

# Looking Ahead: October Term 2013

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After two consecutive years when much of the nation's attention was riveted on the Supreme Court, awaiting long-anticipated rulings on the final day of the Court's term, it is far too soon to know whether we will again find ourselves similarly transfixed on electronic media and the Court's own website once the final day of the October 2013 term arrives in June 2014. Nevertheless, the coming term is already off to quite an auspicious start. Before departing on its summer vacation, the Supreme Court had granted review in 47 cases for its next term, which after some consolidations of similar cases will produce a total of 44 hours of oral argument.

If the Court's workload in each of the last three years is any indication, the Court may have already granted review in more than half of the cases that will be decided on the merits during the October 2013 term—in line with Chief Justice John Roberts's wish to front-load oral argument a bit more to give himself and his colleagues more time to write those final opinions. Or perhaps the term will mark an increase in the Court's merits workload after several terms in which the Court's workload has either declined or held relatively steady.

I begin this essay by taking a look at a baker's dozen of the most important and interesting cases on the Court's docket for the upcoming term. Then I conclude by examining three other cases that may sooner or later make it onto the Court's docket and one potential development that could capture the attention of Court-watchers as the October 2013 term approaches its conclusion.

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## Separation of Powers

### *Recess Appointments*

From its origin in 1789, the U.S. Constitution has provided that: “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.”<sup>1</sup> Although presidents have used their recess appointment powers numerous times to fill vacancies in the executive and judicial branches, the U.S. Supreme Court has never been called on to conclusively determine when that power may lawfully be exercised. Until now.

In *NLRB v. Noel Canning*, the Court has agreed to review a recent ruling by the U.S. Court of Appeals for the D.C. Circuit that severely limited the nature and availability of the president’s recess appointment power.<sup>2</sup> Attempting to thwart President Barack Obama’s ability to make certain recess appointments, the Senate avoided declaring formal recesses and instead convened every few days in so-called pro forma sessions. After President Obama nevertheless proceeded to make recess appointments of individuals to serve on, among other places, the National Labor Relations Board, companies adversely affected by NLRB decisions began challenging the legality of the composition of that agency’s board.

Eventually, one such dispute made its way to the D.C. Circuit, where the majority on a divided three-judge panel held not only that a president is limited to exercising his recess appointment power during a formal intersession recess of the Senate, but also that the recess appointment power can only be exercised with respect to a vacancy that arose during the same recess in which the appointment was made. Taken together, the D.C. Circuit’s ruling represented a significant and largely unexpected limitation on the president’s recess appointment power that made Supreme Court review a foregone conclusion.

*NLRB v. Noel Canning* offers something for every possible method of approaching a constitutional conundrum. The plain language of the original text of the U.S. Constitution is implicated, of course. In addition, the recess appointment power has a long history of having

<sup>1</sup> U.S. Const., art. 2 § 2, cl. 3.

<sup>2</sup> 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (June 24, 2013) (No. 12-1281).

been exercised, so justices who care to examine the historical understanding of a constitutional provision will have much history to examine. And the purpose that the recess appointment power was originally intended to serve may prove important, as may the purpose that the power has come to serve now that compromise has become especially rare in the nation's capital. Finally, justices who value a pragmatic approach to judging may feel conflicted between enabling the president to use the recess appointment power to fill vacancies and encouraging the opposing political parties to pursue compromise nominees acceptable to both parties, which could be a consequence of upholding the D.C. Circuit's rigorous limits.

The judiciary is far from an uninterested observer in the battle over the legality of recess appointments. The three most recent recess appointees to the U.S. Supreme Court remain well-known today: Chief Justice Earl Warren and Associate Justices William Brennan and Potter Stewart. President George W. Bush named two recess appointees to the federal appellate bench: Charles Pickering Sr. and William Pryor Jr. Although the Senate never confirmed Judge Pickering, it did confirm Judge Pryor, who continues to serve on the U.S. Court of Appeals for the Eleventh Circuit. And some may recall that President Bill Clinton, shortly before leaving office, used a recess appointment to place Roger Gregory on the U.S. Court of Appeals for the Fourth Circuit. In a gesture of bipartisanship—which proved futile given the battles attending his later nominees—President George W. Bush thereafter nominated Judge Gregory to a lifetime post on the Fourth Circuit, where he continues to serve thanks to the Senate confirmation that followed.

