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Overview of the Supreme Court's October Term, 2012

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Abstract

Given the excitement and importance of the recently concluded Supreme Court term, it is possible that the upcoming term will lack the same dazzling array of issues; just as not every baseball lineup is loaded with players like the 1927 Yankees Murderers Row, not every Supreme Court term is chock-full of Hall of Fame cases. Still, the next few years promise their fair share of compelling cases, and because even the most veteran Supreme Court prognosticators can predict only the first few innings of a given term—congressional action and lower court decisions can alter the playing field—there could well be some surprises on the horizon.

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The Scorecard for Last Term

October 1, 2012, marks the beginning of a new Supreme Court term. During the 2011 October Term, the justices tackled a slew of important issues, such as the legality of the Arizona immigration law (*Arizona v. United States*); the permissibility of warrantless use of GPS tracking devices by the police (*United States v. Jones*); Congress's authority to outlaw false claims about meritorious military service (*United States v. Alvarez*); and, of course, Congress's power to adopt the Patient Protection and Affordable Care Act with its Medicaid expansion (*NFIB v. Sebelius*).

Each of those cases will have a major effect not only on the development of the law, but also on the lives of millions of people. Given the impact of these decisions, it is unlikely that the Court soon will top the blockbuster term that ended last June.

That prospect should come as no surprise. Except in rare cases, the Supreme Court does not take on major legal issues until the lower federal and state courts have chewed them over for a while. When the Court does decide to answer a question, its decision often leaves open a host of ancillary

Key Points

- October 1, 2012, marks the beginning of a new Supreme Court term.
- During the 2011 October Term, the justices tackled a slew of important issues, such as the legality of the Arizona immigration law, the permissibility of warrantless use of GPS tracking devices by the police, and Congress's power to adopt the Patient Protection and Affordable Care Act with its Medicaid expansion.
- The Court can have a high-profile term followed by one or more ordinary terms as its decisions play out in the lower courts, legislatures, administrative agencies, law schools, and media.
- While not every term can offer the marquee decisions found in the most recently concluded term, the next few years promise their fair share of compelling cases.
- As congressional action and lower court decisions can alter the legal and political landscape, there could well be some Supreme Court surprises on the horizon.

questions—and also may pose new ones that previously had not been apparent. The lower courts, the academy, and the media get the first opportunity to discuss what will happen next and to stake a claim as to the right answer to novel legal issues. In the meantime, the Supreme Court will address the follow-on issues that stem from its decisions three or four terms ago.

Patience affords the justices the opportunity to wait until every relevant issue has been identified and every argument has been fully aired, and fear of getting the answers wrong leads the Court to be patient. Besides, there always are more than enough housekeeping matters to resolve—issues such as when lawsuits must be filed in order to be timely and how cases must be litigated or settled—to keep the trains running on track and on time.

Given the excitement and importance of the recently concluded Supreme Court term, it is possible that the upcoming term will lack the same dazzling array of issues; just as not every baseball lineup is loaded with players like the 1927 Yankees Murderers Row, not every Supreme Court term is chock-full of Hall of Fame cases. Baseball teams have alternating stretches of All-Star and minor league play, and the Supreme Court can have a high-profile term followed by one or more ordinary terms as its decisions play out in the lower courts, legislatures, administrative agencies, law schools, and media.

The Court has already agreed to hear 34 cases and will add more to its schedule once its "megaconference" is finished on September 24. There are 32 cases set for oral argument in October and November, and while it would be premature to divine any sort of overarching trend for the upcoming term, the slate of pending cases is a mix of high- and low-profile issues. Most notably, there is so far a plurality of criminal procedure cases, but it is impossible to know what will happen beyond the first few innings.

Lineup for This Term: The Equal Protection Case

Fisher v. University of Texas at Austin. *Fisher* is arguably the most important and controversial case that the Supreme Court has scheduled for argument. *Fisher* involves an equal protection challenge to Texas's use of race in undergraduate admissions decisions. Under Texas law, every student in the top 10 percent of his or her high school graduating class is automatically granted admission to UT. Abigail Fisher did not qualify, so her application for one of the remaining spots was in competition with candidates who received racial preferences.

