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THE SUPREME COURT 2009 TERM OVERVIEW AND 2010 TERM PREVIEW

Erwin Chemerinsky,^{*} Joan Biskupic,^{**} Martin A. Schwartz,^{***} and
Leon Friedman^{****}

I. INTRODUCTION

DEAN CHEMERINSKY: On Monday, June 28, 2010, the

^{*} Dean and Distinguished Professor of Law, University of California, Irvine, School of Law. This Article is based on presentations given at the Practising Law Institute's ("PLI") Twelfth Annual Supreme Court Review in New York, New York on August 3, 2010 and the Twenty-Second Annual Leon D. Lazer Supreme Court Review in Central Islip, New York on November 5, 2010.

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Supreme Court completed its fifth year with John Roberts as Chief Justice, its first year with Justice Sonia Sotomayor on the bench, and its thirty-fifth and final Term with Justice John Paul Stevens.¹ This year, the Supreme Court decided seventy-three cases after briefing and oral argument,² just a few less than the seventy-six cases decided the year before in the 2008 Term.³ Sixty-seven were orally argued in the 2007 Term,⁴ following seventy-one cases heard in the 2006 Term.⁵ As recently as the 1980s, the Court was averaging 150 cases per year.⁶ A decline from 150 to 73 cases in two decades is truly dramatic and has important implications. Major legal issues will go a longer time before being resolved. Also, more conflicts among the circuits and states will go a longer time before being settled.

The Court's smaller docket may be the reason that the average length of the opinions has increased. This Term may set the record for the largest average number of pages per opinion. The Supreme Court's opinion in *Citizens United v. Federal Elections Commission*⁷ was well over one hundred pages long.⁸ This pales in comparison to the Court's 208 page opinion in *McDonald v. City of Chicago*.⁹ This Term, there were fourteen per curiam opinions, decided without briefing and oral argument.¹⁰ These are cases decided just on the ba-

¹ *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 9, 2010).

² *The Supreme Court Database: 2009 Analysis Case Listing*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-TIETACK-7735> (last visited Jan. 11, 2011).

³ *The Supreme Court Database: 2008 Analysis Case Listing*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-FLAPIACK-2118> (last visited Jan. 11, 2011).

⁴ *The Supreme Court Database: 2007 Analysis Case Listing*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-COLDSPELL-8089> (last visited Jan. 11, 2011).

⁵ *The Supreme Court Database: 2006 Analysis Case Listing*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-FASTBREAK-4542> (last visited Jan. 11, 2011).

⁶ *The Supreme Court Database: 1900-2000 Analysis Case Listing*, SCDB, <http://scdb.wustl.edu/analysisOverview.php?sid=1002-POTLUCK-9768> (last visited Jan. 11, 2011).

⁷ 130 S. Ct. 876 (2010).

⁸ *See id.*

⁹ 130 S. Ct. 3020 (2010).

¹⁰ *See* *Sears v. Upton*, 130 S. Ct. 3259 (2010); *United States v. Juvenile Male*, 130 S. Ct. 2518 (2010); *Jefferson v. Upton*, 130 S. Ct. 2217 (2010); *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010); *Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010); *Thaler v. Haynes*, 130 S. Ct. 1171 (2010); *McDaniel v. Brown*, 130 S. Ct. 665 (2010); *Presley v. Georgia*, 130 S. Ct. 721 (2010); *Wellons v. Hall*, 130 S. Ct. 727 (2010); *Corcoran v. Levenhagen*, 130 S. Ct. 8 (2009); *Bobby v. Van Hook*, 130 S. Ct. 13 (2009); *Wong v. Belmontes*, 130 S. Ct. 383 (2009); *Porter v. McCollum*, 130 S. Ct. 447 (2009); *Michigan v. Fisher*, 130 S. Ct. 546 (2009).

sis of the certiorari petition and the certiorari opposition. Some of these were important cases involving ineffective assistance of counsel.¹¹

This is a disturbing trend. When cases are decided based on the certiorari petition and the opposition to certiorari, the briefing is different than when the case is decided on the merits. A certiorari petition should convince the Court why it should hear the case, such as when there is a split among the circuits and when there is an issue of national importance. The purpose of the opposition to certiorari is for the party to argue that such a conflict does not exist or that further percolation would be beneficial.

This Term, Chief Justice Roberts, Justice Scalia, and Justice Thomas voted together eighty-eight percent of the time.¹² Justices Ginsburg, Breyer, and Sotomayor voted together ninety percent of the time.¹³ However, what matters most is that it is the Anthony Kennedy Court. Out of tradition and deference to the Chief Justice, it is referred to as the John Roberts Court, but it actually functions in practice as the Anthony Kennedy Court. The two Justices most often in the majority this Term were Chief Justice John Roberts and Justice Anthony Kennedy.¹⁴ These Justices were in the majority over ninety percent of the time.¹⁵ Justice Kennedy has had the most effect on the Court with respect to five-four decisions. This Term, there were sixteen five-to-four decisions out of the seventy-three cases.¹⁶ Justice Kennedy was in the majority in eleven of these cases.¹⁷

The ideology of the Roberts Court can best be seen by focusing on the five-four decisions that were split along traditional ideological lines. This Term provided eleven such cases where Justices Roberts, Scalia, Thomas, and Alito on one side, and Justices Stevens,

¹¹ See, e.g., *Sears*, 130 S. Ct. 3259; *Porter*, 130 S. Ct. 447.

¹² *End of Term Statistical Analysis—October Term 2009*, SCOTUSBLOG, 5 (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/Summary-Memo-070710.pdf>.

¹³ *Id.*

¹⁴ Erin Miller, *Frequency in the Majority*, SCOTUSBLOG, 6 (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Charts-070710-6.pdf>.

¹⁵ *Id.*

¹⁶ *The Supreme Court Database: Analysis Case Listings for 5-4 Decisions*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-LEAPFROG-1219> (last visited Jan. 11, 2011).

¹⁷ Erin Miller, *Five-to-Four Cases*, SCOTUSBLOG, 3 (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Charts-070710-3.pdf>.

Ginsburg, Breyer, and Sotomayor were on the other side.¹⁸ Justice Kennedy voted with the conservative Justices in eight out of the eleven cases and sided with the liberal Justices in three out of the eleven cases.¹⁹ The year before, there were sixteen cases split along traditional ideological lines with Justices Roberts, Scalia, Thomas, and Alito on one side, and Justices Stevens, Souter, Ginsburg, and Breyer on the other side.²⁰ Justice Kennedy sided with the conservatives in eleven out of the sixteen cases and sided with the liberals in five out of the sixteen cases.²¹ Looking at the five years of the Roberts Court, Justice Kennedy sided with the conservatives more than with the liberals almost every Term.²²

However, there were notable cases that did not come out the conservative way, such as *Graham v. Florida*,²³ where the Supreme Court ruled that a sentence of life in prison without the possibility of parole is cruel and unusual punishment for a juvenile offender.²⁴ In *Lewis v. City of Chicago*,²⁵ the Supreme Court's unanimous decision impacted the statutes of limitations in employment cases to favor plaintiffs.²⁶ But, there is no doubt that overall the Roberts Court is a conservative court.²⁷

Justice Stevens leaving the bench will likely intensify the role of Anthony Kennedy. When the Chief Justice is in the majority, the Chief Justice assigns the writing of the opinion to either himself or to a Justice in the majority. If the Chief Justice is not in the majority, then the most senior Associate Justice assigns the opinion. Until now, when Justice Kennedy joined the more liberal Justices in the

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Akin Gump Strauss Hauer & Feld LLP, *End of Term Statistical Analysis—October Term 2008*, SCOTUSBLOG (June 30, 2009), <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-LEAPFROG-1219>.

²¹ *Id.*

²² *The Supreme Court Database: Justice Kennedy's Decision Direction*, SCDB, <http://scdb.wustl.edu/analysisOverview.php?sid=1002-BACKPACK-6621> (last visited Jan. 11, 2011).

²³ 130 S. Ct. 2111 (2010).

²⁴ *Id.* at 2030.

²⁵ 130 S. Ct. 2191 (2010).

²⁶ *Id.* at 2199 (holding that while disparate treatment claims require "deliberate discrimination within the limitations period," claims for disparate impact do not).

²⁷ See Adam Liptak, *The Roberts Court; The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1 ([T]he [C]ourt not only moved to the right but also became the most conservative one in living memory . . .).

majority, Justice Stevens would decide who wrote the opinion. Now when Justice Anthony Kennedy is with the liberal Justices, he will be the most senior Associate Justice and thus will assign the author of the majority opinion when Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan form the majority.

