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NOW WE ARE SIX: THE EMERGING ROBERTS COURT*

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THE Roberts Court has now completed its sixth year. This benchmark invites comparisons with earlier Courts. Earl Warren was appointed as Chief Justice in 1953. It was not until nine years later, in 1962, that the Warren Court fully emerged. That was the year in which Felix Frankfurter left the Court, Arthur Goldberg took his place, and the balance on the Court tipped to the more liberal justices. Opinions from the mid-sixties—*Gideon v. Wainwright* (1963) and *Reynolds v. Sims* (1964) come to mind—mark the Warren Court at flood tide.¹

William Rehnquist was confirmed as Chief Justice in 1986. Again, it was about nine years, in 1995, before the Rehnquist Court emerged full blown. Rehnquist, so often a lone dissenter before 1986, now had company in the likes of Antonin Scalia and Clarence Thomas. Thus, in the mid-nineties, the Rehnquist Court was making its distinctive mark on the Court's jurisprudence. Illustrative are *United States v. Lopez* (1995), the first time in sixty years that the Court had declared an act of Congress to be beyond that body's power to regulate commerce, and *Agostini v. Felton* (1997), one of a series of cases in which the increasingly

* Fans of Winnie the Pooh and other A. A. Milne characters will recognize the title's having been drawn from Milne's *Now We Are Six*.

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¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Reynolds v. Sims*, 377 U.S. 533 (1964).

conservative Court began dismantling the wall of separation between church and state.²

Now comes the Roberts Court. Until the appointment of John Roberts as Chief Justice, there had been no vacancy on the Court for eleven years. Then a succession of events changed the face of the Court. Since 2005, we have seen the departure of four justices—Rehnquist, O’Connor, Souter, and Stevens—and the arrival of four new justices—Roberts, Alito, Sotomayor, and Kagan. It has now been six years since Chief Justice Roberts took his seat. Recalling the stories of the Warren and Rehnquist Courts, are we two-thirds of the way through another nine-year cycle? Is the Roberts Court beginning to take shape? What can we say about this Court?

In its study *The Child from One to Six*, New Haven’s Gesell Institute of Human Development has this to say about six-year olds:

Your 6-year-old is a lively creature—dynamic, energetic, and enthusiastic, but one whose life is not without complications. His biggest problem may be his two-way nature. He may be beautiful and bubbly one minute, but difficult and quarrelsome the next.³

Those who follow the work of the Supreme Court might find that its “difficult and quarrelsome” moments overshadow its “beautiful and bubbly” ones. What, then, shall we say about the emerging Roberts Court?

A conservative Court. Is the Roberts Court distinctly trending to the right? Erwin Chemerinsky claims that this is the most conservative Court since the 1930s, and *The New York Times* has given conspicuous attention to a study concluding that, of the six most conservative justices who have served on the Court since 1937, four—Roberts, Alito, Scalia, and Thomas—are now serving.⁴ Those who see the Court as being conservative are likely to point to decisions dealing with race, abortion, and

² *United States v. Lopez*, 514 U.S. 549 (1995); *Agostini v. Felton*, 521 U.S. 203 (1997).

³ Louise Bates Ames et al., *The Gesell Institute’s Child from One to Six* 52 (1979). A. A. Milne offers this insight: “But now I am six, I’m as clever as clever.” A. A. Milne, *Now We Are Six* 102 (2008).

