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Civil Cases

Roberts Bridges Court's Ideological Divide, But Shaky Consensus Reveals Depth of Split

The U.S. Supreme Court handed down more 9–0 decisions during its most recent term than it has in over 70 years.

Some see this rise in unanimity as proof that the court is not as divided along political lines as many people think.

But others see this term as a mirage, where ''faux-nanimity'' reigns, and a 9-0 vote on the bottom line masks sharp 5-4 divides on the reasoning.

These ''lopsided,'' unanimous decisions show ideological divisions playing against Chief Justice John G. Roberts Jr.'s desire to forge consensus, attorneys told Bloomberg BNA.

That tension led to narrow majority opinions that frequently left both parties unsatisfied.

But while the court stopped short of overturning long-standing precedent, one Supreme Court veteran said that this term may just be a ''way station'' on the path to greater change.

If that's true then one has to wonder: Is the court building a bridge across its ideological divide, or tearing it down?

Unparalleled Unanimity. Former Acting Solicitor General Neal Katyal appeared to favor the Roberts-as-structural-engineer view of the term.

The ''Court was unanimous in roughly two-thirds of its cases'' this term, Katyal, who is now a partner at Hogan Lovells, Washington, said.

''You have to go back to 1940 to find a time when the Court agreed on the bottom line so much,'' he told Bloomberg BNA.

But Ilya Shapiro of the Cato Institute, Washington, noted that the court typically has a high percentage of unanimous opinions—generally around 55 percent.

But this year the unanimity was more noticeable, Allyson N. Ho, co-chair of Morgan, Lewis & Bockius LLP's Appellate Practice, Dallas, told Bloomberg BNA, because many high-profile decisions were decided unanimously.

She cited the 9-0 lineup in *NLRB v. Noel Canning*, 82 U.S.L.W. 4584, 2014 BL 177533 (U.S. June 26, 2014) (83 U.S.L.W. 13, 7/1/14) as an example.

'Faux-nanimity' Going Forward

■ faux-nanimity (foh•n*uh*•**nim**•i•tee) *noun* : unanimous agreement as to the end result but with deep divides over reasoning (See Justice Scalia in *McCullen v. Coakley*: ''apparent but specious'' unanimity.)

What does it mean for the future?

■ Shows ideological division playing against Roberts's desire to forge consensus. — Noel Francisco, Jones Day

■ Roberts, Breyer and Kagan reaching for middle-ground. — Adam Winkler, UCLA

■ Emerging split between Scalia/Thomas/Alito and Roberts/Kennedy. — Andrew Pincus, Mayer Brown

■ Resulting narrow opinions means ''open season'' for further litigation. — Robin Conrad, McKenna Long & Aldridge

■ Weak precedent survived but this term only a ''way station.'' — John Elwood, Vinson & Elkins

The court's invalidation of President Barack Obama's January 2012 recess appointments to the National Labor Relations Board underscores the problem with trying to categorize the justices along party lines, Ho said.

That approach is ''just too simplistic, and even inaccurate,'' she said.

But Peter D. Keisler—a former Acting Attorney General and now co-chair of Sidley Austin LLP's Appellate practice—told Bloomberg BNA that this term's unanimity is overstated.

Noel Canning was unanimous in its outcome, he said, but the disagreement between the majority and the concurring justices on the reasoning was as substantial as a 5-4 decision.

Keisler added that ''while the result is the most important thing to the parties and others who are directly affected by the decision, the reasoning is what matters for future cases and the development of the law.''

In particular, Justice Antonin Scalia's opinion—concurring in the judgment only—criticized the majority's decision as far too narrow.

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He said the court should have limited the president's power even further.

In fact, the Cato Institute's Shapiro categorized Scalia's concurrence in *Noel Canning* as more of a dissent.

And Keisler pointed out that ''Scalia even delivered his concurring opinion orally from the bench''—a rarity, even in the case of a full-blown dissent.

Lopsided Results. Decisions that are unanimous on their face, but with rifts running through their foundations derive from Roberts's desire to reach consensus, Noel J. Francisco of Jones Day, Washington, who argued for the company in *Noel Canning*, told Bloomberg BNA.

