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The Supreme Court of the United States – A Court in Transition

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Abstract: This article considers the Supreme Court of the United States as a court in transition, and examines the changes in membership that have occurred in the past few years on the country's high court, examining some of the more divisive issues that have been considered by the Court since these membership changes. It is still too soon to make any definitive judgments about the future of the Supreme Court, but the new changes on the Court do seem to signal a considerable shift in the Court in favor of the conservatives.

Key words: The Supreme Court of the United States. U.S. Judicial System. Judicial Conservatism. Judicial Liberalism.

The Supreme Court of the United States is one of the country's most venerable institutions. The only court specifically established by the Constitution of the United States, the Supreme Court is the ultimate authority on matters of U.S. constitutional law and of federal statutory law, subject only to Congressional action. It has the power to review all cases involving federal law, and its decisions with respect to questions of federal constitutional and statutory law are binding on all courts in the United States. Its opinions often deal with the most important — and most fiercely debated — issues of the day.

This article considers the Supreme Court of the United States as a *court in transition*, and examines the changes in membership that have occurred in the past few years on the country's high court, examining some of the more divisive

issues that have been considered by the Court since these membership changes. It is still too soon to make any definitive judgments about the future of the Supreme Court, but the new changes on the Court do seem to signal a considerable shift in the Court in favor of the conservatives.

Part I provides an overview of the judicial system of the United States. Part II introduces the Supreme Court of the United States as an institution. Part III discusses terminology used in the United States in discussing judicial philosophy and decision-making, which reflects the predominant political binary in the United States. With these foundational elements established, Part IV discusses the changes in membership on the Supreme Court, starting in the summer of 2005. Part V uses a case study to demonstrate the more conservative nature of the Supreme Court since these membership changes. Part VI looks more broadly at the current Supreme Court. Part VII looks at some of the cases that the Court has before it in its current term, and Part VIII ends with some modest conclusions.

I A brief introduction to the judicial system of the United States

The U.S. judicial system is in reality composed of a number of independent and autonomous court systems — the federal court system (which itself is decentralized and organized on the basis of both hierarchy and geography) and the state system of each of the states (and territories) that comprise the United States. As reflected in the system of federalism that characterizes the U.S. legal system, each state judiciary is organized and run by the individual state in which it resides. The high court of each state — often referred to as the state court of last resort — has the final authority to interpret state law.

Article III of the Constitution of the United States establishes and empowers the federal judicial branch.[1] In doing so, the framers of the Constitution established one Supreme Court, and gave Congress the authority to create lower federal courts.[2]

Congress has exercised its power to establish federal courts inferior to the Supreme Court and has done so by creating a system of courts based on hierarchical and geographical divisions. These courts, for the most part, are courts of "general jurisdiction",[3] although there are a few specialty courts.

[1] Article I of the Constitution establishes and empowers the federal legislative branch and Article II establishes and empowers the federal executive branch.

[2] Article III section 1 of the Constitution of the U.S. provides as follows: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish".

[3] The fact that federal courts are primarily courts of general jurisdiction indicates that these courts hear cases on a range of topics. Nevertheless, federal courts must have "subject matter jurisdiction"

Article III gives the power of nomination to federal judgeships to the President of the United States, subject to confirmation by the Senate. Interestingly, the Constitution provides no minimum qualifications that a person may possess in order to be a federal judge; this is in sharp contrast to the Constitutional prescriptions on who can be elected for President and as a member of the U.S. Congress.[4]

The Constitution of the United States provides a number of institutional mechanisms by which to protect federal judges from political pressures and thereby promote judicial independence. First, the Constitution allows federal judges to hold their tenure "during good behaviour".[5] This provision has been interpreted to mean that federal judges hold their positions for life, although in recent years, this interpretation is not without controversy. There is no mandatory retirement age. Federal judges can be removed from office only upon conviction of an impeachable offense.[6] In addition, the salary of a federal judge may not be reduced.[7]

Perhaps the greatest attribute of judicial independence in the U.S. federal judiciary is the power of judicial review. The power of judicial review is the power of the judiciary "to say what the law is",[8] and empowers the federal courts to declare acts of the legislative and executive branches to be unconstitutional and thus invalid.[9]

Although this power is nowhere explicitly stated in the U.S. Constitution, it has been firmly established for more than 200 years and it is a power that remains as robust today as ever.

II The Supreme Court of the United States: the institution

As noted,[10] the Supreme Court of the United States is the only court established by the Constitution. The Supreme Court first assembled in 1790, and as an institution has remained largely unchanged until today.

The Supreme Court is composed of nine members — the Chief Justice of the United States and eight Associate Justices. The Court (as it is commonly referred to) sits *en banc*, meaning that all Justices sit on a single panel to decide cases. (One or more justice may recuse himself or herself to avoid a conflict of interest or the appearance of impropriety.)

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in order to be able to hear and decide a particular case. The notion of subject matter jurisdiction is beyond the scope of this article.

4 Compare U.S. Constitution, Article I section 2 and section 3 and Article II section 1 with Article III.

5 U.S. Constitution, Article III section 1.

6 U.S. Constitution, Article II section 4.

7 U.S. Constitution, Article III section 1.

8 *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

9 The power of judicial review in the United States is highly decentralized and extends to lower federal courts and state courts.

10 *See* Part I, *supra*.

The Chief Justice is the senior justice by operation of law. Nevertheless, the Chief Justice is said to be "first among equals". Although he has important ceremonial and administrative functions (including service as the Chair of the Judicial Conference of the United States, the policy-making body of the federal courts), he has only one vote, just like each of the associate justices. He has little or no authority to influence the voting behavior of the other justices.

The Court's jurisdiction is largely discretionary, meaning that he members of the Court themselves decide which cases will be reviewed. The mechanism by which a party asks the Court to review a case is the *petition for a writ of certiorari*. If four of the nine justices agree to hear the case, the *writ of certiorari* will be granted. If the *writ* is denied, the petitioner essentially has no further recourse. The Court does not need to explain — and does not explain — the reasons for its denial of the *writ*.

