
VIRGINIA LAW REVIEW

IN BRIEF

VOLUME 98

NOVEMBER 2012

PAGES 76–107

ESSAY

OUT OF INFANCY: THE ROBERTS COURT AT SEVEN*

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SEVEN years can see the Supreme Court travel a long way. In 1935 the Court invalidated the National Industrial Recovery Act, a centerpiece of the New Deal's efforts to combat the Depression.¹ This was but one of a series of cases in which the Court sought to entrench old notions about government's role in regulating the nation's economy.² Seven years later, the Court (seven of whose members had been appointed since 1935), decided *Wickard v. Filburn*, upholding the Agricultural Adjustment Act's penalty imposed on a farmer who grew wheat for consumption on his own farm.³ In seven years, the Court had gone from close judicial oversight of Congress's decisions about the national economy to something close to complete deference.

* Reaching age seven was significant at common law. Under the common law's infancy defense, children under seven were presumed to lack the capacity to commit a crime. For children between seven and fourteen, however, the presumption was rebuttable. See 2 Wayne LaFare, *Substantive Criminal Law* § 9.6 (2d ed. 2003 & Supp. 2012).

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¹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

² See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (invalidating the Bituminous Coal Conservation Act of 1935); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) (invalidating a law establishing a compulsory retirement and pension plan).

³ 317 U.S. 111, 128–29 (1942).

Or consider how far the modern Court traveled in seven years in giving new life to substantive due process. When Justice Douglas, in 1965, wrote for the Court in *Griswold v. Connecticut*, Douglas, who had been a New Dealer, had not forgotten the days when the Due Process Clause had been used to allow courts to second-guess legislatures.⁴ Douglas therefore declined the invitation to ground *Griswold* in due process, taking the reader instead on a voyage through “emanations” and “penumbras.”⁵ By 1972, the Court was poised openly to embrace substantive due process. Justice Blackmun did just that the next year in *Roe v. Wade*, when he declared due process to be the basis for a right to privacy and concluded that a woman’s decision whether to terminate a pregnancy was within that right.⁶

Campaign finance cases furnish an even more contemporary example. In 2003, in *McConnell v. FEC*, a five-to-four majority (including O’Connor) upheld the McCain-Feingold Act’s regulations of soft money flowing from corporations, unions, wealthy individuals, and other sources.⁷ The Court reasoned that the government had a legitimate interest in preventing corruption in elections and that the resulting limitations on free speech were minimal.⁸

Seven years later, the Court decided *Citizens United v. FEC*. By that time, Alito had replaced O’Connor, and the balance on the Court had tipped in favor of the *McConnell* dissenters. The new majority saw soft money as protected political speech.⁹ Super PACs are now a pervasive feature of the political scene—eloquent testimony to the practical significance of *Citizens United* and the repudiation of much of *McConnell*.

Now we have had seven years of the Roberts Court. Four justices have joined the Court during those seven years, two (Roberts and Alito) appointed by the second President Bush, two (Sotomayor and Kagan) named by President Obama. At the end of the Roberts Court’s sixth year, in these pages I offered some thoughts about the Roberts Court based on its decisions during the 2010–11 Term. I asked whether the Court under Chief Justice Roberts is trending distinctly to the right. I mused on what evidence of judicial activism one finds in the Roberts

⁴ 381 U.S. 479 (1965).

⁵ *Id.* at 484.

⁶ 410 U.S. 113, 164 (1973). Justice Stewart, who had dissented in *Griswold* and concurred in *Roe*, accepted that substantive due process did, indeed, protect “liberty” interests beyond those enumerated in the Bill of Rights. *Id.* at 168 (Stewart, J., concurring).

⁷ 540 U.S. 93 (2003).

⁸ *Id.* at 169.

⁹ *Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010).

Court. I remarked on the extent to which the Court is divided along ideological lines. I observed the Court's strong attraction to First Amendment values, and I asked whether the Roberts Court may fairly be said to be "pro-business." And I commented on the places being occupied by the individual justices, including Justice Kennedy's pivotal role.¹⁰

Now another year has passed. In its 2011–12 Term, the Court handed down signed merits opinions in only 65 cases—the lowest number in recent history. In over half of its decisions (55%), the Court was unanimous, or there was only one dissent.¹¹ Unanimity prevailed in some quite important cases. The justices were unanimous in their broad affirmation of the ministerial exception, grounded in the First Amendment, against a retaliation claim (supported by the EEOC) brought by a church employee found to be a "minister."¹² Likewise, there were no dissents from the Court's ruling that property owners had the right to go to court to challenge compliance orders issued by the EPA.¹³

If one looks at statistics, the government did not fare well in the 2011–12 Term. The Solicitor General typically wins about two-thirds of the cases his office argues in the Supreme Court. In the most recent Term, however, he won only 45% of cases—11 of 24 cases.¹⁴ Adam Liptak, writing in the *New York Times*, found "assertiveness" in the Court's review of actions of other branches of government. Indeed, he went so far as to say that the Court's relationship to the Obama administration "has often been a distinctly adversarial one."¹⁵

A look at the Term in general is overshadowed by the impact of the Term's biggest cases. Two cases stand out. One is *National Federation of Independent Business v. Sebelius*, in which the Court reviewed challenges to the constitutionality of the Patient Protection and Affordable Care Act.¹⁶ No case in the 2011–12 Term was more closely watched by so many people. In that case, there was not a majority for upholding the individual mandate as resting on Congress's commerce power. But five

¹⁰ A.E. Dick Howard, *Now We Are Six: The Emerging Roberts Court*, 98 Va. L. Rev. In Brief 1 (2012), <http://www.virginialawreview.org/inbrief/2012/04/13/howard.pdf>.

¹¹ SCOTUSblog, *Strength of the Majority*, June 30, 2012, http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_strength_of_the_majority_OT11_final.pdf.

¹² *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

¹³ *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

¹⁴ Adam Liptak, *Supreme Court Moving Beyond Its Old Divides*, N.Y. Times, July 1, 2012, at A1.

¹⁵ *Id.*

¹⁶ 132 S. Ct. 2566, 2577 (2012).

justices agreed that it could be justified as an exercise of the taxing power. Thus the centerpiece of President Obama's signature legislative achievement survived. Liptak called the decision "a victory for Mr. Obama and Congressional Democrats."¹⁷ Historian Robert Dallek declared that future historians will compare Obama's landmark legislation "to F.D.R.'s Social Security and Lyndon Johnson's Medicare."¹⁸ The Court's decision made the issue all the more charged in a presidential year. Republican nominee Mitt Romney said, "What the court did not do on its last day in session, I will do on the first day as president of the United States."¹⁹

The other headline case was the Court's decision in *Arizona v. United States*.²⁰ Of the several sections of Arizona's law reviewed by the Court, only one—the "show me your papers" provision—was upheld.²¹ Even that victory for Arizona was tempered by the fact that the challenge to that section was facial, and Justice Kennedy, writing for the Court, put Arizona on notice that its implementation of the section must meet constitutional standards.²² As for the other sections, they were struck down in an opinion that strongly emphasized the federal government's "broad, undoubted power" over immigration.²³ Arizona sought to defend, as a "mirror image" of a federal requirement, a provision of the state law that penalized failure to comply with federal alien registration requirements; the Court rejected that argument (a popular one in states enacting tough immigration laws) by observing that adding state penalties, however minor, can disturb the "careful framework" of federal regulations.²⁴ As to a section authorizing warrantless searches by state officers believing they had probable cause that there had been an offense making a person removable under federal law, the Court would not accept Arizona's argument that this would simply be Arizona's way of "cooperating" with the

¹⁷ Adam Liptak, Justices, by 5-4, Uphold Health Care Law; Roberts in Majority; Victory for Obama, N.Y. Times, June 29, 2012, at A1.

¹⁸ Mark Landler, A Vindication, With A Legacy Still Unwritten, N.Y. Times, June 29, 2012, at A1.

¹⁹ Jeff Zeleny, G.O.P. Vowing to Take Battle into November, N.Y. Times, June 29, 2012, at A1. For further discussion of *Sebelius*, specifically Chief Justice Roberts's role, see *infra* notes 78–97 and accompanying text.

²⁰ 132 S. Ct. 2492 (2012).

²¹ *Id.* at 2525.

²² *Id.* at 2510.

²³ *Id.* at 2498.

²⁴ *Id.* at 2502.

federal government.²⁵ All in all, *Arizona v. United States* is an unmistakable affirmation of federal primacy in matters of immigration.²⁶

Let me turn now, first, to several areas of the Court's work this Term—the business docket, the First Amendment, and criminal justice—and, second, to some thought on the individual justices, especially Chief Justice Roberts.

