

AT ISSUE



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CALENDAR

- 8/11/15** **Senate Approp. Community Health Subcommittee**
Hepatitis C Hearing
341 CAP
9:00 a.m.
- 8/12/15** **Education Reform Commission Funding Committee**
450 CAP
9:00 a.m.
- 8/26/15** **Education Reform Commission**
DECAL Oak Conference Room
10:00 a.m.
- 8/27/15** **Education Reform Commission Funding Committee**
450 CAP
10:00 a.m.

A Message from Senator Shafer



Last month, the U.S. Supreme Court handed down several decisions of great magnitude. This edition of *At Issue* will focus on the legal implications of those decision, especially at the state level.

The Affordable Care Act has been examined by the U.S. Supreme Court more than once. In its latest review, the Court was asked to determine whether the Obama Administration was correctly implementing provisions of the plan dealing with tax subsidies. The lead article takes a look at the Court’s ruling and potential impacts.

Another case to receive national attention was *Obergefell v. Hodges*, which creates a right to same-sex marriage from language in the 14th Amendment to the Constitution. Although the State of Georgia had filed briefs in opposition to the ultimate ruling, Governor Nathan Deal and Attorney General Sam Olens both issued statements indicating that Georgia public officials will comply with the decision. Georgia’s federal lawmakers, including Senators Johnny Isakson and David Perdue, have introduced legislation protecting the rights of those who disagree with the decision on religious grounds. This issue takes a look at the ruling and its potential ramifications.

Other articles in this edition examine court cases on redistricting and environmental regulation. As always, if you have any comments or suggestions, please feel free to contact me.

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Health & Human Services

U.S. Supreme Court Rejects Challenge to the Affordable Care Act

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The issue in this case was whether the Affordable Care Act’s (ACA’s) tax credits are available in states that have a federal exchange and did not create a state exchange. This issue came to light in 2014, after the Internal Revenue Service (IRS) addressed the availability of tax credits by promulgating a rule that made such subsidies available on both the state and federal exchanges.

On June 25, 2015, the Supreme Court issued its opinion on the *King v. Burwell* case, upholding tax-credit subsidies to coverage purchased through any exchange—state or federal—in a 6-3 vote. Chief Justice John Roberts delivered the opinion of the Court and was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. The dissenting opinion was filed by Justice Scalia, in which Justices Thomas and Alito joined.

(continued on page 5)

Arizona's Use of Independent Redistricting Commission Validated by U.S. Supreme Court

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In a 5-4 decision, the United States Supreme Court approved Arizona's use of an independent redistricting commission in drawing congressional district lines. In 2000, Arizona voters approved Proposition 106, which amended the state's constitution to transfer the power of redistricting from the state legislature to a newly created independent commission in an attempt to dampen the hyper partisan nature of the process. After the 2012 redistricting, the Arizona legislature challenged the congressional map, arguing that the Commission and the 2012 map violated the Elections Clause of the Constitution by stripping the legislature of its constitutional responsibility to redistrict. In part, the Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."

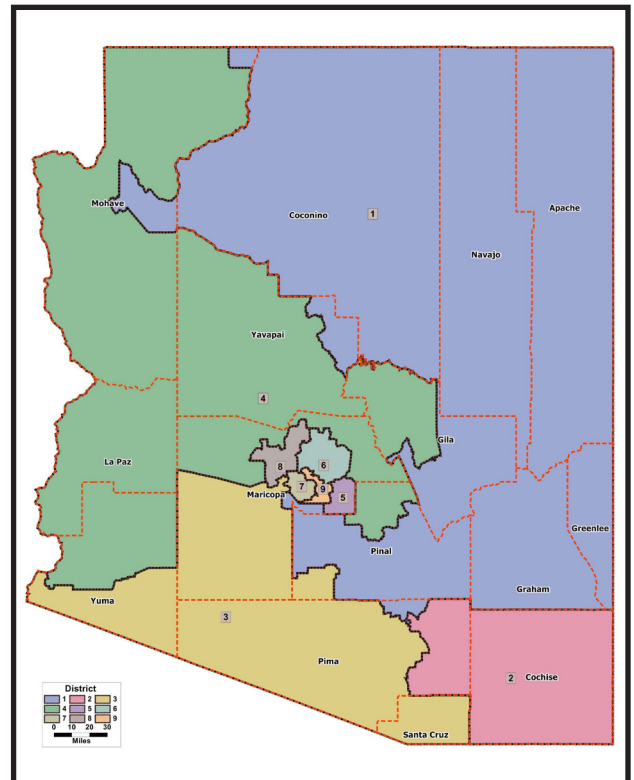
Holding for the Commission in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court primarily relied on a contextual definition of the term "legislature" as used in the Elections Clause to include not only the representative body, but also the voters themselves, from whom the power to legislate is derived. According to Justice Ginsburg, "both parts of the Elections Clause are in line with the fundamental purpose that all political power flows from the people." Because the Arizona Constitution permits the state's voters to act via the initiative and referendum processes, the power to legislate springs from them in addition to the Arizona legislature. The referendum and initiative work as agents of direct legislation, with the initiative operating as an action available to voters in enacting statutes or constitutional amendments, and with the referendum serving as a check whereby voters can approve or disapprove of a certain legislative action.

