2006

Section 3: The Roberts Court

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III. THE ROBERTS COURT

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As the dust settled on a consequential Supreme Court term, the first in 11 years with a change in membership and the first in two decades with a new chief justice, one question that lingered was whether it was now the Roberts court, in fact as well as in name.

The answer: not yet.

Chief Justice John G. Roberts Jr. was clearly in charge, presiding over the court with grace, wit and meticulous preparation. But he was not in control.

In the court's most significant nonunanimous cases, Chief Justice Roberts was in dissent almost as often as he was in the majority. His goal of inspiring the court to speak softly and unanimously seemed a distant aspiration as important cases failed to produce majority opinions and members of the court, including occasionally the chief justice himself, gave voice to their frustration and pique with colleagues who did not see things their way.

The term's closing weeks were particularly ragged. The court issued no decision in a major patent case that had drawn intense interest from the business community, announcing two months after the argument, over the dissents of three justices, that the case had been "improvidently granted"—they should not have agreed to decide it—in the first place.

So if it wasn't yet the Roberts court, what exactly was it?

Perhaps it was the Kennedy court, based on the frequency with which Justice Anthony M. Kennedy cast the deciding vote in important cases.

Or perhaps it was more accurately seen as the Stevens court, reflecting the ability of John Paul Stevens, the senior associate justice in tenure as well as in age, to deliver a majority in the case for which the term will go down in history, the decision on military commissions that rejected the Bush administration's view of open-ended presidential authority.

Chief Justice Roberts did not participate in that case because he had ruled on it a year earlier as an appeals court judge. Based on his vote to uphold the administration's position then, he almost certainly would have joined Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr., the newest member of the court, in dissent.

If none of these labels—Roberts court, Kennedy court, Stevens court—seem to fit precisely, it is probably because what the Supreme Court really was in its 2005-6 term was a court in transition.

For the justices, it was a time of testing, of battles joined and battles, for the moment,
postponed.

The term's early period of unanimity, during which cases on such contentious subjects as abortion and federalism were dispatched quickly, with narrowly phrased opinions, reflected agreement not on the underlying legal principles but rather on the desirability of moving on without getting bogged down in a fruitless search for common ground. This was especially so in the term's early months, when Justice Sandra Day O'Connor was still sitting but was counting the days until a new justice could take her place.

Once Justice O'Connor retired in late January, after Justice Alito's confirmation, and as the court moved into the heart of the term, some of the court's early inhibitions seemed to fall away. Yet when its most conservative members reached out aggressively to test the boundaries of consensus in the term's major environmental case, Justice Kennedy unexpectedly pushed back and left them well short of their goal.

In that case, Chief Justice Roberts along with Justices Alito, Scalia and Thomas tried to cut back on federal regulators' expansive view of their authority under the Clean Water Act to define wetlands.

Justice Kennedy also deserted the conservatives in a redistricting case from Texas when he found a violation of the Voting Rights Act in the dismantling of a Congressional district that had previously had a Mexican-American majority. The action of the Republican-led Texas Legislature had deprived the Latinos of the ability to elect the candidate of their choice, Justice Kennedy said, leaving Chief Justice Roberts to complain in dissent, "It is a sordid business, this divvying us up by race."

Nonetheless, there was little doubt that in its transition, the court was becoming more conservative. A statistical analysis by Jason Harrow on the Scotusblog Web site showed that Justice Alito voted with the conservative justices 15 percent more often than Justice O'Connor had.

A separate analysis, by the Supreme Court Institute at Georgetown University Law Center, showed that Justice Alito and Chief Justice Roberts had the highest agreement rate of any two justices in the court's nonunanimous cases, 88 percent, slightly higher than the agreement rate between Justice O'Connor and Justice David H. Souter in the first half of the term, 87.5 percent.

Chief Justice Roberts agreed with Justice Scalia in 77.5 percent of the nonunanimous cases and with Justice Stevens, arguably the court's most liberal member, only 35 percent of the time. The least agreement between any pair of justices was between Justices Alito and Stevens, 23.1 percent.

The court decided 69 cases with signed opinions in the term that began on Oct. 3 and ended on June 29. Nearly half were decided without dissent, a greater number than usual, although not dramatically so. Sixteen cases were decided by five-justice majorities, either 5 to 4 or 5 to 3, a proportion very close to the 10-year average.

One measure of the court's shift to the right is in dissenting votes. In the previous term, the justice who dissented least often was Stephen G. Breyer, who dissented in 10 of the term's 74 decisions. But this term, he had the second-highest number of dissents, 16; Justice Stevens had the most, 19. Justice Thomas and Justices Ruth Bader Ginsburg and Souter were also frequent dissenters. Of
those who served the full term, Chief Justice Roberts had the fewest dissents, seven. Justice Kennedy had the second fewest, with nine.

Chief Justice Roberts's dissents, while few, came in some important cases. In addition to dissenting from the Voting Rights Act portion of the Texas redistricting decision, he also dissented from a decision reopening a 20-year-old death penalty case on the basis of new evidence; a federalism case, in which the majority found the states not immune from private bankruptcy suits; and a ruling that invalidated the personal assertion of authority by John Ashcroft, the former attorney general, to penalize doctors in Oregon who follow that state's Death With Dignity Act and prescribe lethal doses of medication for terminally ill patients who request it.

The court's next term, which begins Oct. 2, looms as a major test of the justices' fortitude and ability to work together, with cases challenging precedents on abortion and affirmative action already on the docket.

With the court having indicated in *Hamdan v. Rumsfeld*, the military commission case, that lawsuits now pending in the lower courts on behalf of dozens of detainees at Guantanamo Bay, Cuba, are still alive, the justices are likely to have further opportunities to address the profound issues of presidential power and judicial authority that these cases raise. This time, the chief justice will not need to stay silent, and the country that is just getting to know him will hear his voice.

Following are summaries of the term's major rulings.

**Presidential Power**

The court repudiated the Bush administration's plan to use military commissions to try Guantanamo detainees, ruling 5 to 3 that the commissions were unauthorized by statute and violated a provision of the Geneva Conventions.

The majority opinion in *Hamdan v. Rumsfeld*, No. 05-184, by Justice Stevens, set minimum procedural protections that any future commissions, even those authorized by Congress, would have to provide. Justices Kennedy, Souter, Ginsburg and Breyer joined the opinion. Justices Scalia, Thomas and Alito dissented. Chief Justice Roberts, who had voted as an appeals court judge to uphold the commissions, did not participate.

**Elections**

A splintered decision rejected a challenge to the Republican-driven mid-decade redistricting of Texas's Congressional map, finding that it was not an impermissible partisan gerrymander. Justice Kennedy wrote the opinion in *League of United Latin American Citizens v. Perry*, No. 05-204. Agreeing with the judgment on the gerrymander challenge were Chief Justice Roberts and Justices Alito, Scalia and Thomas. Justices Stevens and Breyer dissented. Justices Souter and Ginsburg expressed no view on the issue, making the vote 5 to 2 to 2.

In the same case, the court ruled that the dismantling of a district in southwestern Texas with a Latino majority, an action the State Legislature had taken to shore up the faltering prospects of the Republican incumbent, violated the Voting Rights Act. On this question, Justice Kennedy spoke for a 5-to-4 majority that included Justices Stevens, Souter, Ginsburg and Breyer.
The court voted 6 to 3 to strike down Vermont's campaign finance law, which both limited the amount that candidates could spend on their own campaigns and placed the country's lowest ceilings on contributions to candidates from individuals and political parties.

The fragmented majority did not offer a unified approach to contribution limits, leaving the court's path in this area uncertain. Justice Breyer wrote the controlling opinion in the case, *Randall v. Sorrell*, No. 04-1528, joined by Chief Justice Roberts and Justice Alito. Justices Kennedy, Thomas and Scalia joined the judgment.

**Criminal Law**

In *Georgia v. Randolph*, No. 04-1067, the court held that when the police lack a search warrant, they cannot enter a home if one occupant objects, even if another occupant gives permission. The vote was 5 to 3, with Justice Alito not participating. In his majority opinion, Justice Souter said the decision comported with "widely shared social expectations" about privacy in the home. Chief Justice Roberts filed his first dissenting opinion in this case. Justices Scalia and Thomas also voted in dissent.

The court ruled that evidence the police find when they search a home to execute a search warrant can be admitted in court despite an officer's failure to observe the constitutional requirement to "knock and announce" before entering. Justice Scalia, writing for the 5-to-4 majority, said the ordinary rule against admitting unconstitutionally obtained evidence should not apply in this circumstance—nor, he implied, in many other circumstances currently governed by the "exclusionary rule."

This case, *Hudson v. Michigan*, No. 04-1360, was argued for a second time after Justice Alito joined the court; his vote with the majority determined the outcome. The others in the majority were Chief Justice Roberts and Justices Thomas and Kennedy.

The court was unanimous in ruling that inmates facing execution by lethal injection can invoke a federal civil rights law to challenge the state's choice of drugs and the manner in which they are administered. The decision, *Hill v. McDonough*, No. 05-8794, opened the door to lawsuits that would be prohibited by tight restrictions on petitions for habeas corpus. Justice Kennedy wrote the opinion.

The court ruled 5 to 3 that new evidence in a Tennessee murder case, including DNA evidence, sufficiently undermined the prosecution's theory of the case to require a new federal court hearing for the man who was convicted and sentenced to death for the crime 21 years ago.

The case, *House v. Bell*, No. 04-8990, was the first in which the court factored the results of modern DNA testing into consideration of whether a prisoner might qualify for a chance at habeas corpus that would otherwise be prohibited by procedural obstacles. Justice Kennedy wrote for the majority. Chief Justice Roberts dissented, along with Justices Scalia and Thomas. Justice Alito did not participate.

The court ruled 6 to 3 that foreign criminal defendants who have not been notified of their right under an international treaty to contact one of their country's diplomats are not entitled to special accommodation from courts in the United States. The decision,

In a unanimous opinion, the court ordered a new trial for an inmate on South Carolina's death row on the ground that an evidentiary rule used in that state's courts had prevented the inmate from putting on a complete defense. Justice Alito, writing his first opinion for the court, said the rule was irrational and arbitrary. The case was Holmes v. South Carolina, No. 04-1327.

The court was deeply split on a basic question of death penalty law: the validity of the death penalty statute in Kansas under which a death sentence is automatic if the jury finds that the mitigating evidence and aggravating evidence are of equal weight. Voting 5 to 4 in an opinion by Justice Thomas, the court upheld the law, which the State Supreme Court had declared unconstitutional. Justice Alito's vote, following a reargument after he joined the court, made the difference. Justices Souter, Stevens, Ginsburg and Breyer dissented in the case, Kansas v. Marsh, No. 04-1170.

The court considered defendants' rights to cross-examine the state's witnesses, a right protected by the Confrontation Clause of the Sixth Amendment, in a pair of cases that were decided in a single opinion by Justice Scalia.

In the first part of the opinion in Davis v. Washington, No. 05-5224, the court was unanimous in ruling that a crime victim's emergency telephone call to 911 can be introduced as evidence at trial, even if the victim is not present for cross-examination, because a call to 911 does not produce the kind of "testimonial statement" to which the Confrontation Clause is addressed.

The court then went on to hold, by a vote of 8 to 1, with Justice Thomas dissenting, that a crime victim's statement to police officers who arrive at a scene should be considered "testimonial" if the police are investigating the crime rather than providing emergency assistance. Such a statement should therefore be banned from the trial if the person who gave it is not available for cross-examination, Justice Scalia said.

In another Sixth Amendment case, on the right to the assistance of counsel, the court ruled 5 to 4 that defendants who are wrongly deprived of the right to hire a lawyer of their choice are entitled to have a conviction overturned without the need to show that the first-choice lawyer would have achieved a better result. Justice Scalia wrote the opinion in the case, United States v. Gonzalez-Lopez, No. 05-352, joined by Justices Stevens, Souter, Ginsburg and Breyer.

Government Authority

The court ruled 6 to 3 that John Ashcroft, the former attorney general, acted without legal authority when he declared that doctors in Oregon who followed the procedures of that state's Death With Dignity Act to help patients commit suicide would lose their federal prescription rights and thus forfeit, as a practical matter, their ability to practice medicine.

