2007

Section 8: Judicial Modesty

Institute of Bill of Rights Law at the William & Mary Law School
VIII. JUDICIAL MODESTY

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"Adam Cohen on ‘Conservative Judicial Activism’"

The Volokh Conspiracy
July 9, 2007
Ilya Somin

[Excerpt: Some citations and portions omitted.]

[Adam] Cohen’s argument equates conservative criticism of “judicial activism” with criticism of striking down laws enacted by elected officials. That may be Cohen’s view, but it is not shared by the vast majority of conservative jurists and legal scholars. For decades, legal conservatives have criticized the Court for failing to strike down what they see as unconstitutional laws, particularly in the areas of federalism, property rights and (more recently) free speech. Most conservative (and even more so libertarian) jurists would agree that failure to strike down unconstitutional laws is no less a departure from the proper judicial role than judicial overruling of laws that the Constitution permits. A few judicial conservatives (such as Robert Bork and University of Texas law professor Lino Graglia) have called for the virtual abolition of judicial review; so have a few liberals, such as Harvard professor Mark Tushnet, and Stanford’s Larry Kramer. But such views are very much in the minority among conservative jurists and legal scholars—almost as much so as among liberals.

Cohen also implies that conservatives contradict themselves by supporting “overturning” of the Court’s precedents and invalidation of decisions by federal agencies. Few if any conservative jurists believe that the Court’s precedents are somehow sacrosanct, especially not if they conflict with the text and original meaning of the Constitution. That is particularly true of the very recent precedents (McConnell v. FEC, Stenberg v. Carhart, Grutter v. Bollinger) mentioned in Cohen’s post, all of which were decided within the last few years by narrow 5-4 majorities. Such precedents have failed to gain general acceptance in the legal community (as their narrow 5-4 margins suggest), and are too recent to have engendered much in the way of reliance by the general public. The degree to which the Court should defer to its own flawed precedents is controversial among conservatives (as it also is among liberals and libertarians). There is no general conservative consensus in favor of following wrong precedents, and indeed most right of center legal scholars tend to the view that flawed precedents should be overruled, or at least severely constricted. The same points apply to flawed decisions by federal agencies. It is also worth noting that the Court did not in fact “overturn” the precedents Cohen discusses, but merely limited the scope of their application. Perhaps Cohen means to say that they have been so severely limited as to virtually overturn them. If so, he needs to provide an argument justifying this far from obvious conclusion instead of a bald and misleading assertion.

Cohen also contradicts himself on these issues. If judicial conservatives are supposed to applaud judicial restraint in overruling laws enacted by legislatures, why shouldn’t they support the overruling of precedents that themselves struck down legislative enactments (as was true of Roe v. Wade and
Yet Cohen criticizes conservatives as inconsistent for supporting the Court's partial retreat from *Stenberg* in *Gonzales v. Carhart*.

Finally, Cohen commits an egregious factual error in claiming that the Supreme Court conservatives ruled in its school affirmative action decisions that the Constitution "protects society from integration." As Cohen surely knows, the Court merely ruled that the Constitution forbids some types of racial assignment of students. In no way did the justices claim that "integration" is itself unconstitutional—especially if it is achieved by racially neutral policies.
At the outset of Samuel Alito’s confirmation hearings, Judiciary Committee Chairman Arlen Specter asked a series of questions about the rather arcane subject of stare decisis, which is the judicial practice of following prior decisions. Eventually the questions took an odd turn, with Specter asking Alito whether he agreed that the right to abortion had special immunity from reconsideration, that is, whether it is “super-precedent.” Alito parried this by declining to “get into categorizing precedents as super-precedents or super-duper precedents.” That sort of terminology, Alito said, reminded him “of the size of the laundry detergent in the supermarket.” This exchange, which must have puzzled most Americans, was highly significant. Indeed, it touches on ideas that are basic to understanding why the Court has become such a dangerous institution and whether the appointments of Justice Alito and Chief Justice Roberts are likely to change things.

Although the practice of sticking with precedent is often associated in popular understanding with stodgy legalism, it was a shrewd subject for Specter to choose. Alito, like any good lawyer, makes his living by working from the logic of prior cases. Moreover, a reluctance to disrespect or to unsettle prior understandings is especially natural for someone with conservative instincts. Thus, while it is doubtful that Alito thinks the Court’s famous 1973 abortion decision, Roe v. Wade, was solidly based in the Constitution, it is certainly possible that he might be too devoted to precedent to overrule it. Other Republican appointees—including Justices O’Connor, Kennedy, and Souter—refused in Planned Parenthood v. Casey to overrule Roe largely because they think it is entitled to a special degree of respect as precedent. If the original abortion decision is super-precedent and the Court in Casey emphatically affirmed that extraordinary status, then Casey must be super-duper precedent.

That Alito should have a bit of fun with this logic is encouraging, but it does not tell us how willing he would be to reconsider constitutional precedents. This is crucial, because 35 years of Republican domination of the Court has not resulted in the overruling of a single revolutionary Warren Court decision—not Miranda v. Arizona, which imposed a new interrogation procedure on police departments across the country, not Griswold v. Connecticut, which began the constitutionalization of sexual freedom, not New York Times v. Sullivan, which turned the regulation of defamatory speech over to the courts, and not Brandenburg v. Ohio, which even in this age of terrorism continues to protect most advocacy of violence.

The Roberts Court now faces not only Warren Court precedents but also, even putting the abortion issue aside, dozens of far-reaching precedents established during the Burger and Rehnquist eras. Those include cases prohibiting virtually all gender distinctions in the law, protecting homosexual sodomy, severely limiting
public religious observances, and preventing states from regulating profanity.

Respect for precedent means not only that the justices should follow the specific outcomes of prior cases but also that they must follow their logic. The logic of legions of cases demands that judges second-guess legislative and executive decisions on the most sensitive moral and political issues and that judges decide for themselves on the appropriate means for achieving preferred policies. The simple fact is that constitutional law as set out in the cases now requires judges to legislate from the bench. Nominees to the Court can repeat endlessly that judges should interpret, not make, law. But unless they are willing, once on the Court, to rethink the logic of prior cases, they will have to make law.

This displacement of political decision-making has had deeply harmful consequences for our society. It has led Americans to lose political self-confidence and to depend pathetically on the judiciary to resolve the most pressing public issues. At the same time, since judicial resolutions tend to be couched in the language of high principle, the Court’s role has reduced the opportunity for political compromise and thus has inflamed passions and distrust.

So Specter’s questions about stare decisis were not tangential or technical. They go to the heart of the question of whether even sustained, apparently effective efforts to rein in the Supreme Court through the appointment process can be more than marginally effective. It is important, therefore, to consider carefully the justifications for the ideas of precedent and (God help us) super-precedent.

No wonder Specter asked if Roe were not now super-precedent. When asked about the weighty considerations discussed in Casey, nominee Alito replied blandly, “I think that the Court . . . should be insulated from public opinion. [Courts] should do what the law requires in all instances.” But that is not precisely the argument made in Casey. In fact, Casey comes close to insisting on the opposite: that the Court should stay with a decision wrongly interpreting the Constitution because a reversal of that wrong decision would meet with public criticism and disapproval. Insofar as Casey rests on the relationship between judicial legitimacy and stare decisis, the Court is arguing that public opinion—in the form of attitudes about the Court—should trump law.

Of course, the Casey Court does not say outright that Roe was bad law. One would hardly expect that. But the justices do acknowledge the possibility that Roe might have been in error, and they do refer to “the reservations [some justices] may have in reaffirming the central holding of Roe.” And they do say that these reservations are overcome only by a reexamination of the constitutional questions involved, “combined with the force of stare decisis” (emphasis added).

More disturbingly, Casey does not exactly say that following the precedent set by Roe is important in order to convince the public that the Court is in fact abiding by legal principle. It says, to be precise, that it is important that the Court appear to be abiding by legal principle. Indeed, for all its high-toned references to the rule of law, the opinion is suffused with cynicism about the relationship between law and politics. At one point, for instance, it asserts that, because the usual reasons for overruling precedent do not apply to the original abortion decision, “the Court could not pretend to be reexamining the prior law with
any justification beyond present doctrinal disposition to come out differently from the Court of 1973.” Pretend? And since when is a considered judgment that a constitutional ruling was profoundly wrong as a matter of law referred to as “a present doctrinal disposition to come out differently”?

More generally, in its discussion of judicial legitimacy, the Court in *Casey* refers to the perception of legality rather than the reality. For instance, it asserts, “There is a limit to the amount of error that can plausibly be imputed to prior Courts.” Note: not the amount of error that might properly (as a matter of law) be imputed but the amount that might be made plausible to the public. *Casey* is concerned with the perception of legality more than the substance. Even as it declares that law must be separate from public opinion it elevates the public’s opinion of the Court above law.

*Casey*’s rather frantic concern for the Court’s legitimacy is hard to explain. The justices had no evidence about the public’s knowledge of the doctrine of precedent, no evidence that people think the Court seldom overrules prior decisions, and no evidence that the public loses respect for the Court when it does reverse a prior ruling. Moreover, it is not at all self-evident that the public thinks constitutional decisions are immune from political considerations or that this sort of realism would lead people to the conclusion that the Court is an illegitimate institution. It is quite possible, in fact, that among the general public the legitimacy of the Court is based partly on the belief that the judiciary does respond to politics and thus tends to produce results with which many people agree. It is certain that multitudes of lawyers, most law professors, and virtually all political scientists believe that the Court is influenced by political considerations. Few of these professionals, however, would therefore describe the institution as illegitimate.

That the legalistic fastidiousness of *Casey* should be invoked in a confirmation hearing is downright weird. Even as Specter grilled Alito about the need to separate law and politics, the senator was engaged in a very public process in which politicians try to affect the direction the Court will take. Specter was doing so at a time when the line between political considerations and legal considerations has largely vanished even in the way that the justices attempt to justify their judgments. The doctrine that *Roe* is a super-precedent makes completely clear—as do scores of decisions that rest on precedent rather than on the Constitution itself—that the justices (and their apologists) now believe that the authority of the Court’s decisions is more important than the authority of our fundamental law.

Whether the Court plays a saner role in our political system in the years ahead will depend in large measure on whether the justices can think realistically and critically about the practice of adhering to past decisions. A necessary first step is to drop the inflated conception of the Court’s role inherent in the word “super-precedent.”
"Roberts, Alito and the Rule of Law"

_The Huffington Post_

June 28, 2007

Geoffrey R. Stone

For the Supreme Court of the United States, this will be remembered as the year of intellectual dishonesty. In their Senate confirmation hearings, John Roberts and Samuel Alito cast themselves as first-rate lawyers, as masters of legal craftsmanship who are committed to the principle of _stare decisis_. John Roberts assured the Senate Judiciary Committee that judges must “be bound down by rules and precedents.” Invoking Alexander Hamilton and James Madison, he affirmed that “the founders appreciated the role of precedent in promoting evenhandedness, predictability, stability,” and “integrity in the judicial process.” Although acknowledging that it is sometimes necessary for judges to reconsider precedents, he stressed that this should be reserved for exceptional circumstances, where a decision has proved clearly “unworkable” over time. But in general, “a sound judicial philosophy should reflect recognition of the fact that the judge operates within a system of rules developed over the years by other judges equally striving to live up to the judicial oath.”

Similarly, Samuel Alito testified to the Senate that the doctrine of _stare decisis_ is “a fundamental part of our legal system.” This principle, he explained, “limits the power of the judiciary” and “reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions.” _Stare decisis_, he added, it is “not an inexorable command,” but there must be a strong “presumption that courts are going to follow prior precedents.”