Finally, what will the confirmation of Elena Kagan, and more generally the Obama presidency, likely mean for the Supreme Court? Justice Kagan has never been a judge before joining the Supreme Court, which is in no way disqualifying.²⁸ In fact, many former Justices had never been on the bench before being appointed to the Supreme Court, such as Justices Brandeis, Douglas, Frankfurter, Jackson, Warren, and more recently, Rehnquist and Powell.²⁹ Since Justice Kagan has never been on the bench, there exists no body of prior judicial opinions to scrutinize, unlike when Justice Sotomayor was confirmed.³⁰

As a law professor, Elena Kagan wrote only five major articles, and none of them were particularly controversial.³¹ The disad-

²⁸ Naftali Bendavid & Nathan Koppel, *The Supreme Court: A Modest Start for Kagan—Countering Charges of Activism, Court Nominee Says She Will Be “Deferential,”* WALL ST. J., July 29, 2010, at A5.

²⁹ See Louis D. Brandeis, 1916-1939, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/louis-brandeis-1916-1939/> (last visited Jan. 30, 2011); William O. Douglas, 1939-1975, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/william-douglas-1939-1975/> (last visited Jan. 30, 2011); Felix Frankfurter, 1939-1962, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/felix-frankfurter-1939-1962/> (last visited Jan. 30, 2011); Robert H. Jackson, 1941-1954, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/robert-jackson-1941-1954/> (last visited Jan. 30, 2011); Earl Warren, 1953-1969, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/chief-justices/earl-warren-1953-1969/> (last visited Jan. 30, 2011); William H. Rehnquist, 1986-2005, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/chief-justices/william-rehnquist-1986-2005/> (last visited Jan. 30, 2011).

³⁰ Pat Toomey, *I Would Vote Against Kagan: She’s Willing to Give Government Far Too Much Power*, PITTSBURGH POST-GAZETTE, July 26, 2010, at B-7 (asserting that even though Justice Sotomayor was “left of center,” she had a seventeen-year record as an appellate judge which in turn showed her respect for the Constitution and legal jurisprudence, yet Kagan lacks this as she has no judicial tenure).

³¹ See Dean Elena Kagan, *A Celebration of Justice Ruth Bader Ginsburg*, 32 HARV. J. L. & GENDER 233 (2009); David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2001); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993); Elena Kagan, *When a Speech Code is a Speech Code: The Stanford Policy and the*

vantage that she poses for President Obama is that neither he nor anyone else can know exactly where she falls on the ideological spectrum. Everyone expects that she will be somewhat left of center.³² But, will she be in the same place on the ideological continuum as the Justice she is replacing? Many think Justice Kagan will be considerably more moderate than Justice Stevens.³³ However, there is no way to know based on what she has written or what she has said.

The appointment of Justice Kagan was not President Obama's first choice for the Supreme Court. A year ago, Justice David Souter retired at a relatively young age for a Justice—sixty-nine years old.³⁴ He was replaced by Justice Sotomayor. After having read hundreds of Judge Sotomayor's opinions on the Second Circuit, it was expected that in most cases, she would vote the same way as Justice Souter.³⁵ This past Term, Justice Sotomayor was as liberal as anybody on the Court, across the board, including in the criminal procedure and criminal justice cases where some thought that she would be more conservative.³⁶

It is widely speculated that Justice Ruth Bader Ginsburg might step down in the next year or two.³⁷ She is seventy-seven years old, making her the oldest member of the Court.³⁸ The media reported that a year ago Justice Ginsburg was diagnosed with pan-

Theory of Incidental Restraints, 29 U.C. DAVIS L. REV. 957 (1996).

³² See, e.g., *Confirm Elena Kagan; Intellect, Integrity and Tolerance Make Her Eminently Qualified for the High Court*, WASH. POST, July 4, 2010, at A18 (discussing that Kagan's way of thinking is completely mainstream even though it is "left of center").

³³ See David G. Savage, *Kagan's Views Concern Liberals: Of Top Candidates for the High Court, She Has the Broadest Opinion on Presidential Power*, L.A. TIMES, Apr. 28, 2010, at 12 (stating that some believe Kagan will grant more executive authority than Stevens ever allowed).

³⁴ *Year-End Review of Markets & Finance 2009—Celebrating a Year of Highs and Lows*, WALL ST. J., Jan. 4, 2010, at R10.

³⁵ See, e.g., Mary R. Vasaly et al., *Recent Developments in Appellate Advocacy*, 45 TORT TRIAL & INS. PRAC. L.J. 179, 180 (2010).

³⁶ See, e.g., *Berghuis v. Thompson*, 130 S. Ct. 2250, 2266 (2010) (Sotomayor, J., dissenting) (discussing that the Court's holding that a suspect waived his right to remain silent due to his utterance of a few one-word answers during a three-hour interrogation is a total retreat from the holding of *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Johnson v. United States*, 130 S. Ct. 1265 (2010) (joining the majority's holding that the defendant's prior conviction did not constitute a violent felony).

³⁷ Kimberly Atkins, *Friday Morning Docket: Supreme Court Justice Ruth Bader Ginsburg Hospitalized*, LAW. USA (Sept. 4, 2009), <http://lawyersusaonline.com/dcdicta/2009/09/24/friday-morning-docket-ginsburg-hospitalized/>.

³⁸ See *id.*

creatic cancer.³⁹

On the other side of the ideological aisle, Justice John Roberts turned fifty-five in January 2010.⁴⁰ Justice Samuel Alito turned sixty on April 1, 2010,⁴¹ and Justice Clarence Thomas has been on the Supreme Court almost nineteen years, but is only sixty-two years old.⁴² Both Justice Antonin Scalia and Justice Anthony Kennedy turned seventy-four in 2010.⁴³ Absent unforeseen circumstances, it does not seem likely that any of these five Justices—Roberts, Scalia, Kennedy, Thomas, or Alito—will be leaving the bench during President Obama's presidency.

II. OVERVIEW OF THE OCTOBER 2009 TERM

MS. BISKUPIC: The defining decision of the recently completed Supreme Court Term was *Citizens United*. Even with a total of seventy-three decisions, this Term came down to this one case. During the Senate Judiciary Committee Hearings for Elena Kagan, this decision was repeatedly invoked by both Democrats and Republicans.⁴⁴ It was invoked more than guns, more than abortion, and more than gay rights.

I will address the importance of that decision in two respects: how it reveals the influence of Justice Antonin Scalia, my latest book subject, and how it reveals the direction of the Roberts Court.

The majority opinion was penned by Justice Anthony Kennedy.⁴⁵ However, *Citizens United* is an example of the groundwork that Justice Scalia has laid and seen come to fruition in recent years. In fact, as Justice Stevens read his poignant, sometimes halting, dissenting opinion from the bench that January morning, he noted that the seeds of the majority opinion had been planted by Justice Scalia in the 1990 *Austin v. Michigan State Chamber of Commerce*⁴⁶ dissent.⁴⁷ Justice Stevens wrote in his *Citizens United* dissent, "All of

³⁹ *Id.*

⁴⁰ See *Biographies of Current Justices of the Supreme Court*, *supra* note 1.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *TRANSCRIPT: The Elena Kagan Hearings-Day 1*, WASH. POST, July 28, 2010.

⁴⁵ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 886 (2010).

⁴⁶ 494 U.S. 652 (1990).

⁴⁷ See *id.* at 680, 687-88 (Scalia, J., dissenting) (discussing that the regulation of the polit-

the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, 'that there is no such thing as too much speech.'"⁴⁸ Justice Stevens went on to say, "In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process."⁴⁹ Of the supposed value of plentiful speech, Justice Stevens then said in a footnote, "Of course, no presiding person in a courtroom, legislature, classroom, polling place, or family dinner would take this hyperbole literally."⁵⁰

Justice Scalia, who cut his teeth in Washington during the Nixon and Ford Administrations and post-Watergate era, developed an antagonism towards Congress and the kind of legislation that was at the heart of the *Citizens United* case.⁵¹ As Assistant Attorney General for the Office of Legal Counsel, he was constantly testifying on behalf of executive privilege and against the disclosure of White House documents.⁵² He sparred repeatedly with people who are very familiar to this audience today, such as Sen. Edmund Muskie of Maine, U.S. Rep. Otis Pike of New York, and U.S. Rep. Robert Drinan of Massachusetts.⁵³ All of them were "Democrats [in this era] trying to pry information [out of] the [E]xecutive."⁵⁴

ical speech of corporations, for the purpose of not distorting the political process, premised on the fact that they receive "special advantages" from the government in the form of federal funding is unconstitutional because it does not serve a compelling state interest served by narrowly tailored means).

