Section 3: The Roberts Court

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It was the Supreme Court that conservatives had long yearned for and that liberals feared.

By the time the Roberts court ended its first full term on Thursday, the picture was clear. This was a more conservative court, sometimes muscruously so, sometimes more tentatively, its majority sometimes differing on methodology but agreeing on the outcome in cases big and small.

As a result, the court upheld a federal anti-abortion law, cut back on the free-speech rights of public school students, strictly enforced procedural requirements for bringing and appealing cases, and limited school districts' ability to use racially conscious measures to achieve or preserve integration.

With the exception of four death penalty cases from Texas, where the state and federal courts remain to the right of the Supreme Court and produce decisions that the justices regularly overturn, the prosecution prevailed in nearly every criminal case, 14 of the 18 non-Texas cases.

Fully a third of the court's decisions, more than in any recent term, were decided by 5-to-4 margins. Most of those, 19 of 24, were decided along ideological lines, demonstrating the court's polarization whether on constitutional fundamentals or obscure questions of appellate procedure. The court's last-minute decision, announced on Friday, to hear appeals from Guantanamo detainees required votes from at least five of the nine justices.

Of the ideological cases decided this term, the conservative majority, led by Chief Justice John G. Roberts Jr. and joined by Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr., prevailed in 13. The court's increasingly marginalized liberals—Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer—prevailed in only six, including the four Texas death penalty cases.

The difference depended on how Justice Anthony M. Kennedy voted. Remarkably, he was in the majority in all 24 of the 5-to-4 cases. In the 68 cases the court decided by signed opinions, Justice Kennedy dissented only twice.

The statistics underscore what case after case demonstrated as the term unfolded: Justice Kennedy's role in the position that Justice Sandra Day O'Connor once held at the court's center of gravity. "Kennedy is very much the median justice now, as Justice O'Connor was, and he is to her right," said Steven G. Calabresi, a professor at Northwestern University School of Law.

Professor Calabresi, a former law clerk to Justice Scalia and a founder of the Federalist Society, added: "Clearly the court has moved in a direction that leaves most conservatives pleased."
Justice O'Connor’s actual replacement, Justice Alito, who took his seat in January 2006 and who thus has just completed his first full term, is indisputably to Justice O'Connor’s right. His vote in place of hers made the difference in several important cases, including the decision to uphold the federal Partial-Birth Abortion Ban Act and to treat campaign advertising by corporations and unions as core political speech despite the restrictions imposed by the McCain-Feingold campaign finance law. Justice O'Connor would most likely have voted to uphold the Seattle and Louisville, Ky., school integration plans that the court, with Justice Alito in the majority, voted on Thursday to invalidate; she was the author of the court’s opinion in 2003 to uphold the affirmative action admissions plan at the University of Michigan law school.

It was that decision that prompted Justice Breyer’s highly unusual declaration from the bench on Thursday: “It is not often in the law that so few have so quickly changed so much.”

Conservative commentators, in discussing the court term, appeared to take pains not to gloat, tending to emphasize that a number of the decisions moved the law by increments rather than leaps or came in cases that were “pre-ordained to showcase the court’s conservative leanings,” as Professor Richard W. Garnett of Notre Dame Law School put it. “The marquee cases this term happened to reflect the culture war issues where Kennedy’s leanings are to the right,” he said.

But liberals were in an unrestrained “we told you so” mode. “This court has shown the same respect for precedent that a wrecking ball shows for a plate-glass window,” said Ralph G. Neas, president of People for the American Way, which helped lead the effort to defeat the nominations of both Chief Justice Roberts and Justice Alito. Emily Bazelon, a liberal commentator on legal subjects for the online journal Slate, posted a column on Friday entitled, “Sorry Now?”

The question of how the court is treating its precedents is one that recurred throughout the term in various justices’ opinions. The court explicitly overturned only three precedents, two obscure cases from the 1960s that permitted excuses for missing court filing deadlines and a foundational antitrust decision from 1911 that prohibited manufacturers from imposing minimum retail prices.

Other precedents were left standing, at least for the time being, by decisions that avoided direct overrulings while providing a roadmap for future challenges. In several cases, a frustrated Justice Scalia prodded Chief Justice Roberts to move further and faster to overturn precedents that both men clearly dislike.

Their differences in style, while apparent, did not extend to difference in substance; in nonunanimous cases, the two were in agreement 89 percent of the time, according to statistics compiled by ScotusBlog.

One theme was the court’s sustained interest, across many areas of legal doctrine, in limiting the ability of plaintiffs to bring or appeal lawsuits. The trend was so pronounced that Professor Judith Resnik of Yale Law School proposed as a label for the term: “the year they closed the courts.”

Not all the access-limiting decisions were closely divided. In two important securities cases, the court placed new limits on shareholder lawsuits by votes of 8 to 1 and 7 to 1. Many cases on the court’s fast-growing business docket were decided by comfortable margins. “The entire Supreme Court has a mistrust of lawyer-driven litigation,” Roy T. Englert Jr., who has argued many business
cases at the court, told a forum at the Washington Legal Foundation this week.

The court’s overall approach to business cases left many in the business community gleeful. “It’s our best Supreme Court term ever,” said Robin S. Conrad, executive vice president of the National Chamber Litigation Center, which handles Supreme Court cases for the United States Chamber of Commerce.

The 68 cases the court decided during the term that began last Oct. 2 and ended June 28 were the fewest since the 65 cases the court decided in 1953. That was in an era when the court received barely one-quarter of the 8,000 petitions it now gets every year. The court was deciding more than 100 cases a term as recently as the early 1990s. The justices are self-conscious about the low number and the resulting gaps in their argument schedule. But they seem unable to find a sustained flow of cases that four justices, the required number, are willing to vote to hear.

But the court’s move on Friday to add the Guantanamo case to its calendar came as a surprise. In its term that begins on Oct. 1, the court will hear challenges by two groups of Guantanamo detainees to the legislation barring their access to federal court. A Supreme Court that divided 5 to 4 this month on whether a prisoner should get three extra days to file an ordinary notice of appeal will have its work cut out as it confronts a clash of historic dimension between presidential power and individual rights.

Here are summaries of the term’s major decisions.

**Equal Protection**

By a vote of 5 to 4, the court invalidated voluntary integration plans in the school districts of Seattle and metropolitan Louisville, Ky., ruling that using a student’s race to govern the availability of a place at a desired school, even for the purpose of preventing resegregation, violated the 14th Amendment’s guarantee of equal protection.

Chief Justice Roberts wrote the opinion in *Parents Involved in Community Schools v. Seattle School District No. 1, No. 05-908*. But Justice Kennedy, a member of the majority, refused to sign the more far-reaching parts of the chief justice’s opinion that would have barred even more general considerations of race. His position in the middle of the court gave small comfort to the four dissenters, Justices Stevens, Breyer, Souter and Ginsburg.

**Business**

A pair of decisions made it more difficult for investors to sue companies, executives and underwriters when they suspect securities fraud or unlawful manipulation. In *Tellabs Inc. v. Makor Issues & Rights Ltd.*, No. 06-484, the court ruled 8 to 1 that shareholders must show “cogent and compelling evidence” of intent to defraud in order to withstand dismissal of their lawsuit. Justice Ginsburg wrote the opinion, and Justice Stevens dissented.

In the second case, the court voted 7 to 1 to dismiss a shareholders’ antitrust suit that accused 10 leading investment banks of conspiring to fix the prices and terms for initial public offerings. The court held that the challenged behavior fell within the regulatory domain of the Securities and Exchange Commission, making the banks generally immune from antitrust liability. Justice Breyer wrote the opinion in the case, *Credit Suisse Securities v. Billing*, No. 05-1157, and Justice Thomas dissented. Justice Kennedy did not participate.
In its most important patent ruling in years, the court tilted away from patent owners and made it easier to find that a patent had been improperly issued for an invention that was “obvious” and therefore undeserving of patent protection. Justice Kennedy wrote the unanimous opinion in the case, *KSR International Co. v. Teleflex Inc.*, No. 04-1350.

In an important antitrust ruling, the court voted 5 to 4 to overturn a 96-year-old precedent under which it was always illegal for a manufacturer and retailer to agree on minimum resale prices. The legality of price maintenance will now be judged case by case for its impact on competition. Justice Kennedy wrote the opinion in *Leegin Creative Leather Products Inc. v. PSKS Inc.*, No. 06-480. The dissenters were Justices Breyer, Stevens, Souter and Ginsburg.

The justices continued to curb punitive damages in a 5-to-4 decision that overturned a $79.5 million award against Philip Morris. Justice Breyer’s majority opinion in *Philip Morris USA v. Williams*, No. 05-1256, held that the Oregon jury that gave the award to the widow of a lifelong smoker might have improperly calculated the figure to punish the cigarette maker for harm to other smokers as well.

The dissenters were Justices Scalia, Thomas, Ginsburg and Stevens.

**Criminal Law**

In *Rita v. United States*, No. 06-5754, the court held by a vote of 8 to 1 that even though the federal sentencing guidelines are no longer mandatory, a sentence within the guidelines range can be presumed on appeal to be “reasonable.” In federal circuits that adopt such a presumption, it will be more difficult for defendants to challenge sentences that follow the guidelines. Justice Breyer wrote the majority opinion, and Justice Souter dissented.

The court continued to interpret and apply the law Congress passed in 1996, the Antiterrorism and Effective Death Penalty Act, to restrict the jurisdiction of the federal courts to rule on habeas corpus petitions from state prison inmates. The justices ruled, 9 to 0, that the federal appeals court in California had overstepped those limits when it granted a new trial to a convicted murderer on the ground that the jury had been prejudiced against him by seeing the victim’s relatives in the courtroom wearing buttons with the victim’s picture on them.

Without deciding whether the buttons had, in fact, caused prejudice, Justice Thomas wrote for the court that under the 1996 law, a federal court could not base a grant of habeas corpus on a legal principle that the Supreme Court itself had not adopted. The case was *Carey v. Musladin*, No. 05-785.

The court ruled, 8 to 1, that the police did not violate a speeding driver’s rights by ramming his car and causing a devastating accident. The police officers’ decision to force the driver off the road after a high-speed chase was reasonable, Justice Scalia said in the majority opinion. Justice Stevens dissented, noting that the 19-year-old driver was suspected of nothing more serious than speeding. The case was *Scott v. Harris*, No. 05-1631.

A unanimous ruling extended to automobile passengers the same right that drivers have to challenge the validity of a decision by the police to stop the car. Passengers in a car stopped by the police do not feel free to walk away, the court held in an opinion by Justice Souter, and thus are “seized” for purposes of the Fourth Amendment’s prohibition of...
unreasonable seizure. The case was *Brendlin v. California*, No. 06-8120.