It is next to impossible to predict the ultimate outcome of the recess appointment case at the Supreme Court, but I would be very surprised if the D.C. Circuit's ruling emerged entirely intact. The decision could provide one more noteworthy opportunity for comparing and contrasting the justices' varied approaches to constitutional construction.

#### *Bankruptcy Courts Exercising Article III Jurisdiction*

In *North Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Supreme Court examined the adjudicatory limitations applicable to bankruptcy courts created by Congress under Article I of the Constitution, presided over by judges who lacked life tenure and the other

protections constitutionally guaranteed to judges who preside over the courts created pursuant to Article III.<sup>3</sup> The Court returned to this issue most recently in *Stern v. Marshall*, a case made all the more interesting because it tangentially involved Anna Nicole Smith.<sup>4</sup>

In the upcoming term, the Court will again reexamine the limits of the adjudicatory powers of Article I bankruptcy courts. The newly pending case, *Executive Benefits Insurance Agency v. Arkison*, calls on the Court to resolve, among other things, whether litigants can consent through their conduct to a bankruptcy court's exercise of power otherwise reserved to an Article III court.<sup>5</sup>

Given the continuing economic uncertainties plaguing both businesses and American workers, bankruptcy remains a busy area of practice for the courts. Although Congress, in a fairly expeditious manner, fixed the flaws in the bankruptcy system that the Supreme Court identified in *Northern Pipeline*, Congress has yet to fully remedy the additional flaws that the Court more recently identified in *Stern v. Marshall*. The Court has, in the past, almost jealously guarded the Article III judicial power to ensure that it is exercised only by officials who possess the attributes of Article III judges. In the *Executive Benefits* case, the justices will have the opportunity to further confront these issues in the context of uncertainty that has arisen in the aftermath of the *Stern* ruling.

## Individual Rights

### *State Affirmative Action Bans*

Sometimes, a potential Supreme Court blockbuster can fizzle out, as was the case with the Court's ruling in the 2012 term case of *Fisher v. University of Texas at Austin*.<sup>6</sup> That case potentially could have prohibited—but ultimately did not do so—as a matter of federal constitutional law using race or national origin as a ground for giving minorities an advantage in admissions to state colleges and universities.

Like a moth to a flame, however, in the 2013 term the Court will again return to this same controversial subject matter, this time in

<sup>3</sup> 458 U.S. 50, 58 (1982) (plurality opinion).

<sup>4</sup> 131 S. Ct. 2594 (2011).

<sup>5</sup> 702 F.3d 553 (9th Cir. 2012), cert granted, 133 S. Ct. 2880 (June 24, 2013) (No. 12-1200).

<sup>6</sup> 133 S. Ct. 2411 (2013).

the context of examining the constitutionality of an amendment to Michigan's constitution that prohibits, as a matter of state law, race- and sex-based discrimination or preferential treatment in public-university admissions decisions, government contracting, and public employment.

The en banc Sixth Circuit, by a vote of 8-7 over several heated dissents, ruled that the Michigan Civil Rights Initiative, which Michigan voters approved as a state constitutional amendment in 2006, violated the Equal Protection Clause of the U.S. Constitution by denying minorities a "fair political process."<sup>7</sup> In *Schuetz v. Coalition to Defend Affirmative Action*—pronounced "shoo-tee"—the Supreme Court will review not just this controversial ruling, but that little-used and much-misunderstood "political process" doctrine.

If a majority on the Supreme Court views the MCRI not as an obstacle to protection against unequal treatment, but only as prohibiting preferential treatment, then the Court is likely to reverse the Sixth Circuit and uphold the constitutionality of the Michigan provision. But if the en banc Sixth Circuit's sharply divided views on this case offer any insight, the nearly unanimous outcome that the Supreme Court reached in *Fisher* may be difficult to replicate here. On the other hand, to this point only California and Michigan have enacted these types of state constitutional affirmative action bans, so the ultimate impact of this case—whatever it turns out to be—may initially be rather limited.

#### *Legislative Prayers and the Separation of Church and State*

In *Town of Greece v. Galloway*, the Supreme Court will again return to the always-controversial subject of separation of church and state. The Town of Greece, New York—located just outside Rochester—has a practice of allowing citizens to volunteer to give the invocation at the beginning of town board meetings. In that regard, this small New York State town has much in common with many other local governments throughout the nation.

After two town residents challenged the constitutionality of the town's legislative prayer practices, the U.S. Court of Appeals for the

<sup>7</sup> *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (en banc), cert. granted sub nom. *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (Mar. 25, 2013) (No. 12-682).