He said that even though unanimous, these cases show a deep ideological divide between the justices.

In addition to *Noel Canning*, probably the best example of this is *Bond v. United States*, 82 U.S.L.W. 4417, 2014 BL 151637 (U.S. June 2, 2014) (82 U.S.L.W. 1842, 6/3/14), Francisco said.

In that case, the court overturned the conviction of a microbiologist who sought revenge against her husband's lover by spreading toxic chemicals on her door knob, car and mailbox.

Appearance of unanimity given by 9-0 result in big cases like #McCullen #Canning overcome as soon as you read 'concurrences.'

— Elizabeth Wydra,
Constitutional Accountability Center
During U.S. Law Week's Twitter Chat

The court said that the government's prosecution of her under a statute intended to implement an international chemical weapons treaty was overkill, but it refused to address the broader constitutional question of whether the treaty power or the necessary and proper clause allow the federal government to reach purely local conduct.

The case spawned three ''vigorous'' concurrences by Justices Scalia, Clarence Thomas and Samuel A. Alito Jr., Francisco said.

In one, Scalia again rebuked the majority for being too narrow.

''We have here a supposedly 'narrow' opinion which, in order to be 'narrow,' sets forth interpretive principles never before imagined that will bedevil our jurisprudence (and proliferate litigation) for years to come,'' he said.

Bridging the Divide: 'Unanimous' Decisions

Bond v. United States
Halliburton Co. v. Erica P. John Fund, Inc.
McCullen v. Coakley
NLRB v. Noel Canning

Foundations for Future Fights

Burwell v. Hobby Lobby Stores, Inc.
Harris v. Quinn
McCutcheon v. FEC
Utility Air Regulatory Group v. EPA

Splintered Decisions. Jonathan Hacker, chair of O'Melveny & Myers LLP's Supreme Court and Appellate Practice, Washington, noted that sharp, ideological division also existed in the cases decided on a 5–4 vote—not just the ''unanimous''ones.

For example, in *Burwell v. Hobby Lobby Stores, Inc.*, 82 U.S.L.W. 4636, 2014 BL 180313 (U.S. June 30, 2014) (83 U.S.L.W. 10, 7/1/14), the court split along ideological lines over whether closely held, family-owned businesses could get a religious exemption from regulations requiring employers to provide their workers with insurance that covers certain contraceptive methods—the so-called contraceptive mandate.

Writing for the majority, Alito said that the closely held corporations here were entitled to religious protections under the Religious Freedom Restoration Act and were exempt from providing some of the mandated contraceptives.

But in the principal dissent, Justice Ruth Bader Ginsburg said there was ''no support'' for extending free exercise rights to for-profit corporations.

She said doing so was ''bound to have untoward effects,'' and she called the decision one ''of startling breadth.''

The justices similarly split 5-4 over the issue of legislative prayer in *Town of Greece v. Galloway*, 82 U.S.L.W. 4334, 2014 BL 124245 (U.S. May 5, 2014) (82 U.S.L.W. 1652, 5/6/14).

The majority found that an upstate New York town didn't violate the establishment clause when it invited predominately Christian clergy to open its monthly board meetings.

Citing *Marsh v. Chambers*, 463 U.S. 783 (1983), Justice Anthony M. Kennedy said that legislative prayer had an '' 'unambiguous and unbroken history of more than 200 years,' '' and '' 'has become part of the fabric of our society.' ''

But in her dissent, Justice Elena Kagan said that the town's practice ''does not square'' with the First Amendment and violates ''the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian.''

Leading Justices

This term is ''notable for the emergence of two Justices as leaders, Justices Breyer and Alito,'' said Hogan Lovells's Katyal.

''The folks who regularly argue at the Court know that they pose some of the hardest questions to answer at oral argument.''

But this term ''we really saw them lead the Court in their written work'' too, he said.

In fact, these two justices authored the majority opinions in some of the most important decisions this term.

Notably, Breyer wrote the court's opinion in *Noel Canning* and *Am. Broad. Cos. v. Aereo, Inc.*, 82 U.S.L.W. 4568, 2014 BL 175778 (U.S. June 25, 2014) (83 U.S.L.W. 27, 7/1/14).