The Supreme Court sits in a single term each year. The term begins on the first Monday in October and ends in late June or in early July when the Court finishes its business. After oral argument on a set of cases, the members of the Court meet in private to discuss their views. A straw vote is taken. The task of writing the opinion of the Court — the majority opinion — is assigned by the most senior justice in the majority. Other justices may write concurring or dissenting opinions. A concurring opinion agrees with the result reached by the majority but for a different or additional reason; a dissenting opinion disagrees with the majority holding. Drafts are circulated among the justices and memoranda are written in which members of the Court seek changes to the drafts. Ultimately, the majority opinion is released, often along with one or more concurring and/or dissenting opinions. All opinions are immediately posted on the Supreme Court's website.[11]

III The political binary: judicial conservatism versus judicial liberalism

Because this paper relies somewhat heavily on the terms "conservative" and "liberal", this part will undertake to explain briefly what these terms mean in the context of the U.S. judicial system. These terms, however, are imperfect ways of describing any particular jurist's philosophy, as discussed below.

The term "conservative" generally connotes a judicial philosophy that favors state autonomy and a weaker federal or national government; conservative judges are more interested in so-called "originalist" interpretations of Constitutional and

[11] <http://www.supremecourtus.gov>.

statutory precepts than with developing law through common law evolutionary principles; and perspectives that by-and-large are friendly toward business interests and agnostic — if not hostile — toward the interests of women, racial and other minorities, and those charged with criminal offenses. Historically, judicial conservatives have tended to be strong adherents to *stare decicis*, preferring to leave undisturbed decisions that they might not have rendered in a case of first impression. Historically, conservative judges have seen for themselves a restrained and modest role.

Liberals or progressives envision a more active role for the government — especially the federal government — in protecting minority and other unpopular interests.

Liberals have tended to be more supportive to the rights of women and minorities, perceiving a strong role for the federal government to protect the rights of these groups and others, especially those who find themselves in the criminal justice system. Historically, liberals on the Supreme Court have been more willing to reverse Court precedent when necessary to correct errors, particularly as to constitutional rights. Progressive judges generally see themselves as having important roles in the legal system, and perceive a robust role for the federal judiciary, and support broader access to the courts.

One of the central notions that divides judicial conservatives and liberals is whether the Constitution should be subject to an "originalist" interpretation or whether the concept of a "living Constitution" should be embraced.

Originalists take the view that judges should adhere to the precise words of the Constitution and that the meaning of those terms was essentially locked into place at the time they were written. Originalists believe that a living constitution approach gives judges far too much interpretative latitude. The pragmatic defense to originalism is perhaps most tempting: that it provides the best guidance to legislators trying to enact laws; to lower courts trying to interpret the law; and to the public in understanding its rights and obligations.

But the implications of an originalist perspective would be far-reaching. Many principles of U.S. Constitutional law are based on a more dynamic view, including the right to a court-appointed attorney in criminal cases, the right to be free from unreasonable searches and seizures, and the right to purchase contraception. Those who believe in a living Constitution take the view that the Constitution must evolve to meet modern sensibilities. Supporters of the "living Constitution" approach say that such a concept is implicit in the Constitution's use

of broad phrases that necessarily require judicial interpretation. Chief Justice John Marshall, known as the "Great Chief Justice", wrote in *McCulloch v. Maryland*, that "a constitution [is] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs".[12] Justice Brennan argued that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America".[13] More recently, Justice Stevens said that "[a]rresting the development of the common law... is profoundly unwise", noting that the "human condition is one of constant learning and evolution — both moral and practical".[14] Although this is an issue that deeply divides Supreme Court justices (and others), the notion of the U.S. Constitution as a "living" document has been the prevailing approach.

IV Recent changes in the composition of the Supreme Court

A The Supreme Court in June 2005

In June, 2005, the Supreme Court was composed of the following members (listed with the name of their appointing president, and a designation as to whether each of the appointing presidents was a Democrat (D) or a Republican (R)). It also contains the respective justices' year of birth.

Justice	Appointing President	Year of Birth
Rehnquist	Nixon (R); Bush I (R)	1924
Stevens	Ford (R)	1920
O'Connor	Reagan (R)	1930
Scalia	Reagan (R)	1936
Kennedy	Reagan (R)	1936
Souter	Bush I (R)	1939
Thomas	Bush I (R)	1948
Ginsburg	Clinton (D)	1933
Breyer	Clinton (D)	1938

[12] 17 U.S. (4 Wheat.) 316 (1819).

[13] William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 495 (1977). *See also* William J. Brennan, Jr., Education and the Bill of Rights, 113 U. Pa. L. Rev. 219, 224 (1964).

[14] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1069 (Stevens, J., dissenting).

Federal court judges, including Supreme Court justices, might be expected to reflect the ideological tendencies of their nominating presidents. History suggests that this is often the case; but there have been notable exceptions.

The Supreme Court as it stood in June, 2005, for example, presented some surprises in terms of the judicial orientation of the justices when compared with their nominating president. For instance, Justice Stevens, who was appointed by President Gerald, a Republican,[15] was one of the most consistently liberal members of the Court. Justice Souter also voted with the liberal bloc on the Court on a regular basis, with some notable exceptions — despite the fact that he was nominated by President George H.W. Bush as a "stealth" nominee.[16]

Justice O'Connor and Justice Kennedy also presented an interesting dynamic. Nominated by the very conservative President Reagan, they were for many years so-called "swing voters" on the Court. It had been said of Justice O'Connor (who has since resigned from the Court)[17] that "where O'Connor goes, so goes the Court".[18] Indeed, her vote was widely considered to be the most coveted of any of the justices. Since her retirement, this role has since been assumed by Justice Anthony Kennedy. Despite his conservative leanings in a wide range of cases, he has authored or joined some of the most controversial decisions in recent years in which his vote gave the liberals on the Court a victory.[19]

B Justice O'Connor's retirement

On July 1, 2005, Justice O'Connor announced that she would retire from the Court upon the nomination and confirmation of a successor. This announcement by Justice O'Connor gave President George W. Bush an outstanding opportunity. The ability to name a member of the Supreme Court is a great prospect for any sitting president; but President Bush was given the added opportunity of replacing the leading "swing" voter on the Court with a justice of his choosing — one who would presumably bring a highly conservative pedigree to the Court.

