive Force

- ▶ Police officers hadn't lost a qualified immunity case in 10 years (not all of these cases involved the use of force)
- ▶ *Tolan v. Cotton* (2014) technically wasn't a loss
- ▶ Two case coming up are old
- ▶ *Mullenix v. Luna*
- ▶ *Los Angeles v. Contreras*

Beyond 2015-2106





# Obama Immigration Policy

- ▶ Plan—three year protected status:
  - ▶ Parents of U.S. citizens or green card holders who have lived in the country for more than five years
  - ▶ Under 31 and lived in US since 2010

# Obama Immigration Policy

- ▶ Objections
  - ▶ Constitutional obligation to enforce immigration laws
  - ▶ Violated APA notice and comment

# Obama Immigration Policy

- ▶ Texas district court judge rules against the policy on APA
  - ▶ Policy is "legislative" or "substantive" rule that should have undergone the notice-and comment rule making procedure
  - ▶ DHS was not given any "discretion by law" to give 4.3 million removable aliens what the DHS itself labels as "legal presence"
  - ▶ These changes go beyond mere enforcement or even nonenforcement of this nation's immigration scheme
  - ▶ Major costs on both the states and federal government

# Obama Immigration Policy

- ▶ Sherriff Joe just lost his case on standing!
- ▶ Pending cases
  - ▶ Fifth Circuit—26 states
  - ▶ Ninth Circuit—Arizona
  - ▶ District Court in DC—House of Representatives

# Obama Immigration Policy

- ▶ Will this case run out of time?

# Voter ID

- ▶ Court keeps on refusing to hear these case
  - ▶ Wisconsin case
  - ▶ Arizona and Kansas case
- ▶ North Carolina's law has been changed?
- ▶ Fifth Circuit just struck down Texas's law
  - ▶ First federal court of appeals to say voter ID requirement has a disparate impact on minorities and the poor

# Supreme Court and the Election

- ▶ Justices age in 2024
  - ▶ Ginsburg—91
  - ▶ Kennedy—88
  - ▶ Scalia—88
  - ▶ Breyer—85

# Supreme Court and the Election

- ▶ The media gets it
  - ▶ The Enormous, Unbelievable Stakes For The Supreme Court In 2016
  - ▶ In 2016, your vote counts for Supreme Court
  - ▶ [The 2016 election is not about the presidency. It is about the Supreme Court](#)
- ▶ But does anyone else?



# Supreme Court and the Election

- ▶ Will the Supreme Court ever be discussed as a **big** issue by average Americans?
- ▶ Will it come up in the debates?
- ▶ How specific will the candidates discuss possible nominees?
- ▶ What issues will the candidates focus on?
  - ▶ Abortion
  - ▶ *Citizens United*
  - ▶ Affordable Care Act
  - ▶ Same sex marriage
- ▶ Will there be a serious discussion of institutional changes at the Court?
- ▶ Don't forget about the Senate

# Too Early for a Short List

- ▶ Either candidate be looking at
  - ▶ Age
  - ▶ Religion
  - ▶ Non-controversial judicial experience
  - ▶ Non-judicial experience
  - ▶ Confidence of fidelity to particular ideology (Justice Souter)

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