The court made it easier for prosecutors in death penalty cases to remove potential jurors who express ambivalence about the death penalty. Writing for the 5-to-4 majority, Justice Kennedy said appeals courts must defer to a trial judge’s decision on whether a potential juror would be able to overcome qualms about capital punishment and be open to voting to impose a death sentence. The dissenters, in an opinion by Justice Stevens that Justices Souter, Ginsburg and Breyer also joined, said this set the disqualification bar too low and would skew juries toward those most likely to vote for death. The case was *Uttecht v. Brown*, No. 06-413.

The court ruled 5 to 4 that a mentally ill convicted murderer who was delusional and lacked a “rational understanding” of why the state had sentenced him to death could not be executed. Justice Kennedy wrote the opinion in *Panetti v. Quarterman*, No. 06-6407. The dissenter was Chief Justice Roberts and Justices Scalia, Thomas and Alito.

**Abortion**

The court upheld the federal Partial-Birth Abortion Ban Act in a 5-to-4 decision that was a reversal of course and a reframing of the abortion issue. The decision in *Gonzales v. Carhart*, No. 05-380, was the first time the court had upheld a prohibition on a specific method of abortion. The law, enacted in 2003, subjects doctors to fines and prison terms.

In 2000, with Justice O’Connor in the majority, the court had voted 5 to 4 to strike down a nearly identical state ban. from Nebraska. Justice Kennedy’s majority opinion emphasized abortion’s “ethical and moral concerns” and said the law protected women who might otherwise have an abortion by the prohibited method from “regret,” “grief” and “sorrow.”

Justices Ginsburg, Stevens, Souter and Breyer dissented.

**Access to Court**

A deadline for filing a federal appeal could not be excused by the fact that a federal judge had given an inmate’s lawyer the wrong date, the court held in a 5 to 4 opinion by Justice Thomas. The decision, *Bowles v. Russell*, No. 06-5306, overturned two precedents from the 1960s that had endorsed a “unique circumstances” excuse for missed deadlines. Justices Souter, Stevens, Ginsburg and Breyer dissented.

The court rejected a longstanding position of the Equal Employment Opportunity Commission, which the Bush administration had repudiated months earlier, on the deadline for filing a pay discrimination case. The federal statute against employment discrimination requires an employee, as a condition of being able to proceed with a lawsuit, to file a formal complaint within 180 days of the discriminatory act.

Under the commission’s doctrine of “paycheck accrual” that 180-day clock resets every time the employee receives a paycheck with pay lower than it would have been in the absence of discrimination. But the court’s 5-to-4 decision in *Ledbetter v. Goodyear Tire and Rubber Company*, No. 05-1074, requires the employee to have filed within 180 days of the act of discrimination, an interpretation that will keep many such cases out of court. Justices Ginsburg, Stevens, Souter, and Breyer dissented.

The court ruled 5 to 4 that taxpayers did not
have standing to challenge the Bush administration’s expenditure of federal money to support its Office of Faith-Based and Community Initiatives. The dissenters in the decision, Hein v. Freedom From Religion Foundation, No. 06-157, were Justices Souter, Stevens, Ginsburg and Breyer.

In an important disability case, the court ruled that parents of children with disabilities could go to court without a lawyer to challenge a public school district’s plan for their child’s education. Justice Kennedy’s 7-to-2 opinion said that a federal statute, the Individuals with Disabilities Education Act, which guarantees a “free, appropriate public education” to all children, gives rights to parents as well. Justices Scalia and Thomas dissented from the decision, Winkelman v. Parma City School District, No. 05-983.

Speech

The court ruled 5 to 4 that the restriction on corporate- and union-sponsored television advertising, contained in the 2002 McCain-Feingold campaign finance law, threatened to curb core political speech. The provision could be constitutional, Chief Justice Roberts said, only if interpreted narrowly to apply only to advertisements that are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”

The dissenters, Justices Souter, Stevens, Ginsburg and Breyer, said the ruling would open the door to a flood of corporate and union money in the guise of the “sham” issue advertisements that the law was designed to stop. They said the opinion, Federal Election Commission v. Wisconsin Right to Life, No. 06-969, effectively overruled a major part of the law as well as the 2003 Supreme Court decision that had upheld it, a view with which many election law experts agreed.

School officials can censor and punish student speech that can be interpreted as advocating or celebrating the use of illegal drugs, the court held in ruling that a principal did not violate a student’s First Amendment rights by suspending him for his display of a banner proclaiming “Bong Hits 4 Jesus.” Five justices, in an opinion by Chief Justice Roberts, found no constitutional violation; a sixth, Justice Breyer, said the principal was entitled to immunity from damages no matter how the First Amendment question should be answered. Justices Stevens, Souter and Ginsburg dissented on First Amendment grounds. The case was Morse v. Frederick, No. 06-278.

Federal Authority

In its first encounter with global climate change, the court ruled by a 5-to-4 vote that the Environmental Protection Agency had the authority to regulate heat-trapping gases in automobile emissions. The agency had maintained that it had no such authority and that it would not use it if it did. But the court said the agency could refuse to act only if it provided a scientific basis for its refusal.

To reach that conclusion, the court first had to find that Massachusetts, which along with other states had brought the lawsuit against the E.P.A., was suffering the type of injury from the agency’s antiregulatory stance that gave the state standing to sue. Writing for the majority, Justice Stevens said states were due special deference in their claims to standing. The case, Massachusetts v. Environmental Protection Agency, No. 05-1120, marked a rare expansion by the court of the doctrine of standing. Chief Justice Roberts dissented, along with Justices Scalia, Thomas and Alito.
“Roberts Steers Court Right
Back to Reagan”

USA Today
June 29, 2007
Joan Biskupic

In a remarkable first full term of the remade Supreme Court, a narrow majority of justices changed the law on race, abortion, free speech and a swath of other issues affecting American life.

Long-standing precedents were discarded or reinterpreted. Government interests prevailed over individual rights. Business won at the expense of consumers and workers. And people on the fringe, such as rabble-rousing students and atheists, lost out.

In the 2006-07 annual term that ended Thursday, Chief Justice John Roberts, joined by Antonin Scalia, Anthony Kennedy, Clarence Thomas and newest justice Samuel Alito, set the tone. Of 19 cases that broke 5-4 along ideological lines, that quintet prevailed in 13 of them.

The conservative majority drew increasingly heated protests from liberal Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer.

No case revealed the chasm between the conservatives and the liberals as much as Thursday’s decision preventing the use of race in school assignments. The dueling written opinions ran for 178 pages, and the ceremonial reading of the opinion highlights went on for nearly an hour in the white marble and red velvet courtroom.

“It is not often in the law that so few have so quickly changed so much.” Breyer said.

Undoing Past Decisions

Roberts, fulfilling the conservatism inspired by his personal hero, Ronald Reagan, is taking command of the bench in a way that eluded his predecessor, the late William Rehnquist.

The Roberts court showed a distinct willingness to confront past court rulings as it:

* Struck down programs in Louisville and Seattle that used students’ race as a factor in school placement to build diversity across a district. The majority narrowly interpreted the breadth of a 2003 case endorsing the use of race in higher education admissions for campus diversity.

* Upheld an unconditional ban on a midterm abortion procedure that Congress called “partial birth.” The decision abandoned the view of a 2000 case that such a ban was unconstitutional without an exception for when a physician believes it’s best for the mother’s health.

* Diluted a portion of U.S. campaign-finance law that barred corporations and labor unions from running broadcast ads mentioning candidates right before an election. A 2003 court decision had broadly upheld the ban.

* Limited the reach of a 1969 case that said students do not “shed their constitutional rights . . . at the schoolhouse gate,” by allowing principals and teachers to
discipline students for messages that undercut anti-drug policies.

The same five-justice majority on Thursday overturned a 1911 ruling that barred manufacturers from setting minimum retail prices for their goods.

"The court this term addressed issues that many people care about," says Harvard University law professor Richard Fallon. "The fact that the Roberts Court could do so much in its first term makes it more likely that it will continue this way."

Fallon adds that this more conservative court "is taking us backwards and aggressively changing the law."

Notre Dame Law School professor Richard Garnett, a former law clerk to Rehnquist who thinks the court is moving in the right direction, describes the shift in less dramatic terms. "I don't see it as a counterrevolution. I think it is more modest. They are refusing to extend precedents with which they have problems."

While legal analysts disagree about the extent of the shift to the right, there is no disputing that the liberals on the court are voicing more frustration, and even moral outrage, than occurred during Rehnquist's stewardship.

"It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch," Souter wrote for the dissenting foursome as the majority spurned an appeal by an Ohio defendant who missed a filing deadline by days because a federal judge gave him inaccurate information.

To Thursday's ruling rejecting Seattle and Louisville area efforts to ensure racial integration, Stevens said it was "cruel irony" that Roberts would invoke the court's decision against segregated schools in Brown v. Board of Education. "It is my firm conviction that no member of the court that I joined in 1975 would have agreed with today's decision," Stevens said.

The transformed court is a significant achievement and likely enduring legacy for President Bush. His first appointee, Roberts, 52, took the helm from William Rehnquist in fall of 2005.

Rehnquist, who was named by Richard Nixon in 1972 and elevated to chief in 1986 by Reagan, presided over a court whose conservatism was revealed most consistently in decisions on government structure and that favored the states in disputes with Washington.

Rehnquist was never able, despite his own strong views, to prevail on many high-profile social policy dilemmas. In fact, he dissented when the majority struck down the "partial birth" abortion ban in 2000 and when it upheld campus affirmative action and campaign-finance law in 2003.

The turnabout under Roberts is more directly traced to Bush's replacement of retired Justice Sandra Day O'Connor with Alito, 57, in January 2006.

O'Connor, a 1981 Reagan appointee who moved to the left with time, was the key vote to strike down the state abortion ban, endorse race in college admissions for diversity and uphold the campaign finance law known as McCain-Feingold for its Senate sponsors.

"What a difference a single justice makes," says Goodwin Liu, a law professor at the University of California, Berkeley. Alito
also offered a check in some cases on how far the conservative bloc went. When the majority carved out an exception to speech rights in a decision against a student with a "Bong Hits 4 Jesus" banner. Alito wrote a separate opinion offering a word of caution.

He said he was joining the decision on the understanding that it only targeted messages related to illegal drugs and not speech on any political or social issue.