It is hardly surprising that Roberts and Alito would pay such obeisance to the doctrine of _stare decisis_ in order to get themselves confirmed. _Stare decisis_ is, after all, the bedrock principle of the rule of law. Not only does it promote stability and encourage judges to decide cases based on principle rather than on a preference for one or another of the parties before them, but it also serves importantly to reduce the politicization of the Court. It moderates ideological swings and preserves both the appearance and the reality that the Supreme Court is truly a legal rather than a political institution.

Disturbingly, John Roberts’s and Samuel Alito’s actions on the Court now speak much louder than their words to Congress. During the past year, Roberts and Alito have repeatedly abandoned the principle of _stare decisis_, and they have done so in a particularly insidious manner. In a series of very important decisions, they have cynically pretended to honor precedent while actually jettisoning those precedents one after another.

The tactic, in short, is to purport to respect a precedent while in fact interpreting it into oblivion. Every first-year law student understands the technique. It works like this: “Appellant argues that _Smith v. Jones_ governs the case before us. But _Smith v. Jones_ arose out of an accident that occurred on a Tuesday. The accident in this case occurred on a Thursday. We do not overrule _Smith v. Jones_, but we limit it to accidents...
that occur on Tuesdays.” This illustration is, of course, a parody of the technique. But it captures the Roberts/Alito style of judicial craftsmanship.

Let me offer just a few examples. In Gonzales v. Carhart, the Court, in a five-to-four decision, upheld the constitutionality of a federal law prohibiting so-called “partial birth abortions,” even though the Court had held a virtually identical state law unconstitutional seven years earlier. As Justice Ruth Bader Ginsburg rightly observed in dissent, the majority, which included Justices Roberts, Alito, Scalia, Kennedy, and Thomas, offered no principled basis for ignoring the earlier decision. The only relevant change was Alito for O’Connor.

In Federal Election Commission v. Wisconsin Right to Life, the same five-justice majority held unconstitutional a provision of the Bipartisan Campaign Reform Act that limited political expenditures by corporations, even though the Court had upheld the same provision only four years earlier. As Justice David Souter rightly observed in dissent, Chief Justice Roberts’s opinion offered no principled basis for disregarding the earlier decision.

In Hein v. Freedom from Religion Foundation, the same five-justice majority, in an opinion by Justice Alito, held that individual taxpayers had no “standing” to challenge the constitutionality of the Bush administration’s program of faith-based initiatives as violative of the Establishment Clause, even though the Court had held some forty years ago that taxpayers do have standing to challenge federal expenditures on these grounds. As Justice Souter rightly observed in dissent, Alito’s argument that the earlier decision was distinguishable because it involved a challenge to a legislative rather than an executive program has no basis “in either logic or precedent.”

In Parents Involved in Community Schools v. Seattle School District, the same five-justice majority (with Justice Kennedy filing a separate concurring opinion), in an opinion by Chief Justice Roberts, held that the consideration of race by school districts in assigning students to public schools in order to promote racial diversity violates the Equal Protection Clause, even though the Court had unanimously declared more than thirty-five years ago that such a policy “is within the broad discretionary authority of school authorities.”

As Justice Breyer rightly asked in dissent, “What has happened to stare decisis?” Breyer correctly observed that Roberts had distorted the Court’s precedents, “written out of the law” a host of Supreme Court decisions, and disingenuously reversed the course of constitutional law. Whereas Brown v. Board of Education had held that government could not constitutionally assign black and white students to different schools in order to segregate them, Roberts had the audacity to cite Brown for the extraordinary proposition that government cannot constitutionally assign black and white students to the same school in order to integrate them.

John Roberts and Samuel Alito billed themselves as legal craftsmen who would be guided not by rank ideology, but by a respect for the rule of law. They have now proved otherwise.
During the hiatus between Supreme Court confirmation battles, we may as well settle the clash between the conservative and liberal approaches to constitutional interpretation. The battle lines are familiar. Conservatives, led by Justices Antonin Scalia and Clarence Thomas, say that the sole legitimate approach is to follow the literal text and original meaning of constitutional provisions and amendments. Justices' policy preferences should play no role, assert conservative “originalists.” But the claim is undercut somewhat by the consistency with which the conservatives’ votes on abortion, religion, race, gay rights, and many other big issues happen to fit their policy preferences.

Liberals and many moderates prefer the “living-Constitution” approach, which has been dominant at least since the Warren Court. It involves using ancient but conveniently vague constitutional phrases to enforce “evolving standards of decency,” to promote equality, and to vindicate what sometimes-liberal Justice Anthony Kennedy likes to call “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Not surprisingly, constitutional evolution in the hands of liberals supports liberal policies.

Each school of thought is most persuasive in debunking the other. Justice Stephen Breyer skewers originalism in his 2005 book, *Active Liberty*: “Why would the Framers, who disagreed even about the necessity of including a Bill of Rights in the Constitution, who disagreed about the content of the Bill of Rights, nonetheless have agreed about what school of interpretive thought should prove dominant in interpreting the Bill of Rights in the centuries to come?”

Even when the original meaning is undisputed, it is often intolerable to conservatives as well as liberals. Many Framers did not see the flogging or even the execution of a 12-year-old for theft as “cruel and unusual punishment,” for example. And nothing in the text or original meaning of the Constitution was designed to bar the federal government from discriminating based on race (or sex). This has not stopped Scalia or Thomas from voting to strike down federal racial preferences for minorities. Nor have they hesitated to invoke debatable interpretations of the Constitution to attack laws regulating campaign finance and imposing monetary liability on state governments.

The living-Constitution approach may be even more problematic, because it has cut a wider swath through democratic governance with even less basis in the written Constitution.

If the Constitution is an “invitation to apply current societal values,” as Scalia has asked, “what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? . . . A democratic society does not, by and large, need constitutional guarantees to ensure that its laws will reflect current values. Elections take care of that.”

Consider *Roper v. Simmons.* last year’s decision barring the death penalty for any murder committed before the killer’s 18th
birthday. This would have been good legislation, in my view. But it was bad constitutional law.

Justice Kennedy’s claim for the 5-4 majority that modern Americans had reached a “consensus” that no juvenile murderer should ever get the death penalty was bogus: A majority (20) of the 38 states with the death penalty still allowed such executions. Kennedy’s reliance on the laws of almost all foreign nations against the juvenile death penalty was a fig leaf for his personal moral preferences. So was his twisting of the relevant literature on juvenile psychology to suggest misleadingly that minors are incapable of mature moral reflection. And as Judge Richard Posner of the federal appeals court in Chicago points out, Kennedy was tellingly selective in his attention to social-science literature: He ignored the studies suggesting that the death penalty may deter some would-be killers and thus save lives.

In a variation on the living-Constitution approach, Breyer argues in Active Liberty for interpretations designed to promote “participatory self-government” by voters. But Breyer’s support for the 1973 decision that ended participatory self-government on abortion—Roe v. Wade—casts doubt on his seriousness. Especially since his book does not even mention this, the biggest and most controversial decision of the past 60 years.

The bottom line is that nonadherents understandably see originalism and living constitutionalism alike as smoke screens for imposing the justices’ personal policy preferences.

This is not healthy. How might we avoid the worst excesses of each approach?

The best answer is judicial modesty, in the sense of great hesitation to second-guess decisions by other branches of government. Embraced in general terms by then-Judges John Roberts and Samuel Alito during their Supreme Court confirmation hearings, the judicial-modesty approach is expounded more fully in a November 2005 Harvard Law Review article by Posner, a prolific and ideologically eclectic legal scholar.

Posner begins by puncturing the myth that judging can ever be completely apolitical. In constitutional cases, he shows, the Court is unavoidably “a political body . . . exercising discretion comparable in breadth to that of a legislature.” The most sincere attempt at “lining up the facts alongside the constitutional text” usually provides no more objective a basis for preferring one outcome to another than for “preferring a margarita to a cosmopolitan.”

Next Posner explains that the justices would look and act less like political manipulators if they “acknowledged to themselves the essentially personal, subjective, and indeed arbitrary character of most of their constitutional decisions.”

Such self-awareness is rare among justices, Posner says, because it “would open a psychologically disturbing gap between their official and their actual job descriptions.”

Instead, “cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court justices are at risk of acquiring exaggerated opinions of their ability and character.”

The path of wisdom would be to acknowledge that “the law made me do it” is usually no more than a “rationalization for the assertion of power” of an essentially political nature, Posner adds. Justices who understood this would probably be “less aggressive upsetters.
of political and policy apples with a pragmatic focus on what will be the actual consequences of a proposed decision. Three of Posner's examples—cases in which "the law" did not dictate any particular outcome—are illustrative.

First, he applauds the 5-4 decision (over a liberal dissent) in 2002 to allow Cleveland to finance vouchers enabling low-income children to leave failed public schools for mostly Catholic private schools. The major disputes underlying the case—over whether the Cleveland experiment would work well for children and whether it would lead to sectarian conflict—turned on factual projections beyond the Court's competence.

"Actual social experiments are necessary to generate the data needed for intelligent constitutional rule-making," explains Posner. "The pragmatist wants to base decisions on consequences, and it is very difficult to determine the consequences of a challenged policy if you squelch it at the outset."

Second, Posner deplores as "injurious unpragmatic" the unanimous 1998 ruling against President Clinton in the Paula Jones lawsuit: "It should have been obvious to the justices that forcing the president to submit to a deposition in a case about his sexual escapades would be political dynamite that would explode and interfere with his ability to perform his duties."

Third, Posner shows sympathy for Justice Breyer's solo, split-the-difference approach in two 5-4 decisions last June involving displays of the Ten Commandments. In one, Breyer joined liberals in invalidating the recent, locally controversial installations of Decalogue plaques in two Kentucky courthouses. ("I have no settled view" on that decision, Posner notes.) In the other, Breyer joined conservatives in upholding a Ten Commandments monument on the grounds of the Texas state Capitol, where it had stood for 40 years, amid various secular monuments, with little ado.

Many critics (including me) have faulted Breyer's hairsplitting for leaving the law unclear. Not so Posner: "Compromise is the essence of democratic politics and hence a sensible approach to dealing with indeterminate legal questions charged with political passion. . . . To give a complete victory to the secular side of the debate (or for that matter to the religious side) could be thought at once arrogant, disrespectful, and needlessly inflammatory."

Amen. Or, if that offends you, right on.
The Supreme Court told Seattle and Louisville, and hundreds more cities and counties, last month that they have to scrap their integration programs. There is a word for judges who invoke the Constitution to tell democratically elected officials how to do their jobs: activist.

President Bush, who created the court’s conservative majority when he appointed Chief Justice John Roberts and Justice Samuel Alito, campaigned against activist judges, and promised to nominate judges who would “interpret the law, not try to make law.” Largely because of Chief Justice Roberts and Justice Alito, the court has just completed one of its most activist terms in years.

The individuals and groups that have been railing against judicial activism should be outraged. They are not, though, because their criticism has always been of “liberal activist judges.” Now we have conservative ones, who use their judicial power on behalf of employers who mistreat their workers, tobacco companies, and whites who do not want to be made to go to school with blacks.

The most basic charge against activist judges has always been that they substitute their own views for those of the elected branches. The court’s conservative majority did just that this term. It blithely overruled Congress, notably by nullifying a key part of the McCain-Feingold campaign finance law, a popular law designed to reduce the role of special-interest money in politics.

