The States and the Supreme Court

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This year’s Supreme Court docket includes many cases of interest to the states on controversial subjects like affirmative action and legislative prayer and more esoteric subjects like abandoned railroad rights-of-way and federal court abstention.

A Supreme Court term typically produces one or two really prominent cases. Two terms ago, the Court decided the Affordable Care Act cases and the Arizona immigration case. Last term, the Court heard the same-sex marriage cases and the Voting Rights Act case. What these four cases have in common is they all directly and significantly impacted the states. This year’s big cases—a challenge to the president’s recess appointment power and a campaign finance case—are not as big and won’t have as great an impact on states. But do not be mistaken; the Court has accepted numerous cases of interest to states this term.

The Supreme Court held 6-2 that voters may by ballot prohibit affirmative action in public universities admission decisions in Shuette v. BAMN. In 2006 Michigan voters adopted a constitutional amendment which prohibited preferential treatment in admission to public universities on the basis of race, sex, color, ethnicity, or national origin. The majority of the Court concluded this amendment does not violate the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy, in a plurality opinion joined only by Chief Justice Roberts and Justice Alito, concluded that this case is about who and not how the debate over racial preferences should be resolved. “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.” Justices Sotomayor and Ginsburg dissented; Justice Kagan did not participate in the case.

In a 5-4 decision written by Justice Kennedy the Supreme Court held in Town of Greece v. Galloway that the Town of Greece did not violate the First Amendment by opening its meetings with a prayer. From 1999–2007 all prayer givers were Christian, and some referred to Jesus. The Court rejected respondents’ arguments that legislative prayer cannot contain sectarian language and prayers before town board meetings are coercive. In Marsh v. Chambers, in 1983, the Court held the Nebraska Legislature didn’t violate the First Amendment by opening its sessions with a prayer delivered by a chaplain paid from state funds. The proposition that Marsh allows only nonsectarian prayer “is irreconcilable with the facts of Marsh and with its holding and reasoning.” Only allowing nonsectarian prayer would require state legislatures and local governments to “act as supervisors and censors of religious speech” and it isn’t clear when a prayer is sectarian. Prayer before town board meetings isn’t coercive just because citizens who attend meetings often have business before the board. Prayers in this context—and the state legislative context where citizens can only address state legislatures by invitation—aren’t intended for the public but for the lawmakers “who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing.”

The Clean Air Act’s (CAA) Good Neighbor Provision prohibits upwind states from emitting air pollution in amounts that will contribute significantly to downwind states failing to attain air quality standards. In EPA v. EME Homer City Generation, the lower court concluded that upwind states must be given a second opportunity to file State Improvement Plans (SIPs) after EPA has informed the states of their emissions budgets when they are known, before the federal government can do so, and that EPA can only rely on physical contributions to air pollution when determining responsibility for downwind pollution. The Supreme Court, in a 6-2 opinion written by Justice Ginsburg, disagreed on both issues. The Court concluded the CAA does not require that states be given a second opportunity to file State Improvement Plans (SIPs) after EPA has informed the states of their emis-
sions budgets. The Clean Air Act makes it clear that once EPA has found an SIP inadequate, EPA has a statutory obligation to issue a Federal Improvement Plan. The Court further concluded that the Good Neighbor Provision does not require EPA to disregard costs and consider only each upwind state’s physically proportionate responsibility for each downwind air quality problem. “EPA’s cost-effective allocation of emission reductions among upwind States, we hold, is a permissible, workable, and equitable interpretation of the Good Neighbor Provision.” States and local governments filed on both sides in this case.

In Marvin M. Brandt Revocable Trust v. United States the Court held 8-1 that a private party, rather than the federal government, owns an abandoned railroad right-of-way granted by the General Railroad Right-of-Way Act of 1875. The Court ruled against the United States “in large part because it won when it argued the opposite before this Court more than 70 years ago in the case of Great Northern Railway Co. v. United States.” The United States and the SLLC argued that the Court should not read Great Northern as broadly and that a series of federal statutes apply to abandoned 1875 rights-of-way and grant the United States title to abandoned rights-of-way (unless a state or local government establishes a “public highway,” including a recreational trail, within one year of abandonment). The Justices discussed at oral argument the argument in the SLLC brief that state and local governments have relied on these statutes. Yet the Court concluded they don’t apply to 1875 rights-of-way because “these statutes do not tell us whether the United States has an interest in any particular right of way; they simply tell us how any interest the United States might have should be disposed of.” While this case had a negative outcome for state and local government it does not affect all abandoned railroad corridors.

