Salami Tactics and the Supreme Court

Throughout the term, we have discussed a number of cases heard by the Supreme Court. A coherent logic clearly emerges in the cases the Court chooses to hear. For better or for worse, the Court is clearly seeking to limit the powers of the federal government. *NFIB v. Sebelius* is the prototypical example of these cases, where the conservative members of the Court aimed to dismantle the President's signature initiative, the Affordable Care Act. The drastic limitations to federal power sought by some members of the court cannot happen overnight, and so the Court's jurisprudence this term shows that it will be achieved by "salami slicing."

"Salami tactics" is a time-honored strategy once described by Hungarian communist revolutionary Matvas Rakosi in 1952. Although the Communists were a clear minority of the vote, they were able to deploy salami tactics, "demanding a little more each day, like cutting up a salami, thin slice after thin slice."[1] Simply eating the whole salami outright would not be acceptable, and so one who deploys salami tactics seeks to take piece by piece what they cannot swallow whole. Similarly, the Supreme Court has chosen its cases carefully in order to position itself to make small changes that gradually affect the legal landscape in a particular direction. As discussed above, although not a case from this term, *NFIB v. Sebelius* is the blueprint for the salami tactics case. There, the court held that President Obama's highly controversial Affordable Care Act was constitutional, but ruling that it was a tax rather than an exercise of the Commerce Clause power. In so doing, the Court avoided the public scrutiny and outrage associated with overturning the President's signature initiative, while still limiting the Commerce Clause power. The Court has chosen a few salami tactics cases that would restrict federal power. However, not all of the court's cases are salami-slicing cases, and not all of the salami-slicing cases are aimed at limiting federal power.

Sebelius v. Hobby Lobby is a good example of a salami tactics case where the Court chose a good vehicle for incremental change. The stakes of *Hobby Lobby* are quite large, in that if the regulations are found unconstitutional, there is a risk that strict scrutiny could be applied to the entire Federal Code. The gravity of this concern was recognized by Justice Kagan at oral argument when she said that "if…there was a strict scrutiny standard of the kind that usually applies and a least restrictive alternative requirement, then you would see religious objectors come out of the woodwork with respect to all of these laws."[2] However, the Court's choosing of this case may have been strategic. Unlike other potential plaintiffs, Hobby Lobby only opposed the use of "abortifacient" drugs that they considered to be the equivalent of an abortion. Hobby Lobby did not oppose the use of contraceptive generally. Yet Justice Kagan and the other liberal justices seemed to realize that a ruling for an exception for this (relatively) more reasonable plaintiff would have grave results. Justice Sotomayor put it best when she said: "you picked great plaintiffs."[3] She was right. The Court was able to pick a case with sympathetic plaintiffs that would allow them to chip away at the Affordable Care Act on grounds that seem reasonable

[1] *Salami Tactics*, TIME, Apr. 14, 1952, at 35, *available at* http://goo.gl/x6ftzS.

[2] Transcript of Oral Argument at 16, Sebelius v. Hobby Lobby (Argued Mar. 25, 2014) (No. 13-356).

[3] *Id.* at 19.

(given this country's longstanding moral quagmire related to abortion) but would have serious implications for federal power in the long term.

