



Roberts at 10: Chief Justice Roberts and Big Business

By Tom Donnelly

I. Introduction

In June 2013, legal commentator Jeffrey Rosen interviewed Justice Elena Kagan at the Aspen Ideas Festival. This event came on the heels of an historic (and contentious) Term. In the Term's closing days, the Roberts Court issued opinions on a range of hot-button topics, weighing in on the issue of marriage equality,¹ largely punting on the constitutionality of affirmative action,² and voting 5-to-4 to gut the Voting Rights Act.³ In addition to these headline-grabbing blockbusters, the Court's business docket also ended with a bang, with the Court deciding a series of ideologically divided cases on issues including workplace discrimination, arbitration, drug safety, and environmental protection.⁴ Although these decisions covered a wide range of issue areas, each decision had two things in common: 1) a cohesive (and victorious) bloc of conservative Justices siding with the business community, and 2) a scathing dissent from one (or more) of the Court's progressives, including a powerful oral dissent by Justice Ruth Bader Ginsburg accusing the Chief Justice and the Court's conservative majority of being "blind to the realities of the workplace."⁵

Given this context (and Justice Kagan's own blistering dissent in an important arbitration case⁶), it's perhaps little surprise that Rosen asked Justice Kagan a question that's been on the minds of many legal commentators throughout John Roberts's tenure as Chief Justice: "Is this a pro-business Court?"

While Justice Kagan initially hedged, she eventually settled on a stinging—if measured—critique of the Roberts Court's business jurisprudence: "I think there were a number of cases where the Court made it more difficult for injured persons to come to court and to use federal and state law to hold business to account for injuries that they've done."⁷ Justice Kagan's

¹ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

² *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

³ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

⁴ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Koontz v. St. John's River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

⁵ Steven Greenhouse, *Supreme Court Raises Bar to Prove Job Discrimination*, N.Y. TIMES, June 24, 2013, <http://www.nytimes.com/2013/06/25/business/supreme-court-raises-bar-to-prove-job-discrimination.html>.

⁶ *Italian Colors Rest.*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

⁷ Interview by Jeffrey Rosen with Justice Elena Kagan, *Is the Roberts Court a Pro-Business Court?*, Aspen Inst. (June 29, 2013), <http://www.aspenideas.org/session/justice-elena-kagan-aspen-ideas-festival#oevJTy5kmcx>.

critique matched similar analyses by various news outlets and legal commentators,⁸ which have, in turn, led to new scholarly attempts to quantify the Roberts Court's pro-business leanings⁹ and new political attacks alleging that the Roberts Court is doing the bidding of big business.¹⁰ In the process, the "Corporate Court" story has become one of the defining stories of the Roberts Court.

This snapshot—the latest in our year-long look at the first decade of the Roberts Court—offers Constitutional Accountability Center's own perspective on the "Corporate Court" story. To be sure, we come to it with our own history. Since 2010, we have tracked the Supreme Court activities of the U.S. Chamber of Commerce and released empirical studies covering our findings. These studies document a sharp increase in the Chamber's success rate before the Court since both Chief Justice Roberts and Justice Alito were confirmed. These studies show not only that the Chamber now wins the vast majority of its cases each Term, but also documents the existence of a sharp ideological divide on the Roberts Court in favor of the Chamber, with the Court's conservatives virtually certain to rule in favor of the Chamber in closely decided cases. In this snapshot, we draw upon this data—and our years of experience analyzing the Court's business cases—to explore the Chief Justice's individual track record in the Court's business cases, as well as larger trends on the Court that he leads.

With a number of important business cases already on the docket for next Term, now is an opportune time to look back at the Chief Justice's track record in this area. Indeed, when the Court reconvenes for its new Term in October, the Chief Justice and his conservative colleagues will return to a number of areas in which they've already pushed the law in a pro-business direction, including the rules and procedures that govern class actions (*Campbell-Ewald v. Gomez* and *Tyson Foods v. Bouaphakeo*) and arbitration (*DirectTV v. Imbrugia*). They will also take up an important access-to-courts case, which will address Congress's authority to open up the courthouse doors to plaintiffs accusing companies of violating federal law (*Spokeo v. Robins*). From the Chamber's perspective, each of these cases "presents an opportunity to rein in abusive litigation."¹¹ For workers and consumers alleging corporate misdeeds, these cases are all about access to justice.

⁸ A.E. Dick Howard, *Ten Things the 2012-13 Term Tells Us About the Roberts Court*, 99 VA. L. REV. ONLINE 48 (2013); Erwin Chemerinsky, *Justice for Big Business*, N.Y. TIMES, July 1, 2013, <http://www.nytimes.com/2013/07/02/opinion/justice-for-big-business.html>; Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, May 4, 2013, <http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html>; Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?pagewanted=all&_r=0.

⁹ Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

¹⁰ Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195 (2015); Sen. Elizabeth Warren, Speech to the American Constitution Society: The Corporate Capture of the Federal Courts (June 13, 2013), <https://www.youtube.com/watch?v=9rbA8wbuHnU>.

¹¹ Brief for the Chamber of Commerce et al. as *Amici Curiae* Supporting Petitioner at 2, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. June 6, 2014).

In the end, although sometimes flying under the radar, the Court’s business cases often have far-reaching consequences for the average American. This snapshot seeks to capture the overall magnitude of the Court’s pro-business leanings, the Chief Justice’s role in the larger story, and the effects of the Court’s business cases on individual Americans.

II. John G. Roberts: The Business Community’s “Go-To” Lawyer Becomes Chief Justice

During his confirmation hearing, then-Judge John Roberts faced a pointed question about his pro-business rulings as a judge on the United States Court of Appeals for the D.C. Circuit. Referencing a study of Roberts’s voting record by Duke Professor Katherine Fisk, Senator Dianne Feinstein posed the following question: “[Fisk] made this prediction: you’re going to be a fairly reliable vote against workers’ rights across the board. Would you respond to that, please?”¹² Roberts quickly rejected the study, explaining that, as a judge, he often ruled against corporations and that business cases—like all cases—“depend[] upon the particular law and the particular facts.”¹³ While blockbuster business decisions by the Supreme Court in such cases as *Citizens United v. FEC*¹⁴ and *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁵ were still years away, Senator Feinstein had already introduced a line of questioning that would help define John Roberts’s tenure as Chief Justice.