Second Circuit applied an “endorsement” test and concluded that the proportion of Christian prayers to non-Christian prayers could be viewed by an “ordinary, reasonable observer” as affiliating the town with the Christian faith.<sup>8</sup> The Supreme Court has now granted review to resolve whether constitutional challenges to legislative prayer practices should be analyzed under a historical test, whereby the practices will ordinarily be held lawful, or instead under an “endorsement” test, which is the approach the Second Circuit used in ruling against the Town of Greece.

Although the vast majority of the U.S. citizenry is probably unconcerned and unaware whether its local governmental bodies have any practices or policies regarding legislative prayer, the issue at the heart of *Town of Greece* remains likely to stir passions in people who have strong feelings on where the line separating church from state should be drawn. The composition of the Supreme Court has changed somewhat since the Court sharply divided over the legality of various Ten Commandments displays located on government property.<sup>9</sup> But it would not be a surprise if the Court were still divided on the subject of how to evaluate the constitutionality of challenged legislative prayer practices. The most anyone who values clarity in the law can hope for is a decision announcing clear principles joined in by a majority of the justices.

#### *Abortion and the Speech Rights of Anti-Abortion Protestors*

Another perennially controversial subject at the Supreme Court is abortion. Before even formally opening the 2013 term, the Court has accepted for review not one but two cases implicating that politically fraught issue.

Abortion was necessarily going to be in the news in 2013, as this year marks the 40th anniversary of the Court’s ruling in *Roe v. Wade*,<sup>10</sup> which has unquestionably become one of the Court’s all-time controversial rulings. Moreover, a number of states appear to be in a contest to see which can enact the most restrictive abortion-access law

<sup>8</sup> *Galloway v. Town of Greece*, 681 F.3d 20, 29–30 (2d Cir. 2012), cert granted, 133 S. Ct. 2388 (May 20, 2013) (No. 12-696).

<sup>9</sup> *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>10</sup> 410 U.S. 113 (1973).

imaginable, in an effort to continue to provide the Supreme Court with opportunities to revisit and perhaps overrule earlier decisions recognizing a woman's substantive due process right to terminate her pregnancy.

Some had thought that perhaps medical advances might ultimately render the right to an abortion less controversial, as abortions induced by medications began to replace the need for a surgical procedure. As the Supreme Court's grant of review in *Cline v. Oklahoma Coalition for Reproductive Justice* demonstrates, however, states are equally capable of attempting to place obstacles in the path of medication-induced abortions.<sup>11</sup>

On June 27, 2013, when the Supreme Court granted review in *Cline*—slipping this in while the news cycle was consumed with the previous days' rulings on voting rights and gay marriage—the Court immediately certified several state-law questions to the Supreme Court of Oklahoma for resolution before the U.S. Supreme Court would address the *Cline* case on the merits. The U.S. Supreme Court's order asks Oklahoma's highest court to address whether the challenged Oklahoma statute “prohibits: (1) the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the Food and Drug Administration; and (2) the use of methotrexate to treat ectopic pregnancies.”<sup>12</sup>

Presumably, if the Oklahoma court were to answer “no” to both of those questions, the case now pending before the U.S. Supreme Court would largely disappear. However, if the state court answers “yes” to one or both of those questions, then the federal high court would need to decide whether the Oklahoma law unconstitutionally infringes on the federally recognized abortion right.

There is no timetable for the Supreme Court of Oklahoma to act, so it is unclear right now whether the U.S. Supreme Court will itself actually decide this case on the merits in the October 2013 term if a decision on the merits turns out to be necessary.

The continued controversial nature of the Supreme Court's abortion jurisprudence is regularly driven home to the justices not just

<sup>11</sup> *Cline v. Okla. Coal. for Reproductive Justice*, 292 P.3d 27 (Okla. 2012), cert. granted, 133 S. Ct. 2887 (2013) (Jun. 27, 2013) (No. 12-1094).