⁴⁸ *Citizens United*, 130 S. Ct. at 975 (Stevens, J., dissenting) (quoting *Austin*, 494 U.S. at 695 (Scalia, J., dissenting)).

⁴⁹ *Id.* at 975-76.

⁵⁰ *Id.* at 976 n.74.

⁵¹ See, e.g., Neal Devins, *Commentary: Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 440 (2001) (discussing how Justice Scalia "took aim at Congress" by continuously asserting that Congress had abdicated its duty to be "faithful to the Constitution" (quoting Stuart Taylor, Jr., *The Tipping Point*, 32 NAT'L J. 1810, 1811 (2000))).

⁵² See, e.g., Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1140 (1999) ("Now-Supreme Court Justice Antonin Scalia, who was then serving as the Assistant Attorney General for the Office of Legal Counsel, had the unenviable task of defending executive privilege before a Senate subcommittee considering the legislation.").

⁵³ See Joan Biskupic, *Citizens United v. FEC: The Roles of Justices Scalia and Stevens*, COURT BEAT (Jan. 24, 2010), <http://www.joanbiskupic.com/blog/?p=76>.

⁵⁴ *Id.*

Justice Scalia's experiences in the 1970s led him to value executive power and to consider Congress as an adversary.⁵⁵ This theme has been prevalent throughout Justice Scalia's tenure, emerging not only in his written concurrence in *Citizens United*,⁵⁶ yet even earlier during the oral arguments in *Citizens United* when he challenged then-United States Solicitor General Elena Kagan as to Congress's motives. He said to her at one point, "Congress has a self-interest. . . . [W]e are suspicious of congressional action in the First Amendment area precisely because we . . . doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents. Now is that excessively cynical of me? I don't think so."⁵⁷

Justice Scalia's political savvy, natural combativeness, and allegiance to the Executive were ideally suited to the post-Watergate time. Then in the early 1980s, he rode the conservative revolution identified with Ronald Reagan. He was first appointed to the federal bench in 1982, on the powerful U.S. Court of Appeals for the District of Columbia Circuit.⁵⁸ President Reagan elevated him to the Supreme Court in 1986, and after years of being known for his passionate dissents,⁵⁹ he has now become a major voice in American law. It is hard to believe that Justice Scalia, the dissenter and notable contrarian, would now be with the majority on so many important Supreme Court opinions.⁶⁰ That had happened through the force of his personality, sense of mission, and the play of judicial appointment politics. He has been joined in recent years by similarly committed Justices on the right, most recently Samuel Alito, named by President George W. Bush in 2006.⁶¹

⁵⁵ JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 44 (2009).

⁵⁶ See *Citizens United*, 130 S. Ct. at 928 (Scalia, J., concurring) ("[I]f speech can be prohibited because, in the view of the Government, it leads to 'moral decay' or does not serve 'public ends,' then there is no limit to the Government's censorship power.").

⁵⁷ See Transcript of Oral Argument at 50-51, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

⁵⁸ See *Biographies of Current Justices of the Supreme Court*, *supra* note 1.

⁵⁹ See, e.g., *United States v. Virginia*, 516 U.S. 515, 566 (1996) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

⁶⁰ See Miller, *Frequency in the Majority*, *supra* note 14 (illustrating that Justice Scalia was in the majority in seventy-five cases last Term and only Justice Kennedy and Chief Justice Roberts were in the majority in a greater number of cases).

⁶¹ See *Biographies of Current Justices of the Supreme Court*, *supra* note 1.

Another case demonstrating Scalia's influence, beyond *Citizens United*, is Justice Scalia's 2008 decision in *District of Columbia v. Heller*,⁶² finding for the first time an individual right to firearms in the Second Amendment of the Constitution.⁶³ Joining him in that majority were new Justice Alito and Chief Justice Roberts, along with Justices Kennedy and Thomas. In the recently completed Term, Justice Scalia's decision in *Heller* was reinforced in *McDonald v. City of Chicago*,⁶⁴ as the Justices extended the Second Amendment protection to allow gun owners to challenge city and state regulations.⁶⁵

The Roberts Court, as a whole, is not likely to go as far as Justice Scalia wants on some social issues, for example, to forbid all race-based policies or to overturn the right of abortion.⁶⁶ But his views are clearly prevailing on campaign finance regulation, the Second Amendment, and other hot-button issues. Elena Kagan, who will soon join the Court, called Scalia "the [J]ustice who has had the most important impact over the years on how we think and talk about law."⁶⁷ He has arrived at the apex of his power and is strongly defining the Roberts Court today.

Now, I'd like to turn to Chief Justice Roberts, who has been in the center chair now for five years.⁶⁸ Beyond the shift to the right evident in the *Citizens United* and two Second Amendment cases, the conservative majority's imprint has been deepest in areas of social

⁶² 128 S. Ct. 2783 (2008).

⁶³ *Heller*, 128 S. Ct. at 2799 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

⁶⁴ 130 S. Ct. 3020, 3036 (2010) (posing the issue of whether the Second Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment).

⁶⁵ *Id.* at 3050 (holding "that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*").

⁶⁶ See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., dissenting) ("In my view government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."); *Planned Parenthood of Se. Pa. v. Casey*, 404 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (stating that the issue of a woman's right to have an abortion is "whether it is a liberty protected by the Constitution of the United States [and] I am sure it is not").

⁶⁷ Ann Gerhart & Philip Rucker, *Kagan Has Many Achievements, but Her World Has Been Relatively Narrow*, WASHINGTONPOST.COM (June 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/09/AR2010060906240.html>.

⁶⁸ See *Biographies of Current Justices of the Supreme Court*, *supra* note 1.

conservatism—such as on race,⁶⁹ religion,⁷⁰ and abortion rights.⁷¹ These are all areas of law identified with the social conservatism of Ronald Reagan.⁷²

In fact, after he was sworn in, Chief Justice Roberts's first major public appearance was at the Ronald Reagan Presidential Library and Center for Public Affairs in California.⁷³ There, he identified himself as a Reagan acolyte who had heard the call during the President's first inaugural speech in 1981.⁷⁴ The Chief Justice said: "I felt he was speaking to me" and explained how he then took a job in the Justice Department of the new Reagan administration.⁷⁵

A few months after Roberts's California speech, he struck a more reserved tone and stressed in a commencement address at Georgetown University law school the importance of deciding cases narrowly, and with strong consensus, to build public confidence.⁷⁶ This echoed some of his comments to the Senate Judiciary Committee in his 2005 confirmation hearings.⁷⁷ During those confirmation hearings, the Chief Justice suggested he would avoid reversing precedent because of the "jolt to the system."⁷⁸ Chief Justice Roberts, however, wrote in *Citizens United* that in some cases "the

⁶⁹ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007) (holding that school districts cannot aim for racial balances when there is no history of segregation in the school district).

⁷⁰ See *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 608-09 (2007) (holding that the case fell outside the *Flast* exception, and thus taxpayers did not have standing to challenge the funding as a violation of the Establishment Clause).

⁷¹ See *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (holding that a statute prohibiting dilation and evacuation abortions was constitutionally valid).

⁷² Joan Biskupic, *Court Ends Term With a Right Jab*, WASH. POST, June 30, 1993, at A1.

⁷³ See Chief Justice John G. Roberts, Jr., Address at the Ronald Reagan Presidential Library (Mar. 9, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5254011&ps=rs> (transcript).

⁷⁴ See *id.*

⁷⁵ Joan Biskupic, *Roberts Steers Court Right Back to Reagan: In Rulings Favoring Business and Curbing Race Programs and Abortion, Some See an Overdue Correction; Others Say the Justices are Taking Nation "Backwards"*, USA TODAY, June 28, 2007, at 8A.

⁷⁶ Chief Justice John Roberts, 2006 Georgetown University Law School Commencement Address (May 21, 2006), available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144>.

⁷⁷ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, GPO ACCESS (Sept. 12-15, 2005), <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html>.

⁷⁸ *Id.* at 144 ("I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness.").

precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases."⁷⁹ Pennsylvania Democratic Senator Arlen Specter said that Chief Justice Roberts's concurring opinion in *Citizens United* was "a . . . repudiation of everything he testified to" in his confirmation hearings in 2005.⁸⁰

Along with the elimination of campaign finance rules, Chief Justice Roberts's most aggressive moves have undercut precedent in other areas allowing government to consider an individual's race.⁸¹ In his 2007 opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,⁸² Chief Justice Roberts said that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁸³

In the area of religion, Chief Justice Roberts has also made conservative strides. The Rehnquist Court, his predecessor Court, certainly allowed more religion in public life than prior Courts, for example, by upholding publicly-financed vouchers for religious schools.⁸⁴ The Roberts Court has moved further in that direction. In the recently completed Term, Roberts and the four other conservatives invoked a legal rationale in a dispute over a cross on federal land in the Mojave National Preserve that would strengthen the government's hand to allow religious symbols on public grounds.⁸⁵ Three years earlier, the same conservative majority made it more difficult for taxpayers to challenge government programs that aid religious schools.⁸⁶

Justices Breyer and Stevens have been most vocal in criticizing the conservative majority through the years.⁸⁷ In the recently

⁷⁹ *Citizens United*, 130 S. Ct. at 921 (Roberts, C.J., concurring).

