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A Look Ahead: Supreme Court Likely to Have a Blockbuster Term

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It isn't often that Supreme Court watchers agree; however, right now, it seems that most agree on one thing: the Supreme Court term that started in October is going to be a blockbuster.

While it seems contradictory, remarkable terms have almost become the norm at the Court. The docket over the last couple of years has had more than its fair share of headline-grabbing cases, from gay marriage to Obamacare to the Voting Rights Act. Years ago, an earth-shattering term would generally be followed by a few relatively quiet ones. But over the last three to four years, one high profile term has followed closely on the heels of another, and 2013–2014 is on track to continue the trend.

The Supreme Court started the first two weeks in October with a bang. The Court heard arguments in two cases likely to result in landmark rulings: one on campaign finance (*McCutcheon v. Federal Election Commission*[1]) and another on affirmative action (*Schuette v. Coalition to Defend Affirmative Action*[2]). *McCutcheon* focused on the seemingly straightforward question of whether federal limits on aggregate contributions to political committees and candidates violate the First Amendment. To most casual observers, this question was answered back in 1976 with the Court's decision in *Buckley v. Valeo*.[3] The *Buckley* Court said that the First Amendment was not violated by base limits or aggregate limits on campaign donations. And in those qualifying words, "base" and "aggregate," lies the rub. Base limits restrict the amount of money an individual may contribute to a particular candidate or noncandidate political committee. Aggregate limits restrict the total amount of money that an individual may contribute to all committees and candidates during a given election cycle. In the years after *Buckley*, Congress passed a number of laws changing aggregate contribution limits, and it is those laws that were before the Court. Shaun McCutcheon, an Alabama resident who wanted to make contributions above the aggregate limit, and the Republican National Committee, which, not surprisingly, wanted to accept McCutcheon's additional contributions, challenged the aggregate limits as violating First Amendment rights.

Oral arguments before the Court focused on the logic behind the current limits and their alleged role in preventing corruption. The two parties attempted to shine very specific, and very different, spotlights on these limits. Erin E. Murphy, the attorney representing McCutcheon, said this case was about limits that seek to "prevent individuals from engaging in too much First Amendment activity." On the other hand, Donald B. Verrilli Jr., the solicitor general arguing on behalf of the Federal Election Commission, posed the limits as "combat[ing] corruption." And in the middle of these two opposing lenses were the competing notions that these limits are both narrow in their scope and serious in their implications. There isn't a large population of individuals seeking to donate above the aggregate limit amounts (in 2013-2014, the limits were $48,600 to candidates for federal office and $74,600 to noncandidate committees). However, it is undeniable that when it comes to campaigns, money talks, and as Justice Elena Kagan noted during the argument, without these aggregate limits, an individual could give $3.5 million to any candidate or political party. Justice Kagan observed that an individual writing such a check would likely at least expect a seat at the table. (Justice Antonin Scalia responded that this limit seemed appropriate, as he didn't think "$3.5 million is a heck of a lot of money.")

Of course, the *McCutcheon* arguments took place in the shadow of another recent, probably even more significant, campaign finance case, *Citizens United v. Federal Election Commission*.[4] In *Citizens United*, decided in 2010, the Court held that for the purpose of campaign spending limits as they relate to corporations, corporations were entitled to First Amendment protections. Thus, corporations could challenge campaign-

AP Photo/Susan Walsh

Republican activist Shaun McCutcheon of Hoover, Alabama, left, leaves the Supreme Court on Oct. 8, 2013, after a hearing on campaign finance. The Supreme Court is tackling a challenge to limits on contributions by the biggest individual donors to political campaigns. McCutcheon, the Republican Party, and Senate Minority Leader Mitch McConnell of Kentucky want the Court to overturn the overall limits on what contributors may give in a two-year federal election cycle.

spending restrictions under the First Amendment. Most election experts agree that in the post-*Citizens United* landscape, more money is flowing into federal and state campaigns than ever before. Consequently, *McCutcheon* seems both significant (as a last attempt to prevent corruption and ensure the integrity of our political process) and insignificant (as a small drop in the bucket of the mega-million dollar campaign fundraising that is our new normal).

The second major case argued in early October, *Schuette v. Coalition to Defend Affirmative Action*, takes an issue that is frequently before the Court, affirmative action, and flipped it on its head. *Schuette* presented the Court with the question of whether Michigan violated the Equal Protection Clause when it amended its Constitution (by voter initiative) to *prohibit* race- and sex-based preferences in public university admissions decisions. The voter initiative, Proposal 2, was started after the Court decided *Grutter v. Bollinger*, which allowed the University of Michigan Law School to use race as a factor in its admissions procedure, so long as the use involved an "individualized, holistic review of each applicant's file."[5]

As most Court-watchers expected, oral argument indicated that Justice Kennedy would again be the key vote (Justice Kennedy was one of the dissenting justices in *Grutter).* Justice Kennedy's central role was further magnified by the fact that Justice Kagan has recused herself from this case. A four-four split would uphold the Sixth Circuit's decision finding Proposal 2 to have unconstitutionally altered the political process to the detriment of minority groups and in violation of the Equal Protection Clause.

During argument, it became clear that there were two distinct camps, and Justice Kennedy appeared to float between them. The first camp, led by Justice Sotomayor, viewed Proposal 2 as part of an ongoing effort toward altering the rules of affirmative action to the detriment of minorities. "It seems that the game posts keep changing every few years for minorities," the justice said. According to Justice Sotomayor, Proposal 2 was just another version of similar race-based initiatives the Court had previously struck down."