<sup>12</sup> *Id.*

by annual protests outside the Court's windows, but also by a steady stream of cases challenging on First Amendment grounds the restrictions placed on anti-abortion protestors who picket, chant, and often directly confront people outside the offices of physicians who provide abortions. In *McCullen v. Coakley*, the Court will examine the constitutionality of a Massachusetts law that makes it a crime for speakers 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.<sup>13</sup>

The anti-abortion protestors challenging the law argue that it violates their rights under the First and Fourteenth Amendments and that the law is particularly suspect because it solely targets those who wish to speak out against abortions. In general, speech restrictions based on the content of what is being said are subject to more rigorous scrutiny than content-neutral restrictions.<sup>14</sup> The Court has also agreed to address, if necessary, whether the Court's 6-3 ruling in 2000 in *Hill v. Colorado*<sup>15</sup>—that the First Amendment right to free speech was not violated by a Colorado law limiting protest and distribution of literature within eight feet of a person entering a health-care facility—should be overturned.

Cases involving a conflict between access to abortion services and the exercise of freedom of speech are difficult because they involve a battle between two constitutionally recognized rights. Although Justice Sandra Day O'Connor's departure from the Court, and her replacement by Justice Samuel Alito, cause many to think that the existence and scope of the federal substantive due process right to an abortion rest on a 5-4 margin—depending on the views of Justice Anthony Kennedy in any given case—the Court's lineup in *Hill* was a little different. Although the vote in *Hill* was 6-3, those six votes for the majority included both O'Connor and Chief Justice William Rehnquist; Justice Kennedy was among the dissenters. Accordingly, it is the man who replaced Rehnquist, Chief Justice Roberts, who may hold the key vote in deciding whether *Hill* should be overruled—though he may do all he can to avoid having to reach that question.

<sup>13</sup> 708 F.3d 1 (1st Cir. 2013), cert granted (June 24, 2013) (No. 12-1168).

<sup>14</sup> See, e.g., Charles W. "Rocky" Rhodes, Speech, Subsidies, and Traditions: *AID v. AOSI* in Context, 2012-2013 Cato Sup. Ct. Rev. 363, 364 (2013).

<sup>15</sup> 530 U.S. 703 (2000).

*Political Contribution Limits*

Federal law places limits on the amount of money that can be contributed to candidates and so-called “non-candidate committees”—a term that describes national and subnational political party committees and political action committees (“PACs”)—both to each candidate and committee and in the aggregate by one donor. In *McCutcheon v. Federal Election Commission*, the Court has agreed to decide the constitutionality of those aggregate limits.<sup>16</sup>

Critics of the Court’s recent campaign-finance jurisprudence are already warning that *McCutcheon* may be the next *Citizens United*, which perhaps means that a ruling in favor of the petitioners in *McCutcheon* will give wealthy donors greater political power at the expense of those with more modest means. To be clear, though, this case is not about corporate speech, super PACs, “social welfare organizations,” or any of the other independent advertising vehicles that have controversially entered the campaign space in recent election cycles. *McCutcheon* simply asks whether the federal limits on aggregate contributions by one donor (currently \$123,200, divided among candidates, parties, and PACs) are constitutional. With one limited exception that was swept away by *Citizens United*, the Supreme Court has only ever accepted one justification for limits on political speech: quid pro quo corruption or the appearance thereof. The Court will now decide whether those aggregate limits are justified by that concern.

Or it may not. As one commentator suggests, the Court “may ultimately decide to strike down or uphold the overall limits, but there is also a middle path. The court could find the overall limits to be generally constitutional, but their level to be unconstitutionally low.”<sup>17</sup>

*McCutcheon* is scheduled for oral argument on October 8, 2013, but given the complexity of the case and the strong passions on both sides of this issue that the justices have previously expressed, a decision may not issue until late in the term.

<sup>16</sup> 893 F. Supp. 2d 133 (D.C. Cir. 2012), cert. granted, 133 S. Ct. 1242 (Feb. 19, 2013) (No. 12-536).

<sup>17</sup> Paul Blumenthal, Next Citizens United? McCutcheon Supreme Court Case Targets Campaign Contribution Limits, Huffington Post, Jul. 31, 2013, [http://huffingtonpost.com/2013/07/31/mccutcheon-supreme-court\\_n\\_3678555.html](http://huffingtonpost.com/2013/07/31/mccutcheon-supreme-court_n_3678555.html).

*Personal Jurisdiction*

As every first-year law student recalls with some trepidation, the Supreme Court frequently considers cases raising the issue of when a defendant with little to no contact with a particular state may be sued in that state's judicial system. This term already presents two such cases, both from the embattled (at the Supreme Court) U.S. Court of Appeals for the Ninth Circuit.