The Roberts Court and Business. Can the Roberts Court be said to be pro-business? In the 2011–12 Term, it certainly looked that way.²⁷ In the Term's marquee decision, *National Federation of Independent Business v. Sebelius*, there were business interests on both sides of the case, so that is a hard one to score. As to other cases, by one observer's scorecard, in twenty-five cases in which business interests were directly involved, business interests prevailed in nineteen cases.²⁸ Eleven of the twenty-five cases were decided by a unanimous vote, suggesting that counting decisions to see if they are “pro-business” is far from being the same thing as asking a question about the justices' ideological views.²⁹

One way of posing the question about the Court and business is to ask how the United States Chamber of Commerce—an active participant on today's legal scene—fared in the 2011–12 Term. The Chamber took a position in nine cases, and it was on the winning side of every case in which the Court addressed issues on which the Chamber had taken a position.³⁰ Even more striking is the fact that, in every case in which the Chamber's position diverged from that of the Solicitor General, the Court sided with the Chamber.³¹ Given the Solicitor General's typically high success rate in the Court, this configuration is remarkable.

Preemption cases are sometimes thought to be a measure of how business fares in the Supreme Court. Looking to preemption cases in this context is based on the assumption (not always accurate) that business, in general, will prefer to deal with a single set of federal regulations than

²⁵ Id. at 2507.

²⁶ For insights into *Arizona v. United States* by a seasoned expert on immigration law, see David A. Martin, Reading *Arizona*, 98 Va. L. Rev. In Brief 41 (2012), http://www.virginialawreview.org/inbrief/2012/04/14/Martin_Web.pdf.

²⁷ In reviewing the Court's 2010–11 Term, I gave a more qualified answer to this question. See Howard, *supra* note 10, at 11–12.

²⁸ See Tony Mauro, A Strong Supreme Court Term for Business, *The National Law Journal*, Aug. 1, 2012, available at <http://www.mayerbrown.com/lauren-goldman-supreme-court-decisions/>. Business interests lost in three cases; the results were mixed in three others. Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

be subject to the varying regimes of the states. In two preemption cases decided in the 2011–12 Term, the Court held that strict state regulations were preempted by federal law.³² In *National Meat Ass’n v. Harris*, the Court held that the Federal Meat Inspection Act preempted a California law requiring slaughterhouses immediately to euthanize livestock too weak to walk.³³ Holding that the motive or intent of the California legislature was irrelevant, the Court took a broad view of preemption.³⁴ As if to remind us how slippery the question is about the Court’s being “pro-business,” the Court was unanimous, and the Obama administration joined business interests in urging the Court to find preemption.³⁵

In another case, *Kurns v. Railroad Friction Products*, the Court held that the Locomotive Boiler Inspection Act preempted a state-law tort claim for defective design and failure to warn.³⁶ What makes this case interesting is its reliance on *Napier v. Atlantic Coast Line Railroad Co.*, a 1926 decision which had articulated a broad, pre-New Deal notion of field preemption.³⁷ Focusing on the objects at issue rather than on the legislature’s purpose in enacting a statute, that doctrine protected vast areas of activity from state regulation even where there did not appear an expectation on the part of members of Congress that the federal statute would preempt state regulations. *Kurns* might lead one to wonder whether the Court was resurrecting the formalism of pre-New Deal preemption doctrine. But, in his opinion for the majority, Justice Thomas, noting that petitioners had not asked the court to overrule *Napier*, saw *Kurns* as mandated by stare decisis.³⁸ Justice Kagan’s concurring opinion made the same point even more explicitly. “Viewed through the lens of modern preemption law, *Napier* is an anachronism,” she said. “But *Napier* governs so long as Congress lets it”³⁹

The Roberts Court and the First Amendment. There are at least two possible ways of viewing the Roberts Court’s handling of speech and expression issues. Some of its decisions lead to a view of the Court

³² In this discussion, I am not considering the Term’s most important preemption case, *Arizona v. United States*, 132 S. Ct. 2492 (2012).

³³ 132 S. Ct. 965, 975 (2012).

³⁴ *Id.* at 974.

³⁵ Brief for the United States as Amicus Curiae at 10, *Harris*, 132 S. Ct. 965 (No. 10-224).

³⁶ 132 S. Ct. 1261, 1264 (2012).

³⁷ 272 U.S. 605, 613 (1926).

³⁸ *Kurns*, 132 S. Ct. at 1267 (referring to the “presumption of stare decisis that attaches to this 85-year-old precedent”).

³⁹ *Id.* at 1270 (Kagan, J., concurring). I am indebted to Caleb Nelson for helping me appreciate how to read *Kurns*.

as a robust defender of First Amendment values. Former Solicitor General Ken Starr declares that the Roberts Court is “the most free speech court in American history.”⁴⁰ The ACLU’s Legal Director, Steve Shapiro, remarks on the Roberts Court’s “expansive view of the First Amendment.”⁴¹ This court, he says, “is particularly sensitive to any claim that the government is using its power to censor unpopular speakers or unpopular speech.”⁴² Those who take a view of the Court as zealous in First Amendment cases cite the Court’s willingness to protect even appalling speech, such as the “crush” videos in *United States v. Stevens*,⁴³ or the picketing of funerals in *Snyder v. Phelps*.⁴⁴ In *Snyder*, Roberts, writing for an eight-to-one majority, said that speech cannot be restricted “simply because it is upsetting or arouses contempt.”⁴⁵

A more cynical view sees the Roberts Court as using the First Amendment to advance a selective, ideological agenda. In support of this characterization, one can cite *Davis v. FEC*⁴⁶ and *Arizona Free Enterprise Club’s Freedom Fund PAC v. Bennett*,⁴⁷ in which the Court struck down laws intended to provide matching funds for underfunded candidates—regulations intended to provide more speech, not less.⁴⁸ Erwin Chemerinsky reads such cases as reflecting the Court’s hostility to campaign finance laws—especially those restricting spending by corporations and the rich—rather than being driven by a commitment to free speech.⁴⁹ The cynics see a double standard at work—“slam dunk” cases like *Stevens* and *Snyder* compared with speech cases involving campaign finance.⁵⁰

Kathleen Sullivan seeks to explain the inconsistencies as flowing from the Roberts Court’s use of a different First Amendment model than

⁴⁰ Ken Starr, Address at the Pepperdine Judicial Law Clerk Institute (Mar. 18, 2011).

⁴¹ Tony Mauro, Roberts Court Extends Line of Permissive First Amendment Rulings in Video Game Case, *Am Law Daily*, June 28, 2011, 7:30 AM, <http://amlawdaily.typepad.com/amlawdaily/2011/06/scotusfirstamendmentvideo.html>.

⁴² *Id.*

⁴³ 130 S. Ct. 1577, 1592 (2010).

⁴⁴ 131 S. Ct. 1207, 1218–19 (2011).

⁴⁵ *Id.* at 1219.

⁴⁶ Mauro, *supra* note 41.

⁴⁷ *Id.*

⁴⁸ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011); *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008).

⁴⁹ Erwin Chemerinsky, Not a Free Speech Court, 53 *Ariz. L. Rev.* 724, 734 (2011).

⁵⁰ Monica Youn, The Roberts Court’s Free Speech Double Standard, *ACSblog*, Nov. 29, 2011, <http://www.acslaw.org/acsblog/the-roberts-court%E2%80%99s-free-speech-double-standard>.

the one to which scholars are accustomed. A traditional model sees free speech as serving an interest in political equality. Embracing an antidiscrimination principle, this approach protects minorities whose dissenting or unorthodox speech may make them targets. By contrast, Sullivan argues, the Roberts Court conceives of free speech as serving an interest in political liberty. This view leads to a manifest skepticism of all government efforts to regulate speech. When it comes to speech, government efforts at paternalism are disfavored.⁵¹

Decisions handed down in the Court's 2011–12 Term are not going to resolve the debate between those who applaud the Roberts Court's First Amendment course and those who are more dubious. Squarely in the tradition of robust First Amendment decisions is *United States v. Alvarez*.⁵² In *Alvarez*, a six-to-three majority struck down the Stolen Valor Act, which made it illegal to lie about military decorations. Writing for the plurality, Kennedy rejected the notion that “false speech should be in a general category that is presumptively unprotected.”⁵³ Allowing government to restrict this kind of speech would, he said, have “no clear limiting principle.”⁵⁴

More ambiguous is the Court's decision in *Knox v. Service Employees International Union, Local 1000*.⁵⁵ In that case, the union had provided that members who objected to the use of their dues for political purposes could opt out of paying them. This was not enough for the Court, however, which held that the First Amendment would be satisfied only if the union provided a mandatory opt-in feature.⁵⁶ Those who see the Roberts Court as a stalwart defender of the First Amendment can cite *Knox* as supporting that view—protecting the speech rights of nonmembers against a powerful union. Those who view the Court as being selective in its handling of First Amendment values can cite *Knox* as restricting the union's speech.

Judgments about the Roberts Court being robust in its application of the First Amendment ought perhaps to be tempered by the Court's decision, in *Golan v. Holder*, that the First Amendment does not forbid using the copyright laws to remove works from the public domain.⁵⁷ The case

⁵¹ Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 144, 161 (2010).

⁵² 132 S. Ct. 2537 (2012).

⁵³ Id. at 2546–47.

⁵⁴ Id. at 2545.

⁵⁵ 132 S. Ct. 2277 (2012).

⁵⁶ Id. at 2296.

⁵⁷ 132 S. Ct. 873, 878 (2012).

turned on the specialized field of copyright law—Breyer’s dissent focused on a disagreement over copyright principles rather than on a challenge to the majority’s failure to invoke the First Amendment.⁵⁸ But if the case presented an opportunity for the Roberts Court to highlight its support for the First Amendment, it was an opportunity the Court did not seize.