The Court pointed to a number of founding-era sources in supporting its conclusion that "legislature" is meant to include the people. The Elections Clause was enacted "to empower Congress to override state election rules, not to restrict the way States enact legislation." The country was founded upon the principle that the power to govern is derived from its people. According to Justice Ginsburg, "it would be perverse to interpret the term 'legislature' in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be 'chosen . . . by the People of the several States.'"

Relying upon the interpretational canon requiring the Constitution to be read as "a unified, coherent whole," the Chief Justice, in dissent, located 17 other uses of the term "Legislature" when referring to states, each of which "is consistent with the understanding of a legislature as a representative body." Only in the Elections Clause does the term "Legislature" refer to anything other than the "ordinary meaning of the term." In the end, the context means that "the Legislature" is a representative body that may not be cut out of the elections regulatory process. Even though, in many places, the "Constitution speaks in 'majestic generalities,'" the definition of "the Legislature" is clear. In Arizona, the Commission completely replaced the state Legislature, the one body which cannot be completely (continued on page 6)



2010 Arizona Congressional Districts Map
Credit: ballotpedia.org



2012 Approved Arizona Congressional Districts Map
Credit: azredistricting.org

U.S. Supreme Court Upholds Marriage Rights of Same-Sex Couples

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Justice Anthony Kennedy, writing for the Court's 5-4 majority in *Obergefell v. Hodges*, held that the Fourteenth Amendment to the Constitution requires all states to both license a marriage between two people of the same sex and to recognize same-sex marriages that are licensed and performed in other states. The cases, which arose based on challenges to statutes and constitutional amendments in Michigan, Kentucky, Ohio, and Tennessee, were brought by 14 same-sex couples and two men whose same-sex partners are deceased.

Invoking much of its prominent Fourteenth Amendment jurisprudence from the last half century, the Court's majority—Kennedy and Justices Breyer, Ginsburg, Sotomayor, and Kagan—noted that the Constitution protects “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” The justices also based much of their rationale on cases which have identified marriage as a fundamental Constitutional right—from the *Loving v. Virginia* decision in 1967, which invalidated restrictions on interracial marriage, to later cases which struck down laws banning fathers who were behind on child support from remarrying and limiting the ability of prison inmates to marry. While noting that the prior cases were decided with regard to marrying parties of the opposite sex, the opinion announced that “the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”

The opinion also enumerated the various ways that states and the federal government have conferred benefits on married couples, including considerations relating to taxation, property rights, spousal privileges in the law of evidence, hospital access and medical decision-making authority, rights to adoption, health and retirement benefits, child support, alimony, custody, and parental visitation. The opinion noted that, by enacting these arrangements, “States have contributed to the fundamental character of the marriage right by placing [marriage] at the center of so many facets of the legal and social order.” The justices noted that, because of their “exclusion from that institution, same-sex couples are denied the constellation of benefits . . . linked to marriage.” This is inconsistent, the justices said, with the guarantees of the Fourteenth Amendment's Equal Protection Clause. Thus, *Obergefell* holds that under the Due Process and Equal Protection clauses of the Fourteenth Amendment, a couple of the same sex may not be denied the right to marry and enjoy the social, legal, and economic benefits of marriage. By its terms, *Obergefell* invalidated state laws that “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”

The majority opinion met a series of dissents from Chief Justice John Roberts and Justices Scalia, Thomas, and Alito. Roberts criticized the majority for engaging in what he described as “unprincipled . . . judicial policymaking,” arguing that previous decisions invalidating state laws on controversial social issues, such as the *Roe v. Wade* decision, had invited backlash against the Court's standing.

Roberts also emphasized his view that the Court's decision lacked a constitutional basis. “If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it,” Roberts wrote in closing.

Likewise, Justice Alito similarly assailed the majority opinion as an attack on the democratic process. “Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage . . . and will be used to vilify Americans who are unwilling to assent to the new orthodoxy,” Alito noted. “If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate,” Alito argued.