No statute authorized the attorney general to take such action unilaterally contrary to "the background principles of our federal system," Justice Kennedy said in the majority opinion. The decision, Gonzales v.
Oregon, No. 04-623, was a rebuff of the Bush administration, which had embraced Mr. Ashcroft's personal fight against assisted suicide and carried on the case after he left the government.

Chief Justice Roberts joined a dissenting opinion written by Justice Scalia. Justice Thomas also dissented. Justice Alito was not yet on the court when the case was decided, with Justice O'Connor in the majority, on January 17.

A pair of decisions on the question of state immunity from suit, also issued in January, before Justice Alito joined the court, gave strong indications that the Rehnquist court's federalism battles were far from over.

The court was unanimous in permitting a disabled Georgia prison inmate's lawsuit against the state to go forward under the Americans With Disabilities Act. But the unanimity was achieved only because the court limited the decision, Goodman v. Georgia, No. 04-1203, to little more than the statement of a truism: that Congress has the power to make the states liable to lawsuit when they violate the Constitution.

In this case, the inmate claimed that his mistreatment had been so egregious as to violate not only the disabilities law, but also the Constitution. Justice Scalia's opinion said that to this extent, the lawsuit could proceed.

In the second decision, the court split 5 to 4 in ruling that states are not immune from private lawsuits brought under federal bankruptcy law. Justice O'Connor joined the majority opinion by Justice Stevens in this case, Central Virginia Community College v. Katz, No. 04-885. The dissenters were Chief Justice Roberts and Justices Scalia, Kennedy and Thomas, who wrote the dissenting opinion supporting state immunity.

The court ruled that as a matter of constitutional due process, the government must take reasonable steps to make sure that homeowners have been notified before it sells a house for nonpayment of taxes. Chief Justice Roberts wrote for the 5-to-3 majority in this case, Jones v. Flowers, No. 04-1477. Justices Thomas, Scalia and Kennedy dissented, and Justice Alito did not participate.

The justices ruled 7 to 1 that the Postal Service may be sued by people who trip over packages that letter carriers have carelessly left in their path. The majority opinion by Justice Kennedy in this case, Dolan v. United States Postal Service, No. 04-848, was based on an interpretation of the Federal Tort Claims Act, not on the Constitution. Justice Thomas dissented, and Justice Alito did not participate.

Environment

A fractured decision in the term's major environmental case, defining federal jurisdiction over wetlands in the Clean Water Act, did not produce a majority opinion but did retain the ability of the government to continue enforcing the 1972 statute vigorously.

The court split 4 to 1 to 4 in the case, Rapanos v. United States, No. 04-1034, with Justice Kennedy in the middle. One group of four—Justices Scalia, Thomas and Alito, and Chief Justice Roberts—denounced federal regulators' open-ended approach to wetlands as "beyond parody" and would have redefined the term to land adjacent to open water and actually wet most of the time.
The other foursome, Justices Stevens, Souter, Ginsburg and Breyer, would have deferred to the longstanding judgment of the Army Corps of Engineers that a "wetland" can often appear dry and can be miles from a body of water, as long as it sometimes performs a filtering or runoff-control function. Justice Kennedy voted with the first group to send the case back to a lower court, but he proposed a standard much closer to that of the Stevens group.

In a second case under the Clean Water Act, the court ruled unanimously that operators of hydroelectric dams must meet a state's water quality requirements to qualify for a federal license. Justice Souter wrote the opinion in this case, *S. D. Warren Company v. Maine Board of Environmental Protection*, No. 04-1527.

**Religion**

In a significant application of the Religious Freedom Restoration Act, the court ruled 8 to 0 that a small religious sect based in Brazil has the right to import a hallucinogenic tea that the federal government had wanted to seize as a banned narcotic.

The tea, known as hoasca, is central to the sect's rituals, Chief Justice Roberts noted in his opinion for the court. He said the government had not met the religious freedom act's demanding standard for applying a generally applicable law--federal narcotics law, in this instance--in a way that impinges on religious observance. Justice Alito did not participate in the case, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, No. 04-1084.

**Education**

Voting 8 to 0, the court upheld a federal law that requires universities to forfeit all federal financing if any part of the university does not provide military recruiters with the same access to students as it provides other potential employers.

The law, known as the Solomon Amendment, was challenged by a coalition of law schools that objected to the military's exclusion of openly gay men and women. The law schools argued that their First Amendment rights to free speech and association had been violated by the requirement that they open their doors to military recruiters.

Writing for the court in this case, *Rumsfeld v. Forum for Academic and Institutional Rights*, No. 04-1152, Chief Justice Roberts said the speech in question was that of the government, not of the law schools, which he noted remained free to criticize the military and to express their views on its policies. Justice Alito did not participate.

The court ruled 6 to 2 that parents who disagree with a public school system's special-education plan for their children have the legal burden of proving that the plan will fail to provide the "appropriate" education that a federal law guarantees to children with disabilities. Justice O'Connor wrote the decision in the case, *Schaffer v. Weast*, No. 04-698. Chief Justice Roberts did not participate, and Justice Alito was not yet on the court.

Separately, the court ruled 6 to 3 that parents who prevail at a special-education hearing are not entitled to reimbursement for the cost of hiring expert witnesses. Justice Alito wrote this opinion, *Arlington Central School District v. Murphy*, No. 05-18. Justices Souter, Breyer and Stevens dissented.
Employees' Rights

The court gave employees substantially enhanced protection against retaliation for complaining about discrimination on the job. Justice Breyer wrote the opinion in the case, *Burlington Northern & Santa Fe Railway Company v. White*, No. 05-259, which interpreted the anti-retaliation provision of the Civil Rights Act of 1964.

The court defined retaliation broadly as any "materially adverse" employment action that "might have dissuaded a reasonable worker" from making the complaint. Eight justices joined the majority opinion, and Justice Alito filed a separate concurring opinion.

Addressing the free-speech rights of government workers, the court ruled 5 to 4 that the Constitution does not protect public employees against retaliation for what they say in the course of performing their assigned duties.

Justice Kennedy's majority opinion in this case, *Garcetti v. Ceballos*, No. 04-473, drew a distinction between public employees' official speech, which he said supervisors were entitled to control, and their speech as citizens contributing to "civic discourse," for which they retained constitutional protection. The dissenters were Justices Stevens, Souter, Breyer and Ginsburg.

Abortion

The justices papered over, at least for this term, their fundamental differences on abortion, ruling narrowly and unanimously in a case from New Hampshire on access to abortion for teenagers facing medical emergencies. In an opinion by Justice O'Connor, her last before leaving the bench, the court reaffirmed that a medical-emergency exception was constitutionally required in a law that placed obstacles, like a parental-notice requirement and a waiting period, in the path of teenagers seeking abortions.

The more difficult question in the case, *Ayotte v. Planned Parenthood of Northern New England*, No. 04-1144, was that of what to do about New Hampshire's failure to include such an exception in its parental notice law. The justices sent the case back to the federal appeals court in Boston, which had banned enforcement of the law in its entirety, even for teenagers not facing a medical emergency.

That "most blunt remedy" would be justified, Justice O'Connor said, only if it was clear that New Hampshire's legislature, which enacted the law in 2003, would have preferred no law at all to one with the necessary health exception. Otherwise, she said, the appeals court should come up with a more limited remedy for the constitutional problem.

Patents

Indicating new interest in intellectual property law, the justices considered several patent cases but failed to offer much guidance in this burgeoning legal area.

The court handed a limited victory to eBay in its patent dispute with MercExchange, which successfully sued eBay for patent infringement on the method behind the online auction company's "Buy It Now" feature. The United States Court of Appeals for the Federal Circuit, which has sole jurisdiction over patent appeals, then granted an injunction against eBay's use of the technology, under the view that an
injunction should automatically follow a finding of infringement.

In a unanimous opinion by Justice Thomas, the justices instructed the appeals court to make a case-by-case determination rather than apply an automatic injunction rule. But the opinion, *eBay v. MercExchange*, No. 05-130, left it unclear what presumptions and factors should go into that determination, and it was evident that the justices themselves had not agreed on a standard.
The death of Chief Justice William Rehnquist and the retirement of Justice Sandra Day O'Connor make the current term the first in 34 years in which the Supreme Court gained two new members in a single term. But the changes are more momentous than in 1972, when Rehnquist and Lewis Powell joined the court, for two reasons: They involve the important post of chief justice and the replacement of O'Connor, the court's most influential member.

For more than a decade, the moderate O'Connor was able to steer decisions, sometimes toward the court's more liberal members—John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer—and sometimes toward its conservatives: Rehnquist, Antonin Scalia and Clarence Thomas. Justice Anthony Kennedy often was in the middle with O'Connor, but more to the conservative side.

President Bush cited the conservative credentials of new Chief Justice John Roberts and Justice Samuel Alito when he appointed them, but it isn't clear how they will affect the nation's law. As Roberts and Alito begin to define their roles, other justices are redefining theirs. Five to watch:

Kennedy: From the Middle, an Emerging Power Broker

Kennedy, 69, an appointee of President Reagan, is positioned to be the lone justice in the middle between four liberals and four conservatives—and the high court's voice on divisive issues.

In January, Kennedy wrote the court's opinion that upheld Oregon's law on physician-assisted suicide in the face of the Bush administration's attempt to void it.

On April 3, Kennedy, joined by the conservative Roberts and the liberal Stevens, took the lead in explaining why they had denied an appeal by terror suspect Jose Padilla.

Kennedy is among five justices on the current court—and the only one not in the liberal wing—to have expressed support for abortion rights, making him perhaps the most important vote on the issue.

Early in his tenure he voted against such rights, but he surprisingly reversed course in a 1992 case and voted to uphold Roe v. Wade, the 1973 ruling that made abortion legal nationwide.

However, in a 2000 dispute over a procedure that its critics call "partial-birth" abortion, Kennedy sided with the court's conservatives in a dissenting opinion that said states should be able to outlaw the "abhorrent" procedure.

A significant test of Kennedy's evolving views will come this fall, when the high court takes up a dispute over a federal ban on the procedure.

Harvard University law professor Richard
Fallon says that for years, he taught his constitutional law classes with an eye toward the writings of O'Connor, the author of the court's standards on abortion rights, affirmative action, separation of church and state and several other contentious issues.

"Now, it's going to be Justice Kennedy right in the center," Fallon says.

Roberts: New Chief Shows He'll Be Forceful Presence on Bench

In seven months, the new chief justice, 51, already is making a mark. On the bench he has become known for vigorously asking pointed questions—a stark contrast to the plodding style of his predecessor, Rehnquist.

Roberts has written few opinions, but the charm and preparedness that made him a star litigator before he became a judge have analysts predicting he could be a conservative powerhouse—more effective than Rehnquist and, before him, former chief justice Warren Burger.

"These justices are used to being persuaded by him," says Notre Dame University law professor Richard Garnett, referring to Roberts' having argued 39 cases before the court as a lawyer for the government and in private practice.

"He comes on as the 'rock star' Supreme Court litigator," Garnett says. "And because he is a great litigator, he knows how to find the heart of the issue and focus the attention of others on it."

Georgetown University law professor Peter Rubin says there's a chance that Roberts' conservative views could prompt a stronger show of force from the court's liberals—and further enhance the power of the vacillating Kennedy.

Along with Scalia and Thomas, Roberts has cast dissenting votes against Oregon's assisted-suicide law and in favor of law enforcement in a Georgia dispute over a warrantless search of a home by police. In March, Roberts led a unanimous ruling that said the U.S. government can withhold funds from universities that deny military recruiters access in protest of the Pentagon's policy on gays and lesbians.

"Nothing he has done so far should disappoint conservatives," Fallon says.

Souter: Shy Justice Begins to Reveal Edge

Souter, 66, an appointee of the first President Bush and one of the court's liberals, has long been known for his reserved manner. He has shed that persona in recent court sessions and become more hard-hitting.

During oral arguments in March in a case that tests the administration's plan to hold military tribunals for foreign terror suspects, Souter angrily suggested that the White House was trying to prevent the nation's judges from ensuring that such suspects are not wrongly jailed.

