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A Survey of the 2010 Term
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I would like to spend much of our time together in conversation with you, responding to questions you pose. As a prelude, I will present some comments on the Supreme Court Term just ended, the 2010–2011 Term.

Early in the Term, the Justices sat for a new photograph, as they do every Term the Court's composition changes. Elena Kagan, former Solicitor General, and before that, Dean of the Harvard Law

School, came on board last summer, and has just completed her first year as a member of the Court. She has already shown her talent as an incisive questioner at oral argument and a writer of eminently readable opinions.

The junior Justice, in the first few rounds, tends to get opinion writing assignments in cases neither controversial nor of greatest interest.[1] Displaying her good humor and wit, Justice Kagan opened the announcement of one of her opinions for the Court with

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[1] See *Ransom* v. *FIA Card Services, N. A.*, 562 U. S. ___ (2011); *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. ___ (2011); *Milner* v. *Department of Navy*, 562 U. S. ___ (2011).

this line: "If you understand anything I say here, you will likely be a lawyer, and you will have had your morning cup of coffee."[2]

Lawyers and law professors alike pay close attention to the questions Justices pose at oral argument. The 2010–2011 Term was rich in that regard. Questions from the bench ranged from the historical: "[W]hat [did] James Madison th[ink] about video games[?]"[3] to the practical: "[I]sn't . . . evidence always . . . destroyed when . . . marijuana [once possessed by a

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[2] *Smith* v. *Bayer Corp.*, 564 U. S. ___ (2011).

[3] Tr. of Oral Arg., *Brown* v. *Entertainment Merchants Assn.*, ___ U. S. ___ (2011) (ALITO, J.).

suspect] is . . . smoked? Isn't it being burnt up?"[4] Colleagues have been fearful: "Does al-Qaeda know all this stuff?"[5], occasionally philosophical: "[W]hy are you here?"[6] "[W]hy are we all here?"[7], and sometimes openly exasperated: "I know your client doesn't care. But we still have to write [an opinion]. So what['s] the answer?"[8] Queries ran from the natural: "Is the snake covered?"[9] to the unnatural: "[W]here is the 9,000-foot

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[4] Tr. of Oral Arg., *Kentucky* v. *King*, 563 U. S. ___ (2011) (KENNEDY, J.).
[5] Tr. of Oral Arg., *NASA* v. *Nelson*, 562 U. S. ___ (2011) (SCALIA, J.).
[6] Tr. of Oral Arg., *Camreta* v. *Greene*, 563 U. S. ___ (2011) (ROBERTS, C. J.).
[7] Tr. of Oral Arg., *Cullen* v. *Pinholster*, 563 U. S. ___ (2011) (BREYER, J.).
[8] Tr. of Oral Arg., *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U. S. ___ (2011) (BREYER, J.).
[9] Tr. of Oral Arg., *CSX Transp., Inc.* v. *McBride*, ___ U. S. ___ (2011) (SCALIA, J.).

cow?"[10] to the supernatural: "What do you think about Satan?"[11]

Justice Jackson famously commented that the Court is "not final because [it is] infallible, [it is] infallible only because [it is] final."[12] Some musings from the bench last Term bear out that wisdom: "I don't know what I'm talking about,"[13] "Is that the best you can find on the other side, . . . something I once wrote in a case?"[14]

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[10] Tr. of Oral Arg., *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. ___ (2011) (BREYER, J.).
[11] Tr. of Oral Arg., *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. ___ (2011) (SCALIA, J.).
[12] *Brown* v. *Allen*, 344 U. S. 443, 540 (1953).
[13] Tr. of Oral Arg., *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, ___ U. S. ___ (2011) (BREYER, J.).
[14] Tr. of Oral Arg., *Bruesewitz* v. *Wyeth LLC*, 562 U. S. ___ (2011) (BREYER, J.).

You may not be surprised to learn that I uttered none of the just-recited lines. For, as the New York Times reported, based originally on an empirical study by a former law clerk of mine, when it comes to oral argument, I am—quote—" the least funny Justice who talks."[15] From the foregoing samples, you may better understand why the Court does not plan to permit televising oral arguments any time soon.

Turning to the Term's work, [I will report first on our docket. Argued cases numbered 78, the same

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[15] Adam Liptak, A Taxonomy of Supreme Court Humor, New York Times, Jan. 25, 2011, p. A16.

number as the two preceding Terms. *Per curiam* opinions in cases decided without full briefing or argument numbered only five,[16] consistent with the 2008–2009 Term, but considerably fewer than last Term. One petition was dismissed post-argument as improvidently granted,[17] and another was remanded before argument in light of a recent development bearing on the question presented.[18]]

Justice Kagan's recusal in more than one-third of the argued cases generated speculation that the Court

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[16] *Wilson* v. *Corcoran*, 562 U. S. 1 (2010) *(per curiam)*; *Swarthout* v. *Cooke*, 562 U. S. ___ (2011) *(per curiam)*; *Felkner* v. *Jackson*, 562 U. S. ___ (2011) *(per curiam)*; *Bobby* v. *Mitts*, 563 U. S. ___ (2011) *(per curiam)*; *United States* v. *Juvenile Male*, 564 U. S. ___ (2011) *(per curiam)*.

