

The year in quotes: Predictions for the high court

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Last term, few accurately predicted how the U.S. Supreme Court would rule on the Affordable Care Act cases. We asked court scholars and advocates to look ahead to next year and guess about the same-sex marriage cases and other cases and trends.

"In my judgment, there is no coherent way for the Supreme Court to invalidate Section 3 of the federal Defense of Marriage Act without implying the existence of a federal constitutional right to same-sex marriage.

In particular, the federalism objections to Section 3 are entirely misplaced. Section 3 leaves states free to redefine marriage as they see fit. It merely defines what marriage means for purposes of provisions of federal law (making explicit what had always been implicit) and is thus an unremarkable exercise of federal power in the federal realm. In what I readily acknowledge reflects the triumph of hope (for sound reasoning from the court) over experience, I will therefore predict that in *U.S. v. Windsor* at least seven justices will vote to sustain Section 3."— *Ed Whelan, president of the Ethics and Public Policy Center, a conservative blogger and a former law clerk to Supreme Court Justice Antonin Scalia*

"Justice Thomas will ask a question at oral argument, thus delighting the Supreme Court bar.

While it might not seem possible after the 136 amicus briefs in the blockbuster health care cases, we might see even more filed in the DOMA/Prop. 8 cases. And given affirmative action, voting rights and gay rights, this year will top last year in terms of the public's awareness and interest in the Supreme Court."— *Lisa Blatt, head of the appellate and Supreme Court practice at Arnold & Porter, and frequent advocate before the court*

"In *Fisher v. University of Texas*, the Texas admissions program will lose, possibly on the ground that once the state picks one diversity-enhancing method (admitting the top 10 percent), it cannot pile on by adding another. In *Shelby County v. Holder*, Section 5 of the Voting Rights Act will be struck down—not forever, but requiring an update on the jurisdictions that are covered, which have gone unchanged, except for bailouts, since 1965. In *Association for Molecular Pathology v. Myriad Genetics*, patenting human genes will not stand. And in *Kiobel v. Royal Dutch Petroleum*, that particular case will not be allowed to continue, but the court will leave some wiggle room for others, as suggested by the solicitor general."— *Alan Morrison, the Lerner Family Associate Dean*

for Public Interest and Public Service Law at the George Washington University Law School, and a long-time court scholar and advocate

"There will be no retirements in 2013, the court will continue to issue rulings favoring arbitration, the University of Texas will lose the affirmative action case, but the ruling will be muddled. And Justice Kennedy will cast the deciding vote in both marriage cases."— *Roy Englert Jr., partner and veteran appellate litigator at Robbins, Russell, Englert, Orseck, Untereiner & Sauber*

"I think that this will be a year of equality issues in the Supreme Court, but with mixed results—some decisions advancing equality, and some not. I fear that the court is going to strike down Section 5 of the Voting Rights Act and that the court is going to significantly cut back on the ability of educational institutions to engage in affirmative action. On the other hand, I think the court will strike down Section 3 of the Defense of Marriage Act and California's Proposition 8. I think once more it will be the Kennedy Court, with Kennedy casting the decisive vote on each of these issues."— *Erwin Chemerinsky, founding dean of the University of California, Irvine School of Law, and long-time student of the court*

"My prediction is that Justice Ruth Bader Ginsburg will not retire in 2013 and that the court will break some kind of record for the most patent cases decided in a year, which you would think would prompt [her] to retire."— *Carter Phillips, co-chair of the executive committee of Sidley Austin, who has argued 76 cases before the Supreme Court*

"Because the Constitution's protections have to apply to everyone equally, the court will hand victory to those challenging the decidedly inequitable racial preferences in college admissions, marriage restrictions and Section 5 of the Voting Rights Act. Because John Roberts is a political animal as much as he is a jurist, however—see the Obamacare ruling—these will be narrower decisions than some might wish: Achieving 'diversity' will still be an acceptable goal for government action, states will not uniformly have to certify gay marriages and most federal oversight of local elections will continue."— *Ilya Shapiro, editor of the Cato Institute's Supreme Court Review*

"Following the taxing conclusion of the 2012 term, and a retreat to his 'impregnable island fortress' in Malta, Chief Justice John Roberts returns to anchor the justices for a new year. All eyes turn to Justice Anthony Kennedy to augur his votes on same-sex marriage, affirmative action and voting rights. Yet, if *NFIB v. Sebelius* (upholding the individual mandate in the Affordable Care Act) taught us anything, don't count the chief's broccoli 'til it fully grows in."— *Josh Blackman, legal blogger, law professor and founder of FantasySCOTUS.net, which involves students and others in predicting outcomes of pending cases*