Litigation

Business Cases and the Roberts Supreme Court

*By Martin J. Newhouse**

The statement that the Supreme Court under Chief Justice Roberts, and more specifically the Court majority of five Republican-appointed Justices, has been unusually favorable, even biased, toward business interests is a familiar one in the media and much-repeated among liberal legal commentators (including, with respect to the 2010 *Citizens United* decision, the President of the United States).[1] But is this true? Have the Roberts Court's rulings in cases affecting business interests actually been especially favorable to those interests? This article seeks to answer this question.

Not surprisingly, the issue of pro-business bias is complicated. To begin with, it is clear beyond dispute that none of the Justices generally identified as conservative—specifically, Chief Justice Roberts and Associate Justices Alito, Kennedy, Scalia, and Thomas—is reflexively pro-business.[2] In numerous cases these Justices have cast their votes for, and even written the majority opinions in, decisions in which business parties have lost and investors, consumers, or employees have won.

Most recently, for example, Chief Justice Roberts, writing for a unanimous Court in *Erica P. John Fund, Inc. v. Halliburton Co.*,[3] issued a decision that makes it easier for plaintiffs to certify class actions in securities fraud cases, by holding that they are not required to prove loss causation at the certification stage. Justice Scalia similarly delivered the decision for a unanimous Court in January 2011 in *Thompson v. North American Stainless, LP*[4] holding that the plaintiff Thompson could maintain his claim for retaliation under Title VII even though he had not himself engaged in protected activity, because he alleged that he had been terminated in retaliation for the fact that his fiancée had filed a charge of sex discrimination against their common employer. Yet another recent unanimous decision by the Supreme Court that arguably was anti-business was *Matrixx Intiatives, Inc. v. Siracusano*, in which the five Republican-appointed Justices joined a majority opinion by Justice Sotomayor holding that plaintiffs could bring a securities fraud case based on "a pharmaceutical company's failure to disclose reports of adverse events associated with a product [where] the reports do not disclose a statistically significant number of adverse events."[5]

And lest one think that the allegedly pro-business Justices only join in decisions against business parties that are unanimous, therefore arguably only in cases in which the result is so obvious that even a judge with pro-business leanings could not hold for the business party in the case,[6] there have also been business-related decisions issued by the Roberts Court in which the five Republican-appointed Justices have split their votes, with some joining the majority ruling against corporate interests. A recent example is *Kasten v. Saint-Gobain Performance Plastics Corp.*,[7] which was another case dealing with an anti-retaliation provision, this time a provision of the Fair Labor Standards Act of 1938 ("Act").[8] Section 215(a)(3) of the Act makes it illegal for an employer, *inter alia,* "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . under or related to the Act. . . ." Here the employee had complained to his employer orally about certain work conditions. The issue decided in the case was whether "filed any complaint" in the provision included those oral complaints. The Supreme Court found that it did, in a majority decision by Justice Breyer, in which the Chief Justice and Justices Kennedy, Ginsburg, Alito, and Sotomayor joined. Justice Scalia, joined by Justice Thomas,[9] dissented, arguing in essence that even if "filed any complaint" included oral complaints the employer should still have prevailed because, in his view, § 215(a)(c) does not cover complaints to the employer at all, but only complaints made to a government agency. Interestingly, the employer had raised this issue below, but never mentioned it in its petition for certiorari and the majority, including three of the Justices often considered pro-business, deemed it to have been waived.[10] Two of the more conservative Justices, Kennedy and Thomas (concurring in the judgment), joined their more liberal colleagues in deciding in *Wyeth v. Levine* that federal law did not preempt a state law failure-to-warn claim with respect to Wyeth's anti-nausea drug Phenergan.[11]

Just as in cases such as *Kasten* and *Wyeth* allegedly pro-business Justices have ruled against the business party, so in other cases some of the so-called liberal Justices have joined with some of their conservative colleagues to support a result favoring a business party. Look, for example, at the constellation of Justices in *Watters v. Wachovia*.[12] The question before the Court was whether a wholly-owned mortgage lending subsidiary of a national bank could be regulated by state banking authorities. The answer depended on the enforceability of an Office of the Comptroller of the Currency regulation preempting state regulation of national bank subsidiaries. Preemption would have been the pro-business position, since parallel regulation by federal and state authorities would likely result in inefficiency, waste, and higher costs for the businesses involved (and ultimately, perhaps, for consumers). Justice Ginsburg's majority opinion rejecting the state's claim of parallel regulatory authority was joined by both conservatives and liberals: Justices Kennedy, Souter, Breyer, and Alito. Justice Stevens argued in dissent that preemption should be based on an explicit federal statute, not a mere OCC regulation, and that the majority's decision imperiled the delicate balance between federal and state authority in the banking field. Joining Justice Stevens in defense of federalism were two "conservative" Justices, Chief Justice Roberts and Justice Scalia. Could there be a clearer demonstration than this case that liberalism and conservatism do not automatically align with or against business's perceived interests?[13]