It also overturned the policies of federal agencies, which are supposed to be given special deference because of their expertise. In a pay-discrimination case, the majority interpreted the Civil Rights Act of 1964 in a bizarre way that makes it extremely difficult for many victims of discrimination to prevail. The majority did not care that the Equal Employment Opportunity Commission has long interpreted the law in just the opposite way.

The court also eagerly overturned its own precedents. In an antitrust case, it gave corporations more leeway to collude and drive up prices by reversing 96-year-old case law. In its ruling upholding the Partial-Birth Abortion Ban Act, it almost completely reversed its decision from 2000 on a nearly identical law. The school integration ruling was the most activist of all. The campaign against “activist judges” dates back to the civil rights era, when whites argued that federal judges had no right to order the Jim Crow South to desegregate. These critics insisted they were not against integration; they simply opposed judges’ telling elected officials what to do.

This term, the court did precisely what those federal judges did: it invoked the 14th Amendment to tell localities how to assign students to schools. The Roberts Court’s ruling had an extra fillip of activism. The civil rights era judges were on solid ground in saying that the 14th Amendment, which was adopted after the Civil War to bring former slaves into society, supported
integration. Today's conservative majority makes the much less obvious argument that the 14th Amendment protects society from integration.

With few exceptions, the court's activism was in service of a conservative ideology. The justices invoked the due process clause in a novel way to overturn a jury's award of $79.5 million in punitive damages against Philip Morris, which for decades misrepresented the harm of smoking. It is hard to imagine that Chief Justice Roberts and Justice Alito, who were in the majority, would have supported this sort of "judge-made law" as readily if the beneficiary were not a corporation.

The conservative activism that is taking hold is troubling in two ways. First, it is likely to make America a much harsher place. Companies like Philip Morris will be more likely to injure consumers if they know the due process clause will save them. Employees will be freer to mistreat workers like Lilly Ledbetter, who was for years paid less than her male colleagues, if they know that any lawsuit she files is likely to be thrown out on a technicality.

We have seen this before. In the early 1900s, the court routinely struck down worker protections, including minimum wage and maximum hours laws, and Congressional laws against child labor. That period, known as the Lochner era—after a 1905 ruling that a New York maximum hours law violated the employer's due process rights—is considered one of the court's darkest.

We are not in a new Lochner era, but traces of one are emerging. This court is already the most pro-business one in years, and one or two more conservative appointments could take it to a new level. Janice Rogers Brown, a federal appeals court judge who is often mentioned as a future Supreme Court nominee, has expressly called for a return to the Lochner era. The other disturbing aspect of the new conservative judicial activism is its dishonesty. The conservative justices claim to support "judicial modesty," but reviews of the court's rulings over the last few years show that they have actually voted more often to overturn laws passed by Congress—the ultimate act of judicial activism—than has the liberal bloc.

It is time to admit that all judges are activists for their vision of the law. Once that is done, the focus can shift to where it should be: on whose vision is more faithful to the Constitution, and better for the nation.
"Confirmation Report"

Slate
January 12, 2006
Dahlia Lithwick

It must be excruciating. I mean, here is Judge Sam Alito, slogging through the single biggest job audition of any lawyer's life, and all anybody can talk about is John Roberts. Senate judiciary committee Chairman Arlen Specter, R-Pa., eight minutes into the confirmation hearings: "The preliminary indications from Chief Justice John Roberts' performance on the Court and his judiciary committee testimony on 'modesty,' 'stability' and not 'jolting' the system suggest that he will not move the court in a different direction." Then Sen. Orrin Hatch, R-Utah, reminisces fondly: "As Chief Justice Roberts described it when he was before this committee last fall, judges are not politicians." Then comes Sen. Chuck Grassley, R-Iowa, again borrowing from the last nominee: "Like Chief Justice Roberts described it when he was before this committee last fall, judges are not politicians." On and on it goes. All anyone can talk about is how darn humble John Roberts is, and poor Alito—who really is humble—just has to sit there and take it.

Alito can be deft, however. He has a funny little riff on how the notion of "super-duper stare decisis" sounds like a laundry soap. He says, three times, that stare decisis—while important—is not an "inexorable command." It's his way of pushing back. When Arlen Specter, R-Pa., asks this morning whether the constitution is a "living thing," his response is wonderful: "I think the Constitution is a living thing in the sense that matters, and that is that it is—it sets up a framework of government and a protection of fundamental rights that we have lived under very successfully for 200 years." The Constitution is living because we live under it.

When asked what he thinks of precedential cases this morning, Alito goes with his standard, "That is an important precedent of the court." That is a declarative statement, not a judgment. He frequently adds that precedent is not an "inexorable command." And then he tells us that it would be irresponsible for him to hazard an opinion about any specific case or legal question without going through the "whole judicial process." In other words, precedent should bind, except when Alito goes through his painstaking process and finds that it shouldn't; other branches of government are due great deference, except when Alito's meticulous legal analysis finds they are not; and innocent people have the constitutional right to be free from execution, unless—after meticulous consideration—he finds they do not. Alito is properly renowned for his adherence to that careful and rigorous process. But it starts to look as though absolutely nothing else has any weight with him at all.

In one of the most poignant exchanges of the morning, Sen. Herb Kohl, D-Wis., asks the nominee—almost pleadingly—whether he thinks he might become a justice who "fills the same role" as Sandra Day O'Connor; if "in your opinion, you will turn out in a general way to be that sort of justice?"

Alito's response speaks volumes. He says the quality he most admires in O'Connor is her "meticulous devotion to the facts," the
appreciation of her “dedication to a case-by-case approach.” That, oddly enough, is precisely the quality for which O'Connor has been most roundly criticized. Detractors, from the right and the left, never tire of accusing her of approaching every case from scratch, creating “good-for-one-ride-only” precedents, and fashioning new rules that depend entirely on her own subjective determinations. There is, say her critics, a terrific grandiosity in a jurisprudential approach that elevates one justice’s views over those of her colleagues and allows her own judicial process to trump the wishes of her colleagues, the states, or the other branches of government.

Theoretically, there should be comfort in hearing a judge promise to approach each new case as an open book; to drill deep into the relevant statutes and the case law and emerge with an opinion only after a meticulous analysis of the matter at hand. It suggests that past decisions aren’t predictive and that every case brings a fresh start. It hints at a totally neutral process, untainted by personal views or preferences. It says there is no jurisprudential theory at work but only a mechanical process.

But doesn’t Alito’s open-mind mantra imply that with each fresh, new start he will be the lone, final, unfettered arbiter of every question? Do we really want every legal question to be open and every rule to be mutable? Is there something to be said for a nominee, like John Roberts, who didn’t insist that the answer to every question reside exclusively in his own open mind?
In this essay, I argue that adopting a strong theory of precedent in constitutional law would have at least one consequence that I regard as desirable: it would promote judicial restraint. In arguing for a strong theory of precedent on grounds of judicial restraint, I recognize that I am staking out an idiosyncratic position. Judicial restraint is generally thought to be a conservative value, yet most conservative constitutional law scholars today seem to favor a weak theory of precedent. My claim is that, abstracting away from these controversies and contingencies about the political values of the current Court, someone who believes in judicial restraint should favor a strong theory of precedent, at least in constitutional law.

As I use the term, judicial restraint refers to a style of judging that produces the fewest surprises. Restrained judges render decisions that conform to what an experienced lawyer, familiar with the facts of the case and the relevant legal authorities, would counsel a client would be the most likely outcome. If judicial restraint means predictability, then restrained judges are plodders, not innovators. They are long on diligence, and short on imagination. They are utterly conventional and boring. How can something so dull be a good thing?

One reason should immediately spring to mind: In a democracy, innovation in law and policy is supposed to come from officials elected by the People, not from unelected judges. The tension between democracy and judicial activism has been rehearsed so endlessly in the literature that it is virtually as boring as judicial restraint itself.

A second reason why judicial restraint is a good thing is that it protects expectations and reduces retroactivity in legal decision making. Legal change is not ruled out. The Constitution can be amended, statutes can be enacted, new administrative regulations can be promulgated. But these sorts of changes occur prospectively, allowing individuals to adjust their behavior before they take effect. If legal change is prospective, and courts foreswear legal change through litigation, then individuals can be confident the law applied by courts will be the same as the law on the books.

A third reason why judicial restraint is a good thing is that it promotes equal treatment, in terms of treating similarly situated litigants similarly. The jurisprudence of no surprises means that today’s litigant is treated the same way yesterday’s litigant was treated—for good or ill.

Finally, and related to the last point, judicial restraint helps judges resist pressure to bend the rules in ways that operate to the disadvantage of unpopular claimants or minorities.

Let me briefly offer some reasons why, at least in theory, a strong theory of precedent—and a correspondingly reduced role for originalist reasoning—will result in
more judicial restraint, at least in the context of modern American constitutional law.

First, precedent provides a thicker body of norms with which to resolve constitutional disputes than originalism does. Take virtually any constitutional dispute you want on the recent docket of the Supreme Court—whether the Commerce Clause permits Congress to regulate the use of home-grown pot used for medical purposes, whether the Takings Clause permits property to be condemned solely to promote economic development, whether the Cruel and Unusual Punishment Clause permits the execution of juveniles. A Court that tried to resolve these issues solely in accordance with the text and original understanding would have much less "stuff" to go on than a Court that tried to resolve these issues by examining precedent. The thinness of the set of relevant norms would make the outcome less predictable.

Second, precedent is more accessible to lawyers and judges than evidence of original understanding. Not only is there more of it, it is easier to find. Supreme Court precedents are highly accessible. A full set of U.S. Reports resides in the chambers of every federal judge in the country, and is easily accessed by most state judges and practicing lawyers. These decisions have long been headnoted and indexed in various ways and collected in commentaries. Today of course they are on line and fully searchable electronically. The constitutional text is likewise highly accessible. But other evidence of original understanding is much less so.

Third, the interpretation and application of precedent is more compatible with the skill set of the typical judge than is the interpretation and application of evidence of original understanding. Judges are trained in law, and law training, at least in this country, is grounded in the study of common law and the common law method. To a significant degree—and I recognize that this cuts against my thesis—this is training in the art of manipulation. Students are taught how to read precedents broadly and narrowly, how to exact principles not expressly stated, how to limit precedents to their facts. But training in the common law method is also—and this is less recognized—a socialization process that allows the lawyer to recognize the difference between propositions that are settled, and hence are not eligible for manipulation, and propositions that remain unsettled, and hence open to divergent approaches. There is, lurking in the background, a conservative bias in favor of preserving what is settled, and limiting manipulation to the margins. In this way the common law method, if it does not generate anything like perfect judicial restraint, at least produces a style of decisionmaking that is more restrained than some imaginable alternatives.

Theory is one thing, proof another. It is obviously difficult to test a proposition such as the one I am contending for here: that a strong theory of precedent is more likely to produce judicial restraint. But there are several sources of comparative evidence that may shed light on the question. I will provide a suggestive rather than an exhaustive account of these sources, and offer my own impressions of what a more complete investigation would reveal.

First, it would be instructive to compare the behavior of the U.S. Supreme Court with courts of last resort in other legal systems. Comparative law scholars have occasionally examined the proclivities of different national courts toward activism. These efforts invariably rank the U.S. Supreme Court as world champion of activists.
weak adherence to precedent invites parties seeking social reform to invest in constitutional litigation. If they succeed often enough in enlisting courts to adopt new social policies, the pipeline of litigation will continually be refurbished with new legal theories, sponsored by both the left and the right.