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[15] President Ford was never elected to national office. He became President Nixon's vice president after Vice President Spiro Agnew resigned in disgrace. When President Nixon later resigned in the wake of the Watergate scandal, Vice President Ford became President Ford under constitutional succession rules.

[16] It was thought that his nomination would provoke little debate and dissent by Senate democrats because of his paltry record on the kinds of issues that he would face on the Court; but it was also believed that he would be a solid conservative, a belief that has been belied by his record during his time on the Court. Indeed, he is a solid ally with the liberal block.

[17] *See* Part B, *infra*.

[18] *See* <http:// www.supremecourthistory.org/justice/o'connor.htm>.

[19] *See*, *e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005).

On July 19, 2005, President Bush announced the nomination of John G. Roberts, Jr., to fill Justice O'Connor's seat. John Roberts, then a judge on the United States Court of Appeals for the District of Colombia Circuit, was in the process of his Senate confirmation hearings when Chief Justice Rehnquist died in September, 2005.[20] President Bush at that point nominated John Roberts to succeed the Chief Justice, and new Senate confirmation hearings were scheduled.[21] Ultimately, Roberts — at the age of 50 — was confirmed at the nation's 17th Chief Justice.

This left President Bush with the opportunity to name yet another member to the Court. There was some pressure on President Bush to name a woman to succeed Justice O'Connor, including pressure from the First Lady. President Bush responded by nominating Harriet Miers to that post. Miers at the time served as White House counsel, and was a longtime Bush loyalist. The Miers nomination evoked much criticism from both the left and the right. Conservatives objected because they were not confident of her conservative *bona fides* — Miers had earlier supported democratic causes and politicians, and her public record was too sparse to mollify Republicans that her work on the Court would reflect traditional conservative valued and approaches to Constitutional adjudication. Liberals were concerned that her personal loyalty to President Bush would compromise her independence as a judge and that she was too much of a religious zealot to be trusted with this lofty position. Many on both the left and the right seemed to agree that she simply was not smart enough, or engaged enough on issues of constitutional law, to serve on the Supreme Court. Ultimately, Miers asked that her nomination be withdrawn, citing in what was widely viewed as a pretext that her position as White House counsel would give rise to a conflict of interest in a large number of cases that she would be called upon to decide as a justice on the Supreme Court.

President Bush then nominated Samuel A. Alito Jr., to succeed Justice O'Connor. Alito, also a judge on the United States Court of Appeals for the District of Columbia Circuit, had a record that appealed to staunch conservatives. His nomination was confirmed by the Senate, largely along party lines.

C Justice Souter's retirement

In the summer of 2009, Justice David Souter announced his retirement from the Court. This was not terribly surprising; although relatively young, it was well

[20] The Chief Justice's death was hardly a surprise. For the preceding year, it was public knowledge that he suffered from a serious form of thyroid cancer. His presence on the Court during the 2004 term was sporadic. What surprised many is that the Chief Justice did not resign at the end of the terms.

[21] All this time, Justice O'Connor remained an active member of the Court.

known that Justice Souter did not enjoy living in Washington, D.C. or the lifestyle of a Supreme Court Justice. Justice Souter's retirement gave President Obama his first opportunity to name a member of the High Court.

President Obama nominated Sonia Sotomayor to succeed Justice Souter on the Supreme Court. At the time, Sonia Sotomayor was a judge on the United States Court of Appeals of the Second Circuit, and would become only the third woman and the first Hispanic ever to sit on the Supreme Court of the United States. It was widely presumed that President Obama nominated Sotomayor in part because of her Latina heritage as a nod to the Latino community, which was instrumental in his election as President.

Justice Sotomayor was confirmed by the Senate but her confirmation hearings were marred by accusations of racism and sexism arising out of a comment that she has made a number of times as a lower court federal judge: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life". This gave Republicans an opportunity to label Sotomayor a racist and a sexist and to use this as a rallying cry against her confirmation.

Nevertheless, her nomination was supported by Democrats in the Senate and she was confirmed and received her commission to serve as a Justice of the Supreme Court on August 8, 2009.

D Justice Stevens' retirement

In 2010, President Obama was given his second chance to appoint a Supreme Court Justice upon the retirement of Justice John Paul Stevens. As noted above, Justice Stevens was nominated by President Gerald Ford, a Republican, but had become the leader of the progressive arm of the Supreme Court. Justice Stevens was 90 of age at the time of his retirement, so it came as a great relief to many liberals that he stepped down while there was a Democrat in the White House.

President Obama used this second opportunity to nominate Elena Kagan to succeed Justice Stevens on the Supreme Court. Justice Kagan had been the Attorney General of the United States and she had served as Dean of Harvard Law School for a number of years. The Senate confirmed Kagan as an Associate Justice of the Supreme Court and she received her commission on October 1, 2010.

E What do the new membership changes mean?

In the past seven years, then, we have seen a turnover of four of the nine members of the Supreme Court. What has been the impact of these membership changes?

1 Roberts succeeding Rehnquist: a conservative replacing a conservative

Chief Justice Roberts seems to be cut very much in the mold of his predecessor, Chief Justice Rehnquist, in terms of judicial approach and philosophy. (Early indications, at least, suggest that Chief Justice Roberts is very different from his predecessor, however, in terms of personality and temperament.) What Roberts adds to the Court is the ability to extend the judicial legacy of Chief Justice Rehnquist, probably for a long period of time, given Chief Justice Robert's relatively young age. It is likely, of course, that Chief Justice Roberts will develop as a distinctive jurist, but it would seem that his positions on most important controversial decisions will be similar to those of the immediately preceding Chief Justice.

