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ESSAY

TEN THINGS THE 2012–13 TERM TELLS US ABOUT THE ROBERTS COURT

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BASEBALL fans are familiar with the idea of doubleheaders. Most fans, however, will never see a tripleheader (the last recorded instance of a tripleheader in major league baseball was in 1920).¹

During the last week of June 2013, those who follow the Supreme Court must have felt like spectators watching a tripleheader. Winding up their 2012–13 Term, the Justices saved the big cases for the Term’s last few days. On Monday, June 24, the focus was on affirmative action. Opponents of affirmative action were disappointed when the Court, in *Fisher v. University of Texas*, did not end the practice once and for all.² But they took solace in the Justices’ remand of the case to the Fifth Circuit with an admonition to take strict scrutiny seriously and to cut the

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¹ The last such tripleheader was between the Pittsburgh Pirates and the Cincinnati Reds. See Joseph J. Dittmar, *Baseball Records Registry* 159 (1997).

² 133 S. Ct. 2411 (2013).

University less slack in deciding when and whether affirmative action was necessary to achieve its goal of diversity.³

The next day, June 25, the Court turned to voting rights. Showing that they were no more disposed to defer to Congress than to a university, the Court's majority struck down a key provision of the Voting Rights Act of 1965. Four years earlier, in another case arising under the Voting Rights Act, the Court had avoided deciding the statute's constitutionality. But in that 2009 case, Chief Justice Roberts had cast doubt on the Act's validity.⁴ In 2013, in *Shelby County v. Holder*, the hammer dropped, and the Court struck down Section 4(b) of the Act on the grounds that it was largely the same as it had been in 1965 and could not withstand constitutional scrutiny.⁵

Wednesday, June 26, brought yet another highly charged issue, that of same-sex marriage. Two decisions came down that day. *Hollingsworth v. Perry* involved California's Proposition 8 (recognizing only marriages between a man and a woman).⁶ The Court held that the petitioners in the case—proponents of the ballot initiatives who had intervened in the case when state officials refused to defend the proposition—lacked standing.⁷ Thus, the lower court's decision enjoining Proposition 8 stood, allowing same-sex marriages to remain valid in California, without the Supreme Court's having taken a position one way or the other on whether same-sex marriages enjoy constitutional protection.

In the other same-sex marriage case, *United States v. Windsor*, the Court struck down the federal Defense of Marriage Act.⁸ That statute, enacted in 1996, effectively forbade same-sex marriages from being recognized for purposes of federal law and spouses in such unions from receiving federal marriage benefits.⁹ Justice Kennedy's majority opinion wove themes of federalism and ideas of human dignity into a tapestry that toppled the Act. But he stopped short of finding that same-sex marriages are as such entitled to constitutional recognition.

³ *Id.* at 2421–22.

⁴ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201–06 (2009).

⁵ 133 S. Ct. 2612, 2631 (2013).

⁶ 133 S. Ct. 2652 (2013).

⁷ *Id.* at 2667–68.

⁸ 133 S. Ct. 2675 (2013).

⁹ Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996).

All of these cases laid the way for future battles. The heightened scrutiny insisted on in *Fisher* will require universities to expect to spend more time in court defending affirmative action programs. States have already moved into the void created by *Shelby County*, for example, in enacting laws requiring voter ID.¹⁰ And proponents of same-sex marriage have already begun to file suits in lower courts arguing that the logic of *Windsor* must lead to constitutional protection for such marriages.¹¹

There were, of course, other cases besides the Term's marquee cases. During the 2012–13 Term, the Court decided seventy-eight cases on the merits, an increase from the previous Term (when there were seventy-five such opinions), but still far fewer decisions than some years earlier. Almost half (49%) of the 2012–13 Term's cases were unanimous. Harmony was not, however, the Court's predominant mood. Nearly a third of the cases (29%) were decided by votes of 5–4—an increase of 9% from the previous Term. Another 8% of cases were decided 6–3. As has been true in previous Terms, Justice Kennedy was most often in the majority (91% of all cases and 83% in divided cases). The figures on agreement among various Justices are a bit more surprising. In prior years, we had seen the highest rate of agreement to be among pairs of Justices on the Court's right. In the 2012–13 Term, however, it was the trio of female Justices—Ginsburg, Sotomayor, and Kagan—who most often agreed. Justice Kagan agreed with her sister Justices in 96% of cases, and Sotomayor and Ginsburg were in agreement in 94% of cases.¹²

What does the 2012–13 Term tell us about the Roberts Court? No one Term can reveal the whole story, of course. But I venture a few observations. I style them as “Ten Things the 2012–13 Term Tells Us About the Roberts Court.”

¹⁰ See, e.g., H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013); S.B. 14, 2011 Leg., 82d Reg. Sess. (Tex. 2011).

¹¹ See, e.g., *Bostic v. McDonnell*, No. 2:13-CV-00395 (E.D. Va. filed Sept. 18, 2013); *Harris v. McDonnell*, No. 5:13-CV-00077 (W.D. Va. filed Aug. 1, 2013).

¹² Statistics in this paragraph are drawn from SCOTUSblog's October Term 2012 Final Stat Pack (June 27, 2013), http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/SCOTUSblog_StatPack_OT121.pdf, and October Term 2011 Final Stat Pack (June 30, 2012), http://dailywrit.com/blog/uploads/2012/06/SCOTUSblog_Stat_Pack_OT11_final.pdf.