The other camp of justices seemed to focus on the fact that Proposal 2 was not an attempt to put an end to affirmative action. Chief Justice Roberts lobbed a soft ball at Michigan Solicitor General John J. Bursch, asking, "You have been asked several questions that refer to the ending or termination of affirmative action. That's not what is at issue here, is it?" Bursch quickly took up this line, responding that "affirmative action means a lot more than simply the use of race or sex-based preferences in university admissions."

Of course, guessing how the justices will vote after oral argument is something of a fool's errand. One thing is clear coming out of the *Schuette* argument—it is likely that we still haven't seen the last permutation of affirmative action before the Court.

And those cases provide just a small taste of the eleven arguments the Court heard during its first of seven sessions. There is still much left slated for future sessions, including cases dealing with recess appointments,[6] the Hague Convention and international child kidnappings,[7] and the effect of the Chemical Weapons Convention Implementation Act on ordinary poisoning cases.[8]

Among the cases in the hopper is *Mount Holly, N.J. v. Holly Garden Citizens*, which involves the issue of whether the Fair Housing Act allows for suits claiming disparate impact. "Disparate impact" is a legal theory that allows a court to hold someone liable for discrimination when it can be shown that a practice that may be race-neutral on the surface, actually statistically

disadvantages a certain racial group. Common examples of disparate impact cases involve admission tests results and promotion rates.

The Town of Mount Holly, New Jersey, sought to implement a redevelopment plan, replacing a blighted neighborhood with mid-range single-family dwellings. Current residents of the neighborhood, who are predominately minorities, sued to prevent the plan from being implemented, arguing that they would be unable to afford the new housing and were being unfairly forced out of the area in violation of the Fair Housing Act. The Court is presented with the seemingly straightforward, yet certainly difficult, question of whether disparate impact claims are cognizable under the Fair Housing Act.

McCullen v. Coakley[9] is another case that has been bouncing around the lower courts and has been in the headlines since the Court has agreed to hear it. *McCullen* sits at a unique intersection between the First Amendment and reproductive rights. The question before the Court in *McCullen* is whether a Massachusetts selective exclusion law—which makes it a crime for speakers other than clinic "employees or agents…acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of a "reproductive health care facility" violates the First or Fourteenth Amendments. This case follows on the heels of a 2000 case, *Hill v. Colorado*, in which the Court affirmed a Colorado law that made it illegal for protesters to be within eight feet of anyone within 100 feet of a health-care facility with the intent to counsel, educate, or protest.[10] According to the Court, the *Hill* buffer-zone was a content-neutral restriction on speech in accordance with the First Amendment. And it is this notion—whether the Massachusetts law is "content-neutral"—that is at the heart of the parties' disagreement. Massachusetts argues that its law is neutral and, therefore, passes the First Amendment sniff test. On the other hand, the petitioners claim that the law is "inescapably viewpoint-based" because clinic employees are free to communicate with patients within these buffer zones.

Another set of cases percolating in the lower courts involve the police searching an individual's cell phone incident to the individual's arrest. At the time of this article, *Riley v. California*[11] and *United States v. Wurie*[12], had not been granted certiorari by the Court, but continue to dominate many Supreme Court reviews and previews.

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Generally, police are allowed to search an individual they are arresting in order to ensure their safety and to prevent the destruction of any evidence. Whether this allowance applies to cell phones is yet to be decided.

Although the two cases present similar questions, they have an important difference: the technology at issue. In *Wurie*, the search, which took place in 2007, involved a cell phone with a caller ID screen on the front of the phone and that had to be flipped open to use (in other words, not a smartphone). Police flipped the phone open, viewed a photograph set as the phone's wallpaper, then pressed two single buttons to view call logs and contact information associated with a particular phone number.

The *Riley* search, which took place in 2009, involved an iPhone competitor produced by Samsung.[13] While the exact actions of the police in this case are unclear, they seem more extensive than those taken in the *Wurie* case. According to a lower court opinion, one officer in the *Riley* case "looked at Riley's cell phone, [and] noticed all of the entries starting with the letter K were preceded by the letter C, which gang members use to signify 'Crip Killer.'" The officer also found video clips and photographs. When searching a smartphone, the police are able to gain much more information from merely looking at the phone (without having to flip it open) and, much more information is kept on a smartphone compared to a regular cell phone (emails, social media, banking information, recent GPS searches, just to name a few).

Whether only one case, or both (or possibly neither) will end up on the Court's dance card this term is still unanswered; if the Court does hear one of these cases, you can be sure that many techno-savvy court watchers will be dialed in (likely on smartphone apps such as twitter!).

Notes

1. Docket No. 12-536
2. Docket No. 12-682
3. *Buckley v. Valeo*, 424 U.S. 1 (1976).
4. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
5. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
6. *National Labor Relations Board v. Canning* (Docket No. 12-1281)
7. *Lozano v. Alvarez* (Docket No. 12-820)
8. *Bond v. United States* (Docket No. 12-158)
9. Docket No. 12-1168.
10. *Hill v. Colorado*, 530 U.S. 703 (2000).
11. Docket No. 13-132
12. Docket No. 13-212
13. The Volokh Conspiracy has a great article on the two different cell phones with photos to compare, www.volokh.com/2013/08/19/doj-files-cert-petition-in-wurie/

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