First, in *DaimlerChrysler AG v. Bauman*, the Court has agreed to decide whether a court may exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state.<sup>18</sup> "General jurisdiction" means that the lawsuit need not concern the defendant's actual activities within the state, or even be targeted toward the state, in which the defendant is being sued. At issue here is whether Daimler may be sued in California for alleged human-rights violations committed in Argentina by an Argentine subsidiary against Argentine residents. The Ninth Circuit answered "yes." Chances are that a majority of the Supreme Court will disagree.

The second case, *Walden v. Fiore*, involves a lawsuit against a Georgia police officer who was working at the Atlanta airport as a deputized agent for the Drug Enforcement Agency.<sup>19</sup> Several professional gamblers who were traveling with \$97,000 in cash sued the police officer who seized the cash pending receipt of documentation showing that the money had been legitimately obtained. After the U.S. Attorney's office for the Northern District of Georgia determined that probable cause did *not* exist to forfeit the funds, the money was returned to the gamblers in March 2007.

This case wouldn't have reached the Supreme Court except for the fact that the gamblers filed their suit in federal district court in Nevada—where they resided—rather than in Georgia. The police officer moved to dismiss the suit, arguing that his actions were in no way directed toward Nevada and that the events and omissions giving rise to the gamblers' claims occurred entirely in Georgia. The

<sup>18</sup> *DaimlerChrysler AG v. Bauman*, 644 F.3d 909 (9th Cir. 2011), cert. granted, 133 S. Ct. 1995 (Apr. 22, 2013) (No. 11-965).

<sup>19</sup> *Walden v. Fiore*, 688 F.3d 558 (9th Cir. 2012), cert. granted, 133 S. Ct. 1493 (Mar. 4, 2013) (No. 12-574).

district court granted the motion to dismiss, but a divided three-judge panel of the Ninth Circuit reversed and reinstated the lawsuit. The unusual facts giving rise to an exercise of personal jurisdiction in this case, and the unusual facts that give rise to the *Daimler* case, make it quite possible that the oft-reversed Ninth Circuit will suffer at least two more reversals in the 2013 term.

## **Criminal Law**

### *Fourth Amendment and a Co-Tenant's Consent to Search*

Seven years ago, in *Georgia v. Randolph*, the Supreme Court considered the legality under the Fourth Amendment of the search of a residence when one tenant consents to the search but not the other.<sup>20</sup> The defendant had declined the police request to search his residence for evidence of drug use, but the man's estranged wife, who also lived there, consented to the search. The Court ruled that the consent of one co-tenant could not overcome the denial of consent by another co-tenant.

In the 2013 term, the Court has agreed to examine a case arising from a somewhat similar fact pattern. In *Fernandez v. California*, the defendant had refused to give the police permission to search his residence.<sup>21</sup> After the defendant was arrested, the police asked his co-tenant for permission to search the residence, and the co-tenant granted permission. The question presented in *Fernandez* is whether a co-tenant who objects, *but is thereafter arrested and removed from the scene* (although not for the purpose of preventing an objection), loses his constitutional objection when a co-tenant consents to the police entry and search.

The vote in *Randolph* was 5-3, with Justice Alito not participating. Accordingly, if the outcome in *Fernandez* is anything other than 5-4 in favor of the criminal defendant, it will come as a surprise.

### *Criminal Forfeiture and the Right to Counsel*

A federal statute allows a district court, acting on an *ex parte* motion of the United States, to restrain an indicted defendant's assets that are subject to forfeiture upon conviction. Such a restraining

<sup>20</sup> 547 U.S. 103 (2006).

<sup>21</sup> 208 Cal. App. 4th 100 (Cal. App. 2d Dist., 2012), cert granted, 133 S. Ct. 2388 (May 20, 2013) (No. 12-7822).

order, however, will often preclude the defendant—due to lack of available funds—from retaining the defense counsel whom he wishes to retain. In *Kaley v. United States*, the Supreme Court will consider whether, under these circumstances, the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges.<sup>22</sup>

The Court's earlier rulings in this area have not been particularly friendly to the criminal defendants involved.<sup>23</sup> However, *Kaley* merely asks whether a criminal defendant is entitled to a pre-deprivation hearing before he is precluded from using funds previously under the defendant's control—but which may have been fruits of the criminal enterprise—to hire legal counsel of his choice. The Court may be willing to allow an accused to enjoy this limited degree of procedural protection of his right to counsel, recognizing that in the vast majority of cases the restraint on the use of the funds at issue is likely to be upheld even after a hearing.