I suspect, but cannot prove, that a more complete survey of courts of last resort would show a strong correlation between the respect for precedent and proclivity toward activism. Certainly, the contrast between the U.S. Supreme Court and the appellate courts of England suggests such a relationship. The U.S. Supreme Court employs a weak theory of precedent in constitutional law, and is notoriously activist. English courts, in contrast, follow a strong theory of stare decisis, and are generally regarded as highly restrained.

... It would be revealing to compare the behavior of the U.S. Supreme Court in constitutional cases with its behavior in statutory construction cases. The Court generally follows a weak theory of precedent in constitutional cases, but at least purports to follow a strong theory of precedent with respect to statutory decisions.... Does the Court's weak theory of precedent in constitutional cases render it more activist, in the sense of being less predictable, in constitutional matters relative to statutory interpretation? Although it would be difficult to answer this question with rigorous proof, there is little doubt in my mind that the answer is yes. The major innovations associated with the Supreme Court—such as outlawing segregation, mandating one person one vote in legislative districting, restricting gender discrimination, limiting the use of the death penalty, creating rights to abortion and to engage in homosexual relations, wiping out governmental efforts to control pornography on the internet—have come in constitutional rulings. It is difficult to think of rulings of equivalent innovation rendered as a matter of statutory interpretation.
The Supreme Court’s decision overturning school desegregation policies in two U.S. cities yesterday culminates a fractious term in which the new Roberts court moved the law significantly to the right, legal analysts said.

In a series of 5 to 4 decisions this term, the court also upheld a federal ban on a late-term abortion procedure and gutted a key provision of the McCain-Feingold campaign finance law. Along with yesterday’s schools case, each of these decisions left open the possibility of more change in areas of the law on which the court had seemingly ruled definitively within the past decade.

“Conservatives got everything they could reasonably have hoped for out of the term,” said Thomas C. Goldstein, a Washington lawyer who specializes in Supreme Court litigation. “The table is set, particularly if there are more changes in the court, for wholesale changes in constitutional law. There were some incremental steps, but they were in a distinct direction and a uniform direction.”

The conservatives’ advance was limited by the occasional defection of Justice Anthony M. Kennedy. Yesterday’s case showed Kennedy’s moderating influence, as he issued a concurring opinion that may have blunted the practical impact of the court’s ruling.

Because of Kennedy’s continued role as a swing voter, some analysts suggested that this term’s decisions may be the high-water mark for the right rather than a tidal shift.

“It is a conservative court, but at the same time, just barely so,” said Eugene Volokh, a professor of constitutional law at the University of California at Los Angeles. “The liberals are a forceful bloc and are willing to fight some old battles and win some when they swing Justice Kennedy around.”

Still, Kennedy is a different kind of swing voter from Justice Sandra Day O’Connor, the centrist whom Samuel A. Alito Jr. replaced in 2006. He seems more likely than she was in recent years to side with the right in close cases. Kennedy wrote the court’s opinion upholding the federal ban on what opponents call “partial birth” abortion.

This term, the justices split 5 to 4 in 24 cases, a third of the total. Kennedy sided with the four most conservative justices—Roberts, Alito, Antonin Scalia and Clarence Thomas—in 13 of the 5 to 4 cases, while backing liberals John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer just six times. In five other 5 to 4 cases, the court did not split along liberal-conservative lines.

The most significant victory of the term for liberals came when they secured Kennedy’s vote for a ruling that required the Environmental Protection Agency to justify its refusal to regulate greenhouse gases in vehicle exhaust.
And whereas Kennedy occasionally applied the brakes to the court’s conservatives, Scalia and Thomas sometimes demanded that they move further and faster to the right, suggesting that Roberts and Alito were straining to depict their rulings as consistent with the court’s past cases, rather than just overruling some of them outright, as they should.

That echoed the accusations from the court’s liberals, who have seemed increasingly united in their view that the Roberts court is deviating from settled law without openly saying so.

The liberal justices—Stevens, Souter, Ginsburg and Breyer—have taken turns reading their dissenting opinions from the bench in a show of dismay with the court’s direction.

“Someone like Ginsburg, who used to be a cautious liberal, is now an angry liberal,” said Neil S. Siegel, a professor of law at Duke University and a former law clerk of Ginsburg’s.

And the liberals’ dismay has been evident even in what might otherwise have been relatively minor, technical cases. On June 14, Thomas announced a 5 to 4 ruling in which the conservatives said that a convicted murderer could not pursue an appeal because he had missed a filing deadline, even though his attorney had relied on a judge’s erroneous assurance that he had enough time.

“It is intolerable for the judicial system to treat people this way,” Souter wrote. The majority could reach its result, he said, only by overruling two little-known cases from the 1960s.

As Roberts read his opinion in the schools cases yesterday, Breyer shifted in his chair, rubbed his temples and occasionally shook his head. When his turn came to read his dissent, Breyer spoke heatedly for almost a half-hour, much longer than the chief justice himself had taken to read his opinion.

The 77-page opinion, twice as long as any other dissent Breyer has written, clearly occupied much of Breyer’s time and energy during the term.

As his liberal colleagues have done in their dissents, Breyer accused Roberts and the conservatives of violating stare decisis, the legal principle that decisions should generally be left undisturbed.

“The majority is wrong,” Breyer said. “It’s not often in law that so few have changed so much so quickly.”

The charge of ignoring or twisting precedent stings, because it is essentially an accusation that the conservatives have abandoned the judicial restraint that they so often preach, in pursuit of policy results they favor.

And Roberts, who pledged “judicial modesty” and respect for precedent in his 2005 confirmation hearings, has responded, defending his rulings as applications of the court’s existing doctrine.

In the campaign finance case, he argued that past rulings permitted the court to entertain challenges to specific applications of McCain-Feingold and that his decision to permit a Wisconsin antiabortion group’s television ad was consistent with case law that barred regulation of all ads except those that expressly advocate the election or defeat of a particular candidate.

Yesterday, Roberts peppered his opinion with phrases such as “under our existing
precedent” and “the established law.” He also frequently buttressed his arguments with quotations from the writings of O'Connor, as if to emphasize that his views were well within the court’s historical mainstream.

“I thought Roberts was trying to wrap himself in Sandra Day O’Connor,” said David J. Garrow, a senior fellow at the University of Cambridge, England.

Roberts also responded in kind to Breyer, arguing that his dissent “alters or misapplies our well-established legal framework” and that his “appeal to stare decisis rings particularly hollow.”
Whatever one’s theory of constitutional interpretation, a theory of stare decisis, poured on top and mixed in with it, always corrupts the original theory. If one is an originalist—that is, if one believes that the Constitution should be understood and applied in accordance with the objective meaning the words and phrases would have had to an informed general public at the time of their adoption—then stare decisis, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism. Stare decisis contradicts the premise of originalism—that it is the original meaning of the words of the text, and not anything else, that controls constitutional interpretation. To whatever extent precedents inconsistent with original meaning are accepted as controlling (whether sometimes and to some extent, or always and absolutely), such acceptance undermines—even refutes—the premises that are supposed to justify originalism.

If one is a non-originalist, pragmatist, or otherwise outcome-driven “interpreter” of the Constitution—that is, if one believes that the Constitution should be interpreted in such a manner as to produce justice, good outcomes, or workable and fair solutions to social and political problems, and not be inhibited by the constraints of constitutional text, structure, and history—stare decisis corrupts and undermines such an interpretive theory, too. After all, why should an interpreter be bound by precedents that stand in the way of one’s conception of justice if one is not bound by the language and original meaning of the Constitution itself? It would be silly to let errant (on these criteria), unjust precedents block the way, especially if the Constitution itself is not allowed to do so.

Merrill’s view is a variation of other policy-driven approaches to constitutional law. His favored policies—stability and predictability—are simply more “conservative” (in an incrementalist sense) and nonsubstantive than those animating other policy-driven approaches. But aside from its merits or demerits as a theory of constitutional interpretation, Merrill’s view of precedent as a stabilizing force has its own problems. One problem is the overconfident assumption that precedents need less interpreting, or require less legal competence faithfully to interpret (aren’t we still reading words, just more of them, and ones that sometimes contradict each other?), or are less subject to manipulation or evasion, or provide greater clarity, than direct interpretation of the Constitution through some interpretive methodology or another. A second problem with this view is that it is usually alloyed with some (or many) other methodology (or methodologies) of constitutional interpretation, combining the problems and imprecisions of both, with an unclear but certainly nonabsolute degree of “tilt” in the direction of precedent and away from the other interpretive approach(es). That is still a corruption of the other method(s) of constitutional interpretation, just corruption.
to some uncertain lesser degree.

A third problem with this view is that it does not really provide a justification for stare decisis, in the definitional sense of adhering to a precedent decision even where one would otherwise think it wrong (on other criteria). It only provides a justification for reading and considering precedent decisions, in order to assist the present interpreter in figuring out the right answer, not for binding the present interpreter to a result that he or she otherwise is fully persuaded is incorrect, on other interpretive grounds. And if precedent is not binding, we are not really talking about a doctrine of stare decisis. (And we are also undermining the claim that precedent produces stability.)

The final problem with the Merrill view, and others like it, is the one common to all precedent-based theories of constitutional adjudication. The turtle underneath it is, at some level, the premise that judges’ interpretations create, fix, or “liquidate” constitutional meaning, after the fashion of the common law, at least to some (unclear) degree. On that premise, however, Paulsen’s Rule still holds: if judges’ decisions have the power to establish constitutional meaning, a doctrine of stare decisis corrupts that theory by vesting earlier judges with the power to usurp, to some degree (usually unspecified), later judges’ power to establish constitutional meaning.

The correct answer to all of this, of course, is that stare decisis in constitutional law—the practice of giving some degree of decision-altering force to prior judicial interpretations simply because they are prior judicial interpretations and in contradiction of what one otherwise would conclude are correct principles of constitutional interpretation and correct interpretive results produced by such principles—is utterly unjustifiable. Stare decisis corrupts whatever interpretive method it touches. It corrupts fundamentally correct interpretive principles—original public meaning textualism. It corrupts fundamentally incorrect interpretive principles—policy-driven interpretive theories of every kind. And it corrupts every interpretive theory that tries to craft an “in-between” approach, including, rather ironically, every theory that accords some measure of interpretive force to precedents solely by virtue of being precedents.

In short, whatever theory one concludes is the correct approach to interpreting and applying the Constitution, a theory of stare decisis will inevitably contradict its core justifying premise(s). A doctrine of stare decisis always works in opposition to correct interpretation of the Constitution.

Is there anything at all that can be said in defense of such a doctrine?
No Supreme Court nominee could be confirmed these days without paying homage to the judicial doctrine of "stare decisis," Latin for "to stand by things decided." Yet experienced listeners have learned to take these professions of devotion to precedent "cum grano salis," Latin for "with a grain of salt."

Both Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. assured their Senate questioners at their confirmation hearings that they, too, respected precedent. So why were they on the majority side of a 5-to-4 decision last week declaring that a 45-year-old doctrine excusing people whose "unique circumstances" prevented them from meeting court filing deadlines was now "illegitimate"?

It was the second time the Roberts court had overturned a precedent, and the first in a decision with a divided vote. It surely will not be the last.

The fact is that the court regularly revisits and reconsider its precedents, as Chief Justice William H. Rehnquist, the current chief justice's former boss and mentor, once observed succinctly. "Stare decisis is not an inexorable command." he said in a 1991 opinion that included, in a page and a half of small type, a list of 33 precedents that the court had overturned in the previous 20 years.