1. The Roberts Court Is No Stranger to Activism

Charges that the Supreme Court is “activist” are familiar. But how to define “activism”? One measure is to ask how willing the Court seems to be to step in and overturn an act of Congress. By that standard, activism abounded in the 2012–13 Term’s marquee cases. In its decision in *United States v. Windsor*, striking down the Defense of Marriage Act, the Court imputed animus to Congress in enacting the statute. In *Shelby County v. Holder*, the majority refused to defer to Congress’s primacy in enacting civil rights legislation under the Reconstruction Amendments, notwithstanding extensive legislative hearings.

Dissenting in *Windsor*, Justice Scalia called the majority opinion a “jaw-dropping” expression of judicial review—“an assertion of judicial supremacy over the people’s Representatives in Congress and the Executive.”¹³ Scalia went on to say that the majority’s opinion envisions a Supreme Court “enthroned at the apex of government, empowered to decide all constitutional questions, always and everywhere ‘primary’ in its role.”¹⁴ Professor Eric Posner wonders if Scalia’s encomium to the democratic process might not sound “a little hollow,” coming in the wake of Scalia’s vote to strike down Section 4 of the Voting Rights Act in *Shelby County*.¹⁵ Like questions could be put to the Court’s liberal Justices were they asked to square their vote in *Windsor* with their dissent in that case.

2. The Roberts Court Continues to Scale Back Progressive Legislation and Precedents from the Civil Rights Era

The Voting Rights Act of 1965 has long been considered to be a landmark of the civil rights era. Together with the Civil Rights Act of 1964, the 1965 statute symbolizes the most prominent modern effort to redeem the promises of the Reconstruction era. When the Justices of the Warren Court reviewed congressional civil rights legislation, they were not about to stand in the way of Congress’s judgment as to what constituted appropriate legislation under the Fourteenth and Fifteenth

¹³ 133 S. Ct. at 2698 (Scalia, J., dissenting).

¹⁴ *Id.* (internal parentheses omitted).

¹⁵ Eric Posner, *Supreme Court 2013: The Year in Review*, *Slate* (June 26, 2013, 12:48 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_s_voting_rights_ruling_is_a_fundamental_distortion.html.

Amendments.¹⁶ Measured by the judicial attitudes of the 1960s, the Court’s decision in *Shelby County v. Holder* represents a sea change. The majority found that, as the coverage formula of Section 4 had not been updated since 1965, it did not represent “current conditions.”¹⁷ The Court did not invalidate Section 5 (the preclearance requirement). But unless Congress acts to revise Section 4—highly unlikely in the atmosphere of partisanship and gridlock in the current Congress—Section 5 is, in effect, a dead letter.

The current Court’s skepticism about affirmative action is evident in its decision in *Fisher v. University of Texas*.¹⁸ Many observers anticipated that the Court would use *Fisher* to put an end to affirmative action. The Court did not do that, but the Justices tightened the strict scrutiny standard required of colleges and universities in defending the use of race in their admissions programs. In remanding the case to the Fifth Circuit, Justice Kennedy said that the University must show that it attempted to use non-race alternatives to achieve diversity and that such alternatives proved unworkable.¹⁹ In contrast to earlier cases such as *Bakke*²⁰ and *Grutter*,²¹ the decision in *Fisher* does not allow the reviewing court to defer to the University’s judgment in deciding whether and how to use affirmative action.

3. Business, Especially Big Business, Has a Lot to Like About the Roberts Court

Many Supreme Court cases touch the interests of American business. It is difficult to say with precision just how one should respond to the question: “Is the Roberts Court pro-business?”

¹⁶ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (rejecting a challenge to the preclearance provisions of the Voting Rights Act); *United States v. Raines*, 362 U.S. 17 (1960) (overruling a district court’s determination that a law authorizing the federal government to bring civil actions against state officials for racial discrimination was unconstitutional).

¹⁷ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629 (2013).

¹⁸ 133 S. Ct. 2411 (2013).

¹⁹ *Id.* at 2420.

²⁰ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318–19 (1978) (“[A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases.”).

²¹ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

One measure is to check the scorecard of the U.S. Chamber of Commerce. The Chamber filed amicus briefs in eighteen cases during the 2012–13 Term. It was on the winning side in fourteen of those eighteen cases—not a bad track record. Indeed, in the Term’s most closely divided cases, those decided by a 5-4 vote, the Chamber was on the prevailing side in all of them.²²

The Chamber has done well throughout the span of the Roberts Court. Since Justice Alito succeeded Justice O’Connor in January 2006, the Chamber has been on the winning side in 70% of cases in which it filed briefs. Compare that record with figures of 43% in the later years of the Burger Court (1981–86) and 56% in the stable years of the Rehnquist Court (1994–2005).²³

Not everyone sees the Roberts Court as pro-business, but those who do are outspoken in their conclusions. Summarizing his findings about the 2012–13 Term in the *New York Times*, Adam Liptak concluded that the Court’s rulings “continued to be good for business interests.”²⁴ Professor Erwin Chemerinsky found a “disquieting theme” in the opinions of the Court’s conservative Justices—“a need to protect big business from litigation.”²⁵

Litigants who hope to sue businesses will find little comfort in the decisions of the 2012–13 Term. In cases arising under Title VII, the Court made it more difficult for individuals to bring federal discrimination claims against employers. In *University of Texas Southwestern Medical Center v. Nassar*, the Court held that retaliation against a protected activity must be a “but-for” cause of the employers’ adverse employment decision in order for the plaintiff to prevail on a Title VII claim.²⁶ It seems that the majority was responding to a concern that permitting mixed-motive retaliation claims would increase frivolous claims and drain resources.²⁷ In another case, *Vance v. Ball State University*, the

²² Tom Donnelly, A Big Term for Big Business, Const. Accountability Center Text & Hist. Blog (June 25, 2013), <http://theconstitution.org/text-history/2094/big-term-big-business>.