#### *Criminal Victim Restitution*

Many victims of childhood sexual abuse continue to be victimized as the images of child pornography that their abusers created remain in wide circulation despite federal criminal laws banning their possession and distribution. In *Paroline v. United States*, the question presented is “what, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution” under the relevant federal statute entitling crime victims to recover for their losses.<sup>24</sup>

Advocates for the children depicted in these images have argued that each person convicted of possessing or distributing the images should be held jointly and severally liable for the full amount of the victims' damages. Thus, a defendant convicted of possessing only a single image could be required to pay over a million dollars, if

<sup>22</sup> 677 F.3d 1316 (11th Cir. 2012), cert. granted, 133 S. Ct. 1580 (Mar. 18, 2013) (No. 12-464).

<sup>23</sup> See, e.g., *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989).

<sup>24</sup> 701 F.3d 749 (5th Cir. 2012), cert. granted, 133 S. Ct. 2885 (June 27, 2013) (No. 12-8561).

the defendant can afford to pay that much, to the victims of these crimes.<sup>25</sup> On the opposing side, the convicted defendants themselves have argued that the most any one of them should be responsible for paying in restitution is the share of the loss, if any, that the victim has sustained as the result of the specific individual defendant's criminal offense. This approach would prevent any one defendant from being liable for the entirety of the aggregate losses that the victims have suffered.

The vast majority of the federal appellate courts that have confronted this issue have ruled in favor of the criminal defendants and against the victims. A divided en banc Fifth Circuit, however, held that a district court must award restitution against the criminal defendant for the full amount of the victim's losses, without regard to whether that defendant proximately caused all of them.<sup>26</sup> On the final day of the October 2012 term, again upstaged by that week's big rulings, the Supreme Court decided to review that ruling and resolve this circuit split.

## Federalism

### *The Scope of the Treaty Power*

No lawyer worth his or her salt would ever advise a client to attempt to use dangerous chemicals to poison a rival for the romantic attention of the client's spouse. Nevertheless, having a client who engaged in that legally prohibited conduct appears to be the recipe for periodic visits to address the justices in the Supreme Court's courtroom—at least if you're a superstar Supreme Court advocate.

In the forthcoming term, the case captioned *Bond v. United States* makes its return visit to the Court.<sup>27</sup> In its previous incarnation, the Supreme Court held that the woman charged with attempting to poison her romantic rival for her husband's affections had standing to object to Congress's enactment of legislation alleged to violate the

<sup>25</sup> See Emily Bazelon, *Money Is No Cure*, *The N. Y. Times Sunday Magazine*, Jan. 27, 2013, available at <http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html>.

<sup>26</sup> *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012) (en banc).

<sup>27</sup> *Bond v. United States*, 681 F.3d 149 (3rd Cir. 2012), cert. granted, 133 S. Ct. 978 (Jan. 18, 2013) (No. 12-158).

Tenth Amendment's limitations on federal power.<sup>28</sup> On remand to the U.S. Court of Appeals for the Third Circuit, Bond argued that Congress had overstepped the bounds of its authority to make criminal the purely local poisoning attempt at the heart of the criminal charges against her. Relying on dictum from the Supreme Court's ruling in *Missouri v. Holland*—which suggests that Congress has the power to enact implementing legislation in furtherance of a lawfully approved treaty even if that legislation broadens Congress's constitutional power—the Third Circuit rejected Bond's challenge.<sup>29</sup>

Now, on its return visit to the Supreme Court, Bond is asking the justices to hold that the federal government's approval of a treaty—here an international chemical weapons convention—does not authorize it to assume police powers to turn what otherwise would have been an offense under state law—here, assault or attempted murder—into a federal crime. Although the structural limitations on federal power are important, as the Supreme Court recognized most recently in *NFIB v. Sebelius*,<sup>30</sup> this case appears to present an especially vexing question.

State and local governments are of course powerless to enter into international treaties. Because the treaty power of necessity resides exclusively with the federal government, perhaps the states can be understood to have ceded to the federal government the ability to encroach on what would otherwise ordinarily be state prerogatives where necessary to implement a lawful treaty. Or perhaps the Supreme Court will hold that federalism principles render the federal government unable to fully implement treaties that require such encroachment on state power.

