

When the Supreme Court opened its current term last October by denying review of a raft of same-sex marriage cases, it seemed like a reasonable bet that the Court's docket would have a lower public profile than in recent years. It was not to be: the blockbuster cases are back with a vengeance. There may be no higher-profile issues in American politics these days than the Affordable Care Act and same-sex marriage, and the Court is now poised to make significant rulings in both areas this term.

# Back in the Spotlight (Again)

Josh Patashnik

### Busy Times at One First Street

It has become something of an annual summertime ritual in Washington, D.C.: lawyers and reporters camping out on the steps of the Supreme Court in late June, waiting for the Court to hand down its final opinions of the term in some of the Court's most high-profile, eagerly anticipated cases. These cases include:

- October Term 2013: *Burwell v. Hobby Lobby Stores* (health coverage for contraception); *Harris v. Quinn* (public-employee unions); *NLRB v. Noel Canning* (recess appointments); *McCullen v. Coakley* (protests at abortion clinics); *Utility Air Regulatory Group (UARG) v. EPA* (greenhouse-gas regulation); *Schuette v. BAMN* (affirmative action); *McCutcheon v. FEC* (campaign finance); *Town of Greece v. Galloway* (public prayer)
- October Term 2012: *United States v. Windsor* and *Hollingsworth v. Perry* (same-sex marriage); *Shelby County v. Holder* (Voting Rights Act); *Fisher v. University of Texas* (affirmative action); *Arizona v. Inter-Tribal Council* (proof of citizenship in voter registration)
- October Term 2011: *NFIB v. Sebelius* (Affordable Care Act); *Arizona v. United States* (immigration); *Knox v. Service Employees* (public-employee unionization)

The Supreme Court will consider whether the IRS may offer subsidies to individuals who purchase health coverage on exchanges operated by the federal government (*King v. Burwell*), and whether the Constitution requires states to allow and to recognize same-sex marriages (in four consolidated cases from the Sixth Circuit).

The high-profile, politically salient cases the Court has decided in recent years present what might appear to be a paradox. On the one hand, there seem to be an unusually high number of these cases, in areas ranging from immigration to the environment to voting rights to health care to affirmative action to same-sex marriage to public-employee unionization. On the other hand, the Court has tended to steer a middle ground in these high-profile cases, nearly always opting for incremental change and compromise over doctrinal upheaval and clear-cut wins for one side. Why does the Court inject itself into so many politically charged debates, only to accomplish what seems like so little?

Perhaps both patterns are connected to a larger phenomenon: the increasing ideological and partisan polarization of American politics. Both the Supreme Court's frequent interventions and its incremental approach can be seen as a logical response to the political backdrop against which the Court must act. And if that is true, it could have some interesting implications for the Court's upcoming rulings on same-sex marriage and health care.

The Court received 136 amicus briefs in the Affordable Care Act cases in the 2011 term, 156 briefs in the same-sex marriage cases in the 2012 term, and 82 briefs in last term's *Hobby Lobby* contraception case. The increasing number of amicus briefs is even more noteworthy because it comes at a time when the Court's overall workload has declined sharply: the Court now issues around 70 opinions in argued cases per term, down from more than 150 opinions per term for much of the 1970s and 1980s.

Are these past few years outliers? Maybe, maybe not. It's hard to define what qualifies as a high-profile, politically

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charged case. (As Justice Potter Stewart once said in a different context, “I know it when I see it.”) But there are strong indications that the Court has been more in the public spotlight of late. One measure of the public prominence of the Court’s caseload is the number of amicus briefs filed in the Court’s cases. That number is at an all-time high: amici filed more than 700 briefs during October Term 2011, a record 1,001 briefs during October Term 2012, and more than 800 in October Term 2013. These briefs are heavily concentrated in major cases. The Court received 136 amicus briefs in the Affordable Care Act cases in the 2011 term, 156 briefs in the same-sex marriage cases in the 2012 term, and 82 briefs in last term’s *Hobby Lobby* contraception case. The increasing number of amicus briefs is even more noteworthy because it comes at a time when the Court’s overall workload has declined sharply: the Court now issues around 70 opinions in argued cases per term, down from more than 150 opinions per term for much of the 1970s and 1980s.

One might expect that a Court inclined to involve itself in politically salient cases would also be inclined to issue broad and sweeping rulings in those cases. But the opposite seems to be happening. In a remarkable number of closely watched cases, the Court has carefully crafted opinions that reject the preferred positions on both sides. Indeed, look back to the list of cases above. In *every single case*, the Court declined to adopt the most sweeping contentions offered by the parties and amici. For example:

Polarization and gridlock contribute to the politicization of the Court’s docket. [...] *Shelby County* was a direct consequence of Congress’s inability to agree on an updated coverage formula for Voting Rights Act preclearance. And the Affordable Care Act trilogy of *NFIB*, *Hobby Lobby*, and *King* have flowed in large part from the severe and enduring enmity between the parties regarding health-care reform. The list goes on.

- In *Hobby Lobby*, the Court held that certain for-profit religious employers could claim an exemption from the Affordable Care Act’s contraception mandate—but made clear that its ruling was premised on the Obama Administration’s assurance that women would be able to obtain contraceptive coverage directly from insurance companies at no cost.
- In *Noel Canning*, the Court invalidated some of President Barack Obama’s recess appointments—but only on the narrow ground that the Senate was not actually in recess, rather than on broader constitutional grounds that would have significantly curtailed the president’s recess-appointment power.
- In *McCullen*, the Court invalidated a Massachusetts law imposing a buffer zone outside abortion clinics—but only on narrow-tailoring grounds, rather than on the broader ground urged by the protestors that the law was not content neutral.
- In *UARG*, the Court rejected the EPA’s justification for its regulation of certain greenhouse-gas emitters under the Clean Air Act—but accepted a different justification that allowed EPA to regulate the vast majority of emissions that EPA sought to cover.
- In *Windsor*, the Court invalidated the federal Defense of Marriage Act, but declined to adopt reasoning that would clearly invalidate state gay-marriage bans, which it also avoided ruling on in *Perry*.
- And in *NFIB*, the Court upheld the Affordable Care

Act's individual mandate—but under the taxing power, not the commerce power, and at the same time held that states could decline to participate in the act's Medicaid expansion without losing existing Medicaid funding.