And Alito authored both opinions handed down the court's last day—those in *Hobby Lobby* and *Harris v. Quinn*.

'A Tale of Two Courts.' But while there was ideological division in the court's headline-grabbing cases, there was large consensus in lower-profile ones, Hacker said.

It's like ''A Tale of Two Courts,'' he told Bloomberg BNA.

Of course, split decisions in contentious cases and unanimous results in noncontroversial ones isn't unique to this term—or even this court, Hacker added.

However, Andrew J. Pincus of Mayer Brown, Washington, noted at least one aspect of the justices' voting that was exceptional about this term.

In a number of high-profile cases, there was a significant division between Scalia, Thomas and Alito and either Roberts or Kennedy, he said.

Pincus—who has argued 23 cases in the Supreme Court—cited *Bond*, *Noel Canning*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 82 U.S.L.W. 4522, 2014 BL 172975 (U.S. June 23, 2014) (82 U.S.L.W. 1992, 6/24/14), and *McCullen v. Coakley*, 82 U.S.L.W. 4584, 2014 BL 177532 (U.S. June 26, 2014) (83 U.S.L.W. 11, 7/1/14), as examples of when that core of three justices was not joined by Roberts and/or Kennedy.

For instance, writing for the majority in *Halliburton*, Roberts refused to throw out a 25-year-old cornerstone of private securities litigation that makes it easier for class action plaintiffs to bring suits.

Notably, Roberts's opinion was joined by Kennedy, among other justices.

But while agreeing with the end result, Scalia, Thomas and Alito thought the quarter-centry-old precedent should have been overruled.

Writing for the trio, Thomas said, ''Logic, economic realities, and our subsequent jurisprudence have undermined the foundations'' of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), ''and stare decisis cannot prop up the facade that remains.''

Similarly, Roberts's opinion for the majority in *McCullen* invalidated a Massachusetts law creating a 35-foot ''buffer zone'' around abortion clinics.

In doing so, Roberts said that the law was content-neutral even though it had the '' 'inevitable effect' of restricting abortion-related speech more than speech on other subjects.''

In another opinion concurring only in the judgment, Scalia said that the majority's decision carries forward the ''Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents.''

This time Kennedy joined Scalia, Thomas and Alito in parting ways with the chief justice.

Pincus told Bloomberg BNA that this curious split has happened in other terms, but said that this term it was more marked.

It could be a lasting trend, Pincus said, or it could just be the issues that were before the court this term.

''We will just have to wait and see.''

Adam Winkler, a professor at UCLA School of Law, Los Angeles, agreed that there was a centrist bloc of the court that leans conservative, but wouldn't go as far as the most conservative justices.

He said that Roberts, Kagan and Justice Stephen G. Breyer reached for a middle ground, which led to more moderate results.

He pointed to *Noel Canning*, *McCullen* and Kennedy's concurring opinion in *Hobby Lobby* as examples.

These are conservative victories, but not Tea Party ones, Winkler said.

'Almost' Big Cases. Robin S. Conrad, a longtime advocate at the U.S. Chamber Litigation Center and currently a partner at McKenna Long & Aldridge LLP, Washington, said that this quest for a middle ground was particularly apparent this term.

Four corners of decision = narrow;

implications = broad.

— JOHN P. ELWOOD, VINSON & ELKINS LLP
ON *HOBBY LOBBY* DURING #SCOTUSCHAT

But she told Bloomberg BNA that it means that there weren't many complete victories at the court.

Conrad called it a ''term of unfinished business,'' where ''so many litigants were swinging for the fences, but nobody hit a home run.''

Instead, the court decided many of the cases on the parties' ''fallback position.''

She said this leaves the court's doors wide open, and that it's ''open season for further litigation.''

Conrad gave two examples.

In *Util. Air Regulatory Grp. v. EPA*, 82 U.S.L.W. 4535, 2014 BL 172973 (U.S. June 23, 2014) (82 U.S.L.W. 1985, 6/24/14), the court said that the EPA couldn't regulate ''stationary sources''—like factories and power plants—based solely on greenhouse gas emissions.

