

# Supreme Court Term in Review

Catherine Hawke

You can't have a meaningful discussion about the 2011–2012 U.S. Supreme Court term without mentioning the historic health care challenge. However, even without that headliner, the term was jam-packed with interesting twists and turns. In addition to health care, the Court confronted a number of hot-button issues, including: immigration, the rights of criminal suspects and defendants, and First Amendment rights for liars, broadcasters, and unions.

## Health Care Challenge

Much ink and a great deal of bandwidth has been spent this summer detailing, recapping, debating, and rehashing the challenge to President Obama's health care law (formally, the Patient Care and Affordable Care Act, sometimes shortened simply to the ACA).<sup>1</sup> Given the publicity this challenge received, very little new can be covered on the substance of the ruling within the confines of this article. However, the language of the decision is vital to understanding the justices and the future of the Court. In the lead up to the arguments, much of the discussion focused on the role of the Commerce Clause and the individual mandate (also referred to as the minimum coverage provision). There were three other issues before the Court at that time: whether the Court was barred from hearing the case in the first place under a somewhat obscure federal tax law; whether, if the individual mandate was struck down, the rest of the ACA could remain; and lastly, whether the expansion of Medicaid violated the Tenth Amendment.

In a twist that few Court commentators expected, the Court upheld the ACA, but not under the Commerce Clause; rather, the Court held that the ACA was a valid

use of Congress's taxing authority. The majority was careful not to refer to the penalty for the failure to meet the individual mandate as a tax, but rather, simply stated the Congress had the authority to implement such a financial penalty. Writing for the majority, Chief Justice John Roberts noted: "It is of course true that the Act describes the payment as a 'penalty,' not a 'tax.'... That choice does not, however, control whether an exaction is within Congress's constitutional power to tax." The fact that the chief justice was writing for a majority to uphold the Act came as a surprise to some. Whether Roberts's decision not to vote with the other justices in the conservative bloc of the Court was merely a blip on his normally more conservative political viewpoint or an actual change in his jurisprudence remains to be seen. In a very passionate dissent from Roberts's majority opinion, the four conservative justices broke down each part of the majority's decision; in the view of the dissent, all parts of the ACA were unconstitutional and needed to be struck down.

## First Amendment and Free Speech

Although the Court's First Amendment docket was quieter in 2012 compared to

previous years, it did provide fuel for the continuing debate among court watchers about whether the Roberts Court is the most pro-First Amendment Court or the least (and with most things related to the Court, the answer is "it depends on your viewpoint").

The most closely watched First Amendment case *United States v. Alvarez*, usually referred to as the Stolen Valor case, involved lying.<sup>2</sup> The case arose out of the actions of Xavier Alvarez, who introduced himself at a district water board meeting as having received the Medal of Honor, which was untrue. Alvarez was charged under the Stolen Valor Act, which criminalized false claims about holding any decoration or medal authorized by Congress for the armed forces. Alvarez pled guilty, but claimed that the Act violated the First Amendment; after the case worked its way through the lower courts, the Supreme Court agreed with Alvarez—six justices held that the Stolen Valor Act is unconstitutional. Harkening back to the Court's recent decision that protests at military funerals were protected by the First Amendment,<sup>3</sup> the Court in *Alvarez* strongly opposed content-based censorship of speech that might otherwise be viewed as being socially harmful. *Alvarez* continued the Court's recent trend of pushing back on overbroad restrictions on speech that is perceived as being less valuable to society.

The other big "distasteful" speech case this term, *FCC v. Fox Television Stations*,



This artist rendering shows Chief Justice John Roberts, center, speaking at the Supreme Court in Washington, D.C., June 28, 2012, when the Court upheld President Barack Obama's health care law. From left are, Justices Sonia Sotomayor, Stephen Breyer, Clarence Thomas, Antonin Scalia, Roberts, Anthony Kennedy, Ruth Bader Ginsburg, and Elena Kagan. (AP Photo/Dana Verkouteren)

involved a challenge to the FCC's decision to sanction broadcasters for single utterances of offensive terms.<sup>4</sup> According to the broadcasters, the FCC's application of its rules was so unpredictable and haphazard as to be unconstitutionally vague; the broadcasters also claimed that the regulation of a single utterance or glimpse simply went too far constitutionally. In a somewhat unexpected turn, the Court upheld the broadcasters' constitutional claims, but on very limited grounds that neither the broadcasters nor the FCC originally argued. In an opinion authored by Justice Anthony Kennedy, the Court held that because the broadcasts at issue occurred before the FCC enacted its current regulation structure, there was not enough notice to broadcasters as to what was allowed at the time of the broadcasts. Many court watchers agreed that, although the Court's decision did not directly challenge the FCC's current regulation scheme, the Court was likely signaling to the FCC to change course; Justice Kennedy concluded the opinion by stating, "this opinion leaves the Commission free to modify its current indecency policy in light of

its determination of the public interest and applicable legal requirements."