* *President, New England Legal Foundation*

Nevertheless, while the business decisions by the Roberts Court, when taken as a whole, demonstrate that there is no automatic or reflexive alignment by the Court's more conservative Justices with business interests, it is also true that in a number of recent high-visibility business cases, the Justices have divided along what might be termed political lines (Republican-appointed Justices on one side, Democrat-appointed Justices on the other) with regularity, resulting in a number of 5-4 decisions in favor of business parties. Does this 5-4 split support the claim of a pro-business bias, at least in these cases? Perhaps it would if all one looked at were the results and the identity of the prevailing parties—as the media and commentators often seem to do (see, for example, the editorial in *The New York Times* greeting the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*,[14] which was entitled "Wal-Mart Wins. Workers Lose."[15]). However, closer study of the decisions reveals that what is at issue in each case is not a simple matter of slant or bias (either pro- or anti-business), but rather a struggle with close questions and cutting-edge legal issues that, in all fairness, were evidently decided by each of the Justices based on their honest views of the law. A brief review of four recent allegedly pro-business decisions—three quite high-profile, one less so—will demonstrate this to be the case.

For this analysis there is perhaps no better place to begin than with the *Citizens United* decision, which appears for many liberal commentators to epitomize the alleged pro-business bias of the five conservative Justices.[16] At issue in the case was the constitutionality of the McCain-Feingold campaign finance reform that made it illegal for all corporations (including nonprofits) and labor unions to use money from their general funds for advocacy for or against the election of a candidate in a federal election within thirty days before a primary election and sixty days before a general election.[17] Often seemingly overlooked by liberal commentators is that the Supreme Court's decision that this provision was unconstitutional benefited not only business corporations, but also nonprofits (indeed, the case was brought by a non-profit), and unions. Indeed, one would seek in vain to find any recognition, in mainstream media and commentary at least, that this decision by the Court's Republican-appointed majority was, among other things, a First Amendment victory for nonprofit liberal advocacy groups and organized labor.[18]

Also overlooked is the extent to which both the majority and dissent in the case agreed about fundamentals. For example, many, if not most, critics of *Citizens United* seem unaware of the Supreme Court's prior decisions holding that the First Amendment applies to corporations; *Citizens United* broke no new ground in this respect (although it is routinely criticized for having done so).[19] Even Justice Stevens, in his eloquent dissent, agreed that corporations enjoy First Amendment protection.[20] Not only did both the majority and the dissent agree that corporate speech is protected by the First Amendment, they both also agreed that such protection is not absolute.[21] Additionally, with only Justice Thomas disagreeing, both the majority and the dissent agreed that the statute's disclosure requirements did not violate the First Amendment.[22]

Finally, it is clear from their opinions that all of the Justices, both those in the majority and in the dissent, agreed that the First Amendment serves a crucially important role in our democracy, namely to insure that the people have access to all the information they need in order to exercise their sovereignty as informed citizens. It was their answers to the question whether the limitations on speech at issue served this goal that divided the Justices. Such a question is always very difficult and calls for the most careful consideration and balancing.

In *Citizens United,* the dissenters clearly believed that the restrictions were justified based on a historical record that, for them, demonstrated the tendency of the for-profit corporate form to corrupt political debate. In contrast, the majority did not see this tendency as a proven fact and, perhaps, also did not think that even historical instances of corruption warranted a blanket limitation on all corporate speech, which can, in its own right, be informative.

Unfolding events will no doubt demonstrate whether the fears of the dissent or the hopes of the majority are justified. But for our purposes, it is sufficient to note that the majority's rejection of a limitation on speech that swept broadly enough to include within it not only large for-profit corporations (whose potentially malign influence on federal elections is the primary focus of critics of the decision[23]), but corporations of all sizes and descriptions, including nonprofit corporations and labor unions, can hardly be considered as simply a pro-business decision.

Turning from *Citizens United,* which was decided in 2010, to a more recent example: One of the most publicized and complained-about allegedly pro-business decisions was the Supreme Court's ruling in June 2011 in *Wal-Mart Stores, Inc. v. Dukes*,[24] in which the Court reversed the certification of a class of 1.5 million current and former female employees of the retailer in a sex discrimination suit.

