Supreme Court Update

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Overview of the Presentation

- Big cases decided
- SLLC cases decided
- Other cases decided
- Grants for next term affecting state government
- What else is on the horizon for next term?
Big Cases
The Voting Rights Act: 
*Shelby County v. Holder*
Section 5 Coverage Before...
...And After
The Voting Rights Act of 1965

- Passed to combat pervasive discrimination in voting procedures in the South
- Every time a court would strike down a discriminatory voting practice (think literacy tests, “good character” requirements, etc.), new ones popped up, forcing more expensive, time-consuming litigation
The Voting Rights Act of 1965

- Section 2 forbids discrimination in voting practices and is enforced through case-by-case litigation.
- Section 5 required these “covered” jurisdictions to get permission from the Attorney General or the District Court for the District of Columbia for every change in voting laws.
- Section 4(b) defined § 5’s scope to include any state or political subdivision maintaining a voting “test or device” and that had less than 50% voter turnout in the 1964 elections.
Northwest Austin Municipal Utility District No. 1 v. Holder

- Or NAMUDNO, for short
- Ruling instead on statutory grounds, the Court expanded the Act’s “bailout” provision, which allowed jurisdictions to remove themselves from coverage by maintaining a clean record for a given period of time
- But Chief Justice Roberts, writing for the 8-1 majority, noted that the conditions that had led to the initial passage of the VRA had changed drastically, and questioned whether § 4’s coverage was still justified
- In 2008, the Court passed up a chance to reconsider the constitutionality of the VRA
Shelby County v. Holder

- Following NAMUDNO, Shelby County, Alabama, challenged the constitutionality of §§ 4 and 5
- Shelby County was a covered jurisdiction ineligible for bailout because of federal objections to proposed voting changes within the county
- The District Court upheld the Act, finding that Congress had compiled sufficient evidence to justify the latest reauthorization in 2006
- The D.C. Circuit affirmed the ruling on both sections
Shelby County v. Holder

- In a 5-4 decision, the Court declared § 4(b) unconstitutional.
- Although the coverage formula was permissible at the time of the Act’s passage, “current needs” did not justify the Act’s violation of the “fundamental principle of equal sovereignty” by forcing some states to bear the burden of preclearance but not others.
- Or at least not the states defined by § 4(b), which the Chief Justice called “a formula based on 40-year-old facts having no logical relationship to the present day.”
Why not throw out Section 5?

- Get to 5 votes? Not everyone in the majority (Roberts, Scalia, Kennedy, Thomas, and Alito) might have agreed
  - Although Thomas makes it abundantly clear in his concurrence that he would have loved to strike down this provision as well

- Avoid controversy? Ruling on § 4(b) effectively neuters the preclearance provision but looks like a much narrower decision. And putting the ball back into Congress’s court to revise the coverage formula may lead people to blame preclearance’s demise on a dysfunctional legislature rather than talk about an “activist” Court.

- Stick it to Congress? At the end of the opinion, Chief Justice Roberts berates the legislature for failing to adjust the formula after NAMUDNO.
What does it all mean?

- Section 4 (b), the coverage formula, is gone. Jurisdictions covered under § 4(b) are no longer subject to preclearance.
- Section 5, the preclearance provision, is still on the books, but doesn’t pull much weight. That is, unless Congress comes up with a new coverage formula.
- At the end of the day, a victory for federalism, as formerly covered states and localities will no longer need to ask for federal permission to make even minor changes to voting procedures but a major loss for the civil rights movement.
But wait, there’s more!

- Section 2, which prohibits discrimination in voting procedures and is enforced by lawsuits, is unaffected by the ruling and remains in force.
- Former preclearance jurisdictions should prepare themselves for more § 2 litigation.
- And § 3, which contains a bail-in provision that allows a court to subject a political subdivision that loses a § 2 lawsuit to § 5 preclearance, remains in effect.
- So it is still possible for states and localities to become covered again, just not under the old broad-based formula.
The Marriage Cases
United States v. Windsor

- Edith Windsor and Thea Spyer were married in Ontario, Canada, in 2007.
- New York, their home, recognizes same-sex marriages.
- Under § 3 of the Defense of Marriage Act (DOMA), which only recognizes opposite-sex marriages for federal purposes, the federal government did not.
- The IRS did not grant Windsor the federal benefits typically afforded to married couples when Spyer passed away. Windsor paid $363,053 in estate taxes that an opposite-sex couple in New York would have been exempted from under federal law.
A Procedural Nightmare

- Windsor challenged the constitutionality of DOMA in federal court by suing the United States.
- The United States lost, but refused to pay Windsor.
- Then the Executive Branch announced that it also thought that § 3 was unconstitutional and would not defend it, even though it would enforce it.
- A group of Representatives, the Bipartisan Legal Advisory Committee, intervened to appeal the ruling.
- The Supreme Court granted certiorari before the Second Circuit issued its ruling (which later affirmed the district court’s judgment striking down § 3).
The Ruling

