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Overview of the Supreme Court's October 2015 Term

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Abstract

The Supreme Court's 2014–2015 term included high-profile cases involving same-sex marriage and the Affordable Care Act insurance exchanges, as well as free speech, religious freedom, and property rights. Will the upcoming 2015–2016 term prove to be as newsworthy? The Court typically reviews between 70 and 80 cases per term. It has already agreed to hear 34 cases and likely will add more to the schedule at its September 28 "megaconference." This term, the Court will hear significant cases involving unions, voting rights, the death penalty, and racial preferences, in addition to the possibility of taking up another challenge to Obamacare's contraceptive mandate, cell phone location data, abortion, and solitary confinement.

On October 5, 2015, the Supreme Court of the United States will begin its next term. The 2014 term featured a number of hot-button issues: free speech cases involving a "true threats" prosecution, the Confederate flag, and a local sign ordinance; property rights in the California raisin farmers' case; religious freedom in a challenge to a prison's ban on inmates growing beards and a case involving Abercrombie & Fitch's refusal to hire a Muslim teenager for wearing a headscarf; and the long-anticipated showdowns over same-sex marriage and the Obamacare insurance exchanges. Now that the 2014 term is in the rear-view mirror, the focus turns to the upcoming term.

Each term features plenty of cases involving legal housekeeping issues, such as when lawsuits must be filed to be timely and how cases must be litigated or settled. Generally, the Supreme Court does not consider major legal issues until such matters have been

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Key Points

- The U.S. Supreme Court's upcoming term begins on October 5, 2015, and the justices have already agreed to hear 34 cases.
- In the 2015 term, the Court will hear significant cases involving unions, racial preferences, voting rights, and sentencing in death penalty cases, among others.
- The Court also may take up cases involving solitary confinement, abortion, and another challenge to Obamacare's contraceptive mandate.
- The 2014 Supreme Court term featured such hot-button issues as free speech, property rights, the Confederate flag, religious discrimination against a Muslim teenager, and the long-anticipated showdowns over same-sex marriage and the Obamacare insurance exchanges.
- The Court's decisions on major legal issues during this term may lead to a host of related questions, giving the lower courts, the academy, the media, and Congress the opportunity to reflect and identify solutions.

considered by the lower courts. After the Court does address a major legal issue, its decision may lead to a host of related questions on which the lower courts, the academy, the media, and Congress have the opportunity to reflect and opine.

For example, in *Obergefell v. Hodges*, the Court held that the Fourteenth Amendment's Due Process and Equal Protection Clauses protect a right to same-sex marriage but did not address the question of how to handle religious objections to being involved in those ceremonies—an issue that is currently being debated in Congress and the states. Given several pending actions against bakers, photographers, and others in the wedding industry that refuse to participate in same-sex wedding ceremonies, the issue may be heading to the Supreme Court in the coming years. Similarly, in *Reed v. Town of Gilbert*, the Court struck down a local sign ordinance as content-based regulation of speech in violation of the First Amendment, opening up sign codes across the country to possible attack.

Cases on the Supreme Court's 2015–2016 Docket

The Court typically reviews between 70 and 80 cases per term. It has already agreed to hear 34 cases and likely will add more to the schedule at its September 28 "megaconference." Ten cases have been set for oral argument in October, and another 10 will be argued in November. The upcoming term includes a "one person, one vote" challenge to the Texas legislature's redistricting plan, a handful of capital sentencing cases, an attack on union agency shop fees, and the return of the University of Texas racial preferences case. The following cases are just some of the next term's likely highlights.

Fisher v. University of Texas at Austin. Abigail Fisher's equal protection challenge to the use of race in undergraduate admissions decisions at the University of Texas first reached the Court in 2013. In *Fisher I*, the Supreme Court held that schools must prove their use of race in admissions decisions is narrowly tailored to further compelling governmental interests and that courts must look at actual evidence and not rely on schools' assurances of their good intentions. The justices sent the case back to the U.S. Court of Appeals for the Fifth Circuit for a more searching examination.

