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A VERY TEXAS TERM AT THE SUPREME COURT

Examining the decisions affecting the Lone Star State.

BY JOSH BLACKMAN

Everything is bigger in Texas, including its share of the spotlight at the U.S. Supreme Court. Of the 69 cases decided during the October 2015 term, five involved the Lone Star State. As has become common in recent years, Texas and the high court continue to hold different opinions about the proper bounds of constitutional law and judicial review.

AFFIRMATIVE ACTION

Fisher v. University of Texas at Austin, on its second trip to the high court, is what we refer to as a SCOTUS repeater. In 2008, Abigail Fisher of Sugar Land first challenged the constitutionality of UT's affirmative action policy, arguing that she had been denied admission to the school because of her race. A district court and the 5th Circuit Court of Appeals upheld the policy.

In 2013, the Supreme Court reversed by a 7-1 vote (Justice Elena Kagan recused). Justice Anthony Kennedy, writing for the majority, rebuked the appeals court for not carefully

considering UT's use of race, or in his parlance, the court failed to apply strict scrutiny. On remand, the 5th Circuit once again upheld UT's policy in an opinion that seemed at odds with Kennedy's admonition. In 2015, the Supreme Court granted certiorari a second time.

The court departed from its 2013 decision, and upheld the university's policy. The 4-3 decision, without the votes of Justices Antonin Scalia and Kagan, held that the justifications for UT's affirmative action plan were narrowly tailored to promote the benefits that flow from having diversity in the classroom.

After eight years—Fisher has since graduated from Louisiana State University—the case finally dripped to an anticlimactic conclusion. But this is not the end of challenges to affirmative action. The same organization that backed Fisher's challenge, the Project on Fair Representation, filed cases that are pending against Harvard Law School and the University of North Carolina at Chapel Hill. These appeals may trickle up to the Supreme Court next term.

IMMIGRATION

With more than two dozen lawsuits filed against the federal government during Gov. Greg Abbott's tenure as Texas attorney general, perhaps none was more significant than *United States v. Texas*.

In December 2014, Texas—on behalf of more than two dozen other states—challenged the legality of President Barack Obama's executive action on immigration, known as Deferred Action for Parents of Americans and Lawful Permanent Residents. DAPA would have shielded from deportation roughly 4 million undocumented immigrants who have children who are U.S. citizens or permanent residents and provided them with work authorization. Texas asserted that the policy was inconsistent with federal immigration statutes and violated the president's duty to take care that the laws are faithfully executed.

In February 2015, Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas, sitting in Brownsville, entered a preliminary injunction halting DAPA. Nine months later, the 5th Circuit affirmed. The U.S. solicitor general quickly petitioned for certiorari, and the Supreme Court heard the case in April 2016. Ultimately, the justices split 4-4, upholding the 5th Circuit's judgment.

The Supreme Court only considered whether the preliminary injunction was validly issued. At some point in the future, a full court will have to decide the legality of the underlying policy.

DISTRICTING

Evenwel v. Abbott is a rare case where Texas and the Obama administration are on the same side of the petition. In 1964, the Supreme Court announced that districting must be performed according to the "one person, one vote" principle.

But Chief Justice Earl Warren's majority opinion in *Reynolds v. Sims* did not define which people should count for purposes of districting. Texas, like virtually all other states, uses the total population numbers for the census when drawing legislative districts, which includes people who cannot vote, such as minors, noncitizens, and prisoners.

Sue Evenwel of Titus County challenged this districting plan, claiming that only voting-age citizens should be counted. Because Texas counted people who lacked the franchise, Evenwel argued that her vote was diluted. Texas defended its plan, arguing that it could consider total population but was not required to. The federal government argued that states were required to consider total population. In a unanimous decision for the court, Justice Ruth Bader Ginsburg wrote that a state "may draw its legislative districts based on total population." However, she stopped short of holding that states were prohibited from considering other metrics. As a result, this issue may come back to the court if a state or municipality limits districting to citizens or the voting-age population.

ABORTION

One of the most significant constitutional decisions this term was *Whole Woman's Health v. Hellerstedt*. This case arose from Texas House Bill 2, a law related to abortion procedures, providers, and facilities, made famous by then-Senator

Wendy Davis' pink-sneakered filibuster. Two provisions of the law were challenged: a requirement that physicians hold "admitting privileges" to a nearby hospital and a mandate that abortion facilities meet "minimum standards ... for ambulatory surgical centers."

Justice Stephen Breyer, writing for five members of the court, invalidated HB 2 in its entirety, finding that the law imposed an "undue burden" on a woman's access to obtaining an abortion. The court rejected all of Texas' arguments that the law was supported by concerns for the health of the mother.

Justice Ginsburg went a step further in her concurring opinion, stating that "it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law 'would simply make it more difficult for them to obtain abortions.'" Justice Clarence Thomas' dissenting opinion stated that the court has a "habit of applying different rules to different constitutional rights—especially the putative right to abortion."

This is the court's most significant decision on abortion since *Planned Parenthood v. Casey* in 1991.

THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Zubik v. Burwell did not involve the state government but instead concerned a religious college in the East Texas town of Marshall. The Obama administration has interpreted the Affordable Care Act to require all large employers (with 50 or more full-time workers) to pay for all federally approved contraceptives.

The statute is silent about religious accommodations. As a result, the executive branch has proposed a series of exemptions and accommodations for religious groups. Initially, the government contended that religiously organized for-profit corporations, such as Hobby Lobby Stores, had to pay for contraceptives. However, the Supreme Court held in 2014 that such a requirement would violate the Religious Freedom Restoration Act of 1993.

Churches and houses of worship were exempted from the mandate entirely, but religious nonprofits such as the Little Sisters of the Poor and East Texas Baptist University were only accommodated. The organizations were not required to pay for the contraceptives, but insurers would use the nonprofit's plan to provide the coverage. A district court and the 5th Circuit ruled against ETBU, and the case was appealed to the Supreme Court in a group of similar cases.

In a unanimous decision, the eight justices remanded the cases back to their respective appeals courts with the instructions 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.'" A compromise looks unlikely. **TBJ**



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