APPELLATE REVIEW II

OCTOBER TERM 2011

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Twenty percent.[1] In reviewing the judgments of the federal courts of appeals during the October Term 2011 ("OT11"), the Supreme Court affirmed only 20 percent of the time. The year before, only 28 percent.[2] The circuit courts, it would appear, have a lousy batting average. But appearances can be deceiving.

As we introduced last year, a different picture emerges when the focus is placed on the "parallel affirmance rate" – a broader metric of circuit court performance based on analyzing the Court's resolutions of circuit splits.[3] (Since we published our first ranking this type of appellate review has gained additional attention.[4]) Last year, we reviewed the most recent term for which this data was available, the October Term 2010 ("OT10"). This year, we update the stats for the most recent term, OT11.

Just as the Supreme Court benefits from the development of issues in the federal courts of appeals,[5] we benefit from watching the

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[1] *See* SCOTUSblog, Stat Pack for October Term 2011 (September 25, 2012), at sblog.s3.amazonaws.com/wp-content/uploads/2013/03/SCOTUSblog_Stat_Pack_OT11_Updated.pdf ("SCOTUSblog Stat Pack").

[2] *Id.*

[3] *See* Tom Cummins & Adam Aft, *Appellate Review*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 59 (2012).

[4] *See, e.g.*, John S. Summers & Michael J. Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 U.S.L.W. 393 (2011); *see generally* CIRCUIT SPLITS, www.circuitsplits.com (last visited Apr. 1, 2013).

[5] *See, e.g.*, RICHARD H. FALLON, JR., ET AL., HART AND WECHESLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1476 (6th ed. 2009) (citing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 163 (1985)). *But see id.* at 1477 (citing opposite viewpoints that the argument in favor of letting issues develop in the federal courts of appeal are "an inflated excuse for failing to take steps sorely needed to restore the health of our system of national law").

resolution in the Court itself. For OT10, we observed a marked difference between the affirmance rate on "primary review"[6] (28 percent) versus "parallel review"[7] (64 percent). We also observed that the majority-circuit approach was adopted 90 percent of the time.[8] From this, we concluded that the courts of appeals are getting the hard questions (i.e., those that split the circuits) right more often than not.[9]

This year, we again see that on parallel review the circuits' affirmance rate more than doubles. As noted, the judgments of the circuit courts were affirmed just 20 percent of the time on primary review. On parallel review, however, the affirmance rate climbs to 44 percent. And the Court followed the majority-circuit approach 68 percent of the time.[10]

Still, there was a year-over-year drop in both the primary and parallel review affirmance rate – with the latter metric falling below 50 percent. In short, the Court decided that for the circuit split decisions it reviewed, the circuits got it wrong more often than not. What happened? One explanation, we suggest, can be found in the wisdom of Yogi Berra,[11] who observed: "Slump? I ain't in no

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[6] With "primary review," we refer to the Court's evaluation of the particular decision on which the writ of certiorari was issued.

[7] With "parallel review," we refer to the Court's evaluation of not only the particular decision on which the writ of certiorari was issued, but also the parallel, conflicting decisions on the issue that are evaluated by the Court in resolving the circuit split.

[8] *See* Cummins & Aft, *supra* note 3, app. tbl. 3.

[9] As Justice Jackson once observed of the Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[10] As we did last year, we count the circuits like base runners. So ties (even splits) go to the runners, and are rolled into the "majority approach" calculus. For the curious, of the 22 cases in our sample set this year, there were 5 ties. Seven times the Court affirmed the minority approach. The majority won the remainder.

