

# THE BUSH IMPRINT ON THE SUPREME COURT: WHY CONSERVATIVES SHOULD CONTINUE TO YEARN AND LIBERALS SHOULD NOT FEAR

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

—Supreme Court reporter Linda Greenhouse<sup>1</sup>

*It is not often in the law that so few have so quickly changed so much.*

—Justice Stephen Breyer<sup>2</sup>

*The fact that the Roberts Court could do so much in its first term makes it more likely that it will continue this way.*

—Professor Richard Fallon<sup>3</sup>

## I. INTRODUCTION

The verdict is in: Scholars, commentators, and even a Justice have coalesced around the idea that with John G. Roberts in the center seat, “conservatives seem to have reached the promised land.”<sup>4</sup> Some analysts are even convinced that “[t]he rightward

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1. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right: A 5-4 Dynamic with Kennedy as Linchpin*, 156 N.Y. Times A1 (July 1, 2007). Greenhouse continued, “By the time the Roberts court ended its first full term on Thursday, the picture was clear. This was a more conservative court, sometimes muscled so, sometimes more tentatively, its majority sometimes differing on methodology but agreeing on the outcome in cases big and small.” *Id.*

2. J. Stephen Breyer, Op. Announcement, *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Justice Breyer included this comment in his oral but not written dissent) (available at [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_908/opinion/](http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion/)). Minute 32.50 contains the above quote.

3. Joan Biskupic, *Roberts Steers Court Right Back to Reagan*, USA Today 8A (June 28, 2008).

4. Nina Totenberg, *The Roberts Court and the Role of Precedent*, National Public Radio, Morning Edition, <http://www.npr.org/templates/story/story.php?storyId=11688820> (July 3, 2007). The full quote is as follows:

For decades conservatives have yearned for control of the U.S. Supreme Court. For decades, they

shift [on the Court] is likely to prove a lasting legacy of the Bush presidency.”<sup>5</sup> Or, as Jeffrey Toobin recently put it, “As George W. Bush staggers toward the conclusion of his second term, he can point to at least one major and enduring project that has gone according to plan: the transformation of the Supreme Court.”<sup>6</sup>

No one can deny that the 2006 term, in particular, was a good one for conservatives. Of the seventy-one disputes the Court resolved after hearing oral arguments, only twenty-nine were victories for liberals.<sup>7</sup> The rest were decidedly right-of-center, including the anxiously awaited *Gonzales v. Carhart*<sup>8</sup> and *Parents Involved in Community Schools v. Seattle School District*.<sup>9</sup>

But did 2006 represent a decisive break from the past, a true “transformation,” as some analysts suggest?<sup>10</sup> Relative to the Court’s last major transformation—when Richard Nixon replaced Earl Warren with Warren Burger in 1969—the answer is no. As we explain in Part II, empirical scrutiny of the Court’s voting patterns reveals no significant distinctions between the Rehnquist and Roberts Courts. And, as we show in Part III, while it is easy enough to point to several cases that may represent a break with existing case law—*Parents Involved* and *Gonzales*, for example—it is no more difficult to identify areas of substantial continuity, such as criminal law and access to the federal courts. Moreover, even in particular cases—*Parents Involved* and *Gonzales*, not excepted—our analyses suggest that the outcomes would have been no different had the Rehnquist, and not the Roberts, justices resolved them. In short, the transition from the Rehnquist to the Roberts Court is less a significant break than a continuation of the Republican Court era, an era that began with Nixon’s four appointees and has remained undisturbed ever since.

If relative continuity, and not dramatic change, is the more apt description, then

have been frustrated in achieving that goal, despite having as many as seven Republican appointees on the court. This term, though, conservatives seem to have reached the promised land. With new Chief Justice John Roberts at the helm and Justice Samuel Alito replacing [J]ustice Sandra Day O’Connor, the direction of the court for this term, at least, has been transformed.

*Id.* Exceptions are few and far between. See e.g. Orin S. Kerr, *O’Connor’s Successor Will Likely Be a Swinger*, L.A. Times 1 (July 3, 2005). “O’Connor’s retirement removes a swing vote. But that may not have a dramatic effect on the outcomes of the [C]ourt’s biggest cases.” *Id.*

5. David G. Savage, *Conservative Courts Likely to be Bush Legacy*, L.A. Times 11 (Jan. 2, 2008). See also David Alistair Yalof, *Conservative Supreme Court will be Bush Legacy*, 8 UConn. (Fall–Winter 2007) (available at <http://uconnmagazine.uconn.edu/fwin2007/feature4.html>); Claire Bolderson, *Bush Sets U.S. Supreme Court Legacy*, <http://news.bbc.co.uk/2/hi/americas/7065480.stm> (October 27, 2007).

6. Jeffrey Toobin, *Five to Four*, 83 New Yorker 35 (June 25, 2007). See also Jeffrey Toobin, *Commentary: Conservative Supreme Court is Bush’s Legacy*, <http://www.cnn.com/2007/US/law/10/01/Toobin.scotus/index.html> (last updated Oct. 1, 2007) [hereinafter Toobin, *Commentary*].

The first Monday in October—the traditional start of a new Supreme Court term—comes this year at a dismal political moment for President Bush. With his popularity shattered, his majority in Congress gone and his war in Iraq stalemated, the president can point to few victories in his second term. But Monday is a reminder of what may be his most enduring triumph: the transformation of the Supreme Court.

*Id.*

7. For the source of these numbers, see *infra* note 15.

8. 127 S. Ct. 1610 (2007).

9. 127 S. Ct. 2738 (2007).

10. Toobin, *Commentary*, *supra* n. 6 (Bush’s “enduring triumph” is the “transformation” of the Court); Yalof, *supra* n. 5 (“George W. Bush may have done more to transform the constitutional landscape in a conservative direction than any president in the past century, including Ronald Reagan and Richard Nixon.”).

reports of President Bush's "most enduring" legacy are either way premature, greatly exaggerated, or simply mistaken. This is not surprising. For the reasons we emphasize throughout, Presidents face considerable obstacles in leaving their imprint on an entire Court. Richard Nixon was able to overcome them but George W. Bush has not been so fortunate. As a result, conservatives must go on yearning and liberals need not fear—at least not for the time being.

## II. OVERALL TRENDS IN THE COURT'S DECISIONS

We can envisage many different ways of assessing the prevailing view, that the 2006 term was a banner year for conservatives. Doctrinal analyses of particular cases or areas of the law are not just possible but abound even at this early date.<sup>11</sup> So too, there is already much commentary on the practical implications of several big decisions, especially *Parents Involved*<sup>12</sup> and *Bell Atlantic Corp. v. Twombly*.<sup>13</sup>

These and other approaches are perfectly reasonable of course, but here we take a different tact: We empirically explore larger trends in the Court's decision making—something of a "by the numbers" approach.<sup>14</sup> But instead of considering patterns within a given term (à la the Harvard Law Review), we use data drawn from the 1953 through 2006 terms to make comparisons.<sup>15</sup> In this way, we can gain some historical, if empirical, perspective on the Roberts Court's place in the larger scheme of things and, in particular, assess claims about the watershed that (purportedly) was the 2006 term.

In Part III, we consider several discrete areas of the law. For now, the focus is on

11. E.g. Erwin Chemerinsky, *Turning Sharply to the Right*, 10 Green Bag 2d 423, 424 (2007) ("The Court moved significantly to the right on key issues that divide liberals and conservatives—in particular, abortion and race."); *Leading Cases: Fed. Stat. & Regs.: Standing: Taxpayer Standing—Establishment Clause Violations*, 121 Harv. L. Rev. 325, 331 (2007) ("The plurality's opinion in *Hein* draws an illusory distinction between congressional spending and executive spending in order to preclude challenges to executive discretion in federal court . . ."); *Leading Cases: Fed. Stat. & Regs.: Civ. Rights Act, Tit. VII: Statute of Limitations*, 121 Harv. L. Rev. 355, 356 (2007) (In *Ledbetter v. Goodyear Tire & Rubber Co.*, "the Court not only undercut both Morgan and Bazemore, but it also adopted an employer-based viewpoint that is illogical and contrary to the purposes of Title VII.")

