October Term 2010

News Analysis

A Significant Term, With Bigger Cases Ahead

By ADAM LIPTAK

Published: June 29, 2011, The New York Times, pp. A1, A14

WASHINGTON — The Supreme Court term that ended Monday was marked by accomplishment and anticipation. The court continued its work on two signature projects of Chief Justice John G. Roberts Jr.: defending free speech and curbing big lawsuits. And it dropped occasional hints about the blockbusters on the horizon.

The First Amendment dominated the term, with the court ruling for funeral protesters, the makers of violent video games, drug marketers and politicians who decline public financing. The American commitment to free expression, the court said, cuts across politics and commerce, requires tolerance of offensive speech and forbids the government from stepping in when powerful voices threaten to dominate public debate.

In cases involving the nation's largest private employer, Wal-Mart, and its second-largest cellphone company, AT&T Mobility, the court tightened the rules for class actions and made it easier for companies to do away with class actions entirely by using form contracts.

All of the decisions this term were scrutinized for clues about the arc of the Roberts court as it settles into a period of consolidation and awaits a series of colossal cases, notably the challenges to the health care law championed by President Obama. This term was significant, but the next one may include the most important clash between the Supreme Court and a president since the New Deal.

In the just-completed term, the court's commitment to free speech and its growing business docket sometimes intersected, as in the cases on drug marketing and video games.

"For the conservatives," said Lee Epstein, a professor of law and political science at Northwestern, "the First Amendment continues to trump other values, especially if they can help business in the process."

On Monday, the court agreed to hear another First Amendment case of interest to the business community, this one concerning the Federal Communications Commission's broadcast indecency rules.

Business groups said their success in the court during the term was mixed, and the numbers support them, as the court repeatedly ruled for plaintiffs in employment and securities cases.

But business groups won the most consequential cases, including what a U.S. Chamber of Commerce lawyer called "the triple crown of this year's business docket."

The lawyer, Robin S. Conrad, executive vice president of the chamber's litigation unit, was referring to the Wal-Mart and AT&T cases, along with one rejecting a suit from six states against several power companies over carbon dioxide emissions.

"These three cases," she said, "were easily the most important business cases of the term."

The justices decided about 20 percent of their cases on 5-to-4 votes, which is in line with recent terms. But the number of 5-to-4 decisions in which the court's four liberals found themselves on one side and its four conservatives on the other was high: 12 of the 14 closely divided cases were configured that way, with Justice Anthony M. Kennedy casting the decisive vote.

The justices like to say they are merely applying legal principles to facts without regard to ideology. But the chances of nine truly independent judges finding themselves in just two configurations a dozen times out of 14 is remote. Professor Epstein and Andrew D. Martin, a political scientist at Washington University in St. Louis, calculated the odds as 1 in 44.2 quintillion.

Justice Kennedy, the court's swing justice, voted with its more conservative members in those dozen cases two-thirds of the time.

A theme ran through those decisions, said Judith Resnik, a law professor at Yale. "The same majority of five has imposed new barriers to claimants," she said, referring to the Wal-Mart and AT&T cases, along with ones about prosecutorial immunity and injury suits against the makers of generic drugs. As a consequence, she said, "the doors are closing in both federal and state courts."

Jeffrey L. Fisher, a law professor at Stanford, said that was partly because the justices were wary of judicial power. "This is a court that is, oddly enough, very suspicious of the courts as a place to vindicate rights," he said. "The hostility is amped up when it's a civil-rights-type claim."

The trends were not uniform, and Justice Kennedy joined his more liberal colleagues to cast decisive votes in cases ordering California to reduce its prison population and requiring children's ages to be taken into account in deciding whether Miranda warnings are needed.

The court seems to have entered a period of stability. After 11 years with no changes in personnel through 2005, the court welcomed four new members in five years, starting with Chief Justice Roberts and ending with Justice Elena Kagan last year. There have been no hints of further retirements.