For critics of the holding, the Court's decision appears to be yet again an automatic 5-4 ruling in favor of business, with the Republican-appointed Justices joining in a majority opinion written by Justice Scalia. This view ignores, however, the fact that the Court's reversal of the class certification was in one important aspect unanimous: all of the Justices, both conservative and liberal, agreed that class certification in the case had been sought and granted under the wrong provision of Rule 23 of the Federal Rules of Civil Procedure.[25] Specifically, the Court unanimously held that the plaintiffs' attempt to bring their class action under Fed. R. Civ. P. 23(b)(2) was improper because the plaintiffs were seeking individualized monetary relief, such as back pay. As Justice Scalia's opinion pointed out, Rule 23(b)(2) by its terms applies "only when a single injunction or declaratory judgment would provide relief to each member of the class," and "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."[26] Since the plaintiffs had relied solely on Rule 23(b)(2) for their claims, the certification had to be reversed—a conclusion with which the Justices dissenting as to other aspects of the decision expressly agreed.[27]

Clearly, at most, this unanimous ruling by the Court was a setback for the plaintiffs, since at the least it would require a new attempt to certify a class under a different part of Rule 23 (specifically Rule 23(b)(3)). Yet, most of the commentary on

the decision has paid little attention to the fact that the liberal Justices joined in this defeat for the Wal-Mart workers who had brought the suit.[28]

To be fair, the lack of focus on the unanimous part of the decision in *Wal-Mart* is no doubt due to the less technical aspect of the case over which the liberal and conservative Justices did differ, i.e., whether the evidence presented by the plaintiffs was sufficient to demonstrate the commonality needed for class certification under any provision of Rule 23. The liberal Justices plainly thought that the plaintiffs' evidence was sufficient for certification; the conservatives, in an opinion authored by Justice Scalia, clearly thought that it was not.[29] This is not the place to delve into the specifics of the *Wal-Mart* case, which would require an entirely separate article, but the most basic aspects of the litigation—including that the putative class composed of around 1.5 million women concerning employment decisions made by managers in each of Wal-Mart's approximately 3400 stores throughout the country, who were given discretion in employment matters by Wal-Mart (which had and has an official policy against sex discrimination); that some of the 1.5 million putative class members were themselves managers who arguably might have made some of the decisions complained of by other plaintiffs; that the expert testimony introduced by the plaintiffs included a sociological expert who "could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking"—indicate the questionable, or from a different point of view the innovative (and, therefore, inherently risky), nature of the argument for class certification in the case.[30] It is precisely because the basis for certification was questionable at best, that *The New York Times*'s longtime Supreme Court commentator Linda Greenhouse, in her review of the Court's recent decisions, described the *Wal-Mart* ruling as the Court's "[l]east surprising decision" of the 2010 Term.[31]

Importantly for our purposes, while the decision on commonality that generated a 5-4 split among the Justices has also generated the most heat in the commentary about *Wal-Mart v. Dukes*, it is the more technical, unanimous ruling on the requirements of Rule 23(b) that may have a more lasting impact going forward. This is because, although all those seeking class certification must fulfill Rule 23's commonality requirement, the majority's ruling on that issue was based on the fairly unique facts of Wal-Mart's operations, while the ruling on the scope of Rule 23(b)(2) will govern future class actions in all factual contexts. And, given that this unanimous decision on the Court's part will limit the ability of all potential plaintiffs to seek certification under Rule 23(b)(2), including business plaintiffs (who might seek class certification in a variety of commercial contexts), it is hard to see how it could be characterized as the product of a pro-business bias either by the conservative majority or by the Court as a whole.

Yet another high-visibility recent business decision that has been criticized as one more indication of the conservative Justices' alleged anti-consumer and reflexively pro-business bias is *AT&T Mobility LLC v. Concepcion*,[32] which dealt with the much-litigated question of the enforceability of class-arbitration waivers, this time in a consumer mobile phone service contract. Again, as in *Wal-Mart,* the five conservative Justices ruled in favor of the business party, with a majority opinion by Justice Scalia overruling the Ninth Circuit's application of a California rule under which the waiver was automatically unconscionable. The four liberal Justices joined in a dissenting opinion by Justice Breyer, arguing that the per se state rule at issue did not, in fact, violate the Federal Arbitration Act ("FAA").[33] Despite the familiar 5-4 division of the Justices, and as with the other decisions under discussion, a closer look at the Court's decision erodes any simplistic view that would label it as decisively pro-business or anti-consumer.

The specific legal question before the Court in *AT&T Mobility* was whether the California federal courts' application of a state court rule that operated, in effect, to invalidate such waivers in consumer contracts as per se unconscionable violated the FAA.[34] By its terms, the FAA requires courts to treat arbitration agreements on an equal footing with all other contracts and bars courts from singling out arbitration agreements for suspect status.[35] In other words, the question for the Court was whether the FAA requires that courts, when confronted with a challenge to a class arbitration waiver provision on the grounds that it is unconscionable, treat the question as they would any other contract, i.e., as a fact-intensive inquiry into the nature and circumstances of the waiver and the arbitration provisions themselves.[36]