12. See e.g. Michael C. Dorf, *The Supreme Court's Split over Public School Integration: Who Really Betrayed Brown's Legacy?* <http://writ.news.findlaw.com/dorf/20070702.html> (July 2, 2007) ("I'll briefly explain . . . the reasons the ruling's practical upshot is unclear."); Roger Clegg, *A Good—If Mixed Bag*, <http://article.nationalreview.com/?q=ZDFjODM4NDM4Njk1ZmJiZDY2NWwNkMmEYyYjgyOTRkYzk=> (July 5, 2007) ("The practical effect of this will be significant, and is already visible."); Am. Assn. Sch. Adminstrs, *How Supreme Court Limits on Race-Based Integration Plans Affect School Diversity Efforts*, <http://www.aasa.org/policy/content.cfm?ItemNumber=9571> (accessed Apr. 2, 2008).

13. 127 S. Ct. 1955 (2007). See Einer Elhauge, *Twombly—The New Supreme Court Antitrust Conspiracy Case*, <http://volokh.com/posts/1179785703.shtml> (May 21, 2007) ("I'm afraid the new Supreme Court case on antitrust conspiracies, *Twombly*, is quite insignificant, notwithstanding the views of [some bloggers] . . ."); Baseball Crank, *Law: More Than Just Notice*, [http://baseballcrank.com/archives2/2007/05/law\\_more\\_than\\_j.php](http://baseballcrank.com/archives2/2007/05/law_more_than_j.php) (May 21, 2007) ("In what will almost certainly be the most practically significant case of this term . . ."); PointofLaw.com, *Bell Atlantic v. Twombly*, <http://www.pointoflaw.com/archives/003906.php> (May 21, 2007) (deeming it a "welcome change" that "reduces the ability of plaintiffs' attorneys to bring extortionate complaints to be settled solely for nuisance value").

14. See Lori A. Ringhand, *The Rehnquist Court: A "By the Numbers" Retrospective*, 9 U. Pa. J. Const. L. 1035 (2007).

15. Unless otherwise indicated, we derive our data on Supreme Court cases from Harold J. Spaeth's *The Original U.S. Supreme Court Judicial Database, 1953-2006 Terms*, [http://web.as.uky.edu/polisci/ulmerproject/allcourt\\_codebook.pdf](http://web.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf) (2006). The unit of our analysis is the case citation (analu=0); and we consider all orally argued cases that resulted in a signed opinion of the Court, a judgment, or a per curiam (dec type=1, 6, or 7).

overall trends, beginning with Figure 1. Here, we depict the proportion of *cases* decided in the *conservative* direction since the 1953 term, along with vertical lines indicating each Chief Justice era: Earl Warren (1953–1968), Warren Burger (1969–1985), William H. Rehnquist (1986–2004), and John G. Roberts (2005–2006). By “cases,” we mean those that were orally argued and resulted in a signed or per curiam opinion.<sup>16</sup> By “conservative,” we follow “conventional usage.”<sup>17</sup> In issues pertaining to criminal procedure, for example, a conservative decision is one that favors the government against a person accused or convicted of a crime or denied a jury trial.<sup>18</sup>

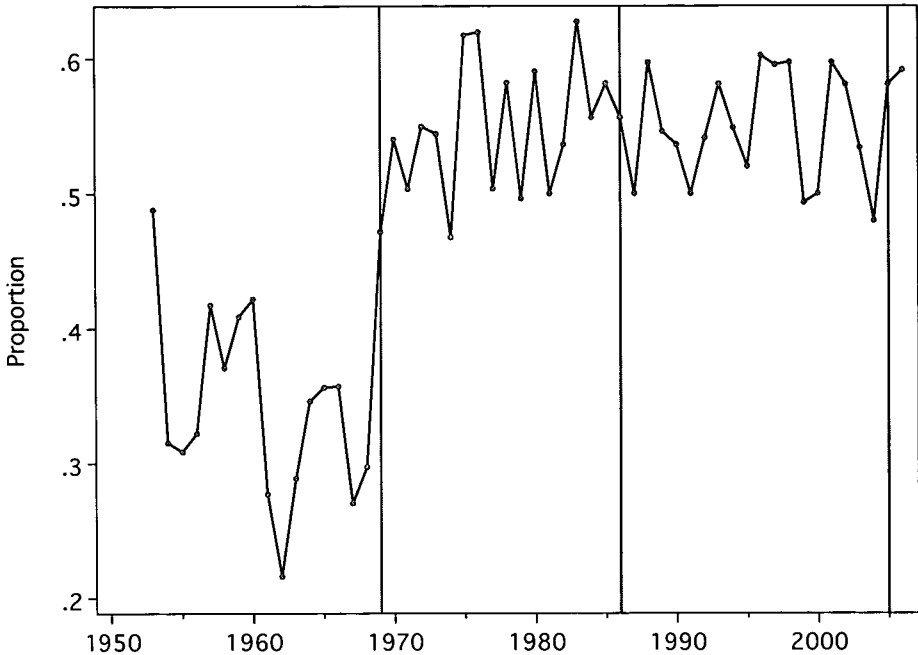


Figure 1: Ideological direction of Supreme Court decisions, 1953–2006 terms. This figure shows the proportion of decisions each term decided in the conservative direction. The solid vertical lines show the Warren Court (1953–1968 terms), the Burger Court (1969–1985), the Rehnquist Court (1986–2004), and the Roberts Court (2005–2006 terms).<sup>19</sup>

As even a mere glance at Figure 1 would attest, a big break in the data occurs in the 1969 term, between the Warren and Burger Courts. In a matter of a year, the proportion of right-of-center decisions increased by over 50 percent, from .30 in 1968 to .47 in 1969. More to the point, in comparing the overall means of conservatism during the two Court eras—the Warren Court (.34) and Burger Court (.55)—the difference, not

16. For more details, see *id.*

17. *Id.* at 51.

18. For other examples, see *id.* at 53–55. We adopt Spaeth definitions here.

19. Data are drawn from Spaeth, *supra* note 15.

surprisingly, is statistically significant.<sup>20</sup>

A similar break, we hasten to note, is *not* evident in the transition from the Burger to Rehnquist Court in 1986. In the 1985 term, Chief Justice Burger's last, 58 percent of the Court's decisions were conservative; in 1986, that figure was 56—a trivial difference. In comparing the overall means of the two eras (55 percent for Burger versus 54 percent for Rehnquist) no statistically significant difference emerges.

That we observe these different patterns should come to the surprise of no one. At the time Richard Nixon took office in 1969, the Supreme Court consisted of Chief Justice Earl Warren and Associate Justices Hugo Black, John Harlan, William Brennan, Potter Stewart, Abe Fortas, Byron White, Thurgood Marshall, and William Douglas. On average, the nine were extremely liberal—voting about seven times out of every ten in favor of parties alleging a violation of their rights or liberties, for example. The four justices Nixon appointed between 1969 and 1971, were, in contrast, quite conservative; indeed, each was (at least initially) substantially to the right of his predecessor.<sup>21</sup>

More importantly, with these appointments Nixon managed to move the center of the Court dramatically to right. This much we can see from Figure 2, which displays the swing or, more technically, the *median* justice's "ideology" for each term.<sup>22</sup> Here, ideology takes the form of an ideal point estimate (derived from analyses of voting patterns),<sup>23</sup> such that the lower, negative numbers indicate more liberal medians and the higher, positive numbers, more conservative ones.

20. Using a t-test,  $p \leq .05$ .

21. The table below reports the estimated ideal point (in parentheses) for each Nixon appointee in his first term and his predecessor's estimate in the predecessor's last term. The higher, positive numbers indicate more conservative ideal point estimates; the lower, negative numbers indicate more liberal ideal point estimates.

