

The Supreme Court, 2013-2014: The Term In Review

William M. Jay

Partner, Goodwin Procter LLP, Washington, D.C.

wjay@goodwinprocter.com

July 30, 2014

A harmonious Term?

How many Justices agree?

- This year well over half of all cases (48 of 73) were unanimous (9-0 on the result)
- Relatively few cases had a lopsided majority (1 or 2 dissenting votes)
- Only 10 cases were decided by a single vote
- Unanimous result may paper over significant disagreement on reasoning
 - › *Noel Canning, McCullen*

Justice Kennedy still at the center

Who agrees?

- In 10 cases decided by one vote:
- 4 cases decided by conservative Justices + Justice Kennedy
- 2 cases decided by liberal Justices + Justice Kennedy
- 4 other one-off alignments
- Justice Kennedy in the majority of every one

Where to begin?

- This Term's most obscure question:
 - › “This case involves the General Railroad Right-of-Way Act of 1875 ("1875 Act"), under which thousands of miles of rights-of-way exist across the United States. ... The question presented is:

Did the United States retain an implied reversionary interest in 1875 Act rights-of way after the underlying lands were patented into private ownership?”

NLRB v. Noel Canning

Could the President make recess appointments during a 3-day Senate recess?

- The Recess Appointments Clause:

“The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”

Article II, Section 2, Clause 3

NLRB v. Noel Canning

Could the President make recess appointments during a 3-day Senate recess?

- Senate recesses at the end of each year
 - › “Sine die,” without day
 - › The recess between the First Session and the Second Session is an “inter-session” recess
 - › May be as short as a few seconds
- Senate also recesses during a session
 - › These are called intra-session recesses

NLRB v. Noel Canning

Could the President make recess appointments during a 3-day Senate recess?

- Senate deliberately did not take a long recess in between 2011 and 2012 sessions
 - › *Pro forma* sessions every Tuesday and Friday, from Dec. 17, 2011, to Jan. 23, 2012
 - › So the Senate was never out of session for more than three days
 - Sundays don't count
 - › Senate convened the second session on January 3 and adjourned until January 6
- On January 4, President Obama recess-appointed three members of the National Labor Relations Board, and the new director of the Consumer Financial Protection Bureau
 - › Said the Senate was really in recess from Dec. 17 to Jan. 23
- Noel Canning alleged that the NLRB was acting without a quorum

NLRB v. Noel Canning

Could the President make recess appointments during a 3-day Senate recess?

- D.C. Circuit holds the NLRB appointments invalid
 - › The January 3-6 recess was not “*the* recess of the Senate”
 - › The vacancies did not “*happen* during the recess of the Senate”
- Government takes the case to the Supreme Court
 - › Asks the Court to decide *only* whether the D.C. Circuit’s two reasons are correct
- Court, at Noel Canning’s urging, adds third question about the effect of the *pro forma* sessions

NLRB v. Noel Canning

Could the President make recess appointments during a 3-day Senate recess?

- Supreme Court invalidates the recess appointments
- The vote is 9-0
- BUT... Justice Breyer writes the opinion of the Court, joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan
- Justice Scalia concurs in the judgment, joined by the Chief Justice and Justices Thomas and Alito

NLRB v. Noel Canning

Could the President make recess appointments during a 3-day Senate recess?

- What's the disagreement?
- The majority holds:
 - › that the President may make recess appointments during intra-session recesses
 - › that the President may make recess appointments to vacancies that existed before the recess
 - › BUT that this recess was too short (three days)
 - 3-10 days “presumptively” too short but presumption is rebuttable

NLRB v. Noel Canning

Could the President make recess appointments during a 3-day Senate recess?

- The real fight is over why
- The words “the recess” and “happen” are ambiguous
 - › No definitive proof that the Framers intended one meaning or the other
- So the majority looks at the Clause’s purpose (fill those jobs and keep the government functioning) and at history
 - › Which means post-Civil War history
 - › “Three-quarters of a century of settled practice is long enough”
 - › Congress has essentially acquiesced
 - Johnson impeachment, Pay Act
- “The Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries”

NLRB v. Noel Canning

Could the President make recess appointments during a 3-day Senate recess?

- Justice Scalia's separate opinion
 - › The President and the Senate can't agree between themselves to reallocate the balance of power among the branches. Checks and balances promote individual liberty, and the branches aren't free to surrender their powers.
 - The Senate confirmation power is a check against despotism
 - Presidents have greater incentives to fight for more power
 - › History tells us the meaning of "recess" and "session," which alternate
 - Colloquial uses don't count—
Washington to Jay: "I had put my carriage in the hands of a workman to be repaired and had not the means of moving [sic] during the recess"
 - › There is a clear text and an at-best-ambiguous historical practice

NLRB v. Noel Canning

Could the President make recess appointments during a 3-day Senate recess?