The Reagan Factor

In his 1980 presidential campaign and after winning office, Ronald Reagan emphasized what he believed were the excesses of the judiciary in the wake of the Earl Warren era and liberal intervention in social policy that is usually the domain of elected officials. Reagan set the bench on a conservative path with his choices for the Supreme Court and lower federal courts during two terms. Roberts was with him in the beginning. He joined the administration in 1981. saying he was moved by Reagan's inaugural speech. "I felt he was speaking to me."

As a lawyer for Reagan and then later in the first Bush administration, Roberts often asserted that judges were improperly creating rights not in the Constitution. He took a narrow view of abortion rights and was involved in efforts to curtail affirmative action, school busing and other programs intended to bring minorities into settings where they were once shut out.

Roberts' opposition to race-based programs to spur integration was loud and clear in Thursday's ruling. "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race," he wrote, seeking to end all programs that take account of race.

Kennedy objected to that statement, so Roberts fell one vote short of a majority for that hard-line stance. But in the view of dissenting justices and other critics of the push to the right, Roberts has carried out a new vision for the court.

"Yesterday, the citizens of this nation could look for guidance to this court... concerning desegregation," Breyer said. "Today, they cannot."

Looking to the breadth of the term, Fallon says, "It takes a long time to remake the Supreme Court. Now we're seeing the court in the image Ronald Reagan dreamed of. It is sort of poetic that Chief Justice Roberts is someone who long ago was inspired by Reagan."
On a Supreme Court that has moved consistently to the right, no justice has been more important to the shift than the newest one: Samuel A. Alito Jr.

The solidly conservative Alito’s replacement of the more moderate Sandra Day O’Connor has made the difference in two of this term’s biggest decisions—the vote in April to uphold the federal Partial Birth Abortion Ban Act and its ruling on Monday to substantially weaken the McCain-Feingold campaign finance act.

And Alito’s vote will be key today if the court announces what could be a landmark decision about whether public school districts may consider an individual student’s race when making assignments to achieve diverse school populations.

“There’s no question that Justice Alito is more conservative than Justice O’Connor; there’s no question that his replacement of Justice O’Connor moves the court to the right,” Washington lawyer Roy T. Englert, a frequent Supreme Court practitioner, said yesterday during a forum at the Washington Legal Foundation.

“The president accomplished what he wanted to do when he appointed Justice Alito to the court.”

But if Alito’s consistency has provided the outcomes his advocates hoped for and his detractors feared, his low-key style has not exactly been what was predicted in his bruising confirmation battles.

The appeals court judge from New Jersey was tagged with the demeaning nickname “Scalito,” a reference to the belief he would be an acolyte of Justice Antonin Scalia. The genial Chief Justice John G. Roberts Jr., thought by some Democrats to be more moderate, sailed through his confirmation hearings and received 78 votes in the Senate; only four months later, 20 fewer senators supported Alito.

But in Alito’s first full year on the court—not always the most accurate predictor of a justice’s future—he and Roberts have been virtually interchangeable. The two have been in full agreement in nearly 90 percent of the court’s cases this year, according to statistics produced by the Washington law firm Akin Gump Strauss Hauer & Feld.

Alito’s votes have provided for “a completely uniform step to the right” for the court, said Akin Gump’s Thomas C. Goldstein. But he added that there is a “big difference” in style between Alito and Roberts and their brethren on the right, Scalia and Clarence Thomas.

“Justice Alito, I think, is a very measured conservative, not in the mold of someone who wants to dramatically rewrite doctrine in the manner that Justice Thomas and Justice Scalia are very comfortable and enthusiastic about.”

Alito and Roberts supported each other this week in 5 to 4 decisions that stopped short of what the other conservatives wanted. In the campaign finance decision, which
divides the court—if not the public—along ideological grounds, Scalia criticized Alito for saying he would wait to see whether a test proposed by Roberts to protect speech rights worked before considering whether the entire provision was unconstitutional, as Scalia believed.

"The wait-and-see approach makes no sense," Scalia wrote. "How will we know that would-be speakers have been chilled and have not spoken? If a tree does not fall in the forest, can we hear the sound it would have made had it fallen?"

Such criticism may not be entirely unwelcome, as Alito and Roberts are being criticized from the left for not living up to their pledges to honor stare decisis—the idea that previous rulings of the court should usually stand.

Although the court has not explicitly overturned specific precedents, Alito has been part of the majority that has implemented an unmistakable shift in the court’s holdings.

If a conservative majority rules against the school programs in Seattle and Louisville, Alito "will have been responsible for overturning three of [O'Connor's] recent landmark decisions," said Georgetown University law professor Martin S. Lederman. He was referring to her role as the fifth vote to strike down a state's prohibition of certain abortion procedures, to find the campaign finance law constitutional and to approve the use of race in admission decisions to the University of Michigan’s law school.

Because the views of Justice Anthony M. Kennedy, the court’s swing vote, were already known in those cases, and because Roberts’s votes are no different from those of the man he replaced, the late William H. Rehnquist, it is Alito’s support that has changed the minority view to the majority opinion.

Lederman has found 31 decisions from 1995 to 2005 in which O'Connor was in the 5 to 4 majority and in which there is a significant chance Alito would vote differently.

Because of the increase in split decisions this year, about double the number from last term, Englert said that Alito’s influence may be misinterpreted.

"There is a tendency to take every 5-4 decision and say, ‘Oh, this would have been different if Justice O'Connor were still on the court,’” he said. “Sometimes that’s true, and sometimes it isn’t true.”

On the bench, Alito, 57, is a frequent and precise questioner, although not nearly as loquacious as Roberts and Scalia on the right or Justice Stephen G. Breyer on the left. He is soft-spoken and sometimes comes across as even shy. But the former prosecutor accepts a large number of the speaking requests he receives, often lecturing at universities and appearing before lawyers and other groups.

He has a somewhat deadpan delivery—he told the National Italian American Foundation in a recent speech that reporters sometimes don’t catch his jokes. He said he should perhaps signal such statements with the text-messaging shorthand he has learned from his daughter, a student at Georgetown University.

"JK, JK," he said, which means "just kidding, just kidding."

The first major decision that Alito wrote this term—a ruling that a lawsuit alleging pay
discrimination had been filed too late under terms of Title VII of the Civil Rights Act of 1964—has also been one of the court's most controversial.

Justice Ruth Bader Ginsburg called it a "parsimonious" reading of the law and called on Congress to act. The proposed Lilly Ledbetter Fair Pay Act, named after the plaintiff in the case, was scheduled to be marked up in a House committee yesterday.

Before the Italian American group, Alito accepted praise from a questioner for the decision but quickly noted that not everyone agreed with it. Since he was interpreting the law that Congress passed, Alito said, "it's certainly Congress's prerogative" to change it.
"Courting Controversy"

Time
July 9, 2007
Jeffrey Rosen

Ever since Robert Bork was defeated in his 1987 bid for a seat on the Supreme Court, liberals have feared that the court would turn right on the issues they care most about. And this was the year their fears finally began to be vindicated. As the first full term with both Justices John Roberts and Samuel Alito came to a close, it became increasingly clear that in the post-Sandra Day O'Connor era, the center of the court has shifted several degrees to the right. Both Alito and Anthony Kennedy, who has emerged as the new swing Justice, are more conservative than O'Connor was on some key issues that came before the Justices this term. As a result, the court tacked right in decisions on issues ranging from partial-birth abortion and employment discrimination to, in recent days, campaign finance.

Some observers believe that if the Democrats win the presidency in 2008, the clash between a more conservative Supreme Court and a more liberal White House and Congress might reach historic proportions. “You could have significant conflict between the court and the political branches, one that we probably haven’t seen since the 1930s,” Samuel Issacharoff of the New York University School of Law has suggested. Yet throughout American history, the President and Congress have gotten angry at the court only when it frustrated the will of a large national majority. In many cases in which the Roberts Court is turning right, it appears to have at least a narrow majority of the country on its side.

Think about the issues in which the center of the court, defined by Kennedy, is now more conservative than it was with O'Connor. The federal ban on partial-birth abortion? Polls consistently show overwhelming support for it. Affirmative action? After the Supreme Court upheld the University of Michigan Law School’s affirmative-action plan in 2003, Michigan voters repudiated it in a referendum. “Any court on which Justice Kennedy is the median voter will never do anything to provoke dramatic backlashes,” says Michael Klarman of the University of Virginia School of Law, “because Justice Kennedy has his finger on the pulse of Middle America even more than Justice O’Connor did.” In the last week of the term, Kennedy joined 5-4 opinions upholding the power of school principals to discipline students and limiting challenges to public funding of religion. Those aren’t likely to provoke a widespread rebellion.

If the court reversed Roe v. Wade or began striking down environmental laws like the Clean Air Act, national majorities might well become energized and alarmed. Although Justice Clarence Thomas has signaled his willingness to overturn Roe and gut the heart of the regulatory state, Kennedy is unlikely to provide a fifth vote for either. In the partial-birth case, he repeated his longstanding view that although late-term abortions could be restricted, the early-term abortions at the core of Roe had to be protected. And he made clear his support for environmental regulations when he joined the court’s four liberals in holding that the Bush Environmental Protection Agency thwarted the will of Congress in
refusing to regulate greenhouse gases.

If congressional Democrats want to pick a fight with the court in the short term, in hopes of prompting a leftward shift, they'll have to be careful to choose issues in which they can count on support from a significant majority of the country. Rather than try to repeal the popular ban on partial-birth abortion—which many Democratic voters support—they might try instead to protect gender equality by overturning the court's narrow interpretation of the federal law prohibiting pay discrimination.

But to mount a successful challenge to the court, Democrats not only need to have public opinion behind them; they also have to mobilize it effectively. During a handful of periods in American history—like the New Deal—congressional opposition to the court was so intense that the court did an about-face. More frequently, though, opposition has been more diffuse, leading the court to beat only a partial retreat or ignore its critics. During the 1960s, for example, Congress complained about the Warren Court's school prayer and apportionment decisions, but there was no public outcry, and the court stood its ground.

Now that Congress has been recaptured by the Democrats, liberals have an opportunity to flex their muscles at the court. But as long as the court moves only as far to the right as a majority of the country will tolerate, its critics will have an uphill battle.

To mount a successful challenge to the court, Democrats not only need to have public opinion behind them; they also have to mobilize it effectively.
As George W. Bush staggers toward the conclusion of his second term, he can point to at least one major and enduring project that has gone according to plan: the transformation of the Supreme Court. In the next week or so, the justices will begin their summer recess. The first full term in which Chief Justice John G. Roberts, Jr., and Justice Samuel A. Alito, Jr., have served together will thus be completed, and the changes on the Court, and their implications for the nation, have been profound.