- Justice Kennedy authored the majority opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan
- The Court found that, despite the fact that the government agreed with Windsor, there was standing because 1) They had to pay, and 2) BLAG offered the concrete adversaries required under Article III
- Two major themes in the ruling on the merits:
  - Individual Dignity
  - Federalism and deference to state choices
A Closer Look

- Equal protection(ish)/due process(like) grounds:
  - Looked at the “design, purpose, and effect of DOMA”
  - “[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage,” so the statute must fall
  - Dignity is mentioned 9 times, 10 if you count “indignity”

- Federalism grounds:
  - Defining marriage is the cornerstone of the state’s authority to regulate domestic relations
  - The federal government has always deferred to the states on the issue of marriage
  - “[N]o legitimate purpose overcomes the purpose and effect to disparge and to injure those whom the state . . . sought to protect in personhood and in dignity.”
Dissents

- Chief Justice Roberts
  - Emphasizes the federalism aspects of the opinion
  - Not that big of a deal, limited to the facts of the case, respects the traditional authority of state definitions

- Justice Scalia
  - THE WORLD IS ENDING
  - Emphasizes the majority’s equal protection language
  - A ruling on the unconstitutionality of same-sex marriage bans in the states in now “just a matter of listening and waiting for the other shoe.”
  - Worth a read for all of the Scalia-isms
To sum up

This ruling does:

- Strike down § 3 of DOMA
- Require the federal government to extend the same benefits to all couples married under state law, including same-sex couples

This ruling does NOT:

- Force states to perform same-sex marriages
- Force states to recognize same-sex marriages performed in other states (This is § 2 of DOMA, which is unaffected by the ruling)
Hollingsworth v. Perry

- May 2008: California Supreme Court holds attempts to ban same-sex marriage unconstitutional under the California Constitution
- November 2008: Voter-sponsored ballot initiative Proposition 8 passes 52% to 48%, amending the California Constitution to define marriage as being only between a man and a woman.
- 2009: California Supreme Court okays the Proposition as carving out a narrow exception under the California Constitution’s equal protection clause
To Federal Court!

- Two same-sex couples challenge the law in the United States District Court for the Northern District of California
- California officials (elected in the same election as Proposition 8 was passed) refuse to defend the law
- The District Court judge allows the ballot initiative's sponsors to intervene to defend it
- The court rules in favor of the couples and holds the law unconstitutional under the Federal Constitution
- Enjoins public officials from enforcing Proposition 8
On Appeal

- California officials decide not to appeal the ruling
- The sponsors appeal to the Ninth Circuit instead
- The Ninth Circuit asks the California Supreme Court if the sponsors are permitted to represent the state in an appeal under state law
- The California Supreme Court unanimously says that they are
- The Ninth Circuit hears the appeal and affirms the District Court’s ruling declaring Prop 8 unconstitutional
- The sponsors appeal to the Supreme Court
Majority Opinion: No Standing

- Chief Justice Roberts wrote for a five-member majority, joined by Justices Scalia, Ginsburg, Breyer, and Kagan.
- The Court held that the sponsors lacked Article III standing to appeal the District Court’s decision.
- The sponsors had no “direct stake” in the outcome of the appeal because the court “had not ordered them to do or refrain from doing anything.”
- A generalized interest in seeing a law upheld is not enough to create standing in federal court.
  - And the fact that they were the initiative’s sponsors does not grant them any special authority to defend it.
- The Ninth Circuit’s precedent-setting ruling was vacated and the District Court’s ruling stands.
What about the state?

- Justice Kennedy wrote the dissent, joined by Justices Thomas, Alito, and Sotomayor.
- Kennedy focuses on the damage this ruling might do to state ballot initiative systems.
- California had decided that the sponsors could represent it under California law. The Court should have respected that decision.
- The whole point of a ballot initiative is for the people to be able to bypass state officials.
- “[T]his purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative.”
In English, please...

- The District Court’s decision that California’s same-sex marriage ban is unconstitutional stands
  - Same-sex couples in California can get married
    - (For now. Sponsors brought another challenge about the effect of the ruling in California’s state court system.)
- There is no broader precedential effect outside of California from that decision
- Ballot initiative sponsors are not allowed to appeal an adverse decision in federal court if state officials refuse to do so. Justice Kennedy points out the issue with this.
- This wasn’t actually a same-sex marriage case, it was a federal courts jurisdiction case...
What’s Next for Same-Sex Marriage?