- Justice Scalia's separate opinion
- Who cares if the government runs more efficiently?
- Where does the ten-day rule come from?

McCullen v. Coakley

Can a State prohibit outsiders from standing near an abortion clinic entrance?

- Fixed buffer zone around abortion clinics
 - › 35' radius around the entrance, exit, or driveway
 - › Plus extend the entrance all the way to the street
- No one may “enter or remain” in the buffer zone
- Exceptions include:
 - › People coming and going from the facility
 - › Employees and agents of the facility “acting within the scope of their employment”
- Separate prohibition on obstruction
- Criminal penalties

McCullen v. Coakley

Can a State prohibit outsiders from standing near an abortion clinic entrance?

- Challengers are sidewalk counselors, not protesters; rather than shout and wave signs, they engage in conversation and hand out literature
- State defends the law as a content-neutral restriction on the time, place, and manner of speech

McCullen v. Coakley

Can a State prohibit outsiders from standing near an abortion clinic entrance?

- 9-0 vote to reverse
- Chief Justice Roberts writes the opinion of the Court
- Joined by Justices Ginsburg, Breyer, Sotomayor and Kagan
- Justice Scalia (joined by Justices Kennedy and Thomas) and Justice Alito concur separately

McCullen v. Coakley

Can a State prohibit outsiders from standing near an abortion clinic entrance?

- Court's opinion finds the statute content-neutral
 - › Not what you say but where you say it
 - › Prohibition applies even if you say nothing
 - › Yes, this is a statute that applies only around abortion clinics, but that's because that's where the problems (e.g., large crowds around an entrance) are. Alternative is to restrict more speech. The legislature chose to restrict less speech, not more.
 - › What about the exception for clinic employees? "Counter-speech" is not in their job description or in the scope of their employment. If clinics authorized their employees to speak in the buffer zone, it "would be a very different case"

McCullen v. Coakley

Can a State prohibit outsiders from standing near an abortion clinic entrance?

- But Court finds the statute not narrowly tailored
 - › Heavy burden on petitioners' type of persuasive speech (petitioners are not protestors)
 - › Burden is too great to be justified
 - There is the obstruction provision in the statute
 - Other generic criminal statutes (such as trespass)
 - No criminal prosecutions under prior laws for 17 years and no injunctions since the 1990s
 - The problem is at 1 clinic, on Saturday morning, but the law applies statewide and around-the-clock.
 -

McCullen v. Coakley

Can a State prohibit outsiders from standing near an abortion clinic entrance?

- Justice Scalia's separate opinion
 - › “This is an opinion that has Something for Everyone”
 - › Unnecessary to address content-neutrality
 - › But if we do, of course it's content-based
 - Only outside abortion clinics
 - Pretextual
 - › *Hill* should be overruled
 - › “I prefer not to take part in the assembling of an apparent but specious unanimity”

McCullen v. Coakley

Can a State prohibit outsiders from standing near an abortion clinic entrance?

- Justice Alito's separate opinion
 - › Viewpoint discrimination
 - › Exemption for clinic employees
 - › “A nonemployee may not enter the buffer zone to warn about the clinic's health record, but an employee may enter and tell prospective clients that the clinic is safe. ... This is blatant viewpoint discrimination.”

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- What does the First Amendment's Free Exercise Clause say?
- Nothing relevant to this case. This case is about the Religious Freedom Restoration Act of 1993:
- The federal government “shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.”
- A person shall be exempted from a substantial burden unless the government demonstrates a compelling interest and shows that the burden “is the least restrictive means of furthering” that interest.

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- Affordable Care Act requires employers to offer “minimum essential coverage” or pay a penalty
 - › Must offer “preventive care and screenings” for women without “cost sharing requirements”
 - › Department of HHS to define the content by rule
- HHS includes all FDA-approved contraceptive methods
- Churches (“religious employers”) are excluded
- Religious nonprofits are accommodated
 - › Certify an objection; group health plan issuer then pays for coverage

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- Conestoga Wood Specialties, Hobby Lobby, and Mardel's are...
 - › Corporations
 - › For profit
 - › Closely held by a single family
 - › That family shares strong religious beliefs
 - › The business is operated in accordance with those beliefs to some degree (e.g., statements of principles, Sunday closing)
- These companies object to paying for four out of the FDA-approved methods of contraception

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- Justice Alito writes the opinion, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas
- Does RFRA even apply to these plaintiffs?
- Is there a substantial burden?
- If so, is it justified?