[11] To understand our seemingly gratuitous baseball references please see Adam Aft, Alex B. Mitchell, & Craig D. Rust, *An Introduction to the Journal of Legal Metrics*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 15 (2012); *see also* Ross E. Davies, Craig D. Rust, & Adam Aft, *Supreme Court Sluggers: Introducing the Justices Scalia, Fortas, and Goldberg Trading Cards*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 155 (2012); Ross E. Davies, Craig D. Rust, & Adam Aft, *Justices at Work, or Not*, 14 GREEN BAG 2D 217 (2011); Ross E. Davies, Craig D. Rust, & Adam Aft, *Supreme Court Sluggers: Justice John Paul Stevens is No Stephen J. Field*, 13 GREEN BAG 2D 465 (2010); Ross E. Davies & Craig D. Rust, *Supreme Court Sluggers: Behind the Numbers*, 13 GREEN BAG 2D 213

slump. . . . I just ain't hitting."[12] More formally, the study of statistics requires an adequate sample size for reliable results.[13] Which brings us to our first caveat. For all the findings presented here, we caution that we require a few more years of data before we will call our sample size sufficient to support firm conclusions.

Now, however, we are pleased to present *Appellate Review II*. First, we review the data from OT11, including the much anticipated circuit scorecard. In addition to counting how the circuits fared in the circuit split resolutions, we again compile data on how the Court resolved the splits (from unanimous opinions through 5-4 decisions). We also track the depths of the splits on which the Court granted cert (from splits between only two of the courts, or a 1-1 split, to splits between almost all the circuits, or 6-5 splits[14]). And, for the first time this year, we track the subject matter of the splits (spoiler: expect a lot of statutory interpretation). Finally, we highlight some of the granularity we are hoping to develop in the data for the future *Appellate Review*.

I. THE DATA

A. The Method

We generally used the same method to gather the data that we used last year. Our circuit split data starts with the Supreme Court Database.[15] From there, we eliminated cases that did not explicitly reference or did not resolve a circuit split. Also, we excluded the Federal Circuit for the reasons we noted last year.[16]

(2010).

[12] We of course kid. After all, if (as we expect) the average over time is close to 50 percent, then all of the courts of appeal deserve a spot in the Hall of Fame; hitting .500 is pretty impressive.

[13] Frankly, we do not think the drop is all that surprising. Averaged over the two years we have tracked this statistic, the parallel review rate is 52 percent, which is consistent with Hansford's prior findings. *See* Cummins & Aft, *supra* n. 3 (discussing Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145 (2011)).

[14] Yes, attentive reader, 6-5 was the deepest split resolved in OT11. *See infra* tbl. 2. It came in *Reynolds v. United States*, 132 S. Ct. 975 (2012).

[15] *The Supreme Court Database*, scdb.wustl.edu (last visited Apr. 1, 2013).

[16] Cummins & Aft, *supra* note 3, at 67.

B. The Scorecard

Without further ado, this year's circuit scorecard:

October Term 2011 Parallel Review Affirmance Rates		
Rank	Court of Appeal	Rate
1	Fourth	78%
2	Eleventh	56%
3	D.C., Sixth	50%
5	Ninth	44%
6	Second, Third	40%
8	Tenth	38%
9	Seventh	36%
10	First, Fifth	33%
12	Eighth	25%

A surprising result on this scorecard is the movement among the circuits. OT10's top three circuits, for example, all fall to the bottom third of the OT11 rankings. Specifically, the Tenth Circuit, which led the rankings last year with a 100 percent affirmance rate, falls to eighth place. OT10's second place finisher, the Fifth Circuit, falls to a two-way tie for tenth place. And there it meets last year's third place finisher, the First Circuit.

Conversely, two of last year's laggards make substantial gains. The D.C. Circuit, which placed twelfth last year, climbs to a two-way tie for third place with the Sixth Circuit, which itself was near the bottom of the rankings last year (placing tenth).

While there was movement at both ends of the rankings, there was also consistency – both at the poles and in the middle. The Ninth Circuit held steady in the middle of the pack (indeed, climbing a couple of spots from seventh to fifth), again suggesting that its reputation as an outlier is not merited in all respects. The Second and Seventh Circuits likewise held their positions (maintaining their respective ranks of sixth and ninth places). The Eighth Circuit continued its losing streak (falling from eleventh to twelfth place). And the Fourth continued its winning streak, rising from third place to first.