For the first time, there are three women on the Supreme Court: Justices Kagan, Ruth Bader Ginsburg and Sonia Sotomayor. They are all reliable members of the court's liberal wing and were very often in agreement, according to statistics compiled by Scotusblog. Justice Kagan voted with Justice Sotomayor 94 percent of the time and with Justice Ginsburg 90 percent of the time.

Only two justices agreed more often than Justices Kagan and Sotomayor, who were both appointed by Mr. Obama. Chief Justice Roberts and Justice Samuel A. Alito Jr., both appointed by President George W. Bush, agreed 96 percent of the time.

The new members of the court are active participants at arguments. “They bring a lot of energy to the court,” said Lisa S. Blatt, a Supreme Court specialist at Arnold & Porter. “It’s a more exciting court in general.”

In remarks at a judicial conference on Saturday, Chief Justice Roberts said the court must work harder “to allow the lawyers to give us some kind of answer and to make sure we’re not stepping on our colleagues’ questions.”

Justice Kagan was recused from about a third of the term’s decisions, a byproduct of her service as United States solicitor general. Her absence caused the court to deadlock in two cases and in part of a third.

Justice Kennedy was the member of the court most often in the majority — 94 percent of the time. But Chief Justice Roberts voted with the majority almost as often — 91 percent of the time. The chief justice dissents sparingly and has worked to produce decisions in which the court can find common ground.

The term did not produce a blockbuster like the Citizens United campaign-finance decision last year on corporate political speech or the Heller decision in 2008 on gun rights.

But there are major cases in store.

“Next term is going to be the term of the century,” said Thomas C. Goldstein, a leading Supreme Court advocate and the publisher of Scotusblog.

There is a chance the court will confront not only challenges to the health care law but also cases involving same-sex marriage, immigration and affirmative action. The next term’s big decisions will land a year from now, just as the 2012 presidential election season kicks into high gear.

The challenges to the health law, now making their way through several federal appeals courts and raising fundamental questions about the limits of the federal government’s power, are the subject of particularly intense interest. As a consequence, every decision this last term was scrutinized for hints about the justices’ attitudes toward the central argument in the suits — whether Congress overstepped its constitutional authority under the Commerce Clause in requiring some people to buy health insurance.

On Thursday, Justice Stephen G. Breyer, writing for himself and Justices Ginsburg and Kagan in a case about the marketing of drugs, said health care laws “regulate commerce and industry.”

A week earlier, Justice Kennedy, writing for a unanimous court in a 10th Amendment case, used sweeping language to tie federalism concerns to individual liberty, a notion central to the arguments of the states and groups challenging the health care law.

“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power,” Justice Kennedy wrote.

Major Rulings of the 2010-11 Term

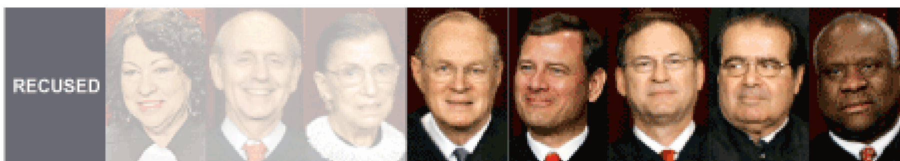
Justices who voted with the majority are denoted with a darker image.

	Kagan	Sotomayor	Breyer	Ginsburg	Kennedy	Roberts	Alito	Scalia	Thomas
AGE	51	57	72	78	74	56	61	75	63
APPOINTED BY	Obama	Obama	Clinton	Clinton	Reagan	G.W. Bush	G.W. Bush	Reagan	Bush
JOINED COURT IN	2010	2009	1994	1993	1988	2005	2006	1986	1991

Prosecutors cannot be sued for failing to turn exculpatory evidence over to a death row inmate.

Taxpayers cannot sue over a public school subsidy program that gives money to private religious schools.

Court upholds an Arizona law that imposes harsh penalties on businesses that hire illegal workers.