The careers of Roberts and Alito have been emblematic of the conservative ascendancy in American law. Both men, shortly after graduating from law school, joined the Reagan Administration, where Edwin Meese III, who was for a time the Attorney General, and others were building a comprehensive critique of the Supreme Court under Chief Justices Earl Warren and Warren E. Burger. The conservative agenda has remained largely unchanged in the decades since: Expand executive power. End racial preferences intended to assist African-Americans. Speed executions. Welcome religion into the public sphere. And, above all, reverse Roe v. Wade, and allow states to ban abortion. As Alito wrote in an application for a Justice Department promotion in 1985, his work on abortion and race cases, among other Reagan Administration priorities, had given him the chance “to advance legal positions in which I personally believe very strongly.”

Moving with great swiftness, by the stately standards of the Court, Roberts, Alito, and their allies have already made progress on that agenda. In Alito’s first major opinion as a justice, earlier this year, he sharply restricted the ability of victims of employment discrimination to file lawsuits. The Court said that plaintiffs in such cases must bring their suits within a hundred and eighty days of, say, an unfair raise. But, because it generally takes employees longer than that to establish that they have been cheated, the effect of the ruling will be to foreclose many lawsuits. In a similar vein, the Court upheld a death sentence in Washington by lessening the scrutiny applied to jury selection in such cases. Last week, the justices rejected an appeal by a prisoner who had filed his case before a deadline set by a federal district judge. Because the judge had misread the law and given the prisoner too much time—three extra days—the Court said that the case had to be thrown out.

Most notoriously, the Court, for the first time in its history, upheld a categorical ban on an abortion procedure. The case dealt with so-called partial-birth abortion—a procedure performed rarely, often when there are extraordinary risks to the mother, the fetus, or both. But more important than the ruling were the implications of Justice Anthony M. Kennedy’s opinion. The Court all but abandoned the reasoning of Roe v. Wade (and its reaffirmation in the 1992 Casey decision) and adopted instead the assumptions and the rhetoric of the anti-abortion movement. To the Court, it was the partial-birth-abortion procedure, not the risks posed to the women who seek it, that was “laden with the power to devalue human life.” In the most startling passage in
the opinion. Kennedy wrote, “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.” Small wonder that Kennedy’s search for such data was unavailing; notwithstanding the claims of the anti-abortion movement, no intellectually respectable support exists for this patronizing notion. The decision to have an abortion is never a simple one, but until this year the Court has said that the women affected, not the state, had the last word.

All these conservative victories were decided by votes of five to four, with Kennedy joining Roberts, Alito, Antonin Scalia, and Clarence Thomas to form the majority. (The last big case outstanding this term is a challenge to school-desegregation plans in Louisville and Seattle. Based on the oral argument, Kennedy appears likely to join the same quartet in striking down the plans.) Kennedy holds the balance of power in the Roberts Court, much the way Sandra Day O’Connor did in the Rehnquist years. Kennedy is more conservative than O’Connor, so the Court is, too. He sided with the liberals in only one important case this year, when the Court ruled that the gases that cause global warming are pollutants under the Clean Air Act, a ruling that repudiated the Bush Administration’s narrow view of the law.

The Rehnquist Court had its share of divided rulings, of course—most notably, Bush v. Gore—but the new conservative ascendancy has prompted a striking reaction from the dissenting liberals. John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. It has been the custom at the Court for dissenters to explain their views individually or in small groups; but this group, led by Stevens, the senior member of the Court, has taken to uniting around a single opinion, as if to emphasize a collective view that the majority is taking the law in dangerous directions. In the case about the missed appeal deadline, the dissenting opinion, by the usually mild-mannered Souter (who was joined by Stevens, Ginsburg, and Breyer), reflected true anguish: “It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch.”

Ginsburg, who prides herself on her collegiality, has taken to reading her dissenting opinions aloud from the bench—a vigorous protest in the genteel world of the justices. In her dissent (also joined by the others) in the abortion case, she observed that in 2000 five justices rejected a Nebraska ban on partial-birth abortions that was nearly identical to the one the Court upheld this year. O’Connor was still on the Court and in the majority in the Nebraska case, so the only meaningful difference between then and now, as Ginsburg noted, is that the Court is “differently composed than it was when we last considered a restrictive abortion regulation.”

And that, ultimately, is the point. When it comes to the incendiary political issues that end up in the Supreme Court, what matters is not the quality of the arguments but the identity of the justices. Presidents pick justices to extend their legacies; by this standard, Bush chose wisely. The days when justices surprised the Presidents who appointed them are over—the last two purported surprises, Souter and Kennedy, were anything but. Souter’s record pegged him as a moderate; Kennedy was nominated because the more conservative Robert Bork was rejected by the Senate. All the subsequently appointed justices—Thomas, Ginsburg, Breyer, Roberts, and Alito—have
turned out precisely as might have been expected by the Presidents who appointed them.

At this moment, the liberals face not only jurisprudential but actuarial peril. Stevens is eighty-seven and Ginsburg seventy-four; Roberts, Thomas, and Alito are in their fifties. The Court, no less than the Presidency, will be on the ballot next November, and a wise electorate will vote accordingly.
Back in 1900, author Finley Peter Dunne quoted Mr. Dooley, his fictional Irish saloonkeeper, as saying, “The Supreme Court follows the election returns.”

That is certainly the case with the Supreme Court term that just ended. “The Roberts Court is a different Court because George Bush won the last election and John Kerry did not,” legal analyst Jeffrey Toobin said. “That is the beginning and end of the reason why this is a much more conservative Supreme Court than two years ago.”

In several significant cases, a conservative majority that included both Bush appointees changed the Court’s direction.

* In 2000, the old Court threw out a state ban on late-term abortions by a 5-4 vote. This year, the new Court upheld such a ban by 5-4.

* In 2003, the old Court upheld the McCain-Feingold campaign finance law by 5-4. Last week, in a 5-4 vote, the new Court struck down the section of that law restricting pre-election issue advertising.

* In 2003, by 5-4, the old Court allowed the use of race as a criterion for admission to schools of higher education. Last week, by 5-4, the new Court struck down the use of race as a criterion for placing students in public schools.

On the old Court, three reliably conservative justices—William Rehnquist, Antonin Scalia, and Clarence Thomas—were frequently joined by Anthony Kennedy, a moderate conservative. Four reliable liberals—Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens—were sometimes joined by Sandra Day O’Connor, a swing vote.

On the new Court, Bush has replaced Rehnquist with John Roberts, an even more reliable conservative. He also replaced O’Connor with Samuel Alito, a reliable conservative. Alito’s vote, along with that of Kennedy, shifted the Court’s majority to the conservatives. The four liberal justices are now almost always in the minority on close votes.

In the view of Georgetown University law professor Steven Goldblatt, “Justice Alito is a much more predictable conservative vote than Justice O’Connor would have been.” Even Kennedy, the current swing vote, has become more predictably conservative. According to The Washington Post, when the Court split 5-4 along liberal-conservative lines this term, Kennedy sided with the liberal bloc six times and the conservative bloc 13 times, including on the three cases cited above.

When earlier presidents nominated justices, ideology was often just one consideration among many. President Reagan was fulfilling a pledge to appoint a woman when he named O’Connor in 1981. When the Senate rejected Robert Bork in 1987 after a bruising ideological fight, Reagan tapped a moderate conservative, Kennedy, to avoid another battle. In 1990, President George H.W. Bush picked Souter, whose views were largely unknown, because he, too,
wanted to avoid a fight with a Democratic Senate.

According to Toobin, “Presidents didn’t used to run for office making promises about the kind of justices they would appoint. But President George W. Bush did, and he has delivered on those promises by transforming the Court in a short period of time.”

Was the Court an issue to voters? In 2004, a Newsweek poll asked Americans how important each of 11 issues would be in their vote for president. The results, in order of importance, were the economy, health care, education, Iraq, terrorism, Social Security, taxes, the deficit, foreign policy, the environment, and—at the very bottom of the list—the Supreme Court. Although the Court was not a major issue for most voters, it mattered a great deal to Bush’s conservative base, which has been protesting “judicial activism” for decades.

In 2008, the Court could be an issue for more of the electorate. “The stakes in the next presidential election are actually huge because the only likely Court retirees are on the left,” said Thomas Goldstein, a Supreme Court lawyer who writes for Scotusblog. “A Republican president could really swing the Supreme Court in a very conservative direction, or a Democratic president could hold the line against further movement to the right.”

So, yes, the Supreme Court did follow the election returns during the Bush presidency. After all, arguably, the 2000 election returns followed the Supreme Court.
It was perhaps inevitable that Linda Greenhouse of the New York Times would proclaim the Supreme Court has become the “Court that conservatives had long yearned for and that liberals feared.” The replacement of Justice Sandra Day O’Connor, a moderate and increasingly inconsistent pragmatist justice, with conservative minimalist Samuel Alito ensured a modest change across many areas of legal doctrine. Yet it is an exaggeration to report a “steady and well-documented turn to the right” during the 2006-07 term, as did the Washington Post in an end-of-term review.

The replacement of Justice O’Connor with Justice Alito has shifted the Supreme Court slightly to the right, but there is no conservative legal revolution in the offing. If anything, the pattern of the Court’s decisions somewhat reflects Justice Kennedy’s somewhat conservative jurisprudence—moderately conservative and generally resistant to dramatic shifts in established doctrine. On many issues, Kennedy is in line with the minimalist approach of the chief justice and Justice Alito, yet on many others he is willing to be significantly more aggressive and depart from conservative principles. The swing justice has a soft spot for sweeping moral arguments, such as claims about personal autonomy or the nature of deliberative democracy.

Some feign surprise at the voting pattern of the Court’s two newest justices, Chief Justice Roberts and Justice Alito. Yet both justices have performed as advertised. President Bush promised Supreme Court nominations in the mold of Justices Scalia and Thomas, and there was never much doubt that Roberts and Alito would join the conservative side of the court. They are both “conservative minimalists”; they read legal texts fairly but narrowly, resist the creation or recognition of new legal rights, show respect for precedent, and avoid announcing legal rules broader than necessary to decide a given case. If anything, some conservatives may think President Bush over-promised, as Roberts and Alito are more reluctant to reverse prior cases than either Scalia and Thomas. Indeed, Alito and Roberts are less prone to overturn prior precedent than any of their colleagues on the Court.

The two newest justices have undoubtedly had an impact, however. Both Bush nominees bring powerful intellects and strong principles to the Court. Chief Justice Roberts has much in common with his mentor, the late Chief Justice William Rehnquist, but Justice Alito is both more conservative and consistent than was Justice O’Connor. Nonetheless, the change has been anything but revolutionary. Most of the Warren and Burger Court precedents that most stoke conservative ire remain on the books.