We are a long way from concluding that the Fourth Circuit is the Yankees, however, or that the Eighth Circuit is the Cubs. We need

more data. But, consistent with prior observations we again find that the rankings "do not seem explicable on 'political' grounds."[17] For example, those circuits commonly believed to be the most "liberal"[18] (the Second, Third, and Ninth) are squarely in the middle of the pack.

C. The View from One First

Though the Supreme Court has the last word,[19] its address is 1 First Street, NE, in Washington, D.C. In OT11, how the Court resolved the splits, like the circuit court rankings, showed both continuity and change from OT10.

First, consistent with last year's findings, [20] circuit splits were not particularly more likely to divide the Court than the other types of issues. For example, of all the cases that the Court decided by a signed opinion during OT11,[21] 45 percent were unanimous.[22] Of the cases involving circuit splits, 40 percent were decided by a unanimous opinion, and another 9 percent were decided over a lone dissent. Thus, simply because different circuits reached opposite conclusions did not make it markedly more likely that One First would do so in OT11.[23]

At the other end of the spectrum, 20 percent of the Court's signed opinions during OT11 were 5-4 decisions, the same as in OT10.[24] Yet in OT10 there was not a single 5-4 opinion that explicitly addressed a circuit split. [25] In OT11, in contrast, 27 percent of the cases on parallel review were resolved on a 5-4 vote.

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[17] Cummins & Aft, *supra* note 3, at 70 (quoting Hansford, *supra*, at 1164).
[18] *See* Hansford, *supra* note 13, at 1164 (collecting sources).
[19] See *Brown*, 344 U.S. at 540 (Jackson, J. concurring).
[20] During the October Term 2010, the Court rendered a unanimous judgment in 48 percent of its merits opinions. On parallel review, the Court rendered a unanimous judgment at almost precisely the same rate, 50 percent of the time. *See* Cummins & Aft, *supra* note 3, at 70.
[21] The Court decided 11 additional cases by summary reversal. *See* SCOTUSblog Stat Pack, *supra* note 1.
[22] *See* SCOTUSblog Stat Pack, *supra* note 1.
[23] This is largely consistent with what we found for OT10, where the Court resolved 70 percent of the cases by an overwhelming majority (either unanimously or over a lone dissent).
[24] *See* Cummins & Aft, *supra* note 3, at 70.
[25] *Id.* at 70.

Cases Resulting in a 5-4 Court Vote Split and Corresponding Circuit Split	
Case	Circuit Split
Florence (5-4)	3 to 8
Hall (5-4)	2 to 1
Ramah (5-4)	1 to 1
Christopher (5-4)	1 to 1
Dorsey (5-4)	3 to 3
NFIB (5-4)	2 to 1

Frankly, we're uncertain what this observation means. Initially, we hypothesized that perhaps the 5-4 splits would only occur in shallow splits. The data did not support this hypothesis – at least not fully.

In OT11, the average split resolved by a 5-4 decision involved 4.5 circuits. The overall average involved 4.92 circuits (compared with an overall average of 5.76 circuits in OT10[26]). It is possible, of course, that *Florence*[27] skewed this result. As with all of our findings, we are going to let a few more years of data accumulate before we decide to definitively call this one way or another.

Similarly, based on the OT11 data we cannot say that the Court is more likely to grant cert the deeper the split. *Roberts*,[28] *Filarsky*,[29] and *Christopher*[30] were 1-1 splits. *Reyonlds*,[31] in contrast, was a 6-5 split. Likewise, outsized circuit majorities are no guarantee of how the Court will vote. *Taniguchi*[32] was a 1-7 split; *Judulang*,[33] a 1-8 split. In both cases, the minority approach prevailed.