A more interesting case of passing on the chance to fortify First Amendment values was *FCC v. Fox Television Stations*.⁵⁹ In that case the Court held that the FCC had not given Fox fair notice of the regulations to which Fox objected. Having resolved the case on the notice ground (under the Due Process Clause), Kennedy said that the Court need not address the First Amendment claims raised by Fox.⁶⁰ There were no dissents. Ginsburg, who concurred, said the case should have been seen as an opportunity to overturn the Court’s 1978 decision in *FCC v. Pacifica Foundation* (upholding the FCC’s censorship of George Carlin’s “filthy words” monologue).⁶¹ No one, however, joined Ginsburg’s concurrence. Perhaps the case was simply one of judicial minimalism—passing up a more difficult constitutional question in favor of another which, albeit constitutional, was hardly controversial.

All in all, how robust is the Roberts Court when it comes to the First Amendment? Sometimes robust, certainly, as in *Alvarez*. But across the board? There the evidence is surely more mixed.

Criminal Justice. Who can claim victory in criminal justice cases in the 2011–12 Term? Did the Court tilt toward defendants? Or toward prosecutors? The picture is a mixed one. Defendants came out on the winning side when Justice Kennedy joined with his more liberal colleagues to extend the Sixth Amendment’s right to effective counsel to plea bargaining.⁶² Television dramas notwithstanding, trials have become increasingly uncommon, and plea bargaining correspondingly more important.⁶³ Since plea bargains are where the action is in criminal cases, this step by the Court can affect countless cases.

⁵⁸ Id. at 900 (Breyer, J., dissenting).

⁵⁹ 132 S. Ct. 2307 (2012).

⁶⁰ Id. at 2320.

⁶¹ Id. at 2321 (Ginsburg, J., concurring) (referring to *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

⁶² *Lafler v. Cooper*, 132 S. Ct. 1376, 1382–83 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012).

⁶³ On the place of plea bargaining in the criminal process, see George Fisher, *Plea Bargaining’s Trump 6–11* (2003); Lucian E. Dervan, *Plea Bargaining’s Survival*, 60 Okla. L. Rev. 451, 457 (2008).

For the third time in less than a decade, the Court put new limits on a state's power to punish juvenile offenders.⁶⁴ In *Miller v. Alabama*, Justice Kagan, writing for a five-to-four majority, held that a law mandating life imprisonment without possibility of parole on juveniles who commit murder violates the Eighth Amendment's ban on cruel and unusual punishment.⁶⁵ This decision brought forth a strong dissent from Justice Alito, who complained in an oral dissent, "We have no license to impose our vision of the future on a nation of 317 million people."⁶⁶

Privacy rights appeared to be the clear victor in *United States v. Jones*, in which the Court held that attaching a GPS tracking device to a vehicle and then using the device to monitor the vehicle's movements constituted a search under the Fourth Amendment.⁶⁷ Just how to read *Jones*, however, is no easy matter. The justices split almost equally between two quite different rationales. Scalia, for five justices, rediscovered a long forgotten trespass test in Fourth Amendment law—manifestly an originalist standard. Scalia held that attaching and monitoring a GPS device is a "search."⁶⁸ Four justices (Alito, Ginsburg, Breyer, and Kagan) rejected that view.⁶⁹ Five justices (these four plus Sotomayor) joined or expressed agreement with a portion of Alito's opinion concluding that long-term monitoring of a GPS device violates a reasonable expectation of privacy.⁷⁰ Four justices (the majority, less Sotomayor) left that question open.⁷¹ Sotomayor expressed the broadest view of privacy of any of the justices, but none of her colleagues joined her opinion.⁷² Like so much of the Court's Fourth Amendment jurisprudence, *Jones* leaves us with more questions than answers. It does seem fair to say that five justices (Breyer, Ginsburg, Alito, Sotomayor, and Kagan) are telling us that the Fourth Amendment requires protections tailored to an electronic age, not limited to those relevant to the era of the Amendment's framing.⁷³ Perhaps Erwin Chemerinsky offers a clue:

⁶⁴ See *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 557 (2005).

⁶⁵ 132 S. Ct. 2455, 2460 (2012).

⁶⁶ Garrett Epps, *Cruel? Sure, But How Unusual?*, *Am. Prospect*, June 27, 2012, <http://prospect.org/article/cruel-sure-how-unusual>.

⁶⁷ 132 S. Ct. 945, 949 (2012).

⁶⁸ *Id.*

⁶⁹ *Id.* at 958 (Alito, J., dissenting).

⁷⁰ *Id.* at 955 (Sotomayor, J., concurring).

⁷¹ *Id.* at 954 (majority opinion).

⁷² *Id.* at 957 (Sotomayor, J., concurring).

⁷³ Sherry F. Colb, *The Supreme Court Decides the GPS Case, United States v. Jones, and the Fourth Amendment Evolves: Part Two, Verdict*, Feb. 15, 2012, <http://verdict.justia>.

“I have long thought that the Supreme Court’s Fourth Amendment decisions can be explained by a simple predictive principle: if the justices can imagine it happening to them, then it violates the Fourth Amendment.”⁷⁴

In other cases decided during the 2011–12 Term, law enforcement came out on the winning side. In *Florence v. Board of Chosen Freeholders*, the Court, dividing five to four, held that jailhouse strip searches do not require reasonable suspicion, at least as long as the arrested person is being admitted into the general jail population.⁷⁵ This was a classic balancing case. Kennedy joined his four more conservative colleagues in believing that deference should be given to officers charged with the jail’s intake.⁷⁶ The other four justices saw the policy, at least when applied to those being arrested for minor offenses, as a “serious invasion[] of . . . privacy.”⁷⁷

Liberal victories in the 2011–12 Term hardly mark a return to the Warren Court. But neither is the Roberts Court a “law and order” court. Its wandering course in criminal justice cases reflects the lack of a lock-step majority in this area of the Court’s docket. As so often happens in other areas, Kennedy’s vote is key. His conservative side is found in his *Florence* opinion. But Kennedy’s inner compass sometimes takes him to the left, as it did in the plea bargaining and juvenile sentencing cases.

All Eyes on Chief Justice Roberts. No case in the 2011–12 Term was more eagerly awaited than *National Federation of Independent Business v. Sebelius*, in which the Court reviewed challenges to the constitutionality of the Patient Care and Affordable Care Act.⁷⁸ Not only was it, by all odds, the Term’s most important case, but it bids fair to be the most historic decision to date from the Roberts Court—being to the Roberts Court what *Bush v. Gore* was to the Rehnquist Court. One recalls how, in 2000, the Court stepped directly into the hotly disputed

com/2012/02/15/the-supreme-court-decides-the-gps-case-united-states-v-jones-and-the-fourth-amendment-evolves-2.

⁷⁴ Erwin Chemerinsky, It’s Now the John Roberts Court, 15 Green Bag 2d 389, 397 (2012), available at http://www.greenbag.org/v15n4/v15n4_articles_chemerinsky.pdf.

⁷⁵ 132 S. Ct. 1510, 1522–23 (2012).

⁷⁶ Orin Kerr, Reviewing the Fourth Amendment Cases of OT2011, SCOTUSblog, Aug. 10, 2012, 2:05 PM, <http://www.scotusblog.com/2012/08/reviewing-the-fourth-amendment-cases-of-ot2011>.

⁷⁷ *Florence*, 132 S. Ct. at 1532 (Breyer, J., dissenting).

⁷⁸ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

presidential vote count and, in its decision, split in such a way that much of the country labeled the Court's behavior as manifestly partisan.⁷⁹

With so much resting on the outcome of the health care case, much of the country was likely, no matter what the Court ruled, to view the decision through political lenses. That being so, Chief Justice Roberts's vote in the case had an element of drama about it. Roberts joined the Court's more conservative justices, as well as Kennedy, in declaring that the individual mandate could not be justified by Congress's commerce power.⁸⁰ Like six other justices (all but Ginsburg, Sotomayor and Breyer), Roberts held that the Act's Medicaid expansion exceeded Congress's spending power by unduly coercing the states to accept new conditions for existing Medicaid funds.⁸¹ In neither vote was there much real surprise in Roberts's position. The surprise came when Roberts joined the Court's more liberal members in holding that the individual mandate could be upheld as resting on Congress's taxing power.⁸² Roberts found it constitutionally irrelevant that the mandate was not labeled as a tax. (A lay person might find it mildly puzzling that, while treating the mandate as a tax for the purposes of the taxing power, the majority opinion held that the litigation in *Sebelius* was not precluded by the Anti-Injunction Act because the health care act labeled the mandate as a "penalty" and not as a "tax.")⁸³

How should one interpret Roberts's vote in the health care case? Prior to the 2011–12 Term, only once in his seven years on the Court had Roberts been in the majority in a five-to-four decision joined by the Court's more liberal justices.⁸⁴ When the Court has divided along ideological lines, we have become accustomed to Roberts being in the more conservative camp. Yet the 2011–12 Term gave us not only *Sebelius*, but also *Arizona v. United States*, in which Roberts joined the four more-liberal justices in finding federal preemption of most sections of Arizona's controversial immigration law. Conservatives were quick to voice bitter disappointment with Roberts's votes. Clint Bolick, writing in the *Wall Street Journal*, said that no longer was Roberts a "solid conserva-

⁷⁹ See Linda Greenhouse, Election Case a Test and a Trauma for Justices, Feb. 20, 2011, N.Y. Times, at A1.