²³ *Id.* For a detailed study supporting the claim that the Roberts Court is the most pro-business Court since World War II, see Lee Epstein et al., How Business Fares in the Supreme Court, 97 *Minn. L. Rev.* 1431 (2013).

²⁴ Adam Liptak, Steady Move to the Right, *N.Y. Times*, June 28, 2013, at A16.

²⁵ Erwin Chemerinsky, Justice for Big Business, *N.Y. Times*, July 2, 2013, at A25.

²⁶ 133 S. Ct. 2517, 2528 (2013).

²⁷ *Id.* at 2531–33.

Court significantly narrowed the definition of what constitutes a “supervisor” in Title VII cases—a major victory for businesses.²⁸

Other decisions in the 2012–13 Term showed a distaste for class action suits and a deference to arbitration agreements. In *American Express v. Italian Colors Restaurant*, citing the Federal Arbitration Act, the Court held that a contract’s provision waiving the right to have class arbitration is valid.²⁹ The majority declared that a court must enforce such agreements even if plaintiffs’ costs of individually proving antitrust violations exceeds the maximum potential recovery.³⁰ Justice Kagan, in dissent, complained of the majority’s hostility to class actions. She objected, “To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”³¹

4. The Roberts Court Has a Mixed Record in Criminal Justice Cases

Did decisions in the 2012–13 Term tilt toward law enforcement? Or favor defendants? The record is decidedly mixed. Indeed, the conventional wisdom about “conservatives” and “liberals” on the Court is muddied by the Justices’ votes in criminal justice cases.

Consider, for example, *Maryland v. King*, in which the Court held that police may use cheek swabs to take DNA samples from suspects arrested for serious crimes.³² Justice Kennedy, writing for the majority, applied a balancing test to determine reasonableness for purposes of the Fourth Amendment.³³ On one side, Kennedy saw a government interest in ascertaining the defendant’s identity, better to assess the danger the arrested person might pose.³⁴ Moreover, DNA testing could allow the police to identify the arrestee as the perpetrator of a grave crime, thus freeing a person wrongfully convicted of that crime.³⁵ As to the defendant’s privacy interest, Kennedy saw cheek swabs as imposing only a minimal intrusion on the arrestee’s expectations of privacy—

²⁸ 133 S. Ct. 2434, 2454 (2013).

²⁹ 133 S. Ct. 2304, 2312 (2013).

³⁰ *Id.* at 2309–11 (“[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”).

³¹ *Id.* at 2320 (Kagan, J., dissenting).

³² 133 S. Ct. 1958, 1980 (2013).

³³ *Id.* at 1970.

³⁴ *Id.* at 1973.

³⁵ *Id.* at 1974.

expectations diminished by the very fact of his being in police custody.³⁶ In Kennedy’s view, the government’s interests outweighed the defendant’s privacy interests.³⁷ Justice Scalia dissented. He described the Fourth Amendment as categorically forbidding the police from conducting suspicionless searches for investigatory purposes.³⁸ The primary purpose of DNA searches, Scalia said, is to discover evidence of criminal wrongdoing, not to identify the person in custody.³⁹

The voting in *King* defied conventional notions about liberal and conservative lineups on the Court. Justice Scalia, hardly a bleeding heart, voted for the defendant. Justice Breyer, no hard-and-fast conservative, voted in favor of the government. Indeed, in three other non-unanimous Fourth Amendment cases in the 2012–13 Term, Scalia voted in favor of the defendant, and Breyer took the government’s side.⁴⁰ Underlying these votes are two divergent ways of reading the Fourth Amendment.⁴¹ Scalia manifestly dislikes balancing;⁴² he prefers bright lines. Breyer, by contrast, does not simply accept balancing; he embraces it.⁴³

The Roberts Court seems especially drawn to cases involving drug-sniffing dogs. There were two such cases in the 2012–13 Term, both arising under the Fourth Amendment. The Court came down in favor of the government in one case and ruled in favor of the defendant in the other.

In *Florida v. Harris*, the Court considered what evidence the government needs to present to show that a dog’s “alert” is sufficiently reliable to establish probable cause to search a vehicle.⁴⁴ The Florida Supreme Court laid down a strict test. That court required the government to present ample evidence of reliability, including field-performance records.⁴⁵ In a unanimous decision, the Court rejected this strict test. The

³⁶ *Id.* at 1977–78.

³⁷ *Id.* at 1980.

³⁸ *Id.* (Scalia, J., dissenting).

³⁹ *Id.* at 1982.

⁴⁰ *Missouri v. McNeely*, 133 S. Ct. 1552 (2013); *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Bailey v. United States*, 133 S. Ct. 1031 (2013).

⁴¹ See Orin Kerr, *Breyer and Scalia in Fourth Amendment Cases This Term*, *Volokh Conspiracy* (June 3, 2013, 11:58 AM), <http://www.volokh.com/2013/06/03/breyer-and-scalia>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 133 S. Ct. 1050, 1053 (2013).