⁴ Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 *Wayne L. Rev.* 947, 948 (2008); Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, *N.Y. Times*, July 25, 2010, at A1 (citing William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 *J. Legal Analysis* 775 (2009)).

business.⁵ But there are some commentators who would dispute the conventional wisdom about the Court's conservatism.⁶ This debate underscores the need for caution in attaching simple labels to a Court whose docket covers so many disparate issues. Even if there is, in general, a rightward shift, there have been some unmistakably liberal decisions, such as *Boumediene v. Bush*, the third in a series of rebuffs by the Court to the Bush administration's policies in detainee cases, and *Kennedy v. Louisiana*, holding that imposing the death penalty for the rape of a child violates the Constitution's ban on cruel and unusual punishment.⁷

A correlation between presidents' expectations and justices' votes. It used to be easy to talk about presidents' disappointments in the voting patterns of their nominees to the Court. Theodore Roosevelt, annoyed by an opinion by Justice Holmes, is reputed to have said that he could "carve a stronger backbone out of a banana." One often hears it said that President Eisenhower complained what a "damn fool" mistake he had made in putting Earl Warren on the Court.⁸ More recent examples of a disconnect with presidential expectations would include Harry Blackmun, John Paul Stevens, and David Souter, each of whom took a far more liberal course than many of their backers on the president's team would have expected.⁹ Those days are now past. Today justices' positions are more in line with the politics of the appointing president's par-

⁵ See, e.g., *Gonzales v. Carhart*, 551 U.S. 124 (2007) (abortion); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (voluntary affirmative action). I discuss the question whether the Roberts Court is "pro-business" later in the essay.

⁶ See Thomas Goldstein & Robert A. Selder, *A Different Take on the Roberts Court: The Court As an Institution, Ideology, and the Settled Nature of American Constitutional Law*, 54 *Wayne L. Rev.* 1033, 1036 (2008); Bob Egelko, *Conservative Bloc Dominates Key Rulings*, *S.F. Chron.*, July 3, 2010, at A1 (citing Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 *Wayne L. Rev.* 983, 986 (2008)). Jeff Jacoby calls the description of the Roberts Court as a right wing stronghold a "caricature." Jeff Jacoby, *Editorial, The Most Conservative Court? Hardly: Despite Hyperventilating About the Supreme Court's Supposed Tilt to the Right, It Is Generally Pretty Stable*, *Bos. Globe*, Oct. 10, 2010, at K9.

⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

⁸ See Earl Warren, *The Memoirs of Earl Warren* 5 (1977).

⁹ In 2007, Lee Epstein and some colleagues published a study regarding the ideological drift of justices over time and concluded that, while justices tend to be ideologically aligned with their nominating presidents, there is a tendency for their views to drift either left or right after about ten years on the bench. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?* 101 *Nw. U. L. Rev.* 1483, 1486 (2007).

ty. In the Court's conservative ranks, we are seeing the fruits of the agenda launched by the Reagan administration's Justice Department and other critics of the Warren Court. It is no coincidence that John Roberts and Samuel Alito were young lawyers in President Reagan's Justice Department.

Judicial activism. Whether an opinion is "activist" is often in the eyes of the beholder. A charge of activism often means, essentially, that the speaker doesn't like the result the Court reached. But activism does have its measures—a lack of deference to the political process, a willingness to overturn precedent, broad rulings. By such yardsticks, is the Roberts Court an "activist" Court? One study concludes that, on average, the Roberts Court has overturned fewer precedents and invalidated fewer laws than did the Warren, Burger, or Rehnquist Courts.¹⁰

Sometimes the justices are drawn to judicial minimalism and case by case adjudication. The 2008–09 Term seemed to end on a note of judicial restraint, for example, when the Court left the Voting Rights Act intact.¹¹ But the next Term produced the most controversial decision since the Rehnquist Court's judgment in *Bush v. Gore*.¹² Activism abounds in the Roberts Court's decision in *Citizens United v. FEC*.¹³ Here there is no trace of judicial minimalism. Not only did the Court strike down important provisions of the McCain-Feingold Act, but the majority also reached out to decide the constitutional question instead, as it might have done, of reading the statute narrowly not to apply to the movie at issue in the case.