⁸⁰ *Audio Recording of Justice Department Nominations Hearing*, C-SPAN (Jan. 9, 2009), <http://www.c-spanvideo.org/program/283954-1>.

⁸¹ *See Seattle Sch. Dist. No. 1*, 551 U.S. at 747-48 (striking down a school assignment plan based on race).

⁸² 404 U.S. 833.

⁸³ *Id.* at 748.

⁸⁴ *See Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (holding that an Ohio school voucher program did not violate the Establishment Clause of the United States Constitution).

⁸⁵ *See Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) (holding that the Latin cross in the desert represented more than religious beliefs—it also represented the heroic acts of those who have defended our country's freedom).

⁸⁶ *See Hein*, 551 U.S. at 608-09.

⁸⁷ Joan Biskupic, *Breyer Argues for 'Good Faith' on High Court Rulings*, USA TODAY, Dec. 1, 2010, at 6A; Joan Biskupic, *Stevens Sure Justices Will Do a Good Job 'In the Long Run'*, USA TODAY, Oct. 4, 2010, at 5A.

completed Term, Justice Breyer took the rare step of announcing his dissenting opinions for the minority in three cases in protest of where the conservatives were going. Justice Breyer dissented from the bench in *Holder v. Humanitarian Law Project*,⁸⁸ *McDonald*,⁸⁹ and *Free Enterprise Fund v. Public Company Accounting Oversight Board*.⁹⁰

Justice Stevens has recently talked about how conservative the bench has been during his nearly thirty-five year tenure and expressed that “ ‘The makeup of the [C]ourt has changed dramatically.’ ”⁹¹ Justice Stevens, who Republican President Gerald Ford appointed in 1975, objects to the common, widespread use of the term “conservative.”⁹² He said, “ ‘If you use the term ‘conservative’ the way a lot of people use it, . . . every new appointee has been more conservative than his or her predecessor. You can go right down the line.’ ”⁹³ Without addressing Justice Sotomayor, Justice Stevens said the possible exception would be Ruth Bader Ginsburg, who succeeded Justice Byron White in 1993.⁹⁴

Stevens also made the strong point that the Burger and Rehnquist Courts, on which he earlier served, would not have pushed as far on racial policies or on the Second Amendment.⁹⁵ Both those earlier Courts had effectively endorsed what had been the prevailing notion in previous decades: that the Second Amendment covered only a state militia right to bear arms, such as for the National Guard, rather

⁸⁸ 130 S. Ct. 2705, 2731 (2010) (Breyer, J., dissenting) (“I cannot agree with the Court’s conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations’ lawful political objectives.”).

⁸⁹ 130 S. Ct. at 3122-23 (Breyer, J., dissenting) (“In my view, taking *Heller* as a given, the Fourteenth Amendment does not incorporate the Second Amendment right to keep and bear arms for purposes of private self-defense.”).

⁹⁰ 130 S. Ct. 3138, 3184 (2010) (Breyer, J., dissenting) (“In my view the Court’s decision is wrong—very wrong.”).

⁹¹ Joan Biskupic, *Justice Stevens Keeps Cards Close to Robe in Supreme Court*, USA TODAY, Oct. 19, 2009, at A1 (quoting Justice Stevens).

⁹² See *id.* (quoting Justice Stevens defining a conservative as one who “ ‘decid[es] cases narrowly and pay[s] attention to (precedent),’ ” as opposed to labeling a Justice on the basis of political outcomes).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Joan Biskupic, *Stevens Sure Justices Will Do a Good Job ‘In the Long Run’*, *supra* note 87.

than an individual right to own guns.⁹⁶ Chief Justice Warren Burger, himself, talked about how the Second Amendment did not cover an individual right, and that the National Rifle Association (NRA) has perpetrated this fraud—a word that Chief Justice Burger used to refer to the interpretation of the Second Amendment providing an individual right to bear arms.⁹⁷ In so many different areas, one can see how this Court is far more to the right than the Courts that Justice Stevens had been part of in his more than three decades on the Court.

It is also of great significance that Chief Justice Roberts is presiding in a politically polarized era and has generated tensions with Democratic President Barack Obama.⁹⁸ This kind of dynamic has not been seen in many decades. When President Obama criticized the Court's decision in *Citizens United* in the State of the Union Address, the Chief Justice and some of his fellow Justices were livid.⁹⁹ In a speech a few weeks later at the University of Alabama, he derisively deemed the State of the Union atmosphere a “ ‘political pep rally.’ ”¹⁰⁰ Separately at his appearance in Tuscaloosa, Chief Justice Roberts referred to the fact that members of Congress often come across the street to hear oral arguments, and added: “We always welcome these visitors to our home with courtesy and respect,” as if the Justices had not been welcomed at the Capitol during the State of the Union address.¹⁰¹

The full weight of the encounter between President Obama and the Justices at the State of the Union is hard to assess at this point, as is how the Roberts Court will ultimately rule on new and significant legal battles heading toward it tied to the Administration's

⁹⁶ See, e.g., *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (stating in a footnote of the Burger Court opinion that “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation of efficiency of a well[-]regulated militia’ ” (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939))).

⁹⁷ Joan Biskupic, *Balancing the Belief, Reality of the Second Amendment*, WASH. POST, May 13, 1995, at A7.

⁹⁸ Joan Biskupic, *Judicial-political Friction Causes Sparks to Fly: Supreme Court Observers See Rise in Tension between Justice, Elected Leaders*, USA TODAY, Jan. 24, 2011, at A4.

⁹⁹ *Id.* (noting that Justice Alito responded to President Obama's denouncement of the Court's *Citizens United* ruling by mouthing, “ ‘[N]ot true’ ”).

¹⁰⁰ *Id.*

¹⁰¹ Chief Justice John G. Roberts, Jr., Address at The University of Alabama School of Law Albritton Lecture (Mar. 9, 2010), available at <http://www.law.ua.edu/resources/roberts10/>.

policies, such as the health care overhaul. The power of the Roberts Court will depend, in part, on the power of President Obama. If the President is elected to a second term, the current composition of the Court will likely be as good as Chief Justice Roberts will have in terms of conservative Justices. But if a Republican President comes into office in 2012, the already significant legacy of John Roberts, the youngest Chief Justice appointed in 200 years, could be monumental.

PROFESSOR SCHWARTZ: In some of the Court's important decisions this past Term, there existed more humaneness than we have seen in past recent Terms. For example, a sentence of life-imprisonment for juveniles convicted of non-homicide offenses was overturned.¹⁰² Other examples include the concern the Court expressed about criminal defendants knowing about deportation consequences,¹⁰³ and the more realistic view of the limitation period for discrimination cases.¹⁰⁴ Another case exemplifying the Court's humaneness was *Florida v. Holland*,¹⁰⁵ where the defendant's lawyer in a death penalty case made a mistake regarding the limitations period for filing a habeas petition.¹⁰⁶ In past Terms, even before the Roberts Court, the Court has said that it is just too bad; that is, the lawyer's sins are visited upon the client.¹⁰⁷ There seemed to be more of a concern in some of the cases last Term for the plight of the individual.

PROFESSOR FRIEDMAN: Sometimes, it is hard to discern whether new trends in the Court are caused by changes in the composition of the Court or changes within the Justices themselves. In the

¹⁰² See *Graham*, 130 S. Ct. at 2030 (holding that a life-sentence for non-homicide crimes for juvenile offenders violated the Eighth Amendment's protection against cruel and unusual punishment).

¹⁰³ See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482, 1486 (2010) (holding that the Sixth Amendment to the United States Constitution requires counsel to inform criminal defendants of the possible deportation consequences of a guilty plea).

¹⁰⁴ See *Lewis*, 130 S. Ct. at 2199 (holding that because disparate-impact claims do not require discriminatory intent, they are not bound by the strict time limitations associated with disparate treatment claims which do require discriminatory intent).

¹⁰⁵ 130 S. Ct. 2549 (2010).

