Eight Supreme Court Cases for States from a (Mostly) Eight-Justice Court

By Lisa Soronen

This article discusses eight Supreme Court cases of interest to states during the 2016–17 term. This term lacks any blockbuster cases at least partially due to being down a Justice most of the term. The court will decide three First Amendment cases (one religion, two speech), one education case, one preemption case, and a few other interesting but narrow cases.

During almost all of the 2016–17 term, the Supreme Court operated with only eight out of nine justices. Unsurprisingly, this has significantly affected the Supreme Court's docket. The court accepted one case which received significant media attention. The case involves a transgender student who wants to use the bathroom consistent with his gender identity. The student is arguing he has a legal right to do so based on the Department of Education's interpretation of Title IX found in an unpublished agency letter. Before oral argument, the Trump administration rescinded this letter. *Gloucester County School Board v. G.G.* has been removed from the court's docket. The lower court will rehear the case without relying on the now rescinded letter.

The court has accepted eight other cases of interest to the states. The court is likely to struggle with a case involving a state's Establishment Clause, and a case involving whether merger provisions where nonconforming adjacent lots under common ownership are combined for zoning purposes results in an unconstitutional taking of property. Both cases were accepted in January 2016 before Justice Scalia died and weren't scheduled for oral argument until over a year later—perhaps in the hopes the court would have a ninth justice to break a 4-4 tied vote. Justice Gorsuch joined the court just in time to hear argument in the religion case. The court is likely to have an easier time deciding two First Amendment free speech cases involving state statutes. First Amendment free speech is one of the few areas of the law where most justices agree (and generally rule against states).

First Amendment

In *Trinity Lutheran Church of Columbia v. Pauley* the Supreme Court will decide whether Missouri can refuse to allow a religious preschool to receive a state grant to resurface its playground based on Missouri's "super-Establishment Clause." The Missouri Department of Natural Resources, or DNR, offers grants to qualifying organizations to purchase recycled tires to resurface playgrounds. The DNR refused to give a grant to Trinity Church's preschool because Missouri's constitution prohibits providing state aid directly or indirectly to churches. Trinity Church argues that excluding it from an "otherwise neutral and secular aid program" violates the federal Constitution's Free Exercise and Equal Protection Clauses, which Missouri's "super-Establishment Clause" may not trump. In *Locke v. Davey* (2004) the Supreme Court upheld Washington state's "super-Establishment Clause," which prohibits post-secondary students from using public scholarships to receive a degree in theology. The lower court concluded *Locke* applies in this case where: "Trinity Church seeks to compel the direct grant of public funds to churches, another of the 'hallmarks of an established religion.'"

The issue in *Packingham v. North Carolina* is whether a North Carolina law prohibiting registered sex offenders from accessing commercial social networking websites where the registered sex offender knows minors can create or maintain a profile, violates the First Amendment. The North Carolina Supreme Court held that North Carolina's law is constitutional "in all respects." The court first concluded that North Carolina's law regulates "conduct" and not "speech," "specifically the ability of registered sex offenders to access certain carefully defined websites." The court then concluded that the statute is a "content-neutral" regulation because it "imposed a ban on accessing certain defined commercial social networking websites without regard to any content or message conveyed on those sites." Finally, the North Carolina Supreme Court concluded the statute was narrowly tailored to prohibit registered sex offenders from accessing websites where they could gather information about minors. Registered sex offenders could still use websites "exclusively devoted to speech" including instant messaging services and chat rooms, websites requiring no more than an a user name and email address to access content, and websites where users must be at least 18 to maintain a profile.

In *Expressions Hair Design v. Schneiderman* the Supreme Court held unanimously that a New York statute prohibiting vendors from advertising a single

price and a statement that credit card customers must pay more regulates speech under the First Amendment. A New York statute states that "[n]o seller in any sales transaction may impose a surcharge on a [credit card] holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Twelve states have adopted credit-card surcharge bans. The court agreed that this statute prohibits Expressions Hair Design from posting a single price—for example "Haircuts $10 (3% or 30 cent surcharge added if you pay by credit card)." The sticker price is the regular price so sellers may not charge credit card customers an amount above the sticker price that is not also charged to cash customers. According the court, this statute regulates speech and isn't a typical price/conduct regulation, which would receive less protection under the First Amendment. "What the law does regulate is how sellers may communicate their prices. A merchant who wants to charge $10 for cash and $10.30 for credit may not convey that price any way he pleases. He is not free to say "$10, with a 3% credit card surcharge" or "$10, plus $0.30 for credit" because both of those displays identify a single sticker price—$10—that is less than the amount credit card users will be charged. Instead, if the merchant wishes to post a single sticker price, he must display $10.30 as his sticker price."

Education

The Supreme Court held unanimously in *Endrew F. v. Douglas County School District* that public school districts must offer students with disabilities an individual education plan (IEP) "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Per the federal Individuals with Disabilities Education Act (IDEA), a student with a disability receives an IEP, developed with parents and educators, which is intended to provide that student with a "free and appropriate public education" (FAPE). *Board of Education v. Rowley* (1982) was the first case where the Supreme Court defined FAPE. In that case the court failed to articulate an "overarching standard" to evaluate the adequacy of an IEP because Amy Rowley was doing well in school. But the court did say in *Rowley* that an IEP must be "reasonably calculated to enable a child to receive educational benefits." For a child receiving instruction in the regular classroom an IEP must be "reasonably calculated to enable the child" to advance from grade to grade. In *Endrew F.* the Court stated that if "progressing smoothly through the regular curriculum" isn't "a reasonable prospect for a child, his IEP need not aim for grade level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives."