In addition to posing the same fundamental question as every other preferential-admission higher education case—When, if at all, can race be used as an admission criterion in higher education?—*Fisher* raises two narrow, novel issues:

- Whether states can use racial preferences in college admissions not only to achieve a diverse student body (as held in *Grutter v. Bollinger*), but also to realize a level of "diversity" well beyond the "critical mass" theory under *Grutter*, one that approaches proportionality for Hispanics; and

- Whether racial preferences harm minorities by leading them to forgo schools where they could perform at a higher level than at schools offering preferences. Although the assumption underlying the use of racial preferences is that they benefit minority applicants, *amici* for Fisher, relying on post-*Grutter* social science studies, believe the opposite to be true.

Lineup for This Term: The Civil Liberties Cases

Clapper v. Amnesty International. Is the National Security Agency listening to everyone's phone conversations and monitoring everyone's Internet use? A gaggle of attorneys, journalists, and labor–media–human rights organizations apparently think so. They brought this suit challenging the constitutionality of the Foreign Intelligence Surveillance Act, which (among other things) allows the government to intercept telecommunications involving non-Americans located outside the United States.

The problem for the challengers, however, is that they cannot prove that the government in fact has intercepted, or later will intercept, any of *their* communications. Ordinarily, that shortcoming would doom their challenge because it would mean that they cannot prove the injury necessary to establish "standing," an element of the Article III "case or controversy" requirement that must be satisfied in order for a federal court to adjudicate a case. The Second Circuit, however, disagreed and allowed the suit to go forward.

Kiobel v. Royal Dutch Petroleum. A holdover from last term, *Kiobel* was argued in February 2012, but the Court ordered supplemental briefing and set the case forreargument. *Kiobel* involves the Alien Tort Statute (ATS), once described by Judge Henry Friendly as "a legal Lohengrin, no one knows from whence it came." The ATS was part of the Judiciary Act, passed by

the first Congress in 1789. It authorizes district courts to hear "any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States."

The ATS has been used since the 1980s in lawsuits alleging that individuals committed torture, murder, and other human rights violations. The question in *Kiobel* is whether it applies to actions of a corporation. The plaintiffs are Nigerian citizens who allege that Royal Dutch Petroleum aided and abetted the Nigerian military dictatorship in committing human rights violations. The Court's decision has the potential to permit a new avenue of relief in American courts for human rights abuses committed anywhere on the globe.

Arkansas Game & Fish Commission v. United States. This case raises the question, "Does the government 'take' your property when the government submerges it every now and then?" Over the course of six years, the U.S. Army Corps of Engineers periodically diverted water—and in the process flooded a state-owned forest, destroying more than 23,000 acres of trees worth more than $5 million. The federal government argued, and the court of appeals held, that recurring government-caused floods may be common law "torts," but they are not Fifth Amendment "takings" unless the flooding is permanent.

Put differently, the government argues that it can flood someone's private property every now and then without "taking" it because the property can still be used after it dries out. On that theory, the flood in *Genesis* that wiped out every living creature except the ones aboard Noah's ark was not a "taking" because the water subsided after 40 days.

Lineup for This Term: The Criminal Cases

Florida v. Harris* and *Florida v. Jardines. How reliable is a dog's nose? That is the question posed by two criminal cases involving police use of narcotics detection dogs. The first case, *Florida v. Harris,* involves the question of whether an "alert" to the presence of illegal drugs by a narcotics detection dog establishes probable cause for a search. In the second case, *Florida v. Jardines*, the issue is whether allowing a dog that is stationed outside the front door of a home to sniff odors emanating from within constitutes a "search" under the Fourth Amendment, thus requiring the officer to have probable cause before the sniff.

Tibbals v. Carter* and *Ryan v. Gonzalez. Three points define a plane, and three legal rules create a playing field. Here, the three rules are that (1) the government may not force a mentally incompetent defendant to waive certain rights (e.g., the right to a fair trial); (2) a state prisoner on death row has a federal statutory right to challenge his conviction and sentence in a federal *habeas corpus* proceeding; and (3) the government may not execute a mentally incompetent defendant.

Lawyers for two prisoners who were deemed to be incompetent argue that *habeas* proceedings must be stayed until the prisoners are competent to proceed. The state is not harmed by such a delay, the prisoners argue, because if they are incompetent, they cannot be executed but can be imprisoned. The state argues that the prisoners have no constitutional right to attend *habeas* proceedings in federal court, so their lawyers can litigate on their behalf. Even if the prisoners cannot be executed now, the state argues that an indefinite stay of proceedings thwarts their legitimate interest in the finality of a conviction.

***Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds* and *Comcast v. Behrend*.** Class actions allow multiple plaintiffs to combine their separate claims into one case. That is socially valuable if numerous people are injured in an amount that is too small for them to file separate lawsuits. But there also is a risk that the defendant will feel coerced into settling a class action case that it should win, simply in order to avoid a massive amount of liability. Oftentimes, therefore the most important question in a class action lawsuit occurs at the outset of the litigation, when the trial judge must decide whether to certify the case as a class action.

Amgen and *Comcast* involve the issue of what plaintiff's counsel must prove in order to have a class certified. *Amgen* asks whether plaintiffs must prove that an allegedly fraudulent representation is "material." Why does that question matter? Because not all lies are important: You can fudge your weight if the Department of Housing and Urban Development is considering you for a janitor's position, but not if NASA is fitting you for a space suit.

Likewise, *Behrend* asks whether a plaintiff's class can be certified without proof that damages can be awarded on a class-wide basis. And why is that important? Litigation, especially discovery, is enormously expensive and is a dead-weight loss to the parties and society if the case falls apart at the end of the lawsuit. It is better to end the suit early on than to waste time, effort, and money litigating a case that never should have been filed.

Bailey v. United States. The police can use a warrant to search

a home for contraband, for the instrumentalities or evidence of a crime, and for evidence showing who committed the crime. What can the police do if they believe that the owner of that home is involved in the crime?

In 1981, the Supreme Court held that a police officer executing a search warrant may detain someone found on the premises until the search has been completed. Does that rule apply if the owner of the premises is not at home when the search is carried out? Suppose the FBI is searching a home in Florida while the owner is 3,000 miles away in California. Can the agents detain the owner until the search is completed? The usual suspects line up in their usual positions: Law enforcement types say "Yes," while civil libertarians say "No."

Cases in the On-Deck Circle

Even if all the cases noted above do not get on base, there are a few in the on-deck circle that might. It is always risky to predict what the Supreme Court will do, but the justices are likely to consider the following cases before the end of the 2012 term.

The Marriage Cases: *Massachusetts v. HHS* (Defense of Marriage Act Case) and *Hollingsworth v. Perry* (California Prop. 8 Case). In 1996, Congress passed and President Bill Clinton signed into law the Defense of Marriage Act (DOMA), which defines the term "marriage" for purposes of federal law as the union of one man and one woman. It also protects the power of each state to make its own decision as to the definition of marriage—regardless of what the federal government or other states do. California, in turn, amended its state constitution to define a "marriage" as a union of one man and one woman.

Earlier this year, the U.S. Courts of Appeals for the First and Ninth Circuits ruled that Congress and California acted irrationally in making that choice. Because the First Circuit in *Massachusetts v. HHS* held an act of Congress unconstitutional, the Supreme Court is very likely to review its decision. The Court also could decide to review the Ninth Circuit's decision in *Hollingsworth v. Perry* together with the First Circuit's decision.

The Voting Rights Act Cases: *Shelby County v. Holder*, *Nix v. Holder*, and *Texas v. Holder*. Congress passed the Voting Rights Act of 1965 (VRA) to prevent states and localities from denying the franchise to blacks. Although the VRA has had a dramatic impact in preventing discrimination in voting, not all of its provisions were intended to be permanent. In particular, Section 5 of the VRA has come under fire in recent years.

Section 5 suspends all changes in state election procedures in certain "covered jurisdictions" until the U.S. Attorney General determines that the change has neither the intent nor the effect of abridging the right to vote on the basis of race or color or until a three-judge district court panel in Washington, D.C., so finds. Congress reauthorized Section 5 in 1970, 1975, 1982, and then in 2006 for another 25 years. During the 2006 reauthorization, Congress did not revise the formula for determining which jurisdictions are subject to preclearance or to justify the difference in treatment between covered and non-covered jurisdictions given today's conditions.

In 2009, in *Northwest Austin Municipal Utility District No. 1 v. Holder*, the petitioner challenged the constitutionality of the preclearance provisions, but the Court did not resolve the issue, ruling in the petitioner's favor on other, narrow grounds. Now two more challenges to Section 5 (*Shelby County v. Holder* and *Nix v. Holder*) have reached the Court, , and a third (*Texas v. Holder*) is on the way.

In *Shelby County*, the county government is subject to Section 5 preclearance because the state (Alabama) used a prohibited voting test in 1965 and less than 50 percent of Alabama's voting-age population voted in the 1964 presidential election. Shelby County must seek preclearance for all proposed voting changes—a costly process that has caused the county to delay at least one past election to ensure compliance—based on Alabama's misdeeds from nearly half a century ago. In *Nix*, the city of Kinston, North Carolina, overwhelmingly passed a referendum that would change from partisan to nonpartisan elections, but the Department of Justice objected to this change and potential officeholders sued.