Nixon Appointee	Predecessor
Warren Burger (1.941)	Earl Warren (-1.165)
Harry Blackmun (1.856)	Abe Fortas (-0.947)
Lewis Powell (1.483)	Hugo Black (0.062)
William H. Rehnquist (3.544)	John M. Harlan (0.569)

These ideal point estimates come from work by Andrew D. Martin & Kevin Quinn, who derive them by analyzing the votes cast by the justices via a Bayesian modeling strategy. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 *Political Analysis* 134 (2002). The updated Martin & Quinn ideal point estimates are available at: <http://mqscores.wustl.edu/measures.php> (accessed Apr. 2, 2008). We also have posted them, along with all other data used in this study at: <http://epstein.law.northwestern.edu/research/ChangeOrNot.html> (accessed Apr. 2, 2008).

22. Formally, the median justice is "the Justice in the middle of a distribution of Justices, such that (in an ideological distribution, for example) half the Justices are to the right of (more 'conservative' than) the median and half are to the left (more 'liberal' than) the median." Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 *N.C. L. Rev.* 1275, 1277 (2005).

23. See *supra* n. 21.



Figure 2: The ideology of the median justice on the U.S. Supreme Court, 1953–2006 terms. The lower, negative numbers indicate more liberal ideal point estimates; the higher, positive numbers indicate more conservative ideal point estimates. The solid vertical lines show the Warren Court (1953–1968 terms), the Burger Court (1969–1985), the Rehnquist Court (1986–2004), and the Roberts Court (2005–2006 terms).<sup>24</sup>

To us, the trend displayed in Figure 2 is quite revealing. With the departures of Earl Warren and Abe Fortas and the elevation of Warren Burger, the justice most likely to have been the median shifted from the very liberal Thurgood Marshall (in 1968) to the moderate-conservatives Byron White and Hugo Black (in 1969).<sup>25</sup> Assuming that the Court's center plays an important role in dictating the outcomes of decisions,<sup>26</sup> it is no wonder why we see the marked turn to the right so vividly depicted in Figure 1.

Using the same logic, it is also no wonder why we see virtually no change from the

24. For details on the ideal point estimates, see *supra* note 21. We derive these estimates from Martin & Quinn's 2006 Court Data Files. They indicate the location of the median justice, and not the ideal point estimate of the justice most likely to have been the median in any given term. In other words, the estimates in Figure 2 are the weighted average of each justice's ideal point weighted by the probability that the justice in question was the median.

25. Because there were only eight members of the Court during the 1969 term, no single justice was the median; rather the median was between White and Black. Also worth noting is that while Black started his career on the Court as a liberal (with an ideal point estimate of -2.852), he drifted considerably to the right toward the end of his tenure. For more details, see Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift among Supreme Court Justices: Who, When, and How Important?* 101 *Nw. U. L. Rev.* 1483 (2007).

26. For more on the importance of the median justice, see Martin et al., *supra* note 22.

1985 Burger Court to the 1986 Rehnquist Court. To be sure, Ronald Reagan did place the extremely conservative Antonin Scalia on the Court, but Scalia took the seat of then-associate justice William H. Rehnquist, another strong conservative. As a result, Scalia's appointment did not have a discernible effect on the direction of Court decisions.<sup>27</sup> Of even greater consequence, the same person, Lewis F. Powell, was the most likely occupant of the median position in 1985 and again in 1986. While it is true that many justices—including Powell—experience ideological drift over the course of their tenures,<sup>28</sup> by the 1985 term Powell had stabilized.<sup>29</sup> And so, Reagan, perhaps the most conservative President of the twentieth century, oversaw a Court that was only marginally less liberal than it was during the Ford and Carter years. All because, in more ways than one, “the center held.”

What of the shift from the Rehnquist to the Roberts Court? Even after Justice O'Connor departed in the 2005 term, the transition more closely resembles the move from Burger to Rehnquist, that is, it lacked all the drama of the Burger-for-Warren exchange. The overall level of conservatism may have risen monotonically from the 2004 (.48) to the 2005 (.58) to the 2006 (.59) terms, as Figure 1 shows. But, if we compare the overall means of the two eras, no significant difference emerges. This holds regardless of whether we focus on (1) the entire Rehnquist (1986–2004 terms) and both Roberts Court years (2005–2006 terms), (2) only the Rehnquist Court of 1994–2004 terms (after Breyer joined) and the Roberts Court after O'Connor departed and Alito arrived, or (3) even just the Rehnquist Court of 1994–2004 and the 2006 term of the Roberts Court.<sup>30</sup>

Of course, the small number of cases decided by the Roberts justices necessarily renders any conclusions highly tentative at this point. On the other hand, the lack of any dramatic change between the two periods so far seems quite understandable. Looking solely at the 2004 and 2006 terms in Figure 2, we see that the center did not move appreciably, or at least not as appreciably as in 1969. Between the 1968 and 1969 terms, the estimated ideal point of the Court's median jumped from -.78 (among the most liberal in our data set) to .19. From the 2004 to 2006 terms, the median too grew more conservative, but only from .08 to .45.

Figure 3 tells the story even more vividly. There we show the ideal point estimates (represented by the dark vertical lines) for the three middle justices of the 2004 and 2006 terms. We also depict 95% intervals around those ideal points (the horizontal lines in either direction).<sup>31</sup>

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27. Nor, for that matter, did Reagan's other two appointments. See Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* 117–41 (Oxford U. Press 2005); Jeffrey A. Segal et al., *Buyer Beware? Presidential Success through Supreme Court Appointments*, 53 *Political Rev. Q.* 557 (2000).

28. See Epstein et al., *supra* n. 25.

29. The difference between Powell's ideal point estimates for the 1985 and 1986 term is a trivial .033.

30. For all these comparisons, the proportions of conservative decisions are .55 (Rehnquist Court) and .59 (Roberts Court).

31. The 95% intervals are Martin & Quinn's, *supra* note 21, estimates. The approach follows from Lee Epstein & Tonja Jacobi, *Super Medians*, \_\_\_ *Stan. L. Rev.* \_\_\_ (forthcoming 2008) (ms. available from authors).

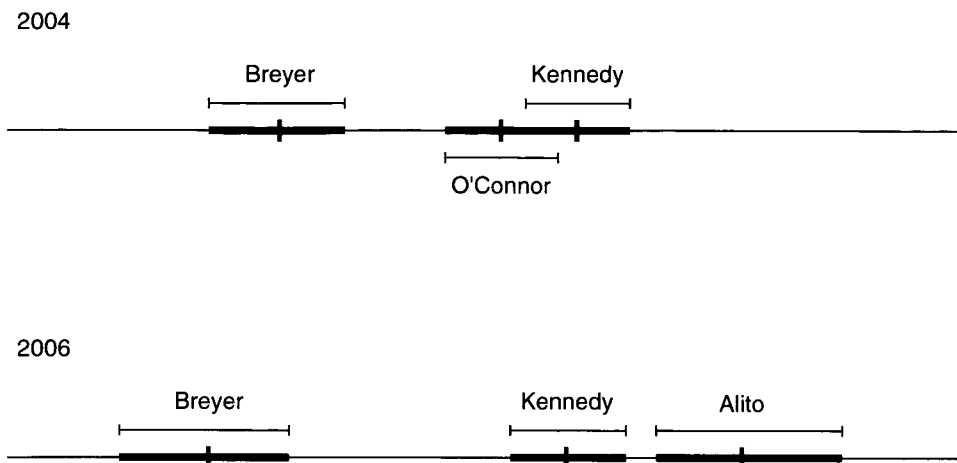


Figure 3: Preference configurations for the three center justices of the 2004 and 2006 terms of the Supreme Court. The short dark vertical lines represent the most preferred position for each justice over a left-right policy space; the short horizontal lines show the 95% interval.<sup>32</sup>

These intervals are interesting for any number of reasons.<sup>33</sup> Most relevant here, though, is that they work to undermine conventional wisdom concerning the significance of the O'Connor departure. While it is clear that after she left, Justice Kennedy—as the median justice—pulled the Court to the right, it is equally clear that the pull may not have been as great as some speculate. That is because some “overlap” existed between Kennedy’s and O'Connor’s preferences, as the top panel of Figure 3 indicates.