⁸⁰ Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2591 (2012).

⁸¹ *Id.* at 2603–04.

⁸² *Id.* at 2600.

⁸³ *Id.* at 2584.

⁸⁴ See *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (holding that procedural due process was violated by failure to provide adequate notice before a tax sale of property).

tive” and he even wondered whether Roberts was now a “swing justice.”⁸⁵

There were reports, from within the Court, that conservative justices felt disappointment, even betrayal, by Roberts’s vote in *Sebelius*. Jan Crawford reported the discord within the Court to be “deep and personal” and likely to last for a long time.⁸⁶ Lyle Denniston, a veteran Court-watcher, characterized the leaks from the Court as being more than a breach of confidentiality; they could be seen as a public rebuke and a challenge to Roberts’s leadership of the Court.⁸⁷ Judge Richard Posner wondered if the episode could drive a wedge between Roberts and his conservative colleagues. “[W]hat do you do [when your friends turn against you]?” asked Posner. “[B]ecome more conservative? Or do you say, ‘What am I doing with this crowd of lunatics?’”⁸⁸

Such predictions of a lasting rift among the Court’s conservatives are surely overblown. One recalls reports of angst within the Court after the decision in *Bush v. Gore*. Whatever bad feelings there might have been at the time of that decision, it was not long before the air cleared. It is difficult to suppose that *Sebelius* has created any sort of cloud over Roberts’s place at the Court. Those who follow royal courts, such as Buckingham Palace, find discord more interesting than harmony. Similarly, speculation about rifts at the Court often outstrips reality.⁸⁹ Moreover, the notion that Roberts has morphed into a liberal lacks a credible basis. It is always risky to take one Term in isolation. That is as true of individual Justices as of the Court at large. John Roberts has been Chief Justice for seven years. He is, by the conventional yardsticks, a conservative jurist and likely to remain one.⁹⁰

⁸⁵ Clint Bolick, *The Supreme Court Stakes in 2012*, Wall St. J., July 10, 2012, at A13.

⁸⁶ Jan Crawford, *Discord at Supreme Court Is Deep, And Personal*, CBS News, July 8, 2012, 10:31 AM, http://www.cbsnews.com/8301-3460_162-57468202/discord-at-supreme-court-is-deep-and-personal/.

⁸⁷ Lyle Denniston, *The “Narrative” of Judicial Intrigue*, SCOTUSblog, July 3, 2012, 2:53 PM, <http://www.scotusblog.com/2012/07/the-narrative-of-judicial-intrigue/>.

⁸⁸ William Bergstrom, *Judge Posner: GOP Has Gone ‘Goofy’*, Politico, July 6, 2012, 4:10 PM, <http://www.politico.com/news/stories/0712/78182.html>.

⁸⁹ See Jeffrey Rosen, *Big Chief*, New Republic, July 13, 2012, <http://www.tnr.com/article/politics/magazine/104898/john-roberts-supreme-court-aca> (“The rift between Roberts and the other conservatives will most likely be repaired.”).

⁹⁰ Vikram David Amar, *The Top 10 Things to Take Away from Last Week’s Supreme Court Obamacare Ruling, Verdict*, July 6, 2012, <http://verdict.justia.com/2012/07/06/the-top-10-things-to-take-away-from-last-weeks-supreme-court-obamacare-ruling>; see also Chemerinsky, *supra* note 74, at 392 (“How much will this matter? Perhaps little in that Congress rarely is going to compel economic transactions.”).

How, then, to explain Roberts's voting to uphold President Obama's signature legislative achievement—a measure for which Roberts must surely have little sympathy? If Roberts had joined the Court's conservatives in striking down the mandate altogether, one can imagine how quickly pundits, politicians, and much of the wider public would castigate the decision as being partisan. Like critics of *Bush v. Gore*, those anguished by the Court's invalidating "Obamacare" would see the Court as thrusting itself into the heart of a highly politicized issue—and in a presidential election year, at that.⁹¹ Whatever Roberts's own reasoning, the decision in *Sebelius* can be seen as a considered move to protect the Court's legitimacy and to enhance its capital in the country's affairs. Might it be that John Roberts was thinking about John Marshall, who carefully wrote *Marbury v. Madison* in such a way as to deny Marbury the writ he sought while at the same time establishing the Court's power of judicial review?⁹²

Viewed through a conservative lens, might Roberts's vote in the health care case embolden him to join conservative colleagues on the Court if they decide, in the new Term's case involving affirmative action at the University of Texas, to curtail or end the use of race as a factor in government decisions such as in a state university's admissions process?⁹³ Might Roberts help move the Court toward overturning the Voting Rights Act?⁹⁴

What will his role be when the Court is asked to decide on same-sex marriage?⁹⁵ Indeed, if *Sebelius* itself is considered, is it not more significant that Roberts joined the conservatives in limiting Congress's com-

⁹¹ See, e.g. *Bush v. Gore*, 531 U.S. 98 (2000).

⁹² See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Laurence Tribe praised Roberts's decision for rising above "the narrowminded partisanship that dominates the country's political discourse." Laurence Tribe, Chief Justice Roberts Comes into His Own and Saves the Court While Preventing a Constitutional Debacle, SCOTUSblog, June 28, 2012, 3:41 PM, <http://www.scotusblog.com/2012/06/chief-justice-roberts-comes-into-his-own-and-saves-the-court-while-preventing-a-constitutional-debacle/>.

⁹³ See *Fisher v. Univ. of Texas*, 631 F.3d 213 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (2012) (No. 11-345). Oral arguments were heard on October 10, 2012.

⁹⁴ In *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S. Ct. 2504, 2516 (2009), Roberts noted that "[i]n part due to the success of that legislation, we are now a very different Nation" and "[w]hether conditions continue to justify such legislation is a difficult constitutional question."

⁹⁵ Supreme Court review has been sought in a challenge to the federal Defense of Marriage Act from the Second Circuit, *Petition for Writ of Certiorari Before Judgment, Windsor v. United States*, No. 12-63 (U.S. July 16, 2012), and a challenge to California's Proposition 8 from the Ninth Circuit, *Petition for a Writ of Certiorari, Hollingsworth v. Perry*, No. 12-144 (U.S. July 30, 2012).

merce power (thereby requiring law professors and students to revisit widely held post-New Deal assumptions about the era of *Wickard v. Filburn* and the reach of the Commerce Clause)? Moreover, what about the Court's holding limiting Congress's spending power? Conditional spending statutes are an important aspect of the modern regulatory state. Until *Sebelius*, the Court had been markedly deferential to Congress in the rare instances when the Court had even seen fit to review conditional spending.⁹⁶ Should the Court in future cases give broad sweep to *Sebelius*'s coercion analysis, the result could be to unsettle a range of programs, such as those affecting education, social welfare, highways, energy, and the environment. One scholar argues that the Medicaid expansion at issue in *Sebelius* was sui generis and concludes that "the coercion inquiry is unlikely to jeopardize other major spending programs"⁹⁷ That may well be, but *Sebelius*'s discovery of limits on Congress's spending power is bound to quicken the hopes of conservative critics of the regulatory state and to encourage litigation hoping to enlarge the reach of the coercion analysis.

Is Justice Kennedy "The Decider"? On its June 18, 2012, cover, *Time* magazine declared Justice Anthony Kennedy to be "The Decider."⁹⁸ When they talk about Kennedy, journalists are fond of the label "swing vote." That label is somewhat misleading, as it suggests that Kennedy always casts the fifth, and therefore deciding, vote. In fact, I am told by a former Kennedy clerk that Kennedy often sends in his vote on another justice's draft opinion early in the game. The notion (if that is what journalists intend) that Kennedy holds back to see what his colleagues are doing before he weighs in is something of a caricature.

Suppose we reframe the question, however, in terms of asking whether Kennedy's vote counts in the sense of being where the Court's majority is, case to case. From that perspective, there is no denying how important Kennedy is to the Court's dynamics. In the 2011–12 Term, Kennedy voted with the majority in 93% of cases (88% in divided cas-

⁹⁶ Only two previous Supreme Court cases had measured the spending power against claims of coercion, and in both cases the Court found no coercion. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (upholding the federal drinking condition on highway funds); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585 (1937) (upholding the unemployment compensation provisions of the Social Security Act of 1935).

⁹⁷ Eloise Pasachoff, *NFIB v. Sebelius*, the Spending Clause, and the Future of Federal Education Law, 62 Am. U. L. Rev. (forthcoming 2013).

