The U.S. Supreme Court 2015 Term: A Play in Three Acts

OSHER Master Class Presentation by
Prof. Glenn Smith

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ACT ONE
"Once there were nine…"

- Scene 1: Fighting ~~to~~ about the death (penalty)
- Scene 2: Rendering an important consumer-protection/judicial role decision
- Review: Impact on 5-4 decision patterns (SCOTUSBLOG statistics)

ACT ONE, Scene 1
Fighting ~~to~~ about the death (penalty)

The dramatic possibilities:

(From Fall 2015 Master Class:) A perspective from Scotusblog.com commentator Rory Little, a UC Hastings law professor:

Last June, the Supreme Court's Term ended not with the same-sex marriage opinions (announced three days earlier), but rather with Justice Stephen Breyer's surprising and comprehensive opinion (joined by Justice Ruth Bader Ginsburg) in *Glossip v. Gross*, which announced that both Justices now "believe it highly likely that the death penalty violates the Eighth Amendment." Justice Antonin Scalia responded that if the Court were to grant merits review on that question, then he correspondingly "would ask that counsel also brief whether" longstanding Eighth Amendment precedents, "beginning with *Trop* [*v. Dulles* (1958)], should be overruled." (continued…)

ACT ONE, Scene 1

- The dramatic possibilities (continued):

Meanwhile, in the *Glossip* argument, Justice Samuel Alito had candidly described the many aspects of capital litigation as "guerilla war against the death penalty," while Justices Sonia Sotomayor and Elena Kagan had remarked that the Court was being asked to approve an execution method akin to "being burned alive." Needless to say, the Justices are deeply divided about the meaning and application of the Eighth Amendment's "cruel and unusual punishment" clause.

ACT ONE, Scene 1

The non-dramatic results: 1) Lopsided, non-ideological rulings, 2) on specific doctrinal grounds not addressing the overall constitutionality of the death penalty

- The Kansas Jury Instruction/Severance Cases
- The Florida Capital Sentencing Case
- The Georgia Racially-Profiled-Jury Case

The Kansas Jury Instruction/Severance Cases (Kansas v. Gleason/Kansas v. Carr)

- Holding (on Jan. 20): 1) The Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt. 2) The Constitution did not require severance of joint sentencing proceedings because the contention that the admission of mitigating evidence by one defendant could have "so infected" the jury's consideration of the other defendant's sentence as to amount to a denial of due process does not stand in light of all the evidence presented at the guilty and penalty phases relevant to the jury's sentencing determination.*
- Vote: 8-1

Majority: Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito & Kagan

Dissent: Sotomayor

(*This and other statements of the majority's "Holding" used in this presentation are from the SCOTUSBLOG list of decided "Merits Cases". THANKS, SCOTUSBLOG!"

The Florida Capital Sentencing Case (Hurst v. Florida)

- Holding on Jan. 12: Florida's capital-sentencing scheme, in which a jury renders an "advisory sentence" but a judge must independently weigh the aggravating and mitigating factors before entering a sentence of life or death, violates the Sixth Amendment in light of the Court's decision in Ring v. Arizona, which deemed unconstitutional an Arizona capital sentencing scheme that permitted a judge rather than a jury to find the facts necessary to sentence a defendant to death.
- Vote: 8-1

Majority: Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, Kagan

Dissent: Alito

The Georgia Racially-Profiled-Jury Case (Foster v. Chatham)

(Technically, an "Act Two" case, because it was decided with 8 justices in May…but follows same pattern as previous death penalty cases:)

- Holding on May 23: (1) This Court has jurisdiction to review the judgment of the Georgia Supreme Court denying Timothy Foster a certificate of probable cause on his claim, under Batson v. Kentucky that the state's use of peremptory challenges to strike all four black prospective jurors qualified to serve on the jury for his capital murder trial was racially motivated; and (2) the decision of the Georgia Supreme Court that Foster failed to show purposeful discrimination was clearly erroneous.
- Vote: 7-1

Majority: Roberts, Scalia, Kennedy,, Ginsburg, Breyer, Sotomayor, Kagan (Alito separate concurrence)

Dissent: Thomas

ACT ONE, Scene 2

Rendering an important consumer-protection/judicial role decision

The dramatic possibilities in Campbell-Ewald Company v. Gomez:

- Will the Court allow defendants to "moot" class actions by trying to making a "buy out" offer to the the lead plaintiff?
- Will a majority of justices get together on the issue?