The viewpoint of the conservative justices in *Sebelius* seems all-the-more political in comparison to *Town of Greece v. Galloway*, where they seemed quite dismissive of the right to be free from government interference with religion. Where in *Sebelius* the sincerely-held religious beliefs of corporations were deserving of defense, in *Town of Greece*, in discussing which religious groups must be catered to in prayers, Justice Scalia (jokingly) said "the atheists are out already."[4] This was well after the polytheists and "devil worshipers"[5] had been excluded from those whose religious sensibilities couldn't be reasonably accommodated. This argument is odd because the conservative viewpoint in *Hobby Lobby* seemed to indicate that even in the face of generally applicable statutes, exceptions needed to be carved out for those with conflicting religions. One might make the argument that *Hobby Lobby* was different in that it was coercing the religious into violating their beliefs. However, the two modes of thinking conflict in that one holds religious conscience to be inviolate in the face of generally applicable statutes, while the other holds that government prayer d plaintiff in a sea of unpleasant anti-abortion fanatics. In the context of sometimes-violent protests outside of abortion clinics, Massachusetts passed legislation mandating a buffer zone in which no protest is allowed. The Court picked an excellent vehicle in this case because the plaintiff, Mrs. McCullen, was an elderly lady who only wished to "counsel" those entering the clinic. Similar to Hobby Lobby in its ACA challenge, Mrs. McCullen was able to avoid some of the outrage associated with the more extremist positions of her peers. A holding protecting her right to free speech, however, would make general laws against more rowdy protest in front of abortion clinics impossible to enforce. This is therefore, another example of the Court picking smaller, more reasonable, cases in order to challenge larger regulatory schemes.

In *Bond v. United States*, the Court took an opportunity to limit the treaty power. If the Court rules for the petitioner, it will create a new limitation on the federal government's ability to pass treaties that authorize jurisdiction over intrastate affairs. The facts of *Bond* are very compelling for those who argue for limiting federal power. Mrs. Bond was being prosecuted in federal court under the Chemical Weapons Convention for attempting to poison her husband's mistress with chemicals she acquired from her lab (she was a microbiologist). There was no question as to whether Congress could have passed a law to criminalize this behavior absent a treaty—it could not. The Government in this case argued that because the legislation was passed pursuant to a binding treaty (the Chemical Weapons Convention), it was a valid exercise of the treaty power. This argument led to a now-common line of discussion that links *Bond* with cases like *NFIB v. Sebelius* and the other federalism cases: the search for a limiting rule for federal power. This is best illustrated by Justice Breyer's question of whether somebody could be prosecuted for feeding a poison potato to a horse,[6] and shows that it is not only the conservative justices who will occasionally play the limits game.

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[4] Transcript of Oral Argument at 46, *Town of Greece v. Galloway* (Argued Nov. 6, 2013) (No. 12-696).

[5] *Id.* at 33.

[6] Transcript of Oral Argument at 34, *Bond v. United States* (Argued Nov. 5, 2013) (No. 12-158).

Where *Bond* challenged the treaty power, *NLRB v. Canning* challenged the President's ability to make recess appointments. This case equally fits into the Court's pattern of picking seemingly innocuous cases—the public is simply not as animated about the appointment power as it might be about other topics. Yet, a decision invalidating the NLRB appointments would arguably have the effect of putting hundreds of board decisions "under a cloud."[7] While the Government may have exaggerated this point, an invalidation *would* still have the effect of hamstringing the President's appointment power, giving the Senate the ability to "sit on nominations for months and years at a time."[8] On the other hand, one might say that a ruling against the Executive Branch in this case relates to checks and balances rather than federal power. In that sense, this decision may be an exception to the Court's habit of picking cases that limit government power. However, it still arguably fits the pattern in that the gridlock caused by limiting the President's appointment power would operate to prevent increases in federal regulation and hamstring government in general.

In *McCutcheon*, the Court addressed laws which restricted the aggregate amount of money private citizens could give to political candidates. Many feared that the Court's willingness to take this issue was an indication that it was targeting campaign finance laws—some Justices had already indicated willingness to overturn *Buckley v. Valeo*. Justice Breyer's dissent accuses the majority of "creat[ing] a loophole that will allow a single individual to contribute millions of dollars" and "eviscerat[ing] our Nation's campaign finance laws."[9] The Court acted by holding that *Buckley* only addressed "quid pro quo" corruption rather than the potential or appearance of corruption. This holding fits in with the general theme of limitations on federal power—the basis of the quid pro quo requirement is that, without it, the law would "impermissibly inject the Government 'into the debate over who should govern.'"[10] When viewed in combination with *Citizens United*, the major case supporting the majority,[11] it shows a pattern of rolling back campaign finance laws.