⁹⁸ In its lead-in to the cover story, *Time* declared that the "fate of Obamacare," (as well as other key cases) rested with Kennedy. Massimo Calabresi & David Von Drehle, What Will Justice Kennedy Do?, *Time*, June 18, 2012, at 28.

es)—a higher percentage than that of any Justice.⁹⁹ This trend has held true throughout the Roberts Court. If Justice O'Connor held the key to majorities in the Rehnquist Court, then that key is now typically in Kennedy's pocket. Kennedy has cast a pivotal vote on a wide range of issues—terrorism, racial balance in schools, the death penalty, the right to bear arms, abortion, and campaign finance.¹⁰⁰

In the 2011–12 Term, Kennedy's vote was critical in some of the Term's most high profile cases. These cases include *Arizona v. United States*, in which Kennedy wrote the majority opinion striking down most of the challenged provisions of Arizona's controversial immigration law.¹⁰¹ In *Miller v. Alabama*, Kennedy made possible the five-to-four majority, finding the Eighth Amendment to be violated by Alabama's sentencing scheme requiring life in prison without possibility of parole for juveniles who committed murder.¹⁰² As the Chief Justice dissented in *Miller*, Kennedy, the senior Associate Justice, assigned the majority opinion to Kagan. In *United States v. Alvarez*, in which the Court invalidated the Stolen Valor Act (making it a crime to lie about military decorations), Kennedy wrote a plurality opinion holding that just because a statement is false, that does not mean that it does not enjoy First Amendment protection.¹⁰³

A striking exception to this generalization—where Kennedy is, there is the majority—is the 2011–12 Term's most important case, the health care decision. When the case was being briefed and argued, it was Kennedy who was the subject of particular attention and speculation. Seeing a libertarian streak in Kennedy (for example, in his opinion ruling against Texas's anti-sodomy law),¹⁰⁴ observers wondered whether Kennedy's concern about personal autonomy would lead him to see the Act's individual mandate as being simply beyond government's power. That expectation was heightened during oral argument when Kennedy challenged the Solicitor General—his skepticism was obvious—and declared that the act “changes the relationship of the Federal Government

⁹⁹ Final October Term 2011 Stat Pack, SCOTUSblog 13, Jun. 30, 2012, http://dailywrit.com/blog/uploads/2012/06/SCOTUSblog_Stat_Pack_OT11_final.pdf.

¹⁰⁰ Lynn Sweet, Justice Kennedy the Potential Swing Vote on Health Care Ruling, Chi. Sun-Times, July 23, 2012, http://blogs.suntimes.com/sweet/2012/06/supreme_court_obama_health_car.html.

¹⁰¹ 132 S. Ct. 2492, 2510 (2012).

¹⁰² 132 S. Ct. 2455, 2460 (2012).

¹⁰³ 132 S. Ct. 2537, 2545 (2012).

¹⁰⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

to the individual.”¹⁰⁵ Kennedy did indeed vote to strike down the mandate, but, when the case came down, it was not Kennedy who cast the deciding vote on the mandate—it was Roberts. Showing its flexibility, *Time* magazine (having put “The Decider” on its June 18 cover), decided, after the health care opinions were released, to declare “Roberts Rules” on its July 16 cover.¹⁰⁶

Commentators and scholars will continue, for good reason, to ponder where Kennedy will come down in important cases. Practitioners are especially likely to have Kennedy in mind when they brief and argue cases before the Court. They will not be so unsubtle as to say, in effect, “Justice Kennedy, this argument is for you.” But the briefs submitted in the new Term’s University of Texas affirmative action case make arguments surely aimed at winning Kennedy to their side.¹⁰⁷

On the Court’s Right. The layperson’s favorite justice may well be Antonin Scalia, well-known for his quick wit, sharp questions, and ready turn of phrase. To his critics, he is too often shrill and caustic. Such carping hardly bothers Scalia. During a recent book tour, Scalia responded, “I don’t know that I’m cantankerous. I express myself vividly.”¹⁰⁸

Scalia was certainly heard from during the 2011–12 Term. During oral arguments, Scalia asked the highest average number of questions of any of the justices—23.8 questions per case overall, 30 questions per case in those cases in which the Court ultimately split five to four. Scalia wrote twenty-two opinions during the Term.¹⁰⁹ Almost half of them (ten) were dissents. It is further evidence of the Term’s unusual mix of conservative and liberal results that Scalia and Breyer tied for the most dissents. Scalia voted with the majority in 81% of the Term’s cases; only Sotomayor, Breyer, and Ginsburg were lower. Of the fifteen cases decided by a five-to-four vote, Scalia was part of a five-member conserva-

¹⁰⁵ Transcript of Oral Argument at 31, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398).

¹⁰⁶ David Von Drehle, *Roberts Rules*, *Time*, July 16, 2012, at 30.

¹⁰⁷ In its brief before the Court, the University of Texas “focuse[d] much of its energy on offering Justice Kennedy assurances that the policy is distinct from one he found troublesome” in *Grutter* in 2003. Peter Schmidt, *U. of Texas Aims at Supreme Court’s Likely Swing Vote in Defending Race-Conscious Admissions*, *Chron. Higher Educ.*, August 7, 2012, <http://chronicle.com/article/U-of-Texas-Looks-to-Sway/133401/>.

¹⁰⁸ Will Dunham, *Justice Scalia Steps Up Criticism of Healthcare Ruling*, *Chi. Trib.*, July 29, 2012, http://articles.chicagotribune.com/2012-07-29/news/sns-rt-us-usa-court-scaliabre86s0or-20120729_1_justice-scalia-interpretation-of-legal-texts-healthcare-law.

¹⁰⁹ Final October Term 2011 Stat Pack, *supra* note 99, at 7.

tive bloc majority (along with Roberts, Kennedy, Thomas, and Alito) in five cases.¹¹⁰

Scalia was especially emphatic—he read his dissents from the bench—in a pair of cases in which the Court extended the Sixth Amendment right of effective counsel to plea bargaining. Scalia criticized the majority for introducing constitutional ambiguity into plea bargaining and for ignoring decades of Sixth Amendment precedent. Seeing the decisions’ potential for affecting thousands of cases, Scalia was clearly concerned about a flood of appeals where plea bargaining took place.¹¹¹

Scalia’s most remarkable dissent of the Term came in *Arizona v. United States*. In that case, the Court considered four controversial provisions of Arizona’s tough immigration law. The majority, including Roberts, held that three of the four challenged provisions of the law were preempted by the Federal Government’s overriding primacy in matters of immigration.¹¹² Scalia staked his stand in state sovereignty. The majority, he objected, were depriving states of “defining characteristic of sovereignty: the power to exclude from the sovereign’s territory people who have no right to be there.”¹¹³ Scalia conceded that valid federal laws and regulations may preempt state control of immigration. He saw no conflict, however, in what Arizona had done. And he was especially critical of the government’s assertion that the executive branch must have discretion to allocate scarce enforcement resources.¹¹⁴ Critics were troubled by two aspects of Scalia’s opinion—its ode to state sovereignty, and what struck the critics as Scalia’s airing political views on the executive branch’s actions—views which, those critics believed, had no place in a Supreme Court opinion.¹¹⁵

A common criticism of Scalia is that he does not respect the line between judging and politics. In his concurring opinion in *Gonzalez v.*

¹¹⁰ Id. at 14.

¹¹¹ *Missouri v. Frye*, 132 S. Ct. 1399, 1413 (2012).

¹¹² *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

¹¹³ Id. at 2511 (Scalia, J., concurring in part and dissenting in part).

¹¹⁴ Id. at 2520–21.

¹¹⁵ See Tony Mauro, *Scalia Defends ‘Citizens United,’ Arizona Immigration Decision*, Blog of Legal Times, July 26, 2012, <http://legaltimes.typepad.com/blt/2012/07/scalia-defends-citizens-united-arizona-immigration-decision.html>; Adam Winkler, *What the Supreme Court’s Arizona Ruling Means for Immigration and Health Care*, Daily Beast, June 25, 2012, <http://www.thedailybeast.com/articles/2012/06/25/what-the-supreme-court-s-arizona-ruling-means-for-immigration-and-healthcare.html>.

Raich, Scalia cited *Wickard v. Filburn* approvingly.¹¹⁶ But in his recent book, *Reading Law* (co-authored with Bryan Garner), Scalia wrote that *Wickard* “expanded the Commerce Clause beyond all reason.”¹¹⁷ Tim Jost, of Washington and Lee Law School, reacted by stating, “I have always had the impression that Justice Scalia’s primary approach to judging is political. Therefore he will interpret the Commerce Clause broadly to support federal laws he likes but narrowly to strike down those he doesn’t.”¹¹⁸ A former Scalia clerk, Brian Fitzpatrick, defended Scalia, arguing that there is no inconsistency in citing a decision in an opinion and thinking that decision was wrong.¹¹⁹ In judging Scalia, it is difficult to separate one’s own politics from one’s reaction to Scalia’s sharp-edged opinions. In Scalia’s world, there is little room for subtlety or understatement. As has been true for years, Scalia stands out from his colleagues—a hero to his supporters, quite something else to his detractors.

As to Justice Clarence Thomas, what can one say about a justice who has not asked a single question in oral arguments for over six years?¹²⁰ One might have imagined that, when the Court allocated five-and-a-half hours for oral argument in the health care decision—and given the ideological freight the case carried—Thomas would have been tempted to slip in at least one question. But, no, he carried on his current tradition of leaving the questions to others on the bench.