Earlier, Souter wrote a biting opinion for a liberal-led majority that declared a police search unconstitutional. In a break from his usual collegiality, Souter derided dissenting justices for opinions that he said gave short shrift to privacy rights.

Souter usually does not draw attention to himself. Off the bench, he is shy and rarely gives public speeches or attends social functions in Washington.
"There is some evidence that Souter is going to become a stronger voice than before," says Harvard University law professor David Barron. He suggests that Roberts' potential as a conservative force of nature appears to be revving up the court's liberals, particularly Souter and Stevens.

Alito: New Justice Shows His Conservative Streak

Alito, 56, joined the court as O'Connor's replacement on Jan. 31. He has a reticent demeanor and has written only one opinion. It was a straightforward, unanimous decision in a South Carolina criminal law dispute; all of the other justices signed his opinion. A key question from his Senate confirmation hearings—whether he, unlike O'Connor, will vote against abortion rights—won't be answered until at least the 2006-07 term.

Alito's questions from the bench often have been in sync with those of the conservative Scalia—perhaps reinforcing the "Scalito" nickname that Alito drew as a conservative lower court judge. During a court session in March, a lawyer arguing before the justices referred to Alito as "Scalia" before quickly correcting himself.

Stevens: Liberal Justice Remains Formidable

At 86, the Ford appointee who is the most senior member of the court's liberal wing has shown few signs of slowing down, much less retiring. This term, Stevens appears to be vying with the new chief justice over the court's direction, Barron says.

One sign of that, Barron says, came when Stevens and Roberts joined Kennedy's statement in the Padilla case. "Neither Chief Justice Roberts nor Justice Stevens was inclined to leave Kennedy out there with an opinion that only one of the competing leaders signed on to," Barron says. "There's a strong interest among them, especially Chief Justice Roberts and Justice Stevens, in commanding the court for their vision of the Constitution. The really open question is: Now that Justice O'Connor's voice is gone, whose voice will the court become?"
Every year, we publish a variety of statistics on the Term. Our preliminary set of voting statistics (subject to the effect of two decisions tomorrow and double checking generally) is now available here. Last Term’s numbers for comparison are available here.

I did some preliminary and rough analysis of the effect of the new Justices. I averaged the Justices’ voting relationships in the 2001 and 2005 Terms. Then I compared them with this Term. The results were relatively striking.

Chief Justice Roberts accomplished something you wouldn’t think possible in a sometimes deeply divided court, at least for someone who is not the “swing vote”: he was closer to every other Justice than his predecessor. For three of the more liberal Justices, the change was dramatic: Stevens, +15%; Souter, +17%; Ginsburg, +17%. For more conservative members of the Court, the change tended to be smaller (though for Scalia it was 12%).

Don’t get confused into thinking that Roberts gravitated towards the more liberal Justices. Rehnquist’s relationship with the other conservatives was already very strong; Roberts had little to do to establish a high degree of affinity.

Instead, the data show that Roberts—consciously or not, and more likely the former—built bridges throughout the Court.

The numbers for Justice Alito were striking as well, in a way that is encouraging for conservatives, discouraging for progressives. (Note that the sample size for Justice Alito is smaller—only 36 cases—and therefore potentially misleading, particularly because he was handed three cases with 4-4 ties that were originally argued when O’Connor was on the Court, without any of the many unanimous cases from that earlier period.)

Compared with Justice O’Connor, Alito’s affinity with all the conservatives grew substantially: Scalia, +13%; Kennedy, +15%; Thomas, +14%; and (though the comparison is inexact) Roberts (compared to O’Connor’s affinity with Rehnquist) +12%. By contrast, the affinity with the liberals was lower, sometimes substantially: Stevens, -15%; Souter, -5%; Ginsburg, -4%; Breyer, -14%.

In case you want to look at the actual numbers, they are available here.
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**Key**
- Full Agreement
- Agree in Part OR All
- In Part, All OR Judgment
- Disagree

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**KEY**

- **Total No of Cases Together**
- **No. and % of Times Agreed in Full**
- **No. of Times Agreed in Part & % of Times Agreed in Full or in Part**
- **No. of Times Agreed in the Judgment & % of Times Agreed in Full, in Part, or in the Judgment**
- **No. and % of Times Disagreed completely**

**October 2004 Term**
Comparisons are average of OT2001 and OT2005 with this Term

### O’Connor to Alito Change in Voting Patterns

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### Rehnquist to Roberts Change in Voting Patterns

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Most analysts predict (and I agree) that if confirmed, Judge Samuel Alito will be more conservative than Justice Sandra Day O'Connor, whom he would succeed on the Supreme Court. That's why O'Connor was practically begged to stay on by liberal Democratic senators such as Barbara Boxer of California and Patrick Leahy of Vermont; moderate Republican senators such as Arlen Specter of Pennsylvania and Olympia Snowe and Susan Collins of Maine; and liberal groups such as the National Organization for Women.

But amid the debate over Alito's writings and decisions, some of the most telling signs of a right-wing agenda have received too little attention.

**Affirmative action.** The judge has repeatedly blocked or crippled programs designed to protect blacks against the continuing effects of American apartheid. One decision, which struck down a school board's policy of considering race in layoff decisions, thwarted an effort to keep a few black teachers as role models for black students. A second blocked a similar program to shield recently hired black police officers from layoffs. A third blocked a city from opening opportunities for minority-owned construction companies by striking down its program to channel 30 percent of public works funds to them.

**Voting rights.** Making it harder for black and Hispanic candidates to overcome white racial-bloc voting, the judge has repeatedly struck down majority-black and majority-Hispanic voting districts because of their supposedly irregular shape. But the judge saw no problem with the gerrymandering of bizarrely shaped districts by Pennsylvania's Republican-controlled Legislature to rig elections against Democrats!

**Civil rights and women's rights.** Decision after decision has made it harder for victims of racial and gender discrimination to vindicate their rights. One used a narrow reading of Title IX, the federal law banning gender discrimination by federally funded schools and colleges, to block victims from suing unless the federal money went to the particular discriminatory program. A second blocked victims of racial and other discrimination from suing federally funded programs and institutions unless they can prove intent to discriminate—often an impossible burden. A third barred victims of rape and domestic violence from suing under the federal Violence Against Women Act.

**Gay rights.** One decision allowed states to prosecute and brand gay people as criminals for enjoying sexual relations, even in the privacy of their own bedrooms. Another supported a homophobic group's discriminatory exclusion of gay boys and men, citing the group's "freedom of association."

**Religion.** The judge has often breached the wall of separation between church and state. Decisions boosting governmental subsidies for Catholic and other religious schools include one that supported "voucher" programs condemned by teachers groups and another that approved a state tax
deduction for tuition paid to religious schools. Other decisions have forced public schools to open their doors to evangelical Bible clubs; forced a state university to subsidize a Christian student magazine; allowed a state legislature to pay a chaplain to open each day's session with a prayer; and supported official displays of explicitly Christian symbols, including a tax-funded Christian nativity scene as part of a city's holiday display.

States' rights--and guns. One decision crippled enforcement of the Brady gun control law by striking down its requirement that local law enforcement officials perform background checks on handgun purchasers. A second struck down a federal law that sought to protect children by barring possession of guns in or near schools. A third immunized states from suits under the federal Fair Labor Standards Act, leaving 4.7 million state employees with no remedy.

Death penalty. The judge has been relentless in pushing death-row inmates toward execution chambers--even in the face of eye-catching evidence of possible innocence and systematic racial discrimination. One decision expedited the execution of a coal miner--whose guilt is doubted by experts--because his lawyer had missed a state court filing deadline by one day. Two dissents supported executions of 16-year-olds and of defendants so insane that they have no idea what they did.

Civil liberties. One decision gave a virtual blank check for government investigators to conduct aerial surveillance of citizens--even by hovering over the fenced yards of private homes. A second upheld the forfeiture of a woman's car because her faithless husband had been parked in it while receiving oral sex from a prostitute. Two more gave presidents absolute immunity and attorneys general almost absolute immunity from lawsuits for their official acts, including the Nixon administration's illegal wiretapping of political opponents. And the judge approved a police officer's fatal shooting of an unarmed, 15-year-old black youth, in the back, because he was suspected of fleeing the scene of a minor burglary.

Choice. The judge has called abortion "morally repugnant"; declared Roe v. Wade to be "on a collision course with itself"; claimed that governments have "compelling interests in the protection of potential human life ... throughout pregnancy"; and forced terrified minors to notify often-abusive parents (or beg judges for permission) before they can obtain abortions.

Environment. Among other anti-environment decisions, the judge overturned a long-established Clean Water Act regulation that had protected ponds and many wetlands from dredging and filling by profiteering developers.

Big business. One decision supported Big Tobacco's position that it could not be regulated in any way by the federal Food and Drug Administration--not even to prevent use of TV ads to hook children and teenagers on cigarettes. A second overturned a jury's $145 million award of punitive damages against a big insurance company that had refused in bad faith to settle a valid car-crash claim and thereby exposed a policyholder to personal liability.

I could go on. But as you've probably figured out by now, I have been playing a little trick. None of the opinions, dissents, or votes described above (accurately if incompletely) were Judge Alito's. All were Justice O'Connor's.

That would be the same Sandra Day
O'Connor who is hailed on the Web sites of Alito's most bitter opponents as "moderate" (Naral Pro-Choice America); as "a critical vote ... in numerous cases to protect Americans' rights and liberties" (People for the American Way); and as "beholden to nothing and to no one except the law" (NOW).

My purpose has been to illustrate how easily the tactics used by liberal groups to tar Alito could be used to portray even the sainted, moderate O'Connor as a fanatical conservative who "has sought to dismantle reproductive choice, undermine civil-rights enforcement, weaken environmental protections, restrict individuals' ability to seek justice in the courts when their rights are trampled by corporations, and diminish constitutional protections for abusive government intrusion into Americans' privacy," to borrow from a recent People for the American Way depiction of Alito.

I have, to be sure, taken certain liberties by using loaded language and by selectively omitting factual context and the many O'Connor decisions and votes that could be used to portray her as quite liberal.

But I have done no more slanting than many liberal groups—and some journalists—have done in their misleading campaign to caricature Alito. And while I have failed (until now) to mention that O'Connor has drifted markedly toward the liberal side of the spectrum over the past two decades, Alito's critics have similarly ignored much evidence that his 15 years of steady, scholarly, precedent-respecting work as a judge tell us more about him than a handful of widely (and misleadingly) publicized memos that he wrote more than 20 years ago.

Not to mention the critics' efforts to drown out the virtually unanimous praise voiced by the many moderates and liberals (as well as conservatives) who know Alito well: colleagues (current and former), classmates, friends, and former law clerks. Sure, they say, Alito is a conservative. But he also believes deeply that judges should be constrained by established legal rules and hard facts—and should not be looking to promote political agendas. This helps explain why the American Bar Association's Standing Committee on Federal Judiciary has unanimously rated Alito "well qualified" for the Supreme Court—the highest possible rating.

After reading hundreds of news articles and interviewing dozens of people during the nearly 10 weeks since Alito's nomination, I have yet to come across a single suggestion (even anonymous) by anyone well acquainted with the man that he will bring a radical conservative agenda to the Court. If I have missed anyone out there, please let me know.
Last week, when Antonin Scalia found himself on the losing end of *Hamdan v. Rumsfeld*—the case invalidating the Bush administration's military commissions for Guantanamo detainees—the court's self-styled littérateur did what he does best: He blew his stack. The court's interpretation of legislative history, he wrote, only makes sense if it "indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness."

Two days earlier, when Justice David Souter's dissent in a death-penalty case, *Kansas v. Marsh*, rubbed Scalia the wrong way (the court upheld a law Souter called "morally absurd"), Scalia gave a similarly scalding performance. Souter's opinion, he wrote in a concurrence, "has nothing substantial to support it" and makes a great fuss about the largely irrelevant question of wrongful conviction in the criminal justice system. "That is a truism," Scalia snapped, "not a revelation."