- A ruling on § 2 of DOMA (which allows states to not recognize same-sex marriages performed in other states)?
  - This week an Ohio federal district court recognized the marriage of two men that took place in Maryland
- A ruling on the constitutionality of banning same-sex marriage?
Fisher v. University of Texas at Austin

Facts: A Texas law requires all state schools to automatically admit any student in the top 10% of their high school class. For those not admitted under the Top Ten Percent Law, the school creates a multifactor admissions profile. One component of this profile considers race alongside leadership, work experience, extracurriculars, and other circumstances that illustrate a student’s background. Abigail Fisher, a white woman, applied for admission at UT Austin, but was denied a spot in the entering class.
Fisher v. University of Texas at Austin

- Affirmative action refresher
  - For the government to consider race is making a decision there must be a compelling state interest
  - AND the use of race must be narrowly tailored to achieve that compelling state interest
  - Achieving diversity at universities can be a compelling state interest
Fisher v. University of Texas at Austin

- The Fifth Circuit upheld the District Court’s ruling in favor of the university and their use of race in their admissions plan.
- The court deferred to the school’s assertion that diversity is a compelling interest for an educational institution.
- The court also deferred to the school’s claim that the multifactor test—including the use of race as a “factor of a factor”—was the only way to achieve sufficient diversity to further that government interest.
Fisher v. University of Texas at Austin

- At the Supreme Court, a 7-1 majority decided to send the case back down to the Fifth Circuit
- Although the lower court had correctly deferred to university administrators on the importance of diversity, the Fifth Circuit should have examined whether “the means chosen by the University [are] narrowly tailored to that goal”
- On remand, the lower court must examine whether the use of race is “necessary’ . . . to achieve the educational benefits of diversity” or whether it can be achieved through some race-neutral alternative
Fisher v. University of Texas at Austin

- *Fisher* was touted as a blockbuster affirmative action case, but ended up delaying a decision on the matter.
- If narrowly tailoring has been made more difficult using affirmative action is less attractive.
- Justice Kagan recused herself because she had been involved with the case before joining the Court.
- Next term, all nine Justices will take up the issue again in *Schuette v. Coalition to Defend Affirmative Action*, a case that examines an amendment to a state constitution that prohibits preferential treatment on the basis of race or sex in university admissions.
Making Sense of the Big Three Cases Together

- Do *Shelby County* plus *Fisher* illustrate the ending of a race-focused civil rights movement?
- Are gay rights the new civil rights?
- Does the Chief has his eye on race...and will he be successful?
SLLC Cases Decided
Wos v. E.M.A.

- SLLC filed a brief in this case
- Issue: Whether the anti-lien provision of the Medicaid act prevents a state from statutorily designating a fixed portion of a tort settlement as medical expenses recoverable by the state to offset its expenditures
- Huh?
Wos v. E.M.A.

- Facts: E.M.A. suffered serious injuries during her birth. North Carolina helped pay for ongoing treatment through its Medicaid program. E.M.A. sued the delivering doctor and hospital, but settled before the trial. North Carolina is required to recover medical expenses from lawsuits; because the settlement did not specifically designate the amount of expenses, the state claimed one third of the judgment under a state statute that fixed medical expenses at that rate when they are not otherwise specified.
Wos v. E.M.A.

- The Court held 6-3 that the state could not create “an irrebuttable, one-size-fits-all statutory presumption” that an “arbitrary” percentage of a tort recovery represents medical expenses in a given case.
- A state cannot recover more than actual medical expenses, which this statute may allow.
- The majority expresses a preference for case-by-case determinations by a judge or through some other proceeding.
- The Court leaves open the possibility of “ex ante administrative criteria . . . backed by evidence suggesting that they are likely to yield reasonable results in the mine run of cases”.
- Could have gone better. States should have more flexibility in administering an expensive, complex program like Medicare.
Decker v. Northwest Environmental Defense Center

- The SLLC filed a brief in this case
- Issue: Whether the Clean Water Act requires that federal NPDES permits be issued for stormwater runoff from logging roads
- Facts: The EPA interpreted the Act and its own regulations regarding stormwater runoff not to apply to logging roads, which are comprehensively regulated by state authorities. A suit was filed against a company that did not seek NPDES permits for roads in Oregon.
- Holding: The Court deferred to the EPA’s interpretation. (7-1)
Decker v. Northwest Environmental Defense Center

- If you like statutory interpretation, administrative law, and *Auer* deference, you’ll love this case.
- Act requires that permits be issued for any discharge into the navigable waters of the US
- There is an exception for stormwater runoff
- There is an exception to the exception for stormwater runoff “associated with industrial activity,” which means “directly related to manufacturing, processing, or raw materials storage areas at an industrial plant”
- The EPA thought, and the Court agreed, that logging roads were “directly related” to harvesting, not manufacturing, processing, or storage, so no permit
Why it matters to states and locals (from SLLC brief)

