The U.S. Supreme Court: A Review of the Last Term, and a Look Ahead

Catherine E. Hawke

The start of the new Supreme Court term this month provides an opportunity to reflect on the impact of the passing of Justice Antonin Scalia, to review the Court’s last term, and to look at what is on the horizon for the upcoming year.

A Notable Loss
On top of some headline-making rulings on abortion and affirmative action, the 2015-16 term will most likely be remembered for the sudden and unexpected death of Justice Antonin Scalia. The impact of Justice Scalia’s death and the vacancy it created on the Court will be opined upon by Supreme Court commentators for years to come; of course, his jurisprudence and legacy will be studied, but also, in the aftermath of his death, the 4-4 split along ideological lines in some of the major cases decided in the latter half of the term will have serious implications for union rights and immigration. However, as Stephen Wermiel, professor of practice at American University Washington College of Law noted, “operating for more than four months without a ninth justice, the Supreme Court kept the number of 4-4 tie votes down and avoided having to reargue cases next term.”

Beyond the passing of Justice Scalia, much of the coverage of the 2015-16...
term has focused on the major “wins” for the progressive bloc of the Court. This is a term that saw the Court protect a woman’s right to access abortion procedures and also affirm a program used by the University of Texas at Austin to ensure a racially diverse student body.

**Whole Women’s Health v. Hellerstedt**

In a surprising 5-3 split, the Court upheld a woman’s right to access abortion services in *Whole Women’s Health v. Hellerstedt*. The underlying case involved a Texas law that required abortion doctors to have admitting privileges at a local hospital and abortion clinics to meet the same high standards as ambulatory surgical centers. These requirements would have forced 75 percent of the state’s abortion clinics to close, creating an access problem for many Texas women. Texas argued these requirements were intended to protect women’s safety, while abortion providers claimed that they were designed to shut down abortion clinics.

The traditionally more liberal justices, joined by Justice Anthony Kennedy, agreed with the abortion providers, finding that the Texas requirements placed an undue burden on abortion access, thereby violating the Constitution. In writing for the majority, Justice Stephen Breyer concluded that

> in the face of no threat to women’s health, Texas seeks to force women to travel long distances to get abortions in cramped-to-capacity super facilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand ... may find that quality of care

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- Preview of United States Supreme Court Cases [http://www.supremecourtpreview.org](http://www.supremecourtpreview.org)
  Find all merit and amicus briefs filed for every case before the Court, not only for the current term, but also back to the 2004–2005 term.

- Legal Information Institute [https://www.law.cornell.edu/](https://www.law.cornell.edu/)
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declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women’s health.

The dissenting justices took great issue with even the hearing of the case, not on substantive grounds, but instead due to procedural rules. According to Justice Samuel Alito, writing on behalf of Chief John Justice Roberts and Justice Clarence Thomas,

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.

**Fisher v. University of Texas**
The liberal wing of the Court again held the majority this term in another hotly contested arena, affirmative action, even without the vote of Justice Elena Kagan, who recused herself because of her work on the issue while she served as solicitor general. In *Fisher v. University of Texas* (known as *Fisher II*), the Court upheld the race-aware admissions program in use at the University of Texas at Austin. Abigail Fisher, a white woman who was denied admission to the University in 2008, sued arguing that the program violated the Equal Protection Clause.

Justice Kennedy, joined by Justices Ruth Bader Ginsburg, Breyer, and Sonia Sotomayor, held that the program was lawful under the Equal Protection Clause. However, the Court was careful to say that it wasn’t simply rubber stamping the university’s policy, but instead, encouraging educational institutions to be thoughtful in developing admissions policies and ensuring they are necessary. As Justice Kennedy wrote,

The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary. The Court’s affirmation of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

In his dissent, Justice Alito argued that the school had not done enough to justify the use of race in its admissions policy. Joined by Chief Justice Roberts and Justice Thomas, Justice Alito wrote,

UT failed to do what our prior decision demanded. 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.

**A Split Vote for Immigration and Unions and a Punt for Birth Control**

In spite of the justices’ best efforts to avoid split decisions following Justice Scalia’s death, the 2015-16 term included a number of ties. In at least one case, however, the justices offered a creative solution to avoid what would have surely been a controversial split ruling. In the first of these rulings, *Friedrichs v. California Teachers Association*, the justices split equally on the issue of whether a law that requires nonunion members in an agency shop to pay a fair-share fee (also called an agency fee) to cover their proportional share of the union’s collective bargaining activities violates the First Amendment. By splitting 4-4, the Court left in place the Ninth Circuit’s decision in favor of the union. Although this decision has no precedential value beyond the geographical boundaries of the Ninth Circuit, it was seen as a major win (even if temporary) for the labor movement.