Such overlap or convergence is important in two senses.<sup>34</sup> First, it suggests the two Reagan appointees had more in common than their “most preferred positions” may indicate—a suggestion the data bear out: In the 47 non-unanimous cases of the 2004 term, Kennedy and O'Connor voted together in two-thirds.<sup>35</sup> Second, the overlap raises the prospect that in any given case in 2004, Kennedy could have been to the left of the median (O'Connor) hence enabling the more liberal justices (Breyer and the three to Breyer’s left) to form a coalition that would exclude O'Connor but include Kennedy.

32. Data are drawn from Martin & Quinn, *supra* note 21.

33. Note, for example, that some are slightly narrower than others (e.g., compare Justices Kennedy and Alito). Because narrower intervals are suggestive of justices who decide cases consistently (*vis-à-vis* their ideology), Justice Kennedy’s ideal point in the 2006 term is more indicative of how he will vote relative to Justice Alito’s.

34. We adopt some of these ideas from Epstein & Jacobi, *supra* note 31.

35. More precisely, they voted together in 31 of the 47 non-unanimous cases, or 65.96 percent.



And, in fact, during the 2004 term, this occurred in two of the term's most publicized cases: *Kelo v. City of New London*<sup>36</sup> and *Roper v. Simmons*.<sup>37</sup> In both, it was Kennedy who provided the crucial vote; and in both it was Kennedy, far more so than the median, O'Connor, who was able to move legal policy in the direction of his most preferred position. This was especially true in *Roper*. In that case, Kennedy wrote the majority opinion overturning *Stanford v. Kentucky*,<sup>38</sup> a case in which O'Connor had cast the crucial fifth vote.

### III. TRENDS IN PARTICULAR AREAS OF THE LAW

This is not to say that the shift in the median from O'Connor to Kennedy—a shift precipitated by the Alito appointment—had no effect. Some scholars, for example, suggest that the greater the ideological homogeneity of the majority, the higher the likelihood that it will produce “big” decisions.<sup>39</sup> If this is so, then when Kennedy coalesces with the four justices to his right, the resulting opinion is likely to produce consequential precedent—or at least more likely than when the conservatives had to contend with O'Connor.<sup>40</sup> Then there is the widely held belief that the outcome in several cases—especially *Parents Involved*<sup>41</sup> and *Gonzales v. Carhart*<sup>42</sup>—would have been different if not for the Alito-for-O'Connor exchange.

For the reasons we provide momentarily, we are less sure about this last claim.

36. 545 U.S. 469 (2005).

37. 543 U.S. 551 (2005).

38. 492 U.S. 361 (1989).

39. See Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, \_\_\_ U. Pa. J. Const. L. \_\_\_ (forthcoming 2008) (available at <http://epstein.law.northwestern.edu/research/homogeneity.html>) (providing empirical support for the claim that: “Regardless of the size of the majority, a strong and positive association exists between ideological homogeneity and the production of a noteworthy decision.”). This is not a new idea. The notion that homogenous groups are more likely to produce significant legal output has been validated in empirical studies of Congress. See e.g. James J. Coleman, *United Government, Divided Government, and Party Responsiveness*, 93 Am. J. Political Sci. 821 (1999); Sean Q. Kelly, *Divided We Govern? A Reassessment*, 25 Polity 475 (1993).

40. Conversely, when Kennedy joins with the four liberals, the resulting opinion likely will be of less consequence than when O'Connor was in their camp.

41. See Paul Greenberg, *A Rare Sighting: Reason in the Law*, Wash. Times A15 (July 12, 2007) (“As this term of the U.S. Supreme Court reached its final week, there were signs that the justices are breaking from the mindless muddle that characterized the O'Connor Court. . . . The turn to clarity since Justice O'Connor's departure was most evident in the court's 5-to-4 decision in a couple of school integration cases, one each out of Seattle and Louisville.”); Charles Whitebread, *The Conservative Kennedy Court—What a Difference a Single Justice Can Make: The 2006-2007 Term of the United States Supreme Court*, 29 Whittier L. Rev. 1, 5 (2007) (claiming that with *Parents Involved*, “Justice O'Connor's legacy [in affirmative action] has been dismantled”).

42. See e.g. Chemerinsky, *supra* n. 11, at 425 (“The key to the case was not in the difference in wording between the federal law and the Nebraska act; it was Justice Alito having replaced Justice O'Connor.”); Marcia Grennberger, Panel Remarks, *After Gonzales v. Carhart: The Future of Abortion Jurisprudence* (D.C., June 14, 2007) (available at <http://pewforum.org/events/?EventID=149>) (“[I]f anything illustrates the importance of one vote on the Supreme Court and a change in one person sitting on the Supreme Court, it's this case. As we heard, [*Stenberg v. Carhart*] had a very different result. With Sandra Day O'Connor's departure, we see a flip.”); Joanna Grossman & Linda McClain, *New Justices, New Rules: The Supreme Court Upholds the Federal Partial-Birth Abortion Ban Act of 2003*, [http://writ.lp.findlaw.com/commentary/20070501\\_mcclain.html](http://writ.lp.findlaw.com/commentary/20070501_mcclain.html) (May 1, 2007) (“[R]etired Justice Sandra Day O'Connor was replaced by Justice Samuel Alito. And that made a great deal of difference. Justice O'Connor, an author of the joint opinion in *Planned Parenthood v. Casey*, which reaffirmed *Roe*, was the swing vote in *Stenberg*, and Justice Alito swung the other way in *Gonzalez*.”).

More plausible, we think, is that the justices might never have heard *Parents Involved* had Justice O'Connor remained.<sup>43</sup> Or, if they had, that the majority opinion would have been closer to Justice Kennedy's concurrence than to the Chief Justice's judgment. Ditto for *Gonzales*. We can hardly imagine Kennedy using the language that he did if he had wanted to attract O'Connor's vote.<sup>44</sup>

But this is sheer speculation on our part. Far less uncertain are the conclusions we can reach from analyses of the justices' votes. As we just detailed, the overall decisional patterns reveal no significant difference between the Rehnquist Court and the 2006 term—not too surprising, as we now know, given Figure 3. Nor do we see especially dramatic shifts in *particular areas of the law* or even in *specific cases*, even those that have received a good deal of ink.

Beginning with particular areas of the law, we take note of Charles Whitebread's comment that 2006 "was not an important term in criminal cases. Except for three Texas death penalty cases, almost all criminal cases were decided in ways favorable to the prosecution."<sup>45</sup> To the extent that Whitebread was making a claim about "important" decisions, we agree: No one case in this area of law registered on any conventional indicator<sup>46</sup> as extraordinarily important or salient.<sup>47</sup>

To the extent that Whitebread was referring to the relative dominance of criminal cases on the docket, however, we disagree. We also note that it is hardly unusual for the Court to rule in favor of the government in criminal cases—at least not a Court sitting

43. Linda Greenhouse, *A Tale of Two Justices*, 11 Green Bag 2d 37, 45–46 (2007), puts it this way:

Based on the paper trail that we have, I think it is both plausible and fair to make an assumption about the one we don't have, and to assume that the arrival on the Court's docket of petitions for certiorari in the Louisville and Seattle voluntary integration cases gave the new Chief Justice an opportunity he had long been waiting for. Or to put a slightly finer point on the sequence of events—the motive was pre-existing, and the opportunity was provided by Justice O'Connor's retirement in January 2006, the same month that the two petitions arrived at the Court. Just a month earlier, with Justice O'Connor still present and voting at conference, the Court had denied cert in an almost identical case from Lynn, Mass., in which the First Circuit had upheld a voluntary integration plan aimed at maintaining racial balance in the city's public schools.