In Sprint Communications Company v. Jacobs, the Court held that a federal court should not have abstained from deciding a case where a state court was reviewing a decision of the Iowa Utilities Board because the utilities board proceedings did not resemble state enforcement actions where abstention is appropriate. Sprint withheld payment of intercarrier access fees for Voice over Internet Protocol calls to an Iowa communications company, Windstream, and filed a complaint with the Iowa Utilities Board asking it to prevent Windstream from discontinuing service to Sprint. The board ordered Sprint to pay, and Sprint challenged the board’s decision in federal and state courts simultaneously. The Supreme Court, in a unanimous opinion, held that Younger abstention does not apply in this case. The Court reasoned that Younger abstention only applies in three exceptional circumstances, including civil enforcement proceedings. The Iowa Utilities Board proceedings in this case did not resemble state enforcement actions because they were not “akin to criminal prosecution” and were not initiated by “the State in its sovereign capacity.” Instead, Sprint initiated the action and no state authority investigated Sprint or filed a complaint against Sprint. The State and Local Legal Center had filed an amicus brief in this case.

In McCullen v. Coakley, the Court will examine the constitutionality of a Massachusetts law that creates a 35-foot buffer zone around reproductive health care facilities into which demonstrators are not allowed to enter. A 2000 case, Hill v. Colorado, upheld a similar law against a First Amendment challenge because it (1) addressed a legitimate state concern for the safety and privacy of individuals using the facilities, (2) was content-neutral in that it applied to all demonstrators equally, regardless of viewpoint, and (3) regulated the time, place and manner of speech without foreclosing or unduly burdening the right of demonstrators to communicate their message. A broad ruling by the justices could have sweeping consequences beyond this particular context, as state governments are continually challenged to strike a balance between free speech rights and the duty to protect their citizens from harassment at clinics, funerals, political events and other locations. The State and Local Legal Center has filed an amicus brief in this case.

The question relevant to states in Bond v. United States is whether the federal government can adopt a statute implementing a valid treaty that it otherwise does not have the authority to adopt. Upon discovering her friend was pregnant with her husband’s child, Carol Anne Bond acquired toxic chemicals and placed them on her friend’s mailbox and door and car handles. Bond was indicted under a federal statute implementing a chemical weapons treaty the United States signed. While Bond concedes the treaty in this case is valid, she argues that the federal statute adopting it violates the 10th Amendment because states—not the federal government—typically punish assaults. Missouri v. Holland, however, decided nearly 100 years ago, holds that if a treaty is valid Congress may implement it even if Congress would otherwise be unable to legislate in that domain. The Supreme Court may
avoid the question of whether *Missouri v. Holland* should be limited or overruled by holding that Bond’s use of the chemicals didn’t violate the federal statute. She argues the statute does not reach “conduct that no signatory state could possibly engage in—such as using chemicals in an effort to poison a romantic rival.”

In 2007 in *Massachusetts v. EPA*, the Supreme Court ruled the EPA has the authority to regulate the emissions of greenhouse gases from new motor vehicles under the Clean Air Act. The question in *Utility Air Regulatory Group v. EPA* is whether the EPA may regulate greenhouse gases emitted from stationary sources, like power plants and factories, too. The District of Columbia Circuit concluded the EPA does have this authority, reasoning that in *Massachusetts v. EPA* the Court determined the Clean Water Act’s overarching definition of air pollutant, which applies to all provisions of the act, not just those related to new motor vehicles, includes greenhouse gases. The EPA significantly increased the amount of greenhouse gases that will require permitting initially because otherwise millions of stationary sources will need permits. States are affected by this case and have filed on both sides, because, on one hand, they issue permits and own stationary sources that emit greenhouse gases, and on the other hand, they would benefit from reduced greenhouse gases emissions.

*Susan B. Anthony List v. Driehaus* involves a First Amendment challenge to a state statute prohibiting making false statements against candidates for office. The Susan B. Anthony List wanted to run a billboard criticizing a congressman for supporting taxpayer-funded abortions by voting in favor of the Affordable Care Act. A panel of the Ohio Elections Commission found probable cause that the billboard would violate Ohio’s false-statement statute and referred the matter to the full commission. The full commission hearing never took place because the congressman lost the election. The Susan B. Anthony List sued the commission claiming the commission proceedings chilled its First Amendment protected speech and association rights. The Susan B. Anthony List wants the Supreme Court to adopt a test that makes it easier to challenge the constitutionality of false-statement laws. At least 15 states have similar laws prohibiting making false statements against candidates that will be affected by how the Court rules in this case.

Even if the most prominent cases of the term don’t affect states, the Court has accepted some pretty significant issues for states, including affirmative action, legislative prayer and two Clean Air Act cases. While oral arguments, rulings on similar cases and the justices’ ideological leanings can provide some insight as to how states will fare in these cases—and overall—nothing is certain until an opinion is issued. The Court will decide these cases by June 30, 2014.

### About the Authors

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