- 46 states issue NPDES permits in lieu of the EPA
  - An adverse ruling would have imposed a huge burden by requiring states to monitor compliance of every roadside ditch
- State and local governments own almost a quarter of the nation’s logging lands
  - Adverse ruling might have exposed governments to liability

Plus, state and local governments already comprehensively regulate both logging roads and water quality, making the NPDES permitting process redundant in this context. There is no additional benefit, and a huge cost, for duplicative regulations.
LACFCD v. NRDC

- SLLC filed a brief in this case
- Issue: Whether water flowing out of a concrete channel within a river qualify as a “discharge of a pollutant” when the Clean Water Act
- Facts: LACFCD operated an MS4; testing in concrete channels in the Los Angeles and San Gabriel Rivers owned by LACFCD revealed a permit violation
- LA County argued were not the only entity polluting this River
- The Ninth Circuit said it doesn’t matter because you control the concrete channel
LACFCD v. NRDC

- Everyone agreed that water flowing out of a concrete channel within a river qualify as a “discharge of a pollutant” when the Clean Water Act

- Why? Because the Supreme Court held this was the case in 2004 in *South Florida Water Management District v. Miccosukee Tribe*

- NRDC tried to argue that LACFCD’s permit made them responsible for the water quality standards being exceeded

- Why did the Court take this case? Put the Ninth Circuit in its place
City of Arlington, Texas v. FCC

- SLLC filed a brief in this case
- Context of this case
  - Telecommunications Act of 1996 regulates sites for cell towers and antennas
  - Shot clock rule says state and local government have to act on a siting application “within a reasonable period of time”
- Question in this case is whether the FCC had authority or “jurisdiction” to define “within a reasonable period of time”
City of Arlington, Texas v. FCC

- A decent argument could be made that FCC had no jurisdiction to interpret this language
  - Savings clause that said nothing else should limit state and local authority over siting decisions
  - If you didn’t agree with a siting decision you could file a lawsuit
City of Arlington, Texas v. FCC

- Court holds 6-3 that *Chevron* deference applies to a statutory ambiguity concerning the scope of an agency’s authority to interpret a statute.
- Justice Scalia writes for the majority.
- He expressed his views on this issue in 1988 and (not surprisingly) hasn’t changed his mind.
City of Arlington, Texas v. FCC

- Court’s reasoning
  - “[T]he distinction between ‘jurisdictional’ and ‘nonjurisdictional’ is a mirage”
  - Statutory ambiguities of any kind are to be resolved by agencies, not courts
  - This case as nothing to do with federalism just because FCC has asserted jurisdiction over an area traditionally regulated by state and local government; this is an agency v. federal courts dispute
City of Arlington, Texas v. FCC

- I don’t care what Justice Scalia says...this case is about the fox guarding the hen house
  - If an agency wants to interpret a statute it is going to say jurisdiction is ambiguous, resolve the ambiguity in its favor, and courts will be unable to do anything about it
  - After all, that is what happened in this case
City of Arlington, Texas v. FCC

- This case is bad for state and local government
  - Agencies regulate in the same space as state and local government
  - Agencies often regulate state and local government
  - And now agencies have more authority
McBurney v. Young

- SLLC filed a brief in this case
- Issue: whether Virginia’s “citizens-only” public records law is unconstitutional
- Facts: Hulbert was denied real estate tax records and McBurney was denied general policy information about the handling of child support claims
- Holding: citizens-only provision are constitutional; unanimous
McBurney v. Young

- Five Privileges and Immunities Clause arguments
  - Pursue a common calling—this law wasn’t passed to burden out of state citizens
  - Own and transfer property—don’t need real estate records to do so
  - Access to Virginia courts—can still do discovery and issue subpoenas
  - Access to public information—not protected by P&I Clause
McBurney v. Young

- Dormant Commerce Clause argument
  - In general state and local government cannot regulate or burden interstate commerce
  - Court says Virginia’s law does neither; it just provides a service to local citizens
McBurney v. Young

- Companies exist for the sole purpose of collecting public records
- Big win here is the court affirming there is no constitutional right of access to public records in general
- Eight states have citizen’s-only provisions: Alabama, Arkansas, Delaware, Missouri, New Hampshire, New Jersey, Tennessee, and Virginia
Maryland v. King

- SLLC filed a brief in this case
- Issue: whether DNA arrest laws violate the Fourth Amendment
- Facts: when Alonzo King was arrested for assault his DNA was taken; it matched with DNA taken from an unsolved rape
- Holding: DNA arrest laws are constitutional
Maryland v. King

Court’s reasoning

- Court weighs the legitimate government interest and intrusion into an individual’s privacy
- Legitimate government interest: identifying a person
- This is really like fingerprints and photos
- Intrusion into privacy: no risk, trauma, or pain
Maryland v. King