*Id.* See also Gina Holland, *Supreme Court to Hear Schools Race Case*, <http://www.cbsnews.com/stories/2006/06/05/ap/politics/mainD812AB700.shtml> (June 5, 2006) ("The court's announcement that it will take up the cases this fall provides the first sign of an aggressiveness by the court under new Chief Justice John Roberts. The court rejected a similar case in December when moderate O'Connor was still on the bench. The outcome will most likely turn on her successor, Alito.")

44. See Chemerinsky, *supra* n. 11, at 426 ("[T]he Court clearly changed the rhetoric of abortion rights. Justice Kennedy's majority opinion repeatedly referred to the fetus as the 'unborn child.'")

45. Whitebread, *supra* n. 41, at 5.

46. Political scientists have devised several ways to measure particularly consequential, notable, salient, or important cases. For a relatively comprehensive list, see Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 Am. J. Political Sci. 66 (2000). We prefer the approach developed by David Mayhew in *Divided We Govern* (2d ed., Yale U. Press 1991) at page 9, and applied to the Court by Epstein & Segal in *Measuring Issue Salience*: Consequential decisions are those reported on the front page of the *New York Times* on the day after the justices handed down their decision (hereinafter the "NYT measure"). On this measure, six cases from the 2006 term qualify as particularly notable: *Parents Involved*, 127 S. Ct. 2738; *Fed. Election Commn. v. Wis. Right to Life*, 127 S. Ct. 2652 (2007); *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007); *Ledbetter v. Goodyear Tire*, 127 S. Ct. 2162 (2007); *Gonzales*, 127 S. Ct. 1610; and *Mass. v. Environmental Protection Agency*, 127 S. Ct. 1438 (2007).

47. But see Chemerinsky's, *supra* note 11 discussion of *Bowles v Russell* as "[a] case that received far fewer headlines, but that also reflects the conservative approach of the Roberts Court in favoring the government over individuals." *Id.* at 432.

since the 1970s.

Figure 4 drives home both points. In the top panel we show the proportion of the Court's plenary docket devoted to criminal law, and clearly it did not take much of a nose dive in the 2006 term. Over the entire period, the mean proportion is about .20—meaning that about one out of every five cases since the 1953 term has implicated criminal law.<sup>48</sup> For the 2006 term, it was over one out of every four.<sup>49</sup> More relevant for our purposes is that virtually nothing of consequence changed between the Rehnquist and Roberts years. No significant difference in the criminal cases' share of the docket emerges in comparisons of the Roberts Court (the mean proportion is .26) and the entire Rehnquist Court years (.24) and or even the last ten terms of the Rehnquist Court (.25).

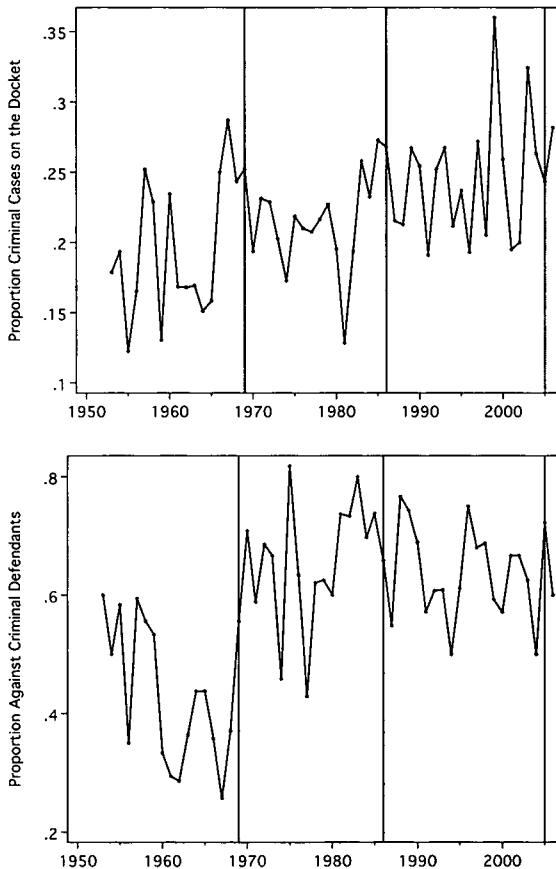


Figure 4: Criminal law in the Supreme Court, 1953–2006 terms. The top panel shows criminal law cases as a proportion of the total plenary docket. The bottom panel displays the proportion of criminal cases in which the Court ruled for the government.<sup>50</sup>

48. The mean is .22, with a standard deviation of .05. The minimum is .12 and the maximum is .36.

49. The mean is .28.

50. Data are drawn from Spaeth, *supra* note 15, with value=1.

Nor is there anything particularly distinct in the Roberts' justices treatment of criminal defendants, as the bottom panel of Figure 4 indicates. Ever since the 1969 term, when President Nixon placed Warren Burger at the helm in part to bring a tougher "law and order" stance to the Court, defendants have lost far more cases than they have won. Consider that prior to the onset of the Republican Court era, during Earl Warren's years as Chief, the Court found for the government in just 42 percent of the cases; in the 1960s, that figure fell to under 35. During the Burger terms (1969–1986), the percentage flipped to the justices ruling in favor of defendants in fewer than 35 percent of cases. The difference between the two eras, almost needless to write, is statistically significant.<sup>51</sup>

Nor so of the shift from Roberts to Rehnquist. In the 2004 term and again in 2006, the justices resolved twenty disputes in the area of criminal law. In 2004 they voted with the government in half of the twenty; in 2006, in twelve of the twenty. More generally, in comparing the means of the two terms of the Roberts Court (.66) and the entire Rehnquist Court period (.64), we observe no significant difference.<sup>52</sup>

Hence, in thinking about the transition from the Roberts to the Rehnquist Court in the area of criminal law, it once again seems reasonable to ask: Which does it more closely resemble, the highly consequential move from Warren to Burger or the far more subdued shift from Burger to Rehnquist? Going strictly by the numbers, the answer is clear. Nothing even close to as dramatic occurred.

We might say the same of yet another area where some have alleged dramatic change—access to the courts. As Judith Resnik deemed it, the 2006 term was "the year they closed the courts,"<sup>53</sup> and many other commentators concur.<sup>54</sup> We certainly understand why—what with *Hein v. Freedom from Religion Foundation*,<sup>55</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>56</sup> *Bell Atlantic*,<sup>57</sup> and *Bowles v. Russell*.<sup>58</sup>

And yet, more systematic data suggest otherwise. While the Roberts justices may be accelerating the trend Resnik identified, they hardly started it. Actually, and once again, ever since the onset of the Republican Court era in 1969, the door to the courthouse has been inching shut.

Underscoring this claim are the data in Figure 5, which show the percentage of standing cases won by the plaintiff during each of the four Chief Justice eras since 1953.<sup>59</sup> While the numbers for some are too small to reach strong conclusions, two

51. On a t-test,  $p \leq .05$ .

52. Nor do any significant differences emerge if we draw the comparison in other ways: e.g., between the 1994–2004 terms and the 2006 term; or between the 1994 and 2004 terms and the Roberts Court since Alito's arrival.

53. Greenhouse, *supra* n. 1.

54. E.g. Chemerinsky, *supra* n. 11, at 437 ("[T]he effect of many of the Court's decisions was to close the courthouse doors."); Whitebread, *supra* n. 41, at 5 ("The fifth theme was the Court's determination to close off access to courts.")

55. 127 S. Ct. 2553 (2007) (limiting taxpayer standing).

56. 127 S. Ct. 2162 (holding that the statute of limitations for pay discrimination claims under Title VII begins at the time pay is set).

57. 127 S. Ct. 1955 (backing off *Conley v. Gibson*'s "no set of facts" standard).

58. 127 S. Ct. 2360 (2007) (restricting extensions in filing notices of appeal).