That scolding tone, those deliciously overwrought metaphors: It's Catholic-school headmistress meets Vladimir Nabokov, and it's the lively, unapologetically stylish Scalia that avid court-watchers know and love. But the opinions above stand out this term, not just for their colorful language and questionable etiquette. Such decisions are noteworthy because they have become increasingly rare. The 2005 term might well mark the demise of more than just Bush's military commissions and mechanisms to enforce the exclusionary rule: It could also signal the decline of Antonin Scalia's literary style. Everyone agrees that Scalia is a witty jurist and a lively writer. Earlier this year, the New York Times crowned him the "funniest justice" on the court, finding him responsible for a whopping 77 "laughing episodes" during oral arguments of the 2004 term—19 times the number of episodes produced by Ruth Bader Ginsburg and infinitely more than those produced by Scalia's ideological neighbor Clarence Thomas. Conservatives, meanwhile, can't stop praising him for the brio he brings to the bench. Web sites like Cult of Scalia and Ninomania give fans the chance to wax sycophantic about the "greatest jurist of our time" and the "yummy" dissents he produces. 2004 also saw the release of a book, *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice*—a fawning collection of opinions, compiled by Kevin A. Ring. "Scalia's way with words," writes a breathless Ring, "is what makes this book possible."

Just what is this "way with words" that makes Scalia so distinctive? His writing style is best described as equal parts anger, confidence, and pageantry. Scalia has a taste for garish analogies and offbeat allusions—often very funny ones—and he speaks in no uncertain terms. He is highly accessible and tries not to get bogged down in abstruse legal jargon. But most of all, Scalia's opinions read like they're about to catch fire for pure outrage. He does not, in short, write like a happy man.
But there was a lot less of his trademark style this year. And there's a very simple reason to expect to see less of Scalia's verbal pyrotechnics in the future: Scalia's angry wit depends on having someone to criticize, and criticism tends to travel by way of the dissent. That's why Ring's book has the title it does, instead of, say, Scalia Delivers or Scalia Convinces Everyone That He's Right.

For 18 years, Scalia has been a frustrated conservative presence on a shifting but moderate bench, and it shows in his writing. Yes, he has certainly produced a few thrilling majority opinions, but Ring rightly notes that "nearly every opinion reveals Scalia's strong disagreement with the reasoning, if not the conclusion, of a majority of the Court."

As that court lurches rightward, though, Scalia's contrarian spirit will begin to seem less, well, contrarian. Already, he has been dissenting less. Since Samuel Alito joined him on the bench (for a total of about 40 cases this term), Scalia has joined or written dissents just three times (with one partial dissent). During the last 40 cases of the 2004 term, by contrast, Scalia dissented 11 times, and twice in part.

Since the 2005 term began, Scalia has written more majority opinions than any other justice and has authored the third-fewest dissents—a stark contrast with past terms. The endlessly charming John Roberts has made no secret of his desire for a court that speaks with a unified voice, and as Walter Dellinger pointed out last week, he pulled off the astonishing mathematical trick of agreeing with every justice on the court more than Rehnquist had. Alito's charms are less universal, but he agreed with Scalia 13 percent more than did Sandra Day O'Connor—a justice with her own special place in Nino's hell. With the court less Balkanized, the vitriolic stylings of Scalia will seem increasingly out of place.

This is not to claim that Scalia won't find a place for a clever turn of phrase or a purple metaphor in the future. His dissent in *Hamdan* and opinion in *Marsh* prove there is enough contested constitutional territory still available, and I have no doubt that Scalia's love of language transcends ideological lines. (For years, he and Harry Blackmun—as intellectually distant as two justices could be—were the sole members of the Chancellor's English Society, a playful group Scalia founded to promote proper English usage.) But it's simply in the nature of dissents to spawn the kind of fuming creativity that Scalia most loves. When you dissent, not only do you have a nice big target at which to take aim—the majority—but, more important, you don't need anyone else on the court to agree with you. "It is clearly true," Georgetown law professor Peter Rubin told me, "that any justice is freer to write whatever he or she wants alone." In short, it's easy for Scalia to be a big, colorful jerk in dissents because he can be a big, colorful jerk all by his lonesome self.

And how. A quick tour of Scalia's greatest hits in dissent is in order. There's *Morrison v. Olson*, in which the court upheld the Independent Counsel Act. (Remember Kenneth Starr?) Scalia, writing on the short end of a 7-1 split, upbraided his colleagues for overlooking an obvious separation-of-powers problem. Some dangers come before the court "in sheep's clothing," he wrote. "But this one comes as a wolf." Then there's *PGA Tour, Inc., v. Martin*, in which the court had to decide whether a rule requiring all golfers to "walk" the course violated the rights of a disabled golfer. In dissent, Scalia suggested that, "out of humility or out of self-respect (one or the other) the Court
should decline to answer this incredibly difficult and incredibly silly question." And few can forget Planned Parenthood v. Casey—the 1992 case upholding the core holding of Roe v. Wade—in which Scalia's dissent achieved a level of frustrated fury usually reserved for undersea volcanoes and small dogs tied to parking meters. Chastising the majority opinion's claim that it is "tempting" to limit the freedom of federal judges, he retorted that "no government official is 'tempted' to place restraints upon his own freedom of action, which is why Lord Acton did not say 'Power tends to purify.'"

It's heady stuff—and that's without even getting into Scalia's jeremiads against the use of international law, "evolving standards of decency," or the court's embrace of the "homosexual agenda." But in majority opinions, the name of the game is coalition-building, and while the Scalia who speaks in the first person plural is able to find room for a flash or two of wit, there's just no comparison with his dissents. You can read Scalia's majority opinions in Davis v. Washington or United States v. Gonzalez-Lopez, without cracking a smile, and—a line or two notwithstanding—Scalia's majority opinion in Hudson v. Michigan (which allowed unconstitutionally acquired evidence to be used at trial) could have been written by pretty much anyone.

I don't doubt that all this newfound relevance pleases Scalia. And he may well try to have his cake and eat it too by writing lots of blistering concurrences that take shots at anyone and everyone within rifle range. But that would be pointless. You might even say it would be a bit like Demosthenes on the beach, rattling off into a big, open nothingness.
“Term Analysis: A “Split-the-Difference” Court”

SCOTUSblog
July 5, 2006
Lyle Denniston

In the annual popular ritual of judging the Supreme Court's Term, pundits and analysts of various stripes have concluded--more or less--that this has been a 4-1-4 Court, with Justice Anthony M. Kennedy rising to new eminence as "the decisive swing vote" in the middle, essentially replacing Justice Sandra Day O'Connor in that role. That, of course, is an arguable position, but it does tend to obscure the complexity of the voting patterns and results as the Term unfolded.

While some commentators, appropriately, have been tentative about drawing firm conclusions until more is known about the Court's two new members, there is a discernible character to this new Court that simultaneously goes beyond the simplistic judgments about Kennedy and locates some characteristics that may well endure as the "Roberts Court" develops further.

That character may be summed up this way: this is a "split-the-difference Court." The idea, and the phrase, originate in the persuasive perspective of J. Harvie Wilkinson III, a judge on the Fourth Circuit Court in Richmond (and one of the federal judiciary's more thoughtful jurists). It is not based on a review of the 2005-2006 Term, but rather on judgments he makes about the last five years of the "Rehnquist Court."

His essay, "The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence," appears in the Stanford Law Review (58 Stanford Law Review 1969 [2006]). The text of the essay can be found here. (Thanks to newspaper columnist George Will for bringing this piece into fuller public display. This post will not do full justice to the piece; it needs to be read in its entirety.)

Before overlaying this perspective on the 2005-2006 Term (that will come shortly), Wilkinson's thesis needs to be summarized.

According to Judge Wilkinson: as the Court entered the 21st Century, there was a discernible shift in its approach. "The Court sought to tackle the most controversial issues before it by splitting the difference. Few courts have ever raised this form of jurisprudence to such an art form." It involves splitting-the-difference in result, in reasoning, and in the way a Court majority adapts to "the polar positions" of national debate about a key issue.

From several decisions that Wilkinson analyzes, here are examples that illustrate each of his categories: the Michigan affirmative action decisions in 2003--splitting-the-difference in result; the 2004 decision in the war-on-terrorism case, Hamdi v. Rumsfeld--splitting-the-difference in reasoning; and the gay sexual privacy decision in 2003, Lawrence v. Texas--splitting-the-difference on an issue of national controversy.

As the judge sums up: "Splitting the difference...enabled the Rehnquist Court in the final years to craft narrow rulings that reflected, by and large, the temper of the times... Splitting the difference is above all an act of compromise. If the wheels of national life are often greased with compromise, courts should not themselves
shy away from seeking it."

Wilkinson, after recounting the positive side of this approach, goes on to warn of its perils. "Splitting the difference," he writes, "allows democratic freedoms to be eroded incrementally, especially since the propelling force behind the Court's gradual encroachments are the Court's own prior pronouncements. Splitting constitutional differences is... more likely to be grounded in policy and wisdom. ... This approach involves the slow accretion of authority. ...

... There is a thin line between the unabashedly pragmatic exercise of splitting differences and the practice of politics itself."

Using this thesis as a caliper to measure the 2005-2006 Term, one can get closer to what the "Roberts Court" is--and what it is becoming.

Take, as a beginning example, the one ruling in the Term that stands above all others in national importance: the war-on-terrorism case, Hamdan v. Rumsfeld, decided on the final day of the Term. For all of its boldness in confronting President Bush and his notions of the "unitary Presidency," the Hamdan decision decidedly splits the difference--in result, in reasoning, and in staying between "polar positions." The Court did not reject the President's "inherent authority" argument, but skipped over it; it avoided confrontation with Congress over its power to curb courts' jurisdiction; it relied on Congress' authority in military justice as controlling; and it eschewed international law and relied instead on domestic statutory command.

There is another war-on-terrorism result that often gets overlooked, because it did not involve a final decision: the Court's decision in April not to hear the challenge by a U.S. citizen, Jose Padilla, to his detention and long-term confinement as an "enemy combatant." But in declining to hear the case, the Court split the difference between embracing presidential power and having the courts used by an Executive willing to shift its handling of terrorism suspects when it was about to lose ground in the courts.

Consider another, very important decision: in the Texas congressional redistricting case. The Court left open the theory that partisan gerrymandering may go too far but did not encourage further debate about it, it paid tribute to legislative supremacy in this field to displace judicial result, and it made modest use of judicial authority to protect minority voters.

In three high-profile cases on criminal law, the Wilkinson perception holds: Hudson v. Michigan, on the use of evidence gathered after a violation of the police "knock-and-announce" rule, Georgia v. Randolph, on the scope of consent to a police search; and House v. Bell, on the treatment of evidence that may show a convicted individual was innocent of the crime. In each, the Court resisted the extremes that were asserted by some of the Justices, and kept the outcome somewhere near the middle of judicial theory and practical outcome.

The pattern is the same in the Vermont campaign finance cases, in the major ruling on the Clean Water Act (Rapanos v. United States), and in the surprisingly narrow ruling on abortion rights in Ayotte v. Planned Parenthood.

Of course, in several of those actions, one can readily see the key role of Justice Kennedy--writing for a shifting majority, or being the object of conspicuous effort to hold or attract his vote. But the complexity of the decisions suggests a dynamic of difference-splitting involving a number of
Justices, with a clear—and differing—majority working to avoid extremes.

If splitting-the-difference is the dominant judicial ethic in this Court, it may be the result more often of necessity than of choice. When there are such pronounced differences in judicial philosophy within the Court, as there clearly are, "massing the Court" for an outcome necessarily involves reaching for something that approximates the middle. This puts a premium on a Justice or Justices who might be capable of submerging otherwise-strong personal philosophy in the search for common ground, or perhaps the least common denominator. Kennedy, of course, is demonstrably capable of that, but so is Justice John Paul Stevens and Justice Stephen G. Breyer, and, now and then, Justices Ruth Bader Ginsburg and David H. Souter. There are signs that Chief Justice John G. Roberts, Jr., may be inclined in that direction, too.

What might emerge, then, is an array on this Court of looser coalitions—Stevens, Ginsburg and Souter on the more liberal end but not immovably so, Kennedy, Breyer and the Chief Justice forming something of a pragmatic middle, new Justice Samuel A. Alito, Jr., drawn to the conservative side but not totally ready to line up with the two predictable occupants of that bloc, Justices Antonin Scalia and Clarence Thomas.