An ideologically divided Court. In the Court's most recent Term (2010–11), sixteen opinions—20% of all opinions—were decided by a vote of 5-4.¹⁴ Of those opinions, 88% split along ideological lines—the

¹⁰ Jonathan Adler reports that the Roberts Court overturns only an average of 1.6 precedents per term, compared with 2.7, 2.8, and 2.4 per term for the Warren, Burger, and Rehnquist Courts respectively. Similarly, he states that the Roberts Court invalidates only an average of three statutes per term, compared with 7.9, 12.5, and 8.2 for its predecessors. Adler thus claims that the Roberts Court is a "conservative minimalist" Court. Jonathan H. Adler, *Court Under Roberts Is Most Constrained in Decades, The Volokh Conspiracy* (Aug. 1, 2010, 6:01 PM), <http://volokh.com/2010/08/01/court-under-roberts-is-most-restrained-in-decades>.

¹¹ See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

¹² 531 U.S. 98 (2000).

¹³ 130 S. Ct. 876 (2010).

¹⁴ The majority of the statistics cited in this essay come from End-of-Term Statistical Analysis — October Term 2010, SCOTUSblog, at 2 (July 1, 2011), http://www.scotusblog.com/wp-content/uploads/2011/07/SB_Summary_Memo_OT10.pdf.

highest percentage in the past ten years. Conservatives prevailed in 71% of those cases. Rates of agreement between pairs of justices reinforce one's sense of the ideological divisions on the Court. The highest rate of agreement between any two justices was between Roberts and Alito (96%), followed closely by Sotomayor and Kagan (94%). Low rates of agreement are yet further evidence of ideological pairings. The lowest rate of agreement was between Ginsburg and Alito (62%). Close behind in disagreement were Roberts and Ginsburg (64%), Scalia and Ginsburg (65%), and Thomas and Ginsburg (65%).

Kennedy's pivotal role. Justice Kennedy has replaced Justice O'Connor as the Court's swing vote (if one may use that sometimes overworn phrase). Figures bear out this judgment. In the 2010–11 Term, no justice was in the majority more often than Kennedy. He was in the majority in 94% of cases (80 cases), followed by Roberts (91%). In 5-4 cases, Kennedy was in the majority in 88% of cases. Thomas (75%) was not even close. The justice least often in the majority in 5-4 cases was Breyer (31%).

Kennedy's being more conservative than O'Connor affects the outcome of important cases. For example, in 2000 the Court struck down a Nebraska law banning partial-birth abortion.¹⁵ The Court's vote was 5-4, with O'Connor in the majority. Then, in 2007, the Court upheld a federal law hardly distinguishable from the Nebraska law.¹⁶ Again, the vote was 5-4, but now it was Kennedy's vote that was decisive. Race cases offer another example. In 2003, O'Connor wrote the majority opinion in *Grutter v. Bollinger*, a 5-4 decision allowing public universities to use race as a factor in admissions decisions.¹⁷ Four years later, the Court wrote at variance with *Grutter* when a new 5-4 majority struck down voluntary school plans taking race into account in making student assignments in Seattle and Louisville.¹⁸ Overall, in the 2010–11 Term's 5-4 decisions, Kennedy was far more likely to join the more conservative justices (Roberts, Scalia, Thomas, and Alito) than those on the Court's other wing (Ginsburg, Breyer, Sotomayor, and Kagan)—63% with the former, 25% with the latter.

By no means does Kennedy march in lockstep with the more conservative justices, though. For example, he wrote separately in the Seat-

¹⁵ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

¹⁶ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

¹⁷ 539 U.S. 306 (2003).

¹⁸ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

tle and Louisville cases, criticizing Roberts' insistence, in his plurality opinion, that race can never be a factor in such cases.¹⁹ Kennedy maintained that, while they must be narrowly tailored, school plans might pursue racial diversity, avoid racial isolation, and address de facto resegregation.²⁰ In *Brown v. Plata*, involving overcrowding in California prisons,²¹ Kennedy broke with the conservative justices. Taking a nuanced view of federal courts' institutional role in remedying constitutional violations, he declared that "courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."²²

On the Court's left. The replacement of Souter and Stevens with Sotomayor and Kagan has done little to alter the Court's overall ideological balance. Justice Stevens' departure did, however, have an effect. It removed a strong intellectual, emotional, and tactical leader from the Court's more liberal wing. Will either Sotomayor or Kagan step in to pick up Stevens' mantle?