59. We derive these data from Spaeth, *supra* note 15 at 50–51, using his "standing" issues (codes 801–11).

trends emerge. First, and in accord with various commentary on the Roberts Court, it does seem that the current justices have a unique interest in standing cases. Over 4 percent of the 145 decisions issued by the Roberts justices so far have centered on standing—a percentage far higher than any of its predecessors. On average, .5 percent of the cases on the Warren Court's docket implicated standing (9 out of 1791 cases); for the Burger and Rehnquist Court eras, that figure was slightly but not appreciably higher.<sup>60</sup>

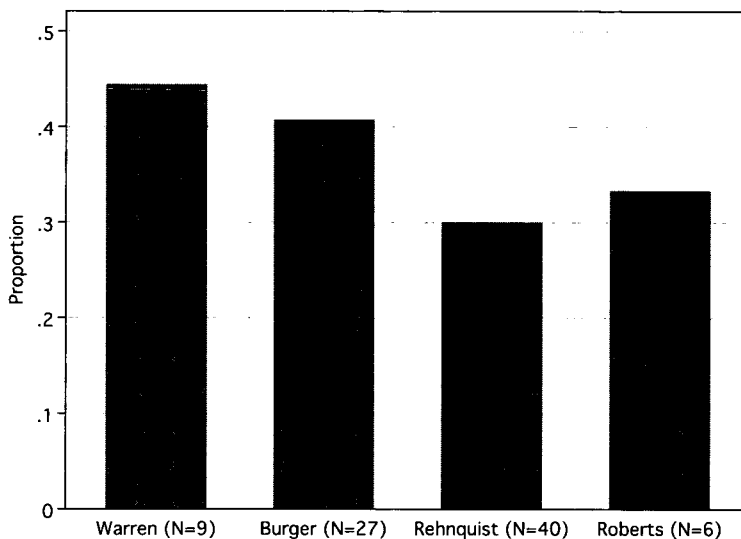


Figure 5: Standing cases in the Supreme Court during four Chief Justice eras, 1953–2006 terms. The bars indicate the proportion of standing cases in which the Court found for the plaintiff. The Ns indicate the total number of standing cases during each era.<sup>61</sup>

On the other hand, and in juxtaposition with recent commentary, the door to courts started closing well before the 2006 term.<sup>62</sup> While we cannot say much about the Warren Court given the small number of cases, it is clear that neither of its successors was especially plaintiff-friendly in standing cases; indeed, in fewer than one out of every three did the Rehnquist justices voice their support.

This much Figure 5 shows, and its findings comport with doctrinal analysis as well. To take taxpayer standing as one example, commentators tell us that in almost all

60. For the Burger Court, 1.12 percent (27 out of 2404 cases); for the Rehnquist Court, 2.15 percent (40 out of 1862 cases).

61. See Spaeth, *supra* n. 15.

62. The data here comport with previous quantitative analyses of the role of ideology in standing cases. See e.g. Gregory J. Rathjen & Harold J. Spaeth, *Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior of the Burger Court Justices, 1969–1976*, in *Studies in U.S. Supreme Court Behavior* 24–46 (Harold J. Spaeth & Saul Brenner eds., Garland 1990) (conservative justices vote to deny standing to plaintiffs with liberal claims and liberal justices vote in their favor); C.K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. Pol. 175, 178–83 (1991) (showing that liberal judges are more likely to grant standing); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. Rev. 612, 668 (2004) (reporting results that “support Professors Rathjen and Spaeth’s findings on the political nature of standing”).

their decisions coming on the heels of *Flast v. Cohen*,<sup>63</sup> the Burger and Rehnquist Courts gave the 1968 Warren Court precedent a narrow reading.<sup>64</sup> Unless the dispute was a near-carbon copy of *Flast*, they almost never granted standing.<sup>65</sup> Viewed in this way, *Hein* would not be considered much of a deviation. Though some say the Roberts justices may have treated *Flast* even more narrowly than its predecessors<sup>66</sup> they did not eliminate taxpayer standing altogether (despite the calls of Justices Scalia and Thomas to do so).<sup>67</sup>

Even more to the point, our own analyses cast considerable doubt on whether the Court would have reached a different conclusion in *Hein* had the term been 2004, and not 2006. To see why, consider Figure 6, in which we display Justice O'Connor's ideal point estimates for the 1994–2004 terms.<sup>68</sup> We focus on Justice O'Connor for obvious reasons: If any justice could have affected the outcome in *Hein*, it would have been O'Connor. Justices Stevens, Souter, Ginsburg, and Breyer voted for the plaintiff; Chief Justice Roberts, Scalia, Kennedy, and Thomas voted against the standing claim—as did Alito, making five. Had O'Connor remained on the Court, would she have joined the four liberals or the four conservatives?

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63. 392 U.S. 83 (1968) (creating an exception to the general rule against taxpayer standing).

64. See Staudt, *supra* n. 62 (“In the years following *Flast*, the Court embarked on a process of limiting the federal taxpayer standing doctrine.”).

65. *Id.* at 628–29 (“The only two Supreme Court cases that allowed federal taxpayers into court after *Flast*—*Tilton v. Richardson* and *Bowen v. Kendrick*—involved taxpayers who challenged Spending Clause projects on Establishment Clause grounds, thereby confirming the viability of the *Flast* doctrine but apparently limiting it to its facts.”).

66. *E.g. Leading Cases: Fed. Stat. & Regs.: Standing: Taxpayer Standing—Establishment Clause Violations*, *supra* n. 11, at 326 (“Because the Supreme Court had previously held that taxpayers have standing where Congress appropriated the allegedly unconstitutional funds, Justice Alito’s plurality opinion, likely the opinion lower courts will follow in future taxpayer standing cases, drew an illusory distinction between congressional and executive action.”).

67. *Hein*, 127 S. Ct. at 2574 (Scalia & Thomas, JJ., concurring).

68. These are Martin & Quinn, *supra* note 21, estimates. We end with the 2004 term because O'Connor voted in only twenty of the term’s seventy-four cases. Moreover, thirteen of the twenty were unanimous.

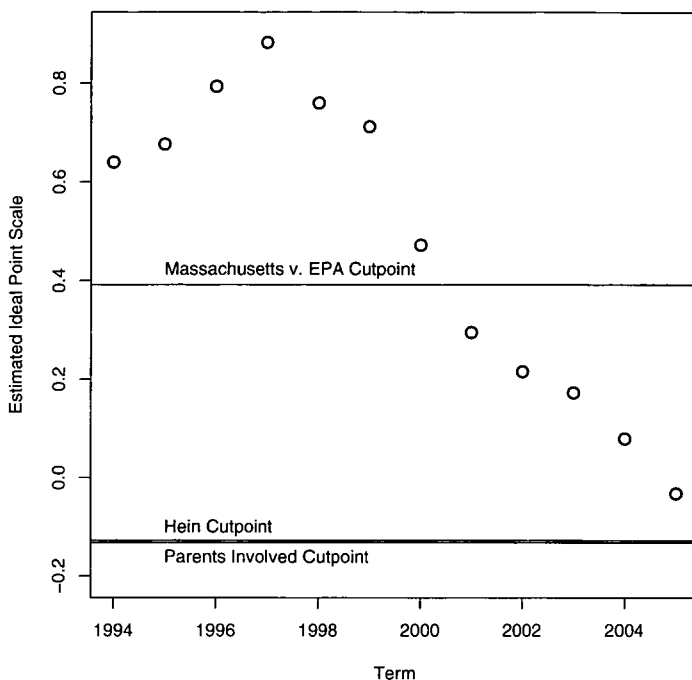


Figure 6: Time series plot of Justice O'Connor's ideal point estimate, 1994–2004 terms. The hollow circles represent O'Connor's ideal points. The horizontal lines are the cut points for *Parents Involved v. Seattle School District*, *Hein v. Freedom from Religion Foundation*, and *Massachusetts v. EPA*. Points above the line indicate a probability of greater than .50 of voting conservatively (as the Court did in *Parents Involved* and *Hein*); those below the line indicate a greater than .50 probability of voting in the liberal direction (as the Court did in *Massachusetts*).<sup>69</sup>

To address that question, Figure 6 also shows the “cut point” line for *Hein* (along with several other cases we discuss shortly). As a general matter, these lines provide information about the likely behavior of justices above and below it, such that if a justice's ideal point is above the line, the probability is greater than .50 that she or he will cast a conservative vote (i.e., against the plaintiff Freedom from Religion Foundation in *Hein*).<sup>70</sup> For ideal points below the line, we predict odds greater than 50–50 that the

69. For more information about the data in this figure, see *supra* note 21 and *infra* note 71.

70. As we have explained in our previous work, Epstein et al., *supra* note 25, we derive these cut points using the Martin-Quinn method. Under their approach, the data and modeling assumptions determine the joint distribution of the ideal points and the cut points. While this joint distribution is large and complex, it is possible to use the conditional distributions of the ideal points—given the cut points—and the cut points—given the ideal points—to fit the model, as well as to gain some intuition about how Martin and Quinn determine the cut points and ideal points.

