Summer 6-1-2016

Everything Changed: October Term 2015

Erwin Chemerinsky
Berkeley Law

EVERYTHING CHANGED

OCTOBER TERM 2015

Erwin Chemerinsky

EVERYTHING CHANGED in the Supreme Court on Saturday, February 13, 2016, when Justice Antonin Scalia died. From 1971, when President Nixon had his third and fourth nominees confirmed for the Court, until February 13, there were at least five justices and at times as many as seven justices who had been appointed by a Republican President. More often than not, when the Court was ideologically divided, there were five votes for a conservative result. But no longer.

Between February 13 and the end of October Term 2015, the Court decided 63 briefed and argued cases. Justice Anthony Kennedy was in the majority in a stunning 98% of the decisions. The most important cases of the term fit a clear pattern. In some, Kennedy voted with the conservative members of the Court – Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito – and the Court then deadlocked 4-4 affirming the lower without opinion and without there being any Supreme Court precedent.

One of the most notable examples was *United States v. Texas*,[1] which was a challenge to President Barack Obama's immigration action, Deferred Action for Parents of Americans. This policy grants "deferred deportation

---

Erwin Chemerinsky is Dean and Distinguished Professor and Raymond Pryke Professor of First Amendment Law at the University of California, Irvine School of Law.

[1] 136 S.Ct. 2271 (2016).

status" to those not lawfully in the United States if they have been present since at least 2010, do not have a criminal conviction, and have a child who is an American citizen or a lawful resident alien. The Court's tie means that a nationwide preliminary injunction issued by a federal district court in Texas against the Obama immigration action remains in effect.

In *Friedrichs v. California Teachers Association*,[2] the Court considered whether to overrule a precedent (*Abood v. Detroit Board of Education*[3]), which held that non-union members can be required to pay the share of union dues that supports the union's collective bargaining activities, though not the part that supports the union's political activities. The Court's deadlock means there is no change in the law and non-union members can continue to be required to pay their "fair share" of union dues.

There is no doubt that both of these cases would have been 5-4 decisions in favor of a conservative result if Scalia were still on the Court. Likewise, with Scalia the conservatives would have had a majority in *Zubik v. Burwell* to strike down a federal law requiring that insurers for religious institutions (such as a Catholic university or the Little Sisters of the Poor Home for the Aged) provide contraceptive coverage for women employees.[4] But without a fifth vote, the Court obviously was deadlocked 4-4 and sent the case back to the lower courts for consideration of a compromise proposed by the justices.

Overall, without Scalia and with some surprising votes from Kennedy, the liberals were able to prevail in most of the important cases of the term. I begin by examining the criminal procedure cases of the term and then consider the decisions concerning equal protection and due process.

I. Criminal Procedure

Since 1969, when the first Nixon nominees to the Supreme Court were confirmed, the Court has voted in favor of law enforcement far more than it has voted in favor of criminal defendants. Yet with one notable exception, criminal defendants prevailed in the most significant criminal procedure cases of the year.

---

[2] 136 S.Ct. 1083 (2016).

[3] 431 U.S. 209 (1977).

[4] 136 S.Ct. 1557 (2016).

A. Fourth Amendment

The only major decision where the conservatives prevailed in an ideologically divided case was in *Utah v. Strieff*,[5] which held that evidence gained after an illegal police stop is admissible if the police learn of an outstanding warrant for the person's arrest.[6] Justice Stephen Breyer joined with Chief Justice Roberts and Justices Kennedy, Thomas (who wrote the opinion for the Court), and Alito to create the majority. This should not be a surprise because in other recent Fourth Amendment cases, Breyer has joined with the conservatives to create a five-person majority. In *Maryland v. King*, the same five justices, in a 5-4 decision, held that police may take DNA from a person arrested for a serious crime to see if it matches an unsolved crime in a police data base.[7] Likewise, in *Navarette v. California*, Breyer was again with these four justices in a majority holding that police may pull over a car based on an anonymous tip of erratic driving without the officers observing this themselves.[8] In both cases, Scalia wrote a dissenting opinion that was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.

