

A Fractious, and Fractured, Term at the Supreme Court

By: Tony Mauro and Marcia Coyle – July 1, 2013

It was a U.S. Supreme Court term for the history books, with a final week that will be remembered for its powerful — and to some, contradictory — rulings on equality.

During the term that began last October, the court made headlines with decisions on issues ranging from gene patenting to drug-sniffing dogs. But it was the final week that updated the story line of the Roberts Court — a divided group of justices that takes on society's biggest issues without hesitation, even if the resulting opinions are sometimes fractious and fractured.

During its last sitting on June 26, the court issued two rulings that were viewed as major advances for same-sex marriage: *U.S. v. Windsor* and *Hollingsworth v. Perry*.

But the day before, in *Shelby County v. Holder*, it delivered a body blow to the Voting Rights Act, crippling the mechanism used to require certain jurisdictions to obtain approval beforehand for election changes from the Justice Department. And the day before that, the court decided cases in ways that will make it harder for employees to prove discrimination in the workplace (*Vance v. Ball State University* and *University of Texas Southwestern Medical Center v. Nassar*) and harder for universities to justify affirmative action programs (*Fisher v. University of Texas at Austin*.)

"The [Defense of Marriage Act] case will go down in history as a watershed moment for gay rights," said Carolyn Shapiro, director of the Institute on the Supreme Court of the United States at Chicago-Kent College of Law. "But when it came to racial and gender equality, there was a very different perspective from the court — a belief that people who complain about discrimination are making mountains out of molehills."

Shapiro saw a second contradiction in the court's historic week. In a dissent in *Windsor*, Justice Antonin Scalia expressed anger at the court for overturning the Defense of Marriage Act or, as he put it, "this democratically adopted legislation." Yet the day before, he had no problem striking down the Voting Rights Act, which was also passed by overwhelming majorities in Congress.

University of Chicago Law School professor Eric Posner chalked up the inconsistencies in the court's decisions to the sharp ideological conflict in the court.

"The ideological rift between the majority and the minority is really, really strong," Posner wrote in an online conversation on *Slate*. "Judges are supposed to base their decisions on legal materials and the proper roles of the branches of government, but the

current justices mostly gesture at them; they can hardly maintain consistency from one day to the next."

STRONG WORDS

Indeed, strong words flew back and forth in the high-profile decisions of the final week. "Hubris is a fit word for today's demolition" of the Voting Rights Act, Justice Ruth Bader Ginsburg wrote in dissent. Justice Antonin Scalia dismissed the majority rationale in the Windsor case as "legalistic argle-bargle," a phrase that has never before been used in a Supreme Court decision. Oral argument last term got more intense and combative than ever. "Trying to get in a question at oral argument is really like trying to grab an item that's on sale at Wal-Mart the day after Thanksgiving," Justice Samuel Alito Jr. recently told an audience of lawyers in Dallas.

At the libertarian Cato Institute, Ilya Shapiro did see harmony and a common thread in the court's top cases: "embracing the Constitution's structural and rights-based protections for individual freedom and self-governance." Shapiro boasted that Cato is the only organization that filed briefs on the winning side in the affirmative action and voting rights cases as well as the two gay marriage cases. In all, Cato submitted 18 amicus curiae brief to the high court last term and was on the winning side in 15.

The Cato Institute is not the only organization that fared well at the Supreme Court in the term just ended.

"It was a term that is hard to summarize in a nutshell — it was a complete mixed bag," said Doug Kendall of the Constitutional Accountability Center. "But the one clear winner is the Chamber of Commerce."

Kendall said the chamber won 14 of the 17 cases in which it filed briefs — including all eight of the closely divided rulings. And the court's conservative wing voted in a united front in favor of corporations, Kendall said. "It's partly a function of the fact that business cases don't get a lot of headlines," he said. "That may make it easier for the conservatives to stick together."

One key win for business this term was *Kiobel v. Royal Dutch Petroleum*, which interpreted the Alien Tort Statute to bar U.S. courts from handling human rights lawsuits filed against companies for abuses outside the United States.

Andrew Pincus of Mayer Brown disputes the "growing amount of chatter about the so-called pro-business court." He said, "I think it's an effort by the plaintiffs' bar to diminish the work of the court and to push the policy ends it is trying to accomplish."

Pincus said the court's antitrust rulings this term have expanded corporate liability — most notably *Federal Trade Commission v. Actavis*, in which the court allowed the commission to pursue antitrust cases against so-called "pay for delay" agreements between generic and brand-name drug manufacturers. In the patent case *Association for Molecular Pathology v. Myriad Genetics*, the court thwarted efforts by biotech companies to patent gene segments.

The largest group of business cases this term involved class actions and arbitration, Pincus said.

"The court continues to recognize the very significant burden class actions impose, particularly on defendants, and that they often can be used to force totally unwarranted settlements," he said. But the justices did not necessarily break new ground, Pincus added.

The cases Pincus cited were *Comcast v. Behrend*, *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds* and *American Express v. Italian Colors Restaurant*, each based on prior high court rulings. The American Express decision, which bolstered the enforcement of class action waivers in arbitration agreements, was a major victory for the increasing number of companies that channel customer complaints into arbitration. Nan Aron of the liberal Alliance for Justice said the ruling was "the latest in a series of decisions that make it significantly more difficult to hold big businesses accountable for their actions."

CRIMINAL DOCKET

The high court's criminal docket produced notable wins and losses for criminal defendants. In *Florida v. Jardines*, the court said a police search conducted with a drug-sniffing dog outside a house constituted a search under the Fourth Amendment. And in *Missouri v. McNeely*, the court said Fourth Amendment search requirements usually apply when police seek to draw blood from a drunk-driving suspect without consent. But in *Maryland v. King*, the court said police could take DNA samples from criminal suspects to see if they match evidence from unrelated crimes.

The court weakened the right to remain silent in *Salinas v. Texas*, ruling that suspects must verbally invoke their Miranda rights during police questioning. But the court ruled for the defendant in *Alleyne v. U.S.*, a Sixth Amendment case involving mandatory minimum sentences.

"You have a conservative court with two justices — Antonin Scalia and Clarence Thomas — with libertarian streaks who feel the power of the state can cut both ways," Stanford Law School professor Jeffrey Fisher said. "That's why you get a mixed bag in the criminal area."

As usual, the public paid attention to the court mainly in the final week and during oral arguments in the marquee cases, especially those on same-sex marriage. The most visible justice by far was Sonia Sotomayor, whose intimate memoir *My Beloved World* became a bestseller and prompted extensive media coverage. Still, Sotomayor said in a recent speech that she was becoming more protective of her own privacy, and she has changed her views on televising Supreme Court proceedings. Once in favor of such access, she now thinks it might end up giving the public a distorted view of the court. Justice Elena Kagan, also once supportive of broadcast access, has also backtracked.

The court building itself has been under wraps for the entire term, so to speak, with scaffolding covering the façade as part of a marble renovation and repair project. The scaffolding has been covered by a fabric "scrim" that displays a full-sized photograph of the court to passersby.

The scrim was added not just for safety, court officials said, but also to ensure that the public could see the words that were chiseled into the façade when it was built, to convey the court's mission: "Equal Justice Under Law."