

Supreme Court Review & Preview 2015

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Overview of the Presentation

- Supreme Court and 2016 election
- Review
- Preview

Supreme Court and the Election

- Don't expect Justice Ginsburg in 2016
- 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

- Do average Americans get it?
- How specific will the candidates discuss possible nominees?
- What issues will the candidates focus on?
- Don't forget about the Senate
- Viewing Justice Roberts fairly

Too Early for a Short List

- Either candidate be looking at:
 - Age
 - Non-controversial judicial experience
 - Non-judicial experience
 - Confidence of fidelity to particular ideology
 - Religion?

Term Statistics

- Oral argument on 67 cases
- 21% of cases came from the 9th Circuit
- 41% cases 9-0 (typical)
- 19% cases 5-4 (almost double last year; a little above average)
- 72% reversed (typical)

Is this a “Liberal Term”?

- Highest number of “liberal” outcomes in 5-4 cases in the last 8 years (and before?)
 - Liberal outcome may have more to do with the mix of cases
 - Have some conservative doctrines just reached their limit?
- One thing is inarguable: Much dissension among the conservatives this term

Big Cases...Now that the Dust is Settling

Same Sex Marriage

- 5-4 Justice Kennedy
- Dramatic, poetic but not rigorous
- Has “liberty” been expanded? What does this mean?
- How did the Court get here so quickly?
- Religious liberty?
- *Obergefell v. Hodges*

Same Sex Marriage

- What should state legislatures expect to see next?
 - Anti-discrimination legislation
 - Religious liberty legislation
 - Performing marriage ceremonies or issuing marriage licenses
 - Denying products and services to gay people based on religious objections

Affordable Care Act

- Tax credits are available on federal exchanges
- 6-3 opinion written by Justice Roberts joined by Justice Kennedy and the liberals
- Fair to now label Roberts as a traitor?
- No *Chevron* deference to IRS interpretation
- ACA is here to stay!
- *King v. Burwell*

Fair Housing Act Case

- Disparate impact claims possible under Fair Housing Act
- Settled twice
- No circuit split
- Justice Scalia oral argument
- 5-4 written by Justice Kennedy
- Kennedy Court
- Kennedy's "I can live with it philosophy"
- *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*

What Do the Big Cases Say

- Deeply divided Supreme Court on important issues
- Not afraid of controversy
- Chief Justice who cares about institutional integrity of the Court
- Kennedy holds the cards

You Should Know About

Arizona State Legislature v. Arizona Independent Redistricting Commission

- State legislatures can be excluded entirely from congressional redistricting
- Most significant case for state legislative power in my tenure at the SLLC
- 5-4
- Decided on the last day
- Didn't go the way I thought it would based on oral argument

Arizona State Legislature v. Arizona Independent Redistricting Commission

- AZ's Prop 106 which places all federal redistricting authority in an independent commission
- The Elections Clause states: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the **Legislature** thereof; but the Congress may at any time by Law make or alter such Regulations"
- Who is the legislature—the body or the people
- Justice Ginsburg's opinion is a celebration of direct democracy—the legislature is the people

Arizona State Legislature v. Arizona Independent Redistricting Commission

- Court's reasoning
 - Founding era dictionaries typically defined legislatures as the “power that makes laws”
 - In Arizona, that includes the voters who may pass laws through initiatives
 - The purpose of the Elections Clause was to “empower Congress to override state elections rules” not restrict how states enact legislation
 - If state legislatures can override redistricting commissions, other voter-initiated election laws may be in jeopardy

Arizona State Legislature v. Arizona Independent Redistricting Commission

- What's next for state legislatures?
 - Bigger loss in theory than in practice
 - Only applicable in Arizona (and California?)
 - State legislatures aren't likely to voluntarily exempt themselves altogether from redistricting so only voters in states with ballot initiatives can replicate the Arizona model
 - *Harris v. Arizona Independent Redistricting Commission*--redistricting plan drawn up by Arizona's redistricting commission violates one-person-one-vote