Although Roberts had divided his pre-judicial career between government service and private practice, during his time at the law firm Hogan & Hartson, he, not surprisingly, represented an array of businesses and business groups, including Toyota, Fox Television, the National Mining Association, and the U.S. Chamber of Commerce—as is true of most (if not all) partners at major law firms, whether progressive, conservative, or non-ideological.¹⁶ He also served on the Legal Advisory Council of the National Legal Center for the Public Interest, whose mission was to promote “the rights of individuals, free enterprise, private ownership of property, balanced use of private and public resources, limited government, and a fair and efficient judiciary.”¹⁷ He was also a frequent participant in press briefings sponsored by the Washington Legal Foundation, a conservative legal group that regularly litigates on behalf of

¹² *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 427 (2005), available at <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/content-detail.html> [hereinafter *Confirmation Hearing*].

¹³ *Id.* at 427-28.

¹⁴ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

¹⁶ Alliance for Justice, *Preliminary Report on the Nomination of D.C. Circuit Judge John G. Roberts to the United States Supreme Court*, at 3 (2005),

https://web.archive.org/web/20051001052242/http://www.independentjudiciary.com/resources/docs/John_Roberts_Report.pdf; Rosen, *Supreme Court Inc.*, *supra* note 8; see also Neil A. Lewis, *An Ultimate Capital Insider*, N.Y. TIMES, July 20, 2005, http://www.nytimes.com/2005/07/20/politics/politicsspecial1/an-ultimate-capital-insider.html?_r=0 (noting that Hogan & Hartson “attract[ed] a flock of corporate clients”).

¹⁷ Alliance for Justice, *supra* note 16, at 2-3 (quoting Nat’l Legal Ctr. for the Pub. Interest, *Mission*, <http://www.nlcpi.org/mission.htm> (last visited June 22, 2005)).

business interests.¹⁸ However, it's worth noting that Roberts also took on cases defending the environment, as well as the weak and the vulnerable.¹⁹ He eventually secured a seat on the D.C. Circuit before being nominated by President George W. Bush to the Supreme Court.

During his Supreme Court confirmation process, Roberts had strong support from the business community, including the U.S. Chamber of Commerce.²⁰ Leading Supreme Court advocate (and SCOTUSblog founder) Tom Goldstein in fact described Roberts as “the go-to lawyer for the business community” and as the “candidate . . . they knew best.”²¹ A statement by former Michigan Governor John Engler, representing the National Association of Manufacturers, bears this out. When strongly endorsing Roberts’s nomination, Governor Engler explained, “John Roberts understands the importance of clarity when deciding cases and the practical consequence of decisions for business. . . . [N]one of the current members of the Court come from a recent private-sector kind of background. Judge Roberts does. He brings that. Accordingly, if confirmed, . . . Roberts will add an important voice to the Court’s deliberations because of his strong experience of how litigation affects major commercial transactions.”²²

The remainder of this snapshot will consider whether Governor Engler’s prediction was right. First, it will examine the Roberts Court’s track record as a whole. Second, it will consider Chief Justice Roberts’s individual role in the Court’s business cases, including his votes and his opinions. Finally, it will examine one important line of Roberts Court business cases, addressing state and federal efforts to regulate prescription drug safety, which are illustrative of a larger theme in the Court’s business cases—corporate accountability.

III. The Roberts Court and Big Business

Ever since John Roberts became Chief Justice and Justice Samuel Alito succeeded Justice Sandra Day O’Connor, the Court—and, in particular, its conservative wing—has delivered a series of important victories to the business community on a range of issues, for instance, allowing corporations to flood our elections with campaign cash,²³ cutting back on the ability of injured consumers and workers to bring class actions against businesses for their alleged misdeeds,²⁴ immunizing generic drug manufacturers from liability for harm done by their products,²⁵ weakening workplace protections under federal antidiscrimination laws,²⁶ and

¹⁸ *Id.* at 3.

¹⁹ Michael Grunwald, *Roberts Cultivated an Audience with Justices for Years*, WASH. POST, Sept. 11, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/10/AR2005091000807.html>.

²⁰ Rosen, *Supreme Court Inc.*, *supra* note 8.

²¹ *Id.*

²² *Confirmation Hearing*, *supra* note 12, at 536.

²³ *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁴ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

²⁵ *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

²⁶ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

cutting off access to the courts in favor of mandatory arbitration.²⁷ Furthermore, some of the Roberts Court's most high-profile (and infamous) decisions—including *Ledbetter* and *Citizens United*—magnified corporate power in the workplace and at the ballot box. While these cases establish that the Roberts Court has often voted in favor of the business community in discrete (if important) cases, the question remains how best to capture any larger pro-business trends at the Court.

Perhaps the most comprehensive study to date was conducted by Lee Epstein, William Landes, and Judge Richard Posner, with its findings published in the *Minnesota Law Review*.²⁸ As part of their study, Epstein, Landes, and Posner examined all Supreme Court cases decided between OT 1946 and OT 2011 in which a business was a party on one side of the case, but not both—a total of 1,759 cases.²⁹ Looking at larger trends at the Court, the Epstein-Landes-Posner study observed a drop in support for business during the Warren Court and a large increase during the Roberts Court, with the Roberts Court itself “much friendlier to business than either the Burger or Rehnquist Courts.”³⁰ Furthermore, looking at the voting records of the individual Justices, the Epstein-Landes-Posner study concluded that all five of the Roberts Court's conservatives are among the ten most pro-business Justices since 1946, with Justices Alito and Roberts as numbers one and two (of 36 total Justices).³¹

Since 2010, Constitutional Accountability Center has conducted our own assessment of the Court's business cases, focusing on cases in which the U.S. Chamber of Commerce has participated, either as a party or an *amicus curiae*. Our reason for focusing on the Chamber's participation is simple: the Chamber's litigation wing, the U.S. Chamber Litigation Center, by its own account, serves “as the voice of business in the courts” on issues of national concern to the business community, and the Chamber's Litigation Center has, indeed, filed *amicus* briefs in many of the Court's most important business cases in recent Terms—whether or not a business was actually a party in the case.³²

As part of our examination of the Supreme Court's Chamber docket, we have analyzed every opinion in a case in which the Chamber participated that was issued by the Roberts Court since Justice Alito was confirmed in early 2006—a universe of 142 cases to date. During that period, a cohesive five-Justice majority on the Court—Chief Justice Roberts and his conservative colleagues (Justices Alito, Kennedy, Scalia, and Thomas)—has produced victories for the Chamber's position in the vast majority of its cases. In fact, our analysis shows that the members of the Court's conservative majority are tightly bunched in their overall support for

²⁷ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

²⁸ Epstein et al., *supra* note 9.