Response in Georgia

Georgia had joined 14 other states in filing an amicus curiae brief with the Supreme Court, arguing that establishing the meaning of marriage is a fundamental exercise of state citizens and should not be determined by the Supreme Court as a matter of constitutional law. Georgia's Constitution recognizes marriage as only the union between a man and a woman, prohibits marriages between members of the same sex, and denies recognition of same-sex marriages entered into in other jurisdictions. *Obergefell* nullified each of these provisions to the extent they would bar same-sex couples from marrying and having their marriages recognized on the same terms as opposite-sex couples in Georgia.

Both Governor Deal and Attorney General Olens indicated their intentions to comply with the ruling. Attorney General Olens stated in a release that “Georgia will follow the law and adhere to the ruling of the Court,” while also releasing a memorandum (*continued on page 4*)

(*Same Sex Marriage - continued from page 3*) to all state agencies and departments regarding “practices and policies relating to marriage.” Governor Deal echoed this sentiment stating in an official release that “the State of Georgia is subject to the laws of the United States and we will follow them.”

Same sex marriages began immediately in Atlanta where the Probate Court of Fulton County had already re-designed marriage license forms in anticipation of the decision in *Obergefell*. In addition, municipal court judges who wish to perform weddings going forward have been instructed by the state’s Council of Municipal Court Judges that any official who performs marriage ceremonies must do so on a basis that is available to both opposite-sex and same-sex couples. “If you do weddings, you have to do all weddings,” Judge Leslie Spornberger Jones said in an interview with the Daily Report.

Legislative Response

The majority opinion in *Obergefell* indicated in dicta that “religions, and those who adhere to religious doctrines, may continue to advocate . . . that, by divine precepts, same-sex marriage should not be condoned” and that “the First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach [these] principles.” Toward that end, news reports indicate that legislators around the country have begun examining what legislative measures may be necessary to protect the free exercise of religion, including in jurisdictions like Georgia which have not adopted general religious freedom legislation.

In early July, Georgia House Speaker David Ralston announced support for legislation known as the “Pastor Protection Act.” According to news reports, bill language being considered would prevent any minister or clergy member who is authorized to perform wedding ceremonies from being compelled to solemnize any marriage in violation of his or her right to free exercise of religion. A similar bill recently became law in Texas, and parallel legislation may be considered next year in other states, including Florida and Tennessee. The *Obergefell* decision may also bring renewed focus to Georgia Senate Bill 129, the proposed Georgia Religious Freedom Restoration Act, which remains pending. That bill, modeled on a 1993 federal statute and other state laws passed following the Supreme Court’s decisions in *Employment Division v. Smith* and *City of Boerne v. Flores*, would prevent government entities in Georgia from substantially burdening a person’s exercise of religion unless the government can demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of achieving such interest.

At the federal level, identical pieces of legislation styled the “First Amendment Defense Acts” have been introduced in the U.S. House of Representatives and the U.S. Senate. Congressmen Collins, Hice, Allen, Graves, Westmoreland, Loudermilk, Price, Carter, Scott, and Woodall of Georgia joined 126 other House members in sponsoring the House bill, while the Senate version’s 36 co-sponsors include both Senators Isakson and Perdue of Georgia. The bills would broaden First Amendment protections by preventing the federal government from taking “any discriminatory action against a person...on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such a marriage.” This would include altering federal tax treatment, disallowing deductions for charitable contributions, or withholding or denying federal grants, contracts, or other benefits. The bills permit a person to assert violations of its provisions as a claim or defense in judicial and administrative proceedings and also grant enforcement authority to the U.S. Attorney General. No action has been taken on either bill as of the time of this publication. - BV