[17] *Tolentino* v. *New York*, 563 U. S. ___ (2011) *(per curiam)*.

[18] *Madison County* v. *Oneida Indian Nation of N. Y.*, 562 U. S. ___ (2011) *(per curiam)*.

would all too often divide 4 to 4; in fact, only two of the 78 argued cases ended in an even division.[19] When that happens, we announce that the judgment we took up for review is affirmed by an equally divided Court. We state no reasons and the disposition does not count as precedent. [A third case last Term was evenly divided only as to threshold jurisdictional issues;[20] and after affirming without opinion the lower court's exercise of jurisdiction, the Court rendered a unanimous decision on the merits of the controversy.]

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[19] *Costco Wholesale Corp.* v. *Omega, S. A.*, 562 U. S. ___ (2010) *(per curiam)*; *Flores-Villar* v. *United States*, 564 U. S. ___ (2011) *(per curiam)*.

[20] *American Elec. Power Co.* v. *Connecticut*, 564 U. S. ___ (2011).

The Court split 5-4 (or 5-3 with one Justice recused) in 16 of the opinions handed down in argued cases.[21] In comparison to that 20% sharp disagreement record, we agreed, unanimously, on the bottom-line judgment more than twice as often, in 33 (or over 40%) of the decisions. And in more than half of those, 18 of the 33, opinions were unanimous as well.

I will next mention six headline-attracting decisions. Two significant class action cases were among them. The first, *AT&T Mobility LLC* v.

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[21] I include in this number *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. ___ (2011), for the Court in that case divided 5-4 on one of two issues presented for review.

Concepcion,[22] concerned the enforceability of fine-print arbitration provisions in consumer contracts. Representatives of a putative class of mobile phone users filed suit against AT&T, their service provider, arguing that the company had engaged in fraud by charging sales tax on phones advertised as "free." The service contract's arbitration provision prohibited class actions. The lower courts held the provision unconscionable and allowed the case to proceed on a class basis.

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[22] 563 U. S. ___ (2011).

The Supreme Court reversed in a 5-4 decision. The majority held that the plaintiffs must pursue their claims, if at all, in individual arbitrations. State unconscionability law, the Court concluded, stood as an obstacle to the objectives of the Federal Arbitration Act. The FAA's purpose, the majority urged, is to enforce private agreements and encourage efficient dispute resolution. State law calling for non-consensual class arbitration, the majority felt, would interfere with fundamental attributes of arbitration. I was among the dissenters. In consumer actions of this kind, the

dissenters observed, due to the small amount of damages each plaintiff could claim, the real choice was often between class litigation, or no suit at all.

The second major-league class action case was *Wal-Mart* v. *Dukes*.[23] Current and former employees sued Wal-Mart, alleging gender discrimination in discretionary pay and promotion decisions, in violation of Title VII (the nation's principal antidiscrimination in employment law). On behalf of themselves and a nationwide class of some 1.5 million female workers, the

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[23] *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. ___ (2011).

named plaintiffs sought declaratory and injunctive relief for the class, and backpay for each class member. Federal Rule of Civil Procedure 23—the Rule governing class actions—controlled. Two questions were raised concerning the Rule's application. First, the Court considered Rule 23(a)(2)'s requirement that a party seeking class certification identify "questions of law or fact common to the class." Next, the Court took up Rule 23(b)(2), the subcategory of class actions permitting certification when "the party opposing the class has acted or refused to act on grounds that apply generally

to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The plaintiffs contended that Rule 23(a)(2)'s gateway "commonality" requirement was met upon showing rudderless managerial discretion to set pay and award promotions, a company culture rooted in sex-role stereotyping, statistics alleged to demonstrate that pay and promotion disparities could be explained only by gender discrimination, and anecdotal evidence of individual instances of disparate treatment. A 5-4

majority concluded that the plaintiffs could not even pass through the 23(a) gateway, because millions of discrete employment decisions were called into question.

On that issue, I wrote for the four dissenters. The requisite commonality was satisfied, I explained, by this phenomenon: Managers were overwhelmingly male, and they tended, perhaps unconsciously, to favor people who looked like themselves. As a graphic example, I noted that women did not appear in numbers in symphony orchestras until a curtain was dropped, so

that the auditioners could not tell whether the applicant was male or female.