¹⁰⁶ *Id.* at 2564-65 (holding that under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which bars untimely filings for habeas corpus, attorney professional misconduct may be considered "extraordinary" circumstances, thus warranting an equitable tolling of the time limitation).

¹⁰⁷ See, e.g., *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (holding that an attorney miscalculation does not warrant equitable tolling because this would essentially allow equitable tolling in every case of attorney error, and post-conviction prisoners have no constitutional right to counsel).

1979 Term, Justice Rehnquist dissented in thirty percent of the cases.¹⁰⁸ In the Court's 2004 Term, his last year, he dissented in only seventeen percent of the cases.¹⁰⁹ Suddenly, the more conservative Justices are dissenting a lot less often.¹¹⁰ What happened? Did the Justices change or did the Court change? It is pretty obvious that they themselves did not change. It is really the shift in the composition of the Court.

The Rehnquist Court held federal laws unconstitutional in thirty-two cases.¹¹¹ The Warren Court held federal laws unconstitutional in twenty-two cases.¹¹² When state laws are declared unconstitutional, it can be due to a violation of the Commerce Clause, preemption, or many other mundane reasons.¹¹³ When a federal law

¹⁰⁸ In 1979, there were 156 opinions and of those opinions, Chief Justice Rehnquist dissented in forty-seven. See *The Supreme Court Database: 1900-2000 Analysis Case Listing*, *supra* note 6; *The Supreme Court Database: Rehnquist's Dissents in the 1979 Term*, SCDB, <http://scdb.wustl.edu/analysisOverviewIssues.php?sid=1002-SLIPKNOT-3838> (last visited Jan. 12, 2011).

¹⁰⁹ In 2001, there were eighty opinions and of those opinions, Chief Justice Rehnquist dissented in fourteen. See *The Supreme Court Database: 2004 Analysis Case Listing*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-FASTPITCH-6662> (last visited Jan. 12, 2011); *The Supreme Court Database: Rehnquist's Dissents in 2004*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-TIETACK-4613> (last visited Jan. 12, 2011).

¹¹⁰ See Marcia Coyle, *Man in the Middle: Justice Kennedy Continues His Role as Pivotal Vote on a Divided Court*, 29 NAT'L L.J. 48 (2008) (stating that Justice Kennedy in the 2006-07 Term cast the least dissenting votes of all Justices, while in the 2007-08 Term, Justice Kennedy cast nine dissenting votes, with Chief Justice Roberts casting the least dissenting votes with seven and Justice Thomas casting the most dissenting votes of all justices with seventeen).

¹¹¹ *The Supreme Court Database: 1986-2004 Cases Declaring Federal Laws Unconstitutional*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-SLIPKNOT-8165> (last visited Jan. 12, 2011).

¹¹² *The Supreme Court Database: 1953-1969 Cases Declaring Federal Laws Unconstitutional*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-LONGJOHN-9681> (last visited Jan. 12, 2011).

¹¹³ See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (stating that state law which "conflicts with federal law is 'without effect,'" and "[i]n the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law" (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981))); *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64 (1988) (holding that the residency requirement enforced by the Virginia Bar as a prerequisite to admission violated the Privileges and Immunities Clause of Article IV, § 2, cl. 1, because it denied non-state citizens a fundamental activity without it being closely related to advancing an important state interest); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 265, 274-75 (1984) (holding that the Twenty-First Amendment to the United States Constitution does not place liquor outside of the control of the Commerce Clause, and the Twenty-First Amendment is read in concert with Commerce Clause principles); *City of Phila. v. New Jersey*, 437 U.S. 617, 620-21, 628-29 (1978) (holding that a New Jersey law

is declared unconstitutional, it must be because that law violated the Constitution.¹¹⁴ The Roberts Court has declared federal laws unconstitutional in only six cases in five years.¹¹⁵ The rate is a lot lower than past Courts and that includes *Citizens United*, where the Court found bipartisan campaign laws unconstitutional.¹¹⁶

For at least three of the decisions that the Supreme Court decided this year, there have been bills introduced to overrule them.¹¹⁷ One was in response to *Morrison v. National Australia Bank, Ltd.*,¹¹⁸ which addressed the issue of whether a lawsuit can be brought in an American court for a violation that occurred abroad.¹¹⁹ There was also *United States v. Stevens*,¹²⁰ the “[c]rush videos” case.¹²¹ In *Stevens*, Congress introduced a law focused on “crush videos,” which feature the intentional torture of animals.¹²² Many of these videos “depict women slowly crushing animals to death ‘with their bare feet or while wearing high heeled shoes,’ ” appealing to a particular sexual fetish.¹²³ The third case, *New Process Steel, L.P. v. National Labor Relations Board*,¹²⁴ involved the structure of delegation by the National Labor Relations Board, in which the Supreme Court found

prohibiting the importation of solid or liquid waste originating outside of the state violated the Commerce Clause).

¹¹⁴ See *Marbury v. Madison*, 5 U.S. 137, 180 (1803) (holding that “a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument”).

¹¹⁵ *The Supreme Court Database: 2005-2009 Cases Declaring Federal Laws Unconstitutional*, SCDB, <http://scdb.wustl.edu/analysisCaseListing.php?sid=1002-HOTSPOT-1374> (last visited Jan. 12, 2011).

¹¹⁶ *Citizens United*, 130 S. Ct. at 913 (holding that the Bipartisan Campaign Reform Act of 2002, which barred corporations from using general treasury funds to make expenditures for campaign communications thirty days prior to an election, was an unconstitutional violation of the corporation’s right to political voice guaranteed under the First Amendment to the United States Constitution).

¹¹⁷ See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (effectively overturning *Morrison v. National Australian Bank, Ltd.*).

¹¹⁸ 130 S. Ct. 2869 (2010).

¹¹⁹ See Dodd-Frank Wall Street Reform and Consumer Protection Act.

¹²⁰ 130 S. Ct. 1577 (2010).

¹²¹ *Id.* at 1583.

¹²² *Id.*

¹²³ *Id.* at 1583, 1588, 1592 (quoting H.R. REP. NO. 106-397, at 2 (1999)) (holding that 18 U.S.C. § 48, criminalizing commercial creation, possession, and sale of depictions of animal cruelty was constitutionally overbroad and violated the First Amendment to the United States Constitution).

¹²⁴ 130 S. Ct. 2635 (2010).

that two members were not enough.¹²⁵ In the 1991 Term, Congress overruled five of the Title VII cases,¹²⁶ and apparently they are seeking to do the same today.

III. LOOKING AHEAD: PREVIEW OF THE 2010 TERM

DEAN CHEMERINSKY: When the Court comes back in October, for the first time in history, on the bench there will be three women, two Justices of color, and not a single veteran of World War II.¹²⁷ The lack of geographic diversity on the bench is also notable.¹²⁸ James Barron, who covers the Supreme Court for the New York Times, said "Only Staten Island . . . would be without a [J]ustice to call its own if the Senate confirms Ms. Kagan."¹²⁹ Only Justice Kennedy came from west of the Mississippi at the time of his appointment, and only he and Justice Breyer have any experience really growing up or being part of the United States west of the Mississippi.¹³⁰ Justice Kagan, like her most recent colleague Justice Sotomayor, hails from New York.¹³¹

There is also a lack of diversity in terms of the academic background of the Justices, and this is quite striking. Elena Kagan

¹²⁵ *Id.* at 2639-40 (holding that NLRB's delegation of powers to a three-member committee, pursuant to its delegation clauses, did not allow a committee to regulate with only two members).

¹²⁶ See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (overruling *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Martin v. Wilks*, 490 U.S. 755 (1989), *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

¹²⁷ See *Biographies of Current Justices of the Supreme Court*, *supra* note 1.

¹²⁸ See *id.* (noting that Chief Justice Roberts is from Buffalo, New York; Justice Scalia is from Trenton, New Jersey; Justice Kennedy is from Sacramento, California; Justice Thomas is from Georgia; Justice Ginsburg is from Brooklyn, New York; Justice Breyer is from San Francisco, California; Justice Alito is from Trenton, New Jersey; Sotomayor is from Bronx, New York; Justice Kagan is from New York, New York).

¹²⁹ James Barron, *A Conservative Bloc, a Liberal Bloc and Now, a New York Bloc*, N.Y. TIMES, May 12, 2010, at A1.

If the nomination of Elena Kagan to the Supreme Court is confirmed, she would join three others in a distinct bloc. For the first time in the [C]ourt's history, said William Treanor, the dean of Fordham Law School, it would have four [J]ustices who grew up in New York City.

Id.

¹³⁰ See *Biographies of Current Justices of the Supreme Court*, *supra* note 1.