In many respects, this year saw the emergence of the “Kennedy Court,” with all that implies. As the swing justice, Justice Kennedy was able to dictate the outcome in many cases. He voted with the majority in every one of this term’s 5-4 decisions, even those that were not decided along
ideological lines. But even when he did not cast the deciding vote, Justice Kennedy was almost always in the majority. The Court decided 68 cases after oral argument this term, and Justice Kennedy dissented only twice, according to end-of-term statistics compiled by the folks at SCOTUSBlog. Chief Justice Roberts, by comparison, dissented eight times, and Justice Alito ten, whereas Justices Thomas and Souter each had 16 dissents. Justice Stevens was the most frequent dissenter, voting with the minority 26 times.

This term’s docket included many cases in which Justice Kennedy joined the four more conservative justices in many high profile cases, but a single term does not produce a representative sample. A different mix of cases would likely produce quite different results. On questions from sexual privacy to capital punishment to executive authority in the war on terror, Justice Kennedy often joins the more liberal members of the Court. On still other issues, including federal preemption and state regulatory authority over interstate commerce, the Court is closely divided, but not on traditional ideological lines.

Justice Kennedy is the least likely member of the Court to uphold government restrictions on speech. Thus, he joined Justices Scalia and Thomas in urging the Court to overturn portions of the Court’s 2003 decision in *McConnell v. FEC* and void federal limits on political advertising adopted as part of the McCain-Feingold campaign finance reforms, rejecting the incremental approach adopted by Chief Justice Roberts that would have preserved the recent precedent. He also joined Justice Alito’s concurrence in the “Bong hits 4 Jesus” case, to ensure the Court’s ruling would not permit limits on political speech by students.

If Roberts and Alito are consistent minimalists, Justice Kennedy has a “maximalist” streak. Kennedy joined Justice Stevens’ opinion for the Court in *Massachusetts v. EPA*, effectively ordering the Environmental Protection Agency to regulate greenhouse gas emissions from motor vehicles. This decision could have profound implications, particularly for the law of “standing.” It invented a new doctrine of “special solicitude” for state attorneys general who wish to sue the federal government. He also wrote the majority opinion in *Leegin Creative Leather Products v. Psks, Inc.*, overturning a decades-old antitrust precedent, and another in *Panetti v. Quarterman* adopting an innovative and expansive interpretation of federal law allowing convicted criminal defendants to file additional habeas corpus petitions.

Many commentators suggest that there was an unusual level of rancor and division in the Supreme Court this year. Simon Lazarus complained of “an unprecedented avalanche of 5-4 end-of-term Supreme Court decisions,” in *The American Prospect* and the *Washington Post* editorialized that the Court “seemed more fractured than ever.” Such claims, like the proclamations of a conservative ascendancy, are overstated.

Only one-in-four decisions was unanimous, and one-in-three was decided 5-4. This is hardly an unprecedented level of division, however. The level of unanimity was even lower during the 2004-05 session. That term the number of 5-4 decisions also reached 30 percent (as it did in the 2001-02 session). If anything was unprecedented it was the unusually high percentage of unanimous rulings (45 percent), and low number of 5-4 decisions (13 percent) during Chief Justice Roberts’s first term that inflated expectations. The 2005-06 unanimous rulings in cases challenging abortion...
restrictions and the Solomon Amendment were more unusual than the split decisions of the term just past.

This is not to deny the very real doctrinal divisions on the Court. The justices are closely split on many issues, ranging from criminal procedure and federalism to race and the status of unenumerated rights. SCOTUSBlog's analysis of the "rate of dissension"—a measure of the number of dissents per case—found the 2006-07 term the most divided in recent years, barely edging out the 2001-02 term, 1.82 dissents per case to 1.81. This and other measures of the Court's may be magnified by the Court's ever-shrinking docket, however. Where once the High Court heard 100 cases a term, the justices only accepted 72 for 2006-07. As the Court grants fewer cases, those that remain on the docket may be more difficult, contentious, and closely fought on the margin. The oral statements from Justices Ginsburg and Breyer delivering dissents in high-profile cases may have been unusual, but they were decidedly mild compared to some of the fiery statements from prior years, as when the Court handed down its decisions in two abortion-related cases, Stenberg v. Carhart and Colorado v. Hill.

Last Friday, after the term ended, the Court agreed to hear another case concerning the legal rights of Guantanamo Bay detainees in the 2007-08 term. This was unusual because it required the Court to reverse course, granting rehearing of a petition the Court had already denied earlier this year. This means that at least five justices were willing to hear the case—as opposed to the usual four. It may also indicate that five justices are skeptical of the Bush administration's legal arguments. If so, this is another sign that reports of a conservative judicial revolution are a bit premature, and that this remains a Court worth watching.
About half of the public thinks the Supreme Court is generally balanced in its decisions, but a growing number of Americans say the court has become “too conservative” in the two years since President Bush began nominating justices, according to a new Washington Post-ABC News poll.

Nearly a third of the public—31 percent—thinks the court is too far to the right, a noticeable jump since the question was last asked in July 2005. That’s when Bush nominated John G. Roberts Jr. to the court and, in the six-month period that followed, the Senate approved Roberts as chief justice and confirmed Justice Samuel A. Alito Jr.

The two have proved to be reliably conservative justices, and the increasingly polarized court this year moved to uphold restraints on abortion, restrict student speech rights and limit the ability of school districts to use race in student assignments, among other issues.

The public seems to have noticed the shift. The percentage who said the court is “too conservative” grew from 19 percent to 31 percent in the past two years, while those who said it is “generally balanced in its decisions” declined from 55 percent to 47 percent.

“I think it shows that we’re at a tipping point in time,” said Ralph G. Neas, president of the liberal People for the American Way. “And it’s why a major priority for us over the next 16 months will be to emphasize the importance of the Supreme Court and why it should be an important factor in voting for president.”

But conservative activists looking at the political consequences of the past term say the public is ambivalent about the two rulings that have most marked the court’s turn to the right—upholding the ban on the procedure sometimes called partial-birth abortion and restricting the use of race in school assignments.

The difference could lie in which side is most successful in framing the court’s actions to a public that pays more attention to the president and Congress.

“As a political strategist, I’d take those two decisions any day of the week,” said Gregory R. Mueller, a public relations consultant who has advised political candidates and represents some conservative judicial organizations. He said that racial classifications remind Americans of quotas, and that even the majority of the public that thinks abortion should generally be available favors some restrictions.

Liberals, on the other hand, portray the court’s decision to uphold the federal Partial-Birth Abortion Ban Act, passed by Congress in 2003, as the first step toward overruling Roe v. Wade and see the race decision as a retreat from civil rights.

Both sides will find support for their views in the Post-ABC poll results, which asked
about the two key cases of the term.

Fifty-five percent of those polled—including majorities of both women and men—approved of the court’s abortion ruling. The decision significantly shifted the court’s abortion jurisprudence, marking the first time justices have upheld a restriction on a specific abortion procedure and one that does not include an exception for a woman’s health.

But a majority disagreed with the court’s decision that sharply restricted the ability of local school boards to use race when making school assignments to achieve diverse student bodies. Fifty-six percent of those polled disapproved of the decision; 40 percent approved.

Three out of four blacks disapproved of the court’s ruling in the race case, as did a narrow majority of whites. Seven out of 10 Democrats disagreed with the ruling, while Republicans and independents both were evenly split.

“People really don’t want to go backwards on civil rights,” said Nan Aron, president of the liberal Alliance for Justice, which focuses on judicial nominations.

The increasing view of the court as more conservative than liberal, and angry rhetoric from Senate Democrats about the role of Roberts and Alito in moving the court in that direction, have energized liberal activist groups that focus on the judiciary.

People for the American Way launched a fundraising drive this month with an e-mail missive sent to 400,000 activists; in the message. Norman Lear, one of the group’s founders, warned, “Only you and I stand between the new Supreme Court and the continued chiseling away at the rights and freedoms we Americans hold dear.”

The group urges activists to sign online petitions to “Correct the Court” by legislatively overturning some of the court’s decisions.

But activists on the right have found in recent years that their supporters are the ones for whom changing the federal judiciary has become a movement.

“It’s a unifying issue in many ways for Republicans,” Mueller said. For the GOP, nominating conservatives to the federal judiciary, he added, “is one of those issues that has almost become like anti-communism was during the Cold War.”

Mueller and his colleague Keith Appell point to the presidential race, where, among Republican candidates, former New York mayor Rudolph W. Giuliani and former Massachusetts governor Mitt Romney have already named “justice advisory committees” for counsel on issues and nominations.

For Giuliani, a candidate seen in some Republican circles as too moderate, endorsements from conservative favorites such as former solicitor general Theodore B. Olson and Steven Calabresi, one of the founders of the Federalist Society, a conservative legal organization, were important.

The specter of “liberal activist judges” is still a strong rallying point for conservatives, despite the fact that, because of the Republican hold on the White House, seven of the nine justices on the Supreme Court were appointed by Republican presidents and GOP appointees are in the majority on
10 of the 13 U.S. courts of appeals.

Aron and Neas note that it was conservative anger over court decisions that fueled the right’s interest in the federal courts, and they hope that this term’s decisions similarly upset activists on the left. “Before, it was hypothetical,” Neas said.
The Supreme Court term that ended Thursday confirmed exactly what many people had feared: that the testimony given by John Roberts and Samuel Alito at their confirmation hearings just months earlier was a lot of baloney.

During those hearings, the two presented themselves as open-minded jurists lacking an ideological agenda. Roberts likened a Supreme Court justice to an umpire, a neutral arbiter whose personal political views are irrelevant to decisions. Both Roberts and Alito promised fidelity to the court’s precedents.

But instead, Chief Justice Roberts and Justice Alito have behaved exactly as their opponents predicted. There was not one case this term in which the court was not ideologically divided, and not one in which Roberts and Alito did not vote for the result that their conservative backers would have wanted. In virtually all of these cases, they were joined by justices Antonin Scalia, Anthony Kennedy and Clarence Thomas.

The result was the most overwhelmingly conservative term since the 1930s. Ever since Richard Nixon ran for president in 1968, conservatives have been striving for a reliable majority voting as a bloc across all areas of the law—and this year they finally got it.