This conclusion, which seemed entirely accurate six months ago, has since been called into question. As will be discussed below, Chief Justice Roberts sided with the progressives on the Court in one of the most widely anticipated an controversial decisions of this decade in order to uphold most provisions of President' Obama's signature health care legislation.

2 Alito replacing O'Connor: a conservative replacing a swing voter

The most significant of the recent membership changes has been Justice Alito succeeding Justice O'Connor. As discussed above, Justice O'Connor was a critical swing voter on the Court, and her vote often decided the most closely contested controversial cases.[22] But Justice Alito, as a very reliable conservative, moves the Court decidedly toward the conservative side. This change in membership, then, reflects an important shift to the right.

3 Sotomayor replacing Souter: a progressive replacing a progressive

Like the replacement of Chief Justice Rehnquist by Chief Justice Roberts, the succession of Justice Souter by Justice Sotomayor does not seem to foretell any significant change in the court's decision-making. Justice Souter, despite having been nominated by President George H.W. Bush, was a fairly reliable (but not entirely consistent) liberal, as Justice Sotomayor has been and is expected to be in the future.

[22] *See*, *e.g.*, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (religious displays by state); *Tennessee v. Lane*, 541 U.S. 509 (2004) (state immunity from lawsuits); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (racial preferences in university admissions); *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of mentally retarded offenders); *Lawrence v. Texas*, 539 U.S. 558 (2003) (criminalization of consensual, private homosexual conduct); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (gerrymandering); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (abortion).

4 Kagan replacing Stevens: a progressive replacing a progressive

Like the justices succeeding Chief Justice Roberts and Justice Souter, Elena Kagan's appointment to replace Justice Stevens is not likely to represent a major shift in the decision-making of the Supreme Court. Kagan is expected to be a firm liberal on the Court, as Justice Stevens had been.

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These last two appointments meant that President Obama had no meaningful opportunity to reshape the Court and shift it to the left. It was anticipated that any vacancies that would arise during his first term in office would be by progressive justices — and this was borne out in fact. It was widely anticipated that Justice Souter and Justice Stevens would resign — and they did. The fact that these two vacancies were created by progressives means that President Obama had no ability to shift the political balance on the Court — only maintain it. However, a Republican victory would have given a President McCain a major opportunity to move the Court to the right.

5 A snapshot of the present Court

The chart that follows represents a snapshot of the current members of the Court, including for each justice whether he or she demonstrates a conservative or liberal tendency, the name of the president that nominated the justice, and his or her date of birth.

Justice	Conservative or Liberal Tendency	Nominating President (Party)	Year of Birth
John G. Roberts	Conservative	Bush II (R)	1955
Antonin Scalia	Conservative	Reagan (R)	1936
Anthony Kennedy	Swing/Conservative	Reagan (R)	1936
Clarence Thomas	Conservative	Bush I (R)	1948
Ruth Bader Ginsburg	Liberal	Clinton (D)	1933
Stephen Breyer	Liberal	Clinton (D)	1938
Samuel Alito	Conservative	Bush II (R)	1950
Sonia Sotomayor	Liberal	Obama (D)	1954
Elena Kagan	Liberal	Obama (D)	1960

At present, then, for the first time in many years, the views and voting patterns of each of the Justices tracks fairly well the ideology of their respective appointing president.

Another reality to note is the declining ages of the Justices. Both President Bush and President Obama nominated to the Court Justices who were far younger than their counterparts. Given the life tenure of federal court judges, this offers the possibility that Chief Justice Roberts and Associate Justices Alito, Sotomayor, and Kagan, will enjoy long terms on the Court.

V A more conservative Court: the October 2006 Supreme Court Term as a case study

Based on the above, we can expect that the Court has taken a turn to the right (toward the conservative) since the membership changes discussed above due primarily to the departure of swing Justice O'Connor and the appointment of conservative Justice Alito. This is perhaps most borne out by the term that began in October 2006 and ended in June 2007. During that term, the Court decided a number of enormously contentious cases in which the justices were bitterly divided. Putting aside cases involving the death penalty, with only one notable exception, the conservatives prevailed.

The major liberal victory of the 2006 Supreme Court term was the 5-4 decision in *Massachusetts v. Environmental Protection Agency*.[23] This case was notable not only on the merits of the environmental claim, but also because the Court reinvigorated its doctrine of environmental standing, which seems to have waned in recent years. This case was brought by the Commonwealth of Massachusetts and a number of other plaintiffs against the Environmental Protection Agency (EPA). Plaintiffs claimed that the EPA had violated its statutory mandate to regulate air pollutants that endanger the public health or welfare.

Section 202(a)(1) of the Clean Air Act provides that the EPA "*shall* by regulation prescribe... standards applicable to the emission of any air pollutant from any class of new motor vehicles... which in his judgment cause, or contribute to, air pollution which may be reasonably anticipated to endanger public health or welfare".[24] The terms "air pollutant" and welfare" are broadly defined by the Act, the latter including "effects on... weather... and climate".[25] Thus, the Court concluded, the EPA defied its "clear statutory command" in refusing to take action to limit greenhouse gases from cars and trucks. The Court ruled that any such refusal

[23] 127 S.Ct. 1438 (2007).
[24] 42 U.S.C. §7521 (a)(1) (emphasis added).
[25] *See* 42 U.S.C. §7602 (g) and (h).

must be based on reliable scientific evidence, which the agency had not proffered; the only way the EPA could avoid taking further action was "if it determines that greenhouse gases do not contribute to climate change" or provides a good explanation why it cannot or will not find out whether they do.[26] The Court also noted that, although Congress has vested the agency with discretion in complying with its statutory command, deference is "not a roving license to ignore the statutory text".[27]