However, the court left open the possibility that the agency could regulate greenhouse gas emissions from sources that are already subject to permitting programs.

In doing so, the court ''ticked out a number of limitations'' for those permits, which leave that issue ripe for further litigation, Conrad said.

She also said that there will be more litigation over the legitimacy of the NLRB decisions made by the board

Cheer Up Government, It's Not So Bad!

UCLA's Winkler said that high profile victories for the Obama administration in previous terms have hidden the court's conservative tilt.

The lack of a big win this term highlighted the distance between the administration's view of the Constitution and the court's, he said.

Still, it could have been much worse for the Obama administration, Winkler added.

Mayer Brown's Pincus agreed, noting that the Solicitor General's 71 percent winning percentage was well within its traditional 60-80 percent average.

When you dig beneath the surface, you see that the government didn't really have that awful of a term, he said.

Even where the government lost, those losses were much narrower than what was being argued, Pincus said.

He pointed to *Bond*, *McCullen*, *Hobby Lobby* and *Noel Canning* as examples of decisions that could have been much worse.

members whose appointments were invalidated by the court in *Noel Canning*.

As many as 800 NLRB decisions are in limbo, Conrad said, and the impact on other presidential recess appointments—like judicial ones—is still unknown.

But John P. Elwood of Vinson & Elkins LLP, Washington, told Bloomberg BNA that this is ''what we've come to expect from the Roberts court.''

Calling it an ''incrementalist term,'' he said deciding cases on narrow grounds is an attempt to minimize division along political lines.

The Cato Institute's Shapiro agreed, saying that Roberts is a ''minimalist'' who wants to find any middle ground so that the court can ''speak with one voice.''

This led to some ''almost big cases,'' he said.

Cases like *McCutcheon v. FEC*, 82 U.S.L.W. 4217, 2014 BL 89958 (U.S. April 2, 2014) (82 U.S.L.W. 1487, 4/8/14), and *Schuette v. BAMN*, 82 U.S.L.W. 4251, 2014 BL 111268 (U.S. April 22, 2014) (82 U.S.L.W. 1627, 4/29/14), seemed important, but the court ''pulled back from making big decisions.''

Sidley's Keisler said that the court showed a preference for ''resolving cases narrowly—not broadly.''

It wanted to avoid broad categorical holdings, and instead focused on the facts of the particular case—including in the most widely noted ones, he said.

These were cases where the petitioners ''won,'' but the court didn't go as far as it was asked to go.

Keisler said instead of overruling precedents, the court merely limited them.

For example, the petitioners challenging the union fees at issue in *Harris v. Quinn*, 82 U.S.L.W. 4662, 2014 BL 180311 (U.S. June 30, 2014) (83 U.S.L.W. 25, 7/1/14), won, but the court refused to overrule its 1977 decision allowing the fees in the first place, he said.

Instead, the court limited its holding to a new category of ''partial public employees.''

In *Bond*, the spurned wife/petitioner won, but the court refused to overrule its previous decision in *Missouri v. Holland*, 252 U.S. 416 (1920), Keisler said.

Instead of announcing a major constitutional ruling, the court decided the case on statutory grounds, he added.

In *Halliburton*, the petitioner won remand, but the court didn't overrule *Basic*, he said.

And in *McCullen*, it invalidated the 35-foot buffer zone, but—again—it didn't overrule its earlier precedent *Hill v. Colorado*, 530 U.S. 703 (2000).

Keisler said this reflects an axiom noted in then-appellate-court-judge Roberts's opinion in *PDK Labs. Inc. v. DEA*, 362 F.3d 786 (2004): ''[I]f it is not necessary to decide more, it is necessary not to decide more.''

The Exception. But everyone agreed that there was one case that didn't fit this mold: *Riley v. California*, 82 U.S.L.W. 4558, 2014 BL 175779 (U.S. June 25, 2014) (83 U.S.L.W. 17, 7/1/14).

This decision is not incremental, and it's one where there is true consensus, O'Melveny's Hacker said.

In *Riley*, the court confronted two criminal defendants' challenges to searches of their mobile phones.