²⁹ *Id.* at 1434.

³⁰ *Id.* at 1448, 1472.

³¹ *Id.* at 1448-50.

³² Press Release, U.S. Chamber Litig. Ctr., NCLC Celebrates 30 Years of Advocacy on Behalf of the Business Community (Feb. 27, 2007), <http://www.chamberlitigation.com/news/releases/nclc-celebrates-30-years-advocacy-behalf-business-community>.

the Chamber. Justice Kennedy doesn't "swing" much in business cases: he supports the Chamber's position 72% of the time, close to the voting pattern of Justice Alito, who had the highest percentage support for the Chamber—voting for the Chamber's position in 74% of the Court's Chamber cases. This cohesion has produced an overall success rate for the Chamber of 69% (98 victories in 142 cases). During this same period, the Court's progressives have generally been more centrist: collectively, the Court's progressives cast nearly half of their votes (47%) in favor of the Chamber's position.

Obviously, not all of the Court's business cases are the same. Some of them are relatively easy for the Court to decide, with the Court reaching a consensus on the outcome. However, 29% of the business cases in our study sharply divided the Roberts Court, and it is in this subset that ideological voting is most pronounced. Of the 41 Chamber cases decided by a five-Justice majority (5-to-4 or 5-to-3 decisions), 33 (or 80%) resulted in victories for the Chamber. In those cases, the Court's conservatives voted for the Chamber's position 79% of the time, compared to only 22% for the Court's progressives.

Our examination of the Roberts Court's Chamber cases establishes that the U.S. Chamber of Commerce has had a strong track record before the Roberts Court to date. To respond to the larger question of whether the Chamber's success before the Roberts Court is a new development, we expanded our study to include two earlier time periods.

Rewinding a few decades, we examined the last five Terms of the Burger Court, from the time Justice Sandra Day O'Connor joined the Court in 1981 until the first member of the Court's current conservative majority, Justice Antonin Scalia, joined the Court in 1986. During that five-year period, the Chamber lost more cases than it won (winning 15 of 35 cases, for a winning percentage of 43%), a stark contrast to the Chamber's success rate in the Roberts Court (69%). Furthermore, there was no division along ideological lines on the Court in its Chamber cases as there is now. The average level of support for the Chamber's position among the Court's conservative bloc on the Roberts Court to date is 24 points higher than the average support for the Chamber by the Court's progressive wing (71% to 47%). Our study of the Burger Court did not reveal a similar ideological division, as this difference during the Burger Court was only 12 points (49% to 37%).

Looking at the individual Justices, the voting records of then-Justice William Rehnquist, widely viewed as the most conservative member of the Burger Court, and Justice William Brennan, probably its most liberal member, differed only by three points—46% Chamber support compared to 43%, respectively. Even Justice Lewis Powell—who worked for the Chamber before joining the Court, writing a prophetic memorandum urging the Chamber to take advantage of a "neglected opportunity in the courts"—only supported the Chamber's position 53% of the time, the highest percentage of any member of the Burger Court during our study period, but also one that would place him barely ahead of Justice Sonia Sotomayor (51% vote rate) on today's Court.

We then expanded our study to include the last eleven Terms of the Rehnquist Court, from the beginning of October Term 1993 until the end of October Term 2004 (June 2005), a stable period with no changes in Court membership. This examination led to two key findings. First, the Chamber's winning percentage during those eleven Terms—56% (45 of 80 cases)—was in the middle of the Chamber's 43% winning percentage during our Burger Court study period and its 69% winning percentage during our Roberts Court study period. Second, it established that the sharp ideological divide that characterizes the Roberts Court in its business cases really is more pronounced than it was on the Court in earlier periods. Comparing the Burger Court and Rehnquist Court study periods, there was a 13-point increase in the Chamber's winning percentage overall, but no discernable increase in the ideological split among the Justices—the Chamber won more votes across the Court's ideological spectrum in the Rehnquist Court. However, when comparing the Rehnquist Court and Roberts Court study periods, the Chamber's winning percentage goes up to 69%, and the ideological split also increases. On the Roberts Court, the difference between the overall support for the Chamber's position among the Court's conservatives (71%) and its progressives (47%) is 24 points. This difference during the Rehnquist Court was only 13 points (61% to 48%).

Finally, this ideological divide on the Roberts Court becomes even more apparent when one looks at the most closely divided opinions, defined as cases decided by a five-Justice majority. Comparing the Rehnquist Court and Roberts Court study periods, the number of close cases as a percentage of the total cases decided rose, as did the Chamber's success rate in those close cases. During our Rehnquist Court study period, just 18% (14 of 80) of the cases were closely divided, while on the Roberts Court, the percentage of close cases has risen to 29% (41 of 142 cases). Furthermore, the Chamber's level of success in close cases has risen 19 points, from 64% (9 of 14) during the Rehnquist Court period, to 83% (33 of 41) during the Roberts Court period. Even more striking, the conservative bloc's average level of support for the Chamber's position in close cases has risen from 68% during the Rehnquist Court period to 79% during the Roberts Court. Meanwhile, the progressive wing's average level of support for the Chamber has decreased from 31% to 22%. The result is that the gap between the level of Chamber support from the conservative and progressive wings in close cases has now become a chasm, increasing dramatically from 37 points to a whopping 57 points during the Roberts Court.

