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Major Decisions from the Supreme Court of the United States: What to Watch (or Watch Out) for during the 2015-2016 Term.

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On October 5, 2015, the United States Supreme Court began its 2015-2016 term. Those that regularly follow Supreme Court news know that the 2014-2015 term was significant: the Court made high-profile decisions concerning the Affordable Care Act (*King v. Burwell*), death penalty (*Glossip v. Gross*), Fourth Amendment privacy protections (*City of Los Angeles v. Patel*), free speech (*Walker v. Texas Division, Sons of Confederate Veterans*), religious freedom (*EEOC v. Abercrombie & Fitch Stores Inc*.), and gay marriage (*Obergefell v. Hodges et. al.*). Based on its case selections to date, the current term is poised to be equally as intriguing and impactful.

During each term, the Supreme Court typically considers between 70 and 80 cases. While many concern legal "housekeeping" issues, the Court tends to focus much of its energy on cases that present one of three issues: novel (and broadly applicable) issues of law, issues that have created dividing lines amongst the Justices or the states (aka a "circuit split"), and issues that the Court deems warrant revisiting due to notable societal changes over the passage of time. The cases selected thus far in the 2015-2016 term echo these trends. The following cases are some of the term's expected highlights.

Affirmative Action

Fisher v. University of Texas at Austin: In this case, the Supreme Court will decide whether the University of Texas's limited affirmative action plan violates the Equal Protection Clause of the Constitution. The plan at issue uses race as a factor when deciding admission to those students outside the top ten percent of their class (who are automatically admitted). During Fisher's first trip to the Supreme Court three terms ago (*Fisher I*), the Court declined to overturn past decisions stating that public universities have a compelling interest in the educational benefits that flow from having a diverse student body and upholding limited affirmative action plans to make that possible. The *Fisher I* court did not make a final decision about the constitutionality of Texas's limited affirmative action plan; rather, it remanded the case and ordered the lower court to make a more robust inquiry into whether the program is sufficiently tailored to meet a compelling governmental purpose. In this case (*Fisher II*), the Plaintiff Abigail Fisher argues that the lower courts were too deferential to the University of Texas in their findings that the program met the "compelling governmental purpose" test. A ruling in Fisher's favor could abolish similar efforts to maintain adequate diversity at colleges and universities across the country.

Government Seizure of "Untainted" Assets

Luis v. United States: The defendant in this case was the owner of a home health care business that provided medical services to Medicare patients. In 2012, Luis was indicted for conspiring to commit fraud by overbilling and billing for services that were never performed. Relying on a related federal law,

the government asked the lower court to freeze all of Luis's assets, whether or not the asset was obtained through fraud. Luis asked the court to release certain of her assets not related to the alleged fraud so that she could pay her attorney – the court denied her request. The court explained that because the government had only been able to recover a portion of the assets related to the fraud, it could freeze her untainted assets to recover the difference. The issue in this case is whether such action by the government unconstitutionally infringes on her right to hire the attorney of her choice, which is at the heart of the Sixth Amendment to the United States Constitution. The Court has broached this topic a number of times in the past, always ruling in the government's favor. However, in a recent case, Chief Justice Robert's dissented from the majority, explaining that such a process allows the government ""to initiate a prosecution and then, at its option, disarm its presumptively innocent opponent by depriving him of his counsel of choice—without even an opportunity to be heard." [1] Only two other Justices joined his dissenting opinion. Unless two more convert their ideology in this case, it seems inevitable that such action by the government will continue unrestrained.

Unions

Friedrichs v. California Teachers Association: In this case, the Supreme Court will decide whether to overrule longstanding precedent and abolish a requirement that public sector employees who are not members of the union required to represent them pay "fair share" fees to cover the costs of that representation that benefits them. Generally speaking, workers who do not want to join a union cannot be forced to do so. However, labor unions in both the private and public sector can charge non-members a monthly fee that is supposed to compensate the union for activities that directly benefit those workers, too.[2] In the 1977 decision in *Abood v. Detroit Board of Education*, the Supreme Court ruled that requiring non-members to pay what is commonly known as an "agency fee" did not violate their rights under the First Amendment.[3] However, several recent cases cast doubt on that decision.[4] The *Friedrichs* case asks the Court to take another more modern look at *Abood* , arguing that public sector collective bargaining is no different from lobbying, and that "agency fees" therefore compel her to financially support political activity she opposes, in violation of the First Amendment. Proponents of the current system fear that if the Court overturns *Abood* and strikes down "fair share fee" provisions, it could spell the end of organized labor as we know it.