Utah v. Strieff arose when police received an anonymous tip that drug dealing was occurring in a specific house. Police watched the house and saw a man briefly enter and then leave. Based on this, an officer stopped the man. (The State of Utah would later concede that this was an illegal stop in violation of the Fourth Amendment because there was not reasonable suspicion.) The officer asked for the man's name. The man identified himself as Edward Strieff. The officer did a search for outstanding warrants. A warrant was found for an unpaid traffic violation and Strieff was arrested based on it. A search of Strieff then was done incident to his arrest and he was found to be in possession of illegal drugs.

---

[5] 136 S.Ct. 2056 (2016).

[6] There was one other Fourth Amendment case. In *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), the Court struck a compromise of sorts, and held that a state may require that a driver consent to breath tests, but not blood tests, when being investigated for driving under the influence. Alito wrote for the Court and said that breath tests are a minimal intrusion of privacy, involving no more than that a person blow into a tube. By contrast, blood tests require piercing the skin and are a much greater intrusion into privacy.

[7] 133 S.Ct. 1958 (2013).

[8] 134 S.Ct. 1683 (2014).

The issue before the Supreme Court was whether the evidence had to be excluded from the trial because it was the direct result of the police officer's violating the Fourth Amendment by illegally stopping Strieff. Long ago, the Court held that the products of police violations cannot be used as evidence by prosecutors because they are "the fruit of the poisonous tree." Otherwise, police would have too great an incentive to violate the law.

But the Supreme Court, in a 5-3 decision, held that the evidence was admissible against Strieff. Thomas wrote the opinion for the Court and said that once the police officer discovered that there was an outstanding warrant on Strieff, that made permissible the resulting search as part of his arrest. The Court said that the attenuation exception to the exclusionary ruled applied. The discovery of an outstanding arrest warrant for Strieff's arrest was a critical intervening circumstance that broke the causal chain between the unconstitutional stop and the search.

Sotomayor and Kagan wrote dissenting opinions that lamented that the decision gives the police an incentive to stop people in violation of the Fourth Amendment knowing that if there is an outstanding warrant, a search can be done and any evidence gained will be admissible. Sotomayor wrote: "[T]his case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[9]

Sotomayor discussed the large number of outstanding arrest warrants. She described the degrading nature of police stops. And she spoke powerfully of the impact of such police practices on minority communities: "For generations, black and brown parents have given their children 'the talk' – instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger – all out of fear of how an officer with a gun will react to them."[10] She concluded: "We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops

[9] 136 S.Ct. at 2071 (Sotomayor, J., dissenting).

[10] Id. at 2070.

corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but."[11]

B. Jury Selection

In every trial, prospective jurors can be excused for "cause," such as if they have personal knowledge of the facts, or know the defendant, or are unable to be impartial. Additionally, the law gives each side the ability to excuse a certain number of prospective jurors without needing to give a reason. These are termed peremptory challenges.

Thirty years ago, in *Batson v. Kentucky*, the Supreme Court ruled that it violates the Constitution to exclude prospective jurors on the basis of their race.[12] But it happens all the time and it is rarely stopped except in the unusual case where there is overwhelming proof of bias.

In *Foster v. Chatman*,[13] the Court found a violation of *Batson* and stressed the importance of preventing race from being used in jury selection. But the case also shows how difficult it is to enforce that prohibition.

In 1987, Timothy Foster was prosecuted for murder in Georgia. There were four prospective African-American jurors questioned during voir dire and the prosecutor used peremptory challenges to exclude each of them. Foster's lawyer objected, but the trial judge found that the prosecutor had offered sufficient explanations apart from race and overruled the objection. Foster was convicted and sentenced to death.

