CAC Supreme Court Preview:

Tests of Government Power in the Supreme Court's 2011 Term—With Even Bigger Cases on the Horizon

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Introduction

The Supreme Court's 2011 Term, which officially begins on the first Monday in October, is already marked by cases that challenge the federal government's constitutional authority to act to protect against sex discrimination in the workplace, *Coleman v. Maryland Court of Appeals*, and to conduct surveillance using modern technology, *United States v. Jones*, as well as the states' ability to take regulatory action that purportedly conflicts with federal law, for example, *Douglas v. Independent Living Center.* But the likely blockbusters of the Term are waiting in the *cert*. pool—cases challenging the constitutionality of President Obama's health care reform law, defending Arizona's controversial immigration law, attacking affirmative action policies, and asserting the rights of same-sex adoptive parents. By June 2012, this term may prove to be among the most momentous terms in recent decades.

Coleman v. Maryland Court of Appeals

In *Coleman*, the Court will decide whether a state can be sued under the "self-care" provisions of the Family and Medical Leave Act, which prohibit employment discrimination based on an employee's attempt to obtain leave due to his or her own serious health condition. *Coleman* is an important sequel to the 2003 ruling in *Nevada Human Resources Department v. Hibbs*, in which a divided Court held that the FMLA's "family-care" requirement of unpaid leave for employees to care for sick family members is a constitutional exercise of Congress's power to protect against gender discrimination in the workplace. The *Coleman* case poses a fundamental question about the permissible role of Congress in passing laws to enforce constitutional rights, and the role the Court should play in responding to such congressional action.

Daniel Coleman, an African-American man, was employed by the Maryland Court of Appeals as executive director of procurement and contract administration. In 2007, he sought FMLA leave to care for his own documented health condition; leave was denied. Coleman eventually filed suit, alleging, among other claims, that his FMLA leave was denied in retaliation for his earlier investigation of wrongdoing by office staff members.

The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of Coleman's FMLA claim, concluding that Congress unconstitutionally abrogated the states' Eleventh Amendment immunity with respect to the FMLA's self-care provision. The Supreme Court has held that while Congress cannot validly abrogate a state's immunity from private suit under its Article I powers, it can do so under its authority to enforce the provisions of the Fourteenth Amendment, including the Equal Protection Clause.

In *Hibbs*, the Court held that Congress had, in enacting the family-care provisions of the FMLA, constitutionally abrogated the states' Eleventh Amendment immunity because it was exercising its Fourteenth Amendment enforcement authority in response to "'the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits.'" The circuit court in *Coleman*, however, distinguished the FMLA's self-care provision from the family-care provision at issue in *Hibbs*, and concluded that "preventing gender discrimination was not a significant motivation for Congress in including the self-care provision."

Coleman's brief to the Supreme Court—supported by a strong group of *amici curiae*, including Constitutional Accountability Center—argues that the lower court got it wrong for two main reasons. First, the language and purpose of Section 5 of the Fourteenth Amendment readily establish that Congress possessed ample authority to enact the FMLA's self-care provision as part of the Act's effort to root out workplace gender discrimination based on leave requests. Second, as CAC's brief argues in particular, the expansive interpretation of the Eleventh Amendment adopted by the lower court—and, indeed, by the Supreme Court itself—does not accord with the Amendment's language and historical purpose. The Eleventh Amendment does not, by its terms, apply to a suit by a citizen against his or her own State—the amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"—and the Amendment was ratified in response to a particular case that dealt with a federal lawsuit by a citizen of one State against a State that was not his own. Coleman's suit against his own state, pursuant to a federal law enforcing the Constitution's guarantee of equal protection, does not fall within the original scope of the Eleventh Amendment.

Coleman will be a significant test of the validity of *Hibbs* in the Roberts Court. Four of the six Justices who voted to uphold the family-care provision are no longer on the Court; while Justice Stevens and Justice Souter have been succeeded by Justices who are likely to reaffirm *Hibbs* and apply it to *Coleman* (Justices Kagan and Sotomayor, respectively), Chief Justice Rehnquist and Justice O'Connor have been replaced by Chief Justice Roberts and Justice Alito, who may well part ways with their predecessors on *Hibbs*. Thus, there could now be a five-Justice majority willing to consider overruling *Hibbs* or at least limiting it by refusing to acknowledge Congress's power to enact the FMLA's self-care provision in *Coleman*. Moreover, the question of the original meaning of the Eleventh Amendment could pose an awkward obstacle for more conservative members of the Court who might be inclined to otherwise strike down Congress's abrogation of state immunity in the FMLA.