The trend toward cautious, incremental opinions in high-profile cases has not escaped the notice (or ire) of the justices who would like the Court to be more definitive. Justice Antonin Scalia lamented that the Court's ruling in *McCullen* was a misguided effort to craft “an opinion that has Something for Everyone,” and has previously dismissed the Court's middle-ground approach as “faux judicial restraint” and “judicial obfuscation.”

### The Court in an Age of Polarization

There is no single answer to the question why the Court has approached these cases the way it has. But the increasingly polarized nature of American politics, in which both parties are more ideologically homogeneous and cohesive than ever before, may be part of the story. That polarization, combined with the divided government that has prevailed in Washington since the 2010 elections, means that Congress is incapable of enacting any significant legislation, or even making relatively minor amendments to existing law.

In several different ways, polarization and gridlock con-

tribute to the politicization of the Court's docket. Political activists who find their agenda stymied in the legislative branch often resort to litigation. Presidents who find *their* agendas stymied in the legislative branch may try to make policy through creative and aggressive interpretations of existing statutory authority, which in turn are likely to be challenged in court. And gridlock can prevent Congress from clearing up ambiguities in laws and from fixing statutes that aren't working as intended, throwing those issues to the judiciary as well.

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Many of the cases listed above never would have come before the Court but for the polarization and gridlock in Washington. Certainly the showdown over recess appointments in *Noel Canning* would have been avoided had President Obama and Senate Republicans not been at loggerheads over presidential nominees. EPA would not have interpreted its authority under the Clean Air Act and

drawn a challenge in *UARG* as it did, had Congress been able to agree on some regulatory scheme for greenhouse-gas emissions. *Shelby County* was a direct consequence of Congress's inability to agree on an updated coverage formula for Voting Rights Act preclearance. And the Affordable Care Act trilogy of *NFIB*, *Hobby Lobby*, and *King* have flowed in large part from the severe and enduring enmity between the parties regarding health-care reform. The list goes on.

Polarization also likely helps explain the Court's middle-ground approach in many of these cases. Chief Justice

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John Roberts famously likened the Court's role to that of a baseball umpire, but a better analogy now might be a referee during an increasingly contentious boxing match. The Court's approach seems geared toward letting opposing sides duke it out in the political arena, reining them in when they stray too far from historical or constitutional norms, and pushing the parties to work together where possible. In this way, the Court both preserves its hard-earned reputation as being (at least somewhat) above politics and engages in an ongoing dialogue with the political branches.

Consider again *UARG*. The Court, in an opinion by Justice Scalia, upheld much of EPA's newly asserted regulatory authority, but rejected the most expansive authority EPA claimed. In so doing, the Court recognized that EPA would continue to expand its regulation of greenhouse-gas emissions under the Clean Air Act. The Court made clear that this effort would receive deference, but under a watchful eye: "We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery," the Court warned. Or consider the saga of *Shelby County*: four years earlier, in its *Northwest Austin* case, the Court, in an opinion joined by eight justices, went out of its way *not* to invalidate the Voting Rights Act's coverage formula—resolving that case instead on all-but-implausible statutory grounds—but warned Congress that the existing coverage formula, which relied on voter-turnout statistics from nearly fifty years ago, raised "serious constitutional questions." The Court's effort to push Congress to update the outmoded coverage formula ultimately proved unsuccessful, but its message, at least, was clear.

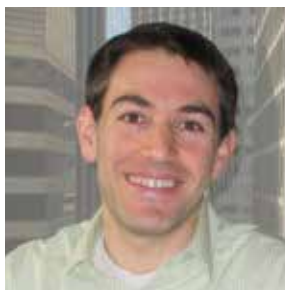
### Looking Ahead

At first blush, this term's blockbuster cases on the Affordable Care Act and same-sex marriage seem like poor candidates to continue a pattern of middleground rulings—and few are predicting that they will. But maybe it's not so unlikely.

In the same-sex marriage cases, the Court reformulated the question presented (which it does not often do) to ask the parties to brief two separate questions: whether states must license same-sex marriages, and whether they must recognize same-sex marriages lawfully performed in other states. Could that presage a ruling in which the Court holds that states must recognize out-of-state same-sex marriages, but need not (at least for now) license such marriages themselves?

In *King*, many commentators view the case as, in the words of Harvard Law School's Noah Feldman, an opportunity for the Court to "effectively put[ ] an end to the Affordable Care Act." A majority of the Court may consider that a significant exaggeration. Unlike *NFIB*, in which wholesale invalidation of the act was a possible outcome, *King* offers no immediate prospect of affecting states with their own exchanges, nor of eliminating the Court's key regulatory provisions, such as its ban on insurance companies discriminating against individuals with preexisting conditions, which apply nationwide. The Court could reasonably view a ruling against the administration in *King* as one that would both encourage state officials to set up exchanges (lest their middle-class constituents lose valuable subsidies and insurance prices rise), and also jump-start negotiations at the federal level over changes to the law.

This is not to say, of course, that the Court *will* issue such middleground rulings in this term's blockbuster cases, or that such rulings would be legally persuasive. But if the Court's recent history is a guide, it may not be a bad bet.



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