Similarly, the justices split equally while reviewing the constitutionality of President Obama’s immigration plan in *United States v. Texas*. That case involved a challenge to the policy called Deferred Action for Parents of Americans and Lawful Permanent Residents, or “DAPA,” granting deferred action for parents of U.S. citizens and lawful permanent residents who meet certain other qualifications. Once again, the Court’s lack of a ruling for one side left the lower court’s decision in place. In this case, the lower court effectively overruled the president’s order to halt deportations for these immigrants (at least for the time being).

In another closely watched case, *Zubik v. Burwell*, the justices avoided what might have been another 4-4 split by essentially coming up with their own
solution, and holding off ruling on the merits of the case until another day. Zubik involved a challenge to a key portion of the Affordable Care Act dealing with birth control coverage for religious and not-for-profit employers. Under the Act, religious and not-for-profit employers who do not wish to provide contraceptive coverage to their employees must send a letter notifying the government of their objections to the ACA’s contraceptive mandate so that arrangements could be made for the employees to receive free contraceptive coverage from a third party. The case asked the Court to determine whether this accommodation for religious nonprofits substantially burdens their religious practices, and, if so, whether the accommodation is the least restrictive way to promote a compelling government interest. Instead of ruling directly on the issue before it, the Court sent the case back to the lower courts, asking them to review the Court’s own proposed solution: allowing workers to get third-party contraception coverage without religious organizations having to provide the notice letter that they deemed objectionable. The Court hoped that “the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.”

A Look Ahead
At first glance, the Supreme Court seems to be set up for a quiet 2016–17 term. The justices have been somewhat slow in granting certiorari (review of the case): there are currently only 31 cases slated for oral argument. An examination of the docket so far shows the justices turning away from headline-grabbing issues such as affirmative action, abortion, and death penalty, and turning instead toward cases focusing on technical subjects. However, there are still a number of cases on the horizon with major implications for voting rights, fair housing, and the First Amendment’s religion clauses.

Two cases before the Court for the next term deal with electoral districts. McCrory v. Harris and Bethune-Hill v. Virginia State Board of Elections both present the Court with the question of what is the proper level of review for a lower court in deciding an allegation of racial gerrymandering, in these cases, in Virginia and North Carolina. In recent terms, the Court has tackled redistricting and voters rights, and as John Marshall Law School Professor Steven D. Schwinn notes, the Court has recently “flatly rebuffed any efforts to draw it into raw political disputes and to use the Court merely as an extension of politics.”

At the end of the 2014–15 term, the Court issued a major win for fair housing advocates when it ruled in Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. that disparate impact claims were permissible under the Fair Housing Act (FHA). A disparate impact claim alleges that a policy or practice, while not discriminatory on its face, is in fact discriminatory in application or impact. For example, certain hiring requirements like tests, degree requirements, or physical requirements (such as having to lift 100 pounds) may automatically preclude a protected class of applicants.

The Texas Department of Housing and Community Affairs ruling was a win for civil rights groups as it firmed up an important legal tool for fighting allegations of discrimination in housing. The 2016–17 term has two more FHA disparate impact claims; the cases, Bank of America Corp. v. City of Miami and Wells Fargo & Co. v. City of Miami involve a question of standing. Mainly, does a city (in this case, Miami) have standing to bring a lawsuit alleging discriminatory lending practices against banks on behalf of city residents? The Eleventh Circuit ruled that cities may bring these suits, and the banks have asked the Court to overturn that ruling. Given the number of similar lawsuits banks face nationwide, these cases could have major implications on the banks’ balance sheets.

Finally, in Trinity Lutheran Church of Columbia v. Pauley, the Court will be tackling the religion prongs of the First Amendment. The very technical question before the Court centers on a fairly mundane topic: playground surfaces. The case stems from the state of Missouri’s rejection of the church’s application to receive a grant to replace its preschool’s playground pebbles with repurposed tire rubber. The state offered these grants as a way to encourage the recycling of tires with the added bonus of making playgrounds safer. The state determined that a Missouri constitutional amendment prevented it from using public funds in aid of any church, and therefore denied the church funding. The Supreme Court must now determine whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern. In other words, given that Missouri had no concerns about Trinity Lutheran’s religious practices, or their playground, but simply denied funding because it happen to be church, does this violate Trinity’s right to free exercise of religion and equal protection under the law? This case will challenge the Court to define the intersections of the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clauses of the Constitution.

While the upcoming term may lack some of the fireworks of recent blockbuster sessions, it will still likely impact key areas of the law; and of course, the looming presidential election and vacancy remain large in any discussion on the future of the Court.

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