In *Schuette v. Coalition to Defend Affirmative Action*, the Court chose another characteristic salami-slicing case. In last year's *Fisher* decision, the majority limited but continued to allow affirmative action in public schools, so long as the plans pass the strict scrutiny test articulated In *Grutter* and *Bakke*.[12] In *Schuette*, the Supreme Court was able to once again make new law without directly overruling precedent. This was of interest to the conservatives on the court because they were able to restrict affirmative action by upholding a ballot measure, a "basic exercise of [the voters'] democratic power, bypassing public officials they deemed not responsive to their concerns."[13] In upholding the ballot measure, the Court's majority was able to both restrict federal intervention in state matters, but also restrict affirmative

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[7] Transcript of Oral Argument at 3, *NLRB v. Canning* (Argued Jan. 13, 2014) (No. 12-1281).

[8] *Id*. at 20.

[9] *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting).

[10] *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014) (citation omitted).

[11] *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1471 (2014) (Breyer, J., Dissenting).

[12] *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2415 (2013).

[13] *Schuette v. Coalition to Defend Affirmative Action Integration & Immigrant Rights & Fight For Equal. By Any Means Necessary (BAMN)*, 12-682, 2014 WL 1577512 (U.S. Apr. 22, 2014).

action by allowing states a way out of such policies after they have been established. Although the case did not by any means ban affirmative action in the future, Justice Sotomayor's dissenting opinion accuses the majority of "disregarding *stare decisis*"[14] and, similar to Justice Breyer's *McCutcheon* dissent, "eviscerate[ing] an important strand of our equal protecting jurisprudence."[15] This decision therefore continues with the salami-slicing theme—rather than simply ruling affirmative action unconstitutional outright, the Court disregarded precedent and created a backdoor for states to opt out of affirmative action on their own.

Yet there are some cases that don't fit with this salami-slicing pattern of cutting back on federal power. A major strand of cases against this trend are the criminal procedure cases. *Bond* is separate from these cases because *Bond* dealt with a federalism issue. In contrast, *Kaley v. United States* and *Abramski v. United States* were federal criminal cases that lacked the sense of direction in the other cases discussed. While *Abramski* was somewhat controversial simply because it dealt with a firearms statue, the discussion of individual rights the criminal law in *Kaley* seemed to slip through the cracks without much fanfare at all.

In *Kaley*, the conservative justices on the Court were not quite as concerned with individual rights against the federal government. *Kaley* posed the question of what process was due to criminal defendants when their assets are frozen such that they cannot afford an attorney. Justice Roberts wrote the dissenting opinion, understanding the grave danger posed by the majority's acceptance of this process. He wrote that he could not join in an opinion "holding that a defendant may be hobbled in this way without an opportunity to challenge the Government's decision to freeze those needed assets."[16] Although Roberts dissented, he was not joined by the more conservative members of the court—Justices Scalia, Thomas, and Alito were all in the majority in what was one of the most odd decision breakdowns in recent memory.[17] Unfortunately for the *Kaley* defendants, there was no salami slicing here—this was a more or less straightforward application of the court's precedent. Although the consequences are dire, as conceded by the majority,[18] Justice Kagan wrote: "[w]hen we decided *Monsanto*, we effectively resolved this case too."[19] *Kaley* is differentiated from the salami slicing cases because it was a criminal matter that didn't implicate federalism. Therefore, the sympathy for Mrs. Bond and her ridiculous prosecution under the Chemical Weapons Convention simply wasn't present for Mr. and Mrs. Kaley when their funds were frozen before they even had an opportunity to defend themselves in court.

Abramski is another case where the conservative justices seemed to favor a straightforward application of the law—this is not a salami tactics case. In *Abramski*, the Court was asked to decide whether straw purchasers could be prosecuted under 18 U.S.C. § 922(a)(6)

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[14] *Id.* (Sotomayor, J., dissenting).

[15] *Id*.

[16] *Kaley v. United States*, 134 S. Ct. 1090, 1105, 188 L. Ed. 2d 46 (2014) (Roberts, J., dissenting).

