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# Overview of the Term: The Rule of Law & Roberts’s Revolution of Restraint

Douglas W. Kmiec\*

The October Term was a notable one, less for any singular case, than for the landmark passages that took place on the Court: a new Chief Justice for the first time in close to twenty years and the addition of an Associate Justice for the first time in over a decade. The initial proceedings in this symposium will examine the substantive work of the Court: criminal justice, civil rights, law and politics, the separation of powers, and the business and commerce cases. This will be followed by a second panel of distinguished journalists who will evaluate the confirmation proceedings which yielded the Court’s new membership, specifically, what questions were asked, whether any were answered, how the process might be improved, and what also might be said about the public coverage of the confirmation.

## A PATHBREAKER RETIRES: A BELOVED CHIEF JUSTICE DIES IN OFFICE

The beginning of the Roberts’s Court really starts with an ending: the “surprise” retirement of Sandra Day O’Connor in advance of the seriously ailing William Rehnquist who tenaciously held to his place on the Court until life’s end. Sandra O’Connor and William Rehnquist learned the law together as Stanford classmates. It was William Rehnquist who brought O’Connor to President Reagan’s attention for the Court, and it was Sandra O’Connor who steadfastly joined Rehnquist in his effort to right the federal-state balance. During their service together, O’Connor—who had a deserved reputation as the Court’s center—also generally had her highest voting affinity with William Rehnquist. Chief Justice Rehnquist and Justice O’Connor gave important new life to a jurisprudence that answered questions and solved problems, even as they parted company on the implication of a non-textual abortion right and differed on the use of race for

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diversity. It is fair to infer that O'Connor heightened Rehnquist's sensitivity to gender discrimination and that Rehnquist influenced O'Connor's thinking, at least in part, toward greater religious accommodation and the protection of private property.

#### NOW JOINING THE LINE-UP: JOHN ROBERTS AND SAMUEL ALITO

The statistical reviews of the Roberts-Alito Rookie Year confirm it to be a continuation of the center-right tradition of the Rehnquist-O'Connor era.<sup>1</sup> Like Rehnquist and O'Connor, Roberts and Alito exhibited a high voting affinity—agreeing close to 90% of the time.<sup>2</sup> They have a common origin, entering public life as young Justice Department lawyers in the Reagan administration. They share an attitude of judicial humility, a desire for judicial consensus, and an abiding respect for law as written and prospectively applied. As suggested herein, these elements—humility, unanimity, and fidelity to the written law—shaped the first year of the Roberts's Court.

Roberts's Rookie Year also featured a veteran infielder who plays at many ideological positions: Justice Kennedy. Because Justice Kennedy's vote was the fifth in some controversial matters, a few public commentators suggested it was more a Kennedy than Roberts's Court.<sup>3</sup>

There is a plausible case to be made for this, but there is a counter-point as well. Knowing Justice Kennedy, he might well be the first to rebut the popular theory simply out of humility. But the pundits have also exaggerated Kennedy's solo influence premised both upon the previous, formidable pairing of O'Connor and Kennedy and perhaps an inability to see beyond the Court's past partisan divisions.

Kennedy without O'Connor is Garfunkel without Simon or, even more classically, Rodgers without Hammerstein. Paul Simon and Oscar Hammerstein wrote lyrics that made songs both memorable and understandable. O'Connor had a comparable gift for creative expression, even as originalists sometimes wondered if she was always reading from the Founders' constitutional songbook. For better or worse, it was O'Connor who had to be satisfied. It was her "reasonable objective observer" who would cast a suspicious eye at public religious displays.<sup>4</sup> And it was her assessment of the University of Michigan's practices that allowed racial

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1. See Bob Egelko, *Kennedy - The New Point Man; No Surprises from Bush's Appointees*, S.F. CHRON., July 2, 2006, at A1 (noting that the "administration's hopes for a rightward shift on an already-conservative court were largely checked" by Justice Kennedy).

2. *Id.* (citing statistics compiled by Georgetown University Law School).

3. See, e.g., Charles Lane, *All Eyes on Kennedy in Court Debate on Abortion: Justice Expected to be Swing Vote in Ruling on Late-Term Procedure*, WASH. POST, Nov. 8, 2006, at A03 (noting that Justice Kennedy was expected as the swing vote in many cases including the late-term abortion case recently heard by the Court).

4. See *McCreary County v. ACLU*, 125 S. Ct. 2722, 2746 (2005) (O'Connor, J., concurring).

diversity to be a factor in admissions.<sup>5</sup> Kennedy, like Art Garfunkel or Richard Rodgers, would often join O'Connor's lyric with an accompanying melody. But it was her words that bound the duo and their compositions together.

Kennedy and O'Connor both concluded, for example, that it was wrong for Texas to single out for criminal punishment, private, consensual homosexual practice.<sup>6</sup> But it was O'Connor's separate concurrence that made sense of the judgment, pointing out that it violates equality for a state to punish unmarried intimacy between people of one sexual orientation, but not the other.<sup>7</sup> Despite a troubling lack of deference to state law, O'Connor's rationale was at least anchored in the equal protection text of the Constitution while Kennedy's was hanging somewhere in mid-air exploring "spatial and transcendent" liberties.<sup>8</sup> O'Connor's rationale was sufficient to keep the homosexual plaintiff John Lawrence and his partner out of a Texas jail;<sup>9</sup> Kennedy's expansive musings to this day provoke litigation to allow same-sex marriage.

In writing her down-to-earth lyric for the Court, O'Connor was pragmatic; as an explorer of the spatial heavens, Kennedy was more poetic. Commentators, including myself, would occasionally express frustration with O'Connor's balancing tests that only she could apply, but at least she decided the particular, and often sensitive, case before her. Kennedy's decisions are indeterminate. Having taught law for more than twenty years,<sup>10</sup> he sees all kinds of potential permutations, and is quite content to let them percolate unresolved, like provocative questions posed during an academic seminar. This is a tolerable trait for a professor, but it is a less helpful quality in a judge. Kennedy's theorizing reveals a mind of great intelligence, but makes it more difficult to strike bargains with him. O'Connor knew what she wanted as a specific outcome, so the liberal and conservative coalitions could make reasonable bids for her affections. Kennedy, as a solo act, poses the perennial Father's Day dilemma: you know the old man needs something, but darned if you can put your finger on it.

Kennedy's ruminations produce cases that have outcomes, but no settled rationale. Thus, the scope of the Clean Water Act remains a mystery,

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5. See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

6. See *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

7. *Id.* at 577-85 (O'Connor, J., concurring).

8. *Id.* at 562.

9. *Id.* at 578-79 (O'Connor, J., concurring).

