SLC Supreme Court Update

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Term Statistics

- From SCOTUSblog
  - Seventy-three case decided
  - Sixty-six percent were unanimous (highest percent since during WWII—45% is more typical)
    - This is someone of an illusion
  - 10 (a few less than usual) were 5-4 with Justice Kennedy always in the majority
  - Reversal rate was 73%
  - Court took the same number of cases from the 6th and 9th Circuits and reversed them at about the same rate
General Observations for States

- Unusually high number of cases impacting the states (particularly compared to local government)
- End of the term blockbusters don’t directly impact states much
  - Recess appointments case
  - Birth control mandate case
- Other big decisions impact states more significantly
  - Affirmative action ban
  - Campaign finance
General Observations for States

- Preemption cases were a bit of a snooze
  - Statutes of repose—not preempted
  - Covenant of good faith and fair dealing—preempted
- Unusual number of qualified immunity cases
Same-Sex Marriage Bans

- Challenges nationwide to the constitutionality of same-sex marriage bans
- Tenth Circuit has struck down Oklahoma’s and Utah’s ban
- If (when) a circuit split happens, the Court is likely to decide the issue
New Justice Watch

- No one expected any retirements this year
  - Justice Ginsburg (81)
  - Justice Scalia (78)
  - Justice Kennedy (77)
- Justice Ginsburg—holding out for a Hillary presidency?
- New Democrat short lister entered the scene this year—Patricia Millett (51)
Top Eight for States!

- Tried to be regionally sensitive
- See your handout for additional cases
Schuette v. BAMN

- By ballot measure, Michigan votes banned the use of race in public university admissions (and in public employment and public contracting)
- We know it is constitutional for public universities to use affirmative action (in some circumstances)
- But is it constitutional for them to be banned from using affirmative action?
- Supreme Court says YES 6-3
Arguably a “political process” doctrine had evolved from Supreme Court case law.

A law with a racial focus that makes it more difficult for minorities to achieve their goals should be reviewed under strict scrutiny.

Minorities who wants affirmative action would have to get MI voters to pass another constitutional amendment; any other admission policy changes could be taken up at the university level.
Schuette v. BAMN

- Court rejects a broad political process doctrine (which could foreclose voter initiatives):
  - Assumes people of the same race think alike
  - Hard to characterize people by race
  - Hard to know what issues different races have a political interest in
  - Racial minorities could say they have an interest in any issue
Schuette v. BAMN

- Bottom line: ballot initiatives are part of our democracy
- “This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan Laws that commit this policy determination to the voters.”
Schuette v. BAMN

- 8 states ban affirmative action by the state (New Hampshire, Washington, Oklahoma, Arizona, California, **Florida**, Michigan, Nebraska)
- Some by referendum, others by state law, and at least one by executive order
- Only Nebraska’s ban appears to apply to only public colleges and universities
- All other bans apply to public contracting and public employment
Schuette v. BAMN

- Presumably these bans too (no matter how they came to be) are constitutional
- Justice Kennedy says as much in the plurality opinion
- One his rationales for the ruling in Schuette was not upsetting 15 year old precedent upholding CA’s ban on racial preferences in public contracting
- This issue has received surprisingly little media attention
- Is it because it isn’t common?
- Has been a call to action by anti-affirmative action groups for affirmative action to be banned at all levels of government by whatever means exists in state law
Schuette v. BAMN

- No Supreme Court commentator predicted the Court going any other way
- BUT had the Supreme Court wanted to go the other way it had the precedent to do so
Justice Sotomayor’s dissent and Chief Justice’s two-page response got as much attention as the holding of the case

- Dissent is almost 60 pages—majority opinion is less than 20
- Sotomayor: To stop discrimination on the basis of race we need to talk about race
- Roberts: Maybe racial preferences do more harm than good; I am talking about it—I just don’t agree with the other side!
Roberts Court and Race

- Is the Roberts Court chipping away at the use of race in government decision-making?
  - I think the short answer is yes
    - Section 4 of the Voting Rights Act (last term)
    - *Fisher* affirmative action ruling (last term)
    - *Schuette*
  - What will happen with race in the next 10 years may be decided by three currently unknown new Justices
Town of Greece v. Galloway