Thus, the basic issue in *AT&T Mobility* was purely legal, and both the majority opinion by Justice Scalia and the dissent by Justice Breyer agreed on what that legal issue was, coming as noted above to diametrically-opposed answers as to whether California's per se rule singled out arbitration agreements for the type of special treatment forbidden by the FAA, each side bolstering its arguments with discussions about the suitability of an arbitral forum for class action proceedings.[37] One would be hard-pressed to see in the Justice's opinions any sign that the identity of the parties involved—i.e., that it was a consumer case against a business—had anything at all to do with their analysis. Indeed, as recent major holdings in the area of arbitration have shown, the Supreme Court has routinely been indifferent to whether the parties involved were commercial enterprises or individuals.[38] Moreover, the notion that *AT&T Mobility* was an anti-consumer decision is belied by the fact that it did not remove the plaintiffs' ability to challenge the class arbitration waiver at issue; it only removed their ability to rely on a per se rule. The plaintiffs remained free to allege and prove unconscionability as it has traditionally been proven, through a close examination of the contract at issue and the circumstances surrounding its execution.[39]

Finally a brief analysis of one more, somewhat lower-profile business-related decision from the Supreme Court's 2010 Term will hopefully underscore the lack of foundation for claims that the Court's decisions in business cases are the product of bias, rather than the results of honest decision-making about issues that are, by their very nature, matters of first impression and not easy cases. This is another 5-4 decision, *Pliva v. Mensing,* in which the conservative majority held for the business defendant in an opinion written by Justice Thomas. Justice Sotomayor wrote a stinging dissent in favor of the consumer plaintiffs, in which all of her liberal colleagues joined.[40] The issue in the case was essentially the same as had been presented in *Wyeth*

v. Levine in 2009—i.e., whether federal law preempted a state law failure-to-warn claim brought against a drug manufacturer based on allegedly defective labeling—with this important, and, it turned out, decisive difference: in *Wyeth* the defendant was the brand-name manufacturer of the drug at issue; in *Pliva* the defendant was the generic manufacturer.

For the majority this distinction was crucial because of the different federal drug labeling duties of generic and brand-name manufacturers. Specifically, while, under federal law and regulation, the brand-name manufacturer has the ability to enhance its labeling without seeking FDA approval first, a generic manufacturer is not free to change its label on its own (federal law requires generic manufacturers to use the labeling approved for brand-name manufacturers). If a generic manufacturer wishes to strengthen warnings on its label, it can propose the change to the FDA, which, if it approves, will then work "with the brand-name manufacturer to create a new label for both the brand-name and generic drug."[41] Noting that federal preemption will be found where it is impossible for a private party to comply with both state and federal requirements, the majority ruled that impossibility was present in this case because (a) the generic manufacturer could not have changed its label to comply with state law without violating its federal duty to keep the label the same as the brand-name label, and (b) even if the generic manufacturer requested a change from the FDA (which the agency might refuse), it still would not have satisfied state law which demanded a safer label, not that the manufacturer ask the FDA for a labeling change.[42] As Justice Thomas's opinion puts it: "The question for 'impossibility' is whether the private party could independently do under federal law what state law requires of it."[43] On this basis, Justice Thomas, who had agreed in *Wyeth v. Levine* that the state-law claim against the brand-name manufacturer was not preempted, found preemption here, even as he recognized, and regretted, that this result would leave millions of generic drug users without a state law remedy.[44]

Writing for the dissent in *Pliva*, Justice Sotomayor, while she strongly disagreed with the majority's ultimate decision, did not dispute the existence of impossibility as a ground for finding federal preemption. She (and her liberal colleagues) only disputed that impossibility, and therefore preemption, had been established in this case, because there was no evidence the generic manufacturers had ever approached the FDA about a label change to bring them into compliance with state law. Rejecting the majority's view that impossibility exists if the private party cannot take action independently, Justice Sotomayor nevertheless described several scenarios that she believed would satisfy the impossibility standard:

> This is not to say that generic manufacturers could never show impossibility. If a generic-manufacturer defendant proposed a label change to the FDA but the FDA rejected the proposal, it would be impossible for that defendant to comply with a state-law duty to warn. Likewise, impossibility would be established if the FDA had not yet responded to a generic manufacturer's request for a label change at the time a plaintiff's injuries arose. A generic manufacturer might also show that the FDA had itself considered whether to request enhanced warnings in light of the evidence on which the plaintiff's claim rests but had decided to leave the warnings as is. . . . But these are questions of fact to be established through discovery.[45]

As this passage reveals, Justice Sotomayor's opinion, while expressing concern at the outset about the impact of the Court's decision on the "75 percent of all prescription drugs dispersed in this country," which are generics, and while, in other places, dismissing the majority's definition of impossibility as illogical, cannot be said to be reflexively anti-business or reflexively pro-consumer in her approach, since she does not foreclose preemption as a defense for generic drug manufacturers.

