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# Supreme Court Review

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Many commentators have noted that the 2010 Supreme Court term was without the "fireworks" of recent years and, therefore, this year the Court garnered limited media attention and national interest. Contributing to this limited attention was the fact that the term ended with no retirements or looming confirmation battles. In addition, the term's highest profile cases ended up being somewhat predictable. Nevertheless, this was still an important term as it provided some insight into how the Court may continue to define its First Amendment jurisprudence and how it may rule in important cases working their way through the appellate process.

## The Roberts Court and the First Amendment

This term, like most in recent memory, included a number of First Amendment cases, allowing the Court to explain what must be present in order for restrictions on free speech to survive. Two of this term's higher-profile cases were decided under the First Amendment's framework and dealt with controversial topics: in *Snyder v. Phelps* the Court addressed the picketing of funerals for U.S. soldiers[1] and in *Brown v. Entertainment Merchants Association* the Court assessed the constitutionality of a state law prohibiting the sale of violent video games to minors.[2]

*Snyder* involved a multimillion-dollar intentional infliction of emotional distress jury verdict awarded to Albert Snyder, the father of Matthew Snyder, a U.S. marine killed in Iraq. At trial, Snyder won a lawsuit against Fred Phelps and the church he founded, Westboro Baptist Church. As they have done at other funerals across the country, Phelps and his church picketed Matthew's funeral; the picketing took place on public land about 1,000 feet away from the church, out of sight from those attending the funeral. However, there was local media coverage of the picket and Snyder eventually learned that the signs at his son's funeral said things such as "Thank God for Dead Soldiers," "Fags Doom Nations" "America is Doomed," "Priests Rape Boys," and "You're Going to Hell." Phelps challenged the jury verdict, claiming that it had violated his and his church-members' First Amendment rights.

With an 8-1 vote, the Court overturned the judgment and held that the First Amendment protected these protests. The Court made it clear that its decision was based on the particular facts of this case; the Court determined that because the speech dealt with a matter of public concern, it was given the greatest degree of First Amendment protection, and even though it was powerful and emotional speech, that alone wasn't enough to eliminate First Amendment protections. According to the majority opinion written by Chief Justice Roberts:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[3]

With the *Snyder* decision, the Court asserted that even speech that most people find distasteful is still given First Amendment protection; the Roberts Court refused to create a First Amendment exception for protests at funerals.

*Brown* presented the Court with another chance to create an exception to the First Amendment, and again, the Court refused to do so. *Brown* involved a challenge to a California law that prohibited the sale or rental of "violent video games" to minors, and required their packaging to be labeled "18." A somewhat divided Supreme Court (five justices joined the majority decision, but seven justices agreed with the result) refused to create exceptions to general First Amendment procedures for either violent speech or speech that is directed at children. According to the Court, video games, even violent ones, are forms of "speech," just like books or movies, and therefore, they are entitled to First Amendment protection. Furthermore, the Court determined that, throughout our history, it had never treated speech targeted at children differently than speech targeted at adults. In turn, the Court applied its most difficult First Amendment test to the California law, known as "strict scrutiny." Under this standard, the law would only be constitutional if California had shown that it had strong interest in the stated goals and that there was no easier way to accomplish those goals. In the majority's view, the law went too far and there were other, less intrusive ways to shield children from

In this Sept. 24, 2003, file photo, Betty Dukes, right, lead plaintiff in the potential class-action suit against Wal-Mart, poses with fellow plaintiffs shortly before a hearing in San Francisco. The suit alleged Wal-Mart discriminated against female employees. (AP Photo/Noah Berger)

violence. The *Brown* decision provided the Court with another opportunity to assert a First Amendment theme: even though we may dislike speech, the First Amendment does not allow that speech to be restricted merely because we dislike it.