So the question is not whether the Roberts court will overturn more precedents, but how often, by what standard and in what terms. As to which precedents will fall next, there are several plausible candidates as the court enters the final days of its term, including the 2003 decision that upheld advertising restrictions in the McCain-Feingold campaign finance law; a 1968 decision that let taxpayers go to federal court to challenge government policies as violating the separation of church and state; and an antitrust price-fixing case from 1911. (In an 8-to-0 decision last term, the court overturned a pair of antitrust precedents from the 1940s that were noticeably at odds with modern antitrust analysis.)

Sometimes the court overrules cases without actually saying so. Some argue that this is what happened in April, when a 5-to-4 majority upheld the federal Partial-Birth Abortion Ban Act without making much effort to reconcile that ruling with a decision in 2000 that found a nearly identical Nebraska law unconstitutional.

As a technical matter, the new decision, Gonzales v. Carhart, left the earlier ruling still on the books, doing its overruling "by stealth, without having the grace to admit that is what they were doing." in the words of Ronald Dworkin, the legal philosopher, who wrote a highly critical appraisal of the new decision in The New York Review of Books last month. "Justices Roberts and Alito had both declared their intention to respect precedent in their confirmation hearings, and no doubt they were reluctant to admit so soon how little those declarations were worth," Professor Dworkin said from London in an e-mail message.
Abortion, of course, is a special case. The debate over whether the court should or could overturn *Roe v. Wade* has been going on so long and with such intensity that it tends to pre-empt any discussion of the subtleties of stare decisis.

Senator Arlen Specter, the Pennsylvania Republican and abortion-rights supporter who at the time was chairman of the Senate Judiciary Committee, pressed Chief Justice Roberts at his confirmation hearing to agree with him that *Roe v. Wade* was not just a precedent, but a “super-duper precedent.” Mr. Specter’s point was that because the court in 1992 had considered whether to overturn *Roe* but reaffirmed it instead, the 1973 precedent had acquired an inviolate status. His implication was that if *Roe* was just an ordinary precedent, it was as vulnerable as any other with which a new majority became disenchanted.

The nominee obviously knew exactly what Mr. Specter was driving at, but he gave away nothing. He acknowledged the historical accuracy of the senator’s chronology, but would not follow him to the land of “super-duper” precedents. When the court explicitly overturns precedent, it tends to offer a checklist of justifications: the precedent has eroded over time through disuse or disregard (this was the majority’s stated reason for discarding the “unique circumstances” precedents in last week’s decision, *Bowles v. Russell*), or it has been a source of confusion in the law, or experience has proven it “unworkable.”

But the real reason is usually that a changing court in changing times has come to see the question in a new light. In *Bowers v. Hardwick* in 1986, the Supreme Court dismissed as “facetious” the notion that the Constitution offered protection for gay rights. Overturning that decision 17 years later, Justice Anthony M. Kennedy declared for the majority in *Lawrence v. Texas*: “*Bowers* was not correct when it was decided, and it is not correct today.”

Still, the court will strive to provide an explanation, if only to avoid the kind of accusation that Justice Thurgood Marshall leveled at the majority when, taking advantage of two retirements, the court reversed course and by a vote of 5 to 4 made “victim impact” testimony admissible in death penalty hearings. “Power, not reason, is the new currency of this court’s decision making.” Justice Marshall declared on the final day of the court’s 1990 term. Two hours later, he announced his own retirement, his words still hanging in the air.
Every year, immediately after the Supreme Court term ends, the politics of law briefly becomes our national obsession. This year, inevitably, the pundits’ focus was on just how far to the right the court had shifted as a result of the arrivals of Chief Justice John Roberts and Justice Samuel Alito. The verdict: Not that much, according to Linda Greenhouse of the New York Times. Charles Lane of the Washington Post concurred in this judgment. As did Dahlia Lithwick of Slate. According to this analysis, Roberts’ first term can be seen as a disappointment to conservatives because the court achieved only a minimal shift to the political right.

A second disappointment to conservatives was Roberts’ apparent failure to rein in the “activist” court. That judgment may be shortsighted. Although Supreme Court justices are a notoriously independent bunch, Roberts made substantial progress in bringing about a more harmonious court. More importantly, Roberts seemed to deliver on a promise made at his confirmation hearings: to be a more minimalist justice and to be guided by legal principles rather than political preferences.

John Roberts presented himself as a “legal process” justice at his confirmation hearings. Legal process was a theory propounded by a number of elite law professors in the 1950s in response to the activism of the Supreme Court under Chief Justice Earl Warren. Adherents hold that cases should be decided by “neutral principles” and that the more representative government actors (Congress, the president, and his representatives) should decide big policy questions. They believe in—indeed they emphasize—the distinction between law (which they see as an autonomous discipline governed by reason and principle) and politics (which they view as merely the expression of one’s political preferences).

Roberts sounded these notes at his hearings, pledging to be “modest”—no more than “an umpire calling balls and strikes”—and to decide cases narrowly so as to promote consensus on the court. At a speech at Georgetown this spring he reiterated this preference for narrow, unanimous decisions. And the court under Roberts did enjoy an initial run of unanimity and modesty. As the term progressed, however, it splintered on a number of decisions, and on the last day of the term, refused to defer to the Bush administration’s contention that there should be no judicial review of the administration’s military commissions. Judicial supremacy, the commentators maintained, thus remains alive and well.

And as for Roberts? His earlier talk of humility and restraint were decried as a smoke screen for his conservative political preferences.

But not so fast. Because while the court’s military commissions decision will likely be the defining case of Roberts’ first term—and it casts a long shadow over the chief justice’s goals of promoting institutional modesty and unanimity on the court—we should acknowledge that Roberts still made substantial progress in bringing about his goals.

Under Roberts’ management, the court was a more harmonious institution than it has been
in the past. According to statistics compiled by the Georgetown University Law Center’s Supreme Court Institute, the court issued more decisions without dissents than in its previous two terms. The court also issued fewer 5-4 decisions, fewer dissenting opinions, and fewer separate opinions (concurrences and dissents) than in the previous term. Complete unanimity on the court may always be a mirage, but we’re closer to consensus than we were during the last term of former Chief Justice William Rehnquist.

A close look at the term also shows the court rediscovering the “passive virtues”—professor Alexander Bickel’s phrase for resolution of cases without deciding them (by returning them to the lower courts or dismissing them without a decision). The passive virtues helped the court avoid political controversy in resolving three cases. In addition, the court decided two controversial cases—one involving abortion rights, the court’s perpetual third rail—“unanimously on narrow grounds,” according to the Supreme Court Institute report. A modest Supreme Court won’t be built in a day. But the court’s use of these techniques suggests a greater inclination toward restraint under Roberts than under Rehnquist.

The question for the future: Can Roberts continue to orient the court toward his goals of judicial modesty and greater consensus on the court? If so, he may succeed in his task of distancing the court from the political fray.

On both the left and the right, skeptics deny that law can be distinguished from politics. Critical legal scholars and their disciples on the left insist that court decisions are no more than the exercise of political power, and such cynicism seemed vindicated by, for instance, the Supreme Court’s decision in Bush v. Gore. On the right, court-bashing continues to be a popular sport. Although President Bush has appointed hundreds of sitting federal judges, some on the far right continue to attack any federal court that disagrees with them.

Roberts’ ability to deliver a more modest, “legal process” court depends upon whether he is deemed sincere in his conviction that law is separate from politics and can be consistent in his efforts to reduce the role of judicial oversight in American political life. A truly principled Justice follows the law, even when that route leads to a disappointing decision. Such sincerity can be measured in two ways. Do his decisions appear to be results-oriented? And do his decisions seem judicial rather than political?

The answer to the first question is possibly, but not definitely, yes. In his first term, Roberts voted with the conservative bloc more frequently than the liberal bloc. (In particular, he voted more often with Justice Alito than any other justice and less often with Justice John Paul Stevens—now considered the court’s most liberal justice—than any other justice.) Furthermore, Roberts’ votes this term tended toward deference to other government actors—which in the current climate tend to support politically conservative results. Thus, depending upon your political orientation, his votes were either cast by a principled jurist or a politician in a black robe. This is a complicated question to sort out, and the truth is it’s too early to tell.

But consider two closely decided cases in which there was no clear majority because the justices’ votes were splintered. In League of United Latin American Citizens v. Perry, the voting rights case, Roberts voted consistently against judicial correction of Texas’ redistricting map. Was Roberts’ vote a stand against judicial oversight of redistricting (a
political action) taken by the Texas legislature (a representative body)? Or a vote to preserve the districts created by the Republican legislature, presumably for the party's benefit? You make the call.

Similarly, in *Rapanos v. United States*, the court rejected the Army Corps of Engineers' approach to determining whether wetlands are "waters" covered by the Clean Water Act. Roberts joined the other four conservative justices in ruling against the government. But before his vote can be dismissed as a political preference for business and against regulation, note that his brief concurring opinion chastised the agency for failing to properly address the problem itself—thereby defaulting on the general claim by a government agency that it is entitled to deference.

Finally, turn to Roberts' written opinions. His decisions, so far, have been straightforward and clear; he tends to eschew footnotes and to cite only legal authority—prior cases, statutes, and regulations. After reading Roberts' first two decisions, David Barron of Harvard Law School described Roberts' citation practice earlier this year as "statecraft by hornbook." Although Barron noted that the opinions have "a kind of no nonsense quality," he also expressed concern that they "suggest a vision of constitutional decision making that is awfully cramped and technical," in which "any sense of the broader legal culture that produces authoritative legal statements" could be lost.

Roberts would likely be delighted with this description of his writing. A legal process justice is the first to acknowledge that neither he nor the court can do it all. The question for the next term—with cases involving partial-birth abortion, the role of race in public high-school education, and the EPA's authority to regulate carbon dioxide emissions—is whether Roberts will continue to move, and to be seen as moving, the court away from the political fray.
Many people feared, or hoped, that President Bush’s appointees to the Supreme Court would be essentially indistinguishable from Justices Antonin Scalia and Clarence Thomas. It turns out that with stunning regularity, Chief Justice John Roberts and Justice Samuel Alito are indeed voting the same way as their conservative colleagues. Just this week, the four justices, along with Justice Anthony Kennedy, formed the majority in decisions involving free speech, campaign finance, race-conscious pupil assignments, and taxpayers’ standing in federal court.

Despite this seeming consensus, however, an intriguing division is emerging among the Court’s conservatives. Roberts and Alito are conservative minimalists. They prefer to preserve previous decisions and work within the law’s existing categories. Their opinions avoid theoretical ambition and tend to be narrowly focused on the particular problem at hand. By contrast, Scalia and Thomas are conservative visionaries, parallel, in many respects, to such liberal predecessors as Hugo Black and William O. Douglas. They favor fundamental change, immediately, and their opinions are sweeping and broad, often calling for overruling longstanding precedents.

This division was most strikingly apparent in this week’s decision resolving the important question of whether and when taxpayers are permitted to challenge federal expenditures to religious organizations. In brief, the Court concluded that taxpayers may not object if the executive branch uses public money to make direct grants to a particular church, or even to build a church where only Catholics may worship.

The case revisited the Court’s 1968 decision in Flast v. Cohen, which held that when Congress has explicitly said that taxpayer funds will go to religious organizations, taxpayers are entitled to make constitutional objections in federal court.

In so ruling, the Court pointed out that a major purpose of the Constitution’s Establishment Clause, emphasized by James Madison, is specifically to ensure that federal funds do not support religion. For this reason, the ordinary ban on “taxpayer standing” would be relaxed when taxpayers objected that their money was going to support religious institutions.

