The Supreme Court and the States: Beyond Same-Sex Marriage and the Affordable Care Act

By Lisa Soronen

While the same-sex marriage and Affordable Care Act cases are the most significant of the U.S. Supreme Court's 2014–15 term in general and specifically affecting states, other cases will significantly impact states too. The court will decide three tax cases, a Medicaid reimbursement case, two redistricting cases and a Fair Housing disparate impact case.

Practically speaking, only two Supreme Court decisions this term will receive any significant fanfare. Every American likely will know someone personally affected by either decision and both cases will affect the states. By the end of June 2015, the court will decide whether there is a federal constitutional right to same-sex marriage and whether the federal exchanges operating in 34 states may offer subsidized health insurance coverage under the Affordable Care Act.

Someone who cares about Supreme Court cases that affect the states should not be so distracted by these blockbusters to miss the many other cases of importance to states this term. Among other issues, including three tax cases, the court will decide whether states can be sued for providing inadequate Medicaid reimbursement, whether state legislatures can be excluded from the redistricting process and whether disparate impact claims may be brought under the Fair Housing Act.

In reviewing four consolidated cases from the Sixth Circuit, the court will decide in *Obergefell v. Hodges* two issues regarding same-sex marriage. First, whether the 14th Amendment requires states to allow same-sex marriages. Second, whether the 14th Amendment requires a state to recognize a same-sex marriage lawfully performed out-of-state. After numerous federal circuit courts of appeals decided the first question affirmatively, the Sixth Circuit answered both questions negatively. The Sixth Circuit reasoned that none of the couples' arguments "makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters."

The issue in *King v. Burwell* is whether tax credits for low- and middle-income health insurance purchasers are available under the Affordable Care Act (ACA) if insurance is purchased on a federal exchange rather than a state exchange. Only 16 states and the District of Columbia have established their own exchanges. The ACA makes tax credits available to those who buy health insurance on exchanges "established by the State." The IRS interpreted that language to include insurance purchased on federal exchanges. The Fourth Circuit upheld the revenue service's interpretation, concluding that "established by the State" is ambiguous, when read in combination with other sections of the ACA, and could include federal exchanges. The "board policy goals of the Act," also persuaded the court that the IRS's interpretation was permissible.

In *Armstrong v. Exceptional Child Center* the Court held 5-4 that Medicaid providers cannot rely on the Supremacy Clause or equity to sue states to enforce a Medicaid reimbursement statute. 42 U.S.C. §1396a(a)(30)(A) requires state Medicaid plans to assure that Medicaid providers are reimbursed at rates "consistent with efficiency, economy, and quality of care" while "safeguard[ing] against unnecessary utilization of … care and services." Medicaid providers sued Idaho claiming that its reimbursement rates for rehabilitation services were lower than §(30)(A) permits. The Court first rejected the argument that the Supremacy Clause creates a private right of action. "It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." The Court also rejected the providers' argument that equity should permit their case to proceed. First, the statute provided a remedy for a state's breach—Health and Human Services may withhold funds—suggesting Congress intended no other remedies. Second, it would be difficult for a court to fashion a remedy in this case—a reimbursement rate—given the broad and unspecific language of §(30)(A).

In a provision added by citizen initiative, the Arizona Constitution entirely removes congressional redistricting authority from the Arizona State Legislature and places it in an unelected commission. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the court will decide whether this violates the U.S. Constitution's Elections Clause, which requires that the time, place and manner of congressional elections be prescribed in each state by the "Legislature thereof." The Arizona district court ruled against the Arizona Legislature, reasoning that the Supreme Court previously held in two cases that a state may allow state bodies other than the legislature to redistrict. A dissenting judge didn't disagree with this, but pointed out that in those cases the state legislature still was able to participate in the redistricting process "in some very significant and meaningful capacity." While the use of redistricting commissions is popular for drawing state legislative district lines, only Arizona and California have mandated them for congressional redistricting.