Many years later, Foster's lawyer filed a request, under Georgia's Open Records Act, seeking access to the State's file from his 1987 trial. The file contained stunning evidence of race discrimination in the exercise of peremptory challenges. One document was a list of prospective jurors and the names of the black prospective jurors were highlighted in bright green. A legend in the upper right corner of the document indicated that the green highlighting "represents Blacks." The letter "B" also appeared next to each black prospective juror's name. They were ranked, "B#1," "B#2," and "B#3," respectively, indicating the prosecutor's preferences among them. Another document in the file was handwritten and titled, "definite

[11] Id. at 2071.

[12] 476 U.S. 79 (1986).

[13] 136 S.Ct. 1737 (2016).

NO's"; it listed six names and included all of the prospective African-American jurors.

Even with this evidence, the Georgia courts found no constitutional violation. But the Supreme Court in a 7-1 decision reversed, with Roberts writing for the Court and only Thomas dissenting. The Court stressed that the "Constitution forbids striking even a single prospective juror for a discriminatory purpose."[14] The Court concluded that Foster's constitutional rights were violated because the "prosecutors were motivated in substantial part by race when they struck" prospective jurors.

But rarely will there be such clear evidence of race discrimination in jury selection. It is so easy for the parties to offer some race neutral reason for excluding prospective jurors. In fact, in this case, at trial, the prosecutor offered many reasons apart from race for excluding an African American prospective juror: that he had a son who was the same age as the defendant and who had previously been convicted of a crime; that he had a wife who worked in food service at the local mental health institution; that he was slow in responding to death penalty questions; that he had a brother who counseled drug offenders. This case so powerfully shows that even when race is the actual basis for the peremptory challenges it is easy for the prosecutor to make up some non-race-based reason for excluding the prospective juror.

Every day, in criminal cases across the country, race discrimination is occurring in jury selection. It is long overdue to confront this and find meaningful solutions.

C. Retroactivity

The Supreme Court's criminal procedure decisions generally apply only prospectively to future cases. In *Teague v. Lane*, the Court recognized two circumstances in which a criminal procedure decision applies retroactively.[15] First, courts must give retroactive effect to new "watershed rules of criminal procedure . . . implicat[ing] the fundamental fairness of the trial."[16] Since 1989, when *Teague* was decided, nothing has been found to be a watershed rule of criminal procedure. Second, Supreme Court decisions ap-

[14] Id. at 1747 (citation omitted).

[15] 489 U.S. 288 (1989).

[16] Id. at 311-12.

ply retroactively if they put a matter beyond the constitutional reach of the criminal law. The Court says this means that "courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'"[17]

In two important cases, the Court applied the latter exception and found that earlier decisions applied retroactively. In *Montgomery v. Louisiana*,[18] the Court held, 6-3, that its earlier decision in *Miller v. Alabama*[19] applies retroactively. In *Miller*, the Court concluded that it is cruel and unusual punishment in violation of the Eighth Amendment to have a mandatory sentence of life in prison for a homicide committed by a juvenile. The effect of *Montgomery* is that all who received such life sentences before 2012, when *Miller* was decided, can take advantage of that ruling.

Similarly, in *Welch v. United States*,[20] the Court held, 7-1, that its decision a term earlier in *Johnson v. United States*[21] – which declared unconstitutional on vagueness grounds the "residual clause" of the Armed Career Criminal Act – applies retroactively. The Act provided that if a person convicted of a crime involving the use of a firearm had three or more earlier convictions for a "violent felony," that person was to be sentenced to a prison term of at least 15 years and a maximum of life. The Act's "residual clause" included a definition of a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." In *Johnson*, the Court declared that "otherwise involves conduct that presents a serious potential risk of physical injury to another" was unconstitutionally vague. In *Welch*, the Court said that the *Johnson* ruling applies retroactively and benefits the thousands of people sentenced under that clause before *Johnson*.

---

[17] Montgomery v. Louisiana, 136 S.Ct. 718, 728 (2016) (citation omitted).

[18] 136 S.Ct. 718 (2016).