Although Roberts and Alito did not expressly vote to overrule precedents, they chipped away at them in a series of niggling decisions. For instance, they upheld a federal law prohibiting so-called partial-birth abortion—even though just seven years ago, the Supreme Court struck down an almost identical state law as a violation of Roe vs. Wade. On Thursday, they ruled that public schools cannot consider race to achieve desegregation except under certain limited conditions—even though three years ago, the high court held that colleges and universities have a compelling interest in achieving diversity and may use race as a factor in their admissions decisions.

A few years ago, the court upheld a provision of the Bipartisan Campaign Finance Reform Act that limited broadcast advertisements by corporations and unions with regard to specific candidates to 30 days before primary elections or 60 days before a general election. On Monday, the court did not expressly overrule its earlier decision, but it implicitly did so by adopting a standard that will allow for virtually unlimited advertising by corporations and unions before elections.

At their confirmation hearings, both Roberts and Alito presented themselves as compassionate, insisting that they would not ignore the needs and rights of the powerless. Yet the decisions this term were especially cruel, advancing the traditional conservative preferences for the government over criminal defendants and the interests of business over consumers and employees. In a particularly outrageous decision, the court ruled, 5 to 4, that a criminal defendant was barred from appealing when a federal district court mistakenly gave him 17 days.
rather than 14, to file his appeal. Even though the defendant followed the instructions of the district court, the high court held that he was barred because the trial judge made a mistake.

In another case, the high court, again ruling 5 to 4, made it extremely difficult for victims of pay discrimination to sue. The court held that a claim must be brought within 180 days of the time a person's pay is set, even though it is rare that a person would know of another employee's pay in this time period and have the information needed to be able to bring a discrimination claim.

This term provides a powerful reminder of the importance of presidential elections in determining the composition of the court. If John Kerry or Al Gore had picked the replacements for William Rehnquist and Sandra Day O'Connor, it would have been a vastly different year at the Supreme Court.

It also is a reminder that the confirmation process is not working. Nominees come forward and murmur all the right platitudes, refusing to answer specific questions about their views. They promise to be open-minded, and they present witnesses who attest to their fairness. For Roberts and Alito, this was enough to secure their confirmation.

But now that they are on the bench, those promises are forgotten. Roberts and Alito are voting exactly as their fiercest critics predicted, but nothing can be done about it now. Both are under 60, and each could be on the court another 30 years.
JUSTICE KENNEDY’S ROLE

“The Fragile Kennedy Court”

*The New York Times*

July 7, 2006

The Supreme Court has nominally been the Roberts Court since last fall, when John Roberts arrived as chief justice. But as a practical matter, the recently completed term marked the start of the Kennedy Court. With the departure of Sandra Day O’Connor, Justice Anthony Kennedy cast the deciding vote in case after case. The court’s major rulings, on presidential power, environmental law and other issues, reflected his moderately conservative, but often fiercely independent, view of the law.

The two new justices, Chief Justice Roberts and Justice Samuel Alito, produced little of the term’s excitement since both men quickly fell into predictably conservative voting patterns. Justice Alito voted with Clarence Thomas 84 percent of the time in non-unanimous decisions, and with John Paul Stevens, a leader of the court’s liberal wing, just 13 percent. Chief Justice Roberts agreed with Antonin Scalia fully 88 percent of the time, and least often with Justice Stevens.

With Chief Justice Roberts and Justices Alito, Scalia and Thomas forming one bloc, and the four most liberal justices forming another, Justice Kennedy had the power to make either camp’s opinion the majority on a striking number of cases.

His influence was clear in the most important case of the term, the historic ruling striking down the military tribunals at the Guantanamo Bay detention camp. Justice Kennedy provided the critical fifth vote for Justice Stevens’s impassioned opinion that found fault not only with the tribunals but with the Bush administration’s broader claims that the president has inherent power to execute the war on terror as he sees fit.

At other times, Justice Kennedy swung to the right. In the Texas redistricting case, he joined with the court’s conservatives to reject the claim that Republicans’ redrawing of the state’s Congressional districts was so nakedly partisan that it violated the Constitution’s equal protection clause. He did, however, join the liberals in holding that one of the newly created districts violated the Voting Rights Act.

In a key environmental case, Justice Kennedy came down between the conservatives, who would have substantially gutted the Clean Water Act’s wetlands protections, and the liberals, who would have applied it forcefully. He laid out a middle-of-the-road test that will, in the end, most likely end up being fairly protective of the environment.

There were cases, of course, that Justice Kennedy did not decide. In an important campaign finance case, the court struck down a Vermont law but made clear that, as a general matter, contribution limits were constitutional. Justice Kennedy wrote his own opinion that expressed his continuing concerns about contribution limits, while Chief Justice Roberts gave critical support to the majority favoring campaign finance reform. In many other areas, though, including police searches and the death
penalty, the law was what Justice Kennedy said it was.

The court’s current centrism is fragile. Justice Stevens recently turned 86, and he or another justice could leave in the next two years, giving President Bush an opportunity to fill the vacancy. If the court’s strongly conservative bloc gained a fifth vote, American law would likely look very different from the court’s decisions this term and from its rulings over the last 50 years on issues like abortion, the environment and civil rights.
The U.S. Supreme Court is a more conservative place under Chief Justice John Roberts and associate Justice Samuel Alito.

But the shift to the right is not as deep and abrupt as it might have been had both of the new justices fulfilled President Bush’s wish to populate the high court with jurists in the mold of Antonin Scalia and Clarence Thomas.

Instead, Chief Justice Roberts and Justice Alito often staked out more moderate positions than Justices Scalia and Thomas, declining invitations from their conservative brethren to vote to strike down liberal precedents and declare broad new conservative doctrines in some of the high-profile cases decided in the just-ended 2006-2007 term.

The session did produce a string of conservative victories, including upholding a national ban on so-called partial-birth abortions, endorsing a narrow reading of a key section of the McCain-Feingold campaign-finance law, making it harder for taxpayers to sue to enforce the separation of church and state, and limiting the use of race-based enrollment policies in public schools.

But this was not Armageddon for liberal precedents. At least not yet.

The court’s move to the right can be partly calibrated by the degree to which Justice Alito is more conservative than the justice he replaced last term, Sandra Day O’Connor. The other factor is the swing voter role of Justice Anthony Kennedy, who is also to the right of Mrs. O’Connor’s prior positions on most key issues heard this term.

“There is not that much of a change because the court had been divided 5-4 on many of these same questions,” says William Van Alstyne of William and Mary Law School in Williamsburg, Va. He calls it “a sea change on the margin.”

For conservatives, even marginal victories are cause for celebration. They are the fruit of an intense campaign to reshape the judiciary launched a quarter-century ago during the Reagan administration. For liberals, it is a time of high anxiety and despair over what an emboldened Roberts court might produce in years to come.

But it’s not all conservative applause and liberal angst.

Kennedy As Swing Voter

The most significant development at the court this term was the emergence of Justice Kennedy, a conservative centrist swing voter, as the center of power in the Roberts court.

In the 2006-2007 term, the high court handed down 24 opinions decided by 5-to-4 votes. Kennedy was on the winning side in all 24 cases.

Scholars had to search back decades to find a justice who might come close in achieving
such a feat. Former Justice O'Connor, often called the most powerful woman in America when she was on the court, never did it.

Professor Van Alstyne says in his 45 years of teaching constitutional law he has never seen a justice who was “as crucial in so many pivotal constitutional cases as has been true of Justice Kennedy this term.”

Thomas Goldstein, a Supreme Court advocate and close court observer, offers a similar assessment. “By and large it is Justice Kennedy’s court across an array of questions,” he told a recent gathering at the Washington Legal Foundation. “He has such complete control it is just extraordinary.”

The essence of Kennedy’s power is his position at the center of the court. While many legal disputes are disposed of with unanimous or lopsided majorities, the most contentious social issues tend to split the nine justices 4-4 into liberal and conservative wings. When this happens, Kennedy often controls the outcome by either writing the majority opinion or authoring a concurring opinion that limits the majority opinion.

As a result, it is Kennedy who decides not only which way the law goes, but also how far to the left or right it goes.

In the six biggest cases of the term, Kennedy joined conservatives five times.

Judicial Restraint Evident

In the campaign-finance case, Federal Election Commission v. Wisconsin Right to Life, Kennedy did not adopt his usual centrist posture. Instead he joined Scalia and Thomas in a call to overturn an important section of the McCain-Feingold law. Roberts and Alito were the ones who took the more moderate road, saying the law was unconstitutional “as applied” to the Wisconsin group, rather than invalidating that section of the law.

The action is an example of a doctrine of judicial restraint often repeated by the chief justice: “If it is not necessary to decide more to dispose of a case, it is necessary not to decide more.”

Roberts’s moderate posture prompted Scalia to include a few choice barbs aimed at the chief justice in a concurring opinion. Scalia said Roberts’s opinion effectively overruled the law without saying so. “This faux judicial restraint is judicial obfuscation,” Scalia wrote, deploying a tone usually reserved for dissenting opinions.

In a case involving taxpayer standing to sue the White House for alleged violations of separation of church and state, Scalia again used a concurring opinion to fire off a barrage of arrows aimed at Alito, Roberts, and Kennedy. Scalia and Thomas favored overruling a 1968 precedent, Flast v. Cohen, that first permitted such taxpayer suits. Instead, the three other justices favored an approach that would carve out an exception allowing taxpayers to sue only in response to congressional action, but not in cases solely involving the White House.

For Scalia, the outcome was untenable. The only principled way to resolve the issue, he wrote, was either to allow taxpayers to sue in every instance or to overturn the underlying precedent that awarded them the right to sue in the first place. He accused the three justices of hiding behind a “pretense of minimalism.”

“If this court is to decide cases by the rule of law rather than a show of hands, we must surrender to logic and choose sides,” Scalia
writes. "Either *Flast v. Cohen* should be applied to all challenges... or *Flast* should be repudiated."

Scalia said he understood the impulse to take a minimalist approach. "But laying just claim to be honoring stare decisis [i.e., respect for precedent] requires more than beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive."

He adds, "We had an opportunity today to erase this blot on our jurisprudence, but instead have simply smudged it."

**A 'Kennedy Doctrine' for Schools**

It is in the school race cases handed down Thursday that Kennedy’s power as a moderating force is on full display.

Roberts wrote the majority decision invalidating race-based public school enrollment programs in Seattle and Louisville, Ky. Both plans violate the Constitution’s equal-protection clause by using race to decide which students would attend the most popular schools, the court ruled. The chief justice’s opinion lays a legal foundation to require officials to adopt a color-blind approach in instances other than attempts to remedy intentional discrimination.

Had Kennedy provided an unreserved fifth vote, the resulting decision would have become a constitutional landmark, in effect opening a new and controversial chapter in race relations in the U.S.