First impressions suggest that Sotomayor and Kagan are becoming a formidable pair. They are often in agreement. In the 2010–11 Term, they agreed 94% of the time—the second highest rate of any pair of justices. Justice Kagan was especially impressive in her first Term on the Court. Read her dissents in *Arizona Christian School Tuition Organization v. Winn* (the taxpayer standing case) and in *Arizona Free Enterprise v. Bennett* (the public financing of elections case).²³ Both are well reasoned and strongly written. Kagan is destined to become an important player on the Court—a compelling counterpoint to Scalia.²⁴ With Sotomayor and Kagan's brisk beginning, might in time they become the twenty-first century versions of Thurgood Marshall and William Brennan?²⁵

The pace of oral argument in the Court has picked up with Sotomayor and Kagan on the bench. The two newest justices are more active in oral

¹⁹ Id. at 782, 787–90 (Kennedy, J., concurring).

²⁰ Id.

²¹ 131 S. Ct. 1910 (2011).

²² Id. at 1928–29.

²³ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1450–63 (2011) (Kagan, J., dissenting); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829–46 (2011) (Kagan, J., dissenting).

²⁴ See Stanley Fish, *A Dollar Is a Dollar: Elena Kagan's Style*, N.Y. Times Opinionator Blog, (Apr. 11, 2011, 8:30 PM), <http://opinionator.blogs.nytimes.com/2011/04/11/a-dollar-is-a-dollar-elena-kagans-style/>.

²⁵ See Emily Bazelon, *Chamber of Pain*, N.Y. Times, Aug. 7, 2011, at MM9.

argument than were the justices they replaced, Souter and Stevens.²⁶ Sotomayor was especially active when the Court considered the case of overcrowding in California prisons.²⁷ Those who remember the relatively quiet pace of oral argument thirty years ago find the courtroom quite different today. Perhaps we should think of the Court's oral arguments as being before and after the presence of Scalia.²⁸ Certainly the two newcomers are comfortable with, and add to, that quickened pace.

While Sotomayor and Kagan share much judicial turf, it may be that they will develop rather different styles of interaction with their colleagues. Passionate and blunt, Sotomayor has been described as the Roberts Court's version of Thurgood Marshall.²⁹ She is so active in oral argument that the Chief Justice has had occasion to ask her to hold her question so that another justice could participate.³⁰ If Sotomayor is Marshall, Kagan may be the current Court's William Brennan—a bridge builder and diplomat. As Harvard Law School's dean, she was known for having good relations with conservatives and liberals alike. Since joining the Court, she has gone skeet shooting with Scalia and to a conference in Buenos Aires with Thomas and his wife.³¹ She seems to enjoy a good relation with Roberts, whom she has said “may have been the best oral advocate in the history of the Supreme Court.”³² At the Court's other wing, she enjoys the obvious confidence of Ginsburg, who has stated that “Elena has it in her to be one of the exemplary justices of our time.”³³ Ginsburg signaled her confidence in Kagan by assigning her

²⁶ See Joan Biskupic, Rookies on Bench May Recast Liberal Wing: ‘Dynamic’ Duo of Kagan and Sotomayor Are Adding a Forceful Style of One-Upsmanship and Vigor to Supreme Court, *USA Today*, Mar. 4, 2011, at 9A; see also David G. Savage, Supreme Court Debates Shift Left: With Sotomayor and Kagan, Liberal Justices Are No Longer Drowned Out During Arguments, *L.A. Times*, Dec. 26, 2010, at 1.