¹³¹ See *id.*

went to Princeton and then to Harvard Law School.¹³² Sonia Sotomayor went to Princeton and then to Yale Law School.¹³³ Samuel Alito went to Princeton and then to Yale Law School.¹³⁴ John Roberts went to Harvard and then to Harvard Law School.¹³⁵

Finally, in terms of demographics, there is a lack of background as trial lawyers among these nine Justices.¹³⁶ Elena Kagan's first argument in any court was when she argued *Citizens United* in the Supreme Court last September.¹³⁷ Only Justice Sotomayor of these nine Justices had ever been a trial lawyer or trial judge for a significant period of time.¹³⁸ This could have the potential of creating a very negative consequence by leading to decisions that are not realistic in terms of what trial lawyers have to deal with on a day-to-day basis or what trial judges confront.

One of the cases on the Court's 2010 docket is *Arizona Christian Schools v. Winn*.¹³⁹ This case involves an Arizona law that allows individuals to receive to a \$500 tax credit for money that is then directed to private schools.¹⁴⁰ Individuals may provide the money to the school tuition organization ("STO") of their choice,¹⁴¹ which in turn can limit the availability of the scholarship money to specific schools as long as it is more than one school.¹⁴² Many STOs, including the three largest, restrict their scholarship money to Catholic schools or Evangelical Christian schools.¹⁴³ The Ninth Circuit held that the plaintiffs, as taxpayers, had standing to challenge the law as a

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *US Supreme Court: Justice Alito*, CORNELL UNIV. LAW SCH. LEGAL INFO. INST., <http://www.law.cornell.edu/supct/justices/alito.bio.html> (last visited Sept. 19, 2010).

¹³⁵ See *Biographies of Current Justices of the Supreme Court*, *supra* note 1.

¹³⁶ See *id.*

¹³⁷ See *Citizens United v. Federal Election Commission*, OYEZ, http://www.oyez.org/cases/2000-2009/2008/2008_08_205 (last visited Jan. 30, 2011).

¹³⁸ See Joe Stephens & Del Quentin Wilber, *Sotomayor Shaped by Stint as Prosecutor*, WASH. POST, June 4, 2009 ("The five years Sotomayor spent in the Manhattan district attorney's office . . . shaped her as a criminal prosecutor and helped form her worldview as a judge. The experience, combined with her later years as a trial judge, would make her unique among her new colleagues at the Supreme Court . . .").

¹³⁹ 130 S. Ct. 3350 (2010) (granting petition for writ of certiorari).

¹⁴⁰ *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1005 (9th Cir. 2009).

¹⁴¹ *Id.*

¹⁴² *Id.* at 1006.

¹⁴³ *Id.*

violation of the Establishment Clause.¹⁴⁴

There are two issues the Supreme Court will be confronting in *Winn*. The first issue is whether taxpayers have standing to bring this challenge as violating the Establishment Clause of the First Amendment.¹⁴⁵ In *Flast v. Cohen*,¹⁴⁶ decided in 1969, the Supreme Court said that taxpayers generally do not have standing, but may when challenging government expenditures violating the Establishment Clause in particular.¹⁴⁷ In the years since, the Court has cut back on *Flast*,¹⁴⁸ and some Justices have urged it to be expressly overruled.¹⁴⁹ Therefore, the underlying issue is whether *Flast* will survive. If the Court finds that the taxpayers do have standing, the second issue is whether the program violates the Establishment Clause of the First Amendment.¹⁵⁰

One thing that is particularly interesting about this case is that the Obama administration wrote a brief arguing that taxpayers do not have standing, and if the Supreme Court reaches the merits, it should uphold the program as constitutional.¹⁵¹ This position, of urging the Court to restrict standing to avoid the possibility of programs being held in violation of the Establishment Clause, is actually the position taken by Republicans. Democrats, on the other hand, have urged a continued wall separating church and state and would therefore want standing to exist. It will be interesting to see how this shift with regard to the Establishment Clause may influence the Court's decision and whether this case will be the vehicle through which the law is changed.

Another case to be argued in front of the Supreme Court for

¹⁴⁴ *Id.* at 1011.

¹⁴⁵ Brief for Respondents, *Winn v. Ariz. Christian Sch. Tuition Org.*, Nos. 09-987, 09-991 (petition for cert. granted May 24, 2010).

¹⁴⁶ 392 U.S. 83 (1968).

¹⁴⁷ *Id.* at 105-06 ("[T]he Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I § 8. . . . [W]henver such specific limitations are found, . . . a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress.").

¹⁴⁸ See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479 (1982) (limiting the *Flast* holding to claims challenging congressional action only, as opposed to actions of administrative agencies).

¹⁴⁹ See, e.g., *Hein*, 551 U.S. at 637 (Scalia, J., dissenting) ("*Flast* should be overruled.").

¹⁵⁰ Brief for Respondents, *supra* note 145.

¹⁵¹ Brief for the United States as Amici Curiae Supporting Petitioners at 6, *Winn v. Ariz. Christian Sch. Tuition Org.*, Nos. 09-987, 09-991 (petition for cert. granted May 24, 2010).

the 2010 Term is *Snyder v. Phelps*.¹⁵² This case deals with the right to protest at a funeral of a prior member of the military.¹⁵³ The members of the Westboro Baptist Church, led by Fred Phelps, attend military funerals to express anti-gay and anti-lesbian messages.¹⁵⁴ They do not directly seek the funerals of those who were homosexual, but instead use the military funerals as the place for expressing their anti-gay and anti-lesbian messages.¹⁵⁵

Matthew Snyder was a Marine who died in Iraq.¹⁵⁶ The members of the Westboro Baptist Church went to his funeral and held up signs stating, "God [h]ates the USA," to represent their belief that a soldier's death was God's punishment for America tolerating homosexuality.¹⁵⁷ Matthew Snyder's father, Alvin Snyder, did not see the signs, but saw a news story that showed footage of them.¹⁵⁸ He sued on several causes of action, including intentional infliction of emotional distress.¹⁵⁹ The jury awarded a large judgment in the district court, which the Judge remitted to \$5 million.¹⁶⁰ The Fourth Circuit reversed and held that the signs were lawful speech.¹⁶¹

This case is extremely difficult because it symbolizes the tension between freedom of speech and privacy. Even if the Supreme Court holds that there is no liability, there may still be other options available to state and local governments to use to protect privacy sensibility at funerals. The core principal of the First Amendment is that speech cannot be punished or be the basis for liability merely because it is offensive,¹⁶² and here, the Court may find that this speech was offensive and nothing more. However, it is likely that the Court will allow state governments to create buffer zones around cemeteries and funeral homes, similar to the buffer zones previously allowed around reproductive health facilities to keep demonstrators away.

¹⁵² 130 S. Ct. 1737 (2010) (granting petition for writ of certiorari).

¹⁵³ *Snyder v. Phelps (Snyder II)*, 580 F.3d 206, 210-11 (4th Cir. 2009), *aff'd* 130 S. Ct. 1737 (2011).

¹⁵⁴ *Id.* at 211.

¹⁵⁵ *Lance Cpl. Matthew A. Snyder: Frequently Asked Questions & Answers*, MATTHEW SNYDER, <http://www.matthewsnyder.org/FAQ.html> (last visited Jan. 6, 2011).

¹⁵⁶ *Snyder II*, 580 F.3d at 211.

¹⁵⁷ *Id.* at 211-12.

¹⁵⁸ *Id.* at 212.

¹⁵⁹ *Id.* at 211.

¹⁶⁰ *Snyder v. Phelps (Snyder I)*, 533 F. Supp. 2d 567, 597 (D. Md. 2008).

¹⁶¹ *Snyder II*, 580 F.3d at 226.

¹⁶² *Id.* at 214.

Another case to be argued before the Court this Term is *Schwarzenegger v. Entertainment Merchants Ass'n*.¹⁶³ The case involves a California law that makes it a crime to sell or rent violent video games to minors under eighteen.¹⁶⁴ Interestingly, many states have adopted such laws, and every court that has ruled on such a law has declared it unconstitutional.¹⁶⁵ The Supreme Court granted review in this case even though there was no split among the circuits or states.¹⁶⁶

The Supreme Court may find the law to be unconstitutionally vague and overbroad due to the difficulty of defining the word "violence." The law applies to games that "[e]nable[] the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics."¹⁶⁷ Even Super Mario Brothers might be regarded as a violent video game under this standard because the characters are human-like images and a lot of violence befalls them as rocks and other objects land on them.¹⁶⁸

In looking at the cases the Court has granted review, which involve federalism concerns, one distinction that becomes clear is that this is a Court that is much more willing to find express preemption than implied preemption.¹⁶⁹

For example, just a few years ago, the Court decided *Riegel v. Medtronic, Inc.*¹⁷⁰ The case involved a balloon catheter that was used in an angioplasty procedure.¹⁷¹ It exploded when it was inserted in

¹⁶³ 130 S. Ct. 2398 (2010) (granting petition for writ of certiorari).

