A TERM FULL OF SURPRISES

Making sense of the Supreme Court's recent unexpected rulings

Josh Patashnik

The Supreme Court's certiorari process—which gives the Court the power to decide which cases it will hear—is the envy of every overworked (or bored) trial and appellate court judge in the country. It also gives the Court an opportunity to act strategically in setting its agenda. All else equal, justices are more likely to vote to hear cases in which they believe their views will prevail than cases in which they expect to be in the minority. And they are also much more likely to vote to hear cases they believe were wrongly decided in the lower court than cases in which they agree with the ruling below.

Because of these dynamics, the certiorari process can also be a valuable source of information about the likely outcome of a case on the merits. Not always, of course: where lower courts are deeply divided on an important legal issue or where a lower court has declared a federal statute unconstitutional, the Supreme Court is apt to get involved without regard to those strategic considerations. But, as a general rule, if the Court grants cert in a case where there is no circuit split or invalidated act of Congress, it signals that at least four justices (the number of votes it takes to grant cert in a case) believe both that the ruling below is wrong and also that there are five votes to reverse it on the merits.

This past term, though, if you had used that general rule as a guide for placing bets in Vegas on the outcomes of cases, you'd have come up snake eyes. In three high-profile cases, the Court granted cert to decide questions on which there was no circuit split, and yet went on to affirm the ruling below: *King v. Burwell* (which concerned the availability of health insurance subsidies under the Affordable Care Act on exchanges operated by the federal government), *Texas Department of Housing v. Inclusive Communities Project* (whether the federal Fair Housing Act [FHA] permits a plaintiff to proceed on a theory of

disparate-impact liability), and *Glossip v. Gross* (an Eighth Amendment challenge to a lethal-injection protocol). A fourth closely watched case arguably follows a similar pattern: in *Williams-Yulee v. Florida Bar*, which concerned state rules restricting judicial candidates' solicitation of campaign funds, there was a circuit split, but a long-entrenched one that the Court had previously shown no interest in resolving. The Court's decision to take that case also led most observers to believe the Court planned to reverse—but it instead ended up affirming Florida's restrictions on judicial campaign solicitations.

So what gives? Were the justices who voted to grant cert in these cases not behaving strategically, contrary to popular wisdom? Were they doing a bad job of predicting their colleagues' views? Did some justices change their minds between the cert and merits stages? Or is something else going on entirely? A little bit of each, most likely—each case seems to tell a different story.

A Nonstrategic Court?

One possibility is that maybe all these fancy-pants Court watchers are reading too much into cert votes: perhaps the Court is just voting to hear cases it thinks are important, without any convoluted strategic considerations. For some justices, that has a ring of truth to it, at least based on their behavior in deciding cases on the merits. Justice Clarence Thomas, for instance, is generally viewed as being less interested in strategically cobbling together fractious majorities than in articulating a principled (if often idiosyncratic) view of the law, as evidenced by his frequent separate dissents and concurrences (a remarkable thirty this term alone). It is not hard to believe that at least some justices vote to grant cases more with an eye toward saying something rather than toward winning.

For the Court as a whole, though, that explanation is not very persuasive. Indeed, this past term provides compelling evidence that justices do vote strategically at the cert stage: the Court voted last fall to deny review in an initial round of same-sex marriage cases, even though the question presented was of unquestioned importance and (we now know) four justices believed that the lower courts had erred in finding a constitutional right to same-sex marriage. Not until the Sixth Circuit Court of Appeals reached the opposite conclusion—creating a circuit split and all but forcing the Supreme Court to take up the matter—did the justices agree to decide the issue in *Obergefell v. Hodges*. While it is impossible to know for certain why the Court acted as it did, there is a strong likelihood that at least one of the four *Obergefell* dissenters voted strategically to deny cert in the first round of cases because he perceived (correctly) that his side lacked the votes to win.

Strategic Miscalculations? Or Changed Minds?

A second possible explanation for the Court's behavior is that maybe the justices are just not very good at predicting each other's views. They are smart people and know each other well, but they are a far cry from congressional whips whose job it is to know how their colleagues will vote. Nor do the justices have much of a chance to feel each other out before casting their cert-stage votes. As David Savage of the *Los Angeles Times* suggested,[1] it is possible that the more conservative justices may have "overreached" in granting cases they lacked the votes to win.

Two cases in particular seem to fit this theory: *Texas Department of Housing* and *Williams-Yulee*. In each case, the four more liberal justices were able to attract a fifth vote (Justice Anthony Kennedy in *Texas Department of Housing* and Chief Justice John Roberts in *Williams-Yulee*) to score unexpected victories to affirm favorable rulings below. It is not hard to see why the four justices who ended up dissenting in these cases might have voted to grant cert under the mistaken belief that they would be in the majority on the merits. Justice Kennedy generally is a skeptic of far-reaching theories of liability under fed-

eral civil rights statutes, so his vote in *Texas Department of Housing* may have surprised even his colleagues. Likewise, Chief Justice Roberts has previously voted to strike down restrictions on campaign speech and may not have been expected to vote to uphold some such restrictions. The Obama administration and left-leaning advocacy groups, for their part, waged a years-long effort to keep the question presented in *Texas Department of Housing*—whether the FHA encompasses disparate-impact liability—out of the Supreme Court and helped broker settlements in two earlier cases presenting that question after the Court had granted cert. This strategy, which likely annoyed and frustrated the more conservative justices, may have made them even more determined to have the Court rule on the FHA disparate-impact question and may also ironically have reinforced their (ultimately incorrect) belief that they would have the votes to win.