In truth, both the majority's and the dissent's positions in *Pliva* are reasonable interpretations of the law of preemption in light of the novel question presented to the Court, namely "whether conflict pre-emption should take into account [the] possible actions by the FDA and the brand-name manufacturer.[46] For the majority, the fact that the generic manufacturers were legally powerless to take remedial action on their own, but rather were dependent on a string of possibilities, was enough to establish impossibility in this instance.[47] On the other hand, the dissent's position that, at the very least, to establish impossibility the generic manufacturers should have been required to show that they had at least requested a change to bring their labels into compliance with state law, does not appear terribly unreasonable.[48] The point here is that neither position can fairly be described as pro-business or anti-business, much less were the Justices' positions plausibly based on any such biases. Rather, their disagreements were over legal doctrine, regulatory impact, and even the meaning of the Constitution's Supremacy Clause.[49] In short, once again, as in *AT&T Mobility,* the identity of the parties had very little to do with the outcome of the case.

To sum up, the above analysis of some of the major business decisions by the Roberts Court indicates that claims of an automatic or even a general pro-business bias are not well-founded, either with respect to the five more conservative Justices or with respect to the Court as a whole. That the Roberts Court has granted certiorari in more business cases than its predecessors is often pointed out, but as the cases above indicate, this may well be the result of a recognition that there are important and outstanding issues in this area that need to be resolved. For those who represent business interests, the Supreme Court's more hospitable attitude toward business cases is welcome. However, as the above analysis demonstrates, business parties should expect in the Supreme Court as elsewhere that, if they are to prevail, they must rely on the strength and cogency of their arguments and not the makeup of the bench.[50]

Endnotes

1 Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010). For a recent, somewhat balanced media discussion of the issue of alleged business bias in the Supreme Court's business decisions see Richard McGregor, *Walmart Discrimination Win Highlights Claims of Court Bias*, Fin. Times, June 21, 2011, *available at* http://www.ft.com/intl/cms/s/0/40f8f9b4-9c3f-11e0-acbc-

00144feabdc0.html#axzz1UZF6FCx4. As is well-known, President Obama's criticism of the Supreme Court's decisions in *Citizens United* was made before the Congress and the Nation during his State of the Union address on January 27, 2010.

2 Although such categories are objectionable because of their over-simplification and imprecision, for ease of reference in what follows the term "conservative Justices" will be used to identify collectively the five Republican-appointed Justices (Chief Justice Roberts and Associate Justices Alito, Kennedy, Scalia, and Thomas). The term "liberal Justices" will similarly be used to refer to the four Democrat-appointed Justices (Associate Justices Breyer, Ginsburg, Kagan, and Sotomayor).

3 131 S. Ct. 2179 (2011).

4 131 S. Ct. 863 (2011).

5 131 S. Ct. 1309 (2011).

6 In fact, that the Supreme Court's decision is unanimous does not mean that the result was obvious from the start. For example, with respect to the issue presented in *Thompson v. North American Stainless, LP*, 131 S. Ct. 2179, as legal commentator Edward Whelan has pointed out, those courts of appeal that had earlier dealt with the question of such third-party retaliation claims (including the decision under review) had decided in the employer's favor that such claims could not be brought under Title VII. *See* Those Sneaky Corporatist Justices, Posting of Ed Whelan to Bench Memos, http://www.nationalreview.com/bench-memos/257788/those-sneaky-corporatist-justices-ed-whelan (Jan. 24, 2011, 13:36 EST).

7 131 S. Ct. 1325 (2011).

8 52 Stat. 1060, 29 U.S.C. §201 *et seq.*

9 Justice Kagan did not participate in the consideration or decision of the case.

10 *Kasten*, 131 S. Ct. at 1336. In his dissent, Justice Scalia takes strong issue with the Court's refusal to consider the question whether intra-company complaints are even covered by the anti-retaliation provision.

11 555 U.S. 555 (2009). The *Wyeth* decision, while benefiting consumers/patients, illustrates how ambiguous such benefits may be, and raises the question whether the case is ultimately actually pro-patient. For example, anyone concerned about the availability of much-needed drugs should be disturbed that, as the dissent in Wyeth correctly points out, the majority's decision makes state court juries, rather than the FDA, ultimately responsible for regulating warning labels for prescription drugs (at least with respect to brand-name manufacturers, see discussion below of the Court's 2011 holding in *Pliva v. Messing*, which came to a different conclusion with respect to generic manufacturers). It is an understatement to say that lay juries, with their exclusively retrospective and case-specific vision and authority, are ill-equipped to perform the important function of regulating warning labels. Furthermore, it seems obvious that, for the vast majority of consumers, the Court's decision will mean higher costs and less availability as pharmaceutical companies deal with the uncertainty that has been created and the litigation that will result. How is a drug company ever to know whether its drug labeling is sufficient? Even after one jury answers that question, another can decide it differently. And the wider economic impacts of this decision, as other regulated industries determine the extent to which the Supreme Court majority's reasoning may apply to them, remain to be seen. Such considerations were evidently not on the majority Justices' minds in *Wyeth* (nor were they decisive for the majority in the 2011 decision *Pliva v. Mensing*, discussed in note 33 and the text below).