Equally significant as the merits decision in this case was the Court's decision to agree to hear the case at all. Under the constitutional doctrine of "standing", a plaintiff in federal court must demonstrate concrete and particularized injury which is either actual or imminent, which is fairly traceable to the defendant, and as to which it is likely that a favorable decision will redress the injury. The EPA and the dissenters argued that the plaintiffs had not demonstrated the requisite injury in order to gain access to the federal courts. The majority opinion disagreed, reinvigorating the fledgling doctrine of environmental standing, and allowing the case to proceed on the merits. In doing so, the Court found that as a sovereign, the Commonwealth of Massachusetts had special access to the federal courts.[28]

The majority opinion was written by Justice Stevens, and was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Writing the principal dissent was Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito. The bitterness of the tone of the Chief Justice's dissent was noticeable in this, his first dissenting opinion of that term.

Despite this substantial victory for the liberals, the 2006 Supreme Court term will be remembered by many for the major conservative victories on issues that lie at the very heart of deeply held views by both sides on the political spectrum. In all of these cases, the Court was closely divided. And in all of these cases, the importance of the votes of Justice Kennedy and/or Justice Alito was evident.

For instance, the Court in *Bowles v. Russell*[29] upheld the dismissal of a criminal defendant's appeal because he filed his appeal three days late, upon an erroneous instruction of the trial court judge. Of particular interest in this case, the Court overruled earlier Supreme Court precedent under which such a party could claim an exemption from the filing deadline for "unique circumstances". In the majority were Chief Justice Roberts, Justice Kennedy, Justice Scalia, Justice Thomas, and

[26] 127 S.Ct. 1462.
[27] *Id*.
[28] *Id*. at 1454.
[29] 127 S.Ct. 2360 (2007).

Justice Alito. In his dissenting opinion, Justice Breyer — joined by Justice Stevens, Justice Souter, and Justice Ginsburg — objected that it "is intolerable for the judicial system to treat people this way... There is not even a technical justification for condoning this bait and switch...Why does today's majority refuse to come to terms with the steady stream of unanimous statements from this Court in the past four years",[30] now leaving Court's precedent "incoherent".[31]

The Court's decision in *Gonzales v. Carhart*[32] was another stinging defeat for liberals. A 5-4 majority upheld a federal statute that banned abortion by the procedure of intact dilation and extraction. The law was called the "Partial-Birth Abortion Ban Act of 2003", a deliberately provocative title that fueled the public controversy over the abortion issue. Surprising about the majority's decision is that the Court had struck down on constitutional grounds a similar state abortion provision in 2000.[33] Although the direct impact of the decision is likely to be minimal as the intact dilation and extraction procedure is used in only a small number of abortions each year, the Court's opinion is likely to have sweeping implications for the future of abortion rights in other cases. The Court's reliance on the morality of abortions and on paternalistic concern for the mother were particularly notable. For instance, Justice Kennedy's majority opinion said that the decision was good for women because it prevented them from making a decision that they would later come to regret:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child... It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: [...].[34]

The decision then proceeded to describe the abortion procedure in vivid detail.

The dissenters were Justices Stevens, Souter, Ginsburg, and Breyer. Justice Ginsburg wrote a harshly critical dissent on behalf of the others in which she noted the Court's decision was "alarming"[35] and "at odds with our jurisprudence".[36]

[30] *Id*. at 2367 (Souter, J., dissenting).
[31] *Id*. at 2369 (Souter, J. dissenting).
[32] 127 S.Ct. 1610 (2007).
[33] *Stenberg v. Carhart*, 530 U.S. 914 (2000).
[34] 127 S.Ct. 1634.
[35] *Id*. at 1641 (Ginsburg, J., dissenting).
[36] *Id*. at 1653 (Ginsburg, J., dissenting).

She was clearly troubled by the Court's obvious hostility[37] to the right to abortion and by the majority's discussion of the "ethical and moral concerns" about abortion.[38] The dissenters were also bothered by the Court's "archaic and overbroad generalizations and assumptions about women's inherent dependency".[39] "[T]his way of thinking reflects ancient notions of women's place in the family and under the Constitution — ideas that have long since been discredited".[40] Justice Ginsburg read her dissent from the bench, a way of showing her extreme displeasure and disagreement with the Court's majority decision.

Justices Scalia and Thomas wrote a separate concurring opinion in which they expressed their view that there is no right to abortion found in the Constitution. The one bright spot for the liberals is that this opinion was not signed by Chief Justice Roberts or Justice Alito — although their views about the continued viability of Supreme Court precedent protecting the abortion right is still not known.

The majority decision in *Ledbetter v. Goodyear*[41] was also a defeat for the liberals. In this bitterly-divided case, the Court was called upon to interpret a provision of Title VII of the Civil Rights Act of 1964[42] that (among other things) gave women the right to a federal civil remedy for pay discrimination in the workplace. The statute contains a 180-day filing period within which to file the lawsuit. This statutory period had a longstanding interpretation within the Equal Employment Opportunity Commission (EEOC), the agency that administers the Civil Rights Act of 1964, as meaning that a complaint must be filed within 180 days of the *initial pay decision* leading to the salary discrimination.

In *Ledbetter*, the EEOC denied a claim brought by a female employee of Goodyear, in which she demonstrated that her pay was 40% lower than that of the lowest-paid male colleague at the same managerial level. Her claim was rejected because she failed to file her complaint within 180 days of the initial pay decision.

A narrow majority of the Court instead adopted the administration's new interpretation which is that discrimination suits under Title VII must be formally filed within 180 days of the initial pay decision leading to the pay disparity. The majority opinion, written by Justice Alito and joined by Chief Justice Rehnquist

[37] *Id*. at 1650 (Ginsburg, J., dissenting). Ronald Dworkin accused the Court of overruling its own abortion precedent "by stealth, without having the grace to admit that is what they were doing". Ronald Dworkin, "The Court & Abortion: Worse Than You Think", *New York Review of Books*, v. 54, n. 9 (May 31, 2007).