United States v. Jones

In *Jones*, the Court will determine whether the Fourth Amendment's protections against unlawful searches and seizures bars the installation—without a warrant—of a GPS monitoring device on a person's car in order to monitor the car's movements over a period of several weeks.

Without Jones's knowledge, law enforcement officers attached a GPS tracking device to his car and observed his movements for four weeks, including trips to a house used for drug trafficking. After his objections to inclusion of evidence obtained from the GPS device were overruled, Jones was convicted for drug trafficking and sentenced to life in prison. The U.S. Court of Appeals for the D.C. Circuit reversed, concluding that the warrantless use of the GPS device violated the Fourth Amendment. The appeals court distinguished Jones's case from an earlier Supreme Court ruling, *U.S. v. Knotts*, which held that the warrantless use of an electronic beeper to track a car during a single trip was not a search and therefore did not violate the Fourth Amendment. Unlike in *Knotts*, the court reasoned, the information regarding a pattern of movement or activity could only have been obtained through the use of technology, as opposed to public observation.

The United States is arguing in the Supreme Court that monitoring a person's movements for a single car trip is not constitutionally different from monitoring a person's movements for several weeks because, in both cases, such activities are exposed to the public. The government further argues that the installation of a GPS device does not constitute a seizure for purposes of the Fourth Amendment because it does not interfere with the vehicle owner's ability to use the car.

The *Jones* case could produce an interesting alliance between more liberal Justices interested in protecting privacy interests and more conservative Justices who favor strong protections against government seizure of private property. Regardless of how the case comes out, the *Jones* case also serves as a reminder that our enduring Constitution cannot be governed by a theory of interpretation that seeks to limit the Constitution to the specific applications envisioned by its original framers. Advancements in technology are one of the most obvious rebukes to such a conservative theory. As even Justice Scalia noted in *Kyllo v. United States* (2001), "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."

Douglas v. Independent Living Center of Southern California

In a set of cases consolidated under the name *Douglas v. Independent Living Center of Southern California*, which will be argued on the first day of the Term, the Court will determine whether Medicaid beneficiaries, citing the Constitution's Supremacy Clause, can sue under the federal Medicaid statute to preempt state action that arguably violates that statute.

In 2008 and 2009, the California Legislature passed several laws reducing Medicaid payment rates. Medicaid recipients and providers sought to preempt the cuts in federal court, arguing that the state laws conflicted with and thus were preempted by the federal Medicaid statute. Specifically, federal law says Medicaid rates must be "sufficient to enlist enough providers" so that Medicaid recipients have access to care to the same extent as the general population in an area.

The U.S. Court of Appeals for the Ninth Circuit affirmed the recipients' ability to raise a preemption challenge to California's plan under the Supremacy Clause of the Constitution, which declares federal law "the supreme law of the land." While the Medicaid statute does not expressly provide a private right of action, the appeals court concluded that the recipients and providers had shown that California's cuts to Medicaid payment rates violated the requirements of the federal Medicaid law and thus were preempted by direct operation of the Constitution.

In a surprise to many observers, the Obama Administration filed a brief opposing the ability of Medicaid recipients and providers to sue to enforce the requirements of the federal statute. Many consumer advocates and health-law experts were disappointed that the Administration sided against low-income recipients of Medicaid who challenge state violations of federal law.

In addition, *Douglas* is interesting because the Medicaid recipients are using a tactic—the preemption suit—that has been used quite successfully by business interests to thwart state health and safety laws. Indeed, the Chamber of Commerce has filed a brief in support of the Medicaid recipients and providers. This could bring unusual results from conservative Justices who are not shy about shutting the courthouse doors to individual litigants, but who nonetheless have heartily supported the ability of business interests to press preemption claims under the Supremacy Clause.

Big Cases on the Horizon

Health Care

Though the current 2011 Term docket already has its share of significant and interesting cases, the real blockbuster of the Term is, as of now, a "coming attraction." Indeed, now that the Obama Administration has filed a petition for *certiorari* appealing the U.S. Court of Appeals for the Eleventh Circuit's ruling in *Florida v. HHS*, striking down the minimum coverage provision of the Affordable Care Act, the Supreme Court is now very likely to hear and decide the constitutionality of President Obama's health care reform law this Term.

The Court already has a pending petition for *certiorari* in *Thomas More Law Center v. Obama*, appealing from the ruling of the U.S. Court of Appeals for the Sixth Circuit that the minimum coverage provision of the Affordable Care Act is a constitutional exercise of Congress's power under the Commerce Clause. The Court, in its discretion, could choose to

consolidate the cases. But even if the cases are not consolidated, the Court will undoubtedly take into account the various opinions from the courts of appeals. Of particular note is Judge Jeffrey S. Sutton's concurring opinion in *Thomas More* upholding the health care law's individual mandate under the Commerce Clause. A nuanced opinion from a conservative judge upholding the law is likely to hold significant sway with the Justices—especially Justice Scalia, who has described Sutton as one of his best law clerks.