The Court's other free speech case from this term garnered much less attention, but will likely go a long way to solidifying the Roberts Court's legacy with regard to regulations (or lack thereof) on political speech. *Knox v. SEIU* involved a challenge by public employees who had not joined their union "agency shop" and who objected to paying for the union's political advocacy.<sup>5</sup> The union had imposed a special assessment which was to be used entirely for political advocacy, and failed to give the nonmembers an opt-out opportunity. According to the Court, the union's actions violated the nonmembers' First Amendment rights. However, the Court went one important step further: traditionally, allowing an opt-out for nonmembers from such assessments had been enough, but according to the Court in *Knox*, the First Amendment required that nonmembers *opt-in* to such special assessments.

In all of these First Amendment cases, Justice Kennedy once again played a major role and was, again, a consistent supporter of First Amendment rights.

As Paul Smith, a partner at Jenner & Block, LLP and co-chair of the firm's Media and First Amendment Practice, noted, "more than anyone else, [Justice Kennedy] is the justice who determines when and where the First Amendment will be applied to protect speech."<sup>6</sup>

### **Criminal Procedure**

First Amendment matters weren't the only cases on the downswing this year; there were fewer than usual criminal procedure and criminal law cases on the docket. This term saw the Eighth Amendment being used as a tool to successfully challenge mandatory sentences of life without parole for juveniles.<sup>7</sup> Another set of cases saw a criminal defendant using the Sixth Amendment to, again successfully, challenge the quality of assistance of counsel during the plea bargaining process. In *Missouri v. Frye* and *Lafler v. Cooper*,<sup>8</sup> the Court first noted that plea bargains have become a central part of our criminal justice system; in turn, the Court concluded that such an important step in our criminal justice system requires effective assistance of counsel under the Sixth Amendment.

In both of these cases, the defendants' attorneys failed to notify them of an offered plea agreement, a violation of the Sixth Amendment according to the Court. Another headliner case involving criminals didn't focus on defendants, but rather those suspected for crimes. *US v. Jones* involved a challenge to the District of Columbia's police department's use of GPS tracking devices.<sup>9</sup> *Jones* challenged the constitutionality under the Fourth Amendment of the police attaching a GPS device without a warrant to Jones's car (Jones was a suspected drug dealer); the device was then used to track Jones for four weeks. According to the Court, the attachment of the GPS and the tracking of Jones constituted a search under the Fourth Amendment.

These criminal cases give some counterweight to the knee-jerk view that the Roberts Court is anti-criminal defendants and suspects. However, when it comes to the criminal procedure docket, the analysis isn't always so black and white. *Jones* can be viewed as dealing much more with tension between technology and the Constitution, and the juvenile life without parole cases can just as easily be viewed as the Court continuing to define and refine how courts should deal with children. And, there is one important criminal suspect case that has gotten lost in the shuffle this year: *Florence v. Board of Chosen Freeholders*.<sup>10</sup> *Florence* arose after Albert Florence was arrested on a warrant for failure to pay an outstanding fine (the warrant had been issued in error as Florence had already paid the fine). After his arrest, Florence was strip searched twice by jail officials. Florence claimed that the searches violated his Fourth Amendment rights as he was about to enter the general jail population and there was no individualized suspicion to justify the searches. The Court disagreed and deferred to local authorities when it comes to establishing jail searches. According to Justice Kennedy, in writing for the majority, "Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise

reasonable solutions to the problems they face."

### Federalism and the Role of the States

*Florence* was not the only case before the Court defining the proper role of the local, state, and federal governments. This term included over a half-dozen cases involving issues of federal-state relations. As John Marshall Law School Professor Steven D. Schwinn commented, these cases "on balance, lean strongly in favor of the federal government."<sup>11</sup> These cases were varied and included the health care challenge, the challenge to the Arizona immigration law,<sup>12</sup> more traditional preemption cases detailing when a federal law trumps state laws,<sup>13</sup> and two important civil rights cases dealing with the Family and Medical Leave Act and the Voting Rights Act.<sup>14</sup> In the majority of these cases, the Court failed to issue rulings that took a strong stance

in favor of states' rights; for example, in the major headlines from this section, health care and Arizona immigration, the Court sanctioned federal government actions to legislate and regulate in areas that arguably were within the purview of a state's police power. On the other hand, as Professor Schwinn concludes: "the Court also signaled, once again, that it takes federalism principles very seriously in cases involving federal civil rights enforcement."