[19] 132 S.Ct. 2455 (2012).

[20] 136 S.Ct. 1257 (2016).

[21] 135 S.Ct. 2551 (2015).

II. Equal Protection and Due Process

The liberal position prevailed in the three major cases concerning equal protection and due process. In one, the Court was unanimous in result; in the other two it was because Kennedy joined the liberal justices.

A. Voting

Evenwel v. Abbott was one of the most important cases of the term even though the Court did nothing to change the way in which legislative districting is done in the United States.[22] The Court reaffirmed that state and local governments may draw election districts on the basis of total population. Surprisingly, the result was unanimous, 8-0, in an opinion by Ginsburg.

Prior to the 1960s, many state legislatures were badly malapportioned with districts of vastly different populations. As cities and suburbs grew, election districts were not redrawn to reflect this. There might be one rural district where 50,000 people elected a representative and another urban district for the same legislative body where 250,000 people elected a representative. Those in the latter district were obviously disadvantaged and had less influence in electing a representative. The same malapportionment was evident in congressional districts in states across the country.

In the early 1960s, the Supreme Court held that such malapportionment denies equal protection of the law and announced the "one person, one vote" principle.[23] This has been understood to mean that for any legislative body all districts must be about the same in population size.

The challengers in *Evenwel v. Abbott* argued that districting should be based on the number of eligible voters and not the total population. The claim was that every voter should have an equal chance to influence the outcome of an election. But the Court unanimously held that districting based on population is constitutional and even left open the question of whether it would be permissible to draw districts based on eligible voters. This was surprising because in *Burns v. Richardson*, the Court held that districting based on eligible voters was constitutional, though obviously not required.[24]

---

[22] 136 S.Ct. 1120 (2016).

[23] *See, e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964).

[24] 384 U.S. 73 (1966).

So why the unanimity on the Court? First, there would be a significant practical problem with requiring that districting be based on the number of eligible voters. The census provides a count of the population, but there is no similar mechanism that measures the number of eligible voters. As the Court noted, a contrary holding would have changed election districts in all 50 states.

Second, the Constitution is clear that districts for the United States House of Representatives must be drawn based on population. Section two of the Fourteenth Amendment says "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." In order to rule for the challengers and hold that districting had to be based on eligible voters, the Court would have had to explain why it was constitutionally forbidden for state and local districts to be drawn on the same basis that is constitutionally required for congressional districts.

Finally, and perhaps most importantly, ruling for the challengers would have required a major change in the political theory underlying the election system. Most of all, the Court's decision rests on a basic principle of democracy: everyone – adults and children, voters and non-voters, citizens and non-citizens – deserves representation. Ginsburg powerfully made this point:

> As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. Nonvoters have an important stake in many policy debates – children, their parents, even their grandparents, for example, have a stake in a strong public-education system – and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.[25]

If the Court had ruled for the challengers, there would be a significant adverse effect on representation of minority communities. Hispanic communities, with significant numbers of non-citizens, would lose representation. Felony convictions generally mean a loss of voting rights and this has

[25] 136 S.Ct. at 1132 (citation omitted).

a disproportionate effect on minority communities. The Court's decision is thus an important for equality, even though it did not change the law.

B. Affirmative Action

The Supreme Court's decision in *Fisher v. University of Texas* was a stunning victory for affirmative action and the ability of colleges and universities to pursue diversity in educating their students.[26] In a 4-3 decision, with Kennedy writing for the majority, the Court upheld a University of Texas plan that uses race as one among many factors in admissions decisions.

In 2003, in *Grutter v. Bollinger*,[27] the Court held that colleges and universities have a compelling interest in having a diverse student body and may use race as one consideration, among many, in admissions decisions. In 2004, the Regents of the University of Texas, seeing a lack of diversity in their undergraduate population, adopted a new admissions policy.

Texas law provided that about 75% of the freshman class would be admitted by taking the top ten percent from each high school in the state. Because of racial segregation in Texas, this would produce some degree of diversity, but not enough to create a "critical mass" of minority students essential for their success and for diversity.