On remand, the Fifth Circuit again deferred to the university rather than requiring it to articulate its compelling interest and forcing it to provide evidence that racial preferences were necessary. The court found that the university's newly asserted interest in "qualitative" diversity (enrolling more minority students from majority-white high schools) justified its use of racial preferences.

Now Fisher is back before the Supreme Court, which will consider whether the university's new diversity rationale can survive strict scrutiny review. Given the history of this case and the fact that a majority of the justices have questioned the continued legitimacy of racial preferences in college admissions, the university may be facing an uphill battle.

Luis v. United States. In *Kaley v. United States* (2014), the Court held that a criminal defendant's tainted assets (those that are traceable to a criminal offense) may be restrained before trial even if they are necessary for the defendant to retain a lawyer of his or her choice. The issue in *Luis* is whether untainted assets also may be restrained prior to trial consistent with the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee of a criminal defendant's right "to have Assistance of Counsel."

Sila Luis was indicted for Medicare fraud, and the government sought to freeze $45 million of assets that purportedly represent her revenue from the alleged fraud. Pursuant to 18 U.S.C. § 1345(2), a federal court may issue a restraining order prohibiting the sale or transfer of "property which is traceable to [a Federal health care offense]" or "property of equivalent value" (also known as substitute assets). Luis argues that the seizure of a presumptively innocent defendant's untainted assets "should be of great concern to this Court" and that the government "possesses no property right in [the assets] prior to trial."

Three justices in *Kaley* suggested that the Constitution requires tracing restrained assets to the charged crime, which would be problematic for untainted, substitute assets. Though the government has an interest in these funds for the purpose of compensating victims (if Luis is ultimately convicted of Medicare fraud), Luis maintains that the government "must yield to the constitutional rights of the accused."

Friedrichs v. California Teachers Association. In *Abood v. Detroit Board of Education* (1977), the Supreme Court held that public employees may be required to pay fees to the local union even if they have opted not to join the union. In such an "agency

shop" arrangement, every public employee is represented by the union for purposes of collective bargaining agreements, but those who choose not to join the union pay only an agency fee for a "fair share" of the union's costs. Unions may not spend such nonmembers' agency fees on "ideological activities unrelated to collective bargaining." Two cases in recent years, *Knox v. SEIU* (2012) and *Harris v. Quinn* (2014), have called into question the validity of *Abood* for imposing a "significant impingement" on an employee's First Amendment free speech and association rights.

In *Friedrichs*, a group of California teachers are calling on the Court to overrule *Abood*, arguing that public-sector collective bargaining is political speech that cannot be distinguished from lobbying and that compelling them to subsidize that speech violates the First Amendment. The Supreme Court noted in *Harris* that is it "impossible to argue that... state spending for employee benefits in general[ ] is not a matter of great public concern." The teachers also challenge California's law requiring nonmembers to affirmatively "opt out" of the union's political expenses each year. They maintain that the only rationale for putting the burden on individual teachers to opt out is "to give the unions the 'advantage of...inertia.'"

Montgomery v. Louisiana. Over the past 10 years, the Supreme Court has chipped away at the states' framework for dealing with underage individuals who commit the most heinous crimes. In *Roper v. Simmons* (2005), the Court found that capital punishment for juvenile murderers violates the Eighth Amendment's prohibition on "cruel and unusual punishment." In *Graham v. Florida* (2010), the Court banned the imposition of life-without-parole sentences for juveniles who commit violent crimes other than murder. In *Miller v. Alabama* (2012), the Court ruled that states may not use sentencing schemes for juvenile murderers that result in automatic life sentences without the possibility of parole. Before such a sentence may be imposed, the sentencing authority must consider the juvenile murderer's youth and other attendant characteristics.

