The Heritage Foundation
LEADERSHIP FOR AMERICA

LEGAL MEMORANDUM

No. 103 | SEPTEMBER 23, 2013

Overview of the Supreme Court's October 2013 Term

Elizabeth H. Slattery

Abstract

The Supreme Court's new term begins on October 7, 2013. The cases this term may be hard-pressed to match the excitement and media flurry that accompanied the Obamacare decision in June 2012 or the Voting Rights Act and marriage cases of June 2013. But while this next term might lack some of the sensational sizzle of the last term, it will address several critical legal issues: free exercise, free speech, separation of powers, and Congress's enumerated powers. Furthermore, the Court may likely decide to weigh in on two issues that are already gaining considerable national attention: the contraceptive mandate and warrantless searches of cell phones.

The Supreme Court of the United States begins its next term on October 7, 2013. The 2012 term was marked by a series of high-profile civil rights cases: a challenge to the Voting Rights Act coverage formula, a case dealing with racial preferences in higher education, Arizona's proof of citizenship voter registration requirement, and, of course, the long-awaited same-sex marriage cases. With a number of cases involving the Fourth Amendment, from drug-sniffing dogs to warrantless blood tests, the Court did little to clarify the murky waters of Fourth Amendment jurisprudence. The 2012 term is now behind us, and the focus turns to the coming term.

With the start of a new term, what issues are likely to come before the justices? Generally, the Supreme Court does not take on major legal issues until cases have percolated in the lower courts for a while. After the Court does address a major legal issue, its

This paper, in its entirety, can be found at **http://report.heritage.org/lm103**

Produced by the Edwin Meese III Center for Legal and Judicial Studies

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- The 2012 Supreme Court term was marked by a series of high-profile civil rights cases: a challenge to the Voting Rights Act coverage formula, a case dealing with affirmative action in higher education, Arizona's proof of citizenship voter registration requirement, and, of course, the long-awaited same-sex marriage cases.
- The Court's new term begins on October 7, 2013.
- While this next term might lack some of the sensational sizzle of the last term, it will address several critical issues: free exercise, free speech, separation of powers, and Congress's enumerated powers.
- Furthermore, the Court may likely decide to weigh in on two issues that are already gaining considerable national attention: the contraceptive mandate and warrantless searches of cell phones.

decision often leaves open a host of related questions on which the lower courts, the academy, the media, and Congress have the opportunity to reflect and identify solutions. For example, in *United States v. Windsor*, the Supreme Court struck down the federal definition of marriage in Section 3 of the Defense of Marriage Act; it did not, however, strike down Section 2, which allows states to refuse to recognize same-sex marriages from other states. This issue will undoubtedly be worked out in the lower courts. Likewise, in *Shelby County, Alabama v. Holder*, the Court invalidated the coverage formula for Section 5 of the Voting Rights Act. Consequently, Members of Congress have been called upon to come up with a new formula to reimpose Section 5.

So, what issues have been percolating in the lower courts? There are a handful of First Amendment cases, a few more cases involving discrimination and race, and a couple of cases dealing with broader constitutional issues. On the heels of the last term, which was followed closely by the media and the American people, 2013–2014 is shaping up to be an important, if not as sensational, term. The Court typically reviews between 70 and 80 cases per term. It has already agreed to hear 44 cases and will add more to its schedule at the "megaconference" on September 30. There are 25 cases set for oral argument in October and November. The following cases are just a few of the likely highlights of the next term.

Cases Dealing with the First Amendment

McCutcheon v. Federal Election Commission. Current campaign finance laws include limits on individual contributions to federal candidates, political action committees, and party committees (known as base limits)—as well as aggregate limits on the total contributions an individual can make to all candidate and non-candidate committees. Shaun McCutcheon, a businessman from Alabama, and the Republican National Committee (RNC) are challenging the constitutionality of the Bipartisan Campaign Reform Act's aggregate limits during a two-year election cycle. McCutcheon would like to make individual contributions to a number of candidates and party committees that are within the base limits for individual candidates and committees but his total giving would exceed the overall contribution cap. In *Buckley v. Valeo,* the Supreme Court upheld an aggregate contribution ceiling because it stopped individuals from bypassing the base contribution limits in place at that time. The aggregate limits prevented corruption and "conduit contributions" to party committees that could be funneled toward a particular candidate in excess of the base limit. Since the *Buckley* decision in 1976, however, America's campaign finance laws have drastically changed. McCutcheon and the RNC argue that an aggregate ceiling, which the *Buckley* Court acknowledged imposes a burden on core First Amendment rights, is no longer justified because current laws have eliminated the ability to circumvent base contribution limits. The challengers maintain that, since aggregate limits are no longer necessary to prevent corruption or "conduit contributions," they cannot survive strict scrutiny analysis under the First Amendment. The Court has historically afforded more protection under the First Amendment for campaign expenditures than contributions, but a majority of the Court appears to be more sympathetic towards the view that contributions are also core free speech. This case has the potential to be as important for the future of campaign finance law as the controversial *Citizens United v. Federal Election Commission* decision.