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- Does RFRA apply to these plaintiffs?
 - › A corporation is a “person” as defined by the Dictionary Act
 - › It can “exercise ... religion”
 - Nonprofits can exercise religion, e.g., churches
 - Engaging in, or refraining from, business practices because of religion amounts to the exercise of religion, e.g., Sabbath observance
 - Modern corporations serve lots of socially responsible purposes besides the profit motive
 - › Its beliefs can be ascertained
 - This case doesn’t involve publicly traded corporations
 - Federal courts determine sincerity all the time

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- Is the mandate a substantial burden?
 - › We take the plaintiffs at their word about the content of their religious beliefs. They believe that paying for others to purchase embryo-destroying methods of contraception is immoral.
 - We won't tell the plaintiffs that their beliefs are too flawed
 - Jehovah's Witness could argue that he would make steel for general purposes, but would not make tank turrets
 - › The penalties are huge (\$475M per year for Hobby Lobby)

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- Does the mandate survive statutory strict scrutiny?
 - › Court assumes it fulfills a compelling interest
 - › But it's not the least restrictive means
 - Government could pay for the contraceptives itself
 - (Cost would be minor compared to cost of ACA)
 - But “we need not rely” on that
 - HHS's accommodation for religious nonprofits is a less restrictive means
 - We do not decide today whether the accommodation complies with RFRA
 - Unlike taxation, where there is no alternative to 100% participation
 - › A flood of similar claims (vaccinations, transfusions) is unlikely

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- Justice Kennedy's concurrence
 - › “The Court’s opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent”
 - › The accommodation already on the books for religious nonprofits “might well suffice to distinguish the instant case from many others in which it is more difficult and expensive to accommodate”

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- Justice Ginsburg dissents, joined by Justice Sotomayor and mostly by Justice Breyer and Justice Kagan
 - › A decision of startling breadth that can introduce “havoc” into civic life
 - › The accommodation already on the books for religious nonprofits “might well suffice to distinguish the instant case from many others in which it is more difficult and expensive to accommodate”
- For-profit corporations don’t exercise religion
 - › Religious corporations exist to foster the interests of a community of adherents to a single faith
 - › For-profits do not. They use labor to make a profit, not to perpetuate religious values. They are legally separate from the individuals who own them – as those individuals emphasize when it serves their interests

Burwell v. Hobby Lobby

Can the federal government compel religious employers to fund contraception?

- The burden is too attenuated to be substantial
 - › All the employer has to do is pay a little more money into a vast pool of funds, from which – someday, maybe – an employee will seek reimbursement for a particular contraceptive, if she and her physician choose it. The woman’s autonomous choice separates the employer from the payment.
- There is no less restrictive means
 - › Creating a whole new government program is not less restrictive
 - › Where would the stopping point to that reasoning be?
- Free Exercise Clause creates no right not to serve black patrons, no right to fire “fornicators.” What’s next? Transfusions? Antidepressants? Vaccinations? Pig-derived medicines?
 - › This decision risks favoring one sect over others

Schuetz v. BAMN

Can a State bar affirmative action in higher education by referendum?

- *Grutter* upheld affirmative action at the U of Michigan for diversity
- Michigan voters adopt a state constitutional amendment to bar affirmative action in higher education
- Sixth Circuit strikes down that amendment under the “political restructuring doctrine”

Schuetz v. BAMN

Can a State bar affirmative action in higher education by referendum?

- Justice Kennedy writes for a plurality (himself, the Chief Justice, Justice Alito)
- Proposition 2 is part of a national dialogue that *Grutter* permits
- *Seattle* case distinguished
 - › *Desegregative* busing
 - › The state initiative “was an aggravation of the very racial injury in which the State itself was complicit”
 - › The Sixth Circuit read *Seattle* to apply to every policy that “inures primarily to the benefit of the minority” and that “minorities . . . consider” to be “in their interest,” and to bar restructuring such policies
 - › That view is rejected. Don’t assume minority group members all “think alike.”

Schuette v. BAMN

Can a State bar affirmative action in higher education by referendum?

- Racially motivated state action is still unconstitutional. This isn't that.
- This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.
- Our constitutional system embraces ... the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure.

Schuetz v. BAMN

Can a State bar affirmative action in higher education by referendum?