That would be a less predictable Court. But, perhaps, not a Court very much different from the one that sat in the concluding years of the Rehnquist era, as portrayed by Judge Wilkinson.
Writing in April for a unanimous Supreme Court, Chief Justice John G. Roberts Jr. found that the police in Brigham City, Utah, acted properly in entering a home without a warrant after they peered through a window and saw a fight in progress that had left one man spitting blood.

"The role of a police officer includes preventing violence and restoring order, not simply rendering first aid to casualties," the chief justice said, rejecting the argument that the police should have waited until the altercation ended more conclusively. "An officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided," he explained.

The chief justice's sports imagery galvanized the legal blogs. Some found his boxing reference inapt. "The whole point of boxing is fighting!" wrote a participant on the Althouse blog, run by Ann Althouse, a law professor at the University of Wisconsin. Others took issue with the hockey reference. "Given all the padding that hockey players wear, being punched by an opponent hardly is more significant than being hit by a toddler," one said.

Finally, another writer took a step back and observed that "this shows another side of Roberts as a good writer: displaying some wry humor and hipness."

It is no surprise that the new chief justice's every vote is being tabulated and scrutinized. But so is his every metaphor. Beyond John Roberts the judge, what has this first term revealed about John Roberts the judge?

He wrote eight majority opinions, roughly his fair share, given that there were 69 opinions to divide among the nine justices. He also wrote three dissenting opinions and two concurrences. While not a huge body of work, it is enough to convey at least a preliminary sense of his judicial voice.

It is direct, straightforward, free of legal jargon, the voice of a lawyer who made a living selling complicated ideas to busy appellate judges under tight time constraints.

Prof. Erwin Chemerinsky of Duke University Law School, who spent the past week editing the term's cases for inclusion in his constitutional law textbook, said that the Roberts opinions were refreshingly easy to edit compared with those of most other justices. "His prose style is clear and easy to follow," Professor Chemerinsky said. "He tells you right in the first paragraph exactly what the case is about."

Prof. Akhil Amar of Yale Law School praised the Roberts style for "elegance and economy" as well as for the "occasionally snappy line" that could crystallize a case for lay readers. He gave two examples. One was a majority opinion that rejected the government's application of federal narcotics law to stop a Brazil-based religious group from importing a hallucinogenic tea for use in its rituals. "The government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody,
so no exceptions," the chief justice wrote.

The second was a majority opinion that found that the state of Arkansas had denied due process to a homeowner by seizing and selling his house for nonpayment of property taxes without taking reasonable steps to notify him of his jeopardy. Referring to Gary K. Jones, the homeowner, Chief Justice Roberts wrote: "In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the state did—nothing."

"That little dash is brilliant," Professor Amar said. "Every ordinary citizen can understand the frustration of dealing with government stupidity."

Among legal academics, the Roberts opinion that received by far the most attention was the one rejecting a constitutional challenge to the Solomon Amendment, under which universities forfeit all federal grants if they fail to open their doors to military recruiters. A group of law schools argued that the statute violated their rights to free speech and association.

As the case reached the court, many law professors who had supported the challenge began to have second thoughts, fearful that the First Amendment argument, if accepted, would undermine many anti-discrimination laws by permitting bigots to opt out in the name of free association. Even liberals, or perhaps especially liberals, were therefore relieved by the chief justice's conclusion that because the law regulated neither speech nor association, but merely conduct, it raised no First Amendment problem.

Jack Balkin, a professor at Yale Law School, said on his blog that the chief justice's opinion "was carefully and skillfully written to make almost no new law." Professor Balkin said the opinion made the case "look easy by artfully dodging every interesting constitutional law question in sight."

That raises the question of whether the chief justice's performance conforms to his own stated goal: to be a "minimalist" judge who decides no more than necessary, an umpire simply calling balls and strikes. The answer is yes, and no.

"He's 'minimalist' in recognizing that the court is an ongoing enterprise with precedents and history and tradition," said Frederick Schauer, a professor at the Kennedy School of Government at Harvard. "He is not coming in with a big new theory or a big new perspective."

On the other hand, the chief justice joined opinions by Justice Antonin Scalia in environmental and criminal cases that reached beyond the specific disputes at hand to call long-settled assumptions into question. And several of his opinions had a rhetorical edge. "It is a sordid business, this divvying us up by race," he wrote in dissent from a decision that enforced the Voting Rights Act to invalidate a Texas Congressional district.

His seeming allergy to citing law review articles, or any other sources outside the body of the court's published opinions, is a striking feature of the Roberts approach. "It's as if the answers to all questions are already there, completely internal to the court, to be teased out of the existing cases," said David Barron, a professor at Harvard Law School.

Chief Justice Roberts, a former managing editor of the Harvard Law Review, has cited only a single law review article, one written by Judge Henry Friendly, for whom he clerked on the federal appeals court in New York. It was a tip of the hat in his first
Relying on precedent as the only source of law is an approach with strengths and weaknesses, Professor Barron said, noting that on the one hand, precedent can be a smokescreen, "a rhetorical device to hide the inevitable policy making," while on the other, "it has its own constraining effects," making a judge less likely to embrace dramatic change in the status quo. Whether John Roberts's first year is a good predictor of his 10th, 20th or 30th is an open question. According to a new study by the political scientists Lee Epstein and Jeffrey A. Segal, Chief Justice Earl Warren voted against criminal defendants and civil rights litigants 62 percent of the time during his first term. Eventually, of course, he became their champion.

But such a trajectory is rare. The other chief justices of the last 50 years, Fred M. Vinson, Warren E. Burger and William H. Rehnquist—Chief Justice Roberts's mentor—all stayed true to their early form.
"Disorder in the Court:
The Guantanamo decision revealed a vein of deep passion on the Supreme Court. Which is just what Chief Justice Roberts hoped for."

Time
July 10, 2006
Jeffrey Rosen

Ordinarily the Supreme Court is not very much like The View. You won't hear much of the Justices' inner thoughts, let alone their outer ones. And with the exception of perhaps the Dalai Lama or, in his day, Alan Greenspan, they are the only people in power who can deliver their opinions and then steadfastly refuse to elaborate on them. Everything about the court's rituals is meant to keep the Justices behind the red velvet curtains and their emotions in check.

The first year of the Supreme Court under John Roberts, though, has not been ordinary. As evidenced last week when the court struck down the Bush Administration's use of military tribunals, the Justices are suddenly unafraid to talk to one another in personal terms. "We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy," wrote Clarence Thomas in an impassioned dissent. Thomas felt so strongly—he called the majority decision "unprecedented and dangerous"—that for the first time in his 15 years on the court, he read his dissent aloud. The ordinarily genial Stephen Breyer responded indignantly that the court did not "weaken our Nation's ability to deal with danger." Congress, he added, "has not issued the Executive a 'blank check.'"

The pointed back and forth was characteristic of the sometimes barbed, often unpredictable and really quite fun Roberts court. It began with a surprising number of unanimous decisions, but by the time it adjourned for the summer last week, in what Justice John Paul Stevens called a " cacophony" of discordant voices, the usual decorous costume drama that is a Supreme Court term had morphed into something much closer—in vitriol, tension and drama—to a soap opera (O.K., a PBS soap opera). Having spent 11 years without a change in personnel, the Justices were clearly rejuvenated by two new colleagues, Roberts and Samuel Alito, and the energy fueled their opinions. Although the alliances on the Roberts court are still fluid, even the longest-serving Justices are debating issues that matter to the American people—the limits of death penalty, the war on terrorism—with unusual passion.

Despite the impression left by its rush of final decisions, the Roberts court is, at least so far, less fractured than the court led for 19 years by William Rehnquist. Almost half its decisions this year had no dissents, compared with 38% in Rehnquist's final term, and the tally of 16 cases decided by a 5-to-4 vote is seven fewer than under Rehnquist. That is a tribute to the personality and leadership skills of Roberts, who has made issuing strong decisions and encouraging collegial debate top priorities. In a commencement speech at Georgetown University Law Center in May, Roberts opened with some high-quality lawyer jokes, then set out his goals as Chief Justice: unanimity or near unanimity, which he thought would promote "clarity and guidance for lawyers and lower courts trying
to figure out what Justices meant."

Roberts emphasized that a good court should decide cases narrowly so Justices on both sides can reach a meaningful consensus. But he added an important qualifier: "There will of course be disagreements on the court, and these could and should not be artificially suppressed." Roberts practiced what he preached in his three dissents, using often forceful prose. "It is a sordid business, this divvying us up by race," he declared last week in the partisan-gerrymandering case, which left all but one of Texas' redrawn congressional districts in place. Earlier in the term, he attacked an opinion by Justice David Souter that held that a wife couldn't give the police permission to search a house over her husband's objection. "The majority reminds us, in high tones, that a man's home is his castle," Roberts wrote, "but even under the majority's rule, it is not his castle if he happens to be absent, asleep in the keep, or otherwise engaged when the constable arrives at the gate."

Souter responded in kind. "In the dissent's view, the centuries of special protection for the privacy of the home are over," he announced with an uncharacteristic note of melodrama. Having abandoned his famous Yankee reserve, he started to make a habit of it. During oral arguments in the Gitmo case, the government's lawyer seemed to suggest that Congress could suspend the writ of habeas corpus—which allows prisoners to challenge the legality of their detentions—inadvertently. Souter, incredulous, asked, "Isn't there a pretty good argument that a suspension of the writ [by] Congress is just about the most stupendously significant act that the Congress of the United States can take? The writ is the writ!" Antonin Scalia, one of the most reliable defenders of Executive power, insisted that Congress could suspend habeas corpus even if it didn't say so explicitly.

That mini courtroom brawl between Souter and Scalia, which had the overtones of an 18th century boxing match, was picked up again in the final days of the term. By a 5-to-4 vote, the court upheld a death-penalty verdict in Kansas, and Souter filed an agonized dissent listing recent cases in which DNA testing had led to innocent people's exoneration. Dripping with sarcasm, Scalia chided Souter for encouraging the "sanctimonious criticism of America's death penalty" that he said was common in "some parts of the world." "I say sanctimonious," Scalia added, "because most of the countries to which these finger waggles belong had the death penalty themselves until recently."

Scalia is famous for picking intellectual street fights on and off the court, and this year he has been even more pugnacious than usual. In March, Scalia ridiculed the challenge to military tribunals during a speech in Switzerland. "Give me a break," he declared. "I had a son on that battlefield, and they were shooting at my son, and I'm not about to give this man who was captured in a war a full jury trial. I mean, it's crazy."

A few weeks later, when a Boston reporter asked whether his participation at a Mass for Catholic lawyers might raise questions about his impartiality, Scalia fanned the fingers of his right hand under his chin. "That's Sicilian," he said, explaining that the gesture meant he "could not care less."

Scalia can always be counted on to pick a fight, but what has changed this year is that other Justices, once relative wallflowers, are increasingly emboldened to fire back in kind. In February, Ruth Bader Ginsburg,
ordinarily a model of judicial composure, gave a speech in South Africa attacking critics in Congress who have assailed her citations of international law as an offense against U.S. sovereignty. Those criticisms, she said, "fuel the irrational fringe" and have encouraged threats on her life. She singled out Scalia, who had called the consultation of "alien law" a form of "sophistry."

Is the recent round of attacks and counterattacks a sign of internal animosity? Not necessarily. Ginsburg and Scalia, after all, are old friends, united by their love of opera and good cooking. For years they have spent New Year's Eve together, along with their spouses. (Ginsburg's husband Marty often cooks.) Certainly, there's nothing on the Roberts court resembling the antagonism among the Justices that raged after World War II. Consider the blood feud between Hugo Black and Robert Jackson, both appointed by Franklin Roosevelt. Jackson thought F.D.R. had promised to promote him to Chief Justice, but after a vacancy arose in 1946, Black threatened to resign if Jackson became Chief. That led Jackson to fire off an unhinged letter to President Harry Truman and Congress, accusing Black of unethical behavior. The '40s produced another nasty rivalry: Felix Frankfurter was so intellectually condescending to Chief Justice Fred Vinson that during one of the Justices' private conferences, Vinson rose from his seat and nearly punched Frankfurter in the nose. After Vinson died unexpectedly of a heart attack while the court was deciding Brown v. Board of Education in 1953, Frankfurter declared on the train back from the funeral, "This is the first indication I have ever had that there is a God."