IV. Chief Justice Roberts: A Friend of Big Business?

Since the beginning of his tenure, Chief Justice John Roberts has taken seriously his role as leader of the Supreme Court as an institution. Indeed, Chief Justice Roberts has often spoken about how important it is for the Justices to maintain the legitimacy of the Court—by limiting divisive rulings, moving the law incrementally, and trying to stay above politics. For instance, in an interview early in his tenure, Roberts explained that the Court is “ripe for a . . . refocus on functioning as an institution, because if it doesn't it's going to lose its credibility and

legitimacy.”³³ Expressing admiration for Chief Justice John Marshall, Roberts added that, even as a committed member of the Federalist Party, Marshall preferred to move the law “in a way that . . . wasn’t going to alienate people on the court and turn the Court into another battleground.” While commentators certainly disagree over just how radical an effect John Roberts has had on the law, there’s little question that Roberts himself prefers the image of the modest jurist to that of judge-as-hero (think Earl Warren) or judge-as-prophet (think Antonin Scalia). A key part of preserving the Court’s institutional reputation is ensuring that the Court as a whole—as well as its individual members—aren’t perceived as advancing any particular ideological agenda. The charge that the Roberts Court is “pro-business”—supported by empirical work like the Epstein-Landes-Posner study and our own Chamber studies—flies in the face of this key institutional imperative. The question remains what role the Chief Justice himself is playing in the Court’s business cases.

To start with, and as shown in our Chamber studies, Chief Justice Roberts’s voting record in these cases largely mirrors that of the Court itself. He votes for the Chamber’s position 70% of the time overall, and 83% of the time in closely divided cases. Comparing Roberts’s voting record to that of his colleagues, these numbers make Roberts the fourth most Chamber-friendly Justice overall (behind Justices Alito, Kennedy, and Scalia) and the second most Chamber-friendly Justice in closely divided cases (behind only Justice Alito). However, it’s worth noting that the voting records of the conservative Justices are highly concentrated, with the overall Chamber winning percentage ranging from 69.5% to 73.6% among the Court’s conservatives. At the same time, there is somewhat greater differentiation between the Court’s conservatives in the closely divided cases, with the Chamber winning percentage ranging from 70.7% (Justice Scalia) to 87.5% (Justice Alito).

Turning to the substance of Chief Justice Roberts’s votes in cases in which the Chamber has participated, it’s important to recognize upfront that there are a few examples of Roberts voting against the Chamber’s position in important cases. For instance, just this past Term, Roberts joined the Court’s progressives to reject the business community’s attempt to weaken federal protections against pregnancy discrimination.³⁴ And, in the Term before that, he voted with Justice Kennedy and the Court’s progressives to uphold important EPA regulations designed to address interstate air pollution.³⁵ Nevertheless, there are far more examples of the Chief Justice voting for the Chamber’s position in key cases than voting against it, and doing so on a wide range of issues, including workplace discrimination,³⁶ money-in-politics,³⁷ access to

³³ Jeffrey Rosen, *Roberts’s Rules*, THE ATLANTIC, Jan./Feb. 2007, available at <http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>.

³⁴ *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

³⁵ *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

³⁶ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Vance v. Ball St. Univ.*, 133 S. Ct. 2434 (2013).

³⁷ *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007).

courts,³⁸ environmental protection,³⁹ and drug safety.⁴⁰ Furthermore, there are also key examples of Roberts voting for the Chamber's position in defeat—votes that would have pushed the law in an even more pro-business direction than the Court was willing to go. Indeed, had Roberts gotten his way, the Court would have blocked efforts to address climate change,⁴¹ immunized brand-name drug manufacturers from state failure-to-warn suits,⁴² and weakened the Fair Housing Act.⁴³ Finally, although the Chamber was not involved in *Obergefell v. Hodges*—the landmark marriage equality decision this past Term—the business community weighed in heavily on the side of marriage equality, including in a powerful *amicus* brief signed by many major businesses and financial institutions.⁴⁴ Nevertheless, Roberts dissented from the Court's ruling that the Constitution requires marriage equality nationwide.

Moving beyond Roberts's votes to the Chamber opinions that he's actually authored, Roberts has written twelve opinions in cases in which the Chamber has participated—four majority opinions (at least in part), three concurrences, four dissents, and one mixed dissent/concurrence.⁴⁵ These opinions run the gamut of issue areas, but regardless of the specific issue addressed, they often intersect with larger themes in Roberts's jurisprudence, or, at least, with the public image that he has sought to cultivate as Chief Justice through his speeches, interviews, and written opinions.

Consider the eight instances in which Roberts has chosen to write separately, either through a concurring opinion or dissent. One of the favorite themes that Roberts has touched on in these opinions is the limited role of the courts in our constitutional system. For instance, in *Massachusetts v. EPA*—the blockbuster environmental case that opened the door for the EPA to begin regulating greenhouse gas emissions—Roberts wrote a dissent that emphasized his commitment to limiting access to the courts to (what he perceived to be) genuine cases and controversies, not mere policy disputes. In chastising the Court for opening the courthouse

³⁸ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

³⁹ *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Rapanos v. United States*, 547 U.S. 715 (2006).

⁴⁰ *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013).

⁴¹ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁴² *Wyeth v. Levine*, 555 U.S. 555 (2009).

⁴³ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

⁴⁴ See Brief of 379 Employers and Organizations Representing Employers as *Amici Curiae* Supporting Petitioners, *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571, 14-574 (U.S. Mar. 5, 2015), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-556tsac379EmployersandOrganizations.pdf>.

⁴⁵ *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 819 (2015) (Roberts, C.J., dissenting); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *City of Arlington v. FEC*, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2195 (2012) (Roberts, C.J., dissenting); *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) (Roberts, C.J., concurring); *Conkright v. Frommert*, 559 U.S. 506 (2010); *Vaden v. Discover Bank*, 556 U.S. 49, 72 (2009) (Roberts, C.J., dissenting in part and concurring in part); *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 119 (2008) (Roberts, C.J., concurring in part and concurring in the judgment); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007); *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting); *Rapanos v. United States*, 547 U.S. 715, 757 (2006) (Roberts, C.J., concurring).

doors to Massachusetts’s claim that it was harmed by global warming, Roberts stated that, while climate change may be a serious problem, it is not one “that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government.”⁴⁶ In concluding that Massachusetts did not have standing to bring its case, he added, “[t]he constitutional role of the courts . . . is to decide concrete cases—not to serve as a convenient forum for policy debates.”⁴⁷