In another First Amendment case that received less national attention, but is also reflective of the Court's desire to stick to traditional First Amendment customs, the Court, in *Sorrell v. IMS Health, Inc.*, struck down a Vermont law targeted at prescription "data miners."[4] The law prohibited the sale, disclosure, or use of pharmacy records that could reveal the prescribing practices of individual doctors. Vermont defended its law by arguing that such marketing to doctors can drive up the cost of medical care and cause doctors to prescribe more expensive brand-name drugs.

According to the Supreme Court, the Vermont law did restrict the data collectors' speech in violation of the First Amendment. The Court found two flaws with the law; first, it restricted speech based on its content, and second, that speech was also restricted based on the speaker. These flaws weren't necessarily fatal, but under the Court's reading of the First Amendment, require the state to satisfy the same strict scrutiny the California video game law was subject to. And just like the video game law, the Court found that Vermont's goals in enacting the prescription-marketing law did not justify the restrictions on speech.

In these, and this year's other First Amendment cases, the Court made it clear that when it comes to applying the First Amendment, the justices will attempt whenever possible to stick to long-standing interpretations, even when applying them to new technologies, modern situations, and in some cases, speech most people find to be objectionable.

### The Court, Big Business, and Class Actions: A Little Bit for Everyone

This year, the Court heard an unprecedented four cases dealing with class action lawsuits. The headline class action case, and one of the big headlines for the term overall, involved the largest female employment discrimination case ever filed: *Wal-Mart Stores, Inc. v. Dukes*.[5]

The case underlying the *Wal-Mart* appeal involved a class action suit by six female Wal-Mart employees who

claimed that Wal-Mart pay and promotion policies violated Title VII by treating female employees differently than their male counterparts. At the time the suit was filed, Wal-Mart employed approximately 500,000 women spread across 41 regions. Since then, Wal-Mart has employed more than three million women. Women comprise over 80 percent of Wal-Mart's hourly workers and hold one-third of managerial jobs.

The plaintiffs sought, and the lower courts granted, class certification allowing the case to move forward as a class action covering at least 1.5 million women. The lower courts asserted that the group of individuals represented in the *Wal-Mart* case satisfied the class action requirements for commonality, typicality, and adequacy.

A divided Supreme Court strongly disagreed. (All nine justices did agree that the plaintiffs failed to meet the requirements to be eligible for back pay but four justices, led by Justice Ginsburg, would have agreed with the lower courts and allowed the class action to go forward.) In a decision written by Justice Scalia, the Court determined that the *Wal-Mart* class was simply too large and varied to have "common" traits. According to the Court, "Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why I was disfavored."[6] In Justice Scalia's view, the plaintiffs had failed to produce enough evidence to show that the class members had been similarly discriminated against. Finally, the majority took some time to detail the dissimilarities between the class members. The Court asserted that there were simply too many dissimilarities between the class members, including too many diverse jobs, workplace categories, different supervisors, store locations, and a wide variety of regional policies. The majority concluded that some women employees "thrived while others did poorly. They have little in common but their sex and the lawsuit."[7]

With the *Wal-Mart* ruling, large corporations around the country likely issued a sigh of relief knowing that the Court looked so disfavorably upon large-scale class actions. The result of the *Wal-Mart* decision will be that employees with gender-based employment discrimination claims will have to produce more evidence of commonality at the class certification stage, or, they will have to prosecute their cases on an individual basis, which is often simply not feasible due to the high costs involved.

However, the Court didn't necessarily always rule in favor of big business, or against class action proceedings, when given the chance this term. Of the four class action cases heard, the Court ruled in favor of business defendants twice and in favor of the plaintiffs twice. However, in the two cases that will likely have the greatest effect, *Wal-Mart* and *AT&T Mobility LLC v. Concepcion* (a decision by the Court that a California state rule requiring class wide arbitration was superseded by the Federal Arbitration Act, meaning that individuals cannot benefit from class action disposition of their arbitration claims),[8] the Court sided with corporate defendants, but split 5–4 along conservative and liberal lines, with the liberals losing the day.