ACT I, Scene 2: An important consumer-protection/judicial role decision

- Holding on Jan. 20: 1) An unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, so the district court retains jurisdiction to adjudicate the plaintiff's complaint. 2) A federal contractor is not entitled to immunity from suit for its violation of the Telephone Consumer Protection Act when it violated both federal law and the government's explicit instruction
- Vote: 6-3

Majority: Kennedy, Ginsburg, Breyer, Sotomayor & Kagan (Thomas, concurred in the result)

Dissent: Roberts, Scalia & Alito

ACT ONE
“Once there were nine…”

- Review: Impact on 5-4 decision patterns (SCOTUSBLOG statistics)

ACT TWO
"And then there were eight…"
R.I.P Justice Antonin Scalia, d. Feb. 13)

- Scene 1: Some cases in which the possibility of 4-4 splits didn't materialize
- Scene 2: Cases clearly affected by 4-4 splits
- Scene 3: Another Case clearly affect by 4-4 splits, and which prompted an unusually active, creative dispute-resolution move

ACT TWO, Scene 1

Some cases in which the possibility of 4-4 splits didn't materialize

(The Georgia Racially-Profiled Jury case – discussed previously)

- The Texas Abortion Regulation Case
- The Texas Districting Case
- The Ex-Virginia-Governor McDonnell Case
- The 9th Circuit Standing Case
- The Guns and Domestic Violence Case

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

- The Issues Posed: (1) Whether, when applying the "undue burden" standard of *Planned Parenthood v. Casey*, a court errs by refusing to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve the government's interest in promoting health; and (2) whether the Fifth Circuit erred in concluding that this standard permits Texas to enforce, in nearly all circumstances, laws that would cause a significant reduction in the availability of abortion services while failing to advance the State's interest in promoting health - or any other valid interest.
- The Stakes Involved
- The Impact of a 4-4 Split

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

- The Result: A decisive decision in favor of abortion rights
- The Vote: 5-3

Majority: Kennedy, Ginsburg, Breyer, Sotomayor & Kagan

Dissent: Roberts, Thomas & Alito

[Note that Justice Scalia's absence didn't affect the outcome]

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

Significant Passages from the Majority's Decision:

- Including the necessity of health regulation in the basic recap of abortion law:

A "State has a legitimate interest in seeing to it that abortion ... is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade*. But "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends," *Planned Parenthood of Southeastern Pa. v. Casey,*), and "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," (quoting Casey)

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

Significant Passages from the Majority's Decision:

- Correcting the 5th Circuit's erroneously narrow "undue burden" analysis (from decision Syllabus):

(a) The Fifth Circuit's standard of review may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when deciding the undue burden question, but ***Casey*** **requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer.** The Fifth Circuit's test also mistakenly equates the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable to, *e.g.,* economic legislation. **And the court's requirement that legislatures resolve questions of medical uncertainty is inconsistent with this Court's case law, which has placed considerable weight upon evidence and argument presented in judicial proceedings** when determining the constitutionality of laws regulating abortion procedures.

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

- Explaining why the admitting-privileges requirement is an "undue burden":

The record contains adequate legal and factual support for the District Court's conclusion…. The requirement's purpose is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure, but the District Court, relying on evidence showing **extremely low rates of serious complications before H.B. 2's passage**, found no significant health-related problem for the new law to cure. **The State's record evidence, in contrast, does not show how the new law advanced the State's legitimate interest in protecting women's health when compared to the prior law**, which required providers to have a "working arrangement" with doctors who had admitting privileges. At the same time…

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

… the record evidence indicates that the requirement places a "substantial obstacle" in a woman's path to abortion**. The dramatic drop in the number of clinics means fewer doctors, longer waiting times, and increased crowding. It also means a significant increase in the distance women of reproductive age live from an abortion clinic. Increased driving distances do not always constitute an "undue burden," but they are an additional burden, which, when taken together with others caused by the closings, and when viewed in light of the virtual absence of any health benefit, help support the District Court's "undue burden" conclusion.**

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

"The surgical-center requirement also provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so."

"Before this requirement was enacted, Texas law required abortion facilities to meet a host of health and safety requirements…**.Record evidence shows that the new provision imposes a number of additional requirements that are generally unnecessary in the abortion clinic context; that it provides no benefit when complications arise in the context of a medical abortion**, which would generally occur after a patient has left the facility; **that abortions taking place in abortion facilities are safer than common procedures** that occur in outside clinics not subject to Texas' surgical-center requirements; and that Texas has waived no part of the requirement for any abortion clinics as it has done for nearly two-thirds of other covered facilities…**.**

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

…. This evidence, along with the absence of any contrary evidence, supports the District Court's conclusions, including its ultimate legal conclusion that requirement is not necessary. At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the requirement places a substantial obstacle in the path of women seeking an abortion**. The court found that it "strained credulity" to think that the seven or eight abortion facilities would be able to meet the demand."**

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

Other Facets of Interest:

--Why Did Justice Kennedy not write the majority opinion (instead, assigned it to Justice Breyer)?