D. How One Plays the Game

New for this year is our tracking of the splits' subject matter. Statutory interpretation makes up the vast majority of the circuit split cases, 82 percent. (We include here *Rehberg*[34] and *Filarsky*,[35]

[26] As noted, there were no splits explicitly resolved by a 5-4 decision in OT10.
[27] Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington, 132 S. Ct. 1510 (2012).
[28] Roberts v. Sea-Land Servs., Inc., 132 S. Ct. 1350 (2012).
[29] Filarsky v. Delia, 132 S. Ct. 1657 (2012).
[30] Christopher v. Smithkline Becham Corp., 132 S. Ct. 2156 (2012).
[31] Reynolds v. United States, 132 S. Ct. 975 (2012).
[32] Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).
[33] Judulang v. Holder, 132 S. Ct. 476 (2011).
[34] Rehberg v. Paulk, 132 S. Ct. 1497 (2012).
[35] Filarsky v. Delia, 132 S. Ct. 1657 (2012).

which are both § 1983 cases.[36]) The remaining 18 percent concern constitutional questions.[37]

All of the circuit split cases that were resolved by unanimous decision in OT11 concerned questions of statutory interpretation. In contrast, 50 percent of the circuit split cases that concerned constitutional questions were decided 5-4.[38] As tempting as it is to speculate about what this might signify, the sample size is too small for us to offer any suggestions regarding these results.

II. THE FLYOVER COUNTRY

Notwithstanding our caution, we do see some trends emerging.[39] In OT10, the average split was 3.67 to 2.29. This term, the average split was 2.45 to 3.00. That is, the average size of the split remains about 3-3, give or take. If this persists, we can expect that the parallel affirmance rate will hover around 50 percent. But why about 3-3?

An often cited benefit of not instantly resolving every split is that the additional courts of appeals weighing in on the same legal issue against different facts or arguments allows issues to more fully develop before the Court decides an issue.[40] Conversely, waiting to resolve circuit splits leaves an uncertainty in the law.[41] Thus, there

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[36] 42 U.S.C. § 1983. We realize that the language of Section 1983 is so broad that it resembles something closer to a blank canvas than a specific command from the legislative branch. Congress essentially said, "Dear Courts: Please find a blank canvas and paint enclosed. Love, Congress." *See also* Herbert Hovenkamp, *Federal Antitrust Policy* § 2.1b, at 52 (3d ed. 1994) ("The framers of the Sherman Act believed that they were simply 'federalizing' the common law of trade restraints."). Nevertheless, the Court has determined that it engages in statutory interpretation in applying the statute. *See, e.g.*, Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989).

[37] Nat'l Fed'n of Indep. Business v. Sebelius, 132 S. Ct. 2566 (2012); S. Union Co. v. United States (2012); Florence v. Bd. of Chosen Freeholders of the County of Burlington, 132 S. Ct. 1510 (2012); Perry v. New Hampshire, 132 S. Ct. 716 (2012).

[38] Florence, 132 S. Ct. at 1510; National Federation of Independent Business, 132 S. Ct. 2566; Hall v. United States, 132 S. Ct. 1882 (2012); Salazr v. Ramah Navajo Chapter, 132 S. Ct. 2181 (2012); Christopher v. Smithkline Becham Corp., 132 S. Ct. 2156 (2012); Dorsey v. United States, 132 S. Ct. 2321 (2012).

[39] Again, we are excited to keep gathering this data over a long enough period to reach more certain conclusions.

[40] *See supra* note 5.

[41] *Cf.* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457, 461

are costs and benefits to the Court's decision to wait. And, significantly, neither one clearly outweighs the other. Thus, we hypothesize that on average the Court's cost-benefit calculation will split the difference – allowing half the courts of appeals to weigh in before resolving the issue.

Excluding the Federal Circuit (which has statutorily distinct, and far more limited, jurisdiction than other circuits), there are 12 federal circuit courts. Consequently, if we do indeed find that the average split the Court reviews remains roughly 3-3 over time, we will not be particularly surprised. On average, the Court will have waited for about half of the courts of appeals to have weighed in before settling the question.[42]

III. ALWAYS WORKING

We highlighted last year our goal of considering the issues in each case to determine whether there were any issue-based generalizations we could make about circuit split cases. The initial results on this metric are provocative, as noted above, but require fuller development.