DMA v. Brohl

- *Quill Corp. v. North Dakota* prohibits states from forcing retailers with no in-state physical presence to collect and remit state sales taxes
- To get around *Quill*, Colorado makes online retailers who don't collect sales tax comply with notice and reporting requirements designed to make it easier for purchasers to pay taxes
- Should this case be barred from being brought in federal court?
- SLLC files an *amicus* brief saying yes; Supreme Court rules no 9-0

DMA v. Brohl

- Justice Kennedy's concurrence
 - I/we were wrong in *Quill*
 - Please bring us a case allowing us to reconsider *Quill*
 - Cites information from the SLLC's brief
- What's next? Alabama?
- What does this case have to do with solitary confinement?

“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

Cases Requiring Action

North Carolina Board of Dental Examiners v. FTC

- All states have hundreds of boards and commissions many of which regulate professions through licenses and rules
- If a controlling number of state board members are market participants, the board must be “actively supervised” to be immune from antitrust law
- States may have to rewrite some laws and/or actively supervise boards

North Carolina Board of Dental Examiners v. FTC

- North Carolina Dental Board rid the state of all non-dentist teeth whiteners
- Per state law, six of its eight board members were actively practicing dentists
- FTC accused the Board of violating federal anti-trust laws
- The Board claimed it was immune from federal anti-trust laws per the state action doctrine

North Carolina Board of Dental Examiners v. FTC

- In *Parker v. Brown* (1943) the Court created the “state action doctrine” which grants states and state actors immunity from federal antitrust liability
- States may grant state action immunity to non-state entities if the clear articulation and active supervision requirements are met
- Court holds when the state delegates control over a market to a non-sovereign actor, such as a board controlled by market participants, supervision by the state is necessary to avoid anticompetitive self-dealing
- Dissenters say that *Parker* applies to state agencies too

North Carolina Board of Dental Examiners v. FTC

- Four options for compliance
 - Reduce the number of market participants on boards—may require a change in the law
 - Actively supervise boards—more likely to require a change in practice
 - Forgo state action immunity
 - Eliminate boards

North Carolina Board of Dental Examiners v. FTC

- What are your states doing?
- SLLC article: NC Dental: What did the Supreme Court Say and What Can States Do?

City of Los Angeles v. Patel

- Statutes and ordinance requiring hotel and motel operators to make their guest registries available to police without at least a subpoena violates the Fourth Amendment
- Eight states have hotel registry statutes: Indiana, Florida, Massachusetts, Maine, New Hampshire, New Jersey, Wisconsin, and the District of Columbia
- 5-4

City of Los Angeles v. Patel

- Why did LA adopt such a hotel registry ordinance?
 - Deter crime—drug dealing, prostitution, and human trafficking
 - Criminals will not commit crimes in hotels if they have to provide identifying information
- Not your typical Fourth Amendment search case right?
 - Everyone has stayed in a hotel
 - Not hard to imagine a rogue police officer misusing this ordinance

City of Los Angeles v. Patel

- Court's reasoning
 - Search here was administrative--done to ensure compliance with recordkeeping requirements
 - No warrant needed; only "precompliance review before a neutral decisionmaker"
 - Subpoena in enough
 - If the officer reasonably suspects that the operator may tamper with the registry before a judge can rule on the motion to quash, the officer "may guard the registry"

City of Los Angeles v. Patel

- In his dissent, Justice Scalia cites to the State and Local Legal Center's (SLLC) [*amicus* brief](#), which notes that local governments in at least 41 states have adopted similar ordinances

Beyond Hotel Registry Ordinances

- No really good reason to believe this ruling doesn't apply to all government inspection programs EXCEPT closely regulated businesses
- Closely regulated business=no warrant, no subpoena
 - SCOTUS has held four industries
 - Liquor sales, firearms dealing, mining, automobile junkyards

Beyond Hotel Registry Ordinances

- Tons of other records inspection laws
 - Mobile home parks, pawn shops, scrap metal dealers, massage parlors
 - Restaurant records, environmental records, labor records
- Inspection requirements controlled by state statute
- Subpoena=conservative approach

Why Has This Case Been a Sleeper?