[38] *Id*. at 1633 (Ginsburg, J., dissenting).

[39] *Id*. at 1649 (Ginsburg, J., dissenting).

[40] *Id*.

[41] 127 S.Ct. 2162 (2007).

[42] 42 U.S.C. §20002-2(a)(1).

and Justices Kennedy, Scalia, and Thomas, argued that the majority was simply complying with the will of Congress as expressed in the legislation. The dissenting opinion, written by Justice Ginsburg and joined by Justices Stevens, Souter, and Bryer, insisted that the majority adopted a patently unreasonable reading of the statute, one that "overlooks common characteristics of pay discrimination", including secrecy.[43] As an expression of her frustration with the majority opinion, Justice Ginsburg read her dissenting opinion from the bench. Among other things, she urged Congress to provide a legislative remedy.[44] This is the second case of the term from which Justice Ginsburg read her dissent from the bench, signaling great disappointment with the majority opinion.[45]

The Supreme Court in *Hein v. Freedom from Religion Foundation, Inc*.[46] dealt another major blow to liberals. In this case, an organization opposed to government endorsement of religion, challenged the establishment and activities of the Office of Faith-Based and Community Initiatives, an office established inside the Bush White House to support and promote religious and other community initiatives. The challengers argued that the office was a violation of the no establishment clause of the U.S. Constitution.[47] The Court, in a highly divisive decision, held that taxpayers lacked standing to challenge such activity on establishment clause grounds.

The only basis on which the Freedom from Religion Foundation could seek standing to sue in federal courts is through the doctrine of taxpayer standing. In the 1968 decision *Flast v. Cohen*,[48] the Supreme Court held that taxpayers did have standing to challenge legislative action on the basis that such action was inconsistent with the establishment clause of the Constitution.

The majority opinion, written by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy, read *Flast v. Cohen* narrowly, limiting that decision to *legislative* — and not executive — action. In a concurring opinion, Justices Scalia and Thomas agreed with the result reached by the majority, but would have overruled the limited taxpayer standing principle announced in *Flast*, calling that decision "a blot on our jurisprudence".[49] In dissent, the liberal justices — Justices

[43] 107 S.Ct. 2178 (Ginsburg, J., dissenting).

[44] *Id*. at 2188. Any such remedy, however, would be too late for Ms. Ledbetter, the claimant in the case before the Supreme Court.

[45] The result of *Ledbetter* was reversed prospectively due to the so-called Lilly Ledbetter Fair Pay Act of 2009.

[46] 107 S.Ct. 2553 (2007).

[47] "Congress shall make no law respecting an establishment of religion". U.S. Constitution, Amendment I.

[48] 392 U.S. 83 (1968).

[49] 107 S.Ct. 2553, 2584 (Scalia, J., concurring).

Stevens, Souter, Ginsburg, and Breyer — complained that the Court's decision in *Hein* essentially negated the notion of taxpayer standing to challenge establishment clause violations: "If the executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away".[50]

In *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,[51] the Court ruled that public school systems cannot seek to achieve or maintain integration through measures that take explicit account of a student's race. This decision, issued on the final day of the Court's term, resulted in a sharply and bitterly divided Court. The majority opinion, written by Chief Justice Roberts, was joined by Justices Kennedy, Scalia, Thomas, and Alito. Although Justice Kennedy agreed with the majority in its ruling on the particular case before the Court, he disagreed with the extreme view of the majority that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race".[52] In his concurring opinion, Justice Kennedy indicated his belief that there was a legitimate government interest in "avoiding racial isolation"[53] in public schools. He was critical of the plurality's opinion's "all-too-unyielding insistence that race cannot be a factor",[54] disagreeing with the plurality's "dismissive"[55] view of the validity of race-based integration measures.

The principal dissent, written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, angrily objected to the Court's dismissal of the efforts of the school district to achieve some racial balance:

The plurality... misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.

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The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review

[50] *Id*. at 2586 (Breyer, J., dissenting).
[51] 127 S.Ct. 2738 (2007).
[52] *Id*. at 2768.
[53] *Id*. at 2789 (opinion of Kennedy, J., concurring in part).
[54] *Id*. at 2791 (opinion of Kennedy, J., concurring in part).
[55] *Id*. (opinion of Kennedy, J., concurring in part).

is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.[56]

As is normally the case, this term included a number of death penalty cases. In the death penalty cases in the 2006 term, the Court reached mixed outcomes. The major death penalty cases involved the selection of a jury in a capital cases (cases in which the death penalty is sought) and in habeas corpus relief (the ability of an offender who was convicted in state court to seek review of the conviction in federal court). For instance, in *Uttecht v. Brown*,[57] the Court made it easier to remove prospective jurors from capital cases who express some uneasiness about the death penalty. This case was decided by the familiar five to four constellation, with Justice Kennedy siding with the conservatives. The dissenters argued that the Court's approach made it likely that juries in capital cases would be unduly inclined to apply the death penalty.[58]

In the habeas corpus cases, the Court decided both in favor of the government prosecution and in favor of the convicted offender. Generally at issue in these cases is the question whether the law is clear based on Supreme Court precedent. Chief Justice Roberts dissented from one case in which the Court ruled in favor of the petitioner, saying that "[w]e give ourselves far too much credit in claiming that our sharply divided, ebbing and flowing decisions in this area give rise to 'clearly established' federal law", describing the Court's precedents as "a dog's breakfast of divided, conflicting, and ever-changing analyses".[59]

VI The new Court on balance

The discussion above about the Supreme Court's 2007 term reflects the new tenor of the Court to the extent that it has indeed become more conservative. But the shift in the Court has not been as pronounced as the major decisions of the 2007 term would suggest. In fairness, the Court continues to be reasonably balanced (with notable exceptions, of course), and there have even been a number of important victories for the progressive wing of the Court, including some in the most recently-ended Court term.