10. Justice Kennedy taught Constitutional Law at the McGeorge School of Law, at University of the Pacific from 1965 to 1988. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Nov. 15, 2006).

beyond Kennedy's requirement for some as-yet-undefined "significant nexus" to U.S. waters;<sup>11</sup> the exclusionary rule does not apply in no-knock cases,<sup>12</sup> but it should not be seen as "in doubt"; and Guantanamo detainee Mr. Hamdan deserves a tribunal more jurisprudentially spiffy than the President's military commissions because of the influence of the Geneva Convention,<sup>13</sup> even as Justice Kennedy claimed it was "not necessary to decide" how to apply the Convention. Whistling improvised tunes can be exhausting even for Kennedy. In rejecting Vermont's campaign spending and contribution limits, Kennedy expressed fatigue and simply directed readers to look up his earlier "skepticism" of the campaign finance "legal universe," and left it at that without elaboration.<sup>14</sup>

If Kennedy by manner and approach chooses to do-si-do rather than lead the judicial dance, who then emerges as the dominant influence on the Court? By virtue of seniority (and sheer intellectual feistiness), Justice John Paul Stevens, eighty-six, is the organizing voice of the four-vote liberal view (himself, Breyer, Souter, Ginsburg). But last year, and likely into the future, most of Stevens's writing was in dissent. Of course, when the Chief is recused, this charming, unpredictable thinker chairs the internal conference, and anything and everything can happen, as it did in *Hamdan v. Rumsfeld*.<sup>15</sup>

Justices Antonin Scalia and Clarence Thomas, of course, remain the rock-solid right, and while two can tango, the number is insufficient to decide cases. Many will see Scalia, Thomas, Roberts, and Alito as a bloc. Yet, that oversimplifies the human dynamic of the Court. Roberts has a conservative mind, but a diplomat's nature. His abiding concern is to keep the Court within bounds on legal, rather than, ideological grounds. Because that is so, he has the capacity to draw votes from both sides on controversial and pedestrian cases alike. Consider just two examples: his unanimous opinion rejecting free speech and association claims against Congress's Solomon Amendment mandating equal campus access for military recruiters,<sup>16</sup> and his opinion for the full Court rejecting, on procedural grounds, a challenge to tax credits favoring in-state investment.<sup>17</sup> Roberts's collegial consensus-building here, and elsewhere, overwhelmed Kennedy's ability to deploy his swing vote. The impact of the new Chief Justice was especially influential because he and Justice Samuel Alito, the newest addition to the Bench, share the founding vision of a more limited role for the Court.

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11. See *Rapanos v. United States*, 126 S. Ct. 2208, 2226-27 (2006) (Kennedy, J., concurring).

12. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2178 (2006) (Kennedy, J., concurring).

13. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759-60 (2006).

14. See *Randall v. Sorrell*, 126 S. Ct. 2479, 2501 (2006) (Kennedy, J., concurring).

15. *Hamdan*, 126 S. Ct. at 2749.

16. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1305-07, 1312 (2006).

17. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1859-63, 1868 (2006).

The fractious finale of *Hamdan v. Rumsfeld*, invalidating the President's military commissions, obscures more than it reveals, because there, Roberts was sidelined by recusal and unable to urge his colleagues toward consensus, or at least a more carefully-tailored and clearly-stated, not to mention succinct, opinion. Roberts's ability to influence Justices across the spectrum of ideas suggests that the most apt modifier for the Court is neither Kennedy nor Roberts, but open-minded. The strengthening of this quality for the Nation's highest tribunal ought not to be missed by outworn efforts to pigeon-hole the Court by partisan label or to perpetuate a cult of personality.

#### THE FRAGILE REHNQUIST LEGACY

No assessment of a rookie year would be complete without the context of the previous season. In his final innings, William Rehnquist lost some of the hard earned constitutional advantages on the bases of religious accommodation, federalism, and the protection of property rights.

#### THE FIVE COMMANDMENTS

It is fair to associate the Rehnquist legacy with greater accommodation of religious belief, but in the final Term in which he served, the Ten Commandments were allowed in one place but not another, and so to some degree, religious accommodation became a more muddled subject. Five commandments might be allowed everywhere: Who knows?

The Court's Establishment Clause jurisprudence, which Rehnquist personally sought to clarify with a masterful historical summary in dissent in *Wallace v. Jaffree*,<sup>18</sup> remained in his final year still mired in considerations of how to apply the ill-fitting *Lemon*<sup>19</sup> test or the highly subjective O'Connor theory of no endorsement. *Lemon*'s purpose prong provides that, in order to be valid, government action must have "a secular . . . purpose," language that has generally been interpreted as permitting government action unless there was *no* secular purpose or if the proffered secular purpose was merely a sham.<sup>20</sup> However, in *McCreary County v. ACLU*,<sup>21</sup> a closely divided Court held that the display of the Ten Commandments in a county courthouse was an unconstitutional establishment of religion because the display was originally motivated by a religious purpose and that

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18. 472 U.S. 38, 91 (1985).

19. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

20. *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting) (emphasis added).

21. 125 S. Ct. 2722 (2005).

government's secular purpose must "predominate."<sup>22</sup> This led Justice Scalia to argue in dissent that the Court had imposed a "heightened requirement" under the purpose prong.<sup>23</sup> As invalidated by the Court, the display was denominated a "Foundations of American Law and Government Display" and the government's expressly-stated purpose of depicting "documents that played a significant role in the foundation of our system of law and government."<sup>24</sup> The Court's new purpose requirement leads to a more searching inquiry into legislative motives under *Lemon v. Kurtzman*.<sup>25</sup> Justice Breyer joined the majority opinion in *McCreary County*, but provided the critical fifth vote upholding a Texas Ten Commandments display in *Van Orden v. Perry*,<sup>26</sup> decided the same day. In Texas, "the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well,"<sup>27</sup> Justice Breyer wrote in his opinion concurring in the judgment, noting that "[t]he circumstances surrounding the display's placement on the capitol grounds and its physical setting [among other, non-religious monuments] suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate."<sup>28</sup> It also appears that if the government changes its position out of concern that its initial purpose or motivation was too religious, the government may be confessing unconstitutionality, from which there can be no judicial redemption. In *McCreary County*, Justice Souter, writing for the Court and joined by Justices Stevens, O'Connor, Ginsburg, and Breyer, held that the display of the Ten Commandments in a county courthouse was an unconstitutional establishment of religion because the display was originally motivated by a religious purpose.<sup>29</sup> After the suit was filed, the county legislative body adopted a resolution calling for a more extensive display of significant documents in American history, including a central passage from the Declaration of Independence announcing the "self-evident truth" that all people are "endowed by their Creator"; the preamble to the Kentucky Constitution ("We, the people of the Commonwealth of Kentucky, grateful to Almighty God . . ."); the national motto ("In God We Trust"); and the Mayflower Compact.<sup>30</sup> When the district court held the expanded display unconstitutional, the County expanded the display yet again, this time to include, alongside the Ten Commandments, "framed copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the

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22. *Id.* at 2745.

23. *Id.* at 2757 (Scalia, J., dissenting).

24. *Id.* at 2758-59 (Scalia, J., dissenting).

25. 403 U.S. 602 (1971).

26. 125 S. Ct. 2854 (2005).

27. *Id.* at 2870 (Breyer, J., concurring).

28. *Id.* (Breyer, J., concurring).

29. *McCreary County*, 125 S. Ct. at 2736.

30. *Id.* at 2729-30.

Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice,” in a collection titled “The Foundations of American Law and Government Display.”<sup>31</sup> The district court enjoined that display, too, holding that it still had a religious purpose in light of the “history of [the] litigation.”<sup>32</sup> A panel of the Sixth Circuit affirmed over the dissent of Judge Ryan, who denied that the prior displays should have any bearing on the constitutionality of the third one.<sup>33</sup> The Supreme Court affirmed, five to four, rejecting, in light of the litigation history, the County’s claim that the purpose of the third exhibit was “to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government.”<sup>34</sup> The Court recognized, though, that one consequence of its inquiry into the purpose of “past actions was that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage,” suggesting that Kentucky’s third display may have been constitutional had it been erected first.<sup>35</sup>

This is not a body of jurisprudence that builds confidence.

### *State Immunity*

New exceptions were crafted with respect to the application of Eleventh Amendment Sovereign Immunity. This was a doctrine very close and dear to the heart of the late Chief Justice, but in the last Term that he served and in this first Roberts’s Term, the Eleventh Amendment was noticeably trimmed in application. For example, the categorical statements in *Seminole Tribe*<sup>36</sup> and *Alden*<sup>37</sup> that Article I power does not include subjecting nonconsenting States to private lawsuits was subsequently qualified in *Central Virginia Community College v. Katz*.<sup>38</sup>

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31. *Id.* at 2730-31.

32. *ACLU v. McCreary County*, 145 F. Supp. 2d 845, 849 (E.D. Ky. 2001).

33. *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 477-78 (6th Cir. 2003) (Ryan, J., dissenting).

34. *McCreary County*, 125 S. Ct. at 2731.

35. *Id.* at 2737.

36. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that under the Constitution’s Eleventh Amendment, absent state consent to be sued, the Indian Commerce Clause does not grant Congress the power to abrogate a state’s immunity from suit in federal court).

37. *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that “the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts”).

38. 126 S. Ct. 990 (2006).

*Katz* involved an action by a bankruptcy trustee to set aside preferential transfers of a bankrupt's assets in favor of the state. In a five to four decision, Justice Stevens held that the suit was not barred by sovereign immunity, even though Congress's bankruptcy power derives from Article I.<sup>39</sup> In part, the majority's reasoning rested upon the *in rem* nature of bankruptcy which the Court repeated from prior precedent "does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction."<sup>40</sup> But the majority wrote more broadly in *Katz* that the Bankruptcy Clause "reflects the States' acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings."<sup>41</sup> To make this more sweeping statement, the majority had to disavow dicta that had assumed that sovereign immunity would be capable of assertion in bankruptcy cases. "[T]hat assumption," said Justice Stevens, "was erroneous."<sup>42</sup> To demonstrate the error, the Court pointed to early difficulty posed by "wildly divergent" state laws on bankruptcy, which yielded judgments of discharge that would sometimes not be recognized in a sister state.<sup>43</sup> "[T]he history of the Bankruptcy Clause . . . shows that the Framers' primary goal was to prevent competing sovereigns' interference with the debtor's discharge . . . ." <sup>44</sup> Early congressional legislation granted a habeas right against the states

[T]o redress the rampant injustice resulting from States' refusal to respect one another's discharge orders. . . . [T]he Sixth Congress' enactment of a provision granting federal courts the authority to release debtors from state prisons . . . was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere.<sup>45</sup>

Justice Thomas dissented for Chief Justice Roberts as well as Justices Scalia and Kennedy. Thomas begins his dissent with an effort to characterize the Stevens opinion as a concession that at least "does not appear to question the established framework for examining the question of state sovereign immunity under our Constitution."<sup>46</sup> Justice Stevens and others in the *Katz* majority had consistently criticized *Seminole Tribe* and its reliance upon the *Hans*' theorem that "[u]nless . . . there is a surrender of [state] immunity in

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39. *Id.* at 994, 1003.

40. *Id.* at 995.

41. *Id.* at 996.

42. *Id.*

43. *Id.* at 997.

44. *Id.* at 1002.

45. *Id.* at 1004.

46. *Id.* at 1006 (Thomas, J., dissenting).

the plan of the convention, it will remain with the states . . . .”<sup>47</sup> It remains, of course, to be seen if, in fact, Justice Stevens is now accepting of that theorem – at least outside bankruptcy. The dissenters thought bankruptcy no exception to the general rule. Quoting *Seminole Tribe*, Justice Thomas reiterated his view that “[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”<sup>48</sup> The dissent argued that the majority in *Katz* ran together two distinct legal points. That a state is denied power to enact bankruptcy provisions by Article I does not mean that the state is also subject to being sued by private citizens. “These two attributes of sovereignty often do not run together – and for purposes of enacting a uniform law of bankruptcy, they need not run together.”<sup>49</sup> Said the dissent:

[N]o historical evidence suggest[s] that the Framers or the early legislatures, even if they were anxious to establish a national bankruptcy law, contemplated that the States would subject themselves to private suit as creditors under that law. In fact, the historical record establishes that the Framers’ held the opposite view.<sup>50</sup>

The dissent pointed out that the availability of habeas relief does not support the majority since it is a suit against a state official allowed under *Ex parte Young*<sup>51</sup> and not against the state itself.<sup>52</sup> The inability to enforce sister state judgments, reasoned Justice Thomas, dealt with the need for uniformity, satisfied by the power itself, and the Full Faith and Credit Clause, and not the abrogation of state immunity. Finally, that bankruptcy is in rem (and conclusive over the property in the control of the court) does not resolve the issue of whether an ancillary suit may be brought against the state to recover property already in the hands of the state.<sup>53</sup> Concluded Justice Thomas:

It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent. The majority’s

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47. *Id.* (Thomas, J., dissenting).

48. *Id.* at 1007 (Thomas, J., dissenting) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996)).

49. *Id.* at 1008 (Thomas, J., dissenting).

50. *Id.* at 1010 (Thomas, J., dissenting).

51. *Ex parte Young*, 209 U.S. 123, 168 (1908).

52. *Katz*, 126 S. Ct. at 1011 (Thomas, J., dissenting).

53. *Id.* at 1012 (Thomas, J., dissenting).

action today, by contrast, is difficult to comprehend. Nothing in the text, structure, or history of the Constitution indicates that the Bankruptcy Clause, in contrast to all of the other provisions of Article I, manifests the States' consent to be sued by private citizens.<sup>54</sup>

While Justice Thomas was protective of the states' immunity in *Katz*, he was of no mind to extend it beyond the states to county governments. In *Northern Insurance Co. of New York v. Chatham County, Georgia*,<sup>55</sup> Justice Thomas wrote for a unanimous Court that an insurer that indemnified a private citizen whose vessel was damaged by the county's malfunctioning drawbridge could recover from the county.<sup>56</sup> Under circuit court precedent, the county was not treated as an "arm of the state," and that being so, there was no residual immunity of unknown provenance that shielded the county.<sup>57</sup> States have immunity by virtue of their pre-ratification sovereignty which counties lack, and thus, "this Court has repeatedly refused to extend sovereign immunity to counties."<sup>58</sup>

Finally, the Court again considered the issue of state liability under the ADA in *United States v. Georgia*.<sup>59</sup> *Georgia* dealt with Title II of the ADA, which deals with discrimination against the disabled in public programs.<sup>60</sup> In *Georgia*, the public program was the state prison, and prisoner Tony Goodman, a paraplegic inmate, alleged that he was housed in such a narrow cell that he could not turn his wheelchair around without assistance, that often assistance was not forthcoming forcing him to spend long periods in his own waste, and that he was deprived of medical attention and other prison services.<sup>61</sup> Goodman sued under both Title II and the general civil rights statute, 42 U.S.C. § 1983, seeking damages and injunctive relief against the state and its department of corrections.<sup>62</sup> Justice Scalia wrote for a unanimous Court finding that Goodman had alleged conduct that, if proven, would potentially violate not just Title II, but the Eighth Amendment's guarantee against cruel and unusual punishment.<sup>63</sup> The possibility of an actual constitutional violation made the case more straightforward than the *Garrett* decision<sup>64</sup> since:

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54. *Id.* at 1014 (Thomas, J., dissenting).