In the *Texas* case, the state legislature drew up a redistricting plan following the 2010 census that added four seats to the state congressional delegation and modified the boundaries of voting districts. These new district maps have been litigated in two federal courts under Sections 2 and 5 of the VRA. Following the decision by a three-judge panel in Washington in late August that Texas failed to show that the new electoral maps would have neither the purpose nor the effect of abridging minority voting rights, the state has announced that it will appeal the decision to the Supreme Court. Due to the nature of the suit, Texas has a right of direct appeal to the Supreme Court, so this

case will not be drawn out nearly as long as *Shelby County* and *Nix* have been.

In his 2009 decision in *Northwest Austin Municipal Utility District No. 1*, Chief Justice Roberts all but invited challenges like these. Eventually, the Court will hear another case challenging the constitutionality of Section 5, and with three Section 5–related cases now on the Court's docket, it could be sooner rather than later.

The Treaty Case: *Bond v. United States*. The Senate ratified the Chemical Weapons Treaty in 1996, and Congress later enacted implementing legislation. *Bond v. United States* tests the federal government's authority to implement a treaty through legislation. The legislation in question broadly prohibits use of "chemical weapons," and the statute could reach use of household chemicals to commit a crime.

In *Bond*'s first trip to the Supreme Court, the Court held that a private party charged with violating the chemical weapons statute has standing to challenge its constitutionality, even though the theory she raised involved a claimed violation of the state's Tenth Amendment rights. On remand, the U.S. Court of Appeals for the Third Circuit held that Congress had authority to implement the Chemical Weapons Treaty by legislation that would not pass muster if Congress had relied only on one of its Article I enumerated powers. The circuit court relied on an early 20th century decision by Justice Holmes that broadly read Congress's authority to pass treaty-implementing legislation.

It is not clear whether the Court will grant review in this case, because the issue does not often arise, but a decision could have important ramifications for defining the extent of congressional lawmaking power.

The Ballot Registration Case. This is an election year, so no Supreme Court preview would be complete without at least one election law case. The not-for-profit National Organization for Marriage (NOM), along with other groups, has challenged a Maine law requiring that advocacy groups participating incidentally in state ballot measures register as political committees and satisfy all registration and donor disclosure requirements.

This dispute began with a 2009 Maine law recognizing same-sex marriages. Supporters of traditional marriage organized a campaign for a statewide referendum on the issue. The Maine Commission on Governmental Ethics and Election Practices investigated NOM for failing to register as a "Ballot Question Committee" (BQC), which Maine regulates in much the same manner as "Political Action Committees" (PACs). BQCs must report expenditures above $5,000 and the sources of contributions greater than $100. NOM challenged the regulation under the First and Fourteenth Amendments but lost in the U.S. Court of Appeals for the First Circuit.

In its petition to the Supreme Court, NOM argues that the Maine BQC regulations are unduly onerous and therefore invalid under *Citizens United v. FEC*. The 2010 *Citizens United* decision has been controversial, but the Court is committed to it. Last term, for example, in *American Tradition Partnership v. Bullock*, the Supreme Court smacked down a decision by the Montana Supreme Court that defied the Court's *Citizens United* holding. This petition presents the Court with the opportunity to decide whether its *Citizens United* decision applies to ballot referenda in the same manner that it governs the election of candidates.

The Mandatory Collective Bargaining Case: *Harris v. Quinn*. Illinois operates a Medicaid-waiver program that pays for in-home care for certain disabled individuals. Illinois law designates these personal care providers as state employees for collective bargaining purposes and requires them to support the union as their exclusive bargaining representative. Some providers have challenged this law as violating their First Amendment freedom of association rights.

This case has been pending in the Court since 2011, and at the close of last term, the Court asked the Solicitor General to state the views of the United States. Although the government has not yet filed its brief, this case offers the Court an opportunity to further define the relationship between compelled union support and the First Amendment.

On the Horizon

While not every Supreme Court term can offer the marquee decisions found in the most recently concluded term, the next few years promise their fair share of compelling cases. In addition, given that even the most veteran Supreme Court prognosticators can predict only the first few innings of a given term—congressional action and lower court decisions can alter the playing field—there could well be some surprises on the horizon.

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