A Agreement not unusual

But first it bears reminding that the members of the Supreme Court are not always bitterly divided. In the most recent term, for instance, there was unanimity

[56] *Id*. at 2800, 2837 (Breyer, J., dissenting).
[57] 107 S.Ct. 2218 (2007).
[58] *Id*. at 2238 *et seq*. (opinion of Stevens, J., dissenting).
[59] *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007) (Roberts, C.J., dissenting).

or near unanimity in about 44 percent of the cases — a number that is in line with recent terms.[60] These included a number of controversial and important cases,

For instance, in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*,[61] a 9-0 Court recognized a ministerial exception to employment discrimination laws, holding that churches and other religious organizations must be free to choose their leaders without government interference. As the Court stated, "[t]he exception... ensures that the authority to select and control who will minister to the faithful — a matter 'strictly ecclesiastical'".[62]

The Court also reached a unanimous decision in the highly anticipated case of *United States v. Jones*,[63] holding that the police violated the Constitution when they placed a GPS tracking device on a suspect's car and monitored his movements for 28 days without a warrant. Despite the unanimity of the decision, the Justices were divided on the rationale, with the majority holding that the problem was the placement of the device on private property. The Court avoided the arguably more difficult and timely questions related to electronic surveillance.

Finally, in *FCC v. Fox Television Stations*[64] the Court set aside as unconstitutional indecency rulings against Fox and ABC made by the Federal Communications Commission for airing fleeting expletives and nudity on television on the ground that the guidelines were too broad and vague to give broadcasters adequate notice of what the indecency standards actually were. In this case, decided by an 8-0 vote (Justice Sotomayor recused herself), the Court again avoided the more controversial question of the constitutionality of decency standards for broadcast television and radio.

B The furor over *Citizens United*

Once case in recent years that deserves special mention is *Citizens United v. Federal Election Commission*.[65] In this case, the Court held unconstitutional portions of the McCain-Feingold Act, which imposed limits on political expenditures by corporations and labor unions. This decision was reached by a 5-4 vote along party lines. The decision opens the door for corporations to pend as much money as they want to support or oppose political candidates. The majority was criticized for having reversed precedents, engaging in activism by striking down portions

[60] *See* <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_votesplit_OT11_final.pdf>.
[61] 132 S.Ct. 694 (2012).
[62] 132 S.Ct. at 709 (2012).
[63] 565 U.S. ___ (2012).
[64] *FCC v. Fox Television Stations, Inc*., 132 S.Ct, 2307 (2012).
[65] 558 U.S. 310 (2010).

of a major act of Congress, and heightening the role of money in politics. The full impact of this decision is not yet clear, but it will be substantial, and very much the product of a conservative Court.

C Some important progressive victories

Despite the decidedly conservative turn of the Court in recent years, it should be recalled that there have been a number of important liberal victories since these recent membership changes on the Court. These progressive decisions cover a range of substantive areas, but just a few from the most recently ended term will be discussed here.

In *Miller v. Alabama*,[66] the Supreme Court held that the cruel and unusual punishment clause of the Eighth Amendment to the U.S. Constitution barred states from imposing life sentences without parole for juvenile offenders, even if convicted of murder. This case a 5-4 decision, with Justice Kennedy siding with the liberal justices.

The case of *Arizona v. United States*[67] was one of the most controversial of the term because it dealt with the authority of a state to regulate immigration given the perceived inability or indifference on the part of the federal government to do so. In this case, the Supreme Court struck down most of the controversial provisions of Arizona's controversial immigration law on the basis of federal preemption of state law.

Immigration groups will still be able to challenge application of law permitting immigration checks to be performed on those who are lawfully detained if the application is applied in a discriminatory manner.

The most controversial and closely watched decision of the Court's last term, however, was *National Association of Independent Business v. Sebelius*.[68] In this 5-4 decision, most provisions of President Obama's signature health care law were upheld against constitutional challenges. But the decision was heavily fractured and resulted in numerous separate opinions. Although the liberals won the war of keeping the legislation in place, they lost the battle with respect to the central argument presented: that the law's individual mandate (which requires persons who do not hold health insurance to purchase it) was a valid exercise of Congress' commerce clause authority.

This decision is far too complex to discuss in any level of detail in this paper, but the alignment of the justices was quite unusual, with Chief Justice Roberts

[66] *Miller v. Alabama*, 132 S. Ct. 2455 (2012).
[67] 567 U.S. ___ (2012).
[68] 567 U.S. ___ (2012).

voting with the liberal bloc of the Court to uphold most provisions of the law, including the controversial individual mandate. This move by the Chief Justice promoted criticisms from many, including the conservative press, which accused him of no longer being a reliable conservative.

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These are just some examples of important progressive victories from the most recently completed Court term. Others from other recent terms, of course, also exist.

VII The Supreme Court's current term

The Supreme Court's term that began in early October 2012 promises to be an interesting one, with a number of hot button issues on the docket. The Court has already agreed to hear a case that could end race-conscious admissions in public universities, a number of cases involving the Fourth Amendment right to privacy, and several cases that consider whether to apply retroactively decisions relating to the rights of criminal defendants.

In addition, the Supreme Court has yet to decide whether to grant the writ of *certiorari* in a series of cases pending, including on gay marriage (the constitutionality of the federal Defense of Marriage Act (DOMA) and the constitutionality of California's Proposition 8 banning gay marriage) and the Voting Rights Act. In short, this term promises to be as lively and potentially controversial as other recent terms.

VIII Some (modest) conclusions

Some modest conclusions can be made about where the Supreme Court now stands since these recent membership changes and what the future may hold for further membership changes on the Court.