In *North Carolina State Board of Dental Examiners v. FTC*, the Supreme Court held 6-3 that if the majority of state board members are active market participants, antitrust immunity applies only if the state actively supervises the board. The North Carolina State Board of Dental Examiners is a state agency principally charged with licensing dentists. Six of its eight members must be actively practicing, licensed dentists. After the board issued cease-and-desist letters to nondentist teeth whitening service providers, the Federal Trade Commission charged it with violating federal antitrust law. In *Parker v. Brown*, the court held that states receive state-action immunity from federal antitrust law when acting in their sovereign capacity. According to the court, nonsovereign entities controlled by active market participants receive state-action immunity only if the challenged restraint is clearly articulated in state policy and the policy is actively supervised by the state. Without active supervision, the court reasoned, agencies, boards and commissions made up of a majority of market participants may act in their own interest rather than the public interest. Here, the parties assumed the clear articulation requirement was met and agreed the board wasn't actively supervised by the state. So the court denied the board state-action immunity.

Michigan v. Environmental Protection Agency challenges a 2012 Environmental Protection Agency regulation intended to limit mercury and other emissions from mostly coal-fired power plants. Before regulating emissions from electric utilities, the Clean Air Act requires the EPA administrator to find that regulation is "appropriate and necessary" based on a public health hazards study. The question in this case is whether EPA unreasonably refused to consider costs in making its determination that regulation was appropriate. The D.C. Circuit agreed with the EPA that it was not required to consider costs. "Appropriate" isn't defined in the relevant section of the Clean Air Act and dictionary definitions of the term don't mention costs. Throughout the Clean Air Act, "Congress mentioned costs explicitly where it intended EPA to consider them." States are involved in this case on both sides.

The court has accepted a case for the third time involving the issue of whether disparate-impact claims can be brought under the Fair Housing Act. The Inclusive Communities Project sued the Texas Department of Housing and Community Affairs, claiming it was disproportionately approving Low Income Housing Tax Credits in minority-concentrated neighborhoods and disproportionately disapproving them in predominately white neighborhoods so as to maintain segregated housing patterns. It remains to be seen if *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* will settle like its predecessors, *Mt. Holly v. Mt. Holly Citizens in Action* and *Magner v. Gallagher*. The 11 federal circuits that have decided this issue all have held that disparate-impact claims are actionable.

The Railroad Revitalization and Regulatory Reform Act (4-R Act) prohibits state and local governments from imposing taxes that discriminate against railroads. Railroads and other commercial and industrial taxpayers in Alabama pay a four percent sales tax on diesel fuel, trucks pay a 19-cents per gallon excise tax and no sales tax, and water carriers pay no tax. CSX claimed Alabama violated the 4-R Act by requiring railroads to pay sales tax on diesel fuel and exempting its competitors (even though railroads paid less in sales tax than trucks paid in excise tax). In *Alabama Department of Revenue v. CSX Transportation** the Court held 7-2 that railroads can be compared to their competitors (rather than other commercial and industrial taxpayers) when determining whether a tax is discriminatory under the 4-R Act. Competitors are a "similarly situated" class "since discrimination in favor of that class most obviously frustrates the purpose of the 4-R Act," including restoring financial stability to railroads and fostering competition between railroads and other modes of transporta-

tion. Because "[t]here is simply no discrimination when there are roughly comparable taxes" different taxes paid by railroads and their competitors must be compared. And the justifications Alabama offered for why water carriers don't pay any tax on diesel fuel must be examined when determining if railroads have been discriminated against.

In 1992 in *Quill Corp. v. North Dakota*, the Court held that states cannot require retailers with no in-state physical presence to collect use tax. Since 2010, Colorado has required remote sellers to inform Colorado purchasers annually of their purchases and send the same information to the Colorado Department of Revenue. Direct Marketing Association sued Colorado in federal court claiming these requirements are unconstitutional under Quill. The Court held unanimously in *Direct Marketing Association v. Brohl** that the Tax Injunction Act (TIA) does not bar a federal court from deciding this case. Per the TIA, that federal courts may not "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" where a remedy is available in state court. The TIA was modelled on the Anti-Injunction Act, which concerns federal taxes. According to the Court, "the Federal Tax Code has long treated information gathering as a phase of tax administration that occurs before assessment, levy, or collection." And, while DMA's lawsuit sought to "limit, restrict, or hold back" tax collection in Colorado, it did not "restrain" tax collection in the narrow sense—by stopping it.