Chief Justice Roberts has also used his opinions in business cases to attack the administrative state. For instance, he used his dissent in a highly technical administrative law dispute (over the siting of wireless communications towers) to attack a regulatory state (allegedly) run amok, explaining that the “Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities”⁴⁸ and lamenting the “hundreds of federal agencies poking into every nook and cranny of daily life.”⁴⁹ Similarly, Roberts used his concurrence in an important Clean Water Act (CWA) decision to chastise the EPA and the Army Corps of Engineers. In that case, he explained that the Court had given the federal government the time and discretion to “develop[] some notion of an outer bound to the reach of their authority” over wetlands under the CWA, but failed to do so.⁵⁰ Instead, according to Roberts, the Corps “chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.”⁵¹

Finally, ever sensitive to charges of judicial radicalism, Chief Justice Roberts wrote separately in *Citizens United* “to address the important principles of judicial restraint and *stare decisis*.”⁵² While Roberts and his conservative colleagues went out of their way in that case to jettison a decades-old precedent (*Austin v. Michigan Chamber of Commerce*⁵³), Roberts defended that decision, explaining that *Citizens United* itself was the first case in which the Court had “been asked” to do so.⁵⁴ He then offered his reasoning for joining Justice Kennedy’s majority opinion explicitly overruling *Austin*, attempting to frame the decision as reasonable in light of the extensive briefing and argument in the case: “We have had two rounds of briefing in this case, two oral arguments, and 54 *amicus* briefs to help us carry out our obligation to decide the necessary constitutional questions according to law. We have also had the benefit of a

⁴⁶ *Massachusetts*, 549 U.S. at 535 (2007) (Roberts, C.J., dissenting).

⁴⁷ *Id.* at 546-47.

⁴⁸ *City of Arlington*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)).

⁴⁹ *Id.* at 1879.

⁵⁰ *Rapanos*, 547 U.S. at 758 (2006) (Roberts, C.J., concurring).

⁵¹ *Id.*

⁵² *Citizens United v. FEC*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring). For more on *Citizens United*, see David H. Gans, *Roberts at 10: Campaign Finance and Voting Rights: Easier to Donate, Harder to Vote*, CONSTITUTIONAL ACCOUNTABILITY CTR. (2014), <http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Easier-to-Donate-Harder-to-Vote.pdf>.

⁵³ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

⁵⁴ *Citizens United*, 558 U.S. at 376 (Roberts, C.J., concurring).

comprehensive dissent that has helped ensure that the Court has considered all the relevant issues.”⁵⁵ Of course, Roberts’s concurrence didn’t save him—or his Court—from charges of radicalism.

Turning finally to Chief Justice Roberts’s four majority opinions in Chamber cases, perhaps the most interesting finding is that Roberts has often been a silent partner in his Court’s pro-business shift. While Roberts has chosen to write many of the Court’s blockbuster decisions in other areas of the law—including health care reform⁵⁶ and voting rights⁵⁷—he has often left the business blockbusters to other Justices. Of his four (at least partial) majority opinions for the Court in its Chamber cases, Roberts authored two in low-profile cases—one addressing employee benefits⁵⁸ and the other a New Deal-era raisin program.⁵⁹ And Roberts pitched his one opinion tackling a hot-button issue—campaign finance—as a modest one, even as Justice Scalia called him out for “faux judicial restraint.”⁶⁰ Furthermore, the opinion itself resulted in a fragmented Court, with the Court’s conservatives joining in full only the parts of Roberts’s opinion dealing with narrow technical issues. Perhaps the one exception is the Chief Justice’s majority opinion in *Halliburton Co. v. Erica B. John Fund*—a much-anticipated business case decided in 2014. Indeed, the Chief Justice’s *Halliburton* opinion is quintessential John Roberts—a model for his preferred method of moving the law.⁶¹

In *Halliburton*, the Court agreed to reconsider a landmark 1988 decision—*Basic v. Levinson*—and its “fraud on the market” presumption.⁶² In short, the *Basic* presumption makes it easier for investors to join together in class actions because it allows them to proceed as a class even without proving that their own losses can be traced to distorted information about the security in question. Instead, *Basic* permits investors to presume “that the price of a stock traded in an efficient market reflects all public, material information—including material misstatements”—and, therefore, “anyone who buys or sells the stock at the market price may be considered to have relied on those misstatements.”⁶³

Halliburton itself involved an investor suit alleging that Halliburton had put out materially misleading information that affected the company’s stock price. Previewing the case for SCOTUSblog, Professor Ronald Mann explained that *Halliburton* had “the potential to

⁵⁵ *Id.* at 385.

⁵⁶ *King v. Burwell*, 135 S. Ct. 2480 (2015); *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

⁵⁷ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

⁵⁸ *Conkright v. Frommert*, 559 U.S. 506 (2010).

⁵⁹ *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015).

⁶⁰ *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 498 n.7 (2007) (Scalia, J., concurring in part and concurring in the judgment).

⁶¹ *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).

⁶² *Id.* at 2405.

⁶³ *Id.*

become one of the most important business-law cases of the decade.”⁶⁴ Instead, it was ultimately emblematic of a key dynamic evident in a number of Roberts Court cases.

Emboldened by a receptive conservative majority on the Roberts Court, the business community made an aggressive argument intended to shake up the status quo and move the law in a pro-business direction. Indeed, in previous cases raising similar questions, four Justices signaled that they would be willing to reconsider *Basic*. In *Halliburton*, the company and leading business groups (including the Chamber) then answered this call, arguing that the Court should overrule the quarter-century-old *Basic*. However, at oral argument, Chief Justice Roberts (joined, in this instance, by Justice Kennedy) sought to stake out a compromise position, one that would make it easier for businesses to successfully challenge securities class actions at the class certification stage—before settlement pressures mounted—but without explicitly overruling *Basic*.