One thing is for sure: the case is bound to be very well argued, as former Solicitor General Paul Clement will represent Bond in this appeal, just as he did in his client's previous victorious visit to the Court. Although the outcome of this case is far from clear, my suspicion is that a majority consisting of the ordinarily pragmatic justices are likely to prevail in holding that the Constitution's treaty

<sup>28</sup> *Bond v. United States*, 131 S. Ct. 2355 (2011). See also John C. Eastman, Will Mrs. Bond Topple *Missouri v. Holland*?, 2010-2011 Cato Sup. Ct. Rev. 185 (2011).

<sup>29</sup> *United States v. Bond*, 681 F.3d 149 (3rd Cir. 2012) (citing *Missouri v. Holland*, 252 U.S. 416, 432 (1920)).

<sup>30</sup> 132 S. Ct. 2566 (a.k.a. the "Obamacare case").

power does give Congress the ability to encroach on state prerogatives where necessary to implement a treaty. Yet even such a holding, however broad, would do little to justify the seemingly aberrant decision of federal prosecutors to treat Mrs. Bond's bizarre offenses as federal crimes.

### **Certiorari Pipeline and Beyond**

Federal appellate courts have recently divided over whether for-profit, secular corporations may claim a religious exemption from providing employees with certain methods of contraception as required under the federal healthcare mandate in the Patient Protection and Affordable Care Act.<sup>31</sup> Given the existence of a circuit split on this issue, and given the importance of the issue, the Supreme Court is likely to agree to hear and resolve the question in relatively short order.

A second issue that is destined for Supreme Court resolution in the near future involves whether the Fourth Amendment requires the police to obtain search warrants to access either the contents of cell phones or tracking information revealed by a person's cell phone. Lower courts have already reached conflicting outcomes on these issues.<sup>32</sup> Given the ubiquitous nature of cell phones in modern life, the Court will be unable to avoid deciding this question for much longer.

Next, after a conclusion to the October 2012 term that gave supporters of same-sex marriages much to applaud, the Supreme Court may soon have to confront a different question regarding homosexuals and their right to serve on juries. The Supreme Court has previously recognized that excluding individuals from jury service solely based on race, gender, or national origin is unconstitutional. A case now pending in the Ninth Circuit asks whether excluding a juror on the basis of his or her sexual orientation is likewise unconstitutional.<sup>33</sup>

<sup>31</sup> Compare *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir. Jun. 27, 2013) (en banc), with *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Services*, No. 13-1144, 2013 WL 3845365 (3d Cir. Jul. 26, 2013).

<sup>32</sup> See, e.g., *United States v. Wurie*, 2013 WL 2129119 (1st Cir. May 17, 2013); *In re Application of United States for Historical Cell Site Data*, 2013 WL 3914484 (5th Cir. Jul. 30, 2013); *State v. Earls*, 2013 WL 3744221 (N.J. Jul. 18, 2013).

<sup>33</sup> See Adam Liptak, *Court to Decide if Lawyers Can Block Gays From Juries*, *The New York Times*, Jul. 30, 2013, available at <http://www.nytimes.com/2013/07/30/us/court-weighs-exclusion-of-jurors-because-theyre-gay.html>.

Finally, and unavoidably, at the end of the October 2013 term attention will surely turn again to the retirement plans of Justice Ruth Bader Ginsburg. One consideration may be that congressional midterm elections will occur in November 2014. The party in control of the White House typically loses congressional seats in a midterm election, so the composition of the Senate is likely to be different in January 2015 from what it is now. The Republicans may even take control of the upper chamber, thus making it more difficult for President Obama to confirm more controversial judicial nominees.

Although Justice Ginsburg shows no signs of being interested in voluntarily departing from the Court, no one can remain on the Court forever. Surely it is important to Justice Ginsburg that the president who nominates her replacement will be someone likely to nominate a justice with views similar to hers. The most certain way to ensure such a replacement is for Justice Ginsburg to retire during the Obama presidency, and the most certain way to obtain confirmation of such a replacement is for the confirmation process to occur during the current Senate, rather than with a Senate of unknown composition that will exist in 2015–2016 (and the run-up to another presidential election).

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The upcoming term does not yet rival the past two terms with regard to the likelihood of capturing the general public's attention, but that of course remains subject to change depending on the cases that are added once the Court returns in October. What is already certain is that the term will be far from boring, as many cases already accepted for review implicate the hot-button legal and societal issues of our time. The addition of one or two more especially riveting cases, or a justice's surprise retirement announcement, could make the October 2013 term one that will be long remembered.