### The Court Addresses Preemption

In a unique development this year, the Court heard a number of preemption cases. Preemption is a somewhat technical constitutional law doctrine, but one that can have important consequences. Preemption has its roots in the Constitution's Supremacy Clause, which says that federal law "shall be the supreme Law of the Land." According to the Supreme Court, this means that a federal law will preempt state law in four circumstances. First, a federal law can directly say that it preempts a state law (this is called "express preemption"). Second, if a federal law and state law impose two conflicting requirements, making it impossible to comply with both, the federal law will preempt the state law. This is called "conflict preemption." Third, if a federal law so comprehensively regulates an area that it "occupies the field," it will preempt any state law in that area. This is called "field preemption." Finally, a federal law preempts state law when the state law frustrates the purpose of federal law.

This term, the Court applied its preemption doctrine in five cases; since these cases were somewhat technical, and the facts weren't always incredibly interesting, they didn't garner much media attention.[9] However, taken together, they teach important lessons about how the Court may deal with future preemption issues, most notably, the challenges to Arizona's controversial immigration law, S.B. 1070. As Professor Steven D. Schwinn has argued, the one thing we can really learn from the Court's recent preemption decisions is the importance of methodology. According to Schwinn,

> The Court traditionally considers congressional purpose the touchstone of its preemption analysis; it looks first to text to discern that purpose and then to legislative history and other indicators (such as the views of the regulating agency). That basic framework remains intact. But within that framework, there are some interesting debates about how and even whether to look beyond the text.[10]

Although the Court follows a set methodology when it comes to preemption cases, the way individual justices interpret the methodology can, and does, vary, and not always along predictable lines. For example, in writing for the majority in *Bruesewitz v. Wyeth*, Justice Scalia was joined by the four more conservative justices (Chief Justice Roberts and Justices Kennedy, Thomas, and Alito) and one of the Court's more liberal justices, Justice Breyer, in determining that the plain language of the text of the National Childhood Vaccine Injury Act expressly preempted design defect claims. However, Justice Breyer went

further and wrote a separate concurring opinion in order to express his strong view that such a reading was not only supported by the language of the text, but also other sources beyond the statute, including legislative history, statutory purpose, and the position of the relevant federal agency.

However, in another preemption case, the justices were unanimous in deciding that a federal automobile safety standard, based on its language and purpose, did not preempt state lawsuits against auto manufacturers who followed one of two options allowed by the federal standard. The *Williamson v. Mazda* case came out of a tragic car accident in which Thanh Williamson, a passenger wearing a lap belt in a rear aisle seat of a Mazda minivan, was killed. The Williamson family claimed that Mazda should have installed a lap-and-shoulder belt for rear aisle seats and that Mazda was therefore liable for Thanh's death. The Williamson family filed a state lawsuit against Mazda. Mazda claimed that the Williamson's lawsuit was preempted by the federal safety standard giving manufacturers a choice to install either type of belt in rear aisle seats.

After looking to the purpose behind the safety standard, the Court ruled against Mazda. According to the Court, the standard was not intended to give manufacturers a choice between the two types of belts, but rather, recognized that at the time it was drafted, lap-and-shoulder belts were difficult to use in rear aisle seats, but were safer. The Court concluded that the standard encouraged manufacturers to move towards the safer design through design innovation. In the view of the Roberts Court, a state lawsuit that would require manufacturers to install the safer lap-and-shoulder belts did not undermine the underlying purpose of the federal safety standard. Therefore, there was no preemption and the state suit could go forward.[11]

These two cases, and the other preemption cases from this term, show that when the Court is asked to pit federal laws against state laws, the methodology the Court uses may be consistent, but the outcomes are not always predictable. As Schwinn concludes, this term's preemption cases likely indicate that as far as where the Court will fall on the Arizona immigration law, we may not know where the justices will end up, but we likely know how they will get there.