Finally, Roberts built a cross-ideological, six-Justice majority—including the progressives and Justice Kennedy—endorsing his preferred compromise and rejecting calls by his more conservative colleagues (Justices Alito, Scalia, and Thomas) to give the business community everything that it wanted (in other words, to overrule *Basic* outright).⁶⁵ In the process, the Chief Justice used his majority opinion to celebrate the importance of precedent and to call upon Congress to correct the Court’s decision if it disagreed with it—two of the Chief Justice’s favorite moves. For instance, Roberts explained that, in order to overrule “long-settled precedent,” the Court requires “‘special justification,’ not just an argument that the precedent was wrongly decided.”⁶⁶ Furthermore, he added that *stare decisis* has “‘special force’” in the context of statutory interpretation, where Congress can respond to whatever the Court does with corrective legislation.⁶⁷ However, even while preserving the *Basic* presumption, Roberts made it clear that businesses were free to rebut the presumption at the class certification stage with direct evidence “that the misrepresentation did not in fact affect the stock price.”⁶⁸

Ultimately, by brokering a compromise with Justice Kennedy and the Court’s progressives, Roberts was able to position himself as more reasonable, incrementalist, and non-ideological than some of his conservative colleagues, while also giving a partial victory to the business community. And, no matter how “disappointed” the Chamber may have been that the Court left *Basic* in place (and the Chamber itself scored the case as a Chamber victory⁶⁹), the Court’s ultimate decision still managed to shift the law in a business-friendly direction by

⁶⁴ Ronald Man, *Argument Recap: Justices Not Quite Ready to Jettison Landmark Securities Decision, Seeking Middle Ground*, SCOTUSBLOG (Mar. 7, 2014), <http://www.scotusblog.com/2014/03/argument-recap-justices-not-quite-ready-to-jettison-landmark-securities-decision-seeking-middle-ground/>.

⁶⁵ *Halliburton Co.*, 134 S. Ct. at 2419 (Thomas, J., concurring in the judgment).

⁶⁶ *Id.* at 2407 (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

⁶⁷ *Id.* at 2411 (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008)).

⁶⁸ *Id.* at 2414.

⁶⁹ Case Page for *Halliburton Co. v. Erica P. John Fund, U.S. CHAMBER LITIG. CTR.*, <http://www.chamberlitigation.com/halliburton-co-and-david-lesar-v-erica-p-john-fund-inc-fka-archdiocese-milwaukee-supporting-fund-inc> (last visited July 29, 2015).

making it easier for business defendants to successfully challenge securities fraud suits at the class certification stage and making it harder (and costlier) for investor class actions to survive the class certification process. Only time will tell whether this outcome represented merely “a small first step in a long journey toward reducing the costs of securities class actions,” as the Chamber argued at the time, or something more.⁷⁰

In the end, *Halliburton* is an interesting case study of Chief Justice Roberts and his preferred model for promoting legal change. Above all, it shows a confident Chief Justice moving the law in precisely the direction and, as important, at precisely the speed of his choosing.

V. A Unifying Theme: Corporate Accountability and Prescription Drug Safety

The Court’s Chamber cases cover a variety of issue areas. Nevertheless, one key theme ties many of these decisions together—precisely the theme that Justice Kagan touched upon in her interview with Jeffrey Rosen—that of corporate accountability. In a series of important and closely divided cases across a range of issue areas, Chief Justice Roberts and his conservative colleagues have made it increasingly difficult for Americans to hold businesses accountable for serious misconduct, including alleged discrimination, fraud, and physical harm.

Previous “Roberts at 10” snapshots have covered important parts of this story. For instance, David Gans examined a pair of important Title VII workplace discrimination cases—*University of Texas Southwestern Medical Center v. Nassar* and *Vance v. Ball State University*—each of which split the Justices 5-to-4 along ideological lines and made it more difficult for employees to seek equal opportunity in the workplace.⁷¹ Brianne Gorod covered another related feature of Chief Justice Roberts’s jurisprudence—his push to limit access to the courts, embodied in a range of issue areas, including his push to limit standing, endorse mandatory arbitration, and make it harder for injured plaintiffs to join in class actions.⁷²

Another line of business cases that illustrates this theme is a trio of decisions addressing prescription drug safety—*Wyeth v. Levine*,⁷³ *PLIVA v. Mensing*,⁷⁴ and *Mutual Pharmaceutical Co. v. Bartlett*.⁷⁵ Overall, these cases illustrate the practical importance and real-world effects of

⁷⁰ U.S. Chamber of Commerce Statement on Supreme Court Decision Scaling Back Securities Class Actions, U.S. CHAMBER OF COMMERCE (June 23, 2014), <https://www.uschamber.com/press-release/us-chamber-commerce-statement-supreme-court-decision-scaling-back-securities-class>.

⁷¹ David H. Gans, *Roberts at 10: Turning Back the Clock on Protections for Racial Equality*, CONSTITUTIONAL ACCOUNTABILITY CTR. (2015), http://theusconstitution.org/sites/default/files/briefs/Roberts_at_10-Race_snapshot.pdf.

⁷² Brianne Gorod, *Roberts at 10: Roberts’s Consistent Votes to Close the Courthouse Doors*, CONSTITUTIONAL ACCOUNTABILITY CTR. (2015), <http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Access-to-the-Courts.pdf>.

⁷³ *Wyeth v. Levine*, 555 U.S. 555 (2009).

⁷⁴ *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

⁷⁵ *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013).

the Roberts Court’s business cases, with Chief Justice Roberts voting with the business community in all three.

Interestingly, this line of cases began with a stinging defeat for the business community—indeed, one of the most important defeats for the Chamber during Chief Justice Roberts’s tenure to date—in *Wyeth v. Levine*.⁷⁶ Diana Levine, a professional musician, sued Wyeth in Vermont court based on injuries she had suffered—including amputation of her right arm—after she was injected with a brand-name anti-nausea drug manufactured by Wyeth. A Vermont jury awarded Levine \$7 million in damages, concluding that Wyeth’s warning label was insufficient. In a 6-3 ruling, the Supreme Court upheld the state court verdict, rejecting Wyeth’s argument that Levine’s state-law claim was preempted by federal drug laws. Justice John Paul Stevens authored the majority opinion, joined by the Court’s other progressives and Justice Kennedy. Justice Thomas also filed an opinion concurring in the judgment. Chief Justice Roberts joined Justice Alito’s dissent (along with Justice Scalia).