His vote mattered, of course. Thomas was in the majority in 85% of cases—the third highest figure of the nine Justices.¹²¹ In five-to-four cases, he was in the majority in 67% of cases. Like Scalia, Thomas was part of a five-vote conservative bloc (with Roberts, Kennedy, Scalia, and Alito) in five of the fifteen cases decided by a five-to-four vote.¹²² In contrast to Scalia, however, Thomas’s opinions during the 2011–12 Term attracted little media attention or commentary. His majority opin-

¹¹⁶ *Gonzalez v. Raich*, 545 U.S. 1, 51, 54–55 (Scalia, J., concurring).

¹¹⁷ Sahil Kapur, *Scalia Reverses Himself: Now Disagrees with Key Precedent Supporting Constitutionality of Health Care Reform*, Talking Points Memo, June 18, 2012, 10:52 AM, <http://tpmdc.talkingpointsmemo.com/2012/06/antonin-scalia-book-health-care-wickard-filburn-raich-constitution-commerce-clause.php>.

¹¹⁸ *Id.* UCLA’s Professor Adam Winkler is similarly critical, saying that Scalia “respects precedents when they fit his conservative ideology and disregards them when they don’t.” *Id.*

¹¹⁹ *Id.*

¹²⁰ Justice Thomas last asked a question in *Holmes v. South Carolina*, 547 U.S. 319 (2006).

¹²¹ Final October Term 2011 Stat Pack, *supra* note 99, at 13.

¹²² *Id.* at 14.

ions tended to be in relatively uncontroversial, often unanimous, cases. His dissents (there were five) struck few sparks.¹²³

Such controversy as there was over Thomas's role in the 2011–12 Term came when some observers said that Thomas should recuse himself in the health care case. Thomas's wife has been conspicuously active in conservative politics, including advocacy for repeal of the health care law.¹²⁴ Seventy-four Democrats in the House of Representatives signed a letter to Thomas urging his recusal.¹²⁵ Supreme Court Justices decide for themselves whether the circumstances of a given case call for recusal. There are, therefore, no formal guidelines governing a Justices' decision whether to recuse. Chief Justice Roberts has expressed "complete confidence" in his colleagues' deciding for themselves when recusal is warranted.¹²⁶

Justice Samuel Alito remains, by and large, one of the Court's most dependably conservative voices. A good example from the 2011–12 Term is his dissent in *Miller v. Alabama*, in which the majority overturned a law requiring mandatory sentences without the possibility of parole for juveniles who commit murder.¹²⁷ Alito felt so strongly about the Court's decision that he wrote a separate dissent and read his opinion from the bench. He criticized the majority for abandoning the Eighth Amendment's original meaning and for destroying any objective reading of the amendment. Obviously distressed that, by his lights, the majority had ignored standards of decency, he went further than the other dissenters in noting that the juveniles before the Court were murderers and deserved no leniency.¹²⁸ Alito's concern that community standards matter reminds one of his lone dissent in *Snyder v. Phelps*, where he was unwilling to extend First Amendment protection to funeral picketers whose offensive speech had inflicted emotional distress on the families of deceased service members.¹²⁹

¹²³ *Id.* at 7.

¹²⁴ See Jeffrey Toobin, *Partners: Will Clarence and Virginia Thomas Succeed in Killing Obama's Health-Care Plan?* *New Yorker*, August 29, 2011, at 40.

¹²⁵ Felicia Sonmez, *House Democrats Say Justice Thomas Should Recuse Himself on Health-care Case*, *Wash. Post*, February 9, 2011, <http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html>.

¹²⁶ Adam Liptak, *Chief Justice Defends Peers on Health Law*, *N.Y. Times*, Jan. 1, 2012, at A1.

¹²⁷ *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

¹²⁸ *Id.* at 2489 (Alito, J., dissenting).

¹²⁹ 131 S. Ct. 1207, 1228–29 (2011) (Alito, J., dissenting).

Conservative he may be, but Alito continues to emerge as one of the Court's more interesting justices. A case in point is his concurring opinion in *United States v. Jones*. There he voted with the majority, holding that the government needed a warrant before attaching a GPS device to a suspect's car. But Alito attacked Scalia's majority opinion for limiting itself to physical trespass. He proposed a different framework, distinguishing between short-term and long-term monitoring.¹³⁰ Barry Friedman portrays Alito's concurrence as ridiculing Scalia's majority opinion for focusing on "conduct that might have provided grounds in 1791 for a suit for trespass to chattels."¹³¹ Jeff Rosen believes that Alito has shown himself to be the Justice most sensitive to privacy concerns in the growing area of virtual surveillance.¹³² Alito was joined in *United States v. Jones* by Ginsburg, Breyer, and Kagan—another reminder that we should take care in characterizing the Court's liberals and conservatives.

On the Court's Left. Before Ruth Bader Ginsburg's appointment to the Supreme Court, she had been a leading figure in the women's rights movement of the 1960s and 1970s, founding and directing the ACLU's Women's Rights Project. She made a national reputation for her successful arguments in groundbreaking sex discrimination cases—such landmarks as *Craig v. Boren* and *Frontiero v. Richardson*.¹³³ She came to the Court in 1993, the first of President Clinton's two appointees. Hardworking and seasoned, she takes a pragmatist's view of the Constitution and the judicial role. David Shapiro describes her as being precise in limiting her decisions to resolving the controversy at hand. He salutes her "respect for the humane and efficient administration of justice."¹³⁴ In some ways, she may be said to reflect President Clinton's "third way" centrism. But, given the Court's shift to the right in the nearly two dec-

¹³⁰ *United States v. Jones*, 132 S. Ct. 945, 964 (Alito, J., concurring).

¹³¹ Barry Friedman, *Privacy, Technology and Law*, N.Y. Times, Jan. 20, 2012, at SR5.

¹³² Jeffrey Rosen, *All Hail Samuel Alito, Privacy Champion Extraordinaire*, New Republic, Jan. 24, 2012, <http://www.tnr.com/article/politics/99946/supreme-court-gps-tracking-us-v-jones-digital-privacy>.

¹³³ Ginsburg argued six sex discrimination cases before the Supreme Court. She won four of them and lost one; one was remanded to determine whether the case had become moot. The four cases she won were *Duren v. Missouri*, 439 U.S. 357(1979), *Califano v. Goldfarb*, 430 U.S. 199(1977), *Wineberger v. Wiesenfeld*, 420 U.S. 636(1975), and *Frontiero v. Richardson*, 411 U.S. 677(1973) (argued as amicus). The case she did not win was *Kahn v. Shevin*, 416 U.S. 351(1974). *Edwards v. Healy*, 421 U.S. 772(1975) was remanded to determine mootness.

¹³⁴ David L. Shapiro, *Justice Ginsburg's First Decade*, 104 Colum. L. Rev. 21, 31 (2004).

ades since Ginsburg's appointment, she is properly described as "a stalwart of the liberal bloc."¹³⁵

Ginsburg was busy during the 2011–12 Term. She wrote seven majority opinions, six concurrences, and seven dissents.¹³⁶ She was in the majority in six of the Term's fifteen five-to-four decisions (counting her in the majority in *Sebelius*). Reinforcing her place as a "stalwart" of the Court's liberals, Ginsburg agreed with Scalia and Thomas in only 56% of cases—the lowest rate of agreement among any of the justices. The number drops to 21.4% when one sets aside unanimous cases. Ginsburg's rate of agreement with Roberts and Alito was not much higher—63.5% and 57.3% respectively, in all cases, and 35.7% and 23.8% in non-unanimous cases.¹³⁷

Ginsburg's most important decision of the Term, without doubt, was her opinion (part concurrence, part dissent) in *National Federation of Independent Business v. Sebelius*. Writing for the Court's four liberals, Ginsburg's opinion would likely have been the dissent had Roberts joined his conservative colleagues in striking down the Affordable Care Act. In her opinion, Ginsburg lambasted Roberts for his "crabbed" and "rigid" reading of the Commerce Clause. For Ginsburg, Roberts's opinion was "stunningly retrogressive."¹³⁸ Essentially invoking the specter of the days of *Lochner*, Ginsburg accused the Chief of taking the Court "back to the era in which the Court routinely thwarted Congress's efforts to regulate the national economy"¹³⁹ For Ginsburg, Roberts's analysis was an exercise in formalism, long since abandoned by the Court.¹⁴⁰

In substantive terms, Ginsburg looked at the health care law and Congress's commerce power through the lens of pragmatism. She associated herself with the Framers' purpose, in framing the Commerce Clause, to allow Congress to enact legislation "where uniform measures are necessary" and "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompe-

¹³⁵ Sheryl Gay Stolberg, *Future of an Aging Court Raises Stakes of Presidential Vote*, N.Y. Times, June 28, 2012, at A18. See also Amy Davidson, *Ruth Bader Ginsburg, Hero*, New Yorker, June 29, 2012, <http://www.newyorker.com/online/blogs/closeread/2012/06/ruth-bader-ginsburg-hero.html>.