In *Comptroller v. Wynne*, the court will determine whether the U.S. Constitution requires states to offer a credit to its residents for all income taxes paid to another jurisdiction. The Wynnes of Howard County, Md., received S-corporation income that was generated and taxed in numerous states. Maryland law allowed them to receive a tax credit against their Maryland state taxes, but not their Maryland county taxes. Maryland's highest state court held that offering no credit against their county taxes violated the dormant Commerce Clause, which denies states the power to unjustifiably discriminate against or burden interstate commerce. If every state imposed a county tax without a credit, interstate commerce would be disadvantaged. Taxpayers who earn income out of state would be "systematically taxed at higher rates relative to taxpayers who earn income entirely within their home state."

In *Alabama Legislative Black Caucus v. Alabama* the Supreme Court held 5-4 that when determining whether unconstitutional racial gerrymandering occurred—if race was a "predominant motivating factor" in creating districts—one-person-one-vote should be a background factor. And Section 5 of the Voting Rights Act (VRA) does not require a covered jurisdiction to maintain a particular percent of minority voters in minority-majority districts. The Alabama Legislative Black Caucus sued Alabama claiming by adding more minority voters to majority-minority districts than were needed for minorities to elect a candidate of their choice Alabama engaged in unconstitutional racial gerrymandering. The Court concluded that one-person-one-vote should be taken as a given and not be weighed with other nonracial factors (compactness, contiguity, incumbency protection, etc.) because the predominance analysis is about "whether the legislature 'placed' race 'above traditional districting considerations in determining which persons were placed in appropriately apportioned districts.'" Section 5 does not require covered jurisdictions to maintain a particular percent of minority voters in majority-minority districts. Instead, it requires that a minority's ability to elect a preferred candidate be maintained. State legislatures must have a "strong basis in evidence" to support their race-based choices when redistricting.

In *Walker v. Texas Division*, Sons of Confederate Veterans, the Texas Department of Motor Vehicles Board rejected the Texas Division of the Sons of Confederate Veterans' application for a specialty license plate featuring images of the Confederate flag. The Fifth Circuit agreed with Texas' Sons of Confederate Veterans that its First Amendment rights had been violated. The speech in this case was private, applying the "reasonable observer test" test from *Pleasant Grove City, Utah v. Summum*, 555 U.S. 467 (2009), where the court held that monuments in a public park are government speech. While governments have historically used monuments "to speak to the public" in parks, a reasonable observer would understand that specialty plates are private speech because "states have not traditionally used license plates to convey a particular message to the public." The board engaged in viewpoint discrimination because it "discriminated against Texas SCV's view that the Confederate flag is a symbol of sacrifice, independence, and Southern heritage."

In the 2008 case of *Baze v. Rees*, the court approved a three-drug method for lethal injections: sodium thiopental to induce unconsciousness so pain is not felt when the second and third drugs cause paralysis

and cardiac arrest. In *Glossip v. Gross*, the court will decide whether Oklahoma's use of midazolam instead of sodium thiopental violates the Eighth Amendment because it cannot reliably produce a deep, coma-like unconsciousness to prevent the substantial pain caused by the second and third drugs. The death row inmates in this case claim that midazolam poses a substantial risk that they will experience severe pain because it has a "ceiling effect"—at a certain dose it will have no greater effect—and can cause "paradoxical reactions" such as agitation. The district court rejected these concerns, relying on expert testimony that midazolam at the high dose used in executions, regardless of a ceiling effect, "will have the effect of shutting down any individual's awareness of pain" and that a paradoxical effect is rare and occurs most frequently at a low therapeutic dose.

So far the Supreme Court's current term has been a mixed bag for the states. *Armstrong is a significant win*. Had the Supreme Court ruled otherwise, the Supremacy Clause would have provided a cause of action for every federal statute that arguably conflicts with state law. *North Carolina State Board of Dental Examiners* is a significant loss for the states because it reduces the authority of state legislatures and governors to compose state agencies, boards and commissions as they may prefer. *Alabama Department of Revenue* and *DMA* might be fairly described—in total—as a draw for state government but for Justice Kennedy's concurrence in *DMA*, almost certainly prompted by the SLLC's *amicus* brief, that the "legal system should find an appropriate case for this Court to reexamine *Quill*."

Editor's Note

For updates on decisions of the U.S. Supreme Court's 2014–2015 term, please visit *The Book of the States* page in CSG's Knowledge Center: *http://knowledgecenter.csg.org/kc/category/content-type/content-type/book-states*

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