Conservatives have long despised Flast. They believe that the Court has been far too aggressive in insisting on a sharp separation between church and state. By allowing taxpayers to challenge federal expenditures, Flast increased the judicial role in policing that separation. Moreover, conservatives object to the idea that taxpayers or citizens should ever have access to federal court. They insist that federal judges should get involved only at the behest of those who have a personal injury, such as a loss of liberty or property, that is both “concrete” and “particularized.” They believe that taxpayers and citizens, as such, lack a concrete, particularized injury, simply because any harm to them is speculative,
remote, or merely psychological.

This week’s decision involved a problem very close to that in *Flast*. In its faith-based initiatives, the White House used taxpayer funds to pay for various conferences, and these were alleged to promote religion as such, in violation of the Constitution. Just as in *Flast*, taxpayers objected that their money was being used unlawfully.

The Bush Administration attempted to distinguish the current case from *Flast*, arguing that in that case Congress had specifically earmarked federal funds for religious institutions, whereas here the executive branch was using funds from a general appropriation. Judge Richard Posner, writing for the court of appeals, responded that this was a distinction without a difference. In the end, all money is appropriated by Congress, and if taxpayer funds are going to religious institutions, it does not matter whether Congress has specifically ordered the funding. Posner added that if taxpayers did not have standing, the executive branch would be able to use a general appropriation for whatever religious purpose it chose—for example, to build a specific church. In his view, *Flast* must be read to allow taxpayers to object to such blatantly unconstitutional action.

In his opinion, Alito took the minimalist route. *Flast*, he explained, was a “narrow” ruling that depended on a specific fact: Congress had expressly authorized the use of federal funds for religious purposes. In this case, by contrast, there had been no express authorization. Alito argued that it made sense to forbid taxpayers to challenge executive uses of general appropriations, because otherwise, taxpayers could “enlist the federal courts to superintend . . . the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials.” And if taxpayers could so enlist the federal courts, they would be “virtually continuing monitors of the wisdom and soundness of Executive action,” which “is not the role of the judiciary.”

Crucially, however, Alito said that the Court’s decision merely would “leave *Flast* as we found it,” neither extending it nor overruling it. The Court would “decide only the case at hand.” Taxpayers would continue to be permitted to challenge any explicit congressional appropriation of taxpayer funds for religious purposes. Scalia, joined by Justice Thomas, refused to join the Alito opinion, which he described as relying “on the random and irrational.” Scalia argued for a more ambitious and altogether different route. In his view, *Flast* is a “blot on our jurisprudence” and should be overruled. Taxpayers could not claim a concrete and particularized injury; any harm they suffered was a form of “Psychic Injury,” not suited for adjudication in federal court. Going back to first principles, Scalia urged that *Flast* was evidently wrong, and its errors had to be “addressed head-on.” “Minimalism,” Scalia said, “is an admirable judicial trait,” but he contended that “the soul of the law” is “logic and reason,” which the Court’s minimalist approach failed to offer. Thus he urged that the Court should insist on “the imposition of logic and order” on the law, founded on “a logical theoretical underpinning.”

Here, in a nutshell, is the division between the Court’s conservative minimalists and its visionaries. In the context of a particular case, which can be resolved without reference to fundamental principles, Alito (along with Roberts, and also Kennedy) does not question past decisions, avoids the most fundamental disputes, and avoids theoretical ambition. By contrast, Scalia
(along with Thomas) is not cautious about objecting to a "chaotic set of precedents" and rethinking them from the ground up. We can see the same disagreements in the many other areas, including abortion and campaign finance, in which Alito and Roberts worked within existing precedent while Scalia and Thomas urged that *Roe v. Wade* and important campaign finance decisions should be jettisoned immediately.

In the short term, the fissures between the Court’s conservatives do not seem to make much difference to actual outcomes. While minimalists tend to be unpredictable, Alito and Roberts have shown no unpredictability at all, almost always siding with Scalia and Thomas in controversial cases. Notwithstanding their differences, Alito and Scalia agreed that, so long as there has not been a specific congressional appropriation, taxpayers are never permitted to object to executive branch expenditures of federal funds for arguably unconstitutional purposes. To the extent that existing law allows room to maneuver, it seems there will apparently be a solid “block” of four conservatives, usually joined by Justice Kennedy. In problems ranging from abortion to employment discrimination to campaign finance to student speech to affirmative action to the war on terror, it is entirely predictable that where current law leaves gaps or uncertainty, the minimalists and the visionaries will be able to make common cause.

It is harder to predict what will happen down the line. Suppose that the continued vitality of *Flast v. Cohen* or *Roe v. Wade* is raised in the near future—how will Alito and Roberts proceed in that event? It is clear that the two justices do not like to overrule precedents when it is not necessary to do so in order to resolve the case at hand. What is less clear is how the minimalists will proceed when a case cannot be decided without taking a stand on a precedent that they reject in principle. The minimalists and the visionaries have been able to agree on how to resolve the key cases this term. It remains to be seen if their alliance will fracture when the question of fundamental constitutional change simply cannot be postponed.
“So, Do You Believe in ‘Superprecedent?’”

The New York Times
October 30, 2005
Jeffrey Rosen

As he prepares for another Supreme Court confirmation battle, President Bush faces intense pressure to quell the uproar from social conservatives who feared that Harriet Miers was not a true strict constructionist.

Many conservatives say they hope that the new nominee will follow the lead of Justice Antonin Scalia and, even more, Justice Clarence Thomas, who has become a conservative hero because of his willingness to overturn many liberal precedents of the last 70 years, from Roe v. Wade to cases upholding the New Deal.

But social conservatives face a problem: a new theory of “superprecedents” that is gaining currency on the right as well as the left.

The term superprecedents first surfaced at the Supreme Court confirmation hearings of Judge John Roberts, when Senator Arlen Specter of Pennsylvania, the chairman of the Judiciary Committee, asked him whether he agreed that certain cases like Roe had become superprecedents or “super-duper” precedents—that is, that they were so deeply embedded in the fabric of law they should be especially hard to overturn.

In response, Judge Roberts embraced the traditional doctrine of “stare decisis”—or, “let the decision stand”—and seemed to agree that judges should be reluctant to overturn cases that had been repeatedly reaffirmed.

If that is the case, Chief Justice Roberts would be at odds with the influential part of the conservative movement that argues that the Constitution should be strictly construed in accordance with the intention of the framers, regardless of the consequences. But the idea of superprecedents is more powerful than a simple affirmation of stare decisis.

An origin of the idea was a 2000 opinion written by J. Michael Luttig, a judge on the United States Court of Appeals for the Fourth Circuit, who regularly appears on short lists for the Supreme Court. Striking down a Virginia ban on a procedure that opponents call partial-birth abortion, Judge Luttig wrote, “I understand the Supreme Court to have intended its decision in Planned Parenthood v. Casey,” the case that reaffirmed Roe in 1992, “to be a decision of super-stare decisis with respect to a woman’s fundamental right to choose whether or not to proceed with a pregnancy.”

Before the Roberts confirmation hearings, Mr. Specter talked informally to several law professors, including this writer, who mentioned the theory of super-stare decisis, noting that Judge Luttig thought it was important that Roe had been repeatedly reaffirmed by different Supreme Courts, composed of justices appointed by presidents from different parties and confirmed by Senates controlled at times by Democrats and Republicans.

And Mr. Specter adopted this theory. At the hearings, he described their first courtesy call, in which he asked Judge Roberts about
the theory of super-stare decisis.

During the hearings, Judge Roberts, who was serving on the United States Court of Appeals for the District of Columbia Circuit, declined to say whether he agreed that Roe was a superprecedent or even a "super-duper" precedent. But, he said, the Casey decision is itself "a precedent on whether or not to revisit the Roe v. Wade precedent." And he also noted that the court over the past 80 years had reaffirmed the idea that the Constitution protects a right to privacy.

Later in the Roberts hearings, Charles Fried, a prominent conservative legal scholar at Harvard, agreed explicitly that Roe was a superprecedent. As solicitor general under President Ronald Reagan, Mr. Fried had asked the court to overturn Roe. But testifying on behalf of Judge Roberts, he said that Roe had become a super-duper precedent that would not and should not be overturned, because it was reaffirmed in 1992 and extended in subsequent decisions protecting gay rights and the right to die. "It's a big tree, but it has ramified and exfoliated," said Mr. Fried, and overturning it "would be an enormous disruption."

The theory of superprecedents is still so new that it has not been thoroughly debated. But since the Roberts hearings, prominent liberal academics have seized on the idea as their best chance in a generation for countering the claim of conservative "strict constructionists" that any precedent should be overturned if it is inconsistent with the original understanding of the Constitution.

At a panel discussion at the University of Minnesota this month, Michael Gerhardt of the University of North Carolina said that cases that have been accepted by the Senate, the White House and different political leaders over time should be considered superprecedents. Mr. Gerhardt said it was hard to be confirmed to the Supreme Court today unless you accept, as Judge Roberts did, that the Constitution protects a right to privacy. "I think the cases upholding the constitutionality of the New Deal and the 1964 Civil Rights Act are also superprecedents," he said, along with cases striking down sex discrimination and upholding the Miranda warnings. "It's clear that bedrock precedents are a very powerful force with lawyers," said Daniel Farber of the University of California, Berkeley, another panelist at the Minnesota conference.

"If somebody had told me in 1968 that Republicans would make all but two of the Supreme Court appointments of the next 37 years and at the end of that time, Miranda would still be on the books, there would be a constitutional right to abortion, and all the Warren court's major decisions would still be there, I never would have believed it."

Still, many conservative scholars say they remain skeptical. "The fact that something is a superprecedent doesn't give us a reason to stick to it if it's wrongly decided," said Randy Barnett of Boston University Law School in a response to Mr. Farber and Mr. Gerhardt at the Minnesota conference.

Other conservatives say they are alarmed by the embrace of superprecedents by Republican moderates. "This whole notion of superprecedent is puzzling, and it's hard to know what Arlen Specter means by it," says Terry Eastland, the legal commentator of The Weekly Standard. "A case like Roe is not accepted across the board. It's been quite a controversial decision from the beginning, and it really falls into the category of cases clearly open to discussion."

Indeed, as early as 1992, Earl Maltz, a
conservative legal scholar at Rutgers, criticized the *Casey* decision for endorsing the idea that "if one side can take control of the court an issue of major national importance," it can protect its position from being reversed "by a kind of super-stare decisis."

And many liberal scholars also concede that *Roe* and *Casey* may not qualify as a superprecedent, because the abortion decisions continue to be hotly contested.

"To me, a bedrock precedent commands a kind of legal and social consensus that I don't think is true of *Roe,*" Mr. Farber said. Mr. Gerhardt agreed. "I think it's hard to argue that *Roe* is a superprecedent," he said. "*Roe* has been opposed by three presidents and probably a majority of the Senate right now." In other words, even if the idea of superprecedent becomes widely accepted by senators, judges and legal scholars, there will be no end to the debate. The question of what decisions qualify as a superprecedent would keep the lawyers busy for years to come.
In supporting John Roberts's nomination to be chief justice of the United States in 2005, I spoke to the Senate Judiciary Committee of his commitment to clarity, consistency and stability in the law—qualities that included respect for precedent, essential if the Supreme Court is to be the guarantor of legality under the Constitution and not an unnecessary third political branch of government. Senator Dianne Feinstein of California asked whether I thought a Justice Roberts would vote to overrule Roe v. Wade. I said I thought he would not, at least not in its later, less absolute version embodied in the 1992 Casey decision, which protected against governments imposing an "undue burden" on a woman's right to choose abortion before the fetus's viability. I told Senator Feinstein that the formulation, and the principles behind it, had become so deeply rooted—in the law relied on not only in abortion cases but by analogy in matters as widely disparate as the Texas homosexual sodomy case, compelled visiting rights for grandparents and the right to die—that its abandonment would produce the kind of violent unsettling of the law against which respect for precedent is meant to protect.