### Looking Ahead

As the Court begins its 2012 term, the role of the federal and state governments with regards to enforcing, or defining, important civil rights will likely take center stage. The first such case came before the Court on October 10th, *Fisher v. University of Texas*.<sup>15</sup> *Fisher* involves a challenge to the University of Texas at Austin's use of race in undergraduate admissions; specifically, the Court has



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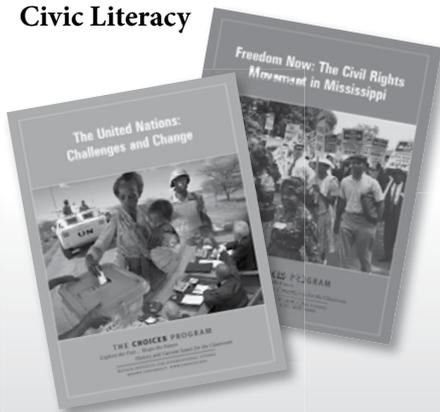
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been asked to determine whether such a program is permitted under the Court's interpretation of the Equal Protection Clause. This case is a follow up to the 2003 *Grutter v. Bollinger* holding that a narrowly tailored use of race during the admissions process does not necessarily violate the Equal Protection Clause. The now-retired Justice Sandra Day O'Connor was the important fifth vote, and author of the opinion, in *Grutter* to allow the University of Michigan Law School affirmative action plan to stand. Since 2003, the line-up of justices has shifted and many Court-watchers will be waiting to see if *Fisher* is just *Grutter* Part II with the role of Justice O'Connor being played by Justice Samuel Alito (and with a completely different ending).

Two cases of interest in the criminal law arena will also be heard during the early portion of this term: *Bailey v. U.S.* and *Florida v. Jardines*.<sup>16</sup> Both of these cases seem to follow up on cases from the previous term, though with unique twists. *Bailey* involves a search that was conducted with a search warrant; however, the police detained an individual who had recently left the home to be searched. It is Supreme Court precedent that officers executing a search warrant may detain individuals within the premise while the search is being completed; it is now up to the Court to determine whether that rule extends further.

*Jardines* takes the line of debate surrounding *U.S. v. Jones* (i.e., how the advance technology applies to police practices and the Constitution) and turns it on its head, assessing some of the most low-tech police tools out there: dogs. *Jardines* ask the Court whether the use of a drug sniffing dog at the front door of a suspected grow house is a Fourth Amendment search requiring probable cause.

At the time of publication, there were some attention-grabbing cases waiting in the wings that although not currently before the Court, will likely be, before the term is out. The two leaders among

this pack are the numerous challenges to the Defense of Marriage Act/same sex marriage cases and the challenge to the Voting Rights Act (the Court clearly signaled it was willing to play ball on this issue in *Perry*).

A few questions to keep in mind as the Court opens the curtain on this term: what is the legacy of the health care challenge on the current batch of justices, particularly Chief Justice Roberts? Is there really a shift in the Court's political alignment? And while considering the politics at play, is the Roberts Court more actively engaged in political hot buttons as compared to its predecessors, or does it just seem that way in the light of an election year?



### Notes

1. *National Federation of Independent Business v. Sebelius*, Docket No. 11-393
2. Docket No. 11-210
3. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)
4. Docket No. 10-1293
5. Docket No. 10-1121
6. *Preview of United States Supreme Court Cases*, *American Bar Association* 39, no. 8 (2012).
7. *Miller v. Alabama*, Docket No. 10-9646 and *Jackson v. Hobbs*, Docket No. 10-9647
8. Docket No. 10-444; Docket No. 10-209
9. Docket No. 10-1259
10. Docket No. 10-945
11. *PREVIEW*, supra, at 286.
12. *Arizona v. United States*, Docket No. 11-182
13. *Kurns v. Railroad Friction Products*, Docket No. 10-879 and *National Meat Association v. Harris*, Docket No. 10-224.
14. *Coleman v. Court of Appeals of Maryland*, Docket No. 10-1016 and *Perry v. Perez*, Docket No. 11-713
15. Docket No. 11-345
16. Docket No. 11-770; Docket No. 11-564

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