¹⁶⁴ *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009).

¹⁶⁵ See, e.g., *Entm't Merchs. Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097, at *7, *9 (W.D. Okla. Sept. 17, 2007) (holding that a state law stating that any " 'description, exhibition, presentation or representation, in whatever form, of inappropriate violence' " is harmful to minors is unconstitutionally vague); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 648, 656 (E.D. Mich. 2006) (holding that a state law criminalizing dissemination to minors of " 'ultra-violent explicit video games[s]' " was unconstitutionally vague).

¹⁶⁶ See *Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Interactive Digital Software Ass'n v. St. Louis*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

¹⁶⁷ *Video Software Dealers Ass'n*, 556 F.3d at 954.

¹⁶⁸ Brief for Respondents at 58, *Schwarzenegger v. Entm't Merchants Ass'n*, No. 08-1448 (petition for cert. granted Apr. 26, 2010).

¹⁶⁹ Daniel E. Troy & Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 2008 CATO SUP. CT. REV. 257, 264 (2008).

¹⁷⁰ 552 U.S. 312 (2008).

¹⁷¹ *Id.* at 320.

Charles Riegel's body.¹⁷² He had to have emergency open heart surgery and was left with severe permanent injuries.¹⁷³ The device had been approved by the FDA under the Federal Medical Devices Act.¹⁷⁴ Before his death in 2004, Charles Riegel brought a tort suit against the manufacturer.¹⁷⁵ The Medical Devices Act preempts state requirements that are "different from, or in addition to, any requirement applicable . . . to the device" under federal law.¹⁷⁶ The question the Court faced was whether the federal statute preempted tort liability.¹⁷⁷ Justice Scalia wrote the opinion for the Court and said that tort liability, unlike other restrictions that only incidentally relate to the device, is a direct regulation and therefore is preempted.¹⁷⁸

The next year in 2009, the Court decided *Wyeth v. Levine*.¹⁷⁹ This involved a woman who was injected with the drug, Phenergan, for nausea.¹⁸⁰ After it was injected through the IV-push method, she developed gangrene in her forearm and it had to be amputated.¹⁸¹ The lawsuit was brought against the drug company for failing to warn physicians and patients of the higher risk of gangrene when administered through the IV-push method compared to the IV-drip method.¹⁸² The Supreme Court faced the question of whether the FDA's approval of the warning labels preempted state tort liability on a failure to warn claim.¹⁸³ The Supreme Court ruled six to three against preemption and said the tort suit could go forward.¹⁸⁴

Both cases arose in the health context. Yet, there was preemption in one and not in the other. One possible explanation for this is that the former was express preemption, and the latter was implied preemption.

This will be important to keep in mind as the Court hears

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Riegel*, 552 U.S. at 320.

¹⁷⁶ Medical Devices Act, 21 U.S.C.A. § 360k(a)(1) (West 2010).

¹⁷⁷ *Riegel*, 552 U.S. at 315.

¹⁷⁸ *Id.* at 328-29.

¹⁷⁹ 129 S. Ct. 1187 (2009).

¹⁸⁰ *Id.* at 1191.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1191-92.

¹⁸³ *Id.* at 1191.

¹⁸⁴ *Wyeth*, 129 S. Ct. at 1204.

Chamber of Commerce v. Whiting.¹⁸⁵ The case involves an Arizona law that prohibits employers from employing undocumented immigrants.¹⁸⁶ If an employer violates the law, the business can lose its business license.¹⁸⁷ The issue the Court must decide is whether the Arizona law is preempted by federal law.¹⁸⁸ Here, there is an express preemption provision that restricts states from punishing businesses that employ undocumented immigrants, except through licensing.¹⁸⁹

Another case on the 2010 docket is *Bond v. United States*.¹⁹⁰ According to the facts of the case, Ms. Bond became very excited when she discovered that her best friend was pregnant, but then later learned that her husband was the father of her friend's baby.¹⁹¹ She set out to poison and kill her best friend by looking for chemical substances which could be absorbed through the skin.¹⁹² Bond was successfully prosecuted and convicted under two federal statutes.¹⁹³ One of the statutes involved prohibiting the use of such chemical agents.¹⁹⁴ Bond argued that this statute violated the Tenth Amendment because it usurps state power.¹⁹⁵ The precise issue before the Supreme Court is whether an individual criminal defendant can raise a states' rights argument claiming the state's prerogatives under the Tenth Amendment are violated.¹⁹⁶

Another case on the 2010 docket is *Flores-Villar v. United States*.¹⁹⁷ *Flores-Villar* involves a federal law that states that a person who was born outside of the United States and has one parent who is an American citizen is eligible for citizenship if that parent spent a certain amount of time in the United States in the period pre-

¹⁸⁵ 130 S. Ct. 3498 (2010) (granting petition for writ of certiorari).

¹⁸⁶ *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860 (9th Cir. 2009).

¹⁸⁷ *Id.*

¹⁸⁸ Brief for Respondents, *Chamber of Commerce v. Whiting*, No. 09-115 (petition for cert. granted June 28, 2010).

¹⁸⁹ *Chicanos Por La Causa, Inc.*, 558 F.3d at 861.

¹⁹⁰ 131 S. Ct. 455 (2010) (granting petition for writ of certiorari).

¹⁹¹ *United States v. Bond*, 581 F.3d 128, 131 (3d Cir. 2009).

¹⁹² *Id.* at 131-32.

¹⁹³ *Id.* at 132.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 134.

¹⁹⁶ Brief for Respondents, *Bond v. United States*, No. 09-1227 (petition for cert. granted Oct. 12, 2010).

¹⁹⁷ 130 S. Ct. 1878 (2010) (granting petition for writ of certiorari).

ceding the child's birth.¹⁹⁸ If it is the mother who is the American citizen, this time period only has to be one year.¹⁹⁹ If it is the father, it has to be "at least five years after [the father's] fourteenth birthday."²⁰⁰ The question is whether the federal law violates equal protection.²⁰¹ The Court is most likely going to find it unconstitutional, because it clearly treats men and women differently without a rational reason to do so.

In 1973, then lawyer Ruth Bader Ginsburg wrote an amicus brief in *Frontiero v. Richardson*²⁰² urging the Supreme Court to use strict scrutiny as the standard for gender discrimination.²⁰³ There were four votes in support of a strict scrutiny standard, but she was unable to get the fifth vote.²⁰⁴ In 1976, the Supreme Court created a new standard of review called intermediate scrutiny, which said that gender classifications should be allowed if they are substantially related to an important government purpose.²⁰⁵

An important change occurred in the mid-1990s when women's rights organizations split among themselves.²⁰⁶ Some women's rights organizations continued to argue for strict scrutiny, but some women's rights organizations began to accept the intermediate scrutiny standard.²⁰⁷ The last case to address this issue was *United States v. Virginia*.²⁰⁸ The case involved Virginia Military Institute's policy of refusing to accept women.²⁰⁹ The Supreme Court held in a seven

¹⁹⁸ *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008).

¹⁹⁹ *Id.* at 995.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 993.

²⁰² 411 U.S. 677 (1973).

²⁰³ Edward McGlynn Gaffney, Jr., *Curious Chiasma: Rising and Falling Protection of Religious Freedom and Gender Equality*, 4 U. PA. J. CONST. L. 394, 431 (2002).

²⁰⁴ See *Frontiero*, 411 U.S. at 691 (Powell, J., concurring) (agreeing that the challenged statute unconstitutionally discriminated on the basis of gender, but refusing to agree that such classifications should be subjected to strict scrutiny).

²⁰⁵ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²⁰⁶ See Brief for Petitioner at 36, *Virginia*, 116 S. Ct. 2264 (No. 94-1941), 1995 WL 703403 ("[T]his court should now hold that such classifications are inherently suspect and subject to strict judicial scrutiny."); Brief for Women's Schools Together, Inc., as Amici Curiae Supporting Respondent, *Virginia*, 116 S. Ct. 2264 (Nos. 94-1941, 94-2107), 1995 WL 761812 (supporting intermediate scrutiny).

²⁰⁷ See Brief for Petitioner, *supra* note 206; Brief for Women's Schools Together, Inc., *supra* note 206.

²⁰⁸ 518 U.S. 515 (1996).