But he stopped short of authorizing that sweeping outcome. Instead, Kennedy provided the crucial fifth vote to strike down the two school programs but then wrote a controlling concurrence that limits the sweep of the Roberts plurality opinion.

The resulting Kennedy doctrine is that school districts may use race to try to avoid the racial isolation of minority students in inner-city schools or to achieve a diverse student body. But they can do so as a last resort only after exhausting nonrace-based means of achieving such goals.

Kennedy didn’t always swing to the right in major cases this term.

His most significant move to the left came in a case involving an attempt to force the U.S. Environmental Protection Agency to regulate greenhouse gases to fight global warming. It represents a victory for states and environmentalists worried about the impact of climate change, and makes it easier to file future suits. But the holding itself does not force the EPA to do anything other than take a more rigorous look at the problem and carefully justify any agency inaction.
If Justice Anthony M. Kennedy is to hold the one vote that counts as the Supreme Court continues the decades—perhaps centuries—of struggle with the role of race in American law, and that seems beyond any shred of doubt after Thursday’s ruling in the Seattle and Louisville cases, it is significant that the liberal-to-moderate wing of the Court will go on trying to coax or shame him into remaining more or less in the middle. The post on this blog by colleague Tom Goldstein analyzing Kennedy’s concurrence Thursday makes clear why his declarations are controlling, and why race is still not a totally forbidden factor in public education policymaking.

What Kennedy’s opinion does not openly admit, but what Kennedy’s view of his role has long made clear, is that he is deeply sensitive to the way his work as a judge is and will be perceived in history. This is not true only in the work of the Court on race questions, but on other social or cultural issues as well.

While his own quite conservative instincts must make it enormously tempting, now that there are four rigorously conservative colleagues, to join them routinely, the pull of reputation and public image appears to have told him to hesitate. He is even less tempted, of course, to join routinely in the more robust liberalism of his other four colleagues. Both help explain why he is so determinedly the middle Justice—a position that is especially vivid at the conclusion of the just-completed Term.

What was fully on display on Thursday, amid a great deal of courtroom drama and soaring rhetoric, was the contest that is going on within the Court to influence Kennedy and his vote. And, in that contest, it can be argued that the Court’s liberal bloc—although it seems increasingly isolated on some of the bigger decisions—is having a substantial effect on reinforcing Kennedy’s instinct to keep staking out the middle. The sharp critique of the dissents plays into another facet of Kennedy’s self-perception.

He has a fundamental distaste for the heroic and simplistic constitutional dogma—so popular with two and perhaps more of his conservative colleagues—that leaves everyone to fend for themselves in decidedly uneven political or legal combat. He regularly seeks to put on display a large—perhaps even a grand—perception of the law that leads some unsympathetic observers to regard him as a puffed-up thespian using the Court and other public forums as a personal stage. And one of his grandest perceptions is that, if possible, the law should be made inclusive and should remain sensitive in human terms. (There is no doubt that Kennedy would regard even his much-criticized romanticizing of the relationship of mother and unborn child in the abortion ruling this Term as exhibiting just that kind of sensitivity, just as he probably also saw his often-maligned opinions in the past on gay sexual relations and on prayers at school graduations.)

The school cases are a clear example. His vote was necessary to control the outcome, and it very likely is true that the fervor of the
dissent helped keep him away from a full embrace of the principal opinion by the Chief Justice. Indeed, while the dissents are blistering in their denunciation of the Roberts opinion, Kennedy’s criticism of it was likely to have a sharper sting. It provided a separation from Roberts’ more sweeping declarations against racial diversity as a valid public school goal, and left those declarations without the profound importance they would have had if they had in fact represented the views of a Court.

“...The plurality opinion,” Kennedy said of some of the Roberts approach, “is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto segregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.”

The plurality, he says at another point, “does not acknowledge that the school districts have identified a compelling interest here.” That, he said, was why he would not sign on to the part of the principal opinion that ruled out the pursuit of racial diversity as an educational policy goal. “Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue,” he went on. He even persuaded a laundry list of “race-conscious” policies that school districts could validly adopt in that pursuit.

And Kennedy shunned entirely the sentiment of conservative colleagues that the Court should insist and that the Constitution commands that public officials must be “color-blind.” He said: “In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”

To emphasize his departure from the Roberts plurality on key points, Kennedy took the highly unusual step of discussing his concurrence in remarks on the bench. While it has become more common for dissenting Justices to recite from their opinions, it hardly ever happens that a concurring Justice does so.

Would Kennedy have worked so energetically to carve out a separate position had the colleagues in dissent moderated their critique? Perhaps he would have. But it is at least equally plausible that he did not wish to be lumped together with the plurality as a target of the dissents’ most aggressive thrusts of rhetoric. The dissent, it should be noted, is only mildly critical of Kennedy’s specific suggestions of alternative race-related policies that might be used, and that made even more vivid the far stronger language leveled at the Roberts coalition. That the dissent was not lightly to be dismissed is also evident in the efforts that the Chief Justice made to answer it, and, even more, the 36-page opinion Justice Clarence Thomas wrote with the sole aim of fending off the dissenters’ arguments.
Justice Kennedy’s just-completed October Term 2006 will certainly go down as one of the most “successful” in the Court’s modern history. Indeed, the statistics are remarkable: Justice Kennedy was in the minority only twice this entire Term, he wrote only one dissenting opinion, and was a perfect 24-for-24 in 5-4 (or 5-3) cases. If the numbers alone weren’t enough evidence of his enormous influence, he certainly ended the Term with a flourish: he authored two of the Court’s three 5-4 cases that were announced today—siding with the liberals in one and the conservatives in the other—and also wrote the controlling concurrence in the school assignment cases, which he proceeded to read aloud from the bench. It was a remarkable way to end a remarkable Term.

Digging deep back into the archives, it’s difficult to find a Term where the decision of a single justice so often determined the direction of the Court. In the last 20 years, under Chief Justices Rehnquist and Roberts, such an achievement in unparalleled. The closest analogy is Justice Kennedy’s own 1993 Term: in that year, he dissented four times, wrote one dissenting opinion, and was in the majority in 12 of 13 5-4 decisions. Not bad, but it doesn’t measure up to what he accomplished this Term.

Even Justice O’Connor, whom some used to refer to as the “most powerful woman in the world” due to her position in the center of the Court for many years, never had a Term like this. Her most successful Term was OT03, when she was in the minority five times and wrote two dissents; still, in that Term, 4 of her 5 dissenting votes were cast in 5-4 cases (there were 19 5-4’s in OT03). While it’s true that she often wrote “controlling concurrences” whose outsized influence wouldn’t necessarily be reflected in the numbers but which did put a stamp on the Court’s jurisprudence, it’s difficult to make the case that she ever exerted as much influence as Justice Kennedy seems to be right now.

One must look way back in the Court’s history to find any single Term where one Justice had comparable success. Justice Kennedy’s two dissenting votes tied Justice Brennan’s output in October Term 1968; with a larger caseload back then, though, Justice Brennan’s feat that Term is arguably more impressive. Still, one must go further back to Justice Byron White’s October Term 1964 to find a circumstance where a Justice bested Kennedy and dissented only once over the course of a full Term, with no extenuating circumstances such as justice turnover (which can lead to misleading numbers).

The bottom line is that, by most measures, Justice Kennedy’s October Term 2006 has been the most successful Term by a single justice in roughly 40 years.
5-4 Decisions in OT06 Sorted by Membership in the Majority

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* Table adapted from “Visual Representation of 5-4 Decisions” by Ben Winograd, SCOTUSblog.
On a mid-March night, the theater at the Kennedy Center was packed for an unusual drama. It was The Trial of Hamlet.

In the hands of Shakespeare, the prince was an enigma, a portrait of agonized indecision. But on this night, he stood trial in a legal drama. Was he mad, or simply a murderer, when he stabbed and killed Polonius?

Real lawyers—not actors—argued for the prosecution and the defense, and two of the nation’s leading psychiatrists testified as expert witnesses. A jury of 12 listened to the evidence. Presiding as the trial judge was the U.S. Supreme Court’s own Hamlet-like figure, Justice Anthony M. Kennedy.

A Shakespeare buff, Kennedy came up with the idea for the staged trial. He said he was fascinated by Hamlet because of the rich complexity of the character—and, indeed, because Hamlet is ultimately elusive.

An Audience Divided

On the nation’s highest court, Kennedy continues to prove elusive and hard to categorize. Plenty of legal commentators have voiced strong reactions to Kennedy’s recent decisions; but like Hamlet’s mock jury—which deadlocked on the issue of his guilt or innocence—they seem hopelessly divided on how to explain the decisions.

In April, for example, Kennedy cast the fifth and deciding vote with the court’s liberal faction to reject President Bush’s policy of regulatory inaction on global warming. Massachusetts v. Environmental Protection Agency, No. 05-1120. The decision gave the environmental movement its biggest victory in years.

The key question for the justices was one of standing: Could anyone show he had suffered a particular and immediate injury from global climate change that could be remedied by a court? Chief Justice John G. Roberts Jr. said the answer was no, and therefore the suit should be dismissed.

But during the oral argument, Kennedy cited an obscure precedent from 1907 that appeared in none of the briefs. In Georgia v. Tennessee Copper Co., 206 U.S. 230, the state was objecting to air pollution wafting over its territory, and Justice Oliver Wendell Holmes agreed it could sue to protect its independent and quasi-sovereign interest “in all the earth and air within its domain.”

In his majority opinion, Justice John Paul Stevens adopted Kennedy’s suggestion and used Tennessee Copper as precedent to say Massachusetts and the other states indeed had standing to protect themselves from the impact of global warming.

Stevens and Kennedy also teamed up in April when the court turned down two cases involving Guantanamo Bay inmates. Although three justices voted to decide whether courts should hear the inmates’ case for habeas corpus, the court couldn’t garner the fourth vote needed to grant cert. Boumediene v. Bush, No. 06-1195, and AlOdah v. United States, No. 06-1196.
In a memo, Stevens and Kennedy said they voted against hearing the appeals because the lawyers for the Guantanamo detainees failed to exhaust all the available remedies in the law.

A few weeks later, Kennedy supplied a fifth vote to reverse the death sentences for Texas murderers in three separate cases. *Abdul-Kabir v. Quarterman*, No. 05-11284; *Brewer v. Quarterman*, No. 05-11287; and *Smith v. Texas*, No. 05-11304. In all three, the majority said the Texas law before 1991 prevented jurors from weighing the mitigating evidence.