Individuals serving life-without-parole sentences have sought to benefit from the *Miller* ruling. Consequently, in *Montgomery*, the Supreme Court will consider whether its *Miller* decision applies retroactively in post-conviction appeals. To do so, the Court must find that *Miller* either announced a "watershed" rule of criminal procedure (which the Court has never before found) or categorically barred a penalty for a class of offenders or type of crime.

Evenwel v. Abbott. In *Reynolds v. Simms* (1964), the Supreme Court held that the Fourteenth Amendment's Equal Protection Clause includes a "one-person, one-vote" guarantee. This means that voting districts must be drawn "on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." In drawing district lines, states are free to choose which population to use, such as total population, voting-age population, citizen voting-age population, citizen-eligible voting-age population, or any other version, as long as the Constitution does not forbid it.

The plaintiffs in *Evenwel* challenge the Texas legislature's use of total population in drawing the state Senate's districts, arguing that this significantly dilutes their votes compared to neighboring districts with large non-voting populations. A three-judge district court dismissed the plaintiffs' claim as judicially unreviewable, but the plaintiffs argue that the Supreme Court made clear in *Reynolds* that "a denial of constitutionally protected rights demands judicial protection" despite the "dangers of [judges] entering the political thickets and mathematical quagmires" of redistricting.

Death Penalty Sentencing Cases. Last term, in *Glossip v. Gross*, the Supreme Court found that Oklahoma death-row inmates had failed either to show that the state's use of certain lethal injection drugs created a "demonstrated risk of severe pain" or to identify an alternative with a lesser risk of pain. Two dissenting justices suggested that the Court should consider whether capital punishment is constitutional at all. Though the Court is unlikely to reach this constitutional question, it will hear four challenges addressing death penalty sentencing issues.

The Court will review Florida's bifurcated sentencing scheme, which requires a judge to find one or more aggravating circumstances in order to impose the death penalty. In *Hurst v. Florida*, a death-row inmate argues that findings of fact—such as the existence of aggravating or mitigating circumstances—"may not be entrusted to the judge" in light of *Ring v. Arizona* (2002). Florida maintains that *Ring* requires only that the jury decide whether there are sufficient facts to make the defendant eligible for the capital punishment.

The Supreme Court also will hear three related cases out of Kansas. In *Kansas v. Gleason*, the Kansas Supreme Court vacated a death penalty sentence because the sentencing jury was not instructed that the defendant did not have to prove mitigating factors beyond a reasonable doubt. The state argues that the Constitution requires that the jury be "permitted to consider and give effect to all relevant mitigating evidence" and does not mandate a burden of proof. In the consolidated cases of the Carr brothers, who were tried, convicted, and sentenced together, the Kansas Supreme Court reversed their sentences, finding that the trial judge's decision not to sever their cases at the penalty phase violated their right to an individualized sentencing determination. The state argues that the Eighth Amendment does not categorically prohibit joinder in capital cases and that requiring separate sentencing hearings would have negative consequences, such as allowing one defendant to have a sneak peek at the state's penalty phase evidence.

Cases on the Horizon

Attempting to predict what the Supreme Court will or will not do is a gamble. The Court receives nearly 10,000 petitions for a writ of certiorari each term, and the justices grant review in roughly 1 percent of cases. The following cases, however, have a good chance of being reviewed by the Court in the near future.

Solitary Confinement. When Justice Anthony Kennedy invites a challenge, the Supreme Court bar takes note. Last term, in *Davis v. Ayala* (a habeas case involving peremptory strikes of jurors), Kennedy wrote a concurring opinion highlighting the harms of long-term solitary confinement and suggesting that the Court consider whether "workable alternative systems" exist. Just three weeks later, a petition was filed with the Court in *Prieto v. Clarke*, a due process challenge to a state's permanent assignment of death-row inmates to solitary confinement. Similar cases are working their way through the federal courts, and inmates who have spent more than a decade in solitary confinement at California's Pelican Bay State Prison have filed a federal class action, *Ashker v. Brown*, alleging that this amounts to "cruel and unusual punishment" in violation of the Eighth Amendment.