- Scalia and the ladies issue a most persuasive dissent
- Bottom line: DNA is used to solve crimes which isn’t a permissible justification for searching without individual suspicion under the Fourth Amendment
Maryland v. King

- This case is a big win for law enforcement and as big of a win for state legislatures
  - At the time of the opinion 28 states had adopted DNA arrest laws
  - How long will it take for the rest of the states to join them?
  - Studies the SLLC’s brief discusses, which are included in the Court’s opinion point out that if you get DNA for the right person you can stop a crime spree
Koontz v. St. Johns River Water Management District

- **Nollan** and **Dolan** refresher
  - Exaction takings: you can have a permit...for a price!
  - **Nollan**—must be a nexus
  - **Dolan**—must be a rough proportionality
  - Between the government’s demand for land and the effect of the land use
  - Note: **Nollan** and **Dolan** both involved the dedication of land (easement for public access to a beach, bike path)
Koontz v. St. Johns River Water Management District

• Issues: (1) whether a taking can occur if no permit is issued and (2) whether *Nollan* and *Dolan* apply to exactions of money
• Facts: Koontz wanted to dredge some wetlands on his property to develop it; St. Johns asked Koontz to mitigate by replacing culverts or plugging drainage canals on someone else’s property nearby; Koontz said no; no permit was issued
• Holding: *Nollan* and *Dolan* apply to permit denials and money exactions
Koontz v. St. Johns River Water Management District

- *Nollan* and *Dolan* apply to permit denials (9-0)
  - Approving a permit on the condition a landowner do X v. denying a permit because a landowner refuses to do Y—what’s the difference?
  - What exactly was taken? What remedy is available?
    - We don’t have to say...Koontz was pursuing state law remedies
Koontz v. St. Johns River Water Management District

- *Nollan* and *Dolan* apply to demands for money (5-4)
  - *Nollan* and *Dolan* practically speaking place a limit on the amount government can demand for a permit
  - This will avoid “extortionate demands” for money
  - Dissents asks are permitting fees now subject to *Nollan* and *Dolan*
Koontz v. St. Johns River Water Management District

- On the positive...
  - Governments can request off-site mitigation
  - Governments can request money to mitigate social cost of land use...it just cannot be “extortionate”
  - There might not be a federal remedy for a permit denial
  - If a landowner is offered just one alternative that satisfies *Nollan* and *Dolan* no unconstitutional condition has occurred
On the negative...

In a New York Times Op-Ed SLLC brief writer John Echeverria writes that this case “creates a perverse incentive for municipal governments to reject applications from developers rather than attempt to negotiate project designs that might advance both public and private goals — and it makes it hard for communities to get property owners to pay to mitigate any environmental damage they may cause.”
Other Relevant State Cases Decided
Arizona v. Inter Tribal Council of Arizona

- The Elections Clause
  - Allows states to regulate the “time, place, and manner” of federal elections, but
  - Provides that “Congress may at any time by Law make or alter such Regulations”

- The National Voter Registration Act of 1993 (NVRA)
  - Federal law requiring states to “accept and use” a uniform federal form for registering voters
    - Requires that applicants attest under penalty of perjury that they meet citizenship requirements, but does not require documentation
  - The Election Assistance Committee may alter forms
Arizona v. Inter Tribal Council of Arizona

- Proposition 200
  - An Arizona ballot initiative passed in 2004
  - Requires state officials to “reject” any registration form not accompanied by documentary proof of citizenship
- Issue
  - Whether the NVRA preempts Proposition 200?
- Holding
  - The Court strikes down Proposition 200 in a 7-2 opinion authored by Justice Scalia
Arizona v. Inter Tribal Council of Arizona

• Court’s reasoning
  • The Elections Clause authorizes Congress to pass elections legislation
  • Any such legislation necessarily displaces conflicting state legislation
  • The Arizona law directly conflicts with the NVRA; an official cannot both “accept” and “reject” the same form
  • So the Arizona law must yield to the NVRA
  • But, Arizona can still petition the EAC to change the federal form to require documentation
  • If they refuse, then Arizona can sue under the APA
Issue: Whether state-law design defect claims that turn on the adequacy of a drug’s warnings are preempted by federal law?

Facts: Karen Bartlett was severely injured by a generic version of “sulindac”, a nonsteroidal anti-inflammatory pain reliever; a jury awarded her $21 million in a design-defect claim.