¹³⁶ Final October Term 2011 Stat Pack, *supra* note 99, at 7.

¹³⁷ *Id.* at 21.

¹³⁸ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

tent.”¹⁴¹ As for the health care market, Ginsburg emphasized its unique character. “Virtually every person . . . sooner or later,” she said, would participate in the market, even though the time when care would be needed is often unpredictable.¹⁴² Ginsburg had no doubt that the health care law’s individual mandate was firmly within Congress’s commerce power.¹⁴³ At least one commentator has asked whether, noting the general speculation over whether Roberts might have switched his vote in *Sebelius*, Ginsburg’s “scathing opinion” might have done Roberts “the favor of showing him what he might have looked like if he had signed on with Scalia”¹⁴⁴

Ginsburg’s distinctive view of women and their rights was manifest when, summarizing her dissent from the bench, she claimed that a five-to-four decision “made it harder for women to live balanced lives, at home and in gainful employment.”¹⁴⁵ In *Coleman v. Court of Appeals of Maryland*, Kennedy and the four conservatives held that the Family and Medical Leave Act (“FMLA”) did not allow suits for damages against state employers who had denied an eligible employee leave for taking care of her own serious medical condition as required by the Act.¹⁴⁶ The majority was not able to find the “self-care” provision as being directed at preventing unconstitutional gender-based discrimination; thus there was no abrogation of the states’ sovereign immunity under Section 5 of the Fourteenth Amendment.¹⁴⁷ Ginsburg’s dissent reflects how she viewed the case through her own life experience and her grounding in the women’s rights movement. In her opinion, she undertook an extensive historical account of why the FMLA was enacted and the legislative process that led to its particular formulation. The FMLA, “in its entirety,” she maintained, “is directed at sex discrimination.”¹⁴⁸ She argued that the many kinds of medical leave encompassed by the Act, self-care among them, were pointedly designed for neutrality.¹⁴⁹ We often recall

¹⁴¹ Id. at 2615 (quoting letter from James Madison to Edmund Randolph (April 8, 1787), in 9 Papers of James Madison 368, 370 (Rutland ed. 1975); 2 Records of the Federal Convention of 1787, at 131–32 (Farrand rev. ed. 1966)).

¹⁴² Id. at 2610.

¹⁴³ Id. at 2617.

¹⁴⁴ Davidson, *supra* note 135.

¹⁴⁵ Adam Liptak, Justices Limit Suits Filed Over Family Leave Violations, N.Y. Times, Mar. 20, 2012, at A15 (internal quotation marks omitted).

¹⁴⁶ 132 S. Ct. 1327, 1332 (2012).

¹⁴⁷ Id. at 1334–35.

¹⁴⁸ Id. at 1340 (Ginsburg, J., dissenting).

¹⁴⁹ Id. at 1340, 1342–44.

Oliver Wendell Holmes's remark that "the life of the law has not been logic; it has been experience."¹⁵⁰ Ginsburg's dissent in *Coleman* gives us an example of that dictum at work.

The second of President Clinton's nominees, Justice Stephen Breyer, came to the Court in 1994 after twenty-seven years on the Harvard Law faculty and fourteen years on the First Circuit Court of Appeals. He is often labeled a pragmatist,¹⁵¹ a label that he embraces.¹⁵² In a 2005 book, he argued that looking to a law's purposes and consequences reinforces the Constitution's purpose—promoting what he calls "active liberty."¹⁵³ He spent nearly twelve years as the Court's junior Justice until Justice Alito's confirmation in 2006.

For Breyer, the 2011–12 Term was a comparatively quiet one. He did not write in the Term's two most prominent cases, *National Federation of Independent Business v. Sebelius* and *Arizona v. United States*. But, where he did venture into print, his opinions help illuminate Breyer's place in the Court's conversation. In *Armour v. Indianapolis*, the city had allowed property owners to pay a sewer assessment in a lump sum or in installments. When the city changed its method of financing sewer projects, it decided that the administrative costs of collecting the remaining installments were not worthwhile, but refused to pay refunds to citizens who had paid lump sums. Breyer wrote for the Court's majority in rejecting the argument that those who were refused refunds had been denied the equal protection of the laws.¹⁵⁴ The facts of the case would seem to tug on both strings of Breyer's judicial philosophy. Roberts, who dissented, noted that the petitioners had paid between ten and thirty times as much as their neighbors.¹⁵⁵ A pragmatist like Breyer might find this unjust. But he appears to have found the case as falling within his long-standing instinct for deferring to the legislative and democratic process ("active liberty").

We get a particular sense of Breyer's sense of the judicial role in the Term's criminal justice cases. In *Miller v. Alabama*, the Court held that

¹⁵⁰ Oliver Wendell Holmes, *The Common Law* 1 (1881).

¹⁵¹ See, e.g., Paul Gerwitz, *The Pragmatic Passion of Stephen Breyer*, 115 *Yale L.J.* 1675, 1676 (2006); Ken I. Kerich, *Justice Breyer's Maudarin Liberty*, 73 *U. Chi. L. Rev.* 759, 760 (2006); Kathleen Sullivan, *Tribute to Justice Steven G. Breyer*, 64 *N.Y.U. Ann. Surv. Am. L.* 25, 27 (2008).

¹⁵² Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 *S. Cal. L. Rev.* 845, 847 (1992).

¹⁵³ Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 6–8 (2005).

¹⁵⁴ *Armour v. City of Indianapolis*, 132 *S. Ct.* 2073, 2077 (2012).

¹⁵⁵ *Id.* at 2085 (Roberts, C.J., dissenting).

the Eighth Amendment forbids a state to require that juveniles found guilty of murder be sentenced to life in prison without possibility of parole.¹⁵⁶ The opinion did not rule out sentences of life without parole; it simply said that a state could not mandate that judges impose such a sentence. Breyer, who concurred, went a step further. Joined only by Sotomayor, he argued that, unless the state could prove that the defendant killed or intended to kill the murder victim (in this case, another defendant fired the fatal shot), life without parole violates the Eighth Amendment, whether such a sentence was mandatory or discretionary.¹⁵⁷ Breyer's dissent in *Florence v. Board of Chosen Freeholders of the County of Burlington* is an example of his pragmatism. The majority held that a strip search following an arrest for an outstanding bench warrant following a traffic stop did not violate the Fourth and Fourteenth Amendments.¹⁵⁸ In his dissent, Breyer the empiricist poured over the facts of the case. In graphic terms, he detailed the nature of the strip search, calling it "a serious invasion of privacy." He noted that strip searches had been applied to sympathetic arrestees (including nuns), and in response to the most minor of offenses (including violating a dog leash law). Weighing the facts of the case and the competing interests, Breyer found "no convincing reason indicating that, in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary in order to further the penal interests mentioned."¹⁵⁹ The dissent was classic Breyer.

Breyer is solidly in the Court's liberal bloc. He has long been allied with Ginsburg (they agreed in 80% of cases in the 2011–12 Term). The term's decisions show that he has found another ally in Kagan. They voted together in 82% of the Term's cases, a higher percentage than Breyer shared with any other colleague.¹⁶⁰ It is interesting to see the former Harvard Law School professor in such close agreement with the former Harvard Law School dean. Is there something in the air in Cambridge these days?

In the 2011–12 Term, the Court's more liberal Justices seem to have done relatively well—upholding the health care law, striking down most of Arizona's immigration law, limiting mandatory life sentences for juveniles in murder cases, extending the right to effective counsel to plea

¹⁵⁶ 132 S. Ct. 2455, 2460 (2012).

¹⁵⁷ Id. at 2475 (Breyer, J., concurring).

¹⁵⁸ *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012).

¹⁵⁹ Id. at 1528 (Breyer, J., dissenting).

¹⁶⁰ Final October Term 2011 Stat Pack, *supra* note 99, at 20.

bargaining. It is natural to ask what weight the two Obama appointees, Sonia Sotomayor and Elena Kagan, have brought to that wing of the Court. In the most recent Term, Sotomayor and Kagan tended to vote together (84.3% of cases), but rates of agreement among conservative Justices were even higher (Scalia and Thomas, for example, agreed in 93.3% of cases, and Roberts and Alito in 90.5% of cases). Sotomayor and Kagan typically voted with the Court's other liberals, but they voted with the conservatives more often than did Ginsburg and Breyer. In divided cases, Sotomayor and Kagan voted with the majority in 64% and 67% of cases respectively, compared with Breyer (57%) and Ginsburg (45%).¹⁶¹

It is in oral argument that one realizes the firepower the two newest Justices, especially Sotomayor, bring to the Court. Sotomayor has already become one of the Court's most vocal and aggressive questioners in oral argument. During the 2011–12 Term, Sotomayor asked more questions on average in oral argument than any other Justice except Scalia. Sotomayor asked 21.3 questions per oral argument, barely behind Scalia, who asked two more per argument. As to being first out of the gate, Sotomayor asked the first question in a case's argument more often than any other Justice, including even Scalia.¹⁶² Kagan is less active than is Sotomayor, but she is being heard too. On the last day of oral argument in *Sebelius*, Kagan allowed petitioner's counsel exactly one sentence before she interrupted him with a series of questions.¹⁶³ The number of questions is, of course, not a reliable measure of a justice's influence in the Court's discourse. Quality and insight matter. During the argument on the health care law, it was Sotomayor who raised the possibility of upholding the Act's individual mandate under Congress's taxing power.¹⁶⁴ One can understand why the Obama administration, reluctant to talk about taxes, would prefer not to characterize the mandate as a tax. Moreover, prevailing assumptions, widely shared in the legal academy, looked to precedent (such as *Wickard v. Filburn*) reaching back to New Deal days as ample support for upholding the mandate as an exercise of Congress's commerce power. The government did not address the taxing power in its opening brief and devoted only twenty-

¹⁶¹ Id. at 13.