The next year, when I testified in support of Samuel Alito, Senator Feinstein asked me the same question. I gave the same answer.

Justice Anthony Kennedy's decision for the court in the abortion case last week does not change my mind, because the procedure that was banned, intact dilation and extraction, is too rarely used and its importance too dubious to make much difference. Still, this most recent decision is disturbing, because in 2000, in a similar case, the Supreme Court struck down a Kansas partial birth abortion ban. The Kansas law was unacceptably vague, but the principal reason for the court's earlier decision was that there was responsible medical opinion that sometimes the procedure was less risky for the mother, and therefore in such cases the ban posed an undue burden. The federal ban cured the vagueness, but sought to overcome the medical testimony by a legislative proclamation of a fact that is not a fact: that the procedure was never safer for the mother.

The decision is disturbing because the court has on numerous occasions refused to allow Congress to overturn constitutional law by bogus fact finding, notably in decisions invalidating the Violence Against Women Act (which Justice Kennedy joined) and the Religious Freedom Restoration Act (which Justice Kennedy wrote). It's disturbing because Justice Kennedy fails to come to grips with his own jurisprudence, going so far as to say that because Congress was acting under its power to regulate interstate commerce, it needed only a rational basis to justify its decision. Where a fundamental right is involved, such an explanation is evidently wrong.

It's also disturbing because Justice Kennedy was not quite willing to embrace his own conclusion. He suggested that perhaps as applied in a particular case in which there was an increased health risk the ban might be unconstitutional after all. What can that mean? The very complaint here was that the ban was unconstitutional because it applies...
in just such situations. Does the court contemplate a surgeon pausing in the midst of an operation in which he determines the banned procedure might be less risky, and seeking a court order?

Finally, the decision is disturbing for a more far-reaching reason: there are indeed cases where the court in the last few years had become truly incoherent, largely as a result of Justice O'Connor's pragmatic and underexplained abandonment of positions she had earlier agreed to or even proclaimed on affirmative action and campaign finance. The first issue has been argued and will be decided this term of court; campaign finance is being argued this week. If the justices eliminate the confusion and restore principle in those areas, the cry will go up that the court is simply reflecting its changed political complexion, not reasoning carefully and promoting stability and clarity in the law. And last week's decision will lend plausibility to that charge.
Last week’s assisted suicide decision reflects the U.S. Supreme Court’s restored commitment to decentralized democracy. Rather than attempting to impose its own nationwide solution to difficult and contentious questions of moral and social policy (as it did in the abortion cases), the court seems to have realized that in the absence of clear direction in our constitutional text or history, it is better to allow the people and their elected representatives to wrestle with these problems.

This reflects a return to humility, after several decades in which the court seemed to view its job as second-guessing the wisdom of democratic judgments. Last week the justices expressly recognized that other institutions in our society often are better positioned to resolve important issues of principle. The justices took off the robes of the philosopher king and donned the more humble garments of judges in a democratic society—deciding cases according to constitutional norms established by the people over time, rather than according to what they candidly called “the policy preferences of the members of this Court.”

Writing for a five-justice majority, Chief Justice William Rehnquist explained that when the court declares a new constitutional “right,” it places the matter “outside the arena of public debate and legislative action.” This is legitimate only when the asserted right is based either on explicit constitutional text or on the “history and tradition” of the nation. This cautious approach ensures that constitutional law is rooted in the will of the people and in principles that have stood the test of time. By declining to find a right to assisted suicide, the court does not purport to resolve the question, but simply “permits this debate to continue, as it should in a democratic society.”

Although the court was unanimous in declining to find a right to assisted suicide, four of the justices wrote concurring opinions in which they said they would reserve a larger role for judicial discretion. But with the sole exception of Justice John Paul Stevens, all expressed healthy skepticism about the competence and legitimacy of the judiciary in making social policy. Justice Sandra Day O’Connor (who joined the majority opinion) made the telling observation that “every one of us at some point may be affected by our own or a family member’s terminal illness,” and legitimate when the rights of a discrete minority (like blacks in the Jim Crow South) are at stake. But when the people of the states decided to restrict assisted suicide, they were not imposing their will on a minority. They were legislating for themselves and their loved ones.

Justice David Souter emphasized that the case turned on the relative “institutional competence” of legislatures and courts. When the consequences of recognizing a new right are unknown, legislatures have the advantage both of superior fact finding and of the ability to experiment. It seems the justices have learned something from their experience with the abortion cases.
The great institutional strength of courts is their ability to enforce legal principles with consistency, treating like cases alike regardless of the temper of the times. But that virtue becomes a vice when principles are in flux and the consequences of new approaches are unpredictable. Constitutional judicial review is too inflexible a process to deal with an issue like assisted suicide.

There are four characteristics of the federal judiciary that make it a poor—and dangerous—social-policy maker. First, any answer imposed by the courts in the name of the Constitution will apply across the nation. Perhaps that makes sense when our national experience points to a single answer. But on a novel and complicated social question like the treatment of the terminally ill, it would be foolhardy indeed for nine people sitting in a courtroom in Washington, D.C., to write the rules for everyone. There is no reason to think that every state must have the same laws pertaining to end-of-life decisions; and we can all learn from the experience of states with different policies.

Second, constitutional decisions are difficult to change, even when mistaken. The legitimacy of the constitutional system depends on its stability: It strains public credulity that the meaning of the Constitution would change rapidly and often. By contrast, legislatures can try new approaches, and then modify or abandon them in light of experience and criticism. The state of Oregon has undertaken an experiment in physician-assisted suicide that—however misguided it may appear to many of us—will cast light on the practical consequences. Other states may try other approaches. To treat this social-policy question as one of federal constitutional law would cut short this process.

Third, because any lines drawn by courts must be based on constitutional principle and not on prudential compromise, it is difficult to limit a new right once it has been recognized. The plaintiffs challenging the New York assisted suicide law maintained that there is no real difference between allowing patients to forgo lifesaving medical treatment (which is allowed) and allowing their doctors to prescribe affirmative measures to bring about death (which is forbidden). The court correctly held that the distinction between killing and letting die is reasonable and legitimate. But if it had gone the other way, where could it stop? On what principled basis could the “right” be denied to competent patients who face the prospect of extreme pain not just for a few months but for many years? How could assistance be limited to those physically capable of administering the lethal poison to themselves? Why limit the right to people in physical pain? Why not those distressed at the prospect of the loss of memory or mobility, or of a loved one? And don’t patients out of their minds with pain, or in a coma, need this help more than anyone? (So much for the requirement of voluntariness.) Once assisted suicide is recognized as a constitutional right, it is difficult to see how the right could be confined to a narrow class of patients—just as, once the right to abortion was recognized, it proved difficult to limit it in any serious way.

Fourth, the Supreme Court is the most unrepresentative body in our governing structure. All its members are from a single profession; they are deliberately insulated from ordinary people. They rarely have experience in the matters about which they adjudicate. They are very busy (deciding around 100 cases every year), and have relatively little time for study and reflection. They rely on arrogant kids just out of law school for information, counsel and assistance. By contrast, now that the
question of assisted suicide has been left to the states, a much wider range of voices will be heard—in churches and synagogues, legislative halls, radio talk shows, hospital ethics committees, jury rooms, learned journals and less-learned ones, within healthy families and families in pain. Sometimes, the best and most peaceful solution to a contentious moral conflict is not to adopt a sweeping principle and reject the other position, but to construct a compromise that allows each side to believe that society is responsive to its deeply held convictions. Legislatures are good at that.

It takes a special kind of hubris for judges to think they have the best answers to social problems about which knowledgeable people of good will do not agree and we have no national experience to guide us. Judge Stephen Reinhardt of the Ninth Circuit U.S. Court of Appeals, who announced the right to assisted suicide last year and was reversed last week, described the arguments of those who favor legal restrictions on assisted suicide as “cruel,” “untenable,” “disingenuous and fallacious,” “meretricious,” “ludicrous” and “nihilist.” He praised his court’s own opinion as “more enlightened.” The Second Circuit declared there was no “rational basis” for allowing refusal of life-sustaining care but prohibiting assisted suicide—never mind that this is the position of almost every U.S. state and almost every nation in the world, as well as professional associations of doctors, psychologists and experts in the care of the elderly.

It is far from clear that federal judges are more “enlightened” and “rational” than the rest of us. And it is refreshing to see the Supreme Court exhibit the humility that the lower courts so conspicuously lacked. The court’s majority says that “in every due process case” where our constitutional text and history are silent and our national experience provides no clear answer, it intends to allow the democratic processes of the 50 states to prevail. That will be a very great improvement over the preceding decades of judicial overreach.
Now and then, a footnote in a Supreme Court opinion is so provocative, so perceptive, or both, that it speaks almost as loudly as the body of the opinions themselves. In the election campaign ads ruling on Monday, Justice Antonin Scalia unleashes this broadside at the main opinion, written by Chief Justice John G. Roberts, Jr.:

[T]he principal opinion's attempt at distinguishing McConnell v. FEC is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of the Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules McConnell without saying so. This faux judicial restraint is judicial obfuscation.

Aside from the substance of the remark, it is especially noteworthy because it is a direct assault on the version of judicial modesty that seems to be—at least at this early stage of the "Roberts Court"—the decision-making style that the new Chief Justice has so often advocated publicly. (Perhaps also to be left aside is that Justice Scalia himself joined earlier in the Term in a ruling by the Court, in the partial-birth abortion decision—Gonzales v. Carhart—that can be read as having overruled precedent without saying so.)

The Chief Justice's opinion in the combined cases of FEC v. Wisconsin Right to Life (06-969) and McCain v. Wisconsin Right to Life (06-970) is the latest example of the Court's moving away from major precedent without actually saying explicitly that the prior ruling was being set aside. The Chief Justice has talked with some fervor about the value of respecting precedent, and the need to keep overrulings to a minimum, if not truly rare. But the new conservative majority on the Court is plainly uncomfortable with some of the precedents it confronts—and the McConnell decision was a prime candidate for overruling. In fact, both sides in the case had been granted additional space in briefing to argue whether it should be cast aside.

In the end, all that the Chief Justice's opinion would say on the point was that "we have no occasion to revisit" the McConnell decision as it applied to federal regulation of broadcast ads aired by corporations and labor unions in election season. But what remains of that aspect of the 2003 decision divided the Court deeply in the various writings on Monday. And the end result is that, if it is hanging on, it is just by a thread.

In fact, the numbers show how vulnerable it is: three Justices wanted to overrule it outright, Justice Samuel A. Alito, Jr., is revealed to be strongly tempted to do that when and if the issue comes back again, and the Chief Justice's tolerance of it as a precedent is fleeting at most. The only thing that might keep that part of McConnell on the books, technically not overruled, is that the Chief Justice's new opinion could make it entirely unnecessary to do so—the campaign ads will flow freely in the weeks closest to elections, with full First Amendment protection, unless they leave no
doubt that what they really say is "vote for Jones" or "vote against Smith." Those who draft campaign ads' content will have no trouble avoiding such blatant advocacy and yet leaving no one in doubt which outcome is preferred by the ads' sponsors.