⁴⁵ *Id.*

Justices preferred a “flexible, common sense standard.”⁴⁶ “If a bona fide organization has certified a dog,” a rebuttable presumption arises that the dog is reliable.⁴⁷ Indeed, even without formal certification, if the dog has recently and successfully completed a training program, the presumption applies.⁴⁸ Viewing the dog’s performance through the “lens of common sense,” Justice Kagan said, “[a] sniff is up to snuff when it meets that test.”⁴⁹

The dog was on the losing side, however, in the Term’s other drug-sniffing case. In *Florida v. Jardines*, decided by a 5-4 vote, the Court held that the use of drug-sniffing dogs on a homeowner’s front porch to investigate the home’s contents constitutes a “search” under the Fourth Amendment.⁵⁰ Writing for the majority, Justice Scalia cited *United States v. Jones*, which involved the placement of a GPS device on a vehicle, for the proposition that the test of a Fourth Amendment search is a physical intrusion.⁵¹ Scalia reasoned that such an intrusion occurred when the police brought a drug-sniffing dog on the defendant’s front porch.⁵² “Social norms,” he said, might invite visitors to knock on a homeowner’s front door.⁵³ But those norms do not invite visitors to engage in a canine forensic investigation.⁵⁴

Scalia was joined by an interesting set of Justices—Thomas, Ginsburg, Sotomayor, and Kagan. Justice Kagan (joined by Ginsburg and Sotomayor) wrote a concurrence arguing that the Court could also have resolved the case using the reasonable expectation of privacy test articulated in *Katz v. United States*.⁵⁵ Thus, in *Jardines*, five Justices arrived at the same destination but showed a preference for different routes—physical intrusion versus a reasonable expectation of privacy.

Justice Alito wrote a dissent, joined by the Chief Justice and by Justices Kennedy and Breyer, in which he disagreed with both the majority and concurring opinions. As for a property rights analysis, Alito argued

⁴⁶ *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983)).

⁴⁷ *Id.* at 1057.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1058.

⁵⁰ 133 S. Ct. 1409, 1417–18 (2013).

⁵¹ *Id.* at 1414 (citing *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012)).

⁵² *Id.* at 1415.

⁵³ *Id.* at 1416.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1418 (Kagan, J., concurring) (citing *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring)).

that the law of trespass allows even unwelcome visitors (including police gathering information) to use the walkway to approach a home's front door and to remain there for a brief time.⁵⁶ Turning to the reasonable expectation of privacy rationale, Alito saw no such expectation with respect to odors emanating from a house.⁵⁷

5. Chief Justice Roberts Is a Master of the Long Game

In *Shelby County v. Holder*, Chief Justice Roberts wrote the majority opinion finding Section 4 (the coverage formula) of the Voting Rights Act invalid.⁵⁸ It is only a small exaggeration to say that Roberts began writing his *Shelby County* opinion in 2009, when he wrote for the Court in *Northwest Austin Municipal Utility District v. Holder*.⁵⁹ In that case, Roberts warned Congress that the coverage formula established by Section 4 raised “serious constitutional questions.”⁶⁰ Roberts also revived the notion of the states’ “equal sovereignty,”⁶¹ a proposition which previously had been mentioned only twice in Supreme Court decisions (in 1845⁶² and in 1960⁶³). By avoiding the constitutional challenge posed by the plaintiffs in *Northwest Austin*, Roberts was able to muster an impressive 8-1 majority to decide the case on statutory grounds.⁶⁴ (Thomas would have reached the constitutional issues and invalidated Section 5 of the Act⁶⁵).

Congress may not have been moved to take notice of Roberts’s not-so-subtle hint in *Northwest Austin*, but litigants did—giving rise to the Court’s decision in *Shelby County*. In his majority opinion, Roberts relied on *Northwest Austin* and its discussion of the “fundamental principle of equal sovereignty.”⁶⁶ He pointedly noted that eight members of the Court had subscribed to his views in the earlier case and that the

⁵⁶ Id. at 1420 (Alito, J., dissenting).

⁵⁷ Id. at 1421.

⁵⁸ 133 S. Ct. 2612, 2631 (2013).

⁵⁹ 557 U.S. 193 (2009).

⁶⁰ Id. at 204.

⁶¹ Id. at 203.

⁶² *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 216 (1845).

⁶³ *United States v. Louisiana*, 363 U.S. 1, 16 (1960).

⁶⁴ *Nw. Austin*, 557 U.S. at 205, 211.

⁶⁵ Id. at 212 (Thomas, J., concurring in the judgment in part and dissenting in part).

⁶⁶ Id. at 203 (Roberts, C.J., majority opinion). ”

ninth would have held the Act unconstitutional.⁶⁷ Ginsburg, who had been one of the eight, obviously had second thoughts about her vote. In an interview with the Associated Press, she signaled some regret for having signed on to Roberts’s opinion in *Northwest Austin*.⁶⁸

It seems fair to say that Roberts has been largely consistent in adhering to conservative views during his time as Chief Justice—for example, in his sensitivity to the interests of state courts and legislatures. One grants that Roberts wrote the majority opinion in *National Federation of Independent Business v. Sebelius*,⁶⁹ upholding the Affordable Care Act’s individual mandate. That opinion dismayed many conservatives and led some observers to question Roberts’s commitment to conservative principles.⁷⁰ But in *Sebelius*, Roberts joined the Court’s other conservative Justices in articulating important limits on Congress’s power under the Commerce Clause.⁷¹ And *Sebelius* protected the states against Congress’s efforts to expand Medicaid—a conservative reading of the spending power.⁷²

What other projects might Roberts have in mind? Might he hope to curb the administrative state? In *City of Arlington v. FCC*, the Court held that an administrative agency is entitled to *Chevron*⁷³ deference regarding the agency’s interpretation of a statute bearing upon the scope of the agency’s jurisdiction.⁷⁴ The majority in this case consisted of an unusual

⁶⁷ *Shelby Cnty.*, 133 S. Ct. at 2621.