- Seen as hotel registry case only?
- Consent is common?
- SCOTUSblog coverage on *Patel*

Glossip v. Gross

- Death penalty case
 - States may use midazolam as part of the lethal injection three-drug protocol

Glossip v. Gross

- All death penalty states and the federal government use lethal injection
- In *Baze v. Rees* (2008) the Court approved a three-drug protocol that begins with a sedative, sodium thiopental, followed by a paralytic agent, and a drug that causes cardiac arrest
- Anti-death penalty advocates have persuaded United States and foreign manufacturers to stop producing sodium thiopental
- An Oklahoma execution is botched; the state increases the dose of midazolam

Glossip v. Gross

- Does use of midazolam violates the Eighth Amendment prohibition against “cruel and unusual punishment” because it fails to render prisoners insensate
 - Prisoners failed to identify a known and available alternative method
 - The inmates’ experts acknowledged that no scientific proof establishes that a 500-milligram dose of midazolam would not render a person sufficiently unconscious to not feel pain
 - While midazolam may have a “ceiling effect,” only “speculative evidence” suggests that it renders prisoners insensate to pain

Glossip v. Gross

- The controversies
 - Out of control oral argument
 - Ginsburg and Breyer want full briefing on whether the death penalty is constitutional
 - Other dissenters basically say if appropriate drugs aren't available the death penalty is unconstitutional
- Future of the death penalty?
- Eighth Amendment cases dominate this term

Williams-Yulee v. Florida Bar

- States may prohibit judicial candidates from personally soliciting campaign funds
- 5-4 decision written by Justice Roberts
- Who knew it was possible for the Chief Justice to find a campaign finance restriction that he liked?
- Thirty of the 39 states that elect trial or appellate judges prohibit judicial candidates from personally soliciting campaign funds

Williams-Yulee v. Florida Bar

- The compelling state interest is preserving public confidence in the integrity of the judiciary
- But what about the fact that Florida allows campaigns to solicit money and candidates to write thank yous to donors (meaning candidates know who contributed to their campaign)?

Williams-Yulee v. Florida Bar

- Roberts joins the liberals
- “Less” speech case from a court that likes “more” speech
- Will the other nine states jump on the bandwagon?
 - Appendix of the ABA’s brief, available on SCOTUSblog describes each states’ requirements

Preview: Cases Accepted

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

- Plaintiffs want **voter** population not total population
- 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

- 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

- 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

- Grant was total surprise
- Legislative authority is on the line
- States could have to make some big changes
- If voter population is required Republicans are expected to benefit
- What is the Court thinking?
- Deviation from the ideal when considering **voter** population is between 30-50% in some districts
- One of three redistricting cases

Friedrichs v. California Teacher Association

- Supreme Court could make right-to-work be the law of the land for all public sector employees
- 20+ states directly affected
- If public employee's don't join the union do they still have to pay their "fair share" of collective bargaining costs?

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 *Aboud*
 - 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...

Gobeille v. Liberty Mutual Insurance Company

- First significant preemption case in a while
- Vermont wants claims data from health insurance companies
- At least 16 other states affected

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
- 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
 - 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
 - Compare ER costs in NH. Save \$500 by driving to a hospital 20 minutes further away!

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

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

- About 11 states have some adopted some form of 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?

Whole Women's Health v. Cole

- Were 41 abortion clinics in Texas; now 19
- Advance women's health?
- Ruse to reduce access to abortions?
- 5th Circuit upheld the law—17% of women have to travel more than 150 miles
- 5-4 decision at the end of June stayed the 5th 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*

Currier v. Jackson Women's Health Organization

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

ACA Birth Control Mandate

- Religious claim that their insurance companies being required to offer birth control at no cost violates their religious freedom rights under RFRA
- 8th Circuit agreed creating a circuit split

10 Years of the Roberts Court for State and Local Government

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