²⁷ Bazelon, *supra* note 25 (discussing argument in *Plata*, 131 S. Ct. 1910); see also Robert Barnes, Justices Argue Value of Talking, *Seattle Times*, Mar. 2, 2011, at A3.

²⁸ There is no doubt about Justice Scalia's contribution to the quickened pace of oral argument. The era when lawyers could make a point uninterrupted—an era now long vanished—is suggested by Justice Powell's remark to Marshall when Scalia was unfolding one of his colorful hypotheticals: “Do you think he knows the rest of us are here?” See John Jeffries, *Lewis F. Powell* 534 (2001).

²⁹ Bazelon, *supra* note 25.

³⁰ Savage, *supra* note 26.

³¹ Savage, *supra* note 26; Bazelon, *supra* note 25; see also Robert Barnes, Kagan Made Her Mark in a Bold Rookie Term, *Wash. Post*, Sept. 26, 2011, at A1.

³² See Barnes, *supra* note 31.

³³ Bazelon, *supra* note 25.

two of the most important liberal dissents of the 2010–11 Term, *Arizona Christian School Tuition Organization* and *Arizona Free Enterprise*.³⁴

On the Court's right. We have come to know Scalia and Thomas for their conservative activism. They are not shy about invalidating legislation or overruling precedent. Indeed, Thomas seems willing to reconsider virtually any issue in the law that he views as having been wrongly decided. Even old warhorses like *Gibbons v. Ogden* seem fair game.³⁵ No Justice has been more vocal in recent years about curbing Congress' Commerce Clause power than Thomas. The 2010–11 Term was no exception. In *Alderman v. United States*, the Court denied certiorari on a Ninth Circuit ruling upholding a federal statute prohibiting those convicted of violent felonies from owning body armor.³⁶ Dissenting, Thomas complained that allowing the circuit court's opinion to stand "threatens the proper limits on Congress' commerce power and may allow Congress to exercise police powers that our Constitution reserves to the States."³⁷

Sometimes, in their narrow reading of the Constitution, Scalia and Thomas take positions clearly favoring government power. Thus, in *Graham v. Florida*, Thomas, in a dissent joined by Scalia, argued that it is never cruel and unusual punishment to sentence a juvenile to life in prison without the possibility of parole.³⁸ But their strict reading of the Constitution sometimes leads Scalia and Thomas to results favorable to criminal defendants. Thus, in their dissent in *United States v. Comstock*, they would have invalidated as beyond Congress' Commerce Power a statute allowing the civil commitment of mentally ill sex offenders after the completion of their criminal sentences.³⁹

Scalia's dissent in *Michigan v. Bryant* yields a vivid example of how his allegiance to the text of the Confrontation Clause often puts him in the defendant's corner.⁴⁰ The majority held that the dying declaration of a murder victim was non-testimonial and therefore not barred by the Confrontation Clause. In a heated dissent, Scalia argued that the officers' primary purpose in questioning the victim before he died was not to

³⁴ See *Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1450–63 (Kagan, J., dissenting); *Ariz. Free Enter.*, 131 S. Ct. at 2829–46 (Kagan, J., dissenting).

³⁵ See *United States v. Lopez*, 514 U.S. 549, 593 (1995) (Thomas, J., concurring).

³⁶ 131 S. Ct. 700 (2011).

³⁷ *Id.* at 700 (Thomas, J., dissenting).

³⁸ 130 S. Ct. 2011, 2058 (2010) (Thomas, J., dissenting).

³⁹ 130 S. Ct. 1949, 1973 (2010) (Thomas, J., dissenting).

⁴⁰ 131 S. Ct. 1143, 1168–76 (2011) (Scalia, J., dissenting).

protect him or others but to obtain his testimony. Looking at the officers' intent, not that of the victim, Scalia said that this was "an absurdly easy case."⁴¹

Few things are more striking about Justice Thomas than his reluctance to ask questions during oral argument. This trait has become even more pronounced during the years of the Roberts Court. The last time Thomas asked a question was February 22, 2006. This streak is all the more striking when one considers that no other Justice in the past forty years has gone a single term, much less Thomas' five (and counting), without asking at least one question. Thomas' thinking may be hinted at in a bar speech in which he said, "If I invite you to argue your case, I should at least listen to you."⁴² Anyone who has been around Thomas—one of the most convivial and gregarious of the justices—must assume that there is a reason for his silence on the bench.