⁶⁸ Mark Sherman, *Ginsburg Says Push for Voter ID Laws Predictable*, Associated Press (July 26, 2013, 3:07 AM), <http://abcnews.go.com/m/story?id=19778961&sid=77&ts=true>.

⁶⁹ 132 S. Ct. 2566 (2012).

⁷⁰ See, e.g., Michael Patrick Leahy, *Justice Roberts Turns Obamacare into Origination Clause Shell Game*, *Breitbart.com* (July 1, 2012), <http://www.breitbart.com/Big-Government/2012/06/29/Justice-Roberts> (“Chief Justice Roberts’ ruling Thursday in *NFIB v. Sebelius* is a bitter loss for constitutional conservatives, delivered to us by a judicial Benedict Arnold.”); *The Roberts Rules*, *Wall St. J.* (July 2, 2012, 12:01 AM), <http://online.wsj.com/article/SB10001424052702304058404577494400059173634.html> (“If this was a play to compete with John Marshall’s legacy, the result is closer to William Brennan’s.”).

⁷¹ 132 S. Ct. at 2591 (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’”).

⁷² *Id.* at 2608. (“Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding.”).

⁷³ *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

⁷⁴ 133 S. Ct. 1863, 1874–75 (2013).

configuration of Justices: Scalia writing for the majority, joined by Thomas, Ginsburg, Sotomayor, and Kagan.

Roberts penned a strong dissent. He quoted James Madison on the accumulation of legislative, executive, and judicial powers in the same hands as being “the very definition of tyranny.”⁷⁵ Observing that administrative agencies exercise all three functions, Roberts declared that this accumulation of power is not occasional or isolated.⁷⁶ It is, he said, “a central feature of modern American government.”⁷⁷ Roberts dismissed the notion of executive control over the administrative state as largely illusory⁷⁸ and urged that the danger posed by the growing power of the administrative state cannot be dismissed.⁷⁹

6. Justice *Kennedy* Remains the Court’s Power Broker

In the 2012–13 Term, Justice Kennedy was in the majority in 91% of cases—more than any other Justice (Chief Justice Roberts was the runner-up at 86%).⁸⁰ Of twenty-three cases decided by a 5-4 vote, Kennedy was in the majority in twenty cases.⁸¹ This score continues a pattern established even before the Roberts Court came into being. Kennedy has been the Justice most frequently in the majority in 5-4 cases every Term since the 2003–04 Term.⁸² Kennedy has a relatively low rate of agreement with other individual Justices—further evidence that he does not consistently line up with any particular liberal or conservative Justice.⁸³

Identifying Justice Kennedy’s judicial philosophy is no easy task. Some commentators say that he has no coherent philosophy, that his votes reflect his personal preferences.⁸⁴ (That is the flavor of dissents from some of Kennedy’s most significant majority opinions, such as

⁷⁵ Id. at 1877 (Roberts, J., dissenting) (quoting *The Federalist* No. 47, at 324 (James Madison) (J. Cooke ed., 1961)).

⁷⁶ Id. at 1878.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id. at 1886.

⁸⁰ October Term 2012 Final Stat Pack, *supra* note 12, at 13.

⁸¹ Id. at 15.

⁸² Erwin Chemerinsky, What We Learned About SCOTUS This Term, A.B.A. J. (July 2, 2013, 9:00 AM), http://www.abajournal.com/news/article/chemerinsky_once_again_its_a_kennedy_court.

⁸³ October Term 2012 Final Stat Pack, *supra* note 12, at 22.

⁸⁴ See, e.g., Frank J. Colucci, Justice Kennedy’s Jurisprudence 1–2 (2009).

in *Lawrence v. Texas*.⁸⁵) I would argue that a concern for personal liberty and human dignity are useful keys to understanding Kennedy's approach to constitutional interpretation. A vivid example from the 2012–13 Term is *United States v. Windsor*, where Kennedy said that the Defense of Marriage Act “humiliates tens of thousands of children now being raised by same-sex couples.”⁸⁶ Consistent with his opinion in *Windsor*, recall Kennedy opinions in earlier gay rights cases—such as *Romer v. Evans*⁸⁷ and *Lawrence v. Texas*⁸⁸—affirming and protecting the dignity of gay persons and couples. Kennedy cabined the decision in *Windsor* by coupling his language about individual dignity with principles of federalism.⁸⁹ The Court in *Windsor* takes care not to reach the question of whether there is a constitutional right to same-sex marriage.⁹⁰ But Kennedy's language in *Windsor* is sure to be quoted in future litigation by proponents of constitutional protection for such unions.⁹¹

7. Justice Scalia Continues to Hammer Away at Familiar Themes

No one who has read previous Scalia opinions will be surprised that, in the 2012–13 Term, he reaffirmed his commitment to two familiar Scalia tenets—an allegiance to originalism and a disdain for legislative history.

The Term's Fourth Amendment cases offer good examples of Scalia's belief in reading the Constitution according to the original understanding—the meaning that he believes would have attached to the document's provisions at the time of its adoption. Writing for the majority in

⁸⁵ 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”).

⁸⁶ 133 S. Ct. 2675, 2694 (2013).

⁸⁷ 517 U.S. 620, 635–36 (1996).

⁸⁸ 539 U.S. at 576–78 (majority opinion).

