U.S. Supreme Court preview

The upcoming term will once again have its fill of high-profile, controversial decisions

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Obamacare who? Arizona immigration what? The U.S. Supreme Court is moving on, and there's no time to linger.

When the U.S. Supreme Court opened its 2011-12 term this time last year, court watchers rightly called it a "blockbuster." Against a backdrop of economic stagnation and election-year politics, the court tore through major issues like federal health insurance reform, Arizona's tough anti-illegal immigration law, warrantless police GPS tracking and mandatory life sentences for juveniles. The *National Review* asked whether last year's term was the "most important Supreme Court ever." The pressure became so intense that by the time the dust settled in late June, the court's marmoreal rivets had sprung unprecedented leaks.

Three months later, as the court's 2012-13 docket shapes up, the *National Review* might want to reopen the question. Far from taking a breather, this term the court has its sights set on divisive issues like same-sex marriage, affirmative action, voting rights, DNA databases and whether corporations can be held liable for international torture. In other words, don't look away now.

SAME-SEX MARRIAGE

The court has yet to grant a *certiorari* petition this term related to homosexuality, but that hasn't stopped most court watchers from declaring this to be the year same-sex marriage reaches the court. With no less than seven separate petitions pending related to same-sex marriage — and comments by Justice Ruth Bader Ginsburg during a speech in September that the court will likely hear some of those petitions near the end of the term — it seems a safe bet that the court will soon determine what effect, if any, the federal Constitution has on a state's decision to permit same-sex marriage.

The challenges related to the issue come to the court in two forms. The first involves decisions by individual states to curtail rights they had previously granted to same-sex couples: in California, the right to marry, and in Arizona, the right of gay state employees to share health benefits with their registered domestic partners. Both these laws were struck by lower courts on constitutional grounds.

In California, where gay people briefly enjoyed a right to marry under the state Constitution, voters passed Proposition 8 in 2008 to amend the Constitution to define marriage as between a man and a woman — but importantly, Prop 8 changed the law in no other way, continuing to permit gay domestic partners to share equal rights under state law with married couples. Although the trial court conducted a lengthy trial to determine whether any evidence exists that same-sex marriage is harmful to society (it found none), on appeal the U.S. Court of Appeals for the Ninth Circuit issued a more limited ruling that California's decision to prohibit same-sex marriage in name only, while leaving all rights the same, lacked any rational basis because it amounted to nothing more than unlawful "separate but equal" treatment. Because the Ninth Circuit carefully limited its decision to California's particular history, some court watchers think the court may take a pass on this petition, titled *Hollingsworth v. Perry* — and if it does, same-sex marriage will become legal again in the nation's most populous state.

Likewise, *Brewer v. Diaz* addresses Arizona's decision to take state employee health benefits away from same-sex domestic partners, who had enjoyed them for years. Although the state claimed budgetary issues lay behind its decision, evidence at trial established that same-sex domestic partner benefits constituted less than 0.0002 percent of the state's annual budget. Accordingly, the Ninth Circuit found the state's justification to be a pretext for treating same-sex couples differently from straight couples, in violation of the Constitution's Equal Protection Clause.

The rest of the gay rights petitions before the court this term involve §3 of the Defense of Marriage Act, a Clinton-era statute which prohibits the federal government from recognizing same-sex marriage for any of its own purposes even if legally performed in a state that allows it. The Obama administration has disowned §3, declaring it unconstitutional and refusing to defend it in court on the grounds that laws directed at gay people are subject to strict scrutiny, which DOMA does not meet. Accordingly, Republicans in Congress formed the "Bipartisan Legal Advisory Group" to defend the statute against lawsuits alleging DOMA violates gay individuals' Fifth and 14th Amendment rights to due process and equal protection, and the states' 10th Amendment right to have state marriage laws recognized by the federal government for Medicare reimbursement and other purposes. That defense has not gone well so far, with every one of the dozen courts to review DOMA in the past five years finding it unconstitutional for one of those reasons.

The fate of DOMA probably rests with Justice Anthony Kennedy — encouragingly to supporters of gay rights, Kennedy authored the court's two most pro-gay decisions, *Romer v. Evans* and *Lawrence v. Texas* — but Chief Justice John Roberts may also prove an unpredictable vote. Steeped in the gay-friendly culture of Washington, D.C.'s law firm community and (if a 2005 *Los Angeles Times* piece is to believed) a key behind-the-scenes pro bono supporter of progay rights petitions in the *Romer* case, Roberts may yet have more surprises in store for the conservative bloc than his vote last term on health care.

AFFIRMATIVE ACTION

Race-based university admission policies have sown controversy for decades. In the late 1970s, a splintered court held in *Regents of the University of California v. Bakke* that the admissions policy of the medical school of UC-Davis, which set aside a portion of available spaces each year for nonwhite students, violated the constitutional equal protection rights of white applicants by denying them access to those seats solely on the basis of their race. While no majority rationale existed for the result, the most widely adopted understanding of *Bakke* is that race could not be a decisive factor in university admissions — no quotas — but it could be a consideration, or "plus" factor, because institutions of higher learning have a compelling interest in fostering a diverse campus.