McCullen v. Coakley. Sidewalks have traditionally been considered the quintessential public forum for peaceful speech. Generally speaking, the government may not regulate the content of speech within a public forum, and any restriction on free speech that focuses on the content of the speech must pass strict scrutiny. Yet in 2002's *Hill v. Colorado,* the Supreme Court exempted from strict scrutiny analysis laws that restrict pro-life speech on sidewalks outside abortion clinics. Instead, such laws must only pass the less rigorous standard for content-neutral time, place, and manner regulations. The creation of "buffer zones" around abortion clinics clashes with a core freedom of individuals who wish to counsel women against having abortions. Massachusetts enacted a law prohibiting people from entering a 35-foot zone around abortion clinics, unless they are entering the clinic, using a public sidewalk to reach a destination other than the clinic, or are clinic employees acting within the scope of their employment. The efforts of individuals seeking to counsel the women entering clinics are often thwarted by clinic employees within the "buffer zone." Thus, the challengers argue that this law allows the use of the forum for speech facilitating abortions but bars speech opposing abortions, which is the definition of viewpoint-based

discrimination. The Supreme Court has been offered the chance to revisit *Hill v. Colorado* and determine if, in fact, free speech as it relates to abortion should be treated the same as other speech.

Town of Greece v. Galloway. The practice of opening a legislative session with an invocation or prayer dates back to the First Congress. In 1983 in *Marsh v. Chambers*, the Supreme Court recognized that this practice does not violate the Establishment Clause of the First Amendment so long as the prayer is not used to advance or disparage a particular faith. The Town of Greece, New York, opens its town board meetings with a prayer given by a citizen and encourages members of any faith to volunteer. The town has never rejected a citizen's request to give the invocation. Indeed, a variety of religious traditions have been represented, including the Bahá'í faith and Wiccans, but most of the prayers have been delivered by Christians. The town's practice was challenged in court, and the U.S. Court of Appeals for the Second Circuit ruled that, based on the totality of circumstances (including the selection process and the sectarian nature of most of the prayers that were offered), a reasonable observer would believe the town endorsed a particular religion. This so-called endorsement test had been used in cases involving religious displays on government property (such as a crèche during the Christmas season), but not in the legislative prayer context. The Supreme Court is faced with the choice of requiring all legislative prayers to be nonsectarian or allowing legislative prayers with sectarian references as long as there is no evidence that they are used to proselytize or disparage any faith.

Cases Dealing with Race and Discrimination

Schuette v. Coalition to Defend Affirmative Action. In *Grutter v. Bollinger*, the Supreme Court held that law schools may consider race and ethnicity as "plus" factors in admissions decisions. Following that ruling, the voters of Michigan passed Proposal 2—an initiative that amended the state constitution to prohibit the use of race in public education, employment, and contracting. The constitutional amendment was challenged on equal protection grounds, and when the Supreme Court agreed to hear this case, Court watchers wondered why, in light of *Fisher v. University of Texas*, which was pending at the time. But the *Fisher* decision fell short of overturning *Grutter*, and further demonstrates that the Court will take small steps toward change in its jurisprudence involving race. The justices will have the opportunity to consider whether an initiative that mandates equal treatment actually violates equal protection. The challengers argue that Proposal 2 creates a political obstruction to equal treatment—that it burdens minorities' right to equal treatment because, unlike other groups, they may not seek to have racially conscious admission programs enacted without first amending the state constitution by reversing Proposal 2. The Michigan attorney general points out that Proposal 2 was not the result of any discriminatory intent or purpose and that the so-called political-restructuring doctrine applies only to laws that obstruct protection against unequal treatment—not those in favor of preferential treatment.

Mount Holly v. Mount Holly Gardens Citizens in Action. The Township of Mount Holly, New Jersey, decided to redevelop a crime-ridden, blighted housing development and replace it with new, market-rate housing. A group of residents sued, alleging that the Township violated Title VIII of the Civil Rights Act of 1968 (popularly known as the Fair Housing Act) because the redevelopment plan had a disparate impact on minorities. The Fair Housing Act prohibits discrimination in housing, and authorizes individuals to sue governmental entities to challenge racially discriminatory housing policy. Disparate impact claims reach conduct that foreseeably perpetuates segregation and disproportionately burdens a particular racial group, rather than intentional discrimination. The township argues that the plain language of the Fair Housing Act indicates it does not cover disparate impact claims and that Congress never amended it to include such claims. The Supreme Court has never recognized disparate impact claims under the act. In the 2011–2012 term, the Court was poised to hear *Magner v. Gallagher*, a challenge to the enforcement by the City of St. Paul, Minnesota, of safety codes that were racially neutral but allegedly had a disparate impact. But the parties agreed to dismiss the case just two weeks before the oral argument.