The Chief Justice's opinion has these central parts:

A. The First Amendment protects a campaign ad on radio, TV, cable or satellite outlets by a corporation and labor union using its own treasury funds, unless no reasonable person, seeing or hearing that ad, would interpret it "as an appeal to vote for or against a specific candidate."

B. The intent of the ad's sponsor is not to be considered, no matter what other activities the sponsor may have carried out that revealed its true preferences. The focus of any inquiry into an ad's legality under the new standard is just what the ad says—its actual words and pictures—without regard to any outside indications of what was intended.

C. The ad can be run as close to election time—primary or general election—as the sponsor wishes.

D. Any public policy issue it discusses, while naming a person who happens to be a candidate that season, need not be a live issue in public debate at the moment.

E. If a given ad is challenged in court as being over the specified line, a court may allow only minimal inquiry—if any at all—into the nature of the ad and whether it does cross the line. If there is any dispute about that, the ad and its sponsor "must be given the benefit of the doubt."

However permissive that formulation may be in actual practice, it is clear that it is considerably more tolerant than almost anyone contemplated at the time the McConnell decision came down. In fact, a respected U.S. District Court, after McConnell, had interpreted that decision to mean that election season ads had simply been banned, if paid for by corporations and labor unions out of their own treasuries, and there was no way they could be challenged a case at a time.

Last Term, the "Roberts Court" said that was a misreading of McConnell, and set the stage for the as-applied challenge that resulted, on Monday, is what appears to be more in reality than an as-applied ruling.
For decades conservatives have yearned for control of the U.S. Supreme Court. For decades, they have been frustrated in achieving that goal, despite having as many as seven Republican appointees on the court.

This term, though, conservatives seem to have reached the promised land. With new Chief Justice John Roberts at the helm and Justice Samuel Alito replacing justice Sandra Day O’Connor, the direction of the court for this term, at least, has been transformed.

For conservatives, this term was pretty close to the best of times, and for liberals, it was pretty close to the worst of times. Although Roberts and Alito both promised at their confirmation hearings to honor precedent whenever possible, in their first full term together, they effectively reversed a number of key precedents. In each case, it was by a 5-to-4 vote.

The court upheld a federal law banning so-called partial-birth abortions, though it had struck down a nearly identical law just seven years ago. The court effectively eviscerated a key provision of the McCain-Feingold campaign finance law, even though the court had upheld that provision just three years ago.

In employment discrimination, the court dramatically limited the ability of workers to file employment discrimination claims.

On school desegregation, the court limited the ability of school boards to adopt voluntary desegregation plans that use race as a factor in assigning some students to schools.

In each of these decisions, the key votes in the majority claimed to be adopting a modest and limited approach. “What we actually have is a pretty bold conservative agenda but it’s clothed in the gentle language of traditional modesty and restraint,” says Kathleen Sullivan, director of the Stanford Law Constitutional Law Center.

Or, as Stanford Professor Pam Karlan puts it. “I think, practically, the court has overruled a number of cases. But the chief can say with a straight face, ‘I didn’t vote to overrule it. I simply limited the earlier decisions to its facts, or I refused to extend the earlier decision.’”

The court was more polarized than at any time in recent memory, with fully one-third of the court’s decisions reached by a 5-to-4 vote, and the liberals spoke with an unusually unified voice in dissent. As Justice Stephen Breyer put it in the school desegregation case: “It is not often in the law that so few have so quickly changed so much.”

The court’s new swing justice, Anthony Kennedy, was in the majority in each of the 24 5-to-4 rulings. And Supreme Court scholar Tom Goldstein says Kennedy’s influence has been significant. “No justice has had so strong an influence on a Supreme Court term in at least 40 years,” says Goldstein. “When you talk about the raw number of decisions where he dissented, only twice, or the 5-4 decisions where he was never in dissent, it was
unquestionably Justice Kennedy’s term and it looks like it’s Justice Kennedy’s court.”

Yale Law School Professor Akhil Amar says Kennedy is the linchpin.

“John Roberts presides but Kennedy pivots,” says Amar. Notre Dame Law School Professor Rick Garnett says Kennedy’s role is clear. “Justice Kennedy sees himself as the justice who is mediating between these two increasingly polarized ways of understanding the constitution and seems to me that he is likely to be relishing it,” says Garnett.

But all is not peace and love on the conservative side of the court. Justices Antonin Scalia and Clarence Thomas, in a number of cases, wanted to go farther than Roberts and Alito. In the campaign finance case, Scalia accused Roberts of effectively overruling the court’s past decision without saying so. This faux judicial restraint, said Scalia, is judicial obfuscation.

“Justice Scalia is saying in his opinion that the chief justice’s modesty, his unwillingness to overturn these longstanding precedents is actually phony. That he’s not being honest about how conservative he is,” says Goldstein.

Sullivan says Scalia and Thomas have a very different approach from Roberts and Alito. “It’s as if Justices Scalia and Thomas would like to come in and blow things up. And Chief Justice Roberts and Justice Alito take some of these old precedents, and, instead, they chip away at the foundations, so that they’ll blow over in a strong wind, but it’s a very different approach.”

George Mason University Professor Neomi Rao is a former law clerk for Justice Thomas. “There’s an agreement perhaps amongst some of the conservatives and some of the liberals that the minimalists as it were are being less than forthright in what they’re doing,” she says.

Ted Olson, who served as solicitor general in the first Bush administration, says Scalia is worried about not solidifying the new conservative approach while he can. “I think he’s looking into the future, who’s going to be the next justice on the court and how will that change the balance and if the court doesn’t do away with precedents that he thinks are unacceptable and wrongly decided they’re going to be around to bite him later on,” Olson says.

But Columbia Law School Professor Michael Dorf, a former Kennedy clerk, says that Justice Kennedy, who so often cast the pivotal, fifth vote, is more temperamentally in tune with the more modest approach.

“Part of what you’re seeing may be that he finds Roberts and Alito less scary than Justices Scalia and Thomas because they aren’t bomb throwers, and it’s possible that the Roberts strategy of incremental moves and not acknowledging when he’s overturning precedents is appealing to Justice Kennedy,” says Dorf.

What’s more, says Goldstein, conservatives still win in the end. “The differences between the conservatives don’t amount to a hill of beans. It’s all about theory, in practice five justices on the right agreed on the result and were willing to change the law in the direction the thought it had to go,” says Goldstein.

No case better illustrates that than the abortion case. Not only are states now freer than before to regulate abortion, many observers note how the court’s emphasis has
changed dramatically, from the doctor and the patient, to the unborn child.

George Annas, chairman of the Department of Health Law, Bioethics and Human Rights at Boston University, contends that, until this term’s abortion decision, most scholars considered the doctor-patient relationship to be protected in some fundamental constitution sense. “That as long as physicians were practicing for the best interests and health of their patients, with their patients’ informed consent, and consistent with good medical practice, the government could not interfere with that relationship. That no longer is the law,” says Annas.

In many cases this term, the court’s majority did not rule on the merits of a case, but ruled that individuals had no right to be in court. For example, the court, by a 5-to-4 vote, ruled that taxpayers could not challenge the president’s faith-based initiative in court.

One small case that many scholars consider emblematic of the court’s new formalism was a ruling that a convicted defendant had lost his right to appeal because his lawyer relied on a judge’s order to file the appeal within 17 days, instead of the 14 days in the statute. The judge had erroneously factored in the weekend in setting the deadline.

The court’s five-justice majority overruled a line of previous decisions, to say there should be no flexibility when such errors inadvertently occur. “These results strike me as simply mean, in that they enforce a kind of strict letter of the law approach, with out any obvious benefit. This struck me at least as something out of a Dickens novel, or perhaps even Kafka,” says Dorf. That echoes what the four, liberal dissenters said in many cases, but they did not prevail.

At his confirmation hearing, Roberts said he viewed the role of a judge as that of an umpire, to call balls and strikes. “One of the most famous umpires in major ball history, Bill Klem, was once asked, ‘Was that a ball or a strike,’ and he said, ‘You know, it’s not a ball or a strike until I say it is.’ So this idea of the umpire as someone who just follows a rule book, has been kind of exploded this term,” says Karlan.
The meaning and value of precedent depends on how subsequent justices construe it. For instance, the justices who decided *Korematsu v. United States* and *Brown* did not frame either decision with affirmative action in mind. Yet, in *Adarand* and *Croson*, a majority of justices relied on *Brown* and *Korematsu* for the proposition that all race-based classifications must be subjected to strict scrutiny.

Similarly, in striking down voluntary desegregation plans in Seattle and Louisville, the Roberts' Court's majority relied on *Brown* for the principle that nearly all race-based classifications, no matter how benign they purport to be, are illegitimate because they are motivated by, or reflect, the same racial attitudes which the Fourteenth Amendment purportedly was designed to eliminate from public decision-making. It did not matter that *Brown* had not clarified the level of scrutiny it had employed or that *Korematsu* plainly had involved a race-based classification directed against a relatively powerless minority. Nor did it matter that a minority of the Roberts Court claimed that a more coherent, honest reading of *Brown* supported, rather than undermined, the voluntary desegregation plans in Seattle and Louisville. What mattered was how subsequent justices construed either *Brown* or *Korematsu*. The ultimate meaning of a precedent, what it ultimately comes to signify, depends in part on how justices construe what their predecessors did.

Social scientists and legal scholars study the implications of subsequent uses of precedents by analyzing their network effects. When we study network effects, we find that the values of precedents—their significance in constitutional law—increase the more often they are cited. Conversely, the values of precedents decrease the less often they are cited—or the more often they are criticized. So, for example, Brown's value as a precedent has increased with the frequency with which it has been approving cited by not only the Court but also other constitutional authorities. Moreover, we can expect the value of *Korematsu* to drop dramatically based on how rarely it is cited and even then without approval.

In their recent network analysis of precedent, social scientists James Fowler and Sangick Jeon reached several conclusions with implications for both the attitudinal model and the golden rule of precedent. They found by the early 20th century "the norm [of stare decisis] had taken hold, even though there is strong evidence that the activist Warren Court later deviated from it. Later Courts also tended to skip over the decisions of the Warren Court, reaching back in time to rulings that were more firmly rooted in precedent."

Of even greater significance is their finding "that reversed cases tended to be much more important [or salient] than other decisions, and the cases overrul[ing] them quickly become and remain more important as the reversed decisions decline. We also show the Court is careful to ground overruling decisions in past precedent, and..."
the care it exercises is increasing in the importance of the decision that is overruled.” These findings are more significant because they indicate the Court avoids repetitive overrulings or tends to limit the numbers of times it revisits previously litigated questions of constitutional law. The Court tends not to repeatedly re-open issues, regardless of justices’ ideological preferences or the salience of issues.

There are, however, phenomena which the study of network effects neglects. First, the network effects of precedent extend beyond courts. If the meanings or values of precedents depend on their frequency of their citation, we should measure how—and how often—it is cited by non-judicial authorities. Presumably, a precedent’s values increase the more often it is approvingly cited by judicial and/or non-judicial authorities. Moreover, non-judicial authorities produce precedents, whose meanings or values depend, in turn, on the frequency with they are approvingly cited by courts or other institutions. Second, citations are not fungible. Contrary to what some lay people and even some social scientists believe, not all precedents are created equal. Some end up mattering more than others, and there are practical limits to the purposes for which public authorities cite either their own or judicial precedents. As the next two chapters demonstrate, non-judicial authorities are instrumental in shaping the values, meanings, and endurance of precedents.