²⁰⁹ *Id.* at 523.

to one decision that the policy was unconstitutional.²¹⁰

Another case on the Court's 2010 docket is *Ashcroft v. al-Kidd*.²¹¹ Abdullah al-Kidd was apprehended by federal authorities and detained under the federal material witness statute.²¹² He was detained for sixteen days, and after his release, he was confined to his home.²¹³ However, his testimony was never used in a prosecution.²¹⁴ Instead, what he alleges is that the material witness statute was used to detain him for purposes of investigation.²¹⁵ The material witness statute allows the government to hold somebody as a material witness if his or her testimony is likely to be essential, and he or she is likely to be unavailable unless detained.²¹⁶

Abdullah al-Kidd may be a representative of thousands of others who are held in this way. He sued the Attorney General of the United States, John Ashcroft, saying that John Ashcroft violated his Fourth Amendment rights.²¹⁷ The Fourth Amendment allows a person to be detained by the government only if there is probable cause that he has committed a crime.²¹⁸ The strong opinion written by Judge Milan Smith, a conservative judge appointed by George W. Bush, said that probable cause is required to be shown to detain individuals under the material witness statute when the statute is "not being used for its stated purpose," which was the case here.²¹⁹ Since the government did not have probable cause to detain al-Kidd, the Ninth Circuit held his detainment to be unconstitutional and rejected any claims of immunity.²²⁰ Attorney General Ashcroft has now sought Supreme Court review and claims that as Attorney General, he has absolute immunity.²²¹

The Court will also consider *Staub v. Proctor Hospital*,²²²

²¹⁰ *Id.* at 557.

²¹¹ 131 S. Ct. 415 (2010) (granting petition for writ of certiorari).

²¹² *al-Kidd v. Ashcroft*, 580 F.3d 949, 952 (9th Cir. 2009).

²¹³ *Id.* at 953.

²¹⁴ *Id.* at 963.

²¹⁵ *Id.* at 954.

²¹⁶ *Id.*

²¹⁷ *al-Kidd*, 580 F.3d at 957.

²¹⁸ *Id.* at 965.

²¹⁹ *Id.* at 970.

²²⁰ *Id.*

²²¹ Brief for Petitioner, *al-Kidd v. Ashcroft*, No. 10-98 (petition for cert. granted Oct. 18, 2010).

²²² 130 S. Ct. 2089 (2010) (granting petition for writ of certiorari).

which involves an angiography technologist who was fired due to alleged insubordination problems.²²³ The number two person in the office, as opposed to the top person who actually engaged in the firing, made a number of deprecating statements about the person based on how much work he was missing because of his reservist military service.²²⁴ Staub sued alleging that he was fired because of his military service.²²⁵ The issue is whether the statements of the number two person in command can be imputed to the number one person who never made such statements.²²⁶

There are also two Confrontation Clause cases in which the Court granted plenary review this Term which will have a great impact on evidence law. One of the biggest changes in evidence law up until this Term occurred when the Supreme Court held that prosecutors cannot use testimonial statements from unavailable witnesses even if they are reliable, based on *Crawford v. Washington*.²²⁷ The key question that still remains is: What is considered testimonial? In *Crawford*, Justice Scalia's opinion said the Court was not going to attempt a definition.²²⁸ The only case to define it since *Crawford* came a couple of years later in *Davis v. Washington*.²²⁹ The case was actually two cases that came together when the Court decided the label.²³⁰ The Supreme Court said if it is an emergency and an individual is describing ongoing events, then it is not testimonial.²³¹ Therefore, the prosecutor can use the statements even if the witness is not available and there is no opportunity for cross-examination.²³² However, if the witness is describing past events and it is not an emergency, then it is testimonial and the prosecutor cannot use the statements.²³³

A similar issue was raised in a 2008 case known as *Giles v.*

²²³ *Staub*, 560 F.3d 647, 650-51 (7th Cir. 2009).

²²⁴ *Id.* at 655.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ 541 U.S. 36, 68-69 (2004).

²²⁸ *Id.* at 68.

²²⁹ 547 U.S. 813 (2006).

²³⁰ *Id.* at 817, 819.

²³¹ *Id.* at 822.

²³² *See id.* at 821 (stating that only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause" and therefore limited by the clause's requirements).

²³³ *Id.* at 822.

California.²³⁴ Giles was prosecuted for the murder of his girlfriend.²³⁵ The week before the murder, Giles's girlfriend made statements to police describing a domestic-violence incident in which Giles threatened to kill her if she cheated on him.²³⁶ The issue in the case was whether the girlfriend's testimonial statements could be used as evidence, since her unavailability was due to the defendant's own actions.²³⁷ She could not testify because she was deceased. The Supreme Court rejected the application of the forfeiture by wrongdoing exception in situations where the actions were not designed to prevent the victim from testifying, and therefore her statements were inadmissible.²³⁸ The dissent objected in terms of the functional consequences in a domestic violence context, like that which existed in the case.²³⁹ Yet, the majority did not entertain this idea.²⁴⁰

The first Confrontation Clause case on the Court's docket is *Michigan v. Bryant*.²⁴¹ Bryant was shot and gravely wounded.²⁴² Five officers found him lying on the ground six blocks from his home.²⁴³ An officer asked him what happened, and the victim described who shot him.²⁴⁴ Several hours later, the victim died in the hospital.²⁴⁵ The prosecutor wanted to use the victim's statements as evidence in the criminal prosecution.²⁴⁶ Even if the statements are held to be testimonial, since there was never a chance for cross-examination, they are inadmissible.²⁴⁷ The Michigan Supreme Court ruled four-to-three that the statements are testimonial and cannot be used.²⁴⁸ The dissent took the opposite position and found it to be objectively reasonable to conceive that the officers' questions were directed at "addressing an ongoing emergency[.]" which would make

²³⁴ 554 U.S. 353 (2008).

²³⁵ *Id.* at 356.

²³⁶ *Id.* at 356-57.

²³⁷ *Id.* at 355.

²³⁸ *Id.* at 377.

²³⁹ *Giles*, 554 U.S. at 406.

²⁴⁰ *See id.* at 376.

²⁴¹ 130 S. Ct. 1685 (2010) (granting petition for writ of certiorari).

²⁴² *People v. Bryant*, 768 N.W.2d 65, 67 (Mich. 2009).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 68.

²⁴⁷ *Bryant*, 768 N.W.2d at 68.

²⁴⁸ *Id.* at 66-67.

the statements non-testimonial.²⁴⁹ It will be interesting to see how the Court addresses the case because it falls between the extreme examples created by *Davis* and *Crawford*.²⁵⁰ Unlike *Davis*, the victim was not confronting an immediate threat when making the statements.²⁵¹ However, it also does not closely resemble the non-testimonial statements made hours later in a police station in *Crawford*.²⁵² In this case, the shooting had just occurred, the location of the shooter was still unknown, and the safety of both the police and the victim were still uncertain.²⁵³ The case demonstrates the difficulty courts have in making testimonial distinctions where the facts of the case pose a “close question.”²⁵⁴

The second Confrontation Clause case is a follow-up to the Supreme Court’s decision in *Melendez-Diaz v. Massachusetts*.²⁵⁵ In *Melendez-Diaz*, the Supreme Court held that when the prosecutor seeks to introduce a laboratory report into evidence, the prosecutor must put the laboratory analyst on the stand and make the laboratory analyst available for cross-examination by the defense.²⁵⁶ Justice Kennedy in his dissent said that there is going to be prosecutions that cannot go forward because the analyst is not available.²⁵⁷ Justice Scalia’s response to this argument was that this is what the Sixth Amendment requires.²⁵⁸ *Bullcoming v. New Mexico*²⁵⁹ raises the issue of whether “the prosecution [can] introduce testimonial statements of a non-testifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis.”²⁶⁰ Hopefully, the Court’s opinion in *Bullcoming*, in addition to the other cases on the 2010 Term docket, will help give answers to these issues and the other unresolved issues confronting the Court this Term.

²⁴⁹ *Id.* at 79 (Corrigan, J., dissenting).

²⁵⁰ *Id.* at 82.

²⁵¹ *Id.*

²⁵² *Bryant*, 768 N.W.2d at 80.

²⁵³ *Id.* at 82.

²⁵⁴ *Id.*

²⁵⁵ 129 S. Ct. 2527 (2009).

²⁵⁶ *Id.* at 2532.

²⁵⁷ *Id.* at 2549 (Kennedy, J., dissenting).

²⁵⁸ *Id.* at 2540 (majority opinion).

²⁵⁹ 131 S. Ct. 62 (2010) (granting petition for writ of certiorari).

²⁶⁰ Brief for Petitioner, *Bullcoming v. New Mexico*, No. 09-10876 (petition for cert. granted Sept. 28, 2010).