Court rejects a class action suit brought by workers at Wal-Mart. Though unanimous on a more minor point, the court split on the question of when workers can band together.

An Arizona campaign finance law impinges on a candidate's freedom of speech.

Court rules that overcrowding constitutes a violation of a prisoner's right to health care and orders a reduction in California's prison population.

A state law restricting the sale of violent video games to minors violates the First Amendment right to free speech.

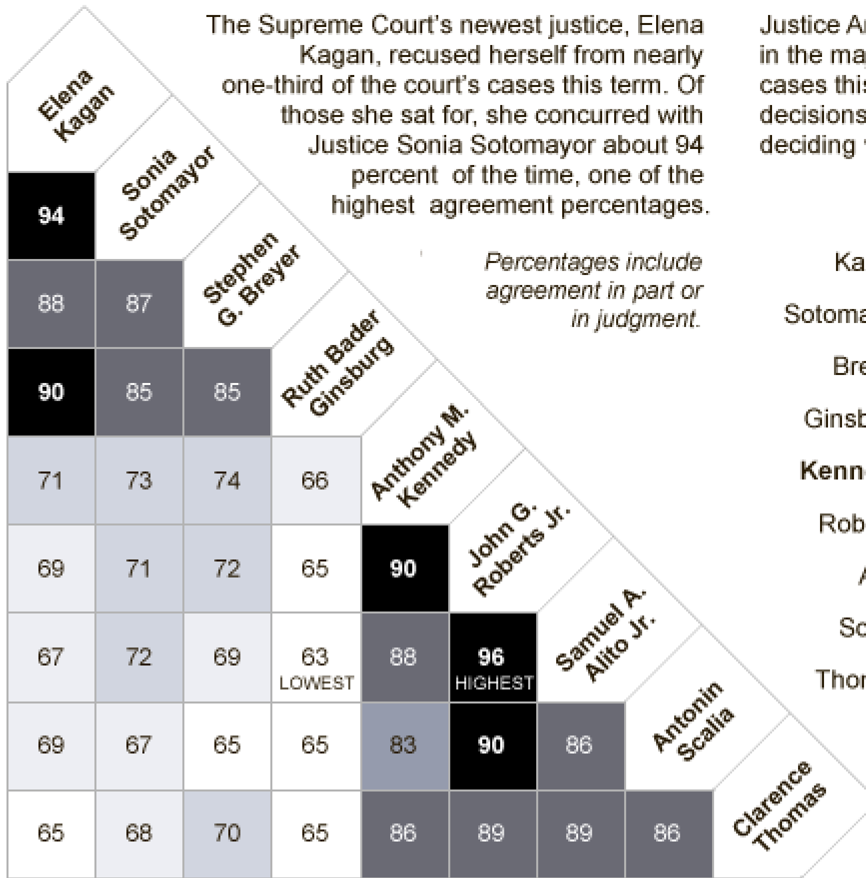
The First Amendment protects individuals who stage a protest near the funeral of *a military service member.

States cannot sue utility companies for contributing to climate change.

How Often They Agreed This Term

The Supreme Court's newest justice, Elena Kagan, recused herself from nearly one-third of the court's cases this term. Of those she sat for, she concurred with Justice Sonia Sotomayor about 94 percent of the time, one of the highest agreement percentages.

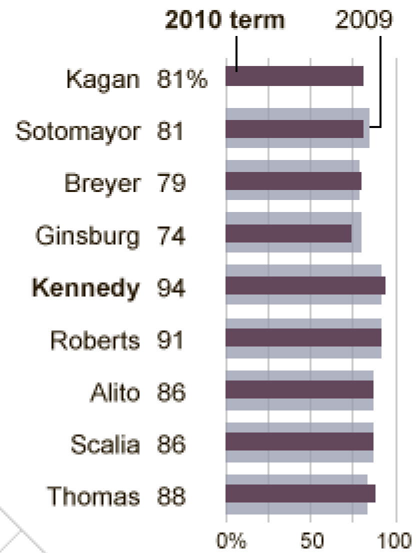
Percentages include agreement in part or in judgment.