12 550 U.S. 1 (2007).

13 Justice Thomas took no part in the consideration or decision of the case. More recently, in another example of crossing the liberal/conservative line, Justice Sotomayor joined her five more conservative colleagues for a 6-3 decision in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), which struck down a Vermont statute restricting the sale of pharmacy records showing individual physicians' prescribing practices as in violation of the First Amendment.

14 131 S. Ct. 2541 (2011).

15 Editorial, *Wal-Mart Wins. Workers Lose.*, N.Y. Times, June 20, 2011.

16 Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010). While *Citizens United* was a First Amendment case, as opposed to the commercial cases generally discussed in this article, it and the Court's subsequent First Amendment decision in *Sorrell v. IMS Health*, 131 S. Ct. 2653 (2011), (see note 13 above) are discussed because they both dealt with issues of great importance to business interests.

17 2 U.S.C. § 441b(b)(2), § 434(f)(3)(A).

18 That such groups, and not simply large for-profit corporations, were on the Justices' minds is revealed by Justice Kennedy's description of the sweep of the provision in his majority decision for the Court:

> Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech.

Citizens United, 130 S. Ct. at 897. One point of contention between the majority and dissent was whether the statute at issue could penalize a corporation or labor union for publishing a book within the proscribed period; Justice Kennedy obviously thought it did (see quote above), while Justice Stevens strongly disagreed. *See id.* at 944 n.31. Justice Stevens, however, based his disagreement primarily on a statement in 11 CFR §100.29(c)(1) that "electioneering communication does not include communications appearing in print media," which does not self-evidently include books, since the term "print media" is generally associated with newspapers and/or news magazines. Moreover, the government apparently conceded in oral argument that a book advocating the election or defeat of a federal election candidate would be covered by the statute and could potentially be banned during the blackout period, especially if the book were transmitted in electronic form (such as via satellite to an electronic reading device). *See, e.g.*, 2009 WL 760811, *29. It therefore does not seem to be quite so clear, as Justice Stevens would have it, that by its plain terms, § 203 does not apply to books, and the majority's concern about the statute's over-breadth, to say the least, was not implausible.

19 For earlier precedents establishing that speech by corporations is entitled to First Amendment protection, *see, e.g.,* First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (listing numerous prior decisions invalidating laws infringing protected speech by corporate bodies). As was recognized already in *Bellotti*, the express language of the First Amendment does not protect speakers, but speech itself; if the speech at issue is protected (and there could be no doubt that, in the abstract at least, the type of political speech at issue in *Citizens United* would be protected under the First Amendment), then the identity and nature of the speaker is irrelevant under the First Amendment. As noted in the text, despite the pre-*Citizens United* Supreme Court cases holding that corporate speech is protected by the First Amendment, critics of the decision often appeared to characterize it as originating this view. *See, e.g.,* Editorial, *The Court's Blow to Democracy*, N.Y. Times, Jan. 21, 2010 ("The majority is deeply wrong on the law. Most wrongheaded of all is its insistence that corporations are just like people and entitled to the same First Amendment rights."); Ronald Dworkin, *The "Devastating" Decision,* N.Y. Rev. Books, Feb. 25, 2010 ("The nerve of [Justice Kennedy's] argument—that corporations must be treated like real people under the First Amendment—is in my view preposterous. Corporations are legal fictions. They have no opinions of their own to contribute and no rights to participate with equal voice or vote in politics.").

20 130 S. Ct. at 960 (Stevens, J., dissenting) (acknowledging that "speech does not fall entirely outside the protection of the First Amendment merely because it comes from a corporation," and noting that "no one suggests the contrary and that neither *Austin* nor *McConnell* held otherwise").

21 For dissent's view, see, e.g., *id.* For majority's view, see, e.g., 130 S. Ct. at 898.

22 See Part IV of Justice Scalia's majority opinion. 130 S. Ct. at 913-917.

23 *See, e.g.*, Ronald Dworkin, *The "Devastating" Decision*, N.Y. Rev. Books, Feb. 25, 2010 (The "five right-wing Supreme Court justices have now guaranteed that big corporations can spend unlimited funds on political advertising in any political election."); *see also The "Devastating" Decisions: An*

Exchange, N.Y. Rev. Books, Apr. 20, 2010; Ronald Dworkin, The Court's Embarrassingly Bad Decisions, N.Y. Rev. Books, May 26, 2011.

24 131 S. Ct. 2541 (2011).

25 As discussed below, the Rule 23 aspect of the decision is probably more consequential because it will govern all class actions going forward, while the ruling on commonality was tied to the specific facts of Wal-Mart's operations.