¹⁶² Id. at 18.

¹⁶³ Transcript of Oral Argument at 3, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) (No. 11-400).

¹⁶⁴ See Joe Palazzolo, Arguments Schmarguments, Wall St. J. Blog, June 28, 2012, 2:22 PM, <http://blogs.wsj.com/law/2012/06/28/arguments-schmarguments/>.

one lines to that issue in its reply brief.¹⁶⁵ It was Sotomayor who, in oral argument, pursued the possibility of upholding the mandate by looking to the taxing power. And, when the case was decided, it was precisely the taxing power that Roberts used to uphold the mandate, even while joining the Court's other conservatives in rejecting the commerce power as being enough to justify the mandate. Years ago, many observers predicted that the Burger Court would turn back much of the legacy of the Warren Court. During those years, Justice Brennan, a canny tactician, furnished much of the leadership on the Court's left. In more recent years during the Rehnquist era, John Paul Stevens put steel in the Court's more liberal wing. Those voices have departed. Might Sotomayor and Kagan prove to have the mettle once exemplified by Justices such as Brennan and Stevens?

Looking Ahead. Soon after the Court embarked on its 2012–13 Term, the Justices heard oral arguments in *Fisher v. University of Texas*.¹⁶⁶ It has been less than a decade since the Court decided *Grutter v. Bollinger*, upholding the University of Michigan Law School's use of race as one factor among other factors in its admissions process.¹⁶⁷ But Justice O'Connor, who wrote the majority opinion, is no longer on the Court, and her place has been taken by Justice Alito, no friend of affirmative action.

Fisher may not excite the passions that surrounded the previous Term's health care decision. But it touches raw nerves all the same—how to deal with the perplexing problems of race in American society and, more specifically, whether a majority of the justices are ready to drop the curtain on affirmative action, at least in higher education. Indeed, where *National Federation of Independent Business v. Sebelius* attracted twenty-nine amicus briefs on the merits,¹⁶⁸ *Fisher* saw over three times that number of amicus briefs on the merits—ninety two in all.¹⁶⁹ The conversation between the bench and the advocates in *Fisher* may give a glimpse into the minds of the Justices as the new Term got un-

¹⁶⁵ The dissent in *Sebelius* pointed this fact out. *Sebelius*, 132 S. Ct. at 2655.

¹⁶⁶ Transcript of Oral Argument, *Fisher v. University of Texas*, No. 11-345 (argued Oct. 10, 2012).

¹⁶⁷ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

¹⁶⁸ Greg Stohr, Record Number of Amicus Briefs Filed in Health Care Cases, Bloomberg, March 15, 2012, 12:55 PM, <http://go.bloomberg.com/health-care-supreme-court/2012-03-15/record-number-of-amicus-briefs-filed-in-health-care-cases/>.

¹⁶⁹ Jessica Huff, Supreme Court Set to Hear Arguments in UT-Austin Case, Tex. Trib., Oct. 9, 2012, <http://www.texastribune.org/texas-education/higher-education/supreme-court-set-hear-oral-arguments-ut-austin-ca/>.

derway. Arguably the Court could avoid deciding the case by finding that the challenger to UT's program, Abigail Fisher, has no standing to bring the lawsuit. The University argued that Fisher would have been rejected in any event and therefore cannot claim injury.¹⁷⁰ Fisher claims that she had indeed been injured because she was deprived of her constitutional right to have her application treated the same as that of any other applicant.¹⁷¹ Justice Ginsburg raised the issue of standing in oral argument,¹⁷² but it seems unlikely that the Court will not proceed to the merits of the case.

On the merits, the questions from the bench saw the justices distributed, by and large, over a familiar liberal/conservative pattern. Justices Ginsburg and Breyer were in the majority in *Grutter* and gave no indication that their support for affirmative action had wavered.¹⁷³ Justice Sotomayor made it clear that she stands by *Grutter* as well. When Fisher's lawyer, Bert Rein, was wary about asking for *Grutter*'s overruling, Sotomayor said, "You don't want to overrule *Grutter*, you just want to gut it."¹⁷⁴ On the Court's right, Chief Justice Roberts made clear his distaste for UT's program. When the University's advocate, Gregory Garre (at one time a colleague at Roberts's former law firm), was at the podium, Roberts, in questioning whether the program was narrowly tailored to achieve a compelling state interest, pressed Garre hard on the question how the University intended to identify a "critical mass" of African Americans and Hispanics.¹⁷⁵ Justice Alito was equally forceful in raising doubts about the UT program. Justice Thomas asked no questions, but there is little doubt about where he and Justice Scalia stand on the merits of affirmative action.

Justice Kagan, who might otherwise be a vote favorable to affirmative action, has recused herself in *Fisher*. Thus the other three Justices to whom UT surely look to uphold their program must win the support of Justice Kennedy even to achieve a four-to-four split on the Court. It is unlikely that the University took heart from Kennedy's exchange with Garre. When Garre, in answer to a question from Alito, said that the University went "out of its way to recruit minorities from disadvantaged

¹⁷⁰ Transcript of Oral Argument at 54–55, *Fisher*, No. 11-345 (argued Oct. 10, 2012).

¹⁷¹ *Id.* at 6.

¹⁷² *Id.* at 3–4.

¹⁷³ *Id.* at 8, 10.

¹⁷⁴ *Id.* at 81.

¹⁷⁵ *Id.* at 46, 48.

backgrounds,” Kennedy interjected, “So what you’re saying is that what counts is race above all.”¹⁷⁶

Another likely headliner joined the new Term's docket when the justices agreed to take a fresh look at the Voting Rights Act of 1965. Section 5 of that statute requires many states and localities, mostly in the South, to get preclearance from the Justice Department or the United States District Court for the District of Columbia before making changes in their laws affecting voting.¹⁷⁷ Upheld by the Court in 1966 as being within Congress's powers,¹⁷⁸ the preclearance requirement has been reenacted several times, most recently in 2006 after extensive congressional hearings. But Congress has made no change to the list of jurisdictions covered by the requirement. The Court reviewed the Act in *Northwest Austin Municipal Utility District Number One v. Holder*¹⁷⁹ but ducked the opportunity to rule on the preclearance requirement's constitutionality. Even so, in his opinion in that case, Chief Justice Roberts could not conceal his skepticism about Section 5. He did not deny that the Act had achieved “historic accomplishments” but said that “[t]hings have changed in the South.”¹⁸⁰ He went on to say, “[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”¹⁸¹ In May a divided panel of the United States Court of Appeals for the District of Columbia rejected a challenge to the law brought by Shelby County, Alabama.¹⁸² Judge David S. Tatel, for the majority, acknowledged the “extraordinary federalism costs” imposed by Section 5, but, all in all, he thought the court should defer to Congress's judgment about its renewal.¹⁸³ Judge Stephen F. Williams, dissenting, complained that the statute's coverage “lacks any rational connection to current levels of voter discrimination” and is “a remarkably bad fit with Congress's concerns.”¹⁸⁴ That case, now before the Supreme Court, will give us occasion whether the Chief Justice's doubts about Section 5 will carry the day and oblige Congress to go back to the drafting board in earnest.

¹⁷⁶ Id. at 44.

¹⁷⁷ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

¹⁷⁸ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

¹⁷⁹ 557 U.S. 193, 202 (2009).

¹⁸⁰ Id. at 201–02.

¹⁸¹ Id. at 203.

¹⁸² *Shelby County, Ala. v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012).

¹⁸³ Id. at 884.

¹⁸⁴ Id. at 898.

As the Court's new Term got underway, the United States Court of Appeals for the Second Circuit struck down the federal Defense of Marriage Act.¹⁸⁵ That decision joins those from the First Circuit, also ruling against the federal statute, and from the Ninth Circuit, finding California's Proposition 8 to be unconstitutional.¹⁸⁶ Same-sex marriage thus seems well on its way to being added to the Supreme Court's docket, perhaps in time for at least one of those cases to be decided this Term. As the Roberts Court nears maturity, the range of important issues being decided becomes broader all the time. It is hard to suppose that, when the final history of the Roberts Court is written, this Court will be remembered as a time when the Justices disengaged themselves from the great issues of their age.

¹⁸⁵ *Windsor v. United States*, Nos. 12–2335–cv(L), 12–2435(Con), 2012 WL 4937310, at *1 (2d Cir. Oct. 18, 2012).

¹⁸⁶ *Massachusetts v. HHS*, 682 F.3d 1, 17 (1st Cir. 2012); *Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012).