In his majority opinion, Justice Stevens held that the FDA’s approval of Wyeth’s label for its anti-nausea drug did not provide a defense to Levine’s state failure-to-warn claim.⁷⁷ Rejecting Wyeth’s attempt to shift the responsibility onto a federal agency (the FDA), the majority countered that the “manufacturer bears responsibility for the content of its label at all times,”⁷⁸ observing that federal drug labelling regulations provided manufacturers like Wyeth with the authority to strengthen their labels even before receiving FDA approval.⁷⁹ As a result, the Vermont jury was free to hold Wyeth responsible for failing to do more to protect Ms. Levine. In a key part of its ruling, the majority applied the “presumption against pre-emption,” which the Court has often used to preserve the traditional authority of the states to protect their citizens.⁸⁰ The Court also rejected Wyeth’s argument that state consumer laws posed an obstacle to the federal regulatory scheme created by Congress, explaining the powerful ways in which state and federal law can work together to protect consumers.⁸¹

Although agreeing with the majority’s conclusion, Justice Thomas wrote separately to criticize aspects of its legal analysis, noting that he had “become increasingly skeptical of this Court’s ‘purposes and objectives’ pre-emption jurisprudence. . . . Because implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution, I concur only in the judgment.”⁸²

While the majority recognized the importance of both state and federal regulation to consumer safety, Justice Alito’s dissent rejected this powerful vision of federalism. Instead, a palpable anti-jury sentiment ran through the dissent. According to Justice Alito, “[t]he real

⁷⁶ *Wyeth*, 555 U.S. 555.

⁷⁷ *Id.* at 558.

⁷⁸ *Id.* at 570-71.

⁷⁹ *Id.* at 568.

⁸⁰ *Id.* at 565 n.3.

⁸¹ *Id.* at 578-79.

⁸² *Id.* at 583 (Thomas, J., concurring in the judgment).

issue is whether a state tort jury can countermand the FDA’s considered judgment that [Wyeth’s brand-name drug’s] FDA-mandated warning label renders its intravenous (IV) use ‘safe.’”⁸³ The dissenters thought that the obvious answer was no, since “juries are ill equipped to perform the FDA’s cost-benefit-balancing function.”⁸⁴ In the dissenters’ view, the majority’s approach resulted in a mixed message for businesses like Wyeth, and a mixed mandate that they were incapable of satisfying: “The FDA told Wyeth that [its drug’s] label renders its use ‘safe.’ But the State of Vermont, through its tort law, said: ‘Not so.’”⁸⁵ In the end, Wyeth is a powerful example of a case in which Chief Justice Roberts wanted to move the law in a pro-business direction, but members of the conservative wing—in this case, Justices Kennedy and Thomas—balked.

Two years later, the Court again took up the issue of prescription drug safety, in *PLIVA v. Mensing*—a similar case involving generic drugs.⁸⁶ This time, the Court reversed course, with Justices Kennedy and Thomas joining their conservative colleagues (including Chief Justice Roberts) to form a new 5-to-4 majority concluding that the injured plaintiffs’ failure-to-warn claims were preempted by federal drug laws.⁸⁷ While Wyeth held that federal drug labelling laws did not displace state consumer-safety laws in the context of brand-name drugs, the Court’s conservative majority held that they did displace them in the generic drug context. Interestingly, the U.S. Chamber of Commerce did not participate in this case.

In *PLIVA*, Gladys Mensing and Julie Demahy took a generic drug designed to treat heartburn and acid reflux. After a few years of taking the drug, both Mensing and Demahy developed tardive dyskinesia, a severe, long-term neurological disorder that causes involuntary muscle movements. Much like Levine in *Wyeth*, Mensing and Demahy argued that the generic drug manufacturers had failed to adequately warn them of the serious adverse effects of the drug. And, like Wyeth, the generic drug manufacturers in *PLIVA* argued that the women’s state failure-to-warn claims were preempted by federal drug laws.

In a majority opinion authored by Justice Thomas (who sided with Levine in *Wyeth*), the Roberts Court held that generic drug manufacturers may not be sued under state failure-to-warn laws because it would be “impossible” for them to comply with both state and federal law.⁸⁸ According to the majority, there are important differences between the labelling laws for brand-name drugs, at issue in *Wyeth*, and for generic drugs. For example, federal law requires a generic drug to carry the same label as the brand-name drug it replicates and limits a generic drug manufacturer’s authority to unilaterally change its label to address newly discovered risks.⁸⁹ The *PLIVA* majority found these differences decisive.⁹⁰ While acknowledging that, from

⁸³ *Id.* at 605 (Alito, J, dissenting).

⁸⁴ *Id.* at 626.

⁸⁵ *Id.* at 628.

⁸⁶ *PLIVA Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

⁸⁷ *Id.* at 2572.

⁸⁸ *Id.* at 2577-78.

⁸⁹ *Id.* at 2574.

⁹⁰ *Id.* at 2581.

the perspective of the injured plaintiffs, this conclusion “makes little sense,” the majority added that “Congress and the FDA retain the authority to change the law and regulations if they so desire.”⁹¹

In a powerful dissent, Justice Sotomayor (joined by the Court’s other progressive Justices) blasted the *PLIVA* majority, accusing it of “effectively rewrit[ing]” *Wyeth*.⁹² On the labelling issue, Justice Sotomayor explained that a generic drug manufacturer’s “duty of sameness” is tempered by a duty under federal law to report problems with generic drugs. Therefore, while generic drug manufacturers cannot unilaterally change their labels, they can—and must—approach the FDA to seek to revise a drug’s label when they have reasonable evidence of a serious problem with the drug.⁹³ Of course, there is no guarantee that the FDA will act based on this information, but the manufacturer’s attempt to achieve a safe and adequate warning label would likely serve as a defense to state liability.⁹⁴ According to Justice Sotomayor, “because federal law affords generic manufacturers a mechanism for attempting to comply with their state-law duties to warn, . . . federal law does not categorically pre-empt state-law failure-to-warn claims against generic manufacturers.”⁹⁵

However, Justice Sotomayor also focused on the “absurd” consequences of the majority’s *PLIVA* ruling.⁹⁶ As she observed, under the Court’s ruling in *PLIVA*, if a doctor prescribed a brand-name drug to a patient but the pharmacist lawfully dispensed a lower-priced generic drug as an alternative, a failure-to-warn claim by the patient against the generic drug manufacturer would be preempted—but if the pharmacist filled the prescription with a brand-name drug, a claim by the patient against the brand-name drug manufacturer would not be preempted.⁹⁷ Justice Sotomayor concluded that Congress could not possibly have intended for a consumer’s rights against a drug manufacturer over an inadequately labeled drug to turn on the serendipity of how a pharmacist fills a prescription.