- Legislative prayer case
- Could have been a huge cases for state legislatures but wasn’t
- It was all Christian prayers all the time in the Town of Greece
- But in its defense, in the Town borders all places of worship were Christian and anyone could offer any prayer
- In *Marsh v. Chambers* (1983) the Court held that legislative prayer is okay based mostly on its “historical foundation”
Town of Greece v. Galloway

- Why did the Court take this case? Theories abounded...
  - To overturn the Second Circuit (that basically said any prayer at board meetings would be difficult after its decision)
  - To reject the sectarian nature of the prayer in this case?
  - To say legislative prayer is different in the local government v. state government context?
    - To overturn Marsh
    - To dump the endorsement test now that Justice O’Connor isn’t on the Court
- No one knew
- Court held the prayer practice in this case was constitutional 5-4
Town of Greece v. Galloway

- Rejected the argument prayers must be nonsectarian
  - Minister in *Marsh* removed references to Christ to have more appeal to his audience but was not required to do so
  - Governments do not want to be in the business of judging prayers
  - What is generic or nonsectarian?
  - Over time prayers cannot denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion
  - All Christian all the time was okay “So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.”
Town of Greece v. Galloway

- Rejected the argument that it is coercive to have to hear prayers at Town board meetings
  - People attending Town board meetings often have business before the Board unlike those attending a state legislative session
  - Prayers are for the lawmakers not the public
  - Audience does not have to participate
  - If you feel offended, excluded, or disrespected...you are an adult!
  - Local governments cannot allocate benefits or burdens based on who participates
Town of Greece v. Galloway

- No surprise...the case had a vigorous dissent
- Justice Kagan writes for the ladies and Justice Breyer
- Her bottom line:
  - All Christian all the time isn’t okay
  - When citizens encounter their government, their religion should not matter
- Has you read a Town of Greece prayer from the perspective of an immigrant attending a naturalization ceremony
Town of Greece v. Galloway

Practical advice

- If you get a chaplain-of-the-month from the community to lead prayers maintain a policy of nondiscrimination and invite (at least) all congregations from your capitol city to participate.
- If state legislators give the prayer maintain a policy of nondiscrimination and invite all to participate.
- If someone goes overboard instruct them not to do so again.
McCullen v. Coakley

- Court unanimously struck down Massachusetts 35 foot buffer zone surrounding abortion clinics as a violation of the First Amendment
- Protesters routinely violated a previous “floating bubble zone” statute
- “Sidewalk counselors” were prevented from having personal interactions with those entering the clinics
Restricting speech at abortion clinics (rather than at any place where a protest might occur) is content-neutral.

This is important because if the statute wasn’t content-neutral strict scrutiny would apply (and MA agreed it would lose).

Great nod to state legislatures: “The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics.”

The fact that employees could enter the buffer zone didn’t make it content-based—this did not amount to giving one side an advantage in the abortion debate.
McCullen v. Coakley

- MA still loses because too much speech was burdened by the buffer zone
- MA had lots of options to deal with problems at abortion clinics
  - Generic criminal statutes forbidding assault, breach on the peace, trespass, vandalism, etc.
  - State laws like the federal Freedom of Access to Clinic Entrances Act which prevents injury, intimidation, or interference toward someone seeking an abortion
  - Criminalize following and harassing people entering a clinic
  - Obstructing clinic entrances can be dealt with by statute
- Some states might see some legislation on this issue
McCullen v. Coakley

- To the argument that nothing else worked the Court said: prove it
  - No prosecutions for 17 years
  - No injunctions since the 1990s
  - Of course enforcing a buffer zone is easier than proving intent under a harassment or obstruction statute: too bad
McCullen v. Coakley

- So many interesting things about this case:
  - Came down at the end of June
  - Unanimous
  - The liberals joined the Chief Justice’s opinion (because he wrote an opinion they could live with)
  - The conservatives are unhappy with the opinion but agree with the outcome; Justice Scalia calls it a Something for Everyone opinion
  - Chief Justice gives practical advice
- Is Hill v. Colorado dead?
- SLLC filed an amicus brief
McCullen v. Coakley