The new admissions policy provided that about 25% of each class would be admitted based on an individualized review of applications. An admissions score was calculated for each student based on two numbers. One was an Academic Index, based on the student's grades and test scores. The other was a Personal Achievement Index, based on the assessment of two admissions essays and a consideration of seven factors, one of which was what the student would contribute to racial diversity. The new policy worked in enhancing diversity. There was a significant increase in applications from minority students and a significant increase in African-American and an increase in Latino students attending the University of Texas.

This is what the Court prescribed in *Grutter v. Bollinger* and the Texas program was upheld by the federal district court and the United States Court of Appeals for the Fifth Circuit. The Supreme Court, though, in a 7-1 decision in June 2013, remanded the case to the Fifth Circuit and held

---

[26] 136 S.Ct. 2198 (2016).

[27] 539 U.S. 306 (2003).

that Texas had to prove that there was no race neutral way to achieve diversity.[28] Kagan was recused then and now because she had been involved in the case as Solicitor General of the United States.

In 2014, the Fifth Circuit, in a 2-1 decision, again ruled in favor of the University of Texas, holding that it had sufficiently demonstrated the need to use race to achieve diversity.[29] To the surprise of many, the Supreme Court, in a 5-3 decision, affirmed and upheld the University of Texas program.

Perhaps most surprising was the tone of Kennedy's majority opinion. To be sure, the Court reaffirmed that the burden is on the educational institution to prove that there is no race neutral way to achieve diversity. But the Court also said that a college or university does not need to quantify what is needed for a "critical mass of minority students" and that Texas did not need to prove that the top ten percent plan was insufficient to achieve diversity.

Most important, the Court expressed the need for deference to educational institutions, declaring: "Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. . . . In striking this sensitive balance, public universities, like the States themselves, can serve as 'laboratories for experimentation.'"[30]

Never before had Kennedy voted to uphold an affirmative action plan. Never before had he written of the need to defer to educational institutions or to allow experimentation in terms of how to achieve diversity.

Colleges and universities still must prove their need for diversity and for affirmative action. Also, the Court stressed a college or university that is engaged in affirmative action has a continuing obligation to reassess an admission program's constitutionality and effectiveness and must tailor its approach to ensure that race plays no greater role than is necessary to meet its compelling interests. But these, as the Court's decision indicates, are manageable burdens.

The Court's decision in *Fisher* is a huge victory for the education of all students. Diversity in the classroom is essential. I have been a professor for 36 years now and have taught constitutional law in classes that are al-

[28] 133 S.Ct. 2411 (2013).

[29] 758 F.3d 633 (5th Cir. 2014).

[30] 136 S.Ct. at 2214 (citation omitted).

most all white and those that are racially diverse. It is different to talk about racial profiling by the police when there are African-American and Latino men in the room who can talk about their experience of being stopped for driving while black or driving while brown. Preparing students for the racially diverse world they will experience requires that they learn in racially diverse classrooms.

Nor are there realistic alternatives for achieving diversity without affirmative action. Because of historic and continuing inequalities in education, color blindness in admissions would mean dramatic decreases in the number of African-American and Latino students in colleges and universities across the country. Giving preferences based on social class fails to achieve racial diversity because there are many more poor whites than poor African-Americans and Latinos, even if the percentage in poverty in the latter groups is larger.

Fisher means colleges and universities can continue to engage in affirmative action.

C. Abortion

The Supreme Court's decision in *Whole Women's Health v. Hellerstedt* sends a clear message: state laws adopted to restrict access to abortion are unconstitutional.[31] Between 2010 and 2014, state governments adopted over 200 different laws restricting access to abortion.[32] These were enacted with the hope that the Supreme Court would defer to regulations that would make it much more difficult for women to have abortions. But the Court's ruling in *Whole Women's Health* reflects that there are not five votes to uphold such laws.

