

FOREWORD

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AN EAGERLY ANTICIPATED TERM

In hindsight, there are particular Supreme Court Terms that were clearly pivotal in indicating and shaping the future direction of constitutional law. October Term 1936, of course, is the most famous example as the Court abandoned forty years of decisions which had limited the scope of Congress's commerce power and which had used the due process clause to invalidate progressive state legislation. Indeed, much of constitutional law changed in that Term in a way that defined a great deal of what has happened since.

Although less dramatic, I believe that October Term 1988 was another pivotal year in constitutional law. It was the first full Term in which Anthony Kennedy was on the Court and his addition created the most conservative majority that there had been since the mid-1930s. In that year, the Court handed down major rulings on affirmative action, abortion, habeas corpus, and separation of church and state which signaled a change in the law and, in some areas, significantly changed the law.

It is widely predicted that October Term 2011 could be such a pivotal year that will influence and even define constitutional law for years to come. Interestingly, it is not because any of the cases that are on the docket as a result of grants of certiorari before the justices recessed for the summer in late June 2011.

Before it adjourned for the summer on June 28, the Court granted review in forty-nine cases to be decided during the upcoming Term. There are some fascinating and important issues before the Court. In *United States v. Jones*, the Court will consider whether the warrantless use of a tracking device on a person's vehicle to monitor its movements on public streets violates the Fourth Amendment. In *Florence v. Board of Chosen*

Freeholders, the Court will examine whether the Fourth Amendment is violated when a jail conducts a suspicionless strip search of every individual arrested for any minor offense, no matter under what circumstances. In *FCC v. Fox Television*, the Court will confront the issue of whether a Federal Communication Commission ban on “fleeting expletives” violates the First Amendment. In *Pollard v. GEO Group, Inc.*, the Court will consider whether a cause of action exists to sue guards at private prisons for violating inmates’ constitutional rights.

But it is the cases where review is yet to be granted that makes this such an eagerly anticipated Term. Between late September and early January, another thirty to forty will be added to the docket to be decided by the end of June 2012. It is thought that these additional cases will include consideration of the constitutionality of the “individual mandate” in the affordable health care law; examination of the constitutionality of Arizona’s controversial immigration law, SB 1070; a reconsideration of the constitutionality of affirmative action by public colleges and universities; and a case presenting the issue of whether the Defense of Marriage Act is constitutional in its prohibition of same sex marriage.

At this point in time, few social issues are more controversial—or more define who is liberal and who is conservative—than the constitutionality of the individual mandate, the state’s power to control immigration, affirmative action, and marriage equality.

In anticipation of the Court’s considering these issues, a few things can safely be said. First, it is clear once more, that many of society’s most difficult and most important issues come to be argued over in constitutional terms and ultimately resolved by the Supreme Court. Liberals may prefer that the Court defer to Congress in upholding the individual mandate, while conservatives would prefer such deference as to the Defense of Marriage Act. Conservatives want the Court to defer to states as to Arizona’s SB 1070, but not as to affirmative action plans adopted by state and local governments. The Term thus could be a powerful reminder that both liberals and conservatives, at times, want judicial activism and judicial restraint; they just disagree as to when.

Second, the allocation of power between the federal government and the states looms large in all of these cases, as federalism and states' rights have throughout American history. Whether Congress has the authority to require individuals to purchase health insurance or pay a tax penalty is entirely a question about the scope of federal power. Whether states may augment federal enforcement of immigration is the underlying issue in the debate over Arizona's SB 1070. Whether states must recognize, and even must allow, marriages for gays and lesbians is at the core of what is likely to come before the Court.

Third, it is easy to predict that in all of these cases, the result is likely to turn on one justice: Anthony Kennedy. For the each of the six years in which John Roberts has been Chief Justice, Kennedy has been in the majority of more 5-4 decisions than any other justice. This is unlikely to change until there is an ideological change on the Court with a conservative justice replacing a liberal or vice versa. With four justices more conservative than Kennedy—Roberts, Scalia, Thomas, and Alito—and four justices more liberal—Ginsburg, Breyer, Sotomayor, and Kagan—Kennedy is the swing vote and likely will be on these issues as well.

If the Court confronts and decides even some of these issues, it will be a blockbuster Term. The cases are so important that they could shape litigation for years to come. There is obviously no way to know in advance, but this could be one of those pivotal Terms that define the future of constitutional law.