[17] The 7–2 majority opinion was authored by Justice Kagan, joined by Justices Scalia, Kennedy, Thomas, Ginsburg, and Alito, while the dissent was authored by Justice Roberts, joined by Justices Breyer and Sotomayor.

[18] *Kaley*, 134 S. Ct. 1090, 1102 (2014) ("For their part, however, defendants like the Kaleys have a vital interest at stake: the constitutional right to retain counsel of their own choosing.").

[19] *Id.* at 1105.

and §924 (a)(1)(A). Unlike the salami tactics cases, this is a more straight-up statutory interpretation question that is interesting only because it relates to firearms. Accordingly, the conservative justices are not as unified at oral argument. In particular, Justice Alito seemed incredulous of the conservative position that straw person buyers were not regulated by the statute. He told counsel for the petitioner, "Well, what you're saying is [Congress] did a meaningless thing. That was the compromise. They would do something that's utterly meaningless."[20] In contrast, Justice Scalia seemed inclined to interpret the criminal statute in the petitioner's favor, in accordance with the rule of lenity.[21] The lack of conservative consensus shows that it's not a salami tactics case. Although the Court has been active on firearms issues, from *Heller* to *McDonald*, this case didn't implicate firearms ownership as directly, nor did it deal with the Second Amendment. Given the relatively simple statutory construction issue at hand, this was a instance where the court probably didn't take the case with an agenda in mind.

Finally, it is important to point out that not all of the cases taken are salami-slicing in nature. *Halliburton v. Erica P. John Fund, Inc.* (*Halliburton II*)is a case that has been closely watched by those involved in the securities industry. Indeed, the Court has been active in the area of class action securities litigation, having decided both *Halliburton I* and *Amgen* in 2011 and 2013, respectively. This case was followed so closely because Justice Thomas' dissent (joined by Justices Kennedy and Scalia) in *Amgen* signaled his willingness to discard the fraud on the market presumption established in 1988's *Basic v. Levinson*.[22] The fraud on the market presumption is the enabling vehicle for the modern securities class action—without it, plaintiffs would have to prove individual reliance on misleading statements in order to sue for securities fraud. This was therefore a clear agenda case, and yet not a salami slicing case, because some of the Justices have already telegraphed their willingness and intent to overturn significant precedent outright.

During the Supreme Court's 2013 term, the conservative members of the Court have employed a strategy that can be described as salami tactics. Rather than overturning (or indicating willingness at oral argument to overturn) precedent outright, this court tends to pick relatively innocuous vehicles to win smaller, but meaningful victories. Although the tone of this argument sounds (extremely) cynical, the salami slicing strategy is not necessarily disparaging in this context. For better or for worse, the Court has used its discretion in choosing cases in order to affect long-term change in the law. The conservatives on the Court should not be condemned for using this strategy effectively. The cases that have been subject to salami tactics this term have focused on limiting federal power—*Hobby Lobby* in the freedom of religion context, *Bond* in the treaty power, *McCutcheon* in campaign finance, and *Canning* in the appointment power. Non-federal powers cases that were still subject to salami slicing include *Schuette* in affirmative action, and *McCullen* in the freedom of speech in the state context. However, the Court's

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[20] Transcript of Oral Argument at 12, *Abramski v. United States* (Argued Jan. 22, 2014) (No. 12-1493).

[21] *Id*. at 49 ("This is a criminal statute. And – and you're saying that when – when I buy it and I told somebody I'll sell it to you later, that I am acting as an agent? Wow. It's a criminal statute.").

[22] *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184, 1208 n.4 (2013) (Thomas, J., dissenting) ("The *Basic* decision itself is questionable. Only four justices joined the portion of the opinion adopting the fraud-on-the-market theory…the Court has not been asked to revisit *Basic*'s fraud-on-the-market presumption. I thus limit my dissent…").

indicated willingness to overrule precedent outright in *Halliburton II* shows that the Court won't always deploy salami tactics.