We are always thinking of what else we could add to our data collection to enable us to obtain an even better picture of the circuit split cases and the parallel affirmance rate. Although we did not start tracking the data this year, we hope to add in the future data

(1897) ("The object of [the study of law] is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

[42] The counter-point, of course, are the blockbuster cases where the Court takes a split that is still developing. OT11 provides a fascinating look at this issue through the health care cases. *See* National Federation of Independent Business, 132 S. Ct. 2566. First, as a process note, we treated these cases as one case for the purpose of our data. While there was certainly more nuance to the split and we could have taken a different approach, we thought that counting the cases as one would keep that particular split from being overrepresented in our data for this term. In passing we note that the Court did not expressly decide this case as resolving a circuit split. Thus, we can take no credit for our prediction that the majority approach would prevail (though it did). We do, however, take full blame for our prediction that the decision would not be 5-4 (no, like everyone else, we had no idea that the only issue that would garner a seven-justice majority was the Medicaid expansion provision). *See* Cummins & Aft, *supra* note 3, at 71.

about which judges have decided the circuit split cases. Based on anecdotal observations we expect this data may yield some interesting results, but we will have to wait to see.

IV. HARVEST TIME

The most important conclusion that we draw this year is the potential trend in the data to the importance of the deliberative process in working through complex or contentious issues prior to the Court's review. This benefit, however, plainly comes at a cost – where the circuits are split, the same federal law yields different outcomes depending on geography. Waiting for about six federal courts of appeals to weigh in appears to be where the Court has drawn the cost-benefit line. As we continue to develop this metric with increased granularity, we will be able to discern more about the nature of developing the law along this path.

To be continued . . .

APPENDIX

Table 1
Wins, Losses, At Bats, and Winning Percentage
(sorted by winning percentage)

Circuit	Wins	Losses	AB	PCT
Fourth	7	2	9	77.78%
Eleventh	5	4	9	55.56%
D.C.	3	3	6	50.00%
Sixth	7	7	14	50.00%
Ninth	8	10	18	44.44%
Second	4	6	10	40.00%
Third	4	6	10	40.00%
Tenth	3	5	8	37.50%
Seventh	4	7	11	36.36%
First	2	4	6	33.33%
Fifth	4	8	12	33.34%
Eighth	2	6	8	25.00%

Table 2
Wins, Losses, At Bats, and Winning Percentage in Unanimous Decisions
(sorted by winning percentage)

Circuit	Wins	Losses	AB	PCT
Fourth	4	1	5	80.00%
D.C.	2	1	3	66.67%
Sixth	3	2	5	60.00%
Eighth	1	1	2	50.00%
Second	1	2	3	33.33%
Third	2	4	6	33.33%
Seventh	1	2	3	33.33%
Ninth	3	6	9	33.33%

Circuit	Wins	Losses	AB	PCT
Eleventh	1	2	3	33.33%
Fifth	2	5	7	28.57%
First	0	1	1	0.00%
Tenth	0	2	2	0.00%

Table 3
The Cases and Votes

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Barion Perry v. New Hampshire	132 S. Ct. 716	3 to 2	1, 2, 6	3, 7	8 to 1 (Thomas concurs, Sotomayor dissents)
Pacific Operators Offshore, LLP, et al. v. Luisa L. Valladolid et al.	132 S. Ct. 680	2 to 1	9	3, 5	9-0 (Scalia concurring in-part with Alito joining)
Joel Judulang v. Eric H. Holder, Jr., Attorney General	132 S. Ct. 476	1 to 8	2	1, 3, 5, 6, 7, 8, 9, 10	9 to 0 (no separate writings)
Marcus D. Mims v. Arrow Financial Services, LLC	132 S. Ct. 740	2 to 6	6, 7	2, 3, 4, 5, 9, 11	9 to 0 (no separate writings)
Billy Joe Reynolds v. United States	132 S. Ct. 975	6 to 5	4, 5, 6, 7, 9, 11	1, 2, 3, 8, 10	7 to 2 (Scalia dissenting with Ginsburg)
Dana Roberts v. Sea-Land Services, Inc., et al.	132 S. Ct. 1350	1 to 1	9	5	9 to 0 (Ginsburg concurring in part and dissenting in part)
Monroe Ace Setser v. United States	132 S. Ct. 1463	4 to 4	5, 8, 10, 11	2, 6, 7, 9	6 to 3 (Breyer dissenting with Kennedy and Ginsburg)