The Texas law challenged in *Whole Women's Health* was one of many of a type known as "targeted restrictions of abortion providers." It required that any doctor performing an abortion have admitting privileges at a hospital within 30 miles and that all places where abortions were performed have surgical facilities even if no surgical abortions were performed there. It was estimated that this would have closed 75 to 80 percent of all facilities providing abortions.

---

[31] 136 S.Ct. 2292 (2016).

[32] Frances Robles, *State Legislatures Put Up Flurry of Roadblocks to Abortion*, N.Y. Times, May 8, 2015.

The federal district court issued a preliminary injunction, finding that the law likely imposed an unconstitutional burden on a woman's right to abortion, and that the law had been adopted for that purpose. In addition, the district court found that there was no evidence that the law protected women's health – if a woman experienced complications at an abortion facility, she could be taken to a local emergency room where doctors would provide medical treatment.

The United States Court of Appeals for the Fifth Circuit reversed. The Fifth Circuit said that it is for the legislature, not the judiciary, to assess whether the law protects women's health. The Fifth Circuit said that deference to the legislature required upholding the law.

The Supreme Court, in a 5-3 decision, reversed. Breyer wrote the opinion for the Court, joined by Kennedy, Ginsburg, Sotomayor, and Kagan. The Court stressed that in deciding whether a law imposes an undue burden on abortion it is for the judiciary to balance the justifications for the restrictions against their effect on the ability of women to have access to abortions. The Court concluded that the Texas law would greatly limit the ability of women in Texas to have access to abortions, without any evidence that the restrictions were necessary to protect women's health.

In one sense, the Court's decision is narrow and is based on an analysis of this particular law, including a detailed analysis of the facts surrounding it. But the case sends a much broader message. The Court was clear that the judiciary must carefully scrutinize laws restricting abortion that are adopted with the purported justification of protecting women's health. The majority rejected judicial deference to legislatures. The laws recently adopted to restrict abortion are about keeping women from having access to abortion, though often it is claimed, like in Texas, that they are about the safety of abortion procedures. The Court's ruling in *Whole Women's Health* makes it likely that these targeted restrictions of abortion providers will be struck down.

Perhaps most important, the case reflects a willingness on the part of Kennedy to invalidate abortion restrictions. When Kennedy first came on the Court, it was widely thought that he would vote to overrule *Roe v. Wade*.[33] And in 1989, the first abortion case in which he participated, *Webster*

[33] 410 U.S. 113 (1973).

v. Reproductive Health Services,[34] found him joining Chief Justice William Rehnquist and Justice Byron White – the two dissenting justices in *Roe* – in an opinion that would have overruled *Roe*. But in 1992, in *Planned Parenthood v. Casey*,[35] Kennedy was part of a five-justice majority to reaffirm *Roe*. Since then, however, in every abortion case, he has been with the conservative majority in voting to uphold restrictions on abortions. For example, in *Gonzales v. Carhart*, in 2007, Kennedy wrote the Court's opinion upholding the federal Partial Birth Abortion Act.[36]

Obviously, if Kennedy had voted with Roberts, Thomas, and Alito in *Whole Women's Health* to uphold the Texas law, it would have been a 4-4 split and the Texas law would have gone into effect. Kennedy's vote means not only that the Texas law is invalidated, but also that there are only three reliable votes on the Court to uphold restrictions on abortion.

THE FUTURE

Since 1960, the average age at which Supreme Court justices have left the bench has been 78 years old. Three justices 78 or older when the next President is inaugurated in 2017: Kennedy, Ginsburg, and Breyer. Especially if it is a two-term President, it seems likely that he or she will have several picks for the high Court. Also, of course, it is uncertain who will replace Scalia. For liberals and conservatives, Democrats and Republicans, one of the most important issues in the coming election must be who will fill these vacancies on the Supreme Court.

[34] 492 U.S. 490 (1989).

[35] 505 U.S. 833 (1992).

[36] 550 U.S. 124 (2007).