To begin, suppose we know the locations of all the cut points. In other words, we know that all justices with an ideal point to the left of the cut point will be more likely to vote in the liberal direction and all justices to the right of the cut point will be more likely to vote in the conservative direction. If we observe only one case, then knowledge of the lone cut point tells us only that some justices (those who voted in the liberal

justice will rule in the liberal direction (i.e., in favor of the plaintiff Freedom from Religion Foundation in *Hein*).

In the case of *Hein*, we know the Court denied standing by a five-to-four vote. But, to return to the question of interest, would the vote have been five-to-four the other way had the Alito-for-O'Connor exchange never occurred? No, or at least not according to our data. Note the location of Justice O'Connor's ideal point estimate in 2004 and in all previous years. Because they are above the line, it seems reasonable to conclude that even at her most moderate moment—coinciding with the end of her tenure—O'Connor would have likely voted against the *Hein* plaintiffs.

Which brings us to our final set of analyses. Thus far, we have looked at overall trends and patterns in the more specific areas of criminal law and standing, and have unearthed no dramatic changes ushered in by the Roberts Court. What, though, of particular cases, especially particularly important ones? Did the Roberts justices deviate significantly from their predecessors? Our analysis of *Hein* is suggestive of a broader response: Not necessarily.

Take *Massachusetts v. EPA*. As Figure 6 indicates, because her ideal point estimate is below the cut point line, we predict that Justice O'Connor would have voted with the majority, thereby changing nothing except the vote: From five-to-four in favor of the state to six-to-three. More interesting, of course, are *Parents Involved* and *Gonzales*. For both, scholars have speculated that O'Connor's departure made a real difference.<sup>71</sup> Yet, as we can see, odds are that Justice O'Connor would have voted to strike down the assignment plan; and although we do not display the cut point line (which is close to *Hein* and *Parents Involved*), she also would have voted to uphold the partial birth abortion law at issue in *Gonzales*.

Of course, there is room for healthy skepticism about these predictions because we can never verify them, and for another reason as well: O'Connor's liberal drift (see Figure 6). If O'Connor had remained on the Court and if her leftward turn continued, it is quite possible that she would have found herself below the cut point line in *Hein*, *Parents Involved*, and *Gonzales*. It is also possible, as we suggested earlier, that even if O'Connor had joined the majorities in *Gonzales* and *Parents Involved*, the opinions

direction on the case) are likely to be to the left of the cut point and other justices (those who voted in the conservative direction) are likely to be to the right of the cut point; we cannot infer the location of each justice other than that they are probably somewhere to the left or right of the cut point. When we observe multiple cases, however, and the cut points are treated as known, more (probabilistic) constraints are applied to the location of the ideal points and tighter estimates of the ideal points become possible.

On the other hand, if we treat the ideal points as known we can make inferences about the likely location of the cut points. To see this, suppose we observe the following sequence of votes (ordered from left to right), where L denotes a liberal vote and C a conservative vote:

LLLCCCCCC

From this sequence, we would infer that the most likely place for the cut point would be somewhere between the third and the fourth justice. (The exact location is determined by the particular modeling assumptions employed but it is qualitatively similar across a range of reasonable alternative assumptions.) Cases with equivalent observed voting patterns will have the same estimated cut points.

By alternately conditioning on the cut points to infer the conditional distribution of the ideal points and conditioning on the ideal points to infer the conditional distribution of the cut points, Martin and Quinn are able to take a sample that is approximately from the joint distribution of the ideal points and cut points given the observed votes on the merits.

71. See *supra* nn. 41–42.



would have been quite different. Actually, we think it reasonably likely that O'Connor's presence in the majority would have prompted some accommodation on the part of the opinion writer, resulting in major disparities between the opinion we know and the opinion we will never know.

Then again, despite speculation that O'Connor would have disagreed with the majority in *Gonzales*, *Parents Involved*, and perhaps *Hein* as well, bits and pieces of evidence support our analysis to the contrary. One is that O'Connor was never very supportive of plaintiffs in standing cases. In only thirteen (27 percent) of the forty-eight cases in which she participated did she rule in their favor. This is substantially<sup>72</sup> lower than her overall conservative voting (40 percent).

Another piece of supporting evidence stems from commentary suggesting that O'Connor was particularly attuned to popular sentiment, if not public opinion.<sup>73</sup> She herself intimated as much when in 2003, she said "real change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus. Courts, in particular, are mainly reactive institutions."<sup>74</sup> If this is so, she certainly did not miss the way the wind was blowing in the aftermath of *Grutter*. Just three months before *Parents Involved* came down, O'Connor cited passage of a ban on affirmative action in Michigan and efforts in other states to do the same as evidence of the "muddy" future of affirmative action.<sup>75</sup>

#### IV. THE BUSH "LEGACY" REVISITED

Of course, it is hard to know exactly what O'Connor meant and what bearing it would have had on her vote in *Parents Involved*.<sup>76</sup> Nonetheless, based on the empirical

72. Substantial but not statistically significant ( $p=.08$ ).

73. E.g. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. Cin. L. Rev. 1257 (2004) ("Yes, O'Connor and Kennedy seem in tune with public opinion in some ways, and maybe many Justices are, consciously or not."); Gail Heriot, *Thoughts on Grutter v. Bollinger and Gratz v. Bollinger as Law and as Practical Politics*, 36 Loy. U. Chi. L.J. 137, 164 (2004) ("The image of Justice O'Connor as a practical-minded jurist who is reluctant to push hard against the tide of public opinion may well be one of which Justice O'Connor, the only Supreme Court Justice to have served as a state legislator, would approve."); Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 Mich. L. Rev. 431, 451 (2005) ("O'Connor's apparent shifts over time toward a more liberal position can be plausibly attributed to changes in public opinion.").

74. Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* 166 (Random House 2003). As Friedman, *supra* note 73, at 1302, noted, "Extrajudicially, Justice O'Connor has been quite explicit in pointing out that in the long run it is public opinion that accounts for change in politics, and in judicial doctrine."

75. Peter Schmidt, *Sandra Day O'Connor Says Affirmative Action Faces Uncertain Future*, <http://chronicle.com/news/article/1953/sandra-day-oconnor-suggests-that-affirmative-actions-demise-draws-near> (Apr. 6, 2007).

76. Frankly, we could point to other speeches that would lead us to a different conclusion. For example, in an interview with Fox News on May 20, 2007, shortly after the Court handed down *Gonzales v. Carhart*, O'Connor said the law "shouldn't change just because the faces on the court have changed." Fox News Sunday, *Former Justice Sandra Day O'Connor on "FNS"* (Fox News May 20, 2007) (TV broad., transcr. available at <http://www.foxnews.com/story/0,2933,274073,00.html>). Some commentators took this as a not-so-subtle dig at the *Gonzales* decision. E.g. Hope Yen, *O'Connor: Court Should Follow Precedent*, <http://abcnews.go.com/Politics/wireStory?id=3194189> (May 20, 2007) (O'Connor's "comments come a month after the high court changed course on abortion, upholding a national ban on a midterm method of ending pregnancies known as 'partial-birth abortion.' It was a 5-4 decision that opened the door for states to pass

evidence we have presented here, it seems clear to us that reports of the sea-change generated by O'Connor's departure and the onset of the Roberts era are overwrought at best and mistaken at worst.