By contrast, the Justices of the Roberts court are able to attack one another vigorously in public while maintaining cordial relations in private. Thomas, for example, has told students groups that he has never heard an uncivil word uttered at the Justices' conferences during his time on the court. And despite the disagreement in the military-tribunals case, Thomas is on good terms with his ideological opponent Breyer, who has praised Thomas' skills as a lawyer and photographic memory in technically complicated cases.

It's a good thing for the court and the country that the Justices of the Roberts court seem to be finding a way to disagree vigorously without taking it too personally. During his confirmation hearings, Roberts said, "It's my job to call balls and strikes and not to pitch or bat." Nevertheless, the court under his leadership will continue to decide some of the most momentous questions of American life. It has already agreed to hear important cases next term on the boundaries of affirmative action and abortion. Those are questions about which all the Justices have extremely strong views, and the fact that they are not shy about expressing them helps citizens on both sides of the issues feel as though their own views have been strongly represented and thoroughly aired.

Still, the Roberts court is walking a delicate line. History suggests that the moment the Justices begin to take their legal disagreements too much to heart, the court may fracture in ways that even the most capable Chief Justices are unable to repair. For that reason, all the Justices might do well to remember Ginsburg's advice for keeping your cool in the face of attacks. "I sometimes find myself alone in chambers momentarily distressed or annoyed," Ginsburg told actress Marlo Thomas in 2002 "thinking, I'd like to strangle Justice So-and-So." At times like that, Ginsburg said, she
remembers the advice of her mother-in-law on her wedding day: "Of course, it is important to be a good listener—but it also pays, sometimes, to be a little deaf."
The more-provocative labels hurled at John Roberts by the dozens of liberal groups opposing his nomination seem unlikely to stick, especially once the nation gets to know him through his televised confirmation testimony after Labor Day.

"Extremes"? This may be the most likable, even-tempered, moderate-spirited nominee in recent memory. True, the more than 60,000 pages of now-public Roberts documents show him to be (or, at least, to have been) a committed legal and political conservative and a trenchant critic of many Supreme Court precedents beloved by liberals. But he has consistently rested his arguments on powerful legal analyses and on the highly defensible premise that the Court should not "view itself as ultimately responsible for governing all aspects of our society," as he put it in a 1983 memo.

"Ideologue"? Roberts has won the personal esteem of many liberals as well as conservatives. He hardly appears to be a man on a Bork-style mission to topple decades of precedent or revolutionize the law. While usually on the conservative side, he has also argued forcefully for a pro-environment client, for native Hawaiians seeking racial preferences, and for poor plaintiffs in a welfare-rights case. (Not to mention his minor but telling assistance in a big gay-rights case.)

"Out of step with ordinary Americans"? Most (or at least many) of the views championed by Roberts as a fast-rising young lawyer in the Reagan and first Bush administrations are more in step with those of ordinary Americans than are the views of his critics.

Still, there is a large kernel of truth in the hundreds of pages of reports by liberal groups about what Roberts had to say during his years as a special assistant in the Justice Department (1981-82), an assistant White House counsel (1982-86), and deputy solicitor general (1989-92).

Unless he has changed his mind about a lot of things—which seems unlikely, although he has shed some youthful cocksureness over the years—Roberts may well tip the Court's precarious balance perceptibly to the right on some big issues. Especially those on which the swing-voting Sandra Day O'Connor has sided with the Court's four liberals.

For better or worse, that could change the law—perhaps dramatically, if one of the liberals, such as 85-year-old John Paul Stevens, steps down. Whether such a change would be to your liking depends on whether you would prefer that the Court remain to the left of public opinion on most big issues, which is where it has been for at least the past 50 years and where most law professors and journalists would like it to stay.

The Roberts documents show him to have been a Reagan Republican with a deeply felt conviction that judges should stop (or be prevented from) invading the province of constitutional interpretation. He touched on the same
theme this summer in his response to a Senate Judiciary Committee questionnaire, asserting that judges "do not have a commission to solve society's problems" and should practice "institutional and personal modesty and humility."

Roberts also bowed to the need to respect precedent, which, he said, "plays an important role in promoting the stability of the legal system." But the principle of modesty in the exercise of judicial power will clash with respect for precedent in every case in which the relevant precedent strikes Roberts as an immodest intrusion into the legislative or judicial realm. There may be many such cases. Even Roberts himself probably does not know how he will resolve them. But here are some predictions as to how he might differ from O'Connor:

**Abortion.** Roberts may be in a position to move the Court by next June toward upholding greater legislative restrictions on abortion than O'Connor has allowed, although no case involving a broad attack on the basic abortion right created by *Roe v. Wade* is on the horizon.

On November 30, the justices will hear a challenge to a New Hampshire law requiring parental notification (or judicial approval) before minors can be given abortions. They will also be asked in the coming months to review a so-far-successful challenge to the 2003 congressional ban on "partial-birth" abortion. Lower courts have held both laws unconstitutional on their face because (among other things) they lack explicit exceptions for abortions deemed by doctors to be necessary to protect the woman's physical or emotional health.

O'Connor would probably have been the fifth vote to strike down both laws, based on her vote in 2000 to void a Nebraska "partial-birth" abortion law with no health exception. Roberts might well become the fifth vote to uphold both laws, and possibly even to overturn the 2000 decision.

Roberts famously helped prepare a 1990 Supreme Court brief restating (in a footnote) the first Bush administration's view that "Roe was wrongly decided and should be overruled." He has cautioned against assuming that this was or is his personal view. Fair enough—especially as to the "should be overruled" part, and especially after 15 years during which six of the current justices (including O'Connor) have repeatedly reaffirmed *Roe*. Indeed, in seeking his current job as a judge of the U.S. Court of Appeals for the District of Columbia Circuit two years ago, Roberts testified that *Roe* was "the settled law of the land."

But it's hard to imagine Roberts differing from the consensus of conservative legal experts—as well as many moderates and even some liberals—that *Roe* had little or no basis in the Constitution and should at least be construed narrowly, if not overturned.

**Racial preferences.** In 2003, in a 5-4 decision upholding the racial preferences in admissions at the University of Michigan Law School, O'Connor moved the Court toward greater acceptance of affirmative-action preferences than ever before, at least in education and perhaps also in employment and contracting.

Roberts may move the Court in the opposite direction. The memos and briefs he wrote while in government exude dislike of "quotas" and other racial preferences, and of using the Voting Rights Act to require race-based election districts.
On the other hand, it would be surprising to see Roberts translate his policy objections into a broad-based constitutional ban on racial preferences. That would be a most immodest exercise of judicial power, junking not only the 2003 precedent but also the considered judgments of Congress, the military, most states, and almost all universities that preferences are sometimes necessary to promote diversity.

Sex discrimination. O'Connor has usually sided with plaintiffs and feminist groups in sex-discrimination lawsuits and has tilted the Court toward a broad view of Title IX. That's the 1972 federal law that courts have used to require colleges receiving federal money to equalize female and male athletic opportunities—even when that means ending dozens of wrestling programs around the country.

Roberts has been more skeptical of the use of lawsuits and federal regulations to promote equal opportunity, as his opponents have stressed. This could make a difference in more than a few cases. In 1999, for example, O'Connor wrote a 5-4 decision allowing lawsuits against federally funded schools and universities for "deliberate indifference" to the need to protect against student-on-student sexual harassment. Roberts might well have sided with the dissenters, who warned of a "flood of liability" potentially "crushing" school districts and soaking local taxpayers.

Religion. O'Connor was the fifth vote in both the June 27 decision ordering removal of certain Ten Commandments displays from courthouses and a 1992 decision holding unconstitutional a brief, nondenominational prayer at a public school graduation. Roberts might have tipped the balance the other way in both cases. In 1985, he faulted the Court for "hostility to religion" and assailed as "indefensible" a decision striking down an Alabama moment-of-silence law. And as deputy solicitor general, he defended the graduation prayer as noncoercive and constitutionally innocuous.

Presidential power. President Bush has claimed virtually unlimited powers to detain and interrogate suspected "enemy combatants" indefinitely with no semblance of due process, and to try them in Bush-created military tribunals that critics call kangaroo courts. His detention policies brought Bush two sharp rebuffs from the Court in June 2004, with O'Connor in the majority. Roberts, on the other hand, took a broad view of executive power in a July 15 decision upholding the legality of Bush's military tribunals. The opinion, which Roberts joined but did not write, was rather cavalier in dismissing the most cogent points raised by the defense lawyers.

Does this opinion foreshadow a blank-check approach that could facilitate creeping presidential autocracy? That is probably the most important of all the questions for senators to explore when Roberts testifies.
JUSTICE KENNEDY'S ROLE

"Kennedy Reigns Supreme on Court"

The Washington Post
July 2, 2006
Charles Lane

It was the O'Connor court. Now it may be the Kennedy court.

The Supreme Court's just-concluded 2005-2006 term was a historic one, in which two new justices, Chief Justice John G. Roberts Jr. and Samuel A. Alito Jr., changed the court's style and ideological balance.

But by the end of the term, it was clear that the main impact of the turnover was to enhance the influence of a justice who has been at the court since 1988, 69-year-old Anthony M. Kennedy.

With the departure of centrist Justice Sandra Day O'Connor, the court is now frequently split between two four-justice liberal and conservative blocs, with Kennedy as the sole remaining swing voter.

An eclectic and sometimes inscrutable moderate conservative, Kennedy repeatedly cast the decisive vote on the most polarizing issues the court faced, from President Bush's military commissions, to the Clean Water Act, to the death penalty. He is poised to do so again next term when the court takes up the issues of abortion and school integration.

"Justice Kennedy seems to be asserting himself more and seems to be relishing the role," said Richard Lazarus, a law professor at Georgetown University who heads the school's Supreme Court Institute. "All the justices enjoy being more significant rather than less significant, and he has certainly asserted his role as a moderating force on both sides."

In the 17 cases during the 2005-2006 term that were decided by five-vote majorities, Kennedy was on the winning side 12 times, more than any other justice, according to figures compiled by the Supreme Court Institute.

In six of those cases, Kennedy voted with the conservative bloc, made up of Roberts, Alito, Antonin Scalia and Clarence Thomas. As a result, the court upheld most of Texas's Republican-drafted redistricting plan, restored the death penalty in Kansas, and ruled that police do not have to throw out evidence they gather in illegal no-knock searches.

But four times, Kennedy, a 1988 appointee of President Ronald Reagan, defected to the liberal justices, John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

As a result, the court not only struck down Bush's military commissions, but also ruled that the police need permission from both occupants to search a home without a warrant, gave a Tennessee death row inmate a chance to win a new trial, and said that Texas violated the Voting Rights Act by diluting the voting power of Latino Democrats in one district. (Twice Kennedy
was part of mixed left-right coalitions.)

Roberts voted in 10 five-justice majorities, the second-most on the court, but he joined the four liberals only once, in a minor procedural case.

The "swing voter" role is not entirely new to Kennedy, who has been in that position before, along with O'Connor.

Indeed, Kennedy is disliked by many conservatives because he has voted with liberals to uphold gay rights and abortion rights, and to strike down the juvenile death penalty.

But since O'Connor retired from the court Jan. 31, and Alito, who replaced her, has lived up to his conservative billing, Kennedy has been all alone as the swing voter—with the added clout, and added pressure, that implies.

O'Connor used to tell audiences that, at the court, "we decide what cases to hear, and then we decide 'em." Though she often ruled only narrowly, she did not agonize.

Kennedy, by contrast, has been known to brood or to switch his vote in the middle of a case—though he is more inclined than O'Connor was to rule broadly once he comes to a conclusion. He is a passionate free-speech advocate, and has a consistent record of opposing affirmative action.

While O'Connor saw herself as a fact-oriented problem-solver, Lazarus says, Kennedy "views himself as a major intellectual force."

More than some other justices, "Kennedy sees real values in conflict in the court's cases, and it's a question how you negotiate it," said Neil Siegel, who served as a Supreme Court law clerk in the 2003-2004 term and now teaches at Duke University's law school. "Sometimes he does it well and skillfully, and sometimes he just can't make up his mind and the legal system gets stuck in a kind of vertigo."