2015 Senate Study Committees

- | | |
|---------------|--|
| SR 487 | Preventing Youth Substance Use Disorders Senate Study Committee
Sen. Renee Unterman (chair), Sen. Josh McKoon, Sen. Fran Millar, Sen. Gloria Butler
<i>Staff:</i> Elizabeth Holcomb (SRO), Jennifer Yarber/Gavi Coffman (SPO) |
| SR 494 | Effect on Georgia of Normalization of Relations with Cuba Senate Study Committee
Sen. David Lucas (chair), Sen. John Wilkinson, Sen. Mike Dugan, Sen. Frank Ginn, Sen. Michael Rhett
<i>Staff:</i> Satyn Geary (SRO), Brett Johnson (SPO) |
| SR 560 | Women’s Adequate Healthcare Senate Study Committee
Sen. Renee Unterman (chair), Sen. Greg Kirk, Sen. Dean Burke, Sen. Nan Orrock
<i>Staff:</i> Elizabeth Holcomb (SRO), Jennifer Yarber/Gavi Coffman (SPO) |
| SR 561 | Consumer and Provider Protection Act Senate Study Committee
Sen. Dean Burke (chair), Sen. Renee Unterman, Sen. Charlie Bethel, Sen. Burt Jones, Manoj Shah, M.D., Richard Smith, DDS, Mr. John Crew, Ms. Angela Waller, Ms. Cindy Zeldin, Mr. Richard Novak
<i>Staff:</i> Alex Azarian (SRO), Brittany Wagner (SPO) |
| SR 564 | School Construction Senate Study Committee
Sen. Ellis Black (chair), Sen. Lindsey Tippins, Sen. Freddie Powell Sims, Sen. Mike Dugan, Sen. Chuck Hufstetler
<i>Staff:</i> Angie Fiese (SRO), Adam Sweat (SPO) |
| SR 594 | Rate of Diagnosis for Children with Attention Deficit Hyperactivity Disorder Senate Study Committee
Sen. Renee Unterman (chair), Sen. Josh McKoon, Sen. Gloria Butler, Sen. Fran Millar
<i>Staff:</i> Elizabeth Holcomb (SRO), Jennifer Yarber/Gavi Coffman (SPO) |

(Affordable Care Act - continued from page 1) While the Court acknowledged that the petitioner's arguments about the plain meaning of Section 36B are strong, a "fair reading" of the language that relies on context and structure was deemed appropriate in this case. Describing the text of Section 36B as "ambiguous," the Court looked to the broader structure of the ACA to determine its meaning and concluded that "a fair reading of legislation demands a fair understanding of the legislative plan." The Court's "fair reading" of the language in question in Section 36B of the ACA was thought by the Court to be consistent with what it sees as Congress's plan. The Court stated that the tax-credit subsidies "are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid." Currently, 16 states and the District of Columbia have established their own exchanges, while the other 34 states have opted into the federal exchange.

According to the dissenting opinion filed by Scalia, the Court should have left it to Congress to address the ambiguous language of Section 36B. Mocking the Court's interpretation of this language, Scalia wrote that "words no longer have meaning if an Exchange that is not established by a State is 'established by the State.'" Agreeing with the Court that context always matters, the dissent went on to suggest that the Court lost sight of "why context matters: It is a tool for understanding terms of the law, not an excuse for rewriting them." Scalia also wrote that it "is entirely plausible that tax credits were restricted" to the states deliberately and this should not be dismissed as a "drafting fumble." After reminding his audience that the term "Exchange established by the State" appears twice in Section 36B and a total of seven times throughout the ACA, Scalia poses the following question to emphasize his skepticism: "What are the odds, do you think, that the same slip of the pen occurred in seven separate places?"



U.S. Supreme Court Justice Antonin Scalia

Effect in Georgia

Georgia will continue to be eligible for the federal subsidies. Georgia is among the 34 states that opted into the federal exchange. Since the Court ruled that tax-credit subsidies apply to coverage purchased through any exchange, Georgia will see no change and continue to be eligible for those subsidies for coverage purchased through the federal marketplace.

The ACA was not struck down and remains intact. The ruling in *King v. Burwell* is regarding only one provision of a very complicated and extensive law. Although President Barack Obama stated in a press conference following the release of the Court's opinion that the law is "working," it is important to note that the Court was not asked to evaluate or rule on the effectiveness of the ACA in *King v. Burwell*. While the Court's decision leaves subsidies intact in Georgia, other aspects of the recently enacted ACA will continue to be critiqued and debated, including whether the law has been successful in achieving the purpose for which it was enacted. Attorney General Sam Olens expressed his disappointment the same day the *King v. Burwell* opinion was released, stating that the "Supreme Court ruling is a loss for everyone who cares about the Constitution and the rule of law." - EH

SR 609

Annexation, Deannexation, and Incorporation Senate Study Committee

Sen. Elena Parent (chair), Sen. Fran Millar, Sen. Charlie Bethel, Sen. John Albers, Sen. Frank Ginn

Staff: Alex Azarian (SRO), Brittany Wagner (SPO)

Senate Preservation of the HOPE Scholarship Program Study Committee

Sen. Brandon Beach (chair), Sen. Rick Jeffares, Sen. Burt Jones, Sen. Jeff Mullis, Sen. Bill Cowsert, Sen. Ronald Ramsey, Sen. Harold Jones, II

*** Study Committee created under the authority granted by SR 4

Staff: Angie Fiese (SRO), Brett Johnson (SPO)