Justice Alito is emerging as a distinctive voice on the Court. Notable are his opinions balancing First Amendment claims against competing interests and giving more weight to legislative judgments than does the Court's majority. In *Snyder v. Phelps*, when the Court affirmed protesters' First Amendment rights to use a funeral as the occasion for offensive picketing,⁴³ Alito was the lone dissenter. He deplored the "brutalization of innocent victims."⁴⁴ Alito's *Snyder* dissent was right in line with his dissent (again a solitary one) a year earlier in *United States v. Stevens*, when the Court struck down a federal statute criminalizing videos and other depictions of animal cruelty.⁴⁵ In another 2011 case, *Brown v. Entertainment Merchants Ass'n*, Alito concurred in the invalidation of a California law banning the sale of violent video games, but only on the ground that the statute was unconstitutionally vague.⁴⁶ Alito surveyed the literature regarding violent video games and stressed that, were the California legislature to draft the statute with sufficient specificity, he would uphold it.⁴⁷ Alito's marked concern to preserve space

⁴¹ Id. at 1171.

⁴² See Adam Liptak, No Argument: Thomas Keeps 5-Year Silence, N.Y. Times, Feb. 13, 2011, at A1.

⁴³ 131 S. Ct. 1207, 1220 (2011).

⁴⁴ Id. at 1228–29 (Alito, J., dissenting).

⁴⁵ 130 S. Ct. 1577, 1592 (2010) (Alito, J. dissenting).

⁴⁶ 131 S. Ct. 2729, 2742 (2011).

⁴⁷ Id. (Alito, J., concurring).

for legislatures to define and protect community values has led one commentator to dub him the Court's "Burkean Justice."⁴⁸

No discussion of the Roberts Court Justices would be complete without mention of Chief Justice Roberts himself. It is inevitable that a Chief Justice sets a tone for the Court, and Roberts is no exception. Roberts seems well liked and esteemed by his colleagues. Retired Justice John Paul Stevens speaks for many when he paints a highly favorable portrait of Roberts in his recent memoir, *Five Chiefs*.⁴⁹ Stevens notes that, despite their divergent ideologies, he and Roberts formed a solid friendship, and he is especially emphatic in praising Roberts for being, "with the possible exception of Earl Warren, . . . the best spokesman for the Court in nonjudicial functions."⁵⁰ As to Roberts' leadership within the Court, Stevens describes the Chief Justice as being "well-prepared, fair, and effective" in presiding over the conference.⁵¹ Stevens believes Roberts, during oral arguments, to be "a better presiding officer" than either Burger or Rehnquist.⁵²

The 2010–11 Term as a benchmark. Two themes in the Court's most recent Term merit comment. First is the Court's pervasive, indeed aggressive, commitment to the First Amendment. Chief Justice Roberts' language in his funeral protest opinion in *Snyder* is likely to join oft-quoted Brandeis, Black, and Brennan opinions in the casebooks.⁵³ Writing for the Court in *Entertainment Merchants*, Scalia forcefully rejected the notion that violence could be classified with obscenity.⁵⁴ The inclusion of commercial speech under the First Amendment was further expanded in *Sorrell v. IMS Health Inc.*⁵⁵ And campaign finance laws took another hit when the Court struck down Arizona's public financing law, the Justices' 5-4 split recalling a like division in their high profile decision in *Citizens United*.⁵⁶

⁴⁸ Adam J. White, The Burkean Justice: Samuel Alito's Understanding of Community and Tradition Distinguishes Him from His Supreme Court Colleagues, *The Weekly Standard*, July 18, 2011, at 20–29.