Yet even if strategic miscalculation is part of the story, it clearly is not the whole story. In *King*, for example, the Court ultimately voted six to three to hold that health-care subsidies are available on federal exchanges—meaning that at least one justice in the majority voted to grant cert in the case, notwithstanding the lack of a circuit split on the question. Most Court watchers believe that Justice Kennedy—who voted three years ago to strike down the Affordable Care Act in its entirety—is the most likely candidate to have provided the fourth vote to grant cert in *King*. If so, perhaps he later came to realize that the challengers' arguments in *King* rested entirely on the sort of rigid textualism that he rarely finds persuasive—unlike the challengers' arguments in the first Affordable Care Act case, which relied instead on broad constitutional theories. As *King* demonstrates, it is not unheard of for a justice to vote to grant cert, even in the absence of a circuit split, and yet still vote to affirm. It is possible the same thing happened in other cases besides *King*, but we don't know for sure.

Taking the Long View

A final possibility is that justices might occasionally vote to grant cert in a case in which there is no circuit split or invalidated federal statute *even though* they know there is a strong possibility they will be in the minority on the merits. Why would justices do that? *King* and *Glossip* may provide two examples.

In *King*, from the standpoint of the plaintiffs, time was of the essence. A ruling in their favor would have resulted in the denial of subsidies to more than 6 million people who purchased health insurance on federal exchanges. The justices sympathetic to that side of the case may have calculated that—as many political observers, including the plaintiffs themselves, believed—the longer those subsidies remained available, the more entrenched they would become and the more disruptive and chaotic their eventual removal would be. Thus, those justices might have reasoned that the usual course of action they might have followed—vote strategically to deny cert for the time being and wait and see if the Court's membership changes or other favorable circumstances arise—simply would not work. If that view is right and *King* truly was a now-or-never case, the justices who voted to grant cert acted rationally in doing so even if they knew their odds of prevailing were low.

In *Glossip*, all appearances are that it was the four more liberal justices who voted to grant cert to consider the constitutionality of Oklahoma's lethal-injection protocol. They may well have known they were likely to lose on the merits: a similar lethal-injection challenge failed in 2008. But they may have calculated that they did not need to win the case to achieve their aims. Capital punishment seems to be on the wane in the United States: just thirty-five prisoners were executed in 2014, a twenty-year low. It is not primarily judicial decisions driving this trend—rather, it is an increasing realization on the part of voters and legislators (including in conservative states like Ne-

braska, which recently eliminated the death penalty) that capital punishment is expensive, unreliable, and plagued by racial and class disparities.

The Court's more liberal justices may have seen in *Glossip* an opportunity to provide additional momentum and support for this trend—not by winning on the merits, but by highlighting what a mess the death penalty is, both on death row itself and in the courts. On that score, mission accomplished. *Glossip* was, to put it mildly, not the Court's finest hour. The case produced five separate opinions, which are full of righteous indignation about lethal injection and the death penalty more broadly. Both Justices Stephen Breyer and Sonia Sotomayor read their dissents aloud from the bench (which is rare), and Justice Antonin Scalia read his *concurrence* from the bench (which is virtually unprecedented). Justice Breyer's dissent, which all but concludes that the death penalty is unconstitutional—a question not presented by the case—is unpersuasive as a matter of legal reasoning, but marshals an impressive array of statistics, studies, and other evidence of the death penalty's flaws. Assuming that its intended audience is voters and legislators rather than the five justices in the majority, it may well prove effective. Perhaps that was the idea all along.

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New Term, Same Pattern?

A key takeaway from all of this is that perhaps we should be a bit more cautious before reading too much into the Court's decision to grant or deny cert. Unfortunately, that message seems not to have gotten through. Already, various prognosticators are confidently trumpeting their theories regarding the likely outcome of cases in which the Court has granted cert for next term. "Supreme Court Agrees to Hear Case That Will Likely Wipe Out Public Sector Unions," read one headline in *Slate*, referring to the Court's cert grant in *Friedrichs v. California Teachers Association*. Another, on the blog of the liberal Center for American Progress: "This Move by the Supreme Court Probably Means the End of Affirmative Action," referring to the cert grant in *Fisher v. University of Texas*.

Maybe. Then again, lots of people were saying similar things about last year's cases. And *Friedrichs* and *Fisher* bear some of the hallmarks of those cases: the petitioners in both cases hope the Court will overrule or modify its existing precedents and articulate a clear, bright-line rule that definitively resolves a high-profile, politically salient legal question. The Court does that sometimes—witness last term's same-sex marriage ruling in *Obergefell*. But recent experience cautions against casually assuming that the Court will do so just because it has agreed to hear a particular case.

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Note

1. Savage, David G., "Conservative Overreach May Explain Liberal Victories in Supreme Court," *Los Angeles Times*, July 2, 2015.