



SCOTUS-Palooza: Preview of the Big Cases in the New Term

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As the leaves turn colors and another debt-ceiling showdown looms, the Supreme Court returns on its traditional First Monday of October. Though the dust has barely settled on a term that saw the high court strike down key parts of the Voting Rights Act and Defense of Marriage Act, our nine black-robed platonic guardians are back for more.

While the docket doesn't yet rival the previous two terms in capturing the public's attention—Obamacare and same-sex marriage are hard acts to follow—there are more than enough significant cases to headline many news cycles.

Here's a rundown of some of the biggest ones. (Full disclosure: I've filed briefs in all of these cases on behalf of the Cato Institute, supporting the asterisked party.)

1. Campaign Finance: *McCutcheon* v. *FEC*

While often described as the second coming of *Citizens United*, this case has nothing to do with corporate speech, super PACs, or the other advocacy vehicles that have recently entered campaigns. Instead it addresses the relative disadvantage that candidates and parties face in a world where their donations are restricted even as *Citizens United* liberated independent associational speech. This isn't a challenge to the \$2,600 "base limit" that someone can give a candidate but to the *aggregate* limit someone can give to all candidates, parties, and campaign committees (currently \$132,000 per cycle). The Supreme Court only accepts one justification for limiting political speech: *quid pro quo* corruption or the appearance thereof. Given the Roberts Court's track record, it won't be surprising if it finds those aggregate limits not to be justified by those concerns.

2. Racial Preferences: *Schuette* v. *Coalition to Defend Affirmative Action*

Michigan voters passed a state constitutional amendment forbidding racial preferences in college admissions (as well as public employment and contracting). In a controversial 8-7 ruling, the Sixth Circuit found that provision to violate the Equal Protection Clause. Disagreeing with a 1997 Ninth Circuit ruling that approved California's similar Prop 209, the court invoked the little-used "political structure" doctrine, which outlaws distortions of government processes in ways that place special burdens on minorities' ability to achieve legislation. Given last term's punt in the UT-Austin affirmative-action case, it's likely that the Supreme Court will issue a narrow ruling reinstating the Michigan amendment without ruling on larger issues of racial preferences in higher education.

3. The Treaty Power: *Bond v. United States*

This is your typical case of adultery, federalism, and chemical weapons. When Carol Anne Bond used some readily available chemicals to try to hurt an erstwhile friend who'd gotten pregnant by Bond's husband, she wasn't tried for assault by the local district attorney. Instead, federal prosecutors charged her with violating the legislation that implements the international Chemical Weapons Convention. The case has already been to the Supreme Court once and finally we're at its heart: can federal power increase beyond constitutional limits—reaching even local crimes—pursuant to a treaty?

4. Criminal Forfeiture: *Kaley v. United States*

Court can restrain an indicted defendant's assets that are subject to forfeiture upon conviction. Such a restraining order, however, will often preclude the defendant from retaining his counsel of choice. This case examines whether 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. Asset forfeiture is a booming business for law enforcement, so the least the Supreme Court could do is offer some procedural protections against its abuse.

5. Racial Discrimination in Housing: *Mount Holly v. Mount Holly Citizens in Action*

The Fair Housing Act makes it illegal to refuse to sell or rent housing to someone on the basis of race and other protected categories. Lower courts have increasingly allowed FHA claims to proceed despite lack of discriminatory intent, however, where, as here, those affected by a particular housing/development policy are racial minorities. The Supreme Court has never recognized such "disparate impact" claims but was scheduled to hear such a case two years ago until the Justice Department's Thomas Perez—now Labor Secretary—pressured the defendant town to settle. If the Court is given the opportunity to hear this case, it's likely to rule for the defendants.

6. Abortion-Clinic Access: *McCullen v. Coakley*

This case takes up the constitutionality of a Massachusetts law that makes it a crime for speakers to be on a public street within 35 feet of an abortion clinic. The plaintiffs argue that the law is particularly suspect because it targets those who speak *against* abortion. In general, content-based speech restrictions are subject to stricter scrutiny than content-neutral rules. In the 2000

case of *Hill v. Colorado*, the Court approved a law limiting protest within eight feet of a clinic, but it could rule either way here without disturbing that precedent—perhaps by relying on the individual right to be in a *public* place. (There might also be a case regarding the abortion right itself, depending on how the Oklahoma Supreme Court answers the questions that the U.S. Supreme Court posed in June.)

7. Recess Appointments: *NLRB v. Noel Canning**

The D.C. Circuit struck down several nominations that President Obama made to the National Labor Relations Board, limiting the recess-appointment power to (1) recesses *between* Senate sessions and (2) vacancies that arise during those recesses. Presidents of both parties have exercised a broader power, but political games have escalated to the point where, as here, the Senate convenes every three days in *pro forma* sessions rather than going into full recess. The Supreme Court is wary of wading into political quagmires, so will likely find a way to affirm the lower court without going quite as far.

8. Compulsory Unionization: *Harris v. Quinn*

After sitting on this cert petition for a year and a half, and rejecting the solicitor general's advice to deny review, the Supreme Court will decide whether a state can force home healthcare care providers to accept and financially support a union as their representative to petition for Medicaid reimbursement. Unionizing independent contractors may be critical to the survival (or at least to maintaining the power) of organized labor, so this little-known case may have greater long-term impact than any of the above.

Other important cases involve legislative prayer, class actions, criminal procedure, and the ability to bring foreign corporations (and countries!) into U.S. court. And several big issues are on the horizon, notably challenges to Obamacare's contraceptive mandate and the police's ability to search the cell phones of people they arrest. The lower courts are split and multiple cert petitions are pending on these issues.

In short, even if the new term won't have the blockbusters that the last two did, there's plenty for everyone to watch.