Racial (In)Equality During Jury Selection

Foster v. Chatman: Prior to the 1986 Supreme Court decision in *Batson v. Kentucky*, elimination of racially diverse jurors during the process known as "jury selection" was a widespread problem in trial courtrooms across the country. In *Batson*, the Court took steps to try to expose and invalidate this practice by setting up a three-step process for testing complaints about racial bias during the jury selection process. Unfortunately, most trial lawyers today will tell you that the mandates of *Batson* have failed and the problem of maintaining racially diverse jurors is as difficult as ever. This is largely because

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[1] *Kaley v. United States*, 134 S.Ct. 1090, 1110 (2014).
[2] http://www.scotusblog.com/2015/08/new-challenge-to-public-employee-unions-made-simple/
[3] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).
[4] See *Knox v. Services Employees International Union*, 132 S.Ct. 2277 (2012); *Harris v. Quinn*, 134 S.Ct. 2618 (2014).

trial court's default to prosecutors' "race-neutral" reasons for eliminating particular jurors of color (step-two of the *Batson* test). In *Foster*, the defense used the state's open records request to obtain the prosecution's trial notes in an effort to show that they purposefully and systematically struck black jurors from the prospective jury pool. In that case, which involved a black male defendant and a white female victim, the prosecution successfully struck all five black jurors on the presumptive panel, resulting in an all-white jury (and a trial that convicted Foster and sentenced him to death). Using the prosecution's notes (which had all black jurors name on a separate sheet under the headline "Definite NO") and the mandates of *Batson*, Foster's defense attempted to show that the state purposefully and systematically removed all of the potential black candidates from the jury pool. The Supreme Court is expected to undertake an in-depth review of the argued racial bias and discrimination at issue in this case. The concern is that if the Court does not find a so-called *Batson* violation based upon the egregious facts presented, it would effectively render *Batson* meaningless. If the Court finds a *Batson* violation, it could be a signal for more robust scrutiny of such issues in trial courtrooms across the country.[5]

Abortion

Whole Women's Health v. Cole: For the first time in years, the Supreme Court is stepping back into the abortion debate by accepting a case centered on a challenge to a recent Texas law that abortion rights supporters say, if upheld, would effectively close 75% of available abortion clinics in the state. The law, passed in 2013, requires physicians who perform abortions to have admitting privileges at a hospital no more than thirty miles from the clinic, and also requires abortion clinics to have facilities equal to an outpatient surgical center. Texas contends that such regulations are necessary to protect the health and wellbeing of female patients, while opponents argue that the law is simply a ploy to shut down a majority of the state's abortion clinics. Precedential cases such as *Planned Parenthood v. Casey* and *Roe v. Wade* stand for the proposition that a woman has a constitutional right to terminate her pregnancy in the early stages, but also that a state can impose restrictions on that right so long as the restrictions do not impose an "undue burden" on the mother: a law will be struck down if it creates or is intended to create a "substantial obstacle" to obtaining an abortion.[6] In *Cole*, the Court will have to put the *Casey* standard to the test in a decision that will provide tell-tale signs about the Court's leanings on this issue, which could – if the law is upheld – result in wide-spread legislation limiting the powers and operations of abortion clinics across the country.

[5] It is worth noting that a last-minute procedural hiccup was discovered by the Justices in the days prior to the oral argument, which took place before the Court on November 2, 2015, that may force the court to return the case to the lower courts for further review before (or in lieu of) considering the merits of the *Batson* challenge.
[6] See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); see also *Roe v. Wade*, 410 U.S. 113 (1973).