Writing for a unanimous court, Roberts said, the ''answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.''

Riley, like the GPS case in *United States v. Jones*, 80 U.S.L.W. 4125, 2012 BL 14420 (U.S. January 23, 2012) (80 U.S.L.W. 964, 1/24/12), ''brings the Fourth Amendment into the digital age,'' Allison Zieve of Public Citizen Litigation Group, Washington, said.

But many agreed that *Riley* would have an impact beyond the criminal context.

The court's holding of what may be searched during an arrest probably isn't terribly important to most people, Sidley's Keisler said.

Nevertheless, the technologies involved are pervasive and the court's approach to that will affect many individuals, he added.

The ''key takeaway'' is that this kind of technology ''isn't merely different in degree, it is different in kind.''

Keisler pointed out that the court dismissed the government's argument that data stored on a mobile phone was indistinguishable from permissible searches of physical items.

''That is like saying a ride on horseback is materially indistinguishable from a flight to the moon,'' the court said.

''Both are ways of getting from point A to point B, but little else justifies lumping them together.''

Only 636 donors hit aggregate limit that #McCutcheon struck down. Not many folks want to donate >$123k.

— Ilya Shapiro, Cato Institute
During U.S. Law Week's #SCOTUSchat

Federal Circuit's 0–54 Record

Morgan Lewis's Ho said that there was a record number of IP cases this term.

The court heard 6 patent cases alone—roughly 10% of its docket, Mayer Brown's Pincus noted.

That number by itself is significant, he said.

But McKenna Long's Conrad also noted that the court had some pretty harsh words for the Federal Circuit.

The Federal Circuit was reversed in 5 of those 6 patent cases, Pincus said.

And even where the court affirmed, it wholly rejected the Federal Circuit's reasoning, he said.

The Federal Circuit's reasoning didn't get a single vote in patent cases this year, Pincus said. It was 0–54.

This shows that the court isn't going to mechanically plug its old precedent into the digital-data context, Keisler said.

Pincus agreed that digitally stored information is ''fundamentally different'' than other information.

Riley shows that legal principles from the pre-digital age can't be mindlessly applied to the digital, he said.

By refusing to extend those prior cases to this technology, the court really ''swept aside'' its prior precedent, Hacker added.

Weak Precedent. UCLA's Winkler cited *McCutcheon* as another ''counterexample'' to the court's general adherence to precedent this term.

In another 5-4 decision, the court struck down regulations on campaign finance.

The court held that ''aggregate limits'' that currently restrict—to $123,000—the total amount an individual donor may contribute to a candidate or committee violate the First Amendment.

Using the definition of 'corruption' advocated by the court in *Citizens United v. FEC*, 558 U.S. 310 (2010)—''dollars for political favors''—the court said that ''the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process.''

Winkler said that the court read the definition of ''corruption'' so narrowly in the context of campaign finance that it effectively overruled a portion of the court's landmark campaign finance regulation decision in *Buckley v. Valeo*, 424 U.S. 1 (1976).

Nevertheless, cases like *Bond*, *McCullen*, *Harris* and *Schuette* demonstrate the court's reluctance to overturn precedent this term, Winkler said.

That hasn't been the case in previous terms, he added, and Public Citizen's Zieve agreed.

''We continue to see that a majority [of the court] is not particularly guided by precedent,'' she said.

From this term, Zieve pointed to *McCutcheon* and Thomas's concurrence in *Halliburton*.

''From recent terms, decisions about campaign finance, antitrust, and the Voting Rights Act fall into this category.''

Way Station. However, Vinson & Elkins's Elwood—who already has two cases before the court next term—said that while a lot of cases implicated weak precedent, most lived to see another day.

But, he said that this term may just be a ''way station'' for those battered precedents.

O'Melveny's Hacker explained that in the late-1970s and 1980s there was a series of dissents from then-associate-justice William H. Rehnquist ''laying out markers.''

Those dissents became majority opinions when Rehnquist became chief justice, he said, and you can see something similar going on now.

Hacker said that while this term's majority opinions are narrow, they leave markers that could lead to broader rulings later on.