Two years later, Chief Justice Roberts and his conservative colleagues doubled-down on their *PLIVA* ruling in *Mutual Pharmaceutical Co v. Bartlett*⁹⁸—the third case in five years addressing whether state consumer laws are preempted by federal drug laws. While Karen Bartlett presented a different theory of liability under state tort law—strict liability rather than negligent failure-to-warn—both the result and the Court’s lineup were the same as in *PLIVA*. After sitting out *PLIVA*, the Chamber decided to participate in *Mutual Pharmaceutical*.

As in *Wyeth* and *PLIVA*, *Mutual Pharmaceutical* featured a sympathetic plaintiff. Bartlett had been taking generic pain relief medication for shoulder pain. Because of a rare

⁹¹ *Id.* at 2581, 2582.

⁹² *Id.* at 2582 (Sotomayor, J., dissenting).

⁹³ *Id.* at 2585.

⁹⁴ *Id.* at 2588.

⁹⁵ *Id.* at 2593.

⁹⁶ *Id.* at 2592.

⁹⁷ *Id.*

⁹⁸ *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013).

(but known) side-effect, the generic drug caused burns over more than half of Bartlett’s body, “caus[ing] two-thirds of her skin to slough off, damag[ing] her lungs and esophagus and render[ing] her legally blind.”⁹⁹ Bartlett won a \$21 million verdict from a New Hampshire jury. While *PLIVA* involved a state negligence claim for failure-to-warn, Bartlett prevailed under a state strict liability theory, which turned on the jury’s conclusion that the generic drug at issue was unreasonably dangerous.¹⁰⁰

In a 5-to-4 ruling, Chief Justice Roberts and his conservative colleagues held that Bartlett’s claim was preempted by federal drug law. The majority concluded that, while Bartlett may have advanced a different legal theory—strict liability—the legal result still ultimately turned on the generic drug’s label.¹⁰¹ Therefore, *PLIVA* controlled, and the generic drug manufacturer prevailed.¹⁰² Justice Alito added, “Respondent’s situation is tragic and evokes deep sympathy, but a straightforward application of pre-emption law requires that the judgment below be reversed.”¹⁰³

The Court’s progressives responded with two dissents. Justice Breyer (joined by Justice Kagan) filed a fairly technical dissent, focusing on administrative law principles and the deference owed the expert agency in this case, the FDA.¹⁰⁴ Justice Sotomayor (joined by Justice Ginsburg) offered a dissent more squarely focused on the merits of the majority’s arguments, criticizing the Court’s conservative majority for “unnecessarily and unwisely extend[ing] its holding in [*PLIVA*] to pre-empt New Hampshire’s law governing design-defects with respect to generic drugs.”¹⁰⁵ Justice Sotomayor returned to many of the same themes and arguments from her *PLIVA* dissent, including the presumption against preemption, the mutually reinforcing role of federal and state law in keeping consumers safe, and congressional intent.¹⁰⁶ Justice Sotomayor concluded, “By once again expanding the scope of impossibility pre-emption, the Court turns Congress’ intent on its head and arrives at a holding that is irreconcilable with our precedents. As a result, the Court has left a seriously injured consumer without any remedy despite Congress’ explicit efforts to preserve state common-law liability.”¹⁰⁷ She added, “[R]esponsibility for the fact that Karen Bartlett has been deprived of a remedy for her injuries rests with this Court.”¹⁰⁸

In the end, although the legal issues in *PLIVA* and *Mutual Pharmaceutical* may be complicated, the bottom line is easy enough to understand: by siding with the business

⁹⁹ Adam Liptak, *Justices Explore Fine Line on Generic Drug Injuries*, N.Y. TIMES, Mar. 19, 2013, http://www.nytimes.com/2013/03/20/business/justices-explore-fine-line-on-generic-drug-injuries.html?_r=0.

¹⁰⁰ *Bartlett*, 133 S. Ct. at 2468.

¹⁰¹ *Id.* at 2470.

¹⁰² *Id.*

¹⁰³ *Id.* at 2480.

¹⁰⁴ *Id.* at 2481-82 (Breyer, J., dissenting).

¹⁰⁵ *Id.* at 2482 (Sotomayor, J., dissenting).

¹⁰⁶ *Id.* at 2489-96.

¹⁰⁷ *Id.* at 2496.

¹⁰⁸ *Id.* at 2483.

community, Chief Justice Roberts and his conservative colleagues closed the courthouse doors to certain patients who have been severely injured by generic drugs. And a patient's ability to recover damages under state law now turns largely on whether a doctor prescribed or a pharmacist provided her a brand-name drug or its generic alternative.¹⁰⁹ Of course, Roberts himself would have gone even further, eliminating these state-law claims even in the case of brand-name drugs. Taken together, these cases illustrate a larger theme at the heart of the Court's business cases across many different issue areas—corporate accountability.

VI. Conclusion

In an interview shortly after being confirmed as Chief Justice, John Roberts told Jeffrey Rosen that he believed the success of a Chief Justice could be measure by his ability to get his colleagues to speak in one voice, in unanimous or near-unanimous opinions.¹¹⁰ But in its business cases, the Court under Chief Justice Roberts's leadership has trended in the exact opposite direction, becoming more sharply divided along ideological lines. This may be great news for the business community, including the U.S. Chamber of Commerce, which has won some sweeping victories in the Roberts Court, but it is often bad for the Court as an institution and for the American people.

¹⁰⁹ The FDA is working on a rule designed to address this line of cases. See Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products, 78 Fed. Reg. 67985 (proposed Nov. 13, 2013) (to be codified at 21 C.F.R. pt. 314, 601), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-11-13/pdf/2013-26799.pdf>.

¹¹⁰ Rosen, *Roberts's Rules*, *supra* note 33.