55. 126 S. Ct. 1689 (2006).

56. *Id.* at 1695.

57. *Id.* at 1692.

58. *Id.* at 1693.

59. 126 S. Ct. 877 (2006).

60. *Id.* at 878.

61. *Id.* at 879.

62. *Id.*

63. *Id.* at 880-81.

64. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that the Eleventh Amendment bars suits by state employees against the state for failing to comply with the

Congress is expressly granted authority to enforce . . . the *substantive provisions* of the Fourteenth Amendment [which incorporates the Eighth] by providing actions for money damages against the States. . . . Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.<sup>65</sup>

Justice Scalia was careful to admonish the lower court on remand, however, to differentiate where conduct violated Title II, but not the Constitution, and to determine whether Congress successfully abrogated state immunity as to that discrete class of conduct.<sup>66</sup> In short, the Court left for another day whether Title II of the ADA is a sufficient abrogation. Justices Stevens and Ginsburg wrote a separate concurrence that suggested there might be constitutional violations in Goodman's allegations beyond the Eighth Amendment – such as denial of access to the judicial process or denial of procedural due process.<sup>67</sup> The concurrence is obviously intended to incline the Court to find Title II to be a sufficient abrogation and provision of section five prophylactic remedy in light of the significant set of rights theoretically affected in the treatment of the disabled in public programs.<sup>68</sup>

### *The Commerce Power*

The late Chief Justice's efforts to limit the commerce power might be said to have gone up in a puff of medical marijuana. The scope of the commerce power was raised only indirectly in Roberts's Rookie Year and it triggered one of the new Chief Justice's rare dissents, or at least his willingness to join a dissent of Justice Scalia.<sup>69</sup> The scope of the commerce power is much debated with serious consequences for the balance between state and federal power – a broad conception of federal commerce power limits state authority, while construing the commerce power narrowly leaves more discretion to the states.<sup>70</sup> As mentioned, *Gonzales v. Raich*<sup>71</sup> found the intra-state use of medicinal marijuana prescribed by a doctor pursuant to

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ADA).

65. *Georgia*, 126 S. Ct. at 881 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

66. *Id.* at 882.

67. *Id.* at 884 (Stevens, J., concurring).

68. *See id.* (Stevens, J., concurring).

69. *Gonzales v. Oregon*, 126 S. Ct. 904, 926 (Scalia, J., dissenting).

70. *See* Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 PEPP. L. REV. 547, 559 (2001).

71. 545 U.S. 1 (2005).

state law nevertheless to be subject to federal prosecution under the Controlled Substances Act (“CSA”).<sup>72</sup> In *Gonzales v. Oregon*,<sup>73</sup> the primary issue was whether the Attorney General had authority to declare assisted suicide an illegitimate medical practice and to prevent doctors from using controlled substances to accomplish it.<sup>74</sup> While the majority (Kennedy, Stevens, O’Connor, Souter, Ginsburg, and Breyer) found the CSA not to reach intra-state assisted suicide as a matter of statutory and regulatory interpretation,<sup>75</sup> Justice Scalia and the new Chief would have deferred to the exercise of federal power.<sup>76</sup> Justice Thomas in dissent would have deferred, too, but more grudgingly.<sup>77</sup> In his dissent, Justice Thomas writes:

[I]n stark contrast to *Raich*’s broad conclusions about the scope of the CSA as it pertains to the medicinal use of controlled substances, today this Court concludes that the CSA is merely concerned with fighting ‘drug abuse’. . . . The majority’s newfound understanding of the CSA as a statute of limited reach is all the more puzzling because it rests upon constitutional principles that the majority of the Court rejected in *Raich* [– the states’] “traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.”<sup>78</sup>

Thomas would have found for state authority in both cases, but he dissents in *Oregon* as a matter of stare decisis, respecting what he believes was the mistakenly broad conception of federal power in *Raich* to sustain the Attorney General’s federal directive.<sup>79</sup>

#### MISLEADING LABELS

It is fashionable, though I think unilluminating, to toss around liberal and conservative labels about the Justices. This usage merely perpetuates the mistaken view that the members of the Court are necessarily outcome driven and that no one on the Court is capable of following the law as written. Justice Thomas is popularly labeled a judicial conservative, for example, and his preference for state over federal authority is principled and consistent. His willingness in *Gonzales v. Oregon* to follow precedent against his principled federalism<sup>80</sup> would be singled out by some

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72. *Id.* at 33.

73. 126 S. Ct. 904 (2006).

74. *Id.* at 911.

75. *Id.* at 925.

76. *Id.* at 926 (Scalia, J., dissenting).

77. *Id.* at 939-41 (Thomas, J., dissenting).

78. *Id.* at 940 (Thomas, J., dissenting) (citation omitted).

79. *Id.* (Thomas, J., dissenting).

80. *See id.* (Thomas, J., dissenting).

conservatives as laudatory, and by others, as treachery (i.e., preferring incorrect judicial opinion to constitutional text and original meaning).

Even in a political sense, the partisan labeling is foggy. Attorney General Ashcroft is also described as a conservative, so why then is he so eager to displace the states? It might be argued that there are two competing conservative principles in play: respect for state authority versus respect for the unalienability of human life. Justice Scalia touches on this question in his *Gonzales v. Oregon* dissent:

The Court's decision today is perhaps driven by a feeling that the subject of assisted suicide is none of the Federal Government's business. It is easy to sympathize with that position. The prohibition or deterrence of assisted suicide is certainly not among the enumerated powers conferred on the United States by the Constitution, and it is within the realm of public morality (*bonos mores*) traditionally addressed by the so-called police power of the States. But then, neither is prohibiting the recreational use of drugs or discouraging drug addiction among the enumerated powers. From an early time in our national history, the Federal Government has used its enumerated powers, such as its power to regulate interstate commerce, for the purpose of protecting public morality—for example, by banning the interstate shipment of lottery tickets, or the interstate transport of women for immoral purposes. . . . *Lottery Case* . . . (1903). Unless we are to repudiate a long and well-established principle of our jurisprudence, using the federal commerce power to prevent assisted suicide is unquestionably permissible. The question before us is not whether Congress *can* do this, or even whether Congress *should* do this; but simply whether Congress *has* done this in the CSA. I think there is no doubt that it has. If the term "*legitimate* medical purpose" has any meaning, it surely excludes the prescription of drugs to produce death.<sup>81</sup>

Like Justice Thomas, Justice Scalia thinks the regulation of assisted suicide lies outside federal power as an original, textual understanding of the Constitution, but as a matter of precedent, the exercise of federal power over drug use has come to be accepted.<sup>82</sup> Perhaps with two new members, the Court can take up the issue of when judges have an obligation to correct the mistakes of past opinions. The Supremacy Clause might well be viewed as

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81. *Id.* at 939 (Scalia, J., dissenting).