Holding: state law was preempted (5-4; Kennedy in the majority)
Mutual Pharmaceutical v. Bartlett

- Background
  - Federal law prohibits generic drug manufacturers from changing a drug’s label; no drug manufacturer can change ingredients
  - In *PLIVA v. Mensing* in 2011 the Court held that generic drug manufacturers are preempted by federal law from state failure-to-warn (versus design defect claims) because they cannot change drug labels
Mutual Pharmaceutical v. Bartlett

- Court’s analysis
  - New Hampshire prohibits drug manufacturers from selling drugs that are “unreasonably dangerous”
  - Drug manufactures in New Hampshire have two choices: change the drug’s design or change its label
  - Neither option is available under federal law so state law is preempted
  - Actually a third option exists but the Court says it is not required...stop selling the drug
Mutual Pharmaceutical v. Bartlett

- CSG filed an *amicus* brief in this case
  - FDA controlling warnings regarding drugs is one thing; controlling whether injured people get compensation is another
  - Mutual Pharmaceutical doesn’t have to make this drug
  - States should be able to have higher standards for design defect cases
  - Bottom line: this case is a loss for state consumer protection regimes
Dan’s City Used Cars, Inc. v. Pelkey

- Facts: Dan’s City towed Pelkey’s car from his apartment while he in the hospital getting his foot amputated. Despite Pelkey’s protests, they traded it away and gave him nothing. Pelkey sued under New Hampshire law.
- Holding: State law claims are not preempted under the statute (unanimous).
The Federal Law

- Section 14501(c)(1) of the FAAAA preempts any state law “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property”

- It borrows this language from the Airline Deregulation Act of 1978, which operates to prevent states from passing laws related to commercial aviation, but adds the “with respect to the transportation of property” as a limitation
Dan’s City Used Cars, Inc. v. Pelkey

- Court’s reasoning
  - While towing the car was a qualifying “service,” storing and trading the vehicle was no
  - So Pelkey’s state law claims based on the disposal of his car after towing were not “related to . . . the transportation of property” and escape preemption
  - From a policy standpoint, this makes sense
    - The FAAAA regulates interstate commerce by motor carriers, not local towing disputes
    - If state law were preempted, there would be no law to govern such conflicts, which can’t have been Congress’s purpose
Dan’s City Used Cars, Inc. v. Pelkey

- This case reaffirms the limits of federal preemption doctrine
- While federal law will preempt state laws that are in direct conflict with or otherwise impede the execution of Congress’s legislative designs, federal statutes will not be read so broadly that they will displace state laws that only tangentially relate to their purpose
- The state regulatory framework was left in place, which makes sense since there was no applicable federal law that could have filled in the gap
Issue: whether the Red River Compact preempts Oklahoma statutes that restrict the out-of-state diversion of water

Facts: the Dallas area wants water from Oklahoma; the Compact says a number of states have “equal right” to a particular subbasin of water as long as Louisiana gets a certain amount of water

Tarrant interprets this compact to mean that all states can cross each other’s boundaries and get the water they want

Supreme Court disagrees unanimously
Does this case pass the smell test? The Court interprets the compact...

- State sovereignty: States are disinclined to cede their sovereignty in interstate compacts; silence doesn’t equal giving up sovereignty
- What was the intent of the parties? If states thought border crossing was okay why wouldn’t they expressly say it?
- Parties behavior: The Compact was agreed to in 1980; no one tried to cross borders to get water since then; Tarrant first tried to buy water from Oklahoma before claiming it could take the water for free under the compact
Tarrant Regional Water District v. Herrmann

- I am guessing...
  - That all states but Texas see this case as a victory for interstate compacts
Baby Veronica
Adoptive Couple v. Baby Girl

- Indian Child Welfare Act of 1978
  - Goal: keep adopted Indian children in Indian homes
    - Before involuntary termination of parental rights efforts must be made to prevent breakup of an Indian family
    - Before terminating parental rights it must be proven beyond a reasonable doubt the Indian parent is likely to cause serious emotional or physical damage to the child
    - Indian families are preferred for placement
Adoptive Couple v. Baby Girl

• Issue: Whether the ICWA prevents the termination of an Indian father’s parental rights under state law when he has never had physical or legal custody of his child

• Facts: The child’s biological father, a member of the Cherokee tribe, abandoned the non-Indian mother while she was pregnant. The mother put the child up for adoption, and following the birth, Baby Girl lived with Adoptive Couple. The biological father contested the adoption, and a state supreme court affirmed a ruling awarding him custody under the ICWA.