Preemption

The Federal Employees Health Benefits Act, or FEHBA, governs federal employee health insurance benefits and authorizes the Office of Personnel Management, or OPM, to enter into contracts with private health insurance companies to administer benefit plans. FEHBA preempts state law relating to the "nature, provision, or extent of coverage or benefits." Coventry Heath Care argued that FEHBA preempts Missouri's anti-subrogation law. The Missouri Supreme Court disagreed reasoning that Missouri's anti-subrogation law does not clearly "relate to the nature, provision, or extent of coverage or benefits." In 2015 the U.S. Supreme Court vacated and remanded the Missouri Supreme Court's decision after OMP promulgated a rule saying that an insurance carrier's rights and responsibilities pertaining to subrogation "relate to the nature, provision, or extent of coverage or benefits." The Missouri Supreme Court again ruled that FEBHA doesn't preempt Missouri's anti-subrogation law. The Missouri Supreme Court refused give to *Chevron* deference to OPM's rule reasoning "no binding precedent requiring courts to afford dispositive deference to an agency rule defining the scope of an express preemption clause." In *Coventry Health Care of Missouri v. Nevils* the Supreme Court held unanimously that the Federal Employees Health Benefits Act (FEHBA) preemption clause overrides state laws prohibiting subrogation and reimbursement and that the preemption clause is consistent with the Supremacy Clause. FEHBA allows the federal government to contract with private insurance carriers for federal employees' health insurance. FEHBA preempts state law related to the "nature, provision, and extent of coverage of benefits." The court focused on the plain language of FEHBA to conclude it preempts state reimbursement and subrogation laws. "Contractual provisions for subrogation and reimbursement 'relate to … payments with respect to benefits' because subrogation and reimbursement rights yield just such payments. When a carrier exercises its right to either reimbursement or subrogation, it receives from either the beneficiary or a third party 'payment' respecting the benefits the carrier had previously paid. The carrier's very provision of benefits triggers the right to payment." The court also rejected the argument that FEHBA violates the Supremacy Clause, which states that federal laws are the supreme law of the land, "by assigning preemptive effect to

the terms of a contract, not to the laws of the United States." According to the court it is the statute and not a contract that "strips state law of its force." The court failed to address the question of most interest to states lurking in this case; whether *Chevron* deference applies when an agency is construing the scope of a statute's preemption provision, absent Congress's assent.

Miscellaneous

In *Murr v. Wisconsin* the Supreme Court will decide whether merger provisions in state law and local ordinances, where nonconforming, adjacent lots under common ownership are combined for zoning purposes, may result in the unconstitutional taking of property. The Murrs owned contiguous lots E and F which together are .98 acres. Lot F contained a cabin and lot E was undeveloped. A St. Croix County merger ordinance prohibits the individual development or sale of adjacent lots under common ownership that are less than one acre total. But the ordinance treats commonly owned adjacent lots of less than an acre as a single, buildable lot. The Murrs sought and were denied a variance to separately use or sell lots E and F. They claim the ordinance resulted in an unconstitutional uncompensated taking. The Wisconsin Court of Appeals ruled there was no taking in this case. It looked at the value of lots E and F in combination and determined that the Murrs' property retained significant value despite being merged. A year-round residence could be located on lot E or F or could straddle both lots. And state court precedent indicated that the lots should be considered in combination for purposes of takings analysis.

The Supreme Court will decide in *Nelson v. Colorado* whether it violates due process to require criminal defendants whose convictions have been reversed to prove their innocence by clear and convincing evidence to receive refunds of monetary penalties they have paid. Shannon Nelson was convicted of five charges relating to sexually assaulting her children. She was ordered to pay a variety of costs and fees. The appeals court overturned her conviction and a new jury acquitted her. The Colorado Supreme Court ruled that due process does not require that a court award Nelson the costs and fees she paid. The Colorado Exoneration Act authorizes a court to issue refunds to exonerated defendants. Nelson didn't pursue a claim under the Exoneration Act. According to the Colorado Supreme Court: "The Exoneration Act provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction." To receive compensation under the act, the exonerated person must prove, by clear and convincing evidence, that he or she was "actually innocent."

Most states, including Colorado, and the federal government have a "no-impeachment" rule which prevents jurors from testifying after a verdict about what happened during deliberations with limited exceptions that do not include that a juror expressed racial bias. A jury found Miguel Angel Pena-Rodriguez guilty of unlawful sexual contact and harassment involving two teenage sisters. Subsequent to conviction, two jurors alleged that another juror made numerous statements during deliberations indicating he believed Pena-Rodriguez was guilty because he is Mexican. Justice Kennedy, writing for the 5-3 court in *Pena-Rodriguez v. Colorado* concluded that the "Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt." "An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy."

Conclusion

So far, 2017's Supreme Court docket looks like this year's Supreme Court docket. No big cases have been accepted yet. The most interesting case accepted so far is *National Association of Manufacturers v. Department of Defense*. The issue in this case is whether federal courts of appeals versus federal district courts have the authority to rule whether the "waters of the United States" (WOTUS) regulations finalized during the Obama Administration are lawful. The Supreme Court has decided to keep this case on its docket despite President Trump's executive order suggesting a rewrite of the current WOTUS definitional rule.

About the Author

Lisa Soronen is the executive director of the State and Local Legal Center (SLLC). In this role, Lisa files *amicus curiae* briefs to the U.S. Supreme Court on behalf of members of the Big Seven in cases affecting state and local government. Prior to joining the SLLC, Lisa worked for the National School Boards Association, the Wisconsin Association of School Boards, and clerked for the Wisconsin Court of Appeals. She earned her J.D. at the University of Wisconsin Law School and is a graduate of Central Michigan University.