82. *Id.* (Scalia, J., dissenting).

supplying a different answer than the one Justice Scalia gave if, that is, supremacy includes respecting that which is within and without the scope of enumerated authority given to the federal government. If Justice Scalia is right that the regulation of morality (*bonos mores*) has traditionally been a state matter, it seems odd to argue, as he does, for deference to federal power on the subject. There is a good case, of course, that the state law authorizing assisted suicide contradicts the First Principles of the American republic (persons created equal with an *inalienable* right to life), and that the Declaration of Independence trumps the Supremacy Clause, but Justice Scalia does not understand the judicial role as appropriately opining on the objective truth of the human person.<sup>83</sup>

Putting high theory aside, it is standard doctrine that when federal and state power compete over the same topic, there is a problem of “pre-emption.” Justice Scalia, in his dissent for himself, Chief Justice Roberts and Justice Thomas, claims that the Attorney General’s Directive would not have conflicted with Oregon law.<sup>84</sup> Is that true? Oregon permits assisted suicide; the federal government, by the Directive, precludes it. Justice Scalia says that is not a conflict since the Directive merely prohibits what the state law allows.<sup>85</sup> There would only be a conflict, he says, if a state *required* assisted suicide.<sup>86</sup> That is a sufficient argument to address conflict preemption understood as impossibility, but it understates the type of conflict preemption premised on frustration of purpose. In truth, it would be interesting to know if any member of the Court understands frustration of purpose as running in two directions and not just when the state law is said to frustrate a federal objective. As some of the oral argument in *Oregon* suggested, if the Attorney General took away controlled substances, the state objective of facilitating suicide would be far more difficult and perhaps painful.<sup>87</sup>

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83. Douglas W. Kmiec, *Natural Law Originalism – Or Why Justice Scalia (Almost) Gets It Right*, 20 HARV. J. L. & PUB. POL’Y 627 (1997); Douglas W. Kmiec, *The Human Nature of Freedom and Identity— We Hold More Than Random Thoughts*, 29 HARV. J. L. & PUB. POL’Y 33 (2005).

84. *Gonzales*, 126 S. Ct. at 934 (Scalia, J., dissenting).

85. *Id.* (Scalia, J., dissenting) (“The Directive merely interprets the CSA to prohibit, like countless other federal criminal provisions, conduct that happens not to be forbidden under state law (or at least the law of the State of Oregon).”).

86. *Id.* (Scalia, J., dissenting) (“[T]he Directive does not purport to pre-empt state law in any way, not even by conflict pre-emption - unless the Court is under the misimpression that some States *require* assisted suicide.”).

87. Transcript of Oral Argument at 11, *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) (No. 04-623), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-623.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-623.pdf).

### PROPERTY UNTOUCHED

In his last Term, the late Chief Justice Rehnquist saw the constitutional protection of private property also diminished. In the area of eminent domain, there was the transmutation of “public use” into “private use for economic development” in the very controversial *Kelo v. City of New London*<sup>88</sup> case. A less well remembered opinion was *Lingle v. Chevron*,<sup>89</sup> where the standard of review matching means and ends for land use cases became far more deferential and approving of regulation. Mercifully, the Roberts’s first year gave property a respite.

It was thus unfortunate reality that as the late Chief Justice was clinging to life, and as the first year of his successor got underway, the Rehnquist legacy to some degree was already eroding. Instead of Rehnquist’s clarity, the religion clauses remained cloudy; state sovereign immunity was less robust, and federalism was a sometime thing, with the Commerce Clause seemingly back for all-purpose duty, except that the states might prevail when a federal official over-reaches.

William Rehnquist served on the Supreme Court of the United States for thirty-three years.<sup>90</sup> He served as Chief Justice for nineteen of them.<sup>91</sup> May he rest in peace.

### MEET THE NEW PLAYERS

So who are the new members? Garrison Keillor described John Roberts this way:

Mr. Roberts has a good story. A boy grows up in Indiana, which is a disadvantage, but he overcomes it by hard work and clean, purposeful living. He learns how to excel without offending anybody, which is a great and rare art, and he ascends to the ivy-clad citadel of Harvard, and he rises through the ranks—managing editor of the law review, Supreme Court clerk, job at the White House—and he plows forward . . . . Political labels don’t quite stick

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88. 545 U.S. 469 (2005).

89. 544 U.S. 528 (2005).

90. Members of the Supreme Court of the United States, <http://www.supremecourtsus.gov/members.pdf> (last visited Nov. 15, 2006). William Rehnquist was appointed to the Court on January 7, 1972. He was elevated to Chief Justice on September 26, 1986 and his service ended on September 3, 2005. *Id.*

91. *Id.*

to him; friends of various stripes have only good things to say about him. He is cool.<sup>92</sup>

Roberts is cool and he has a good mind—and judicial humility (a quality not always associated with the Supreme Court) was on display from the beginning. He told us in opening statement:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them.

The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.

Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.

And judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.<sup>93</sup>

In year one, Roberts was faithful to this view. And darn if he isn't reconfiguring the Court as "the least dangerous branch" by in some ways making it the least interesting one. Marcia Coyle takes up the confirmation process later, but it was clear that some Senators, reflecting the prodding of interest groups, were anxious to have Roberts opine on one political issue or another, be it abortion or the war on terror. These are vitally important topics to be sure, but as John Roberts made plain in his answers, they are for us, the people, and the elected delegates we have sent to the House and Senate and state assemblies, to address.

#### JUST CASES PLEASE – "STANDING" ON THE SIDE WITH THE LAW

The role of a judge is intended to be limited—the resolution of specific cases—requiring interpretative skill and respect for enacted text and precedent, but most of all a commitment to maintaining those legal doctrines and landmarks which keep the powers of government separate. This can be

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92. Garrison Keillor, *The Inexorable Ascent of A Harvard Man*, THE OLD SCOUT (July 26, 2005), available at [http://prairiehome.publicradio.org/features/deskofgk/2005/old\\_scout/08/02.shtml](http://prairiehome.publicradio.org/features/deskofgk/2005/old_scout/08/02.shtml).

93. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Judiciary Comm.*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

arcane lawyerly stuff, but Madison knew, as we do today, that dividing power prevents its abuse and ensures impartiality.<sup>94</sup>

Back in 1993, when John Roberts was not in public office and was outside searching national scrutiny, he was invited to participate in an administrative law discussion in the *Duke Law Journal*. No one blowing the dust off this academic volume will find Robert's thinking on partial birth abortion or same-sex marriage or any of the other matters that make headlines. What will be found, however, is a fair-minded lawyer's commitment to observing the doctrine of standing.<sup>95</sup>

Standing, as first year law students learn, qualifies one to bring a case to court.<sup>96</sup> The courthouse was never envisioned as a locus for all purpose problem-solving, but the disposition of "cases or controversies" where someone who has suffered tangible injury can seek the redress the law permits. But let then-counselor Roberts speak for himself:

Standing is an apolitical limitation on judicial power. It restricts the right of conservative public interest groups to challenge liberal agency action or inaction, just as it restricts the right of liberal public interest groups to challenge conservative agency action or inaction. It precludes Congress from assigning a right to sue to those without injury whether the statutory interest sought to be judicially enforced is perceived as liberal or conservative. The relatively recent growth of conservative public interest groups, and the even more recent change in presidential administrations, should set the stage for rethinking the facile assumption that standing cloaks a political agenda. *It does derive from and promote a conception that judicial power is properly limited in a democratic society.* That leaves greater responsibility to the political branches of government—however they are inclined. To the extent that is a political agenda, it is the one the Framers enshrined in the Constitution.<sup>97</sup>

This respect for constitutional structure and democratic choice is not simple-minded majoritarianism. The founders secured individual rights from free speech to private property not just by dividing power, but by articulating express limits or prohibitions on the power so divided.

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94. JAMES MADISON ET AL., *THE FEDERALIST* NO. 48 332-38 (Jacob E. Cooke ed., 1961).

95. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 *DUKE L.J.* 1219, 1230-31 (1993).

96. *BLACK'S LAW DICTIONARY* 1442 (8th ed. 2004).

97. Roberts, Jr., *supra* note 95, at 1230-31.

Much of the Senate's questioning confused who is judge and who is legislator. John Roberts shared none of that confusion in the hearings or his first year.

Take as an exemplar case of Roberts's humility: *DaimlerChrysler Corp. v. Cuno*,<sup>98</sup> speculated to be a major dormant commerce challenge to investment tax credits. An Ohio law reduces a company's corporate franchise tax liability in amounts tied to the purchase of "new manufacturing machinery and equipment" that is installed in the state of Ohio.<sup>99</sup> The Sixth Circuit found that to violate the dormant Commerce Clause as discriminatory against out of state commerce.<sup>100</sup>

There was precedent supporting the Sixth Circuit view. Many previous cases have found taxes that appear innocuous on their own to discriminate against interstate commerce when working in connection with another statutory implement such as a tax or subsidy. In *West Lynn Creamery, Inc. v. Healy*,<sup>101</sup> all raw milk sold by dealers to Massachusetts retailers was taxed; but then the proceeds from that tax were distributed to in-state dairy farmers. *Maryland v. Louisiana*<sup>102</sup> had the state of Louisiana placing a first use tax on natural gas and then using various tax credits and exclusions to benefit in-state suppliers. In both instances, the Court struck down the statutes because they benefited in-state producers to the detriment of out-of-state producers and had no justifiable reason other than economic protectionism.<sup>103</sup>

There have also been several cases where a tax was ruled unconstitutional because it was based upon activities conducted outside the state. The state of New York, in *Westinghouse Electric Corp. v. Tully*,<sup>104</sup> was assessing a tax on corporations based on the relative proportion of exports they had within the state; meaning the business they conducted in New York could remain the same, but the tax would increase if business increased outside the state.<sup>105</sup> Similarly, it was found discriminatory for exemptions from taxes to be provided only to non-profits operating principally for the benefit of residents of the state in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*.<sup>106</sup>

Now, it is possible to distinguish those cases. The Ohio investment tax credit is not working in concert with any other statute to benefit those that invest in-state, while at the same time assessing a penalty on those that do

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98. 126 S. Ct. 1854 (2006).

99. *Id.* at 1859.

100. See *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004).

101. 512 U.S. 186 (1994).

102. 451 U.S. 725 (1981).

103. *Id.* at 757-58; *West Lynn Creamery*, 512 U.S. at 192-96.

104. 466 U.S. 388 (1984).

105. *Id.* at 391-94.

106. 520 U.S. 564 (1997).

not. As mentioned above, the investment tax credit is available to anyone interested in building a plant or locating new equipment in Ohio.<sup>107</sup> There is no preferential treatment for those that are already doing business or producing goods in Ohio.<sup>108</sup> Further, no restrictions are being placed on businesses that operate outside of the state, in whole or in part, to prevent them from participating in the investment tax credit program.<sup>109</sup> Nothing about the investment tax credit exhibits the kind of protectionism being displayed in the above mentioned cases. The investment tax credit is also not proportionally based on activity that goes on outside the state of Ohio. Unlike in *Westinghouse* and *Camps Newfound*, if a corporation decides not to invest in Ohio, there is no alteration in the taxes assessed by Ohio.

The essential argument against the Ohio investment tax credit was that there *is* a penalty because investing in the state yields a lower effective tax rate compared to those that invest outside the state.<sup>110</sup> While this might technically be true, there is no additional tax being placed on out of state businesses and it is not an actual change in the tax rate.<sup>111</sup> Additionally, the investment tax credit lasts for seven years, at which point corporations pay the full amount of their taxes. The investment tax credit also lacks the effort to coerce operations to be focused on serving the state, as was the case in *Camps Newfound*. There is no restriction on how much business must be conducted in the state to be awarded the benefit or to whom the products and services produced by the new facilities can be supplied.<sup>112</sup> The investment tax credit merely promotes investment in the state through the tax structure to any corporation interested, and this ought to be understood as constitutionally permissible. The benefit provided to those situated in the state is not being provided at the expense of those outside the state, which has traditionally been where state taxes and credits have come into conflict with the dormant Commerce Clause.

#### SO HOW DID THE ROBERTS COURT DECIDE?

No taxpayer standing—unanimously—in an opinion by the new Chief Justice with a concurrence by Justice Ginsburg suggesting she favors broader standing than the Chief was describing. All agreed, however, that the alleged injury was not “concrete and particularized,” but instead a

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107. *Cuno v. DaimlerChrysler, Inc.*, 126 S. Ct. 1854, 1859 (2006).

108. *Id.*

109. *Id.*

110. *Id.* at 1859-68.

111. *Id.*

112. *Id.*

grievance the taxpayer “suffers in some indefinite way in common with people generally.”<sup>113</sup> In addition, the injury was not “actual or imminent,” but instead “conjectural or hypothetical.”<sup>114</sup> As an initial matter, the Chief Justice found for the Court, it is unclear that tax breaks of the sort at issue here do in fact deplete the treasury. The very point of the tax benefit is to spur economic activity, which in turn *increases* government revenues.<sup>115</sup> Who knows, it might work.

Roberts also reasoned that the plaintiffs’ alleged injury was “conjectural or hypothetical” in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit.<sup>116</sup>

Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff’s tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing.<sup>117</sup>

As the Chief Justice explained,

[The] taxpayer-plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him. To the contrary, the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the “broad and legitimate discretion” of lawmakers, which “the courts cannot presume either to control or to predict.” . . . Under such circumstances, we have no assurance that the asserted injury is “imminent” – that it is “certainly impending.”<sup>118</sup>

To most accounts of the Term, *DaimlerChrysler* was not of signal importance. With respect, these commentators failed to grasp John Roberts’s promise of judicial humility or to take it seriously. The investment tax questions remain, and at some point in the future, claimants with tangible economic injury may raise some of the merits issues anew. In the meantime, however, the effect is to make state policymakers more important than Supreme Court Justices—at least in terms of state tax policy.