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Panagis Vartelas v. Eric H. Holder, Jr., Attorney General	132 S. Ct. 1479	2 to 1	4, 9	2	6 to 3 (Scalia dissenting with Thomas and Alito)
Charles A. Rehberg v. James P. Paulk	132 S. Ct. 1497	3 to 7	3, 4, 11	2, 5, 6, 7, 9, 10, DC	9 to 0 (no separate writings)
Albert W. Florence v. Board of Chosen Freeholders of the County of Burlington, et al.	132 S. Ct. 1510	3 to 8	3, 9, 11	1, 2, 4, 5, 6, 7, 8, 10	5 to 4 (in-part, Kennedy loses majority (Thomas) for one section) (Breyer dissenting with Ginsburg, Sotomayor, and Kagan)
Steve A. Filarsky v. Nicholas B. Delia	132 S. Ct. 1657	1 to 1	6	9	9 to 0 (Ginsburg and Sotomayor each write concurrences)
Asid Mohamad, Individually and for the Estate of Azzam Rahim, Deceased, et al. v. Palestinian Authority, et al.	132 S. Ct. 1702	3 to 1	4, 9, DC	11	9 to 0 (Breyer concurs, Scalia joins all but one section)
Lynwood D. Hall, et ux. v. United States	132 S. Ct. 1882	2 to 1	9, 10	8	5 to 4 (Breyer dissents, joined by Kennedy, Kagan, and Ginsburg)

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Michael J. Astrue, Commissioner of Social Security v. Karen K. Capato, on Behalf of B.N.C., et al.	132 S. Ct. 2021	5 to 2	4, 5, 6, 8, DC	3, 9	9 to 0 (no separate writings)
Kouichi Taniguchi v. Kan Pacific Saipan, Ltd., DBA Marianas Resort and Spa	132 S. Ct. 1997	1 to 6	7	1, 5, 6, 8, 9, DC	6 to 3 (Ginsburg dissents, joined by Breyer and Sotomayor)
Eric H. Holder, Jr., Attorney General v. Carlos Martinez Gutierrez	132 S. Ct. 2011	3 to 1	3, 4 (dicta), 5	9	9 to 0 (no separate writings)
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak	132 S. Ct. 2199	1 to 4	DC	7, 9, 10, 11	8 to 1 (Sotomayor dissenting)
Salazar v. Ramah Navajo Chapter	132 S. Ct. 2181	1 to 1	10	DC	5 to 4 (Roberts dissents, joined by Ginsburg, Breyer, and Alito)
Michael Shane Christopher, et al. v. Smithkline Beecham Corporation DBA Glaxosmithkline	132 S. Ct. 2156	1 to 1	2	9	5 to 4 (Breyer dissents, joined by Ginsburg, Sotomayor, and Kagan)
Southern Union Co. v. United States	132 S. Ct. 2344	4 to 1	2, 6, 7, 9	1	6 to 2 (Breyer dissents, joined by Kennedy and Alito)

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Edward Dorsey, Sr. v. United States	132 S. Ct. 2321	3 to 3	1, 3, 11	5, 7, 8	5 to 4 (Scalia dissents, joined by Roberts, Thomas, and Alito)
National Federation of Independent Business, at al. v. Kathleen Sebelius, Secretary of Health and Human Services, et al.	132 S. Ct. 2566	2 to 1	4 ,6	11	5-4 (Scalia, Kennedy, Thomas, Alito, joint dissent)

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