In the military commission case, Kennedy ruled unequivocally, joining almost all of Stevens's broad opinion. His few reservations came in a concurring opinion that also contained Kennedy's admonition that "concentration of power puts personal liberty in peril of arbitrary action by officials."

But at other times this term, Kennedy cut difficult issues very fine, drawing criticism from his colleagues.

In a key case on the scope of the Clean Water Act, Kennedy refused to join either the conservatives, who voted as a bloc to scale back federal power to regulate wetlands, or the liberals, who wanted to leave it intact.

Kennedy instead wrote a long opinion of his own. He agreed with the conservatives that a lower court had mistakenly allowed the federal government to block development on two Michigan properties, but disagreed with them about why. He said the lower court should reconsider the issue under a new legal test—one that most analysts thought would end up producing the same result the liberals wanted anyway.

Kennedy's opinion would not change wetlands protection in the long run, Stevens wrote in a dissenting opinion joined by the three other liberals, but "will have the effect of creating additional work for all concerned parties."
Scalia, joined by the three conservatives, called Kennedy's proposal "perfectly opaque."

"He is a man in the middle, and the man in the middle is fully capable of causing muddle," said Douglas A. Kmiec, a Pepperdine University law professor.

The pressure on Kennedy could mount next term, when the court will rule on the constitutionality of a federal law banning the procedure opponents call "partial birth" abortion, and will decide whether local governments may consider students' race when assigning them to public schools.

Though Kennedy is on record in favor of Roe v. Wade, the 1973 decision that recognized a right to abortion, he dissented angrily from a 5 to 4 ruling in 2000 that struck down a state law banning partial-birth abortion.

That would seem to commit him to upholding the federal ban, legal analysts said, except that the 2000 case is binding precedent and Kennedy may "be acutely aware of a mere personnel change on the court causing a radical shift," Siegel said.

Kennedy has always voted against affirmative action, most recently in 2003 when he voted against race-conscious admissions policies at the University of Michigan's law school and undergraduate program.

But the cases the court has agreed to hear next term involve compulsory public education for students as young as kindergarten age. They also present the problem of how public schools can avoid resegregation, at a time when residential segregation persists and court-ordered school desegregation is largely a thing of the past.

Under the circumstances, legal analysts do not all agree that Kennedy necessarily relishes his situation.

"I'm not certain it's an enviable position to be in," Siegel said. "It's quite a burden to bear."
Lost in last week's cacophony about the critical role of Sandra Day O'Connor as sole and exclusive swing voter on the U.S. Supreme Court was any sign of respect for the other sole and exclusive swing voter on the U.S. Supreme Court: Anthony M. Kennedy. And in case anyone else missed this subtle shift in power, Kennedy's majority opinion in today's big physician-assisted-suicide case serves as the perfect reminder of who's going to call the shots in the near future.

The 6-3 opinion in *Gonzales v. Oregon*—a decision upholding Oregon's physician-assisted-suicide law from attack by the Attorney General's Office—sharply outlines the court's Anthony Kennedy-shaped future. The dissenters are Antonin Scalia, Clarence Thomas, and—not surprisingly—Chief Justice John Roberts. In the majority you'll find the court's usual moderate-to-liberal lineup: John Paul Stevens, Ruth Bader Ginsburg, David Souter, and Stephen Breyer. The other two votes for Oregon thus come from the swingers: O'Connor, who will (barring some stunning revelation that she dances for money in women's lingerie) soon be replaced by Samuel Alito, and Kennedy. In other words, this opinion was Kennedy's latest big chance to swing for the bleachers, and swing he does.

While it's true that O'Connor has tended to vote with the majority more frequently than Kennedy, and that she has done so in some big 5-4 decisions, it's also true that in other extremely contentious areas, it is Kennedy, not O'Connor, who has swung the court leftward. It was Kennedy who weighed in with the broad rationale of the court's liberals on a key gay-rights case; Kennedy who voted with the court's liberals to strike down the death penalty for juveniles and the mentally disabled; and Kennedy who has joined with O'Connor (and David Souter) to reaffirm the basic right of a woman to have an abortion. Kennedy also offended the political right when he authored a key opinion prohibiting sectarian prayer at a public-school graduation. And last term saw Kennedy voting—against O'Connor and with the court's liberals—on major cases giving local governments permission to seize private property in the interest of economic development and denying states the right to trump federal medical-marijuana laws.

It's Kennedy who was labeled by the right as the most dangerous man in America, and Kennedy whose name is most often associated with the word impeachment. Kennedy uniquely engenders hysteria, in part because of his tendency to think grandly and write sweepingly. O'Connor's case-by-case approach allows the right to loathe her on a case-by-case basis. But Kennedy's tendency to tilt the whole universe on its axis with a stroke of the pen sends his enemies into orbit. The entire English lit department at Yale would be hard-pressed, for example, to deconstruct Kennedy's Big Rights language in the gay-rights case, which banned the states from outlawing sodomy. It was Kennedy, not William Brennan, who penned the sentiment in that opinion:
“Times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

Today's opinion in *Gonzales* includes few of the usual Kennedy-esque linguistic aeronautics. But that's probably because it deals not with rights but with the mundane world of statutory interpretation.

Jeffrey Toobin at The New Yorker recently explained why Kennedy sometimes parts company with his buddies on the court's hard right wing. Of the court's conservatives, only he has an abiding affection for all things foreign, including—to the intense chagrin of some of his colleagues—foreign law. Kennedy's pragmatic reason for citing to foreign courts as a means of fostering worldwide legal respect is a part of his rather grand vision for the lofty role of the Supreme Court in government. He is invariably parodied as the court's great white agonizer; when pondering a vote in a case, he is said to walk the court's ramparts for hours, like an extremely tall Hamlet. For better or worse, he takes the reputation of the court extremely seriously, both in the eyes of the world and the nation.

But another key to understanding Kennedy's role as a swing voter is simpler: He just really, really likes the power. In his book *Closed Chambers*, Edward Lazarus, a former clerk for Justice Harry Blackmun, writes that Kennedy bragged about his ability to occupy one of the pivotal positions on the court, deliberately and craftily espousing views at conference that would make him a necessary but distinctive fifth vote for a majority. Like O'Connor, Kennedy may be a legal politician before he is an ideological purist. And with O'Connor soon to be out of the picture, Kennedy may now get the chance to really make some constitutional hay.

All of which raises another question now bandied about by hard-core court-watchers: What will happen when the good-natured and temperate Chief Justice Roberts begins to work his twinky charm on Kennedy? Is it possible that while Scalia's insults helped push the conservative Kennedy toward the left, the tractor beam of Roberts' niceness may pull him back into the fold? That's certainly the hope of the political right. But if today's opinion in *Gonzales* is a harbinger of things to come, Roberts has some fairly heavy-duty twinkling ahead of him.
John G. Roberts Jr. may be the new chief justice, but the Supreme Court is not truly the Roberts court, at least not yet.

In the most divisive cases before the court in the term that just ended, it was Justice Anthony M. Kennedy who determined the outcome every time. In unpredictable fashion, he sided some of the time with the court's conservative bloc and some of the time with its liberals.

His influence was dramatically displayed Thursday, when the court announced that it had struck down President Bush's specially created military tribunals for suspected terrorists.

As Justices Antonin Scalia and Clarence Thomas read their dissenting opinions in court that day, Roberts and Samuel A. Alito Jr., Bush's other new appointee, could do no more than listen in agreement.

It was 86-year-old John Paul Stevens, the court's last World War II veteran, who read the 5-3 majority opinion. He solemnly declared that the president was "bound to comply with the rule of law" and that he could not ignore congressional mandates and long-standing U.S. military rules.

He paused to note that Kennedy, seated next to him, had joined most of his opinion, creating a majority. Liberals hailed the result, and conservatives lamented it.

While the issue before the court was the balance of power in government, the drama showed how little the balance of power within the high court itself had changed. Even when Roberts and Alito side with fellow conservatives Scalia and Thomas, they need a fifth vote to prevail.

For the last decade, Justices Kennedy and Sandra Day O'Connor, both Ronald Reagan appointees, had supplied the votes that decided the court's major cases. They usually joined with the conservatives on issues of crime, the death penalty, civil rights and states' rights, but with the liberals on abortion, gay rights and school prayer.

Now, with O'Connor in retirement, Kennedy stands alone at the center.

He voted with the conservatives more often than not, but joined the liberals in several major rulings. In one closely watched environmental case, Kennedy wrote a separate, solo opinion that was decisive.

On the issue of military tribunals, Kennedy made it clear that he shared the liberals' concern about unchecked presidential power.

The Constitution created "a system where the single power of the executive is checked," he wrote. Even in a national emergency, he said, "the Constitution is best preserved by a reliance on standards tested over time and insulated from the pressure of the moment."

This does not mean that suspected terrorists cannot be tried in military tribunals, Kennedy said—but that Congress should first debate the issue and pass a law.
Kennedy is hardly in the camp of the liberals. Just the day before, he spoke for a five-member majority that upheld the mid-decade redistricting plan engineered by former House Majority Leader Tom DeLay for Texas' seats in the U.S. House of Representatives.

The four liberals, led by Stevens, say "partisan gerrymandering" is unconstitutional. The conservatives, led by Scalia, counter that politics inevitably plays a role in the drawing of electoral districts and that there is no fair way to decide how much politics is too much.

Kennedy came down in between. He says that he finds partisan gerrymandering troubling, but that the Texas plan was not so extreme as to be unconstitutional.

Before 2003, he pointed out, the Democrats had drawn electoral districts that gave them a slim majority of seats in Congress at a time when nearly 60% of Texans were voting Republican. Measured against that map, DeLay's plan "can be seen as fairer," Kennedy said.

Developers and property-rights activists hoped a more conservative court, bolstered by Roberts and Alito, would sharply limit the Army Corps of Engineers' control over hundreds of millions of acres of wetlands. Environmentalists feared the same.

Scalia wrote an opinion to do just that, and he was joined by Roberts, Thomas and Alito. He said federal environmental protection extended only to wetlands that were part of a continuously flowing stream. This would exclude many wetlands in the middle part of the nation and nearly all of those in West, where streams are dry for much of the year.

But in this case, Kennedy refused to go along. Instead, he wrote in a separate opinion that wetlands could be protected as long as environmentalists could show that filling them or draining them would affect downstream waters.

Earlier this year, Kennedy and O'Connor thwarted the Bush administration's move to void the nation's only "right to die" law. Oregon's voters had twice approved a measure that allowed dying people to obtain a dose of lethal medication from their doctors.

Bush's first attorney general, John Ashcroft, reinterpreted the federal drug control law and said it empowered him to strip Oregon's doctors of their right to prescribe medication.

In January, Kennedy, speaking for the court, overturned Ashcroft's order. The administration's position, he said, would "delegate to a single executive officer the power to effect a radical shift of authority from the states to the federal government to define general standards of medical practice in every locality."

Had Kennedy agreed with Roberts, Scalia and Thomas to support Ashcroft's view, the court would have split 4-4 and could have held the case until the next month, when Alito took O'Connor's seat. Then a 5-4 majority could have ruled in the administration's favor.

Kennedy, who turns 70 this month, joined the court after a tumultuous confirmation battle. In 1987, Reagan's first nominee, Robert H. Bork, was defeated in the Senate. His second, Douglas H. Ginsburg, withdrew after reports that he had smoked marijuana regularly as a law professor.
Kennedy, a Sacramento native with a reputation as a straight arrow, was nominated next and won unanimous confirmation in the Senate.

At first, he looked to be a reliable conservative, voting regularly with then-Chief Justice William H. Rehnquist. But in 1992, he split with the conservatives and voted with O'Connor to uphold the right to abortion and to maintain the strict ban on school-sponsored prayers.

Since then, many on the right have portrayed him as a traitor. Their ire grew in recent years when Kennedy voted to strike down the death penalty for defendants who are mentally retarded or younger than 18 at the time of the crime.

He also wrote the court's two major rulings in favor of gay rights. In one, he said gay and lesbian couples deserved respect and dignity, not condemnation by law. Scalia denounced his opinion as the first step toward same-sex marriage.