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113. *Id.* at 1862.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1862-63.

118. *Id.* at 1863.

State policymakers, no less than their federal counterparts, retain broad discretion to make “policy decisions” concerning state spending “in different ways . . . depending on their perceptions of wise state fiscal policy and myriad other circumstances.”<sup>119</sup> Federal courts may not assume a particular exercise of this state fiscal discretion in establishing standing. Justiciability is a subtle matter, and in law school and legal commentary, it has not been on the front lines. It is, however, essential to the Roberts’s Revolution in favor of the rule of law.

#### RESTRAINT AND ABORTION

Another, perhaps even more profound, exercise of judicial restraint related to the Court’s sole abortion case – *Ayotte v. Planned Parenthood*.<sup>120</sup> The facial invalidity standard in the abortion context is not the usual, demanding one, but a highly relaxed standard that in the past has led to voiding abortion restrictions easily and in their entirety, nationwide. *Ayotte* said—if it is reasonable to construe a statute to avoid a narrow aspect of hypothetical unconstitutionality—in that case the need for a waiver of parental notice is a bona fide health emergency—then the Court should construe the statute accordingly.<sup>121</sup>

How significant is *Ayotte*? Does it signify that the Court intends to regularize the abortion jurisprudence, such that it will now follow the more customary and demanding standard for proving facial invalidity—namely, that a law has no conceivable constitutional application? Since at least *Planned Parenthood v. Casey*,<sup>122</sup> the Court has seemingly applied a standard that promotes invalidity asking only whether some fraction of the subset of women affected by a regulation are unduly burdened. In *Casey* itself, this invalidated the spousal notice requirement even though an overwhelming percentage of women either experienced no burden or fell within one of several exceptions for an abusive spouse and the like.<sup>123</sup>

By contrast, *Ayotte* stands for three principles: nullify no more of an unconstitutional law than is necessary, do not rewrite state laws to make them constitutional, and stay true to the intent of the legislature in passing the law at issue.<sup>124</sup> *Ayotte* was the last opinion authored for the Court by Justice O’Connor. It was a fitting end and unanimous, something no other

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119. *Id.*

120. 126 S. Ct. 961 (2006).

121. *Id.* at 963.

122. 505 U.S. 833 (1992).

123. *Id.* at 895-98.

124. *Ayotte*, 126 S. Ct. at 967-69.

abortion ruling had ever been. That said, this new Roberts's Court approach of minimalist rulings—never deciding more than is necessary—takes some mental adjustment.

The opinion with its narrow remedial focus, of course, did not clarify whether abortion restrictions must always have a health exception—that is, in emergency and non-emergency situations alike. That is a question on the Court's horizon as it has heard oral argument on the constitutionality of the federal law limiting partial birth abortions.<sup>125</sup>

Read most broadly, *Ayotte* could be understood as laying down a new limit on lower court judges' authority to issue sweeping decisions that nullify new abortion laws. At a minimum, *Ayotte* calls for a much more discrete, refined review of the ways in which a law might be enforced validly. Some argue this more particularized review casts doubt on the Court's reliance in *Stenberg*<sup>126</sup> upon an individual doctor's professional judgment about when a health exception is needed as that practice leaves virtually no statute limiting abortion free from doubt.

#### ACHIEVING CONSENSUS

Beyond humility, there was also unanimity. John Roberts promised and delivered that he would encourage greater consensus and collegiality on the Court. Unanimity indeed prevailed. 37.7% of the argued cases were decided unanimously. An additional 12% of the submitted cases were also decided in a manner where the Justices in their entirety concurred in the outcome leading to remarkable percentage of roughly 49% of the cases being decided without dissent. That's a hair shy of half of the Court's docket, and it is extraordinary. There were also fewer, significantly fewer, five to four opinions and fewer separate opinions all together—thirty-four fewer to be exact.

What's the cause of this happiness on the Supreme Court? In part, it is the conscious desire on the part of John Roberts to issue rulings on the narrowest possible ground. He said in a university speech that if it was not necessary to decide, it was not necessary to decide and he would not reach out for it.<sup>127</sup> On smaller ground, the Justices would be chummier.

In addition, one gets the impression, though only the Justices know for sure, that the conference proceedings may be allowing a fuller discussion of the issues and interplay among the Justices themselves. The late Chief Justice William Rehnquist prided himself on not having what he termed

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125. *Gonzalez v. Carhart*, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (U.S. Feb. 21, 2006) (No. 05-380) (challenging a federal appeals court ruling striking down that federal ban for lack of a health exception).

126. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

127. *Chief Justice Says His Goal is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16.

“sidebar” discussions around the conference table. Rehnquist preferred for differences to come out in the writing—the circulation of draft opinions. Well, differences probably did come out that way, but there was also less opportunity for agreement. It is human nature that setting something in print stiffens resistance. Roberts’s years as a Supreme Court advocate may be paying dividends now because his refined skill of effective preparation and answer also allows—now that he gets to go behind the curtain—this skilled legal thinker to, in essence, close the deal orally at the conference table.

But is unanimity a good thing? One aspect of the unanimity is to have presumably more stable opinions. If Senator Specter’s conception of “super stare decisis” means anything, it probably should mean something more when associated with the unanimous judgment of the Supreme Court.<sup>128</sup> Yet, if unanimity is also premised upon the narrowness of the ruling, is that actually judicial restraint or merely hiding the ball, as students always complain of Socratic law professors? It is a worthy proposition to inquire whether narrow rulings that produce unanimous outcomes, in fact, are reserving to the Supreme Court more power rather than it is giving it up.

Beyond humility and unanimity, the Roberts’s method also seems to give almost total emphasis to primary legal materials—statutes and cases—over the speculations of law reviews. Several scholars have noted fewer citations to the work of the academy.<sup>129</sup> I have not counted, but if true, it is perfectly consistent with a model of judicial restraint and anyone who has read a law review lately would know what I mean.

#### ENTER ALITO

These are the ingredients of the Roberts’s restraint revolution: humility, unanimity, and primary materials. But, there is one more essential element: the Honorable Samuel A. Alito, Jr.—the 110th Justice of the United States. As already noted, Roberts and Alito in year one saw eye-to-eye in over 90% of the cases in the Term.

Like his restraint revolution counterpart, Sam Alito telegraphed his approach at his confirmation hearing. Then-Judge Alito explained:

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128. Dana Milbank, *The Issue Senators Dare Not Speak of by Name*, WASH. POST, Sept. 13, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301127.html>.

129. See, e.g., Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134-35 (1986); Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. REV. 105, 105 (2004).