⁴⁹ See John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* 203–27 (2011).

⁵⁰ *Id.* at 210.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *Snyder*, 131 S. Ct. at 1207.

⁵⁴ 131 S. Ct. at 2734.

⁵⁵ 131 S. Ct. 2653, 2672 (2011) (invalidating parts of a Vermont law barring pharmacies from disclosing information identifying prescribers for marketing purposes).

⁵⁶ See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

The Term's other theme inheres in the now oft-asked question: is the Roberts Court pro-business? Liberal groups and some commentators are quick to slap that label on the Court,⁵⁷ especially after *Citizens United* gave corporations more license to spend freely in political campaigns. Certainly business interests—especially the United States Chamber of Commerce—have taken great satisfaction in some of the 2010–11 Term's most important cases. Big wins for business included *Wal-Mart Stores, Inc. v. Dukes*, where the Court disallowed a class action employment discrimination suit against Wal-Mart on behalf of as many as 1.5 million female employees.⁵⁸ Even more important in its potential for affecting vast numbers of consumers is *AT&T Mobility LLC v. Conception*, where the majority held that businesses may use standard form contracts to forbid consumers claiming fraud from binding together in a single arbitration.⁵⁹ After these two cases, who will doubt that the Court—at least its majority (both of these cases were decided 5-4)—is not fond of class action litigation? As the Term neared its conclusion, drug companies won two victories in the Court on the same day (June 23). In *PLIVA, Inc. v. Mensing*, the Court used preemption to foreclose a state law suit by individuals claiming to be injured by generic drugs.⁶⁰ And in *Sorrell*, the majority invoked the First Amendment to strike down a Vermont law banning certain uses of prescription data.⁶¹

Yet one should pause before saying that the Roberts Court is broadly “pro-business.”⁶² Employment discrimination decisions in the most recent Term favored employees (other than *Wal-Mart*, which was decided on procedural grounds). In one case, the Court held in a 6-2 decision that oral statements will suffice to bring a complaint under the Fair Labor Standards Act.⁶³ And the Court was unanimous in holding that retaliation against an employee's fiancé provided standing to sue under Title

⁵⁷ See, e.g., John Biskupic, Supreme Court: Different—But the Same; Term's Rulings Show Majority Maintains Its Muscle Despite Obama's Picks, USA Today, June 28, 2011, at 4A; Bob Egelko, Recent U.S. High Court Rulings Favor Businesses, S.F. Chron., July 3, 2011, at A10.

⁵⁸ 131 S. Ct. 2541 (2011).

⁵⁹ 131 S. Ct. 1740 (2011).

⁶⁰ 131 S. Ct. 2567 (2011).

⁶¹ 131 S. Ct. at 2653.

⁶² A few Court observers have recognized this point. See, e.g., Ramesh Ponnuru, Supreme Court Isn't Pro-Business, But Should Be, Bloomberg View (July 5, 2011), <http://www.bloomberg.com/news/2011-07-05/supreme-court-isn-t-pro-business-but-should-be-ramesh-ponnuru.html>.

⁶³ *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011).

VII.⁶⁴ There were yet other cases that did not break in business' favor. A unanimous Court ruled that corporations do not have a right to "personal privacy" under the Freedom of Information Act.⁶⁵ The justices were similarly unanimous in rejecting an automaker's federal preemption argument and allowing the family of a woman killed in a collision to go forward with a state law claim for failure to install lap-and-shoulder belts.⁶⁶ Especially noteworthy was the Court's decision in *Chamber of Commerce v. Whiting*, where the majority upheld an Arizona law imposing penalties on businesses hiring illegal immigrants.⁶⁷ There, the United States Chamber of Commerce joined an unusual coalition of plaintiffs (including civil rights groups, labor unions, and the Obama administration) because business groups disliked a patchwork of state and local laws, and immigration-related bills have been introduced by the hundreds in legislatures across the country. All in all, an attempt to place the pro-business label on the Court requires one to go case by case, mull the competing interests at play, and come up with, at best, a highly qualified conclusion.