Despite the fiery exchanges over social issues, Kennedy has some conservative views that could loom large in the years ahead. For example, he has voted regularly against affirmative action, arguing that the government should not rely on race in making decisions. In the fall, the court will consider a challenge to voluntary school integration programs, and Kennedy could create a majority for the conservative bloc.

Last year, he voted to uphold the display of the Ten Commandments on public property. O'Connor joined a 5-4 majority to strike down such displays. Now, with Alito having replaced her, the court, with Kennedy, appears to have a majority to uphold religious displays.

The abortion issue also appears to turn on Kennedy's vote. Though he agreed in 1992 to maintain the legal right of women to choose abortion, he also said states had considerable authority to regulate it.

Six years ago, he disagreed with O'Connor when the court struck down a Nebraska law that banned intact dilation and extraction, which opponents call "partial-birth abortion." Kennedy called the practice "abhorrent" and similar to infanticide.

Congress then passed a federal ban on this form of abortion. It was struck down by federal courts relying on the Nebraska ruling.

This fall, the Supreme Court will take up an appeal. Kennedy, as usual, will probably hold the deciding vote.

** Major Decisions This Session **

Key Supreme Court decisions in the just-concluded 2005-2006 session, and how the justices voted:

** War on Terrorism **

President Bush overstepped his authority when he set up special military courts to try Al Qaeda suspects without the approval of Congress, the court said in Hamdan vs. Rumsfeld. These tribunals at Guantanamo Bay lack basic standards of fairness, the 5-3 majority said.

Justice John Paul Stevens wrote the opinion and was joined by Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr.
dissent. Chief Justice John G. Roberts Jr. did not participate because he had ruled on the case when it was before the U.S. appeals court.

End of Life

Doctors in Oregon may prescribe lethal medication for people who are terminally ill and near death, the court said in *Gonzales vs. Oregon*. The 6-3 ruling upheld the nation's only "right to die" law and rejected a Bush administration order that would have stripped doctors of their license to prescribe drugs.

Kennedy wrote the opinion, joined by Stevens, Souter, Ginsburg, O'Connor and Breyer. Scalia, Thomas and Roberts dissented.

Wetlands

Federal environmental regulators may protect most wetlands from development if they can show that these swampy areas have some impact on the nation's rivers and lakes. The split ruling in *Rapanos vs. U.S.* rejected a move by property rights advocates to sharply cut back on environmental protection.

Kennedy wrote the key concurring opinion, and Stevens, Souter, Ginsburg and Breyer sided with the government. Scalia, Roberts, Thomas and Alito would have limited the protection for wetlands.

Redistricting

State lawmakers have broad power to redraw the lines of electoral districts to benefit the party in power, the court said. The five-member majority rejected a charge of "partisan gerrymandering" lodged against the Texas Republicans and former House Majority Leader Tom DeLay for a mid-decade change that gave the GOP six additional seats in Congress.

Kennedy wrote the opinion in *League of United Latin American Citizens vs. Perry*, and Roberts, Scalia, Thomas and Alito agreed with him.

Campaign Funding

The government may not cap how much candidates spend for their campaigns, and contribution limits are illegal if they are too low, the court said in striking down a novel Vermont law. The 6-3 ruling was a defeat for liberal reformers who wanted to lessen the impact of money in politics.

Breyer wrote the opinion in *Randall vs. Sorrell*, and Roberts, Alito, Scalia, Kennedy and Thomas agreed with him.

Whistle-blowers

Public employees do not have a free-speech right to complain about serious wrongdoing in the workplace, the court said in *Garcetti vs. Ceballos*. The 1st Amendment protects employees when they speak out in public as citizens, but not for internal matters, the court said in its 5-4 ruling.

Kennedy wrote for the majority, which included Roberts, Scalia, Thomas and Alito. Stevens, Souter, Ginsburg and Breyer dissented.
"Swing for the Bleachers"

*Slate Magazine*
July 1, 2006
Dahlia Lithwick

The new John Roberts Supreme Court is only one term old and yet already we're all wrong about it.

Liberals had feared, and conservatives had feted, the end of judicial review as we know it, at least until this week's blockbuster ruling on the scope of presidential war powers in *Hamdan v. Rumsfeld* proved that bit of conventional wisdom wrong, practically before it had become conventional. Predictions of a new era of hands-off judicial minimalism may have been premature.

Yes, we are seeing the expected shift to the political right with the replacement of moderate Justice Sandra Day O'Connor by conservative Justice Samuel Alito. But, more significantly, the role of swing justice has itself swung from O'Connor to Justice Anthony Kennedy. On virtually all the most divisive issues, today's court is now a Supreme Court of One.

Yes, Kennedy has inherited the power to decide crucial cases, and he's started to show us this term what that might mean. In *Hamdan* he joined with the court's left wing to invalidate the military tribunals President Bush had concocted for the detainees at Guantanamo Bay. The majority opinion he joined, authored by John Paul Stevens, was neither minimalist nor mild: "In undertaking to try *Hamdan* and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."

But more crucially, Kennedy has appropriated O'Connor's trick of writing either an opinion or a concurrence that goes on to become the law of the land. O'Connor was famous (and not always in a good way) for signing on to an opinion, but on narrower grounds than the other four justices in the majority. The trick is that the justice who decides the case most narrowly then speaks for the whole court. And that's how O'Connor imprinted her views on an awful lot of jurisprudence.

But unlike O'Connor, who invariably pooh-poohed her pivotal role on the court (always claiming that she had only one vote, like every other justice), Kennedy is said to relish it. In his controversial book Closed Chambers, Edward Lazarus, a former clerk for Harry Blackmun, claimed that Kennedy actively seeks out these pivotal positions on the court, deliberately staking out positions that would make him a "necessary but distinctive fifth vote for a majority."

The fact that Kennedy is not rigidly moored to any one easily classified ideology or interpretive theory has led to some spectacular defections from the court's conservatives, every one of which stand as festering sores for his conservative critics. This was, in their minds, Robert Bork's seat, after all.

It was Kennedy who allied with justices David Souter and Sandra Day O'Connor to preserve the core holding of *Roe v. Wade*, and it was Kennedy who authored the court's most sweeping defense for decriminalizing
gay sodomy. And Kennedy, reversing himself, who voted with the court’s liberals to strike down the death penalty for juveniles and for the mentally disabled. Kennedy also authored a crucial church/state opinion prohibiting sectarian prayer at a public-school graduation.

The fact that Anthony Kennedy is rumored to be somewhat suggestible—easily influenced by his colleagues, the media, his affection for foreign things—makes his critics even more nervous. It sometimes makes his fans even more so: Adam Cohen recently wrote of him in the New York Times that, at the very least, "there is something refreshing about a justice who genuinely seems to have an open mind." But since when is doing justice meant to be a refreshing enterprise?

If Edward Lazarus was correct in characterizing some vital Kennedy decisions as the fruits of "a tug-of-war for Kennedy’s mind" between his law clerks, just imagine how fascinating it has become to see that same, higher stakes, tug of war playing out, not only behind the oak doors of judicial chambers but in the courtroom, in the newspapers, and among the justices themselves.

From James Dobson, who famously called Kennedy "the most dangerous man in America," to oral advocates at the court, who increasingly respond to the justice at oral argument with a reverence usually reserved for conversations with the Burning Bush, efforts to influence Kennedy are no longer limited to case conference. The hottest game in current Supreme Court brief-writing is to quote Kennedy gratuitously and often. Even if you find yourself citing an asterisk in the footnote of a Kennedy dissent, inserting something flattering to Kennedy is almost as important as running the spell check.

The other justices are playing the quote-Kennedy game, too, presumably in hopes of wooing him to their side and keeping him there. Read the opinions and dissents in Rapanos v. United States, the major Clean Water decision that came down earlier this month. Embedded within are coded love notes to Kennedy.

The justices may also be cozying up to Kennedy in other ways: He won himself some sweet writing assignments this term (data from the Georgetown Supreme Court Institute’s term overview shows him authoring five of the term’s most "high profile" opinions. Most of his colleagues authored one or two). Some court-watchers have suggested that the bizarre trio of Stevens, Kennedy, and Chief Justice Roberts, who jointly issued a strange concurring opinion in the refusal to hear Jose Padilla’s case this past April, was yet another effort by the court’s liberal and conservative leaders to show Kennedy more love. Roberts is a savvy insider who knows that over the years the abuse heaped upon the court’s moderates from the right has pushed them into the arms of the court’s liberals. Make no mistake about it: Justice Kennedy is now being love-bombed.

And what is the crucial swing voter doing with these newfound superpowers? Let’s do the numbers. While it’s still too early to predict, the invaluable annual end-of-term tally done by SCOTUSblog, and the numbers from Georgetown, show that Kennedy voted with the majority in 88.4 percent of the cases this term. Only the chief justice had a better record (see Walter Dellinger’s discussion of that fact here). Kennedy authored eight majority opinions (only Scalia authored more) and seven
concurrences, more than any of his colleagues. Moreover, in the court’s 11 5-4 cases decided this term, Kennedy was in the majority 75 percent of the time. But again, that’s also only half the story. The other half is how Kennedy used that vote to shape the law.

It was Kennedy who provided the fifth vote in *Hudson v. Michigan*, an amazing criminal law case in which he voted with the court’s four reliably conservative jurists—Roberts, Alito, Antonin Scalia, and Clarence Thomas—to hold that the remedy for police violations of the centuries-old "knock and announce" rule, required whenever the cops serve a warrant, was, in effect, nothing. But while Scalia’s majority opinion showed a readiness to forever end the practice of throwing out evidence illegally obtained by the police, Kennedy’s moderating fifth vote put on the brakes by insisting, in a separate concurrence, that the general rule of excluding evidence gained illegally was not in jeopardy. Future challenges to the exclusionary rule may hereinafter be posed to a Supreme Court of one.

Kennedy provided the key fifth vote in the term’s major environmental case, *Rapanos et al. v. United States*. The case tested the authority of the Army Corps of Engineers to enforce the Clean Water Act, and the court’s four conservatives would have dramatically curtailed the corps’ powers. It was Kennedy—again writing separately—who refused to go as far as Scalia, again, urged. In fact, Kennedy left open the possibility of far broader regulation than his colleagues would tolerate. And thus it was Kennedy whose opinion in *Rapanos* will become the standard for the Army Corps as it fashions future policy. Looking forward to next year’s big greenhouse-gases case, which explores whether the Environmental Protection Agency has an obligation to regulate carbon dioxide, an attorney for the Sierra Club has already suggested that "*Rapanos* means we will write our brief for Anthony Kennedy and maybe a little bit for Roberts."

Kennedy’s was the moderating, and controlling, fifth voice again in *LULAC v. Perry*, the cacophony of a Texas redistricting case, where he sided with the court’s conservatives to defeat the claim that Tom DeLay’s mid-census redistricting festival was unconstitutional. But he joined with the liberals to find that a new congressional district violated the rights of Hispanic voters, and he held open the prospect of some future hypothetical gerrymander that really would offend the Constitution. The lesson again: Anyone mounting a political redistricting challenge will need to persuade a court of one.

And probably most important, *Hamdan*, perhaps the most consequential separation-of-powers case in recent memory, again pivoted on Kennedy’s vote. He sided with the court’s liberals but again refused to go as far as they would have led him.

So, then what does all this nipping and tucking, shucking and jiving mean for Kennedy and the court? It’s still just too early to tell. He clearly intends to fill the shoes recently vacated by O’Connor; shoes she in turn inherited from Justice Lewis Powell. They each played the role of moderating a polarized court; building bridges, navigating toward the center—a center where most of the nation was most comfortable. Each took abuse for that when they sat on the court. Each was largely celebrated for it when they retired. Kennedy, too, appears poised to hold that center together. Indeed more often than not, he seems to be leaving his options open, laying
the groundwork for revisiting these issues more fully in the future, as he becomes more comfortable in this role.

A lot of the soaring, Keatsian Kennedy rhetoric of the previous years' opinions that once brimmed with the language of the ineffable glory of unflinching human dignity and such seems to have been toned down of late, as well. But then, perhaps Justice Kennedy doesn't need to write about the ineffable glory of anything, anymore. He can finally just sit back and bask in it instead.