The court expanded on *Bakke* in 2003's *Grutter v. Bollinger* and *Gratz v. Bollinger*. In *Grutter*, the court considered the admissions policy of the University of Michigan's law school, which combined the race of each applicant with other aspects of their background to form a "holistic" picture, while in *Gratz*, the University of Michigan's undergraduate college simply awarded minority students many more "points" on a scale than nonminorities, ensuring that virtually any minority applicant gained admission over an equally qualified nonminority. The court approved the process in *Grutter* but not that in *Gratz*.

Now, the University of Texas at Austin has given a more conservative Supreme Court another chance to look at the question in *Fisher v. University of Texas*. Because 85 percent of admissions at the University of Texas are reserved for high school graduates in the top 10 percent of their class, admissions based on campus diversity are limited. Before *Grutter*, the school doled out the limited remaining slots based on a metric that did not consider race. After *Grutter*, the university added race back into that mix. Fisher, a white student denied admission, sued on the ground that she was unlawfully excluded on the basis of her race.

The Supreme Court's grant of the petition in *Fisher* bodes ill for race-based admissions policies. The *Grutter* majority no longer exists, with the 5-4 decision's author, Justice Sandra O'Connor, replaced by the far more conservative Justice Samuel Alito. Moreover, Justice Elena Kagan, an appointee of President Obama and presumptive liberal vote, has recused herself from the case, likely because she participated in discussions about it while serving as solicitor general.

CORPORATE LIABILITY FOR INTERNATIONAL TORTURE, MURDER AND GENOCIDE

In 1789 the very first Congress passed the Alien Tort Statute, which granted U.S. courts jurisdiction over any civil action "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Some historians say the law was passed because a number of states refused to allow foreign ministers, merchants and tourists access to their own courts, and for 190 years, the statute lay basically dormant.

Then, in 1980, enterprising human rights attorneys realized that the text of the statute contained no restrictions on where the "violation of the law of nations" had to take place. When the father of an individual tortured in Paraguay successfully brought an action against his son's torturer in federal court in New York under the ATS, he ushered in a new age of human rights litigation. In 2004's *Sosa v. Alvarez-Machain*, the Supreme Court held the statute was limited to claims based on the law of nations in 1789, such as torture and piracy, but otherwise left the statute's enforcement intact.

Last term the court heard arguments in *Kiobel v. Royal Dutch Petroleum*, in which a Nigerian living in the United States brought suit under the ATS against three international oil giants, alleging they caused the Nigerian government to use military force to silence local resistance to oil drilling. The Supreme Court granted *certiorari* to review whether corporations could be sued under the ATS, but during oral argument, it became clear that a number of justices — particularly Roberts, Alito and Kennedy — had doubts whether the statute applied to claims arising entirely overseas. In an unusual order that followed, the court requested new briefing and another oral argument this term on whether the statute applies to events occurring entirely abroad.

Once again, the court's lurch rightward with the replacement of O'Connor with Alito may make a critical difference here. Since Kennedy was one of the most vocal doubters of the statute's reach in the oral arguments last term, five votes may exist to significantly rein in the law.

OTHER PENDING PETITIONS

The Supreme Court continues to grant petitions for *certiorari* throughout much of its term, and at least a few pending petitions have drawn notice as possible upcoming grants.

In *Maryland v. King*, the Commonwealth of Maryland lost a challenge before its own highest court, on Fourth Amendment grounds, to the state's standard practice of collecting DNA samples from all felony arrestees before conviction and without a warrant. King was arrested for felony assault, and an automatic DNA swab linked him to a six-year-old rape. Convicted and sentenced to life in prison, King challenged the warrantless DNA swab that led to his arrest, and the Maryland court held King's reasonable expectation of genetic privacy mandated a warrant before DNA collection. Don't expect the decision to last very long, though: the Commonwealth sought an emergency stay, which Chief Justice Roberts granted — stating in his order that there is a "fair prospect" the court will both grant the petition for *certiorari* and reverse the decision. If the court views DNA collection on arrest as akin to fingerprint collection on arrest, his prediction may well come true.

Another set of petitions to watch involve voting rights. In April, an *en banc* panel of the Ninth Circuit held in *Arizona v. Inter Tribal Council* that an Arizona statute requiring hopeful voters to show government-issued identification to vote is not preempted by the National Voting Rights Act. With dozens of states enacting similar laws, the court may well wish to clarify the landscape.

Similarly, the court faces a number of petitions challenging Congress's 2006 reauthorization of the Voting Rights Act, which requires states and counties with historically discriminatory voting practices to obtain pre-clearance from the Justice Department to change voting district lines. In 2009, the Supreme Court hinted, but did not hold, that the decline in practical racial discrimination since the enactment of the Voting Rights Act in 1965 may mean the federal government no longer has a compelling interest in impinging state sovereignty by requiring preclearance from communities based purely on their history of discriminatory practice. This time, the court may go further than a hint.

As the court's docket indicates, neither the leaks nor controversies from last term have intimidated the justices away from high-profile cases. To the contrary, it makes clear that anyone lingering in the past does so at his peril.

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