The Court was unanimous, however, on the second issue raised in *Wal-Mart*. Rule 23(b)(2), under which the plaintiffs sought certification, was designed for cases in which injunctive or declaratory relief is prime. For the would-be class in *Wal-Mart*, we concluded, the driving issue was backpay. Therefore, Rule 23(b)(3)—which generally governs when monetary relief is sought—controlled. But the plaintiffs quite deliberately declined to invoke that portion of the Rule, involving,

as it does, more exacting procedural requirements.

The next top-billed case I will discuss, *Snyder* v. *Phelps*,[24] attracted constant coverage in the media, reportorial, photographic, and editorial. The case concerned the First Amendment rights of the Westboro Baptist Church, a small congregation engaged in expressive activity many would rank as outrageous: Church members picket military funerals to communicate the congregation's belief that God hates the United States for its tolerance of homosexuality.

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[24] 562 U. S. ___ (2011).

Church members picketed in proximity of the funeral of Marine Lance Corporal Matthew Snyder, a young man killed in the line of duty in Iraq. Snyder's father sued the congregation, asserting various state law tort claims, including intentional infliction of emotional distress. The content of the picketers' signs, however offensive, plainly related to issues of public concern and could not be categorized as addressing, dominantly, concerns of a private character. We held that the First Amendment shielded the church from tort liability for picketing in the vicinity of Snyder's funeral.

Our judgment invalidated a jury's two million dollar punitive damages award. The First Amendment, we reminded, protects even the most hateful views.

Justice Alito's heart-felt dissent underscored the incomparable distress suffered by the Snyder family. Although no member of the Court joined him, his opinion aligned with the views of many Court-watchers, including one of the nation's newest—retired Justice Stevens recently told the Federal Bar Council he "would have joined [Justice Alito's] powerful dissent."[25]

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[25] Adam Liptak, Justice Stevens Is Off the Bench but Not Out of Opinions, New York Times, May 31, 2011, p. A14.

With Justice O'Connor's retirement and Chief Justice Rehnquist's passing, no member of the Court hails from Arizona. Perhaps counterbalancing that loss, Arizona was disproportionately represented among frontrunning and closely contested cases argued last Term.

One of the 5-4 decisions, *Arizona Christian School Tuition Organization* v. *Winn*,[26] presented this question: Did Arizona taxpayers have Article III standing to challenge a newly installed tax credit, allowed for

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[26] 563 U. S. ___ (2011).

contributions to school tuition organizations, which, in turn, use the contributions to provide scholarships to students attending private schools—most of them, as one might expect, religious schools. Justice Kennedy, writing for the majority, distinguished what many (including me) considered the controlling precedent, *Flast* v. *Cohen*,[27] and held that state taxpayers lacked standing. Justice Kagan's forceful dissent—her first—was joined by Justice Breyer, Justice Sotomayor, and me.

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[27] 392 U. S. 83 (1968).

Another headline case, *Chamber of Commerce* v. *Whiting*,[28] asked whether federal law preempts an Arizona statute that authorizes suspension or revocation of the business license of any employer found to have knowingly or intentionally employed an undocumented alien. In a 5-3 decision, the Court ruled that Arizona's law was not preempted by the extensive federal regulation of the field.

Perhaps the most consequential case from the Grand Canyon State was the last opinion announced on

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[28] *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. ___ (2011).

the Court's last sitting day of the 2010–2011 Term. In *Arizona Free Enterprise Club* v. *Bennett*,[29] the Court addressed a First Amendment challenge to an Arizona campaign-finance law. Under the State's law, a candidate for state office who accepts public financing could receive additional state funds tied to the campaign spending of opposing, privately-financed candidates and of independent expenditure groups supporting those candidates. Five past and future candidates for Arizona state office and two independent

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[29] *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. ___ (2011).

expenditure groups challenged Arizona's matching funds law. They argued that the State's law constrained them from exercising their First Amendment rights. In a 5-4 decision, the Court agreed, holding that Arizona's matching funds scheme substantially burdens political speech and is not justified by a compelling state interest. In a powerful dissent summarized from the bench, the Court's junior Justice stated the opposing view, with which I agree in full. All the democracy money can buy, I believe, is not what the First Amendment orders.

We have already granted review in 42 cases for the 2011–2012 Term, a pace slightly ahead of last year. So far, no State stands out on next year's docket as Arizona did last Term. One might argue that if Arizona's experience in the 2010–2011 Term is an indication that the absence of a home-state Justice increases the Court's readiness to grant review, the converse may also be true. If so, my home State, New York, is most securely situated. With Justices now bred in four of New York City's five boroughs, should another vacancy arise, Staten Island jurists should stay close to their

phones.

Last year, in remarks addressed to the Second Circuit's Judicial Conference, I noted my joy that we would soon have three women on the Court. I am now delighted to report that not once this Term has an advocate called me Justice Sotomayor or Justice Kagan, and the same holds true for my junior colleagues. We sit left, right, and center of the bench and, as transcripts of oral argument show, Justice Scalia is getting a run for his title as the Justice who asks the most questions.