• Holding: The ICWA does not apply and does not prevent the termination of a non-custodial parent’s rights
Adoptive Couple v. Baby Girl

Court’s reasoning

- Court looked at the language of the ICWA...all of which indicated it did not apply to non-custodial parents
  - “Continued custody”
  - “Removal of Indian children from Indian families”
  - “Breakup of the Indian family”
Adoptive Couple v. Baby Girl

- In addition to having a really interesting fact pattern, this case will have a big effect on adoption proceedings involving Indian children.
- Federal law previously preempted state law and treated all Indian parents uniformly with respect to adoption proceedings involving Indian children.
- Now, non-Indian custodial parents and all non-custodial parents, Indian or not, will be governed by state law in adoption proceedings, and custodial Indian parents will be treated differently under the ICWA.
- The South Carolina Supreme Court has awarded custody of Baby Veronica to the Capobiancos.
A little primer on the state-action doctrine

- State-action doctrine protects states from liability under federal anti-trust laws
- State legislatures may pass along state-action immunity to municipalities or political subdivisions if the state authorizes the challenged action and “has clearly articulated a policy authorizing anti-competitive conduct”
Facts

- Georgia legislature created hospital authorities where cities and counties could own and operate non-profit hospitals
- By statute, hospital authorities also could acquire and lease other hospitals
- In 1990 a hospital authority leased the Phoebe Putney Memorial Hospital to a nonprofit corporation Phoebe Putney Health Systems (PPHS)
- In 2011 the Authority, through PPHS, acquired Palmyra Park Hospital (the only other hospital in the area), and leased it to PPHS
FTC v. Phoebe Putney Health Systems

- Real question in this case is how clearly did the Georgia legislature have to be about being okay with anti-competition in the hospital market?
- Eleventh Circuit says by allowing hospital authorities to acquire and lease other hospitals it was reasonably foreseeable that some of them would acquire and lease all of the hospitals in the area!
FTC v. Phoebe Putney Health Systems

- Supreme Court unanimously disagrees
  - Local government must show it has been delegated to act anti-competitively
  - Just because authorities can clearly acquire hospitals does not mean they can clearly make acquisitions that will substantially lessen competition
  - Eleventh Circuit took the concept of foreseeability too far...displacement of competition must be the “inherent, logical, or ordinary result” of a delegation by a state legislature
  - “Simple permission to play in a market” does not “foreseeably entail permission to roughhouse in the market”
Oh by the way, the Court says it is doing state legislatures a favor in this case

As the AG’s said in their brief, by the Court ruling this way state legislatures won’t have to “disclaim an intent displace competition to avoid inadvertently authorizing anticompetitive conduct”

But the reverse is true too

Now, if state legislatures want to allow anti-competition they have to be very clear about it
2013 Cases Granted
Galloway v. Town of Greece

**Facts**

- Greece, NY, likes to open its Town Board meeting with a short prayer
- Prayer-givers are usually selected from a list consisting of individuals from religious organizations within the town’s borders, most of which happen to be Christian
- However, the official policy is neutral:
  - Town permits any member of any or no religion to lead prayer
    - Has previously had prayers led by a Jewish man, the chairman of the local Baha’i congregation, and a Wiccan priestess
  - Town does not censor or review the contents of the prayer
Galloway v. Town of Greece

- Issue: Does a legislative prayer practice violate the Establishment Clause if it does not discriminate in selecting prayer-givers and does not proselytize?
  - Upheld a Nebraska state legislature’s employment of a Christian clergyman to deliver opening prayers, provided he did not advance or disparage any religion.
- Based on precedent, one would think this is an easy case, given that Greece’s actions don’t violate *Marsh*...
Galloway v. Town of Greece

- Lower Court Ruling: The Second Circuit made up a new totality of the circumstances test to evaluate the Establishment Clause claim in this case
  - Under this standard, Greece had violated the First Amendment because an observer might think that the Town officially supported Christianity based on the large number of Christians who had led the prayer
- Calls into question the constitutionality of all legislative prayer practices under vague new standard
- Supreme Court probably taking to revisit Marsh
McCullen v. Coakley

- Facts: Massachusetts enacted a law creating a 35 foot “buffer zone” around the entrances to abortion clinics. Demonstrators are not allowed to enter it.
- Issue: Whether the buffer zone law violates the First Amendment speech rights of demonstrators
  - Upheld a similar law in Colorado because it was
    - Content-neutral (applied to all demonstrations, didn’t single out any particular group or viewpoint)
    - A limited “time, place, and manner” restriction that did not foreclose all communication, just provided some guidelines
    - Passed to ensure public safety, not to burden speech
McCullen v. Coakley

- Like Town of Greece, the Court seems to be taking this case to revisit its precedent, albeit much more explicitly here, as they granted cert on overruling *Hill*
- States and localities have a big interest in being able to put time/place/manner restrictions on speech.
  - Think funeral protests, conventions, parades, etc.
  - Even the Supreme Court has one: no signs allowed on the plaza!
- Uncontroversial outside the context of abortion clinics, but that aspect will raise this case’s profile
Mount Holly Gardens Citizens in Action v. Township of Mount Holly

- Facts
  - Mount Holly planned to redevelop a low income, predominantly minority neighborhood
  - Residents sued under the Fair Housing Act, claiming that the plan disparately impact minorities

- Issue
  - Whether disparate impact claims are cognizable under the Fair Housing Act