	Elena Kagan	Sonia Sotomayor	Stephen G. Breyer	Ruth Bader Ginsburg	Anthony M. Kennedy	John G. Roberts Jr.	Samuel A. Alito Jr.	Antonin Scalia
Sonia Sotomayor	**94**							
Stephen G. Breyer	88	87						
Ruth Bader Ginsburg	**90**	85	85					
Anthony M. Kennedy	71	73	74	66				
John G. Roberts Jr.	69	71	72	65	**90**			
Samuel A. Alito Jr.	67	72	69	63 LOWEST	88	**96** HIGHEST		
Antonin Scalia	69	67	65	65	83	**90**	86	
Clarence Thomas	65	68	70	65	86	89	89	86

How Often They Were in the Majority

Justice Anthony M. Kennedy was in the majority in 94 percent of the cases this term. In split 5-to-4 decisions, he was most often the deciding vote.



July 4, 2011, *8:30 pm*, The New York Times

What Does the First Amendment Protect?

By STANLEY FISH

In the two First Amendment cases handed down last week — one about limiting sales of violent video games to children, the other about Arizona's attempt to make public financing more attractive to candidates — the dissenting justices contend that the protection of speech is not really the issue at all.

In his dissent to Brown v. Entertainment Merchants, Justice Stephen Breyer declares that this is not a case, as the majority claims, about "depictions of violence"; rather it is a case about "protection of children." What Breyer is doing (or attempting to do) is shift the category under which the matter of dispute is to be considered. According to Justice Antonin Scalia, writing for the majority, depictions of violence merit First Amendment protection because they are speech, not acts. Breyer replies that the video games in question are in fact acts, although they are, he acknowledges, acts "containing an expressive component." That component, he argues, does not outweigh or render irrelevant the "significant amount of physical activity" involved in playing these games, activity in the course of which players do not merely see violent things but do violent things.

The danger Breyer wants to protect children from is not the danger of being exposed to violence, but the danger of being initiated into violence. This happens (or can happen) when game-players are required not merely to view violent acts passively, but to perform them by making a succession of choices (with a button or joystick) that decide the fate of the characters they have created.

Justice Samuel Alito, who concurs in the result because he believes the law to have been poorly drafted but disagrees with the majority's reasoning, provides an example. Compare, he says, the reader of a novel depicting violence with a video-game player "who creates an avatar that bears his own image; who sees a realistic image of the victim … in three dimensions; who is forced to decide whether or not to kill the victim and decides to do so; who then pretends to grasp an axe, to raise it above the head of the victim; who hears the thud of the axe hitting her head and her cry of pain; who sees her split skull and feels the sensation of blood on his face and hands." Are these experiences the same?, Alito asks, and answers no. The difference, which Scalia labors to deny ("Certainly the *books* we give to children … contain no shortage of gore"), is sufficient, Alito thinks, to justify the state's interest in regulation, even though he finds the present attempt at regulation flawed.

Breyer frames the issue precisely when he declares, "This case is ultimately less about censorship than it is about education." Education is important in a democracy, he explains, because it gives us a means of raising "future generations committed cooperatively to making

our system of government work.” The implication is that a generation immersed in violent video-games will be committed not to cooperation but to actions less helpful to the flourishing of the country.

Justice Clarence Thomas, writing another dissent disguised as a concurrence, shares Breyer’s concern that children be protected from influences that might turn them into damaged citizens. He reminds us of Noah Webster’s admonition that children’s minds be “untainted till their reasoning faculties have acquired strength and the good principles which may be planted … have taken deep root”; and he cites a 1979 opinion in which Justice Lewis F. Powell declares that “the State is entitled to adjust its legal system to account for children’s vulnerability.” Children are vulnerable, according to this theory, because they have not yet developed the ability to distance themselves from what is put before them. Interactive video games increase this vulnerability and lead not merely to the consuming of bad images, but to the possibility of becoming a bad person. This is the corruption that will follow, Alito fears, from allowing “troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.”