What then of the narrative that with his two appointments, President George W. Bush has left a significant, enduring imprint on the Court? Our data leave plenty of room for doubt on that score as well.<sup>77</sup> Relative to Richard Nixon, the President has not succeeded in moving the center of the Court all that much. The new median, Kennedy, may be to the right of the old median, O'Connor. Nonetheless, as Figure 3 indicates, the overlap in their preferences was sufficient to thwart substantial change. In other words, because the two swings were not as different as extant commentary would lead us to believe, continuity and not change has prevailed.

Taken collectively, our analyses suggest that President Bush has less in common with Richard Nixon, than he does with the many Presidents who tried and failed to move the Court—including, of course, Ronald Reagan. Though Reagan's appointees did guarantee another generation of conservative domination, the Court on which they served was (and is) not significantly more conservative than it was during the Nixon, Ford, and Carter years.

Assuming no new appointments, that too, we believe, is the fate awaiting President Bush. Despite commentary indicating that his most enduring legacy will be the "transformed" U.S. Supreme Court, our data suggest that he will be unable to rest even on that laurel.

#### V. APPENDIX: PRESIDENTS AND THEIR APPOINTEES

The analyses we present in the text indicate that with his appointees, President Bush has been unable to leave a significant mark on the Court. But what about a legacy in the form of two *individuals* he has named, John G. Roberts and Samuel Alito? Will they maintain the President's ideological commitments in the long term?

To be sure, George W. Bush and all other Presidents, for that matter, can be reasonably certain that their appointees will reflect their values—at least during the justice's first term in office. Nicely making this point is Figure 7, which plots the results of regression analyses comparing the justice's first-and-tenth-term ideal point estimates with the ideal point of their appointing President.<sup>78</sup> The closer a justice is to the line, the

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additional abortion restrictions.”).

77. Moreover, as we explain in the Appendix, it is even too soon to tell whether Bush's two appointees, Roberts and Alito, will be “legacy” appointments.

78. To derive Figure 7 we used linear regression. The dependent variable is the Martin-Quinn estimates of justices in their first and tenth terms. The independent variable is Keith Poole's estimates of the ideology of their appointment President. Keith Poole's *Common Space Data* estimates are available at <http://www.voteview.com/readmeb.htm> (Jan. 4, 2007).

better their President's ideology corresponds to the justice's first (left panel) or tenth- (right panel) term ideal point estimate. Justices above the line are more conservative than we would expect based on the ideology of their appointing President; justices below it, more liberal. For justices on the line, their President's most preferred position perfectly (or nearly so) predicts their own.

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The table below presents the results (standard errors are in parentheses); a visual depiction of this relationship appears in Figure 7.

	First Term	Tenth Term
Intercept	0.393 (0.190)	-0.078 (0.438)
Predicted Ideal Point	2.43 (0.393)	2.43 (0.990)
	n = 24	n = 19
	RMSE = .829	RMSE = 1.614

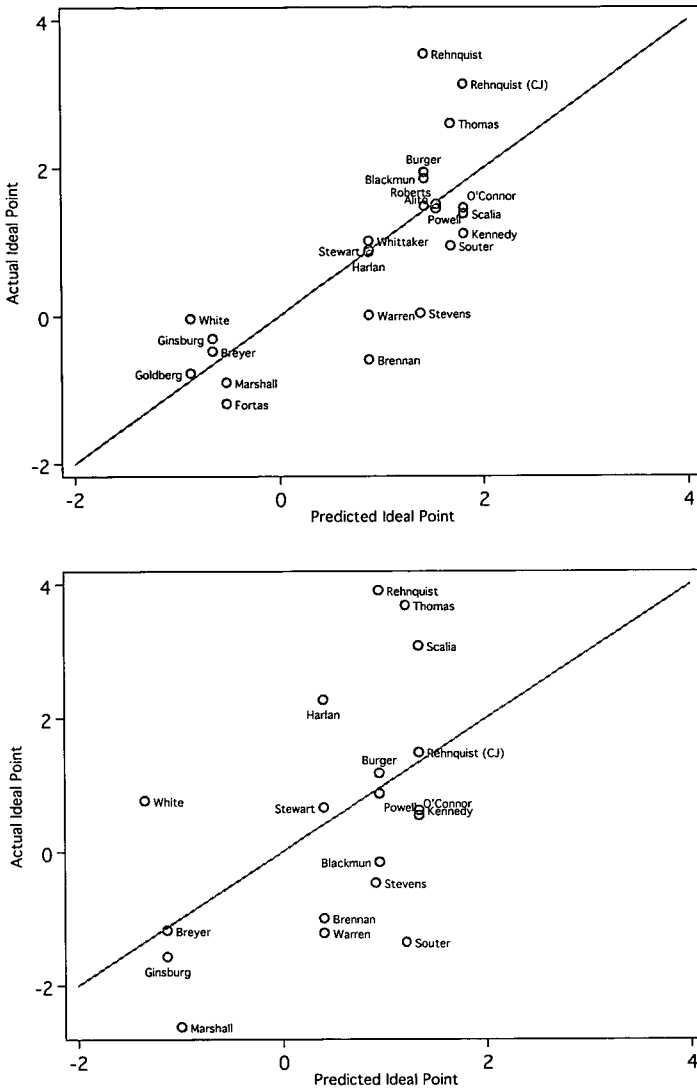


Figure 7: Actual (Martin-Quinn) ideal points during a justice’s first and tenth terms plotted against predicted ideal points (based on the ideology of the appointing President). The superimposed lines are where  $X=Y$ . The closer a circle is to the line, the better the prediction.<sup>79</sup>

Assuming that Presidents hope to make appointments as close to their own ideology as possible, many have succeeded—including George W. Bush. Were we to use Bush’s ideology to predict Alito’s and Robert’s ideal points during their first term on the Court, we would be nearly right on the money for both.<sup>80</sup> Note too that even justices

79. For more detail on the actual (Martin-Quinn) estimated ideal points, see *supra* note 21; for information on the Presidents’ ideology, see *supra* note 78.

80. For Alito, the prediction is 1.53; his actual ideal point estimate is 1.45. For Roberts, the prediction is HeinOnline -- 43 Tulsa L. Rev. 670 2007-2008

famous for eventually making significant moves to the right or left tended to reflect their President's ideology commitments in their first term. Justice Souter provides a case in point. Based on the ideology of Souter's appointing President, George H.W. Bush, we would have expected a moderately conservative justice, and that is what we observed in Souter's initial year on the Court.

Ten years after appointment, the picture clouds considerably. Underscoring this point is the bottom panel of Figure 7. Here, we see a substantial increase in the uncertainty about the location of an *individual* justice,<sup>81</sup> suggestive of a serious problem for Presidents seeking to leave lasting legacies in the form of even individual justices: Even though the association between the President's and his justice's ideology remains fairly strong, we observe a degradation in the relationship between the justices initial attitudes and their ideological preferences as soon as ten years out. Once again, Souter is the classic example—of a justice who sharply departed from the values of his appointing President within a decade of service. But, as we can see in Figure 7, there are others, including Blackmun, Harlan, and White.

Whether Alito, Roberts, or both will join this list, we cannot say with any degree of certainty. But, if history is any guide, the Alito and Roberts of today will not be the same Alito and Roberts of 2018.

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1.53; the actual value is 1.51.

81. The table depicted in *supra* note 78 confirms this visual analysis more formally. Note that the slope estimate is quite similar in both the first term and tenth term regressions. The RMSE, however, increases from .829 in the first term regression to 1.614 in the tenth term regression. In other words, the predicted error around the regression line increases by 95% after ten terms.