Some commentators found little to get excited about in the 2010–11 Term. Robert Barnes in *The Washington Post*, Andrew Cohen in *The Atlantic*, and former Solicitor General Paul Clement in *Slate* all lamented the absence of "blockbuster" cases.⁶⁸ At Term's end, *Slate*'s Dahlia Lithwick spoke of "a low-carb finish to a quiet term."⁶⁹ It was as if, lacking the judicial equivalent of D-Day or the Battle of the Bulge, there was nothing to write home about. However, just because there was no *Bush v. Gore* or *Citizens United* in the 2010–11 Term doesn't mean that the Term wasn't important—surely the business community, among

⁶⁴ *Thompson v. N. Am. Stainless, LP.*, 131 S. Ct. 863 (2011).

⁶⁵ *FCC v. AT&T*, 131 S. Ct. 1177 (2011).

⁶⁶ *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011).

⁶⁷ 131 S. Ct. 1968 (2011).

⁶⁸ Robert Barnes, *Justices Who Will Shape Court Future Pair Up*, *Wash. Post*, June 29, 2011, at A6 (quotation omitted); Andrew Cohen, *The 9 Best Supreme Court Dissents of the Term*, *The Atlantic*, June 28, 2011, <http://www.theatlantic.com/national/archive/2011/06/the-9-best-supreme-court-dissents-of-the-term/241033>; Paul Clement, *Supreme Court Year in Review: Entry 4: Sometimes the End-of-Term Drama Obscures the Truth*, *Slate*, June 24, 2011, http://slate.com/articles/life/the_breakfast_table/features/2011/supreme_court_year_in_review/sometimes_the_endofterm_drama_obscurers_the_truth.html.

⁶⁹ Dahlia Lithwick, *Supreme Court Year in Review: Entry 1: A Low-Carb Term*, *Slate*, June 23, 2011, http://www.slate.com/articles/life/the_breakfast_table/features/2011/supreme_court_year_in_review/a_lowcarb_term.html.

others, sat up and took notice. And the Term's opinions are well worth parsing for trends and directions. As Clement observed, the Term gives us "a chance to talk about some of the cases that are much more typical of the court's day-to-day work."⁷⁰

One example illustrates this point. Americans who debate the Court's abortion or gun rights cases are perhaps less aware of how much of the Court's docket is devoted to criminal cases. Those cases can give us an opportunity to reflect on the more nuanced aspects of shifting coalitions on the Court. In an engaging online discussion, Lithwick, Clement, and seasoned appellate advocate Walter Dellinger discussed how a Confrontation Clause case, *Bullcoming v. Washington*,⁷¹ serves to illustrate such nuances.⁷² While most people might expect the Court's criminal jurisprudence to break along conventional liberal-conservative lines, the discussants see in cases, reaching as far back as *Blakely v. Washington* (2004),⁷³ "legalists" on the Court (now Scalia, Thomas, Ginsburg, Sotomayor, and Kagan) and "pragmatists" (now Roberts, Kennedy, Breyer, and Alito).⁷⁴

If one swallow doesn't make a summer, then six Terms don't make a Court. But we are well on our way to saying what history will make of the Roberts Court. The mention of some eras—the Marshall Court and the Warren Court are two examples—brings distinct images to mind. A combination of politics, social forces, litigation tactics, and distinctive personalities on the bench, among others, shapes a Court. It is not fanciful to suppose that such forces will make the Roberts Court one for the books.

⁷⁰ Clement, *supra* note 68.

⁷¹ 131 S. Ct. 2705 (2011).

⁷² Lithwick, *supra* note 69.

⁷³ 542 U.S. 296 (2004).

⁷⁴ Lithwick, *supra* note 69.