⁸⁹ 133 S. Ct. at 2691.

⁹⁰ *Id.* at 2696.

⁹¹ *Id.* at 2694 (“The differentiation [among a subset of state-sanctioned marriages] deems the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify.”). Indeed, before the Court's 2013–14 Term got underway, lawsuits challenging state laws banning same-sex marriage had been filed in eighteen states. Robert Barnes, *Gay Rights Activists Target Va. On Marriage*, *Wash. Post*, Sept. 30, 2013, at A1. In New Jersey, a state court judge has ruled that the state must recognize same-sex marriages. *Garden State Equality v. Dow*, No. L-1729-11, 2013 WL 5397372 (N.J. Super. Ct. Law Div. Sept. 27, 2013).

Florida v. Jardines, Scalia delved into the common law at the time of the Fourth Amendment’s enactment.⁹² Finding that the policeman and his drug-sniffing dog had entered the house’s “curtilage,” Scalia concluded that there had been a “search” in violation of the Amendment.⁹³ In Maryland v. King, Scalia dissented from the Court’s upholding of Maryland’s taking DNA samples from a suspect.⁹⁴ Scalia began his opinion by discussing the history of “general warrants” at the time of the Fourth Amendment’s adoption.⁹⁵

Scalia’s world of constitutional interpretation is poles apart from that of the late Justice William Brennan. An advocate of the “living Constitution,” Brennan conceded that Justices consider both history and precedent in deciding constitutional cases.⁹⁶ But he would not stop there. For Brennan, the “ultimate question” was: “What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone,” but rather, “in the adaptability of its great principles to cope with current problems and current needs.”⁹⁷

Scalia will have none of this. He argues that originalism is “more compatible with the nature and purpose of a Constitution in a democratic system.”⁹⁸ If society wants fundamental change, Scalia says that is what the amending process is for. Scalia’s Constitution requires society to devote “the long and hard consideration required for a constitutional amendment” before the Constitution’s original values are “cast aside.”⁹⁹

Likewise, Scalia’s well-known distaste for legislative history continued to manifest itself in the 2012–13 Term. In Hillman v. Maretta, Scalia joined Sotomayor’s majority opinion except for footnote 4, a note examining Congress’s intent in enacting the statute.¹⁰⁰ In Levin v. United

⁹² 133 S. Ct. 1409, 1415 (2013) (citing eighteenth-century caselaw for the proposition that an unlicensed physical intrusion into one’s home constitutes a search under the Fourth Amendment).

⁹³ *Id.* at 1410.

⁹⁴ 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

⁹⁵ *Id.* (“At the time of the Founding, Americans despised the British use of so-called ‘general warrants’ . . .”).

⁹⁶ See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986).

⁹⁷ *Id.*

⁹⁸ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862 (1989).

⁹⁹ *Id.*

¹⁰⁰ 133 S. Ct. 1943, 1952 n.4 (2013).

States, Ginsburg’s opinion for the Court was unanimous except that Scalia did not join footnotes 6 and 7—notes discussing the Senate Report on the relevant statute.¹⁰¹

In *Sebelius v. Cloer*, a unanimous Court affirmed that a claimant was eligible for attorney’s fees under the National Vaccine Injury Compensation Program.¹⁰² Justice Sotomayor held that the petition met the statutory requirements that it be filed in good faith and that there be a reasonable basis for the claim.¹⁰³ Sotomayor’s opinion was straightforward: the statutory language was clear, and the Court would not second-guess it. Scalia and Thomas did not join the part of Sotomayor’s opinion that looked beyond the statute’s text to the “goals of the fees provision” as expressed in the House Report.¹⁰⁴

Justice Breyer is among those, on and off the Court, who believe that the use of legislative history to help interpret unclear statutory language “seems natural.”¹⁰⁵ Even before he went on the Court, Breyer argued that using such language “helps a court understand the context and purpose of a statute. Outside the law we often turn to context and purpose to clarify ambiguity.”¹⁰⁶

Scalia disagrees. His belief, long held and repeatedly affirmed, is that legislative history “serves to maintain the illusion that legislative history is an important factor in this Court’s deciding of cases, as opposed to an omnipresent makeweight for decisions arrived at on other grounds.”¹⁰⁷

8. Justices Scalia and Thomas Continue Their Close Affinity

In the 2012–13 Term, Scalia and Thomas agreed in whole or part in 82% of cases (74% in 5-4 cases)—among the highest rates of agreement on the Court.¹⁰⁸ Their close relation has attracted the attention of people beyond the usual observers in the profession and the academy. At the 2013 White House Correspondents Association annual dinner, comedian Conan O’Brien had this to say: “The Supreme Court seems divided over

¹⁰¹ 133 S. Ct. 1224, 1232 n.6, 1234 n.7 (2013).

¹⁰² 133 S. Ct. 1886 (2013).

¹⁰³ *Id.* at 1896–97.

¹⁰⁴ *Id.* at 1895.

¹⁰⁵ Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 848 (1992).

¹⁰⁶ *Id.*

¹⁰⁷ *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia, J., concurring).