Richard Re, a professor at UCLA School of Law, Los Angeles, explained some of these opinions through what he calls the ''one last chance'' doctrine.

''The doctrine of one last chance holds that the Court must stay its hand once—but just once—before issuing immediately disruptive decisions,'' he wrote on his blog Re's Judicata.

He cites *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U. S. 193 (2009) as one of the most obvious examples of that doctrine.

There, the court was just shy of invalidating the Voting Rights Act's coverage formula, which specifies which jurisdictions must get ''preclearance'' from the U.S. Attorney General or the U.S. District Court for D.C. before making any change affecting voting.

The court packed its *Northwest Austin* decision ''with dicta suggesting that the merits would likely be decided against the Act's constitutionality,'' Re said.

When the court was squarely confronted with the issue a few years later—in *Shelby Cnty. v. Holder*, 81 U.S.L.W. 4572, 2013 BL 167707 (U.S. June 25, 2013) (82 U.S.L.W. 15, 7/2/13)—the court finally struck that provision.

A Civ Pro Staple

The court's decision in *Daimler AG v. Bauman*, 82 U.S.L.W. 4043, 2014 BL 9151 (U.S. January 14, 2014) (82 U.S.L.W. 1038, 1/21/14), has ''huge ramifications,'' McKenna Long's Conrad said.

There, the court said that a German parent company couldn't be sued in California over allegations that its Argentinian subsidiary collaborated with Argentinian forces during the country's ''Dirty War'' in 1976-1983 to kidnap, detain, torture, and kill some of the subsidiary's workers.

The case sorts out fundamental issues present in every case, including what kinds of suits can be brought against what kinds of defendants in what jurisdiction, Sidley's Keisler said.

By adopting a narrow view of general jurisdiction, it's going to have reverberations in lots of different areas, Mayer Brown's Pincus said.

It's a ''touchstone case'' that's ''destined to become a staple of every civil procedure casebook,'' the Cato Institute's Shapiro said.

Re told Bloomberg BNA, ''Year after year, the Chief Justice seems interested in one last chance decisions, and sometimes other justices are as well.''

He called the approach ''inherently attractive because it lowers the costs of doctrinal change.''

Take *Shelby County* as an example, he said.

''While Justice Ginsburg's dissent in *Shelby County* was strong, it was rendered markedly less effective by the fact that she and her colleagues had signed onto *Northwest Austin*.''

Additionally, once ''put on notice of a potential disruptive change in the law, parties can reduce their reliance on precedents that have been called into question,'' Re said.

The ''political branches can implement new laws or new ways of enforcing laws in light of new trends at the Court, and litigants can have time to generate the best arguments pro and con before a big decision is made.''

But the ''main disadvantages have to do with the Court's institutional role''—namely, avoiding constitutional questions whenever possible.

''One last chance decisions certainly foster restraint at the first step, because they strongly counsel against disruptive action when the chance to do so first arises,'' Re said.

''But the one last chance approach sometimes allows the Court to become—in two steps—an agent of change. And by lowering the eventual costs of legal change, one last chance decisions may render change more likely to occur.''

''That kind of apparent or actual strategic behavior may foster cynicism about the Court's legitimacy as a court, as opposed to a legislative body,'' Re said.

***Abood* All Wet.** Re pointed to *Harris* as one possible candidate for the one last chance doctrine.

There, a divided 5-4 Supreme Court held that Illinois home health care workers weren't truly public sector employees.

Therefore, they couldn't be forced by the state to pay ''union fair share fees.''

These fees require workers to reimburse the union for its ''core'' functions—like negotiating contracts and representing employees in grievances.

Paul M. Smith of Jenner & Block LLP, Washington—who argued for the union in *Harris*—said these fees are very important because without them ''union opponents and even union supporters have an incentive to free ride—getting the benefits of representation by the union but not paying for it.''

William L. Messenger of the National Right to Work Legal Defense Foundation Inc., Springfield, Va.—who argued for the employees challenging the union fees—agreed that the case has broad implications for all public employees—not just those at issue here.

Breyer's Backlash

Breyer's opinion in *Noel Canning* is one of the most significant opinions from this term, according to Adam Winkler of UCLA School of Law.