- Are buffer zones dead?
  - Are their other options that restrict speech less?
  - Have you tried them? Really?
Court holds 5-4 that the Affordable Care Act birth control mandate violates the Religious Freedom Restoration Act (RFRA) as applied to closely held corporation

SLLC filed an *amicus* brief in this case

What does this have to do with state and local government?
**Bruwell v. Hobby Lobby**

- Case is (fairly) easy to understand but there are a lot of steps to getting to the outcome
  - Conestoga, Mardel, and Hobby Lobby are closely held corporations that objected on religious ground to two morning after pills and two IUDs
  - RFRA prevents the federal government from **substantially burdening a person's exercise of religion** unless the action is the **least restrictive means** of serving a compelling government interest
Corporations can **persons** under the Dictionary Act

Corporations can do a lot of thing other than just try to make a profit including **exercise religion**

Burden on not offering health insurance with birth control (over $500 million) or dropping coverage (about $30 million) is **substantial**

Court assumes providing cost-free contraception is a **compelling state interest**

Birth control mandate isn’t the **least restrictive** option: government could pay for birth control or closely held corporations could receive the same exemption religious nonprofits receive (coverage is offered but the insurance company must pay)
Why did the SLLC file an *amicus* brief?

- RFRA only applies to the federal government but has a sister statute, the Religious Land Use and Institutionalized Person Act (RLUIPA)
- RLUIPA prohibits state and local governments from *substantially burdening a person’s exercise of religion* in land use decision
- Both statutes apply to persons
- So if privately held corporations are persons under RFRA they probably are persons under RLUIPA
Justice Ginsburg quotes the SLLC’s amicus brief describing the downside of corporations being persons under RLUIPA: “[I]t is passing strange to attribute to RLUIPA any purpose to cover entities other than ‘religious assembl[ies] or institution[s].’ That law applies to land-use regulation. To permit commercial enterprises to challenge zoning and other land-use regulations under RLUIPA would ‘dramatically expand the statute’s reach’ and deeply intrude on local prerogatives, contrary to Congress’ intent. Brief for National League of Cities et al. as Amici Curiae 26.”
Here is the fear:

- An unnamed corporation decides that it has a sincerely held religious belief that it should make a profit.
- It wants to locate, let’s say a giant warehouse, in an area zoned as residential.
- Might the corporation have a case under RLUIPA?
- Before *Hobby Lobby* there was no doubt it did not because it wasn’t a person.
Bruwell v. Hobby Lobby

- For state legislators:
  - You use the words “persons” all the time in legislation right?
  - How is person defined (do you have a Dictionary Act)?
  - Do you want the definition to include corporations?

- Hobby Lobby fall out
  - Will Congress modify the ACA to exclude corporations from RFRA coverage?
  - Both religious nonprofits and religious closely held corporations object to filling out the form that makes their insurance company pay
Next Affordable Care Act case (maybe) coming to the Supreme Court soon...

Halbig v. Brewell

To be decided shortly by the D.C. Circuit

Whether ACA exchange enrollees can receive a subsidy if they buy insurance in a state that has not established an exchange

Key language “established by the state”
Bond v. US

- Huge federalism case that wasn’t
- Issue (the Court ultimately did not decide): whether the federal government can adopt a statute implementing a treaty that it would not otherwise have the authority to adopt
- Why is this a federalism question: imagine anything subject the federal government does not have the authority to legislate over (but that states have authority to do)
- Now imagine the US getting involved in a treaty that allows the federal government to legislate over that subject
**Bond v. US**

- Most salacious facts ever!
- Bond is charged with possessing and using a “chemical weapon” in violation of a federal statute implementing a chemical weapons treaty
- Most crime is handled by state statute
- US government admits but for the treaty it would have no authority to pass this chemical weapons statute
- Bond asked the Court to limit or overrule the 1920 case of *Missouri v. Holland*, which held that if a treaty is valid then a statute implementing it is valid
Court declined

In an all-federalism-all-the-time opinion, the Court holds that Bond’s behavior did not violate statute.