Breyer drives the point home: “…extremely violent games can harm children by rewarding them for being violently aggressive in play, and thereby often teaching them to be violently aggressive in life.” Violent video games, in short, are not representations that deserve First Amendment protection; they are acts with harmful consequences and children deserve to be protected from *them*.

Although its subject matter could not be more different, Arizona Free Enterprise v. Bennett, displays the same opposition between a libertarian concern for freedom and a consequentialist concern for the corruption that attends unregulated activity. In this case it is not a child but the political system that is in danger of corruption, and the source of corruption is not a violent game but the desire of private individuals to purchase the votes of office-holders.

That at least is the view of Justice Elena Kagan, writing in dissent: “Campaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system.” In Kagan’s formulation, “private money” equals “special interests,” whereas those who “rely on public, rather than private moneys, are ‘beholden [to] no person.’” Therefore by “supplanting private cash, public financing eliminates the source of political corruption.”

No says Chief Justice John G. Roberts, writing for the majority. Arizona’s public financing scheme, he contends, is an unconstitutional restriction on free speech because it penalizes privately financed candidates for being successful. Expenditures by privately financed candidates and the groups supporting them trigger the awarding of matching funds to candidates who have accepted the limits that come along with public funding. Roberts concludes that “any increase in speech is of one kind … that of publicly financed candidates.” So even if “the matching funds provision did result in more speech … in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates.”

But that parentheses — "and thus reducing" — is a little too fast. How exactly does the fact that in response to your expenditures an opponent with fewer resources will be given additional funds reduce *your* speech? You can still get to spend as much as you want and to say as much as you want. What you don't get to do is overwhelm the voices of less affluent candidates and their supporters. As Kagan points out, "what petitioners demand is essentially a right to quash others' speech … they would prefer the field to themselves, so that they can speak free from response." The Arizona law, she adds, can hardly be characterized as a restriction on speech..

It follows, Kagan asserts, that "public financing furthers a compelling interest" — the prevention of corruption — and does so without diminishing anyone's speech rights. The conclusion, she believes, is inescapable "[e]xcept in this Court," where the majority declares that the state interest in leveling the playing field "cannot justify undue burdens on political speech." But, to make the point again, there is no burden unless being prevented from being the only speaker with a megaphone is a burden, and it is not. In the majority decision, a compelling state interest is set aside because of a restriction on speech that has not occurred.

In some exasperation, Kagan remarks, "Only one thing is missing from the Court's response: any reasoning to support [its] conclusion." That's not quite right. The reasoning is contained in an assumption that is the reverse of Kagan's: private money, rather than being the vehicle of corruption, is the vehicle of speech, and therefore you can't have too much of it, no matter what its effects. The First Amendment, says Roberts, "embodies our choice as a Nation that, when it comes to … speech, the guiding principle is freedom—the 'unfettered interchange of ideas' — not whatever the State may view as fair."

Roberts does not have to reply to Kagan's points — he can even concede them — because in his view they are irrelevant. "When it comes to protected speech, the speaker is sovereign." Other considerations (like corruption and fairness) may be in play, but the rights of the speaker — in this case the rights of the spender — are paramount. They are what the First Amendment protects. Kagan disagrees: "The First Amendment's core purpose is to foster a healthy vibrant political system full of robust discussion and debate," and the Arizona law, with its mechanism for increasing participation is, she maintains, true to that purpose.

And there you have it: a clash between the worship of freedom of speech and a concern for the quality of public life in relation to which free speech may sometimes be asked to take a back seat. It is the same clash that pits the freedom to play video games against society's interest in fostering a generation of young adults responsive to its ideals and aspirations. We have seen this before — in the pornography cases, in the crush-video case, in the case upholding the right of an anti-gay ministry to picket the funerals of soldiers — and we shall certainly see it again.