SUPREME COURT REVIEW AND JUDGE BARRY RUSSELL AWARDS

By Jimmy Rotstein

On October 8, 2015, the Federal Bar Association *Los Angeles Chapter* held its annual "Supreme Court Review and Judge Barry Russell Scholarship Awards" luncheon at the Biltmore Hotel in downtown Los Angeles. Each year, this event recognizes local law students for their achievements in their federal courts courses. The event also features a review of the Supreme Court's most recent term by Dean Erwin Chemerinsky. As in past years, over 150 judges, lawyers, and law clerks attended the event.

Jimmy Rotstein
Paul Hastings LLP

The event began with Magistrate Judge Michael R. Wilner welcoming those in attendance. He then proceeded to swear in the FBA-LA Chapter's new officers and board members.

Next, Bankruptcy Judge Barry Russell took the stage and presented the annual Judge Barry Russell Scholarship Awards to five students from local law schools for excelling in their federal courts and practice courses. Each recipient was recognized on stage and received a personalized plaque reflecting the honor, a $500 check, and the latest edition of Judge Russell's Bankruptcy Evidence Manual.

The focus then shifted to Dean Chemerinsky, who reflected upon the October 2014 term. His remarks were broken down into five categories: the Court's liberal "voting pattern;" the "blockbuster cases" that dominated headlines; the "sleeper cases" that escaped headlines, but are enormously important; the Court's evolving "rhetoric;" and a look ahead at the Court's "upcoming term."

Voting Pattern

Dean Chemerinsky began his review by noting that the historically liberal Justices—Ginsburg, Breyer, Sotomayor, and Kagan—were in the majority of most of the high profile decisions of the October 2014 term. Dean Chemerinsky posited two theories to explain the Court's recent liberal leaning.

First, he explained that the shift could be tied tied directly to the voting pattern of Justice Anthony Kennedy. In the first nine years of the Roberts' Court where the Justices were split ideologically 5-4, Justice Kennedy sided with the liberals only 30% of the time. Yet, out of the fourteen ideologically divided 5-4 decisions last term, Justice Kennedy joined the liberal Justices in nine of those decisions.

Second, Dean Chemerinsky attributed the shift to the cohesiveness of the liberal Justices. There were nineteen 5-4 decisions last term. In sixteen of those decisions, the liberal justices voted together. Dean Chemerinsky noted that the cohesiveness is even more apparent when considering 6-3 decisions.

Does this mean that the Roberts' Court is becoming more liberal? Dean Chemerinsky strongly cautioned against such a conclusion. He explained that the decisions in any year are merely a product of the cases on the docket. After 66% of cases in the October 2013 term were decided unanimously, commentators quickly concluded that Chief Justice Roberts finally succeeded in getting the consensus and unity he wanted. But, Dean Chemerinsky noted that only 34% of cases were decided unanimously last term, and the Court already has cases addressing affirmative action, first amendment rights of nonunion members, and voting disputes on the docket for next term—three areas where Justice Kennedy has historically sided with the conservatives.

Blockbuster Cases

Dean Chemerinsky next discussed two cases that received the most headlines and were the most controversial: *Obergefell v. Hodges* and *King v. Burwell*.

Obergefell addressed whether laws prohibiting same sex marriage in Kentucky, Michigan, Ohio, and Tennessee were constitutional. In a 5-4 decision, the Court declared that state laws prohibiting same-sex marriage violate the due process and equal protection clauses of the Fourteenth Amendment. In *King*, the Court held that the federal government may permissibly promulgate regulations to extend tax-credit

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subsidies to coverage purchased through exchanges established under Section 1321 of the Patient Protection and Affordable Care Act—thereby upholding "Obamacare."

Dean Chemerinsky explained that aside from media attention, the cases have three important similarities. First, both decisions are "ending" litigation. After *United States v. Windsor*, dozens of cases were filed challenging laws that prohibited same sex marriage. He noted that those cases are now resolved. Similarly, he explained that *King* was the last "global challenge" to the Affordable Care Act that had the potential of collapsing the entire statute. Second, Dean Chemerinsky noted that both cases reject narrow versions of interpretation. *Obergefell* rejects an originalist approach to constitutional interpretation, while *King* rejects a plain meaning approach to statutory interpretation. Finally, Dean Chemerinsky emphasized that both cases have an enormous impact on people's lives. He explained that the decision in *Obergefell* means that same sex couples can marry in every state, and the decision in *King* translates into 6.5 to 10 million people being able to afford health insurance.

Sleeper Cases

Next, Dean Chemerinsky reviewed notable sleeper cases of the term that he believed were particularly significant. He began with *Johnson v. United States*, in which the Court held that the residual clause in the Armed Career Criminal Act was unconstitutionally vague. Among other reasons, this case was notable because a number of provisions in federal statutes use similar language. Dean Chemerinsky opined that these provisions can now be challenged as void on vagueness grounds.

He then discussed *Reed v. Town of Gilbert, Arizona*, in which the Court struck down provisions of a municipality's sign code that imposed more stringent restrictions on signs directing the public to the meeting of a non-profit group than on signs conveying other messages. The Court reasoned that the restriction was content based and did not survive strict scrutiny. Dean Chemerinsky explained that this case was the "clearest articulation in recent memory of the framework to be used in First Amendment analysis."

Rhetoric

Calling it the "nastiest we have seen on the Supreme Court," Dean Chemerinsky attributed most of last term's vitriolic rhetoric to Justice Scalia. Dean Chemerinsky cited both Justice Scalia's concurring opinion in *Glossip v. Gross*, which referred to Justice Breyer's opinion as "nonsense" and "gobbledygook," and his dissent in *Obergefell*, which described Justice Kennedy's opinion as "pompous and egotistical" and "like the aphorism in a fortune cookie." Dean Chemerinsky hoped everyone could agree that "such rhetoric has no place in judicial opinions, and sends a terrible message to law students and lawyers."

Upcoming Term

Finally, Dean Chemerinsky closed by looking ahead to the upcoming 2015-2016 term, which includes cases that address headline-grabbing issues such as first amendment rights, affirmative action, and voting disputes. Although always hesitant to make predictions about the coming term, Dean Chemerinsky made what he called a "safe prediction": that the upcoming cases will once again show that what the Supreme Court does—whatever it may be—will affect everyone in the most intimate and most important aspects of our lives.

(l. to r.) Kenneth D. Sulzer, Constitution Day Award Winner Emily Filkin, and Bankruptcy Judge Sandra R. Klein Photo Courtesy of the Bankruptcy Court

(l. to r.) Kenneth D. Sulzer, Natella Royzman, and Joseph Boufadel at the 12th Annual Bankruptcy Ethics Symposium