Concluding the use of chemicals in this case is a “chemical weapon” would “alter sensitive federal-state relationships,” “convert an astonishing amount of ‘traditionally local criminal conduct’” into “a matter for federal enforcement,” and “involve a substantial extension of federal police resources.”
If you don’t think the Chief Justice is funny you need to read Bond:

“In sum, the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon”

“That the statute would apply so broadly, however, is the inescapable conclusion of the Government’s position: Any parent would be guilty of a serious federal offense—possession of a chemical weapon—when, exasperated by the children’s repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar. We are reluctant to ignore the ordinary meaning of "chemical weapon" when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish.”
Why *Lane v. Franks*?

- Cautionary tale for state legislators (not that I think any of you have to worry about these antics)
- It comes from your region—Alabama
- State governments hire a lot of people
- Legal nerd case
- I like the case
Lane v. Franks

- Chronology
  - In 1968 in *Pickering* the Supreme Court held that public employees have some First Amendment rights.
  - In 2006 in *Garcetti v. Ceballos* the Court held that when public employees speak pursuant to their official job duties they receive no First Amendment protection for their speech.
  - In 2008 community college program director Edward Lane testified under subpoena at a federal criminal trial that he terminated State Legislator Suzanne Schmitz for failing to report to work.
Lane v. Franks

Here is the problem in this case for the community college:
- What Lane testified about he learned at work
- But the community college didn’t hire Lane to respond to subpoenas

Court held unanimously that the First Amendment protects a public employee who provides truthful sworn testimony, compelled by a subpoena, outside the course of his or her ordinary responsibilities.
Lane v. Franks

The good: The Court was clear that if employees admit to wrongdoing while testifying they can still be disciplined and that false or erroneous testimony or testimony that unnecessarily discloses sensitive, confidential, or privileged information may balance the *Pickering* scale in the employer’s favor.

The bad: The Court read “official job duties” narrowly to exclude speech about information merely learned at the job.

The ugly: The Court doesn’t decide the obvious next question: is an employee’s truthful sworn testimony, *which is part of an employee’s ordinary responsibilities*, protected by the First Amendment?
In 2002 in *Atkins v. Virginia* the Supreme Court held the Eighth Amendment banned the execution of persons with intellectual disabilities.

- Next obvious question is who is intellectually disabled?
- General agreement in the medical community that an IQ of 70 or less renders a person intellectually disabled.
- Court holds state death penalty statutes with rigid IQ cuts offs of 70 or less are unconstitutional.
- Freddie Lee Hall’s lowest IQ score was 71.
- 5-4 opinion with Justice Kennedy writing and joined by the liberals.
Hall v. Florida

- Court’s bottom line
  - IQ isn’t final and conclusive proof of intellectual disability
  - IQ scores are imprecise
- Instead of using a rigid 70 or less IQ cutoff, states should take into account the standard error of measurement, which is generally plus or minus 5 points
- So if a capital defendant’s IQ is 75 or less he or she may present additional evidence of intellectual disability
Hall v. Florida

- Nine states should relook at their death penalty statutes in light of *Hall*
- Two other states have strict IQ cutoffs like Florida (Kentucky and Virginia)
- Six other states *may* have bright-line cutoffs, depending on how courts interpret the statutes (Alabama, Arizona, Delaware, Kansas, North Carolina, and Washington)
**McCutcheon v. FEC**

- Campaign finance case refresher
  - Expenditure and contribution limits
    - In *Citizens United* the Court okayed no expenditure limit on corporate expenditures
    - Federal law limited “aggregate” contributions of $123,200 per two-year election cycle to candidates (up to $48,600) and non-candidate committees (up to $74,600)
  - Shaun McCutcheon had no problem with the $5,200 “base” contribution limits to federal candidates—he wanted to contribute to more candidates
  - In *McCutcheon* the Court struck down federal aggregate campaign contribution limits
McCutcheon v. FEC

- Bottom line: where is the quid pro quo corruption?
- “If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime.”
What is the impact on states?

About a dozen states provide aggregate limits on campaign contributions to state candidates—none in the Southern Region.

The constitutionality of these state laws seems doubtful in the wake of McCutcheon.

The impact of these state laws no longer applying will vary. In New York, for example, the aggregate limit to contribute to a state candidate is $150,000, so not much likely will change in that state.