NCSL Supreme Court Roundup

Term Statistics

From SCOTUSblog
- Seventy-three case decided
- Sixty-six percent were unanimous (highest percent since during WWII—45% is more typical)
  - This is some what 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

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

New Justice Watch

No one expected any retirements this year
- Justice Ginsburg (82)
- Justice Scalia (78)
- Justice Kennedy (77)

Justice Ginsburg—holding out for a Hillary presidency? Katie Couric asked this indirectly and she did not take the bait

New Democrat short lister entered the scene this year—Patricia Millett (51)
Same-Sex Marriage Ban Speculation

Challenges nationwide to the constitutionality of same-sex marriage bans

Court has two petitions on its docket from the 10th Circuit (Utah and Oklahoma) striking down bans

There is a circuit split with an 8th Circuit case (pre-Windsor 2006/Nebraska)

All post-Windsor courts have struck down same-sex marriage bans

All sorts of practical problems if courts don’t issue stays of orders striking down the bans

ACA Subsidy Case Speculation

On the same day in late July the DC Circuit and the 4th Circuit reached opposite conclusions regarding 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”

Petition for cert has been filed in the Fourth Circuit case (where the federal government won)
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.”

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**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

In the last 10 years the Roberts Court has heard very few cases involving religion
◦ Nothing really new or bold came out of this decision
◦ But a lot of people are still very upset
**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

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**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
**Bond v. US**

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”

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**Bond v. US**

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.”
Burwell v. Hobby Lobby

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?

Why would the SLLC get involved in a case so controversial?

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Burwell 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*
Burwell v. Hobby Lobby

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)

Burwell v. Hobby Lobby

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
Burwell v. Hobby Lobby

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.”

Burwell v. Hobby Lobby

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
Burwell v. Hobby Lobby

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

Riley v. California

Holding: (Generally) police must first obtain a warrant before searching an arrested person’s cellphone

Unanimous
Riley v. California

Technical legal question: is searching a cell phone a “search incident to an arrest”

Relevant case law

◦ In *Chimel v. California* (1969) the Court identified two factors that justify an officer searching an arrested person: officer safety and preventing the destruction of evidence.

◦ Four years later in *United States v. Robinson* the Court held that police could search a cigarette pack found on Robinson’s person despite the absence of these two factors. The Court noted that “[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it.”

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Riley v. California

The Court declined to extend *Robinson* to searches of data on cell phones

Applying the *Chimel* factors:

◦ No officer safety concerns: “[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape.”

◦ No significant destruction of data concerns: remote wiping (third party deletion of all data) or data encryption (an unbreakable password) weren’t prevalent problems
Riley v. California

To the argument that cell phones are “materially indistinguishable” from other items on an arrestee’s person that lower courts have allowed police to search without warrants, like wallets and purses, the Court responded:

“That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together.”

Cell phones are “minicomputers” with an “immense storage capacity”

Riley v. California

Exigent circumstances exception may justify a warrantless search, for example, “to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury”

Obvious example: kidnapping suspect
Riley v. California

Case is a big blow to law enforcement which the Chief Justice acknowledges

But privacy comes at a cost and warrants are faster and easier to obtain now than ever before

The Chief writes with clarity, confidence, and humor in an opinion a lay person would understand and (might) enjoy reading

Hall v. Florida

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 for 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)
**EPA v. EME Homer City Generation**

Pollution swirls from upwind states to downwind states

How should EPA decide how much each responsible state should reduce pollution?

Court holds that EPA can consider cost-effectiveness, rather than the amount a state physically contributes to pollution, when telling states how much pollution they must reduce pollution.

6-2 victory for EPA

Justice Scalia must change his dissent!!

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**Utility Air Regulatory Group v. EPA**

Court holds 5-4 that EPA cannot require stationary sources to obtain Clean Air Act permits only because they emit greenhouse gases.

Court hold 7-2 EPA may require regulate stationary sources for greenhouse gases if it is already regulating them for emitting other pollutants (“anyway” stationary sources).

Justice Scalia calls this case a win for EPA

- EPA could cut back on greenhouse gas pollution at eighty-three percent of the sources across the country, while denying it authority over an additional three percent
- “EPA is getting almost everything it wanted in this case”