For all the familiarity in the justices' alignments this term, there were still some fine distinctions in interpretation and some rulings that did not seem to flow from popularly assumed political ideologies. All this is to say that the cases this term give us some indication of where the Court is headed with its preemption jurisprudence, but they also leave some significant indeterminacies. But this is to be expected in this area of constitutional law, which

involves complicated and often opposing interests and requires a case-by-case approach.[12]

### The 2011–2012 Term

On October 3, the new Supreme Court term opened and this looks to be one that may be filled with more traditional constitutional "fireworks." The opening session slated 12 cases for argument with a whole set of additional cases ready for the November and December sessions. Of particular note, these include a group of cases challenging whether Medicaid patients and providers can object to a state's decision to change how it reimburses for Medicaid expenses.[13] These cases could give the Court a chance to expand on its Supremacy Clause doctrine. *United States v. Jones* is another case that will likely garner much interest, particularly given the Supreme Court's recent struggles with cases involving modern technology. *Jones* will ask the Court to determine whether the Fourth Amendment is violated when the police, without a warrant, use a GPS tracking device on a suspect's vehicle to monitor its movements on public streets.[14] And, in keeping with the Court's recent trend of hearing controversial First Amendment challenges, this year the Court has agreed to hear *FCC v. Fox Television*. This case challenges a court of appeals decision, which invalidated an FCC finding that broadcasts including expletives and nudity are indecent on the grounds that such regulations are unconstitutionally vague and violate the First Amendment.[15]

Given how the past term played out, it is likely that even with some controversial and highly-publicized cases, the Court will continue to focus on the methodology it applies and not the emotional responses a case may garner.

**Notes**

1. *Snyder v. Phelps*, No. 09-751 (March 2, 2011).
2. *Brown v. Entertainment Merchants Association*, No. 08-1448 (June 27, 2011).
3. *Snyder v. Phelps*, Ibid., 15.
4. *Sorrell v. IMS Health, Inc.*, No 10-779 (June 23, 2011).
5. *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (June 20, 2011).
6. *Wal-Mart v. Dukes*, Ibid., 12.
7. *Wal-Mart v. Dukes*, Ibid., 23.
8. *AT&T Mobility v. Concepcion*, No. 09-893 (April 27, 2011).
9. The preemption cases from this term included: *Chamber of Commerce v. Whiting*, No. 09-115 (May, 26, 2011) in which the Court upheld Arizona's punitive business licensing law for businesses that employed illegal aliens; *PLIVA v. Mensing*, No. 09-993 (June 23, 2011) holding that federal drug regulations, as they apply to generic drugs, directly conflict with state claims alleging failure to provide adequate warning labels; *Bruesewitz v. Wyeth*, No. 09-152 (February 22, 2011), in which the Court determined that the National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers for injury or death; *Williamson v. Mazda*, No. 08-1314 (February 23, 2011), a case determining that a federal safety standard requiring auto manufacturers to install seat belts in the rear of cars, but not requiring lap-and-shoulder belts, does not preempt state tort suits claiming that manufacturers should install the latter; and *AT&T Mobility v. Concepcion*, No. 09-893 (April 27, 2011) a decision by the Court that a California state rule requiring class wide arbitration was overruled by the Federal Arbitration Act, meaning that individuals cannot benefit from class action disposition of their arbitration claims.
10. Steven D. Schwinn "The Court's Preemption Cases," 38 PREVIEW 337 (August 6, 2011).
11. Justice Thomas wrote a separate concurring decision to indicate that in his view, the plain text of the federal Safety Act would have resulted in the same conclusion.
12. Ibid.
13. *Douglas v. Independent Living Center of South California*, No. 09-958, *Douglas v. California Pharmacists Association*, No. 09-1158, and *Douglas v. Santa Rosa Memorial Hospital*, No. 10-238.
14. *United States v. Jones*, No. 10-1259.
15. *FCC v. Fox Television*, No. 10-1293.

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