Abortion Doctor Admitting Privileges. In recent years, a number of state legislatures have passed laws requiring doctors who perform abortions to have admitting privileges at nearby hospitals—a common requirement for many outpatient procedures. After Mississippi's passage of such a law in 2012, the state's only licensed abortion clinic challenged the law in court, arguing that this imposed an undue burden on women seeking to obtain abortions. The new law required that all clinic doctors have admitting privileges, and local hospitals rejected the applications from two of the Mississippi clinic's three doctors, in part because they were from out of state. At the same time, Texas passed a similar law, which also resulted in a lawsuit.

In *Whole Women's Health v. Cole*, a three-judge panel of the Fifth Circuit upheld the Texas law, finding that it advanced the Lone Star State's interest in maternal health and increased the quality of care. Meanwhile, in *Currier v. Jackson Women's Health Organization*, a different three-judge panel of the same appeals court ruled against Mississippi's law since it would require women seeking an abortion to go to another state, noting that a state may not "lean on its sovereign neighbors to provide protection of its citizens' constitutional rights."

Warrantless Seizure of Cell Phone Records. As technology advances, the Supreme Court must continually reevaluate the contours of the Fourth Amendment. In recent terms, the Court has reined in law enforcement officers' use of technology to gather evidence without a warrant. In *United States v. Jones* (2012), for example, the Court held that police tracking of a suspect's car with a GPS device constitutes a search under the Fourth Amendment. In *Riley v. California* (2014), the Court ruled that police must obtain a warrant before searching a cell phone seized incident to an arrest.

The latest issue in Fourth Amendment jurisprudence is whether the government may seize cell phone location records from service providers without a warrant. The Stored Communications Act, 18 U.S.C. § 2703, allows law enforcement officers to acquire an individual's cell phone location records from telecommunications service providers after obtaining either a warrant or a court order—the latter under a lower standard of proof. These records include incoming and outgoing calls, text messages, and location data.

The federal appellate courts disagree about whether these records are subject to the third-party doctrine, recognized by the Supreme Court in *United*

States v. Miller (1976) and *Maryland v. Smith* (1979), that information shared with third parties receives no protection under the Fourth Amendment and that law enforcement authorities can obtain such records from service providers without a warrant. While some appeals courts have concluded that there is no expectation of privacy in cell phone location records, others have found that the third-party doctrine does not apply given the sensitivity of these records and the fact that, at least in a meaningful way, individuals do not give this information to their service providers voluntarily. One petition for a writ of certiorari has already been filed (*Davis v. United States*), and others may be on the way.

Obamacare Contraceptive Mandate. In *Burwell v. Hobby Lobby* (2014), the Supreme Court held that a rule promulgated pursuant to the Affordable Care Act requiring businesses to offer employee health insurance plans that include contraceptive services violated the rights of some for-profit business owners who objected on religious grounds to paying for or providing abortion-inducing drugs and devices. This holding raised questions about the decision's impact on pending challenges to an "accommodation" from the mandate that the Obama Administration offered nonprofit religious employers, such as the Little Sisters of the Poor. Under this accommodation, the employer may fill out a form notifying the government of its religious objection to providing such coverage, initiating the process whereby insurers and third-party administrators provide the mandated coverage at no cost to the insured.

To date, every appeals court to consider the issue has ruled in favor of the government. The Little Sisters of the Poor and others argue that instead of accommodating their religious beliefs, this process also violates their faith by requiring them to hire and maintain contracts with insurance companies that provide objectionable services. With seven petitions (and counting) pending before the Court, the Obama Administration's accommodation may end up on the docket this term.

Conclusion

The Supreme Court's upcoming term begins on October 5, 2015. The justices will hear significant cases involving unions, racial preferences, voting rights, and sentencing in death penalty cases, among others. The Court also may take up cases involving solitary confinement, abortion, seizure of cell phone data by law enforcement, and another challenge to Obamacare's contraceptive mandate.

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