That's because it's a very strong endorsement of a ''living Constitution''—the idea that you ''look to the entire experience of American life'' when interpreting the Constitution and not just the founders' original intent.

Winkler said Breyer's decision is a ''backlash'' against originalism.

The court's landmark Second Amendment decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) was hailed by many as the ''triumph of originalism,'' he said.

Breyer's opinion is ''ground breaking'' because it distances the court from that trend, Winkler said.

He said it puts the court's 1977 decision in *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977)—initially upholding union fair share fees for public sector employees—on ''shaky ground.''

Harris ''strongly suggests'' that *Abood*'s ''days are numbered,'' Messenger said.

If overturned, it doesn't mean public sector employees can't still choose to join a union, he explained.

But it does mean that government employees can't be forced to pay union fees in order to keep their jobs, Messenger said.

If *Abood* is overruled, it would be like passing a national right to work law for all public employees nationwide, Messenger said.

And while both Smith and Professor Re cautioned about exaggerating reports of *Abood*'s death, Vinson & Elkins's Elwood said *Harris* really ''threw cold water'' on it.

But while it seems inevitable that the court will eventually overrule *Abood*, Elwood said, all the rest of the court's prior cases survived intact.

And Jones Day's Francisco said that's not surprising.

The court is always reluctant to strike its prior precedent, he said. It rarely does so, and then only when it feels it has to.

Francisco said that viewpoint isn't distinctive of the Roberts court either.

It's an ''institutional'' viewpoint, and one that will continue, he said.

BY KIMBERLY ROBINSON

Supreme Court Scorecard

Top Cases Selected by Supreme Court Analysts

	Robin Conrad	John Elwood	Noel Francisco	Jonathan Hacker	Allyson Ho	Neal Katyal	Peter Keisler	Douglas Laycock	Andrew Pincus	Kannon Shanmugam	Ilya Shapiro	Adam Winkler	Allison Zieve
Am. Broad. Cos., Inc. v. Aereo, Inc.			●	●		●							
Burwell v. Hobby Lobby Stores, Inc.	●	●	●	●	●	●	●	●	●	●	●	●	●
Daimler AG v. Bauman	●						●				●		
Halliburton Co. v. Erica P. John Fund, Inc.	●			●				●		●			
Harris v. Quinn		●							●		●		●
McCullen v. Coakley										●		●	
McCutcheon v. Fed. Election Comm'n			●				●	●			●		●
Michigan v. Bay Mills Indian Cmty.						●							
NLRB v. Noel Canning	●	●	●		●	●	●	●		●	●	●	●
Riley v. California	●	●	●	●		●	●		●	●	●		
Schuette v. BAMN					●							●	
Town of Greece v. Galloway		●		●	●			●	●				●
Util. Air Regulatory Grp. v. EPA (GHG cases)	●						●	●	●				
Patent Cases*									●				

Robin S. Conrad, McKenna Long & Aldridge LLP, Washington
John P. Elwood, Vinson & Elkins LLP, Washington
Noel J. Francisco, Jones Day, Washington
Jonathan Hacker, O'Melveny & Myers LLP, Washington
Allyson N. Ho, Morgan, Lewis & Bockius LLP, Dallas
Neal Katyal, Hogan Lovells, Washington
Peter D. Keisler, Sidley Austin LLP, Washington
Douglas Laycock, University of Virginia School of Law, Charlottesville, Va.
Andrew J. Pincus, Mayer Brown, Washington
Kannon K. Shanmugam, Williams & Connolly LLP, Washington
Ilya Shapiro, Cato Institute, Washington
Adam Winkler, UCLA School of Law, Los Angeles
Allison Zieve, Public Citizen Litigation Group, Washington

*The Supreme Court decided six patent cases this term: Medtronic, Inc. v. Mirowski Family Ventures, LLC; Octane Fitness, LLC v. ICON Health & Fitness, Inc.; Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.; Nautilus, Inc. v. Biosig Instruments, Inc.; Limelight Networks, Inc. v. Akamai Techs., Inc.; and Alice Corp. Pty. Ltd. v. CLS Bank Int'l.

A BNA Graphic/lw8407g1