¹⁰⁸ October Term 2012 Final Stat Pack, *supra* note 12, at 19, 21.

same-sex marriage. The liberal Justices favor it, while the conservatives oppose any lifelong sacred union between two men—unless, of course, it’s Antonin Scalia and Clarence Thomas.”¹⁰⁹

9. Justice Ginsburg Makes It Clear that She Has No Plans to Retire

At age eighty, Justice Ginsburg is the Court’s oldest member.¹¹⁰ She has survived two serious bouts with cancer.¹¹¹ Some liberals have called for her to retire so that President Obama and the Democrats can ensure a liberal replacement before the next presidential election gets close enough to make this goal more difficult.¹¹²

Justice Ginsburg, however, has made it clear that she has no retirement plans. In a round of interviews after the close of the 2012–13 Term—with Reuters,¹¹³ USA Today,¹¹⁴ the Associated Press,¹¹⁵ and the New York Times¹¹⁶—Ginsburg says that she is committed to staying on the Court as long as she can do the job “full steam.”¹¹⁷

Ginsburg’s work during the 2012–13 looks indeed to have been “full steam.” Octogenarian Ginsburg wrote seventeen opinions—the same number as 58-year-old Chief Justice Roberts.¹¹⁸ Ginsburg was the Term’s most efficient Justice. She issued her majority opinions on average sixty days after oral argument (the next most efficient was Roberts,

¹⁰⁹ C-SPAN, Conan O’Brien Remarks at the 2013 White House Correspondents’ Dinner, YouTube (Apr. 27, 2013), <http://www.youtube.com/watch?v=VIgSgLFwEMs>.

¹¹⁰ See Biographies of Current Justices of the Supreme Court, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 20, 2013).

¹¹¹ Terry Gross & Jeffrey Toobin, Ruth Bader Ginsburg: The Supreme Court’s “Heavy-weight,” NPR: Fresh Air (Mar. 6, 2013, 2:28 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=173466698>.

¹¹² E.g., Jonathan Bernstein, Ruth Bader Ginsburg Must Go, Salon (Mar. 30, 2013, 9:00 AM), http://www.salon.com/2013/03/30/ruth_bader_ginsburg_must_go/.

¹¹³ Joan Biskupic, Exclusive: Supreme Court’s Ginsburg Vows to Resist Pressure to Retire, Reuters (July 4, 2013, 8:03 AM), <http://www.reuters.com/article/2013/07/04/us-usa-court-ginsburg-idUSBRE9630C820130704>.

¹¹⁴ Richard Wolf, Ginsburg’s Dedication Undimmed After 20 Years, USA Today (Aug. 1, 2013, 7:45 AM), <http://www.usatoday.com/story/news/nation/2013/07/31/ginsburg-female-justices-no-shrinking-violets-/2606239/>.

¹¹⁵ Sherman, *supra* note 68.

¹¹⁶ Adam Liptak, Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay, N.Y. Times, Aug. 25, 2013, at A1.

¹¹⁷ *Id.* at A15.

¹¹⁸ October Term 2012 Final Stat Pack, *supra* note 12, at 8.

whose score was eighty-six days).¹¹⁹ In oral argument, Ginsburg was most frequent among the Justices in asking the first question—37% of first questions.¹²⁰ She asked, on average, 10.5 questions per argument.¹²¹

Since Justice Stevens's retirement, Ginsburg has been a major factor in unifying the Court's liberal bloc. The agreement among the three women Justices is especially striking: they agreed with each other in 93% of the Term's cases.¹²² Ginsburg agreed with Kagan in 96% of all cases and in 92% of all divided cases—the highest agreement rate among any pair of Justices.¹²³ By contrast, Ginsburg agreed with Alito in only 58% of all cases and in 18% of divided cases—the lowest rate of agreement among any of the Justices.¹²⁴ Similarly, Ginsburg's rate of agreement with Roberts and Thomas was low—65% with Roberts (32% in divided cases) and 59% with Thomas (20% in divided cases).¹²⁵

Ginsburg is especially vocal in dissent. In the past five years, she has written more dissents than any other Justice.¹²⁶ Her most striking opinions in the 2012–13 Term were dissents. She delivered oral dissents in five cases¹²⁷ (I cannot remember when a Justice has delivered so many oral dissents in a single Term). Oral dissents are rare and are meant to drive home a deeply held belief. Ginsburg has said that oral dissents are meant to say not simply that the Court is wrong, but that it is “importantly and grievously misguided.”¹²⁸

The 2012–13 Term provides vivid examples of Ginsburg dissents. In her dissent in *Shelby County v. Holder*,¹²⁹ Ginsburg (joined by Breyer, Sotomayor, and Kagan) condemned the majority for striking down Sec-

¹¹⁹ *Id.* at 12.

¹²⁰ *Id.* at 27.

¹²¹ *Id.*

¹²² *Id.* at 19.

¹²³ *Id.* at 22.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Jeffrey Toobin, *Heavyweight: How Ruth Bader Ginsburg Has Moved the Supreme Court*, *The New Yorker*, Mar. 11, 2013, at 44.

¹²⁷ Wolf, *supra* note 114. The five cases in which Ginsburg gave oral dissents were *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Fisher v. Univ. of Texas*, 133 S. Ct. 2411 (2013); and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

¹²⁸ Ruth Bader Ginsburg, *Assoc. Justice*, U.S. Supreme Court, *The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions* (Oct. 21, 2007), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_10-21-07.html.