Affirmative Action

This Term, the Supreme Court is likely to take up—for the first time with its current configuration of Justices —the issue of affirmative action in higher education. Since the Court's 5-4 decision in *Grutter v. Bollinger* (2003), which held that racial diversity in higher education is a "compelling state interest" justifying the use of racial preferences to ensure that there is a "critical mass" of minority students, Justice Alito has replaced Justice O'Connor, who authored *Grutter*. This means that there is now a likely 5-4 split in favor of Justices who would like to limit or even overrule *Grutter*.

The case that will likely re-open this issue at the Court is *Fisher v. Texas*, in which the U.S. Court of Appeals for the Fifth Circuit upheld the University of Texas's use of race as a part of its admissions program. The plaintiffs in *Fisher* have argued that UT cannot permissibly consider race in the admissions process if the school can use racially neutral policies to achieve diversity. Given that a plurality of the conservative Justices joined Chief Justice Roberts's simplistic statement in *Parents Involved v. Seattle School District No. 1* (2007), that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race"—which the conservative Justices take to include race-conscious measures to improve school diversity—the battle will be for the swing vote of Justice Kennedy.

The petition for *certiorari* was filed on September 25, and the state's response is currently due October 19, 2011. On this current schedule, the Court could grant and hear the *Fisher* case this Term.

Equality

The Supreme Court also has before it a petition for *certiorari* challenging a state's refusal to give constitutionally-required "full faith and credit" to valid, out-of-state adoptions by gay parents. While the highest profile case involving equal protection for gays and lesbians, *Perry v. Schwarzenegger*, involving marriage equality, may not make its way to the Supreme Court until next Term (if at all), *Adar v. Smith* raises important equality issues of its own.

In 2006, Oren Adar and Mickey Smith legally adopted a little boy who was born in Louisiana. The valid, legal adoption took place in New York. In order to ensure that their son could be covered by Smith's employer's health insurance and get travel and identity documents, among other rights and benefits, the couple asked Louisiana to issue an amended birth certificate listing them as the boy's parents. Louisiana refused, even though state law requires that when a child born in Louisiana has been adopted in another state, Louisiana must issue an amended birth certificate to the adoptive parents upon presentation of the adoption

decree. Louisiana claimed that the New York adoption decree violated its own policy of not allowing joint adoptions by "unmarried persons."

Adar and Smith, supported by *amici*, including CAC, argue that the state's refusal to recognize Adar and Smith's valid, out-of-state adoption of their child violates the Full Faith and Credit Clause of the U.S. Constitution. This Clause requires that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and ensures that judgments issued in one state are given nationwide force. In other words, the Full Faith and Credit Clause prohibits a state from refusing to enforce another state's judgment based on disagreement with that state's "public policy." So, even if Louisiana doesn't want "unmarried" or gay couples adopting a child—which may be a constitutional problem in its own right—the Full Faith and Credit Clause nonetheless prevents the state from refusing to recognize a valid judgment of adoption from a state that doesn't have such discriminatory policies. The Fifth Circuit, however, held that Louisiana could, in fact, discriminate in such a fashion and that Adar and Smith lacked even the right to bring suit against the state under the Full Faith and Credit Clause.

The Supreme Court will consider whether to grant review in *Adar* in its conference on October 7, 2011. If the Court grants review, the case will likely be heard early in 2012.

Immigration

Finally, the Supreme Court will also have the opportunity to hear Arizona's appeal challenging the lower courts' refusal to allow portions of the state's controversial immigration law, S.B. 1070, to go into effect. Among other things, the statute would require law enforcement officers to determine the immigration status of a suspect—even in the case of a minor infraction, such as a traffic offense—whenever they have a "reasonable suspicion" the person may be in the country illegally.

The United States has argued (supported by CAC and other amici) that the text of the Constitution and centuries of precedent demonstrate that the federal government has control over immigration, naturalization, citizenship, and deportation policy. The U.S. Court of Appeals for the Ninth Circuit agreed, emphasizing that the federal government's powers are particularly sweeping when it comes to immigration and foreign affairs.

Since Arizona passed its law, other states—notably, Alabama—have adopted similar or even more stringent immigration laws. Accordingly, while the Court might otherwise be reluctant to take a case that is on appeal from a preliminary injunction ruling, the Justices may want to clarify sooner rather than later the line between federal authority over immigration and the area, if any, in which states are free to act. The United States' response to Arizona's petition for *certiorari* is currently due October 12, 2011.