26 *Dukes*, 131 S. Ct. at 2557.

27 *See id.* at 2561. In her opinion, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, makes clear her agreement with the majority on this point:

> The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation of Title VII, 42 U.S.C. § 2000 *et seq.,* seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available.

28 While the liberals' decision in this regard has not been the focus of great criticism, it has not been ignored. *The New York Times,* in its editorial decrying the decision, *see supra* note 15, does point out that the Court unanimously dismissed "the suit as the plaintiffs presented it," thus giving "Wal-Mart what it wanted from the court." The *Times*, primarily focusing on where the majority and liberal Justices differed, refers to the liberals as "the four moderates on the court." However, as Justice Scalia pointed out in his opinion, the plaintiffs' decision to proceed under Rule 23(b)(2) was not only harmful to Wal-Mart, by denying it the ability to defend itself against individual claims, *Dukes*, 131 S. Ct. at 2560-61, but was also harmful to the potential class members (i.e., Wal-Mart employees) themselves by limiting the types of claims they could bring, *id.* at 2559, and by divesting them of the ability to opt-out of the class action. *Id.* at 2558 (noting that a (b)(2) class is mandatory and that the rule "does not even oblige the District Court to afford [putative class members] notice of the action").

29 Although Justice Ginsburg stated at the outset of her opinion that whether the plaintiffs satisfied the requirements of Rule 23(b)(3) was not before the Court and should be considered on remand, *id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part), she clearly considered that the evidence met the requirements of 23(b)(3). *Id.* at 2565.

30 For basic facts of the case, see *id.* at 2547-2549 (majority opinion). The putative class included "*all* Wal-Mart's female employees," and, therefore, the class included women in management positions (not to mention women who may have prospered at Wal-Mart). *See id.* at 2549 (emphasis in original). For the plaintiffs' sociological expert's inability to tell what percentage employment decisions were determined by stereotypical thinking, *see id.* at 2553.

31 A Supreme Court Scorecard, Posting of Linda Greenhouse to Opinionator, http://opinionator.blogs.nytimes.com/2011/07/13/a-supreme-court-scorecard/ (July 13, 2011, 21:30 EDT). As Ms. Greenhouse put it:

> Whatever its merits, the nationwide class action of 1.5 million women (representing "all women employed at any Wal-Mart domestic retail store at any time since Dec. 26, 1998") was an accident waiting to happen from the minute it showed up on the radar screen of a Supreme Court that is deeply skeptical of litigation, particularly of lawsuits that appear designed to achieve broad policy aims.
>
> One indispensable test of whether a lawsuit may proceed as a class action is whether question of law or fact are common to all plaintiffs. In addition to the huge size of the class in Wal-Mart Stores v. Dukes, the essence of the plaintiffs' complaint made the case vulnerable. The claim was not that Wal-Mart's policies actively discriminate against women in pay and promotion, but rather that headquarters leaves local managers with too much discretion on those matters. In other words, the problem was said to be not the existence but the absence of a uniform company-wide employment policy.

Id. (In fact, of course, the company did have a uniform, company-wide policy against sex-discrimination.) Ms. Greenhouse, who appears to be favorable to the dissent's view that certification could have been ordered based on the fact that women at Wal-Mart faced "unsupervised bosses who *might* base personnel judgments on unconscious stereotypes as well as conscious prejudices," *id.* (emphasis added), nonetheless conceded that while this was a "strong argument," "it would have been a surprise had it prevailed." *Id.*

32 131 S.Ct. 1740 (2011).

33 In addition to Justice Scalia's majority opinion and Justice Breyer's dissent, Justice Thomas filed a concurring opinion joining his conservative colleagues in reversing the Ninth Circuit decision in the case.

34 The rule invalidating class action waivers in consumer arbitration agreements was announced by the California Supreme Court in *Discover Bank v. Superior Court,* 113 P.3d 1100 (Cal. 2005). In that case, the California Supreme Court held that a class action waiver in a consumer arbitration agreement is unconscionable as a matter of law if it is contained within a "consumer contract of adhesion," if the claim is of a kind that "predictably involve[s] small amounts of damages," and "when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individual small sums of money . . . ." *Id.* at 1110. (California broadly defines a contract of adhesion as any unilateral, "take it or leave it" contract, in which the "part of superior bargaining strength[] relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Id.* at 1108 (internal quotations and citations omitted).)

35 *See* 9 U.S.C. § 2; Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) ("The FAA . . . places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms . . . . Like other contracts, however, they may be invalidated by *generally applicable contract defenses,* such as fraud, duress, or unconscionability." (emphasis added)).

36 Unlike the rigid rule applied by the lower federal courts in *AT&T Mobility*, the generally-applicable unconscionability standard under California law involves a "sliding scale" approach, under which courts weigh varying degrees of procedural and substantive factors to determine a particular contract's overall fairness at the time of its formation. *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000); Cal. Civ. Code § 1670.5(A) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract.").