--portends his marginal support of the opinion?

--OR, indicates that he has "converted" to the strong-application-of-undue-burden camp?

(--OR, something more mundane – e.g., even opinion-writing-duty distribution?)

--Only dissenting Justice Thomas engaged with the majority on key abortion-law review questions

--The other 2 dissenters (Alito & Roberts) focused on the procedural issues in the case (claim preclusion & severability) and NOT on the "big abortion" questions. To wit…

The Texas Abortion Regulation Case (Whole Woman's Health v. Hellerstedt)

--From Justice Alito's lengthy (twice as long as majority opinion) dissent:

"The constitutionality of laws regulating abortion is one of the most controversial issues in American law, but this case does not require us to delve into that contentious dispute. Instead, the dispositive issue here concerns a workaday question that can arise in any case no matter the subject, namely, whether the present case is barred by res judicata. As a court of law, we have an obligation to apply such rules in a neutral fashion in all cases, regardless of the subject of the suit. If anything, when a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules.

The Court has not done so here. On the contrary, determined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases."

The Texas Districting Case (Evenwel v. Abbott)

- The Basic Issue: In complying with Court-imposed "one person, one vote" requirements in drawing legislative districts, is the relevant measure of equality:

--Total population (as Texas and other states typically do)

--Voter population

- The Political Stakes

The Texas Districting Case (Evenwel v. Abbott)

- The Varying Positions:

Challengers: Although states are not always required to use voter population, they must do so if *necessary to avoid excessive district-by-district disparities*

Texas: States are not *required* to use voter population (but could if it chose to)

U.S.: States are required to use total population

- Holding (on Apr. 4):
- The Vote: 8-0

[BUT: significant Alito & Thomas concurrences underline looming issues…]

The Texas Districting Case (Evenwel v. Abbott)

BUT – was there a hidden 4-4 dynamic at work?

…from reporter Lyle Denniston's SCOTUSBLOG profile on the justice alignment:

"The ruling's bottom line was unanimous, but the main opinion bore many signs that its warm embrace of the theory of equality of representation had to be qualified by leaving the states with at least the appearance of the power of choice, to hold together six solid votes."

"Two of the eight Justices were clearly not satisfied with the rhetoric and some of the implications of Justice Ginsburg's opinion, and only joined in the outcome. Those were Justices Samuel A. Alito, Jr., and Clarence Thomas, each of whom wrote separately.

"Had Justice Ginsburg not held five colleagues in support of what her opinion actually said in the end, two — perhaps Chief Justice John G. Roberts, Jr., and Justice Anthony M. Kennedy — might have abandoned the common result. The result then might have been that the Court would have split four to four, settling nothing and releasing no opinion at all while leaving intact a three-judge federal district court's ruling that Texas had the authority to base its state legislative seats on a division of the total population of Texas."

ACT TWO
"And then there were eight…"

A Shorter Look at Three Other Cases without 4-4 splits:

- The Ex-Virginia-Governor McDonnell Case

Holding (on June 27): The federal bribery statute makes it a crime for a public official to "receive or accept anything of value" in exchange for being "influenced in the performance of any official act." An "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy"; that question or matter must involve a formal exercise of governmental power, and must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision to take an action on that question or matter, or agree to do so. Setting up a meeting, talking to another official, or organizing an event -- without more -- does not fit that definition of "official act." Because jury instructions in the case of former Virginia governor Bob McDonnell were erroneous, and those errors are not harmless beyond a reasonable doubt, McDonnell's convictions are vacated.

- Vote: 8-0 (Roberts, for a unanimous court)

ACT TWO
"And then there were eight…"

- The 9th Circuit Standing Case

-The Stakes Involved (Could have decided a big ? re: "standing" to sue – can personal injury be shown merely b/c Congress, by creating a federal cause of action, recognized that violations of this type inherently cause injury)

--The Holding (on May 16:) Ninth Circuit ruling is reversed and remanded: "Because the Ninth Circuit failed to consider both aspects of the injury-in-fact requirements – as injury in fact must be both concrete and particularized, but the Ninth Circuit's observations concerned only "particularization"– its Article III standing analysis was incomplete.

--The Vote: 6-2

Majority: Roberts, Kennedy, Thomas, Breyer, Alito & Kagan

Dissent: Ginsburg & Sotomayor (rationale: sufficient concrete injury already shown in record; no remand needed)

ACT TWO
"And then there were eight…"

- The Guns and Domestic Violence Case

--Holding (On June 27): A reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" that prohibits firearms possession by convicted felons under 18 U.S.C. § 922(g)(9).

--Vote: 6-2

Majority: Roberts, Kennedy, Ginsburg, Breyer, Alito & Kagan

Dissent: Thomas & Sotomayor

ACT TWO
"And then there were eight…"

- The Guns and Domestic Violence Case:

Other Interesting Aspects

(--The interesting dissent alignment!)