¹²⁹ 133 S. Ct. at 2632 (Ginsburg, J., dissenting).

tion 4 of the Voting Rights Act.¹³⁰ In an interview in the *New York Times*, Ginsburg described Shelby County as “stunning in terms of activism.”¹³¹ The question, in Ginsburg’s mind, was quite simple: “who decides”?¹³² When confronting the “most constitutionally invidious form of discrimination”¹³³ (race) and the “most fundamental right in our democratic system”¹³⁴ (the vote), Congress’s power to act, Ginsburg declared, “is at its height.”¹³⁵ Ginsburg grounded her opinion in the purpose of the Reconstruction Amendments: to arm Congress with the authority to protect citizens from violation of their rights by the states. Taking a close look at the legislative record, Ginsburg condemned the majority for being dismissive of the “great care and seriousness” with which Congress acted.¹³⁶ Ginsburg is obviously disappointed with the way some states have moved to pick up on the invitation implicitly extended to them by the decision in *Shelby County*. In an interview with the *Associated Press*, she pointed to Texas’s implementation of a new voter ID law—an action taken hours after the Court’s decision—as powerful evidence of the mistake the Court had made.¹³⁷

Two Title VII cases called forth strong Ginsburg dissents from the Court’s limiting employees’ ability to bring discrimination and retaliation suits. In *University of Texas Southwestern Medical Center v. Nassar*, the Court held that “but-for” causation must be shown in retaliation cases.¹³⁸ In *Vance v. Ball State University*, the Court adopted a narrow definition of “supervisor.”¹³⁹ In both cases, Ginsburg, in dissent, called for recognition of the realities of the workplace.¹⁴⁰ And in both cases Ginsburg asked Congress to step in and overturn the Court’s decision.¹⁴¹

¹³⁰ *Id.*

¹³¹ Liptak, *supra* note 116.

¹³² *Shelby Cnty.*, 133 S. Ct. at 2632.

¹³³ *Id.* at 2636.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 2644.

¹³⁷ Sherman, *supra* note 68.

¹³⁸ 133 S. Ct. at 2534.

¹³⁹ 133 S. Ct. at 2454.

¹⁴⁰ See *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting); *Vance*, 133 S. Ct. at 2459 (Ginsburg, J., dissenting).

¹⁴¹ *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting) (“Today’s misguided judgment, along with the judgment in *Vance v. Ball State Univ.*, . . . should prompt yet another Civil Rights Restoration Act.”).

This gambit recalls Ginsburg's success in urging the Congress to overturn *Ledbetter v. Goodyear*; ¹⁴² the Lilly Ledbetter Act ¹⁴³ was signed into law in 2009. Anyone who watches today's dysfunctional Congress may well wonder whether Ginsburg's plea this time around has much chance of success.

10. The Roberts Court Has Made It to the Opera Stage

Justices Scalia and Ginsburg go at it hammer and tong when they disagree in the Court's opinions. But, outside the Marble Palace, they have famously bonded over their mutual love of opera. ¹⁴⁴ Derrick Wang, a recent graduate of the University of Maryland School of Opera, has composed an opera, *Scalia/Ginsburg*. The opera is based on the Justices' own works. According to the composer, it uses themes and styles drawn from Verdi, Puccini, and Bizet. (This is an odd ensemble of composing styles, but then the pairing of Scalia and Ginsburg is unconventional.) Scalia and Ginsburg got a preview of the opera in June in the Court's East Conference Room. ¹⁴⁵ Ancient philosophers spoke of the "music of the spheres"—a harmony found in the movement of celestial bodies. Those who follow the opinions of the Supreme Court, especially opinions issued by Scalia and Ginsburg, should not suppose that the amity found when they go to the opera together will somehow seep into their judicial writing. ¹⁴⁶

Fiction has had a hard time with the Supreme Court. Contrast the season-after-season success of television's *West Wing* with two short-lived dramas based on life at the Court. One was CBS's *First Monday*, ¹⁴⁷ the other was ABC's *The Court*. ¹⁴⁸ Both premiered in 2002. Tony Mauro, a

¹⁴² 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting).

¹⁴³ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

¹⁴⁴ Nina Totenberg, *Scalia v. Ginsburg: Supreme Court Sparring Put to Music*, NPR (July 10, 2013, 4:21 PM), <http://www.npr.org/2013/07/10/200137481/scalia-v-ginsburg-supreme-court-sparring-put-to-music>.

¹⁴⁵ *Id.*

¹⁴⁶ In Wang's opera, after the two Justices have sparred, musically and judicially, Scalia ends with harrumph and a flourish, "Anyway, that's my view, and it happens to be correct." *Id.*

¹⁴⁷ Dahlia Lithwick, *Adjudicating the Court vs. First Monday*, *Slate* (Mar. 27, 2002, 4:33 PM), http://www.slate.com/articles/arts/culturebox/2002/03/justice_at_the_speed_of_light.html.

¹⁴⁸ *Id.*

veteran Court-watcher, called First Monday “Must Not See TV.”¹⁴⁹ Dahlia Lithwick thought The Court more promising, mainly because, like The West Wing, it had a breathless pace and featured Sally Field as the Court’s newest member.¹⁵⁰ Neither series survived, and neither is mourned (save perhaps by its producers). Showing its tin ear for life at the Court, First Monday had an episode in which the Chief Justice, a sports fan, preceded the Term’s first session with a football-style handshake among the Justices and the rallying cry, “Let’s go out there and make history.”¹⁵¹ Those who are not privileged to be in the Justices’ conference room understand that traditional one-on-one handshakes suffice. But, even though the Courtroom bears little resemblance to a football stadium, the Court’s most recent Term is surely a reminder that the Roberts Court will “make history.”

¹⁴⁹ Tony Mauro, Supreme Court Drama “First Monday” Is Dismissed by Court Insiders, *Legal Intelligencer* (Jan. 14, 2002), <http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202552373047>.

¹⁵⁰ Lithwick, *supra* note 147.

¹⁵¹ Mauro, *supra* note 149.