37 While Justice Scalia's view was that, contrary to the California rule, "[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," *Dukes*, 131 S. Ct. at 1748, he acknowledged, of course, that if the parties to an arbitration agreement agree to a class proceeding, the arbitration must go forward on that basis. *See, e.g.*, *id.* at 1751. For the majority, the California rule operated, in effect, to permit consumers to require class arbitration in consumer contracts irrespective of the parties' agreement. "Although the [*Discover Bank*] rule does not *require* arbitration, it allows any party to a consumer contract to demand it *ex post.*" *Id.* at 1750.

38 Thus, for example, in this case, the Court applied the conclusions regarding the need for consent to class action arbitration that it had reached in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), even though the latter case was purely a dispute between businesses.

39 It appears that one of the reasons the plaintiffs in *AT&T Mobility* wished to take advantage of the *Discover Bank* per se rule was that the agreement at issue contained unusually consumer-friendly terms and was therefore unlikely to be found to be unconscionable under the traditional tests. Indeed, in this very case, the Ninth Circuit itself expressly acknowledged that AT&T Mobility's agreement was consumer-friendly. Laster v. AT&T Mobility LLC*,* 584 F.3d 849, 855-56, 856 n.9, n.10 (9th Cir. 2009). In an earlier case that reviewed the same agreement and rejected an unconscionability challenge, the federal district court noted that AT&T Mobility's agreement "contains perhaps the most fair and consumer-friendly provisions this Court has ever seen." Makarowski v. AT&T Mobility, LLC*,* 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009).

40 131 S. Ct. 2567 (2011).

41 *Id.* at 2576.

42 *Id.* at 2577-78.

43 *Id.,* at 2579.

44 As Justice Thomas, writing for the Court, put it:

> We recognize that from the perspective of [the plaintiffs], finding pre-emption here but not in *Wyeth* makes little sense. . . . We acknowledge

> the unfortunate hand that federal drug regulation has dealt [the plaintiffs] and others similarly situated. . . . But it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre.

Id. at 2581-82.

45 *Id.* at 2588-2589.

46 *Id.* at 2578.

47 From the majority's point of view, taking into account the process the generic manufacturers could have initiated to strengthen their labels would ultimately "render conflict analysis largely meaningless because it would make most conflicts between state and federal law illusory," since it would subject conflict preemption to a conjectural analysis of what *might* have happened had a request to change the federal requirements been made. *Id.* at 2579.

48 Even the majority describes this position as a "fair argument," although it rejects it. *Id.*

49 See, e.g., Justice Thomas's extended discussion of the Supremacy Clause, in which he argues that "the phrase 'any [*state* law] to the Contrary notwithstanding' is a *non obstante* provision," suggesting that "federal law should be understood to impliedly repeal conflicting state law." *Id.* at 2579-80.

50 It should be mentioned, as pertinent to the subject of this article, that a report was issued in December 2010 entitled "Is the Roberts Court Pro-Business?" The report, which is available online at epstein.usc.edu/research/RobertsBusiness.pdf, was authored by three prominent scholars, Lee Epstein, William M. Landes, and Richard A. Posner, who analyzed those cases in the U.S. Supreme Court Database that are categorized as dealing with "Economic Activity." The report's conclusion was that, based on the data reviewed, "it might be reasonable to conclude that the current Court is distinctly favorable toward business interests." Although dealing with the same topic under discussion here, in fact no reliance was placed upon the Epstein, Landes, and Posner report or its conclusion during the preparation of this article for the simple reason that their report utilizes categories and definitions, as well as a methodology, that, to the author of this article, seem flawed. For example, the report is based upon the view that pro-business decisions are always conservative and anti-business decisions are always liberal (even though as demonstrated above the liberal/conservative division does not consistently match pro/anti-business results). Furthermore, even the definitions of liberal and conservative can be problematic. Thus, for example, Epstein, Landes, and Posner use a definition of liberal decisions as "anti-business, anti-employer, pro-liability, pro-competition, pro-consumer, etc.," though they admit in a footnote that the definition is imperfect. The most serious flaw of the report, however, is that its methodology appears to ignore not only the substantive issues in the cases it reviews, but the statutory and regulatory background of each matter. A decision that might be counted as conservative under the Epstein, Landes, and Posner rubric might be compelled by a statutory provision enacted by Congress or, as in the unanimous Fed. R. Civ. P. 23 holding in *Wal-Mart Sores v. Dukes*, the result of the wording of a rule, rather than the result of the Justices' liberal or conservative outlooks. Without looking more deeply into the cases, any analysis undertaken to demonstrate the existence or lack of bias will reveal little beyond the identity of the prevailing parties, which as shown above is very far from the whole story.