- Justice Scalia and Justice Thomas concur in the judgment
- “We confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment forbid what its text plainly requires?”
 - › *Grutter* was wrong, so Michigan simply codified the US Constitution
- Even if *Grutter* is right, the Equal Protection Clause does not forbid a State from banning a practice that the Clause barely—and only provisionally—permits
- Proposition 2 probably does violate the political-restructuring doctrine, but that’s a reason to junk the doctrine
 - › What’s a “racial issue”? What’s an unconstitutional restructuring?
 - › Equal protection violation without racial intent

Schuette v. BAMN

Can a State bar affirmative action in higher education by referendum?

- Justice Breyer also concurs in the judgment
- This decision previously rested in the hands of unelected faculty and administrators
- There is no constitutional problem with taking a decision out of the hands of the unelected and giving it to the electorate

Schuetz v. BAMN

Can a State bar affirmative action in higher education by referendum?

- Justice Sotomayor dissents, joined by Justice Ginsburg
- This is “the last chapter of discrimination”
- Our precedents do not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else.
- The plurality “embraces majority rule without an important constitutional limit.” Our cases impose this limit without regard to intent
- Three protections: the right to vote; the right not to have the vote impeded; and the right not to have the political process restructured

Schuette v. BAMN

Can a State bar affirmative action in higher education by referendum?

- “Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process. Race also matters because of persistent racial inequality in society— inequality that cannot be ignored and that has produced stark socioeconomic disparities. And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. ... Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: ‘I do not belong here.’”
- “This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”

Town of Greece v. Galloway

Does prayer at town council meetings violate the Establishment Clause?

- Greece, N.Y., began meetings with a prayer, soliciting unpaid voluntary prayer-givers from among the town's clergy
- Nearly all were by Christian clergy, and some prayers were Christian
- After complaints, the town invited a Jewish layman and the chairman of the local Baha'i temple; a Wiccan priestess volunteered
- The Second Circuit found in this practice an endorsement of Christianity

Town of Greece v. Galloway

Does prayer at town council meetings violate the Establishment Clause?

- Justice Kennedy writes the opinion, joined by the Chief Justice, Justice Alito, and (mostly) Justices Scalia and Thomas
- Marsh v. Chambers – Does the town’s practice fit within this tradition?
- Must prayer be nonsectarian or ecumenical? No.
 - › The First Congress would have been comfortable with these prayers
 - › Legislatures and courts should not have to act as supervisors and censors of religious speech
 - › What’s ecumenical? Is “King of Kings” OK? “Father”?
 - › The relevant limit is solemnity – inviting lawmakers to reflect on shared ideals before deliberating, not a pattern of attacking nonbelievers, threatening damnation, or preaching conversion

Town of Greece v. Galloway

Does prayer at town council meetings violate the Establishment Clause?

- This can be done consistent with the invocation of an individual chaplain's particular deity
 - › “Respectful of every religious tradition, I offer this prayer in the name of God's only son Jesus Christ, the Lord, Amen.”
- There's no coercion here (plurality)
 - › The analysis would be different if the town directed the public to participate
 - › No evidence of pressure
 - › Offense is not coercion
 - › School graduations are different

Town of Greece v. Galloway

Does prayer at town council meetings violate the Establishment Clause?

- Justices Thomas and Scalia concur in part
- Justice Thomas thinks Establishment Clause is about federalism
- Both think coercion test should be junked

Town of Greece v. Galloway

Does prayer at town council meetings violate the Establishment Clause?

- Justice Kagan dissents, joined by Justices Ginsburg, Breyer, and Sotomayor
- “I agree with” *Marsh*
- Pluralism and inclusion can satisfy the requirement of neutrality
- But these meetings involve participation by ordinary citizens
 - › Imagine this at a naturalization ceremony, a courtroom, a polling place
- And the invocations were too sectarian, both in content and in selection of speakers.
 - › Christian prayer can’t be dismissed as mere ceremony
 - › Citizens should not confront government-sponsored worship that divides them along religious lines

What else did the Court do last year?

Civil

- Campaign contributions
- Greenhouse gases
- “Good neighbor” rule
- First Amendment challenge to agency fees
- *Raging Bull* copyright
- Securities suits
- Software patents
- Foreign parent corporations
- Aereo

Criminal

- Fifth Amendment / capital cases
 - › Mandatory minimums
 - › Ex post facto
- Consent searches
- Execution of the mentally retarded

- Poisoning your husband’s mistress’s mailbox

Questions or feedback?
wjay@goodwinprocter.com