In between the rulings on the environment and capital punishment, Kennedy spoke for a 5-4 conservative majority in what many saw as the most important anti-abortion legal victory in the long struggle over the procedure. *Gonzales v. Carhart*, No. 05-0380, upheld Congress' ban on a disputed mid-term abortion method that opponents call “partial-birth abortion.”

Kennedy’s words may prove even more significant over the long term: “The government has a legitimate and substantial interest in preserving and promoting fetal life,” he said, and the state “may use its voice and its regulatory authority to show its profound respect for the life within the woman.” His opinion clears the way for new laws that seek to discourage pregnant women from choosing abortion. Several states are considering measures that would require a doctor to show the patient an ultrasound image of the fetus before performing an abortion. Other proposals would tell women about the pain a fetus could feel at the middle months of a pregnancy.

The reactions were many and sharply split. “Kennedy is all but inexplicable,” wrote University of Oregon law professor Garrett Epps and senior editor Dahlia Lithwick in the Internet magazine *Slate*. He “puzzles because he speaks in more than one voice.” They noted that in the past, he had written glowingly about the “heart of liberty” protected by the Constitution. He did so in support of gay rights, *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to choose abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). “How,” they asked, “to square the two men?”

By contrast, legal correspondent Jan Crawford Greenburg of ABC News praised Kennedy for consistency and courage. She noted that Kennedy had dissented vehemently seven years ago when the court had struck down a similar Nebraska state ban. *Stenberg v. Carhart*, 530 U.S. 914. “If I say something, I want to stick with it,” she quoted him as saying.

**Shift in Position**

When President Reagan nominated Kennedy to the court 20 years ago this fall, the new justice came with a belief that abortion was immoral and that *Roe v. Wade*, 410 U.S. 113 (1973), had been wrongly decided.

But in the spring of 1992, when a five-member majority was poised to overturn *Roe*, Kennedy balked. He was reluctant to repeal a long-standing constitutional right. Instead, he joined an uneasy compromise with Justices Sandra Day O’Connor and David H. Souter that preserved the right to choose abortion, while also giving states more leeway to regulate the practice.

The difference between the Nebraska case and this year’s decision appears to be O’Connor’s retirement and President Bush’s choice of Samuel A. Alito Jr. to replace her.
Kennedy believed O'Connor and Souter had gone back on their deal in 2000 when they voted to strike down the state’s ban on so-called partial-birth abortions. This regulatory measure did not prevent women from having abortions, and therefore it should have been upheld under the joint opinion from 1992, he said.

"Casey, in short, struck a balance," Kennedy said in April. This includes "regulating the medical profession in order to promote respect for life, including life of the unborn."

When Congress passed the Partial-Birth Abortion Ban Act, it said the disputed procedure was never “medically necessary” to preserve the health of women. Three lawsuits were filed to challenge the law, and in all three, U.S. district judges held trials to hear from medical experts.

Judge Richard Kopf in Nebraska held a two-week trial and later wrote an opinion stretching over 400 pages to summarize the testimony. “In truth, ‘partial-birth abortions’ . . . are sometimes necessary to preserve the health of a woman seeking an abortion. . . . When it is needed, the health of women frequently hangs in balance,” he concluded. When a doctor faces an emergency with a patient who is bleeding heavily, the “intact” removal is by far the safest procedure, he said. The two other judges came to essentially the same conclusion.

But Kennedy’s opinion dismissed the findings and said there is “medical uncertainty” over the need for the disputed procedure. In dissent, Justice Ruth Bader Ginsburg complained that the majority “brushes under the rug the district courts’ well-supported findings.”

A Door is Ajar

Still, Kennedy’s opinion left the door open for advocates to bring a targeted, as-applied challenge to the ban. If doctors can show the disputed procedure is needed to cope with “a particular condition,” they may be able to obtain a limited exemption from it, he said.

When the court wraps up its term this month, expect more of the same. Kennedy is likely to hold the deciding vote when the court is split along conservative-liberal lines.

Kennedy regularly votes in favor of free-speech claims. This aligns him with the conservative bloc on cases involving campaign finance or abortion protests, but with the liberal bloc in recent cases involving indecency and Internet pornography.

He has strongly opposed the government’s use of race in decision-making, which puts him with the conservative wing in opposition to affirmative-action policies.

Columbia University law professor Michael Dorf, a former Kennedy clerk, has attributed Kennedy’s middle-of-the-road stance to his background as a moderate California Republican.

But sometimes the outcome is hard to forecast. As the trial judge in Hamlet’s case, he waited on stage while the jurors deliberated on the defendant’s mental state. They came back split 6-6, with no verdict. Addressing the Hamlet who sat before him, "Judge" Kennedy said he had no choice but "to remand you to the pages of our literary history."
Anthony Kennedy seems most at home when he is lecturing others about morality. And now all of us have little choice but to pay attention. With the retirement of Sandra Day O'Connor, Kennedy is relishing his role as the new swing justice on an evenly divided court. As Kennedy goes, so goes America: As he votes to uphold partial-birth abortion laws or to strike down President Bush’s military tribunals, lo shall they be upheld or struck down. Fawning lawyers must write briefs to Kennedy alone, and breathless commentators try to predict which laws he will bless or reprove.

Many accounts of Kennedy cast him as an indecisive justice—“Flipper,” as the law clerks unkindly put it in a Supreme Court skit—who swings left or right in an anxious effort to court the approval of Washington elites: the Hamlet of the Supreme Court. But these accounts misunderstand Kennedy and his worldview. According to a recent study by Lee Epstein of Northwestern University and other political scientists, far from being unpredictable, Kennedy is one of the most consistent justices in recent history—displaying far less leftward ideological drift since the early ‘90s than O’Connor or even former Chief Justice William Rehnquist. From the beginning, Kennedy’s performance on the Court has been defined not by indecision but by self-dramatizing utopianism. He believes it is the role of the Court in general and himself in particular to align the messy reality of American life with an inspiring and highly abstracted set of ideals. He thinks that great judges, like great literary figures, have both the power and the duty to “impose order on a disordered reality,” as he told the Kennedy Center audience. By forcing legislators to respect a series of moralistic abstractions about liberty, equality, and dignity, judges, he believes, can create a national consensus about American values that will usher in what he calls “the golden age of peace.” This lofty vision has made Kennedy the Court’s most activist justice—that is, the justice who votes to strike down more state and federal laws combined than any of his colleagues.

Kennedy often complains about the “loneliness” of his position, which stems from the fact that he has no reliable public constituency: Both liberals and conservatives tend to view him as a self-aggrandizing turncoat. “Oh, I suppose everyone would like it if everyone applauded when he walked down the street,” he said in an interview. “There is loneliness.”

But, when it comes time to hand down decisions, Kennedy shows little ambivalence about the centrality of his role in our national drama. His opinions are full of Manichean platitudes about liberty and equality that acknowledge no uncertainty. “Liberty finds no refuge in a jurisprudence of doubt,” he wrote in his decision in Planned Parenthood v. Casey, the 1992 opinion upholding the core of Roe v. Wade. “Preferment by race, when resorted to by the State, can be the most divisive of all
policies. containing within it the potential to destroy confidence in the Constitution and in the idea of equality,” he intoned in a 2003 dissent from the Court’s decision to uphold affirmative action in law schools. Kennedy does indeed agonize before reaching his decisions, and he has dramatically switched his vote in high-profile cases. Yet he seems to agonize not because he is genuinely ambivalent or humble but because he thinks that agonizing is something a great judge should do, to show that he takes seriously the awesome magnitude of his task.

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Is there a case to be made for Kennedy’s jurisprudence? The most convincing defense is made by some Supreme Court advocates who say he is willing to listen to the arguments in important cases, engage with them seriously, and make a decision based on his sense of what justice and the law require, rather than a partisan ideological agenda. “As a litigant coming into the court, the thing you want most of all is a justice who has his or her mind open to argument, persuasion, and reason,” says my brother-in-law Neal Katyal, who successfully argued the Hamdan case last June, where Kennedy sided with a five-four majority that struck down Bush’s military commissions. “You want someone who struggles really hard, who’s kept awake at night, grappling with what to do—a true judge. Justice Kennedy, regardless of the issue in front of him, has always been that kind of justice.”

The claim that Kennedy is open-minded is called into question, however, by Lee Epstein’s study, which concluded that, in all doctrinal areas—especially affirmative action—Kennedy has not changed much since 1990. Of course, even if Kennedy isn’t open-minded, he might still be praised if he were so ambivalent about judicial power that he deferred to the other branches, although he disagreed with their actions. But agonizing can be a sign of many things—modesty, arrogance, or insecurity. Truly modest judges agonize because they are humble about their own limitations and genuinely ambivalent about second-guessing legislatures. Judged by his willingness to strike down federal and state laws, Kennedy is the least modest justice on the Court.

That still leaves the core of a case for Kennedy, which is that he is a moderate, decent, fair-minded person rather than a judicial ideologue—no small achievement in a polarized age. And there’s no question that Kennedy deserves praise for deciding many important cases on the basis of what he thinks justice requires, rather than consistently voting in ways that happen to coincide with the platform of the Republican Party. But the same could have been said for Kennedy’s predecessor as the median justice, Sandra Day O’Connor. And, in other respects, the contrast between Kennedy and O’Connor is stark. To be sure, no one would accuse O’Connor of being modest. She viewed her role on the Court much as she viewed her role in the Arizona legislature: to split the difference between Republicans and Democrats in order to express the view of the American median voter. But O’Connor’s decisions, as Cass R. Sunstein has noted, were minimalist—that is, they were narrow and shallow. Because she offered few principles to support her rulings, it was difficult to extend them to future cases. Moreover, her thinly reasoned opinions were easier for citizens with differing political commitments to accept.

By contrast, Kennedy instinctively prefers opinions that are broad and deep. He attempts to identify a sweeping principle of justice and then tries to impose his abstractions on society. Unlike a
consistently principled judge, however, Kennedy often balks at carrying his principles to their logical conclusions. In striking down sodomy laws in *Lawrence v. Texas*, he promised that his reasoning wouldn’t lead to gay marriage. But he also unnecessarily included his lucubrations about the sweet mystery of life—then was presumably shocked, shocked, when the Massachusetts Supreme Judicial Court, a few months later, invoked the sweet-mystery-of-life passage to strike down restrictions on gay marriage. And, in *Bush v. Gore*, he denied the obvious consequences of his newly created right to equal treatment for ballots, which was to call into question the results in virtually any close election. Kennedy is not a systematic thinker but a utopian moralist; and, like many sweeping visionaries, he is unwilling to accept the radical implications of his own abstractions.