Cases Dealing with Broader Constitutional Concerns

Bond v. United States. After discovering that her best friend and husband were having an affair, Carol

Anne Bond attempted to poison her friend by spreading chemicals on her mailbox, car door, and front door. This resulted in a federal prosecution under the Chemical Weapons Act and two trips to the Supreme Court (the first of which involved standing). Having been granted standing by the Court, Bond now disputes Congress's power to implement the Chemical Weapons Treaty, which effectively gave the federal government the power to criminalize any malicious use of chemicals. Since the federal government lacks a plenary police power, Bond argues that Congress's authority to pass treaty-implementing legislation should not be an end run around its enumerated powers. As Justice Antonin Scalia said during oral argument in a case last year, "I don't think that powers that Congress does not have under the Constitution can be acquired by simply obtaining the agreement of the Senate, the President and Zimbabwe. I do not think a treaty can expand the powers of the Federal government." Yet, the lower court relied on a single sentence in *Missouri v. Holland*, an obscure early 20th century Supreme Court decision written by Justice Oliver Wendell Holmes dealing with a migratory bird treaty, noting that Congress may pass any legislation that is necessary and proper to execute a valid treaty—regardless of whether the legislation is within Congress's enumerated powers. The government points out that the Court has *never* invalidated the implementation of a treaty based on federalism and, further, maintains that the Chemical Weapons Act is a valid exercise of Congress's power to regulate commerce—the act is, after all, part of a comprehensive scheme of commodity regulation across an interstate market.

National Labor Relations Board v. Noel Canning. Article II, section 2 of the Constitution provides that the President may "fill up all Vacancies that may happen during the Recess of the Senate." Otherwise, the President must receive the advice and consent of the Senate for ambassadors, judges, and higher level executive officers. In January 2012, President Obama determined that the Senate was unavailable to confirm four nominees to the National Labor Relations Board (NLRB) and Consumer Financial Protection Bureau, so he appointed them pursuant to the Recess Appointments Clause. Yet, the Senate was not in "the Recess" (as contemplated by the Recess Appointments Clause) since it had been conducting *pro forma* sessions every three days. One year later, the U.S. Court of Appeals for the D.C. Circuit struck down the "recess" appointments to the NLRB as unconstitutional in *Noel Canning v. NLRB*. The federal government petitioned the Supreme Court for review, and the justices may decide if "the Recess" refers to breaks within sessions of Congress or breaks between sessions of Congress, and also if recess appointments may be made when the Senate is conducting *pro forma* sessions every three days.

Cases on the Horizon

Predicting what the Supreme Court will or won't do is always a tricky business. Indeed, after a few faulty predictions, CNN's lead Supreme Court analyst announced this summer that he will only "make predictions about the past" from now on. Some cases, though, are relatively safe bets, and the following two cases are more than likely to be reviewed by the Supreme Court in the next two terms.

Contraceptive Mandate Litigation. In an effort to increase access to contraceptive services, the Department of Health and Human Services issued guidelines requiring employers to pay for contraception, sterilization, and abortifacients, and granted a narrow exemption for certain religious employers. Many employers—both religious and secular—believe that complying with the mandate would violate the tenets of their faith. Yet, failure to adhere to the law could result in steep fines—an estimated $1.3 million per day in one case. Nearly 70 lawsuits with over 200 plaintiffs have been filed by religious organizations and other private employers to block the contraceptive mandate from going into effect, and two are poised to reach the Supreme Court in the near future. Following a favorable decision by the U.S. Court of Appeals for the Tenth Circuit, a federal district court granted a preliminary injunction to the craft store chain Hobby Lobby because it had shown a likely violation of the Religious Freedom Restoration Act of 1993. Meanwhile, the U.S. Court of Appeals for the Third Circuit denied temporary relief in *Conestoga Wood Specialties v. Sebelius*, finding that for-profit, secular corporations cannot engage in religious exercise. On September 19, the federal government asked the Supreme Court to review *Hobby Lobby v. Sebelius*. The same day, the attorneys for Conestoga Wood Specialties also petitioned the Court for review.

Warrantless Searches of Cell Phones. As technology advances, the Supreme Court must

continually reevaluate the contours of the Fourth Amendment. The latest wrinkle in Fourth Amendment jurisprudence is whether a police officer may conduct a warrantless search of an arrestee's cell phone. Typically, officers are permitted to conduct warrantless searches incident to arrest for the officers' safety and the preservation of evidence. Thus, officers may search an arrestee's person and the area within his immediate reach, including containers, for weapons. The federal appellate courts and state supreme courts are at odds on whether to treat cell phones like ordinary containers and allow police to review the digital contents without a warrant. Searching the digital contents of a cell phone does not serve the officer safety justification. The California Supreme Court indicated that cell phones should be treated like any other container, which may be searched incident to arrest. But the U.S. Court of Appeals for the First Circuit established a bright-line rule that cell phones may not be searched incident to arrest without a warrant due to the privacy interests at stake. Petitions for a writ of certiorari have been filed in *Riley v. California* and *United States v. Wurie*, and given the disagreement among lower courts, the Supreme Court is likely to weigh in soon.

Conclusion

The Supreme Court's upcoming term begins on October 7, 2013. The cases this term may be hard-pressed to match the excitement and media flurry that accompanied the Obamacare decision in June 2012 or the Voting Rights Act and marriage cases of June 2013. But the upcoming term has the potential to be an important year for free exercise, free speech, separation of powers, and Congress's enumerated powers.

*—**Elizabeth H. Slattery** is a Senior Legal Policy Analyst in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*