- Lower court ruling
  - Yes; the Third Circuit does not address in any detail the issue on which the Supreme Court granted certiorari
Mount Holly Gardens Citizens in Action v. Township of Mount Holly

- All federal circuit courts of appeals have recognized disparate impact claims under the FHA
- So has Housing and Urban Development, the agency charged with administering the statute
- Mount Holly maintains that the language of the statute does not support disparate impact claims
- Cities are already liable for the disparate impact of their redevelopment plans under the existing interpretation of the law
- If the Court finds that the claims are not cognizable, state and local governments will have less legal exposure from redevelopment
Schuette v. Coalition to Defend Affirmative Action

- Facts
  - In 2006, Michigan voters approved Proposal 2 by a 58-42% vote, effectively banning affirmative action in Michigan’s higher education system
  - Universities may “not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education”

- Issue
  - Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions
Schuette v. Coalition to Defend Affirmative Action

- Lower court ruling (Sixth Circuit)
  - Proposal 2 put a “special burden” on minorities and proponents of affirmative action in violation of the Equal Protection Clause
  - While normally a change in admissions policy can be secured by lobbying university administrators or electing new members of a Michigan school’s publicly accountable governing board, a racially-sensitive policy may now be implemented only through constitutional amendment
**Schuette v. Coalition to Defend Affirmative Action**

- Could limit state options for changing affirmative action policies at universities
- Justice Kagan recused herself, leaving only 8 Justices to decide the case and making a broad, pro-affirmative action ruling unlikely
- The Court could also use this as an opportunity to reconsider affirmative action in general, although given the holding in last term’s *Fisher* case that seems unlikely
Environmental Protection Agency v. EME Homer City Generation

- Clean Air Act (CAA)
  - Authorizes the EPA to set national air quality standards.
  - Requires states to implement them through State Implementation Plans (SIPs)
  - If a SIP is rejected or not submitted, the EPA can issue a Federal Implementation Plan (FIP) instead
  - A “good neighbor” provision requires SIPs to limit emissions which “contribute significantly” to air pollution in downwind states
Environmental Protection Agency v. EME Homer City Generation

- Transport Rule
  - A regulation promulgated by the EPA
  - Interprets the CAA’s good neighbor provision in 2 steps:
    - 1) Determines which states “contribute significantly” to downwind pollution for various pollutants
    - 2) Imposes an FIP requiring states qualifying under step 1 to implement all pollution controls at or below a set cost-effectiveness (cost/ton of pollutant) threshold

- Lower Court Ruling (DC Circuit)
  - EPA cannot set a standard and impose a FIP without giving states time to propose new compliant SIPs
  - EPA cannot use cost-effectiveness as a reduction mechanism because it may force states to reduce emissions below the levels that swept them within the reach of the Rule in the first place
Environmental Protection Agency v. EME Homer City Generation

- The Supreme Court granted cert on 3 questions:
  - Whether the DC Circuit had jurisdiction to consider the case below
  - Whether the EPA overstepped its statutory authority when it mandated FIPs without first giving states an opportunity to develop SIPs after the EPA quantified air pollution reduction requirements
  - Whether the EPA may define pollution reductions in terms of cost-effectiveness rather than physical contribution
- Most downwind states filed in support of the EPA, most upwind states are challenging the regulation
Madigan v. Levin

- **Facts**
  - Harvey Levin was fired from his job at the Illinois Attorney General’s office
  - Claiming he was let go because of his age, he sued under the Age Discrimination in Employment Act (ADEA) and the 14th Amendment through 42 U.S.C. § 1983.

- **Issue**
  - Whether a plaintiff may avoid the procedural requirements of an ADEA suit by filing an age discrimination claim directly through § 1983
Madigan v. Levin

- **ADEA Claims**
  - Plaintiff must first notify the Equal Employment Opportunity Commission (EEOC) of any claim
  - The EEOC tries to mediate a resolution between the employer and the plaintiff before a suit can be filed
  - Informal, so much cheaper for everyone involved
- **Section 1983**
  - Allows an individual to sue to vindicate a federal right violated under color of state law
  - In this case, Levin is suing a state employer to enforce the Fourteenth Amendment Equal Protection Clause’s prohibition against age discrimination
Madigan v. Levin

- Lower court ruling (Seventh Circuit)
  - Acknowledges that other circuits had held that the ADEA precludes direct suit under § 1983 because of its comprehensive dispute resolution scheme, but
  - Holds that the lack of evidence of congressional intent to make the ADEA the exclusive remedy for age discrimination suggests that § 1983 suits are allowed
- The Court took this case to resolve the circuit split
- State and local employers face increased expenses and liability if the Court rules to allow § 1983 claims
- The ADEA saves both employers and plaintiffs time and money and effectively resolves disputes
Keeping in Touch with the SLLC

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