First, it is important to note that the Supreme Court continues to decide a number of cases with unanimity or near unanimity. It is sometimes far too easy to focus on the cases that sharply divide the members of the Court without noticing the many cases that engender agreement among all or most of the members of the Court.

Second, the age of the Justices is declining. The most recent appointees to the Supreme Court took their posts as the ages of 50 (Roberts), 55 (Alito), 55 (Sotomayor), and 50 (Kagan). This trend is likely to continue; Presidents will undoubtedly appoint Justices at a relatively young age as a way of maximizing their impact on the future of the Court. In what might be called a "race to the bottom", presidents

are likely to continue to appoint Justices hovering around the age of 50. What remains unclear is how far the race to the bottom will proceed; are presidents likely to appoint justices who are near the age of 40? Or 30? I would predict that the age of new justices will not go below 45 or so, at least for the coming years; this is consistent with the U.S. tradition of judges having a significant amount of experience before assuming the bench.

Third, despite the mixed outcome of cases over the past several years, the Court has taken a decided turn to the right, meaning that the Court's decisions on the whole have become more conservative in nature. This can be seen through a number of indicia but perhaps most starkly by the following set of statistics that show that, in the most recently-ended term, the conservative justices were in the majority far more often than were the Court's most liberal members:[69]

Justice (Tendency)	Percentage in Majority (2012 Term)
Kennedy (conservative/swing)	93
Roberts, C.J. (conservative)	92
Thomas (conservative)	85
Alito (conservative)	83
Kagan (progressive)	82
Scalia (conservative)	81
Sotomayor (progressive)	80
Breyer (progressive)	76
Ginsburg (progressive)	69

As *The New York Times* — admittedly a progressive publication — noted:

> Six full terms after Justice Samuel Alito Jr. joined the court, the five in the majority have redefined judicial conservatism. The contrast in style and philosophy with the moderate minority is pronounced, including the conservatives' willingness to flout court rules, constraints of precedent and well-established practices of legal reasoning to reach the results they seek.[70]

Fourth, the appointment of Justice Samuel Alito to succeed Justice Sandra Day O'Connor has probably been the most dramatic of the recent membership changes on the Court as far as voting patterns is concerned.

[69] *See* <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_frequency_OT11_final.pdf>.
[70] *The Radical Supreme Court*, The New York Times, June 30, 2012.

Fifth, Justice Anthony Kennedy remains an important swing voter on the Court. He is in the majority often and in the most controversial cases before the Court, his vote is often decisive.

Sixth, Chief Justice Roberts has become an enigmatic figure on the Court and even a lightening rod for criticism and speculation. He has been a solid conservative on the Supreme Court — and very much in control of the Court. This past term, Roberts was in the majority 92 percent of the time, second only to Justice Kennedy (93 percent). However, Justice Roberts' plurality decision upholding most elements of the Affordable Health Care Act[71] has put him at the center of a debate about his place in the Court, with some conservatives asserting that the Chief Justice no longer can be counted on to vote with his conservative colleagues. As the *Wall Street Journal* reported, a conservative publication, reported: "Chief Justice Roberts has become a 'swing' justice on the Supreme Court" and he is no longer a "solid conservative".[72]

I believe that the Chief Justice's vote in the Affordable Health Care Act was an aberration and does not reflect a shift on his part to the left. It is perhaps best explained by two distinguished commentators. Linda Greenhouse observed as follows: "I doubt there was a single reason for the chief justice's evolution... but let me suggest one: the breathtaking radicalism of the other four conservative justices. [The dissenting justices] would have invalidated the entire Affordable Health Care Act, finding no one part of it severable from the rest. This astonishing act of judicial activism has received insufficient attention, because it ultimately didn't happen, but it surely got the chief justice's attention as a warning that his ostensible allies were about to drive the Supreme Court over the cliff and into the abyss".[73] And Thomas Friedman noted that the decision showed "how starved the nation is for leadership that puts the nation's interest before partisan politics, which is exactly what Chief Justice John Roberts Jr. did... I think [his decision] was inspired by a simple noble leadership impulse at a critical juncture in our history".[74]

Seventh, President Obama's re-election suggests that Justice Ginsburg may well retire in the next several years. There have been suggestions that Justice Breyer, age 74, should consider retiring during President Obama's second term in office to ensure that he is succeeded by a progressive jurist. It is not likely that any of the conservative members of the Court would retire during this presidency,

[71] *National Association of Independent Business v. Sebelius*, *supra*.
[72] Clint Bolick, *The Supreme Court Stakes in 2012*, Wall Street Journal, July 9, 2012.
[73] Linda Greenhouse, *The Mystery of John Roberts*, The New York Times, July 11, 2012.
[74] Thomas I. Freidman, *Taking One for the Country*, The New York Times, July 1, 2012.

unless compelled by health issues (none are known to exist). Again, therefore, unless this contingency were to occur, President Obama will not have the opportunity to dramatically re-shape the posture of the Court.

The direction that the Supreme Court will take is as important now as it ever has been. In the current term, which began in October 2012, the Court will take on a number of important issues, many of which are likely to divide the justices along ideological lines. The Supreme Court's decisions on these issues as well as in the major cases of recent years will likely shape a number of areas of U.S. Constitutional law for decades to come.

A Suprema Corte dos Estados Unidos – Uma corte em transição

Resumo: O artigo considera a Suprema Corte dos Estados Unidos como uma corte em transição, e examina as mudanças de composição que ocorreram nos últimos anos na mais alta corte do país, analisando algumas das questões mais divisivas que foram apreciadas pela Corte desde essas mudanças de composição. É ainda muito cedo para fazer qualquer juízo definitivo quanto ao futuro da Suprema Corte, mas algumas novas mudanças no Tribunal parecem sinalizar no sentido de uma considerável mudança da Corte em favor dos conservadores.

Palavras-chave: Suprema Corte dos Estados Unidos. Corte em transição. Composição dos membros da Suprema Corte.

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