I had the good fortune to begin my legal career as a law clerk for a judge [Leonard Garth] who really epitomized open-mindedness and fairness. He read the record in detail in every single case that came before [him]; he insisted on scrupulously following precedents, both the precedents of the Supreme Court and the decisions of his own court, the Third Circuit. He taught all of his law clerks that every case has to be decided on an individual basis. And he really didn't have much use for any grand theories.<sup>130</sup>

It is fitting to draw these overview remarks about the Roberts's Rookie Year to a close with Justice Alito's judicial rules of thumb, which, in truth, elaborate on the elements of the Roberts's restraint revolution – humility, unanimity, and law. Alito said:

Good judges develop certain habits of mind. One of those habits of mind is the habit of delaying reaching conclusions until everything has been considered. Good judges are always open to the possibility of changing their minds based on the next brief that they read, or the next argument that is made by an attorney who is appearing before them or a comment that is made by a colleague during the conference on the case, when the judges privately discuss the case.<sup>131</sup>

Justice Alito's first opinion for the Roberts's Court—befittingly unanimous—gave illustration to these qualities. The Court struck down a state evidentiary rule barring a criminal defendant from introducing evidence that someone else committed the crime. That ruling came in the case of *Holmes v. South Carolina*.<sup>132</sup>

The state had a rule that evidence alleging another person's guilt was not allowed if the prosecution had offered "strong" physical evidence of the defendant's guilt. The state supreme court decided that, when the prosecution has put on a case with forensic evidence that provided a strong indication of guilt, evidence about a third party's alleged culpability could not be admitted because it did not raise a reasonable inference of innocence.<sup>133</sup> Writing for the Court, Alito's opinion said that the state rule focused on the strength of only one party's evidence, and as such, it could not support a conclusion about the strength of contrary evidence.<sup>134</sup>

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130. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2006) (statement of Judge Samuel A. Alito, Jr.).

131. *Id.*

132. 126 S. Ct. 1727 (2006).

133. *Id.* at 1731.

134. *Id.* at 1734-35.

The Alito opinion, alas, did not get much attention. It is perhaps unsurprising that fair trial rights include the ability to put on a defense, even when the prosecution looks formidable. Of course, the lack of attention might have also been traceable to the Court's favorable ruling in behalf of Anna Nicole Smith—a/k/a Vickie Lynn Marshall—the same morning.<sup>135</sup> The Court found Mrs. Marshall's claim in bankruptcy court to be "alleg[ing] the widely recognized tort of interference with a gift or inheritance."<sup>136</sup> Thus, she was seeking a judgment against her step-son, not the probate or annulment of a will, said Justice Ginsburg for a unanimous (what else) Court. "Under our federal system, Texas cannot render its probate courts exclusively competent to entertain a claim of that genre," even if it does have exclusive authority over the validity of wills.<sup>137</sup>

#### A FEW HEADLINES

As mentioned at the outset, this was a landmark Term more for its changes of personnel than substantive result, but in the presentations and panels that follow some of the headlines from the past Term that emerge are:

*\*In the war on terror, the President does not have a blank check.* The question is: was he short-changed?

*\*Federal-state cases split.*

While the late Chief Justice's vision of a more controlled commerce power remained elusive, states won a number of minor skirmishes. The states were free to do mid-census re-districting,<sup>138</sup> to pursue, as discussed, assisted suicide without federal interference over the drugs used; and given the ruling in *Ayotte*, the states may have more latitude for abortion regulation. The states did not always win, of course. As mentioned earlier, the Eleventh Amendment was scaled back, both in respect to the bankruptcy power and also with respect to Title II of the ADA.

*\*Speech claims did not fare well.*

There were a number of intriguing speech and association claims brought before the Court. These largely did not prevail. Law schools that

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135. *Marshall v. Marshall*, 126 S. Ct. 1735 (2006).

136. *Id.* at 1739.

137. *Id.* at 1750.

138. *League of United American Citizens v. Perry*, 126 S. Ct. 2594 (2006).

did not want to talk to the military but wanted to accept federal money were told money and military go together, and there is no speech or association infringement implicated by that combination.<sup>139</sup> In the public workplace, whistle blowers talking about their job responsibilities are talking outside the protection of the First Amendment.<sup>140</sup> If you think campaign money is speech, then the forces of free (spending) speech invalidated Vermont's attempt at spending and low contribution limits.<sup>141</sup>

*\*The business community was treated reasonably well.*

There were favorable rulings in the anti-trust and patent areas, but it got easier to collect on retaliatory discrimination claims.<sup>142</sup>

*\* The criminal justice search rules were re-calibrated – largely in law enforcement's favor.*

The exclusionary rule does not apply to no-knock violations;<sup>143</sup> police can enter a dwelling when they see violent behavior through the window,<sup>144</sup> but if co-owners are present, both must consent to a premises search.<sup>145</sup>

The appointment of Roberts and Alito bring to the Court a partnership in favor of judicial restraint. This posture supersedes the view of the Court as divided: liberal, swing vote, conservative. There may still be natural right-left groupings, with Justices Scalia and Thomas seeing matters differently than Justices Souter, Ginsburg, Stevens and Breyer. But Roberts's and Alito's attitude of humility and the new Chief's desire and capability to achieve unanimity along with Justice Kennedy's free thinking ways should mean a less ideological Bench overall. And should this prove true, the strengthening of the rule of law will best summarize Roberts's Rookie Year.

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139. *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006).

140. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

141. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

142. *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).

143. *Hudson v. Michigan*, 126 S. Ct. 2159 (2006).

144. *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943 (2006).

145. *Georgia v. Randolph*, 126 S. Ct. 1515 (2006).

PROFESSOR KMIEC: Now, as our favorite visiting professor at Pepperdine, Akhil Amar, takes the podium to discuss the criminal justice cases, his topic will be introduced by a few comments by Associate Justice Samuel Alito.

**(Video clip shown)<sup>1</sup>**

Enough on the procedure; more on the substance.

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1. From Judge Samuel Alito's Confirmation Hearing:

SENATOR RUSS FEINGOLD: Do you think it could ever be constitutional to admit evidence obtained by torture against an individual who is being charged with a crime?

JUDGE SAMUEL ALITO: The Fifth Amendment prohibits compelled self-incrimination, and it's long been established that evidence that is obtained through torture is inadmissible in our courts; that's the governing principle.

SENATOR RUSS FEINGOLD: So, I take it, the answer would be it would not be constitutional to admit evidence obtained by torture against individuals being charged with a crime.

JUDGE SAMUEL ALITO: In all the contexts that I am familiar with, that would be the answer.

SENATOR RUSS FEINGOLD: Thank you for that answer. I want to follow up one question that Senator Lahey asked this morning about the constitutionality of executing an innocent person. You said that the Constitution, of course, is designed to prevent that, and we all agree on that, but let's say that the trial was procedurally perfect, and there were no legal or constitutional errors, but later evidence proves that the person convicted was unquestionably innocent. Does that person have a constitutional right not to be executed?

JUDGE SAMUEL ALITO: The person would first ask to avail himself or herself of the procedures that Congress has specified for challenging convictions after they've become final. If this individual has been convicted and has gone through the whole process of direct appeal either in the state system or in the federal system, then there are procedures. States have procedures for collateral attacks on federal convictions and on state convictions, and the person would have to go through procedures that . . .