--Justice Thomas "found his voice" at oral argument

--In a portion of his dissent not joined by Justice Sotomayor, Thomas raised the specter that the majority's statutory resolution could violate 2nd Amendment rights, and objected to what he viewed as the Court's continuing pattern of "relegating the Second Amendment to a second-class right."

ACT TWO, Scene 2

Two high-profile cases clearly affected by 4-4 splits

- The DAPA Case
- The Public-Employee Union Dues Case

The DAPA Case
(United States v. Texas)

- The DAPA program
- The lower-court invalidations/injunctions
- The only hope to revise the program: an Administration win in the Supreme Court
- The Important Issues posed: (1) Whether a state that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA) to challenge the Secretary of Homeland Security's guidance seeking to establish a process for considering deferred action for certain aliens because it will lead to more aliens having deferred action; (2) whether the guidance is arbitrary and capricious or otherwise not in accordance with law; (3) whether the guidance was subject to the APA's notice-and-comment procedures; and (4) whether the guidance violates the Take Care Clause of the Constitution, Article II, section 3.

The DAPA Case
(United States v. Texas)

The Opinion in Full:

SUPREME COURT OF THE UNITED STATES

No. 15–674

UNITED STATES, ET AL., PETITIONERS *v.* TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2016]

The judgment is affirmed by an equally divided Court.

The Public-Employee Union Dues Case (Friedrichs v. California Teachers Ass'n)

- The Issues: (1) whether Abood v. Detroit Board of Education should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing non-chargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.
- The Stakes for public-employee unions, public education, and politics
- The likely Outcome (argued 1/11/2016)

The Public-Employee Union Dues Case (Friedrichs v. California Teachers Ass'n)

- The Result: 9th Circuit opinion in favor of unions upheld by an equally divided court
- The Fight will continue (and this is one of those cases on which the appointment of the new 9th justice will be critical)

ACT TWO, Scene Three

Another Case clearly affect by 4-4 splits, and which prompted an unusually active, creative dispute-resolution move

- The Obamacare Contraception Coverage controversies
- The Religious Freedom Controversy leading to
- Split Circuit Decisions
- The Impracticability of 4-4 Affirmance

ACT TWO, Scene Three

The Creative Dispute-Resolution Solution:

[May 16, 2016] PER CURIAM.

Following oral argument, the Court requested supplemental briefing from the parties addressing "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners." **Both petitioners and the Government now confirm that such an option is feasible.** Petitioners have clarified that their religious exercise is not infringed where they "need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception," even if their employees receive cost-free contraceptive coverage from the same insurance company. The Government has confirmed that the challenged procedures "for employers with insured plans could be modified to operate in the manner posited in the Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage."

ACT TWO, Scene Three

In light of the positions asserted by the parties in their supplemental briefs, **the Court vacates the judgments below and remands to the respective United States Courts of Appeals for the Third, Fifth, Tenth, and D. C. Circuits.** Given the gravity of the dispute and the substantial clarification and refinement in the positions of the parties, **the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans "receive full and equal health coverage, including contraceptive coverage." We anticipate that the Courts of Appeals will allow the parties sufficient time** to resolve any outstanding issues between them.

ACT TWO, Scene Three

The Court finds the foregoing approach more suitable than addressing the significantly clarified views of the parties in the first instance. Although there may still be areas of disagreement between the parties on issues of implementation, the importance of those areas of potential concern is uncertain, as is the necessity of this Court's involvement at this point to resolve them. The Court expresses no view on the merits of the cases. In particular, the Court does not decide whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.

ACT THREE
"And once there were seven"

- The one case NOT raising a 4-4 split problem: Fisher v. Univ. of Texas (Kagan recusal)
- UT's last visit to the Court; a serious warning to apply strict scrutiny
- The Holding (on June 23): UT wins

Majority: Kennedy, Ginsburg, Breyer & Sotomayor

Dissent: Roberts, Alito & Thomas

ACT THREE
"And once there were seven"

Was this conclusion surprising? Excerpts from Justice Alito's lengthy dissent:

Something strange has happened since our prior decision in this case…. In that decision, we held that strict scrutiny requires the University of Texas at Austin (UT or University) to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends. Rejecting the argument that we should defer to UT's judgment on those matters, we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded….

ACT THREE
"And once there were seven"

(Continuing Excerpts from Justice Alito's lengthy dissent):

The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request….

By all rights, judgment should be entered in favor of petitioner.

But if the majority is determined to give UT yet another chance, we should reverse and send this case back to the District Court. What the majority has now done— awarding a victory to UT in an opinion that fails to ad dress the important issues in the case—is simply wrong.