2015 Joint Study Committees

SR 26

Coastal Greenway Study Committee

Sen. William Ligon (chair), Sen. Ben Watson, Sen. Ross Tolleson, Sen. Lester Jackson, Rep. Ron Stephens (chair), Rep. Alex Atwood, Rep. Bill Hitchens, Rep. Al Williams

Senate Staff: Angie Fiese/Satyn Geary (SRO), Brittany Wagner (SPO)

HB 170

Special Joint Committee on Revenue Structure

Sen. David Shafer, Sen. Bill Cowsert, Sen. Steve Henson, Sen. Judson Hill, Sen. Michael Williams, Sen. Jack Hill, Sen. Emanuel Jones

House Committee Members: TBD

Senate Staff: Angie Fiese (SRO), Jennifer Yarber/Adam Sweat (SPO)

HR 395

Georgia-Alabama Joint Study Committee

Sen. Freddie Powell Sims, Sen. Jeff Mullis, Sen. Ed Harbison, Sen. Dean Burke, Sen. Chuck Hufstetler, Rep. Gerald Green (chair), Rep. John Deffenbaugh, Rep. Randy Nix, Rep. Calvin Smyre, Rep. Darlene Taylor

Senate Staff: Brad Vaughan (SRO), Adam Sweat (SPO)

Michigan v. EPA: Cost Considerations in Agency Regulations

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Under the Clean Air Act (CAA), the U.S. Environmental Protection Agency (EPA) may regulate hazardous air pollutants emitted by power plants only after deciding whether they are “appropriate and necessary.” In 2000 and again in 2012, the EPA determined that regulating power plants was “appropriate” because the emission of hazardous air pollutants jeopardizes public health and the environment, and “necessary” because no CAA provisions adequately addressed those risks. The EPA had estimated that the cost of its regulations to power plants would be \$9.6 billion a year, but the quantifiable benefits from the resulting reduction in hazardous air pollutant emissions would be \$4 to \$6 million; however, the EPA expressly concluded that costs should not be considered in making this determination. Petitioners, including 23 states, challenged the EPA’s refusal to consider the cost of regulation. The D.C. Circuit upheld the EPA’s decision.



In its 5-4 decision in *Michigan v. EPA*, the Court reversed and held that EPA must consider cost, including the cost of compliance, in the initial decision to regulate hazardous air pollutants from power plants. Justice Scalia, writing for the majority, rejected EPA’s contention that the CAA’s “appropriate and necessary” language does not require consideration of costs, reasoning that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.” “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”

Judicial Deference to Agency Interpretations

The Court found in *Michigan* that EPA strayed far beyond the bounds of reasonable interpretation of the CAA and, therefore, the agency’s interpretation did not deserve deference under *Chevron v. NRDC*. In *Chevron*, the Court set a two-part test for reviewing agency interpretations of statutes: first, judges must determine if the agency’s interpretation of the law is consistent with the clear meaning of the statute’s text; and, if there is no clear conflict, then judges should uphold the agency’s interpretation of any ambiguous statutory text as long as it is reasonable.

Justice Thomas, in a concurrence in *Michigan*, went even further than the majority opinion. He worries that decades of experience under *Chevron* have disrupted the constitutional order by giving agencies the impression that it is their job to legislate (under a thin pretense of “interpretation”), with judges improperly acquiescing to this transfer of power. Justice Kagan, writing for the dissent, takes a different approach to statutory interpretation that looks at the totality of the regulatory process, finding that EPA is better suited than the courts at figuring out to handle its statutory responsibilities, and, per *Chevron*, “Congress has entrusted such matters to [agencies], not to [judges].” - AF

(*Arizona Redistricting* - continued from page 2) excised from the federal redistricting process.

Arizona is not alone in employing an independent redistricting commission: California, Hawaii, Idaho, Montana, New Jersey, and Washington utilize similar commissions, while Indiana utilizes such a commission only if the legislature fails to pass a congressional district map.

On Deck for Next Year

In addition to the opinions it issued in the closing days of its term, the Supreme Court also made announcements regarding several cases that it will hear over the coming year. One case will again review the constitutionality of the University of Texas’s practice of considering applicants’ race when making admissions decisions. A second, also from Texas, will examine whether a state should rely on the U.S. Census in determining how many individuals to include in its state legislative districts or whether it can instead draw districts based on the total number of eligible voters (a narrower figure) residing in the state. The Court also agreed to hear a case that deals